FAIR VALUE AS PROCESS: A RETROSPECTIVE RECONSIDERATION OF DELAWARE APPRAISAL

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ABSTRACT

This Article reconsiders the jurisprudence of fair value under Delaware's appraisal remedy, placing recent cases in historical perspective and offering a novel account. Its central observation is that appraisal has developed into a process jurisprudence rather than jurisprudence devoted to the articulation of an entitlement. As such it defies expectations and excites the wrath of academic commentators looking for a more conventional, rights-based evolution. There is a nominal entitlement: the cases at all times announce that shareholder dissenters may pursue going concern value (as opposed to third party sale value) as the measure of fair value. But the Delaware courts have never gone on to articulate workable instructions as to how the entitlement may be realized. They have instead developed a minimalist conceptual framework in which fair value is the sui generis result of case specific fact-finding. Doctrinal pronouncements on shareholder entitlements matter much less than does a menu of approved methodologies, a menu that has included measures of third-party sale value during all periods of appraisal's history. The determinative factor is the court's ascertainment of the most reliable approach in the case from among presentations made by the parties drawing on the methodological menu. parties. Shifting perspectives on reliability rather than changing notions about shareholder entitlement have driven the recent course of the remedy's history. It is a jurisprudence about how to decide the instructions of which change over time in response to policy concerns. A range of considerations come to bear--methodological integrity, fairness to shareholders, and the courts' institutional interest in enhancing Delaware's role as the nation's maker and adjudicator of corporate law. Flexibility also is important--law-to-fact applications tend not to bind as precedents, permitting the courts to restrike the balance among the policy concerns as events unfold. Finally, since the decision of Weinberger v. UOP in 1983, there has been a consistent trend as regards the methodological menu: it grows. As the menu becomes more capacious the set of possible outcomes expands, giving the courts more room for maneuver. Concomitantly, the conceptual profile of a dissenting shareholder's entitlement becomes less and less distinct. This is not a problem. Once one takes Delaware's appraisal jurisprudence on its own terms, one cannot say that it fails to accomplish what it sets out to do.

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INTRODUCTION

Section 262(h) of Delaware's General Corporation Law (DGCL) bids the Chancery Court in an appraisal proceeding to "determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger."[1] It provides no further instructions regarding the means to the end, other than an admonition to "take into account all relevant factors."[2] For additional guidance on the meaning of fair value, we must consult a caselaw that stretches back in time almost a century.

There have been two intervals of disruption in this history—disruptions incident to unexpected revisions of the methodology of fair value ascertainment by the Delaware Supreme Court. The first was the 1983 decision of *Weinberger v. UOP*,[3] which withdrew a longstanding and constraining valuation mandate and much expanded appraisal's menu of acceptable methodologies, inviting reference to state-of-the-art valuation technologies. The intent and result was to facilitate liberality in the treatment of appraisal petitioners. The second disruptive intervention occurred more recently, with the decision of three cases--*DFC Global Corporation v. Muirfield Value Partners, L.P.*,[4] in 2017, *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd*,[5] also in 2017, and *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*,[6] in 2019. This trio of cases brings back mandatory methodology, imposing the merger price as the basis for fair value ascertainment in appraisals arising from a high-profile subset of arm's length mergers. The rulings substantially modify *Weinberger* without overruling it, lurching away from liberality of treatment. Controversy and confusion have resulted.

This is accordingly a propitious time to reconsider the jurisprudence of fair value as it has evolved over time, explicating the recent cases by placing them in historical perspective. This Article undertakes this review, providing a novel account. The central observation is that appraisal has developed into a process jurisprudence rather than jurisprudence devoted to the coherent articulation of an entitlement. As such it defies expectations and excites the wrath of academic commentators, who blame it for not being something it does not try to be. Once we shift perspectives

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[1] DEL. CODE ANN. tit. 8, § 262(h).

[2] *Id.*

[3] 457 A.2d 701 (Del. 1983).

[4] 172 A.3d 346 (Del. 2017).

[5] 177 A.3d 1 (Del. 2017).

[6] Verition Partners Master Fund Ltd. v. Aruba Networks, Inc. (*Aruba*), 210 A.3d 128 (2019).

and take Delaware appraisal on its own terms much of the basis for criticism dissipates. Although one might personally have shaped the remedy differently, one cannot say that it fails to accomplish what it sets out to do.

Given a more conventional, rights-based evolution, the law of appraisal early on would have provided a clear answer to the central question of business valuation: whether to model the company as a standalone going concern or to value it by reference to the price a third-party buyer would be willing to pay. Assuming a choice in favor of going concern value, the cases would both exclude methodologies that sweep in third party sale value and articulate specific instructions concerning the assumptions and methodologies to be employed in ascertaining going concern value. There would have resulted a precise statement of the dissenting shareholder's entitlement, a statement that would as much reflect inputs from financial economics as from legal sources.

Viewed superficially, Delaware appraisal does resemble such a model. Its first major precedent, decided in 1934,[7] opts for going concern value over third party sale value. The ruling, which has been emphatically reconfirmed ever since, is widely acknowledged as the centerpiece of a conceptual framework of fair value. Outcome determinative traction does not follow, however. In Delaware appraisal, doctrinal pronouncements on shareholder entitlements matter much less than does a menu of approved methodologies pursuant to which the Delaware courts ascertain fair value on a particular case's facts. Significantly, measures of third-party sale value have appeared on this menu during all periods of appraisal's history. In appraisal, what the courts do matters much more than what they say.

Appraisal cases are decided when the court selects the most reliable methodology from among a range of presentations made by the parties. Shifting perspectives on reliability have determined the recent course of the remedy's history rather than changing notions about shareholder entitlement. It is a jurisprudence about how to decide, a jurisprudence that evolves in response to institutional concerns particular to the Delaware courts. Interestingly, even as the evolution has been volatile, there has since *Weinberger* been a consistent trend as regards the methodological menu: it grows. As the menu becomes more capacious the set of possible outcomes expands, giving the courts more room for maneuver. Concomitantly, the conceptual profile of a dissenting shareholder's entitlement becomes less and less distinct.

This Article has five parts.

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[7] Chicago Corp. v. Munds, 20 Del. Ch. 142, 172 A. 452 (1934).

Part I prefaces the Article's historical account with an ahistorical review of the policy concerns and technical variables that come to bear on adjudications of fair value. The objective is to provide a concise and comprehensive statement of the issues that courts confront when adjudicating appraisal cases. The discussion has three modules. First comes a policy heuristic that poses a conceptual opposition between appraisal as a neutral, technical exercise and appraisal as a fairness-based regime that plays a role alongside fiduciary law in judicial policing of self-dealing in mergers and acquisitions. The second module is a list and description of the methodologies employed in today's business world in the valuation of the sell side partner in a merger. The third module is a more particular description of the issues the courts inevitably confront in fair value determinations. Courts make choices within four subject matter categories: (1) they choose between going concern value and third party sale value; (2) given a choice of going concern value, they go on to choose among and deploy means of measurement, viz. discounted cash flow analysis, comparable companies analysis and trading market price; (3) given a choice of third party sale value, they go on to choose among and deploy means of measurement, viz. comparable transactions analysis and negotiated merger price, and choose among broad and narrow definitions of deductible synergies; and (4) they choose whether or not to impose discounts related to the petitioner's status as a shareholder.

Parts II, III, and IV recount the history of Delaware appraisal cases. Three distinct periods are identified: the first starts with the earliest case and lasts until the decision of *Weinberger* in 1983; the second begins with *Weinberger* and ends when conditions conducive to hedge fund appraisal arbitrage coalesce in 2007; and the third begins in 2007 and continues to today, sweeping in the era of appraisal arbitrage.

The early period, described in Part II, saw the decision of landmark cases that made going concern value the base point for fair value determination and made initial choices regarding its ascertainment, favoring scenarios grounded in the pre-merger business plan and rejecting the alternative of trading market price. These conceptual statements stood in tension with the period's methodological approach. This centered on a mandatory menu biased toward verifiable inputs (the "Delaware Block"), a menu that included both the trading market price and third-party sale value in additional to going concern value. The methodologies, as applied, tended to undervalue companies, over time making appraisal an area of reputational concern for the Delaware courts.

Part III takes up the *Weinberger* period. *Weinberger* threw out the Delaware Block and opened the door to consideration of whatever state-of-art valuation methodologies the parties' experts brought to court.[8] This leveled the playing field in the petitioners' favor but also increased the court's technical burden. Although going concern value remained at the center of appraisal's conceptual framework, the courts did not avail themselves of the opportunity created by *Weinberger* to mandate it by fashioning a bright, exclusionary line that distinguished it from third party sale value. The contrary was the case, for the courts accepted new approaches to valuation that swept in third party sale value, including, at the end of the period, a menu extension that picked up negotiated merger prices.

Developments in the most recent period, assayed in Part IV, turn on the waxing and waning of appraisal arbitrage. This was an explosion of litigation by special purpose hedge funds in pursuit of fair value rulings well above the merger price, an enterprise dependent on a particular methodological approach—expert projection and analysis of discounted cash flows. The *DFC*, *Dell*, and *Aruba* decisions put a stop to the arbitrageurs by modifying the *Weinberger* playbook to privilege the merger price as the measure of going concern value given a qualifying arm's length transaction. The effect was to chill the incentive to litigate by putting a thumb on the scale to favor of transactionally based measures of value over expert analyses. And, because the respondent bears an onerous burden of proof to reduce the merger price with evidence of shared synergistic gain, awards of merger price more closely resemble third party sale value than they do going concern value. Finally, the recent cases put the trading market price--the transactional measure *par excellence*—back on the menu for the first time since *Weinberger*.

Part V unpacks the history's implications for corporate legal theory, describing a conceptual framework of fair value that turns away from entitlement thinking in favor of a minimalist approach in which fair value is the *sui generis* result of each separate fact-finding process. It is an area where law-to-fact precedents tend not to bind, leaving the Chancery Court maximum freedom of movement to restrike a balance between methodological integrity and fairness to shareholders as events unfold.

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[8] *See Weinberger*, 457 A.2d at 712–13.

I. FAIR VALUE IN THEORY: POLICY CONCERNS AND METHODOLOGICAL CHOICES

In this Part we pause before taking up our historical review of Delaware appraisal to consider fair value as an ahistorical, abstract proposition. The discussion lays out the range of valuation variables and unpacks the technical questions and policy considerations that come to bear on fair value's legal ascertainment. The purpose of the exercise is to state the issues, outlining the choices posed in fair value determinations. The discussion prefaces this Article's subsequent, historical sections, which describe the resolutions made by the Delaware courts over the past eighty-nine years.

Section A describes policy objectives, posing a binary of competing concerns which puts methodological integrity at one pole and fairness to the dissenting shareholder at the other. The binary emerges in the course of the appraisal statute's evolution--calculative concerns dominated during the remedy's early history with fairness arising as a competing concern after a statutory amendment in the 1960s allowed cash consideration to be paid to target shareholders. Section B lays out the menu of valuation methodologies drawn on in today's M&A market, making reference to the sell side investment banker's analysis in a 2021 merger. The menu begins with measures of going concern value—discounted cash flow analysis, comparable companies analysis, and trading market prices. It then goes on to sweep in measures of third-party sale value—comparable transactions analysis and premiums paid analysis. Section C describes the legal issues that come up when courts adjudicating appraisal cases select and apply the methodologies on the menu. The basic question is whether the courts should restrict themselves to pre-merger going concern value or open the door to third party sale value. Once that question is decided, there arise questions about the selection and application of the methodologies available on the menu, including an overarching choice between figures derived from expert reports and figures derived from arm's length transactions in the real world.

A. *The Policy Binary: Methodological Integrity v. Transactional Fairness*

In the context of appraisal, determinations of fair value are heavily influenced by (1) a policy binary, and (2) a menu of valuation methodologies. This Section A takes up the policy binary.

The policy binary disaggregates "fair value" into "value" at one pole and "fairness" at the other.

At the binary's value pole, value is something to be ascertained through the application of an appropriate methodology. By hypothesis, the petitioning shareholder's entitlement to a determination of "fair value" is taken as a given. The question concerns the means for ascertaining an amount. The exercise is technical and, depending on the methodology, the services of an expert are required. The policy aspirations are integrity and neutrality. Ideally, the process of ascertainment should be ministerial, with the best available methodology brought to bear. Neutral ascertainment according to the best methodology subsumes concerns about fairness: If the best methodology has been capably and neutrally applied, then the result presumably is fair. Significantly, a court looking for guidance respecting available metrics will reference not only business practice but financial economics, making judicial appraisal a focal point of intersection between law and economics.[9]

At the opposite pole lies fairness. We will shortly see that for any given merger there will be a wide range of valuation methodologies yielding a wide range of monetary results. To determine a single figure as the fair value is to make choices among the methodologies on this menu, choices that materially impact the bottom-line. As these choices are posed, value ascertainment starts to implicate fairness concerns. One method may yield a more generous figure than another; different assumptions and inputs can yield different results pursuant to a given method. The choices made may be sensitive to transactional context—some mergers carry a higher risk of an outcome skewed against the interest of the dissenter than do others. The more salient the risk of misappropriation, the greater the justification for a generous calculation. This follows partly as a function of the appraisal remedy's compensatory purpose and party as a function of its proximity to the regime of fiduciary law governing mergers, which bids the courts to police transactional slack and self-dealing.

The relative salience of the binary's two sides has shifted as Delaware's appraisal statute has evolved in history. Early on, appraisal was seen largely as a matter of neutral ascertainment. The remedy came

[9] *See* Jonathan Macey & Joshua Mitts, *Asking the Right Question: The Statutory Right of Appraisal and Efficient Markets*, 74 BUS. LAW. 1015, 1016 (2019) ("Appraisal proceedings drag financial economics from the classroom into the courtroom.").

into Delaware law incident to the relaxation of the process rules governing mergers, which originally required unanimous shareholder approval.[10] When the statute was amended in 1899 to permit approval by a majority shareholder vote,[11] appraisal rights were inserted as a concession to shareholders on the vote's losing, minority side. The notion was that the dissenter should have the option of cashing out rather than being required to participate as a securityholder in an altered enterprise.[12] An alternative source of liquidity was unlikely to be available in those days, when public trading was the exception rather than the rule. Appraisal provided the dissenter with an exit door, and as such was viewed as a largely technical exercise.

As public trading proliferated, appraisal rights loomed less large. A trading market in the stock distributed at the close of the merger performs the liquidity function for the exiting shareholder better than does a costly judicial valuation proceeding. The statute accordingly was modified in 1967 to add the "market out" pursuant to which public trading negates appraisal rights in some cases.[13]

The 1967 revision of the Delaware's corporate code made an additional change, for the first time permitting the acquiring corporation in a merger to pay cash (as opposed to its own stock or other securities) to the shareholders of the target corporation (alternatively, the selling or transferor corporation).[14] On its face the amendment was a technical change that imported flexibility to dealmakers. But it opened up possibilities for exploitation, especially in companies controlled by a majority shareholder, for the majority now could use its voting power to force a one-sided "cashout" or "freezeout" merger that cut the minority off from further participation in the enterprise by dispatching it a low cash price.[15] Fairness waxed as policy concern as a result. Appraisal rights,

[10] Robert B. Thompson, *Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law*, 84 GEO. L.J. 1, 3 (1995).

[11] 21 Del. Laws 461–62 (1899) (chapter 54, section 273).

[12] Thompson, *supra* note 10, at 3–4 (1995).

[13] *Id*. at 29.

[14] 56 Del. Laws 50, § 262 (1967). Note that prior to the at the time of enactment, all mergers were, as a practical matter, stock mergers. In a merger market including only stock deals the market out would have had the effect of eliminating appraisal in respect of all public company mergers, returning the remedy to its original sphere of operation as a liquidity provider. One suspects that was what the drafters had in mind. But once the door opened to cash consideration, dealmakers took advantage. Awkwardly, the appraisal statute now admits the remedy in public company cash deals but not in public company stock deals.

[15] Thompson, *supra* note 10, at 4.

earlier written off as an anachronistic backwater,[16] returned to the corporate law's foreground as an area where salient rights were at stake.[17]

Fairness has competed with methodological integrity for policy dominance ever since, both in judicial opinions and in academic commentary.

B. *The Methodological Menu*

There is no single way to value a company. Instead, there is a menu of alternatives, each of which produces a snapshot of value from a different perspective. This section lays out the menu in its present form.

The survey draws on a real-world transaction rather than a textbook description. The transaction is a large strategic acquisition proposed and consummated in 2021—Microsoft Corporation's purchase of Nuance Communications, Inc. for $56 cash per share, a price representing a premium of 26.66 percent over Nuance's pre-merger market price of $44.21.[18] Reference is made to a proxy statement, dated May 17, 2021, sent to Nuance's shareholders in connection with their meeting to vote on the merger agreement.[19] The proxy statement reports on value analyses conducted by Evercore, the investment banker advising the Nuance board and delivering to it a fairness opinion in connection with the transaction.[20]

Evercore reported the following analyses:

> (1) *Discounted cash flow analysis* (DCF analysis). Nuance management provided Evercore with projections of the company's unlevered free cash flow (net cash inflows minus taxes, capital expenditures, and changes in working capital)

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[16] Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 245 n.37 (1962) ("[C]orporation law, as a field of intellectual effort, is dead in the United States.").

[17] Thompson, *supra* note 12, at 4–5.

[18] Nuance Communications, Inc. Schedule 14A, May 17, 2021, *available at* https://www.sec.gov/Archives/edgar/data/0001002517/000114036121017650/nt10023637x2_defm14a.htm [hereinafter *Nuance Proxy Statement*].

[19] *Nuance Proxy Statement*, *supra* note 18, at 43. The Nuance shareholders approved the merger by a vote of 210,029,541 to 1,763,815 on June 15, 2021. *See* Nuance Communications, Inc. Form 8-K, June 16, 2021, *available at* https://www.sec.gov/ix?doc=/Archives/edgar/data/0001002517/000114036121021146/brhc10025920_8k.htm.

[20] The disclosure backstops the fairness opinion. Fairness opinions make minimal concessions to detail, opining only that the merger price is lies within a plausible range of appropriate values and so is fair and disclosing the assumptions behind the opinion at a very high level of generality. *See* William W. Bratton & Michael L. Wachter, *Bankers and Chancellors*, 93 TEX. L. REV. 1, 14 (2014) [*hereinafter B-W 1*]. The information finds its way to the shareholders indirectly when the issuer reports in detail on the banker's diligence in the proxy statement.

for the present and next four fiscal years.[21] For the sixth and following years, Evercore took the fifth-year figure and added a "terminal value" of 4 to 5 percent—an estimate of a perpetual rate of growth of adjusted free cash flows.[22] Evercore discounted the future cash flows thus projected at rates ranging from 8 to 9 percent, rates based on its "professional judgment and experience." The analysis yielded a value range from $29.23 to $48.14.[23] There was also a sum-of-the-parts DCF analysis taking each division of the company separately and adding up the results rather than taking the company as a whole.[24] This yielded a range of $33.34 to $52.10.[25]

(2) *Comparable company analysis* (CCA). Evercore collected financial information from publicly-traded companies in three sectors in which Nuance operated—vertical software (sixteen companies), healthcare (thirteen companies), and call center technology (six companies).[26] As to each Evercore calculated series of ratios: (1) enterprise value (equity market capitalization plus value of senior securities minus cash) over current year estimated revenue, (2) enterprise value over current year estimated earnings before interest, taxes and depreciation and amortization (EBITDA), and (3) equity market capitalization over levered after-tax free cash flows.[27] The ratios yielded a sequence of mean and median multiples.[28] From these Evercore extracted multiples which it applied to Nuance's revenues, EBITDA and cash flows.[29] There resulted ten implied stock price ranges for Nuance.[30] The lowest of these spreads was $20.74 and the highest was $52.76.[31]

(3) *Comparable transactions analysis* (CTA). Evercore collected the sale prices of companies in the three sectors in

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[21] *Nuance Proxy Statement*, *supra* note 18, at 43.
[22] *Nuance Proxy Statement*, *supra* note 18, at 43.
[23] *Nuance Proxy Statement*, *supra* note 18, at 43.
[24] *Nuance Proxy Statement*, *supra* note 18, at 43.
[25] *Nuance Proxy Statement*, *supra* note 18, at 40–42.
[26] *Nuance Proxy Statement*, *supra* note 18, at 40–42.
[27] *Nuance Proxy Statement*, *supra* note 18, at 40–42.
[28] *Nuance Proxy Statement*, *supra* note 18, at 40–42.
[29] *Nuance Proxy Statement*, *supra* note 18, at 40–42.
[30] *Nuance Proxy Statement*, *supra* note 18, at 40–42.
[31] *Nuance Proxy Statement*, *supra* note 18, at 40–42.

transactions going back three, four, or ten years depending on the sector.[32] It then constructed ratios by putting the sale price over the selling company's revenues for its most recent 12 months, yielding mean and median multiples for each of the three sectors.[33] The multiples, brought back to Nuance's most recent revenues, implied a range for sale prices from $22.43 to $37.06.[34]

(4) *Premiums paid analysis* (PPA). Evercore collected data from 80 large ($10 billion plus) domestic mergers from 2010 to 2021 and calculated mean and median merger price premiums from one day prior to the merger's announcement and four weeks prior to announcement and in respect of the stocks' 52-week highs prior to announcement.[35] The premiums, carried back to Nuance market prices, implied a sale price range of $50.51 to $63.31.[36]

(5) *52-week trading range* (market price). Evercore reported that Nuance stock had traded between $16.997 and $50.51 during the 52 weeks prior to the merger announcement.[37]

The different methods view Nuance from different perspectives. The DCF analysis derives going concern value (GCV).[38] It looks at the stand-alone company and ascertains a present value based on its managers' projections of the company's future cash flows.[39] The market price trading range report offers a different report of GCV, looking at the stand-alone company and applying values as determined by buyers and sellers in actual stock market trades.[40] Like the DCF analysis, these values follow from the discounting of projected future returns.[41] Reference to market price has the virtue of attaching verifiable numbers resulting from actual transactions.[42] The DCF analysis, in comparison, has a cheap talk aspect—

[32] *Nuance Proxy Statement*, *supra* note 18, at 44–45.
[33] *Nuance Proxy Statement*, *supra* note 18, at 44–45.
[34] *Nuance Proxy Statement*, *supra* note 18, at 44–45.
[35] *Nuance Proxy Statement*, *supra* note 18, at 46.
[36] *Nuance Proxy Statement*, *supra* note 18, at 46.
[37] *Nuance Proxy Statement*, *supra* note 18, at 44.
[38] *Nuance Proxy Statement*, *supra* note 18, at 40–42.
[39] *Nuance Proxy Statement*, *supra* note 18, at 40–42.
[40] *Nuance Proxy Statement*, *supra* note 18, at 40–42.
[41] *Nuance Proxy Statement*, *supra* note 18, at 40–42. At least in theory. To the extent that "noise" traders are determining the market price, the price reflects speculation about future market prices rather than dispassionate discounting of projected future cash flows.
[42] *See generally Nuance Proxy Statement*, *supra* note 18, at 40–46.

it begins with management's informed guesses about future returns and ends with the appraiser's informed guess about growth rates in the distant future and choices of methodology and numerical inputs in the ascertainment of a cost of equity capital, which provides the discount rate.[43] The CCA analysis also seeks to derive a GCV for Nuance.[44] But it turns its view away from Nuance itself to infer values from outside, building ratios based on verifiable numbers respecting companies in similar lines of business, and deriving value figures by bringing Nuance's own numbers to the ratios.[45] A methodological tie connects this method to the market price results: the comparable companies are publicly traded and the ratios build on their stock prices.[46]

The CTA and PPA project third party sale values (TPSV).[47] They shift the perspective away from the stand-alone company and its GCV to sale prices of other companies. The resulting ranges have obvious importance to the Nuance shareholders as they evaluate the $56 merger price.[48] These figures also can loom large from the point of view of a dissenting shareholder: TPSV tends to be higher than GCV.[49]

The wide range of perspectives yields a wide range of dollar results—a sequence of values with a low end of $20.74 and a high end of $63.31.[50] (The numbers just happened to imply that the merger price of $56 lay at the range's high end, with only the PPA yielding numbers higher than the merger price.) The range's breadth, while considerable, is not unusual. An important point follows for judicial appraisal: the choice among the methodologies on the menu can materially impact the litigation's outcome.

C. *Legal Choices*

The policy binary and the methodological menu intersect and interact as courts apply the fair value standard in litigated cases. Because different methodologies yield different values, the choice among them frequently will be contested, and concerns of both methodological integrity and fair treatment will come to bear on the resulting rulings. To the extent that past judicial choices operate as binding precedents that limit the dissenting shareholder's access to a desired methodology, or

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[43] *See generally Nuance Proxy Statement*, *supra* note 18, at 42.
[44] *See generally Nuance Proxy Statement*, *supra* note 18, at 42.
[45] *Nuance Proxy Statement*, *supra* note 18, at 45–46.
[46] *See generally Nuance Proxy Statement*, *supra* note 18, at 42.
[47] *Nuance Proxy Statement*, *supra* note 18, at 44–45.
[48] *Nuance Proxy Statement*, *supra* note 18, at 44–45.
[49] *Nuance Proxy Statement*, *supra* note 18, at 44–45.
[50] *Nuance Proxy Statement*, *supra* note 18, at 42–46.

alternatively, open access to a desired methodology, the caselaw sets the parameters of the dissenting shareholder's entitlement.

This section highlights the factors that come to bear as these choices are made. Four points of contention are identified: (1) the choice between GCV and TPSV, (2) the selection of the appropriate measure of GCV, (3) the selection of the appropriate measure of TPSV, including the identification and possible deduction of synergistic gains, and (4) the appropriateness of discounts related to the situation of the company's shareholders.

1. Going Concern Value v. Third Party Sale Value.

a. The Entitlement Issue.

In a first best economic equilibrium, GCV always will be greater than TPSV. "First best" means that all assets have gone to their highest valuing users. It follows that a company's present owners will be the most productive and that GCV is a maximizing figure. The highest bidder in a sale will by definition be the next highest valuing user, and TPSV will be a lower, opportunity cost figure.[51] In the real world, TPSV will tend to be higher than GCV, as we saw with the spreads in Evercore's PPA.[52] There is a universally accepted, albeit conclusory explanation for this: a third party seeking to buy control must pay a premium over GCV as measured by the trading market price.[53] It follows that appraisal petitioners may benefit from access to TPSV. Fair value's central entitlement question follows directly: whether the petitioning shareholder is entitled only to GCV or may pursue TPSV.[54]

Various factors and considerations bear on the answer. First comes a property rights question: whether the value of control is a part of the value of the corporate entity or attaches to the block of stock held by the controlling shareholder. To see why this issue arises, consider a simple example involving an arm's length merger. The target corporation has a dispersed shareholder population; there is no control party. The acquiring corporation, which will emerge from the transaction owning 100 percent of the stock of the target, pays a premium of 35 percent over the pre-merger market price of the target's shares. If the control sold to the acquiring corporation in this merger belongs to the target entity, then the

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[51] *See* Lawrence A. Hamermesh & Michael L. Wachter, *The Fair Value of Cornfields in Delaware Appraisal Law*, 31 J. CORP. L. 119, 134–37 (2005)[hereinafter *H-W 1*].

[52] *See* discussion *supra* Section I.B.

[53] Lawrence A. Hamermesh & Michael L. Wachter, *Rationalizing Appraisal Standards in Compulsory Buyouts*, 50 B.C.L. REV. 1021, 1038, 1045 (2009) [hereinafter *H-W 3*].

[54] *See* discussion *infra* Section II.

premium paid is a part of the corporation's intrinsic value and a dissenter seeking compensation should be awarded TPSV. In the alternative, corporate law could deem control value to be something that springs into existence in connection with the transaction that brings a control block into existence, effecting the transition between dispersed ownership and the acquiring corporation's ownership of 100 percent of the shares. Under this conceptualization, control value has not been taken away from the dissenting shareholder, who should be awarded only stand-alone GCV.

b. Premiums and Discounts.

The property rights issue can be restated to emphasize the concepts of "premium" and "discount." Let us first focus on the premium side of the coin and characterize a merger purchase price as having two components, stand-alone GCV and an additional "premium" sum. The added sum is causally related to the merger and economically separate from the pre-merger value of the company. Under this view, stand-alone GCV has not been discounted, and the premium springs entirely from the transaction. This perspective enhances the optics of the case for GCV over TPSV. But the perspective can be shifted. In this view, one compares GCV and TPSV, notes that the former is lower, and infers that the GCV incorporates a discount from intrinsic value—the premium's converse.[55] If (1) the pre-merger market value of the company's shares does not include the premium, (2) the premium reflects the value of control, and (3) control is an asset belonging to the corporate entity, then pre-merger GCV, however calculated, reflects a discount to intrinsic value, a discount that should be "made up" in the calculation of fair value.

Consider agency costs in connection with this comparison of the premium and discount perspectives of merger pricing. Agency costs are the negative effects of self-dealing, slacking, and incompetence on the part of the company's managers and employees.[56] They can be seen as a discount factor: the production function is worth less than it otherwise would be due to the shortcomings of the people in charge; replace them with a more capable and better monitored team and the assets automatically perform better.[57] The value realized is seen to inhere in the

[55] The text's notion that the premium and the discount are converses of one another is admittedly simplistic. For more nuanced presentations, *see* Richard A. Booth, *Minority Discounts and Control Premiums in Appraisal Proceedings*, 57 BUS. LAW. 127, 130–32. (2001); John C. Coates IV, *"Fair Value" as an Avoidable Rule in Corporate Law: Minority Discounts in Conflict Transactions*, 147 U. PA. L. REV. 1251, 1262–80 (1999).

[56] Lawrence A. Hamermesh & Michael L. Wachter, *The Short and Puzzling Life of the "Implicit Minority Discount" in Delaware Appraisal Law*, 156 U. PA. L. REV. 1, 58 (2007) [hereinafter *H-W 2*].

[57] *Id.* at 52.

existing asset base. An agency cost reductive merger thus makes up a discount, permitting the assets' intrinsic value to be realized.[58] A shareholder entitlement is implied. But this picture can be reversed into a premium account. Agency costs, like any other costs, cause the firm's net cash flows to be smaller.[59] That they can be reduced makes them not an element of intrinsic value but an opportunity cost foregone in respect of the existing assets. The third-party purchaser, seeking to make a profit by reducing them, is forced to pay a premium in arm's length negotiation as the price of access.[60] The value is not intrinsic but added. No shareholder entitlement is implied.

c. Academic Perspectives.

Academic views on the choice between TPSV and GCV go both ways.

Those arguing for access to TPSV emphasize the fairness side of the policy binary.[61] Concerns about equal treatment of shareholders have long fostered the theory that control belongs to the corporation and accordingly is an element of its intrinsic value.[62] Such concerns become acute as

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[58] Reinier Kraakman, *Taking Discounts Seriously: The Implications of Discounted Share Prices As an Acquisition Motive*, 88 COLUM L. REV. 891, 897–98 (1988) (describing misinvestment discounts).

[59] *H-W 1*, *supra* note 51, at 140.

[60] *H-W 2*, *supra* note 56, at 35–38; *H-W 3*, *supra* note 53, at 1021, 1023–25, 1048.

[61] There is also an economic theory grounded in the pricing of nonfinancial assets—the downward sloping demand theory of merger pricing. Under this, different shareholders value the company differently, with the lowest valuing holders selling into the pre-merger stock market and with higher valuing holders holding out for their higher reservation prices. The acquirer pays a premium because it has to go up the demand curve, offering a sufficiently high price to garner the support of a majority of the shares. By hypothesis, the appraisal dissenter comes from the minority of holders with higher-still valuations. *See* Robert Miller, *Stock Market Value and Deal Value in Appraisal Proceedings*, 96 N. D. L. REV. 1403, 1411–13 (2021); Richard A. Booth, *Discounts and Other Mysteries of Corporate Finance*, 79 CAL. L. REV. 1053, 1055 (1991); Lynn A. Stout, *Are Takeover Premiums Really Premiums? Market Price, Fair Value, and Corporate Law*, 99 YALE L.J. 1235, 1239 (1990). The implication is that control value belongs to the company rather than the acquirer.

This approach is inconsistent with orthodox financial economic theory, which holds that security pricing has a flat demand curve. The idea is that stocks and bonds are not consumed, like widgets. They provide payment streams that finance the consumption of widgets and other goods and services. Demand for money is constant—people always want it. When a stock goes down it is not because demand for the money on offer has decreased, it is because less future money is now projected or the same monetary projection has become a riskier proposition. Portfolio theory backs up this insight with its showing that rational investors will hold stocks in a single optimal market portfolio, addressing their variant tastes for risk as they interpolate risk-free treasuries into the investment mix.

[62] *See* Adolf A. Berle, Jr., "*Control" in Corporate Law*, 58 COLUM. L. REV. 1212, 1220 (1958) ("[W]here stockholdings carrying controls are sold, any identifiable portion of the consideration paid for the power-position over and above the value of the stock ex the control

regards a particular subset of conflicted transactions—mergers that serve as the vehicle for majority shareholders to freeze out minority shareholders.[63] Majority shareholders are thought to be able to game these mergers, either by timing them so as to disadvantage the minority or exploiting informational advantages to obscure (and thereby convert) sources of value. Given the conflict of interest and the high risk of a skewed distribution, a shift in the yardstick from GCV to TPSV makes compensatory sense. More broadly, the appraisal remedy better performs a policing function when the petitioner has access to TPSV as the measure of fair value. A more liberal value measure brings the appraisal remedy into purposive alignment with the regime of fiduciary scrutiny applying to mergers,[64] which seeks to assure that all sell side shareholders get the benefit of an arm's length bargain.[65] Although fiduciary law does not require a "best" price, it does seek to assure an effectively negotiated price toward the end of increasing returns to target shareholders. Arguably, shareholder value is maximized thereby, and with it efficiency.

Those arguing for GCV stress methodological integrity and incentive alignment. Lawrence Hamermesh and Michael Wachter (H-W), the leading exponents of this approach, make a strong theoretical case in a series of articles.[66] Their base point is that the benefits of control should adhere to the controlling shareholder and not to the corporation.[67] This assertion enjoys cognizable doctrinal support: fiduciary law permits a controlling shareholder to sell its control block at a premium over the market price and to pocket the premium without sharing the premium with the corporation as a whole.[68] H-W back up this entitlement allocation with

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power element belongs not to the control-seller but to the corporation or (perhaps) to all the shareholders ratably.").

[63] *See* Thompson, *supra* note 12, at 3–5; Coates, *supra* note 55, at 1323–26 (arguing that the benefits from making up minority discounts outweigh the costs).

[64] *See* Albert H. Choi & Eric L. Talley, *Appraising the "Merger Price" Appraisal Rule*, 35 J.L. ECON & ORG. 543 (2019) (setting out an economic model of the role of appraisal in merger policing).

[65] *See* Weinberger v. UOP, 457 A.2d 701 (Del. 1983) (seeking to assure a fair pricing process in a conflicted merger); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986) (seeking to assure a robust pricing process in an arm's length merger).

[66] *See H-W 1*, *supra* note 51; *H-W 2*, *supra* note 56, *H-W* 3, *supra* note 53; Lawrence A. Hamermesh & Michael L. Wachter, *Finding the Right Balance in Appraisal Litigation: Deal Price, Deal Process, and Synergies*, 73 BUS. LAW. 961 (2018) [hereinafter *H-W 4*]. H-W expand on themes first mooted in William J. Carney & Mark Heimendinger, *Appraising the Nonexistent: The Delaware Courts' Struggle with Control Premiums*, 152 U. PA. L. REV. 845 (2003).

[67] *H-W 3*, *supra* note 53, at 1023–25.

[68] At least provided the transaction causes no ancillary injury to the going concern. *See, e.g.*, Mendel v. Carroll, 651 A.2d 297 (Del. Ch. 1994), Zetlin v. Hanson Holdings, Inc. 48 N.Y. 2d 684, 421 N.Y.S. 2d 877, 397 N.E. 2d. 387 (1979), Perlman v. Feldman, 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955).

a policy case.[69] In their view, given an arm's length, third-party merger in which the sell-side corporation has dispersed owners, incentives to create value remain unimpaired only if we cap the dissenters' entitlement at GCV.[70] The acquirer pays a premium for control in order to get the opportunity to enhance the productivity of the selling corporation's assets, whether as a result of new, combined operations made possible by the merger or by agency cost reduction through improved management.[71] Were the appraisal remedy to give minority shareholders of the target a right to siphon off a portion of the merger gain by awarding TPSV,[72] there would be a diminished incentive to do the deal in the first place. Meanwhile, there is nothing unfair about limiting the entitlement to GCV, for the target shareholders are thereby compensated for exactly what was taken from them: they bought into an enterprise in which ownership and control were separated and agency costs accordingly ran higher than would have been the case had a control party been in place, paying a price that adjusted downward for the costs.[73] Nor can it fairly be said that the difference between TPSV and GCV somehow inheres in the enterprise's stand-alone value. Most companies, most of the time are not for sale. It takes an actual transaction to unlock the differential, something that takes place only when new opportunities arise.[74]

To sum up, there are two camps on the CGV/TPSV issue. Their differences reflect different perspectives on the allocation of entitlements within the corporation. The TPSV side assumes that the target shareholders are disabled as regards self-protection and assigns appraisal a legal role in mitigating the disability. It also assumes that enhancement of target shareholder returns enhances shareholder value more generally and thus performs an efficiency function. The GCV side is more protective of the discretion of sell-side managers and less worried about the adequacy of fiduciary policing. It tells a different efficiency story, looking to enhance welfare by encouraging transactions, thereby getting assets to higher valuing users. Significantly, the contrasting cases are made by reference to different touchstone transactions: the TPSV side poses a conflicted cashout merger while the GCV case is based on an arm's

[69] *H-W 2*, *supra* note 56, at 36–38.
[70] *H-W 2*, *supra* note 56, at 36–38.
[71] *H-W 2*, *supra* note 56, at 36–38.
[72] *H-W 3*, *supra* note 53, at 1052.
[73] *H-W 1*, *supra* note 51, at 140; *H-W 2*, *supra* note 56, at 35; *H-W 3*, *supra* note 53, at 1048.
[74] *H-W 2*, *supra* note 60, at 32 (noting that "dogs don't bark:" there are lots of dogs, and most of the time most do not bark); *H-W 3*, *supra* note 53, at 1039–40 (noting that most companies most of the time deploy their assets efficiently).

length transaction. Looking only at the touchstone deal in view, each side has the better of the argument.

2. Ascertainment of GCV.

Let us assume that GCV is the appropriate yardstick of fair value. Reference to Evercore's Nuance analyses shows at least three alternate routes to its ascertainment: a DCF valuation, a CCA, and reference to the pre-merger market price.[75] Which is preferable? Another binary comes to bear on this choice: at one pole value is determined by expert analysts; at other value is determined by a real-world transaction. DCF is at the expert pole, requiring assumption-laden inputs from an appraiser. CCA makes a move in the transactional direction, for it starts with comparable company market prices before calling on an expert to select the comparable companies and work their numbers into an analysis. Market price is at the other pole—all the analyst has to do is isolate a transactional artifact. To the extent verifiability is a policy concern, market price make sense. To the extent market valuations are mistrusted, the expert analysis will be preferred. Methodological integrity can be argued either way.

a. Judgment Calls in DCF and CCA Valuation.

Both DCF and CCA present problems respecting inputs. DCF valuation presupposes projections of future cash flows. To the extent the projections are prepared for the occasion, as occurred with the Nuance analysis, there are problems of credibility. Thus do the Delaware cases state a clear preference for a management projection prepared for internal planning purposes prior to the merger.[76] Problems remain even given a credible projection. The terminal value added at the end of the projection period (based on a four to five percent growth rate in the Evercore analysis) depends on judgment calls about the subject company's future prospects and the growth and inflation rates of the economy as a whole. The discount factor comes from the company's cost of capital and is usually determined pursuant to the capital asset pricing model (CAPM) or one of its more complex descendants. The CAPM, when presented on the pages of a finance textbook, has the look of a tight, closed model calling for easily verified inputs. In reality, determination of each of the CAPM's operative components—the risk-free rate of return, the equity risk premium, and the beta—implicates significant (and highly technical)

[75] *See Nuance Proxy Statement*, *supra* note 18, at 40–46.

[76] *See, e.g.*, Huff Fund Investment Partnership v. CKx, Inc., C.A. No. 6844-VCG, 2013 WL 5878807, at *10 (Del. Ch. Nov. 1, 2013).

exercises of judgment.[77] Small changes in any of these inputs can make a material difference at the bottom line.

CCA presents a different problem: the identification and selection of genuinely comparable companies. Here again there are judgment calls and potentially material differences of dollar outcome. Since there is unlikely to be a company or companies on all fours with the subject company, even the best analysis will be subject to serious second guessing. The CCA in Evercore's Nuance analysis avoids such complications by proceeding at a higher level of generality. The analyst builds entire sectors that overlap Nuance's lines of business, sweeping in large numbers of companies without worrying about their on the ground comparability with Nuance. The resulting analysis contributes datapoints useful in the evaluation of the merger's negotiated price. But it would not provide a basis for a credible fair value determination. More factual winnowing would be necessary.

b. Business Scenarios in DCF Analysis.

A list of subsidiary questions comes up when future cash flows are projected in a DCF analysis. One question goes to the selection of business scenarios for the projection base. Projections could be based on the business exactly as run pre-merger. Projections also could include alternative possibilities—future investments or changes in the business plan, actually planned or potential. Note that to the extent that alternative possibilities are admitted, the GCV likely rises.

The statute draws a line as regards alternative possibilities. Section 262(h) directs the court to "determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger[.]"[78] If an alternative scenario involves value stemming from the combination of the two merger partners—sometimes referred to as synergy value—it is not compensable. But how does the prohibition of this element of merger-related gain bear on the permissible set of pre-merger business scenarios?

To see the bearing, consider a case where the assets of the company can be put to an alternate and more profitable use. In the classic hypothetical, the company owns and farms agricultural land that profitably can be developed as commercial real estate.[79] The appraisal petitioner will argue that the development potential is a part of the value of the

[77] *See* Global GT LP v. Golden Telecom, Inc., 993 A.2d 497, 513–24 (Del. Ch. 2010) (discussing the equity risk premium and beta).

[78] DEL. CODE ANN. tit. 8, § 262(h).

[79] *See H-W 1*, *supra* note 51, at 146–47.

corporation.[80] It can point for support to the barrier in section 262(h), arguing that no merger with another entity is necessary to realize this potential and that the alternative scenario accordingly is appropriate fair value input; since the statute does not preclude its consideration as an element of value, the court may go ahead and do so.[81] The respondent will argue that the petitioner takes the corporation's business plan as it finds it--GCV should be determined by the business plan in place rather than an unexploited but potential source of value. Furthermore, the merger price includes a premium paid to permit the buyer to exploit the asset's unexploited potential; any value yielded as such "arises from" the merger.[82]

c. Market Price.

There is a long-standing debate on the question whether and in what circumstances the trading market price should determine GCV. Its great advantage is a verifiable transactional basis. Its great disadvantage (at least in the view of many) is that the greater the probability that market price will be the yardstick, the less reason there is to pursue appraisal. DCF and CCA analyses are manipulable, and so can provide a platform for recoveries higher than the merger price, encouraging dissent. With the substitution of market price as the measure of GCV, there is no incentive to dissent. To the extent that the appraisal remedy serves a policing function, that benefit is lost. Appraisal largely becomes relegated to close corporation contexts.

A decision on the appropriateness of market price as a measure of GCV also implicates views on the market's accuracy and reliability. If the stock market is seen as a volatile casino in which prices are driven by speculation rather than rational evaluation, then market prices will tend to be disqualified. If the stock prices are seen as informationally efficient and the best available indicators of GCV, qualification could follow.

[80] *See H-W 1*, *supra* note 51, at 147.

[81] *See H-W 1*, *supra* note 51, at 147.

[82] Note that the petitioner's argument for the alternate use's inclusion seeks to gross up GCV to compensate for an opportunity cost. It thereby poses a variant of the question presented by the choice between GCV and TPSV. Since the unexploited but profitable alternate use incentivizes bidders, its value will be reflected in the price paid and is accordingly a part of TPSV. Once we locate the alternate use of the assets as an element of TPSV, a follow up question arises: even assuming that we permit awards of TPSV, whether this element of TPSV is appropriately deemed a synergy and subject to exclusion pursuant to the section 262(h) barrier. *See infra* text accompanying note 101. H-W draw a line here: If the unexploited opportunity amounted to a corporate opportunity under fiduciary law, then it can be included in a fair value determination; other changes in the business plan are not includable. *H-W 1*, *supra* note 51, at 145–48.

Indeed, the question would become whether DCF or CCA should be allowed at all, given the availability of a reliable, transactionally grounded measure.

Assuming that market price gets a place on fair value's methodological menu, a final question remains: whether the market for the given stock must meet a qualitative standard, showing sufficient depth and informational efficiency. To the extent a more particular inquiry into market quality is required, uncertainty and judgment calls will enter the calculative process.[83]

3. Ascertainment of TPSV.

a. Alternative Measures.

Now let us change assumptions and admit TPSV as an appropriate, even superior measure of value. How might a court go about ascertaining a figure?

There are two choices. One route—CTA—combines real world transactions with expert analysis.[84] Instead of collecting data on comparable operating companies, the expert collects data on comparable mergers, taking the transaction prices and drawing on pre-merger numbers (such as revenues or earnings) to build ratios.[85] Multipliers derived from the ratios are then brought back to the subject company's numbers.[86] As with CCA, judgment calls are entailed and there arise questions regarding degrees of comparability.[87]

The alternate route is the price paid in the merger in question. This is the TPSV equivalent of looking to the trading market price as the measure of GCV.[88] As with market price, merger price holds out the great advantage of verifiability.[89] Questions arise nonetheless. One concerns the quality of the negotiation behind the price.[90] Different types of mergers

[83] Note that while market price is a measure of GCV, the projections influencing it are not necessarily confined to the stand-alone company's present business plan. Alterative scenarios, or even TPSV can figure into the value projected by market traders. Hypothesize a company in a concentrating industry. It is one of the smaller players and there is a 20 percent probability in any given year that it will be acquired by a larger player at a 30 percent premium. The company's stock is trading for $106. On a standard expected value analysis, we can infer that $6 of that value stems from the anticipation of a possible acquisition.

[84] *See H-W 3*, *supra* note 53, at 1023–25, 1046–47.

[85] *See H-W 3*, *supra* note 53, at 1023–25, 1046–47.

[86] *See H-W 3*, *supra* note 53, at 1023–25, 1046–47.

[87] *See H-W 3*, *supra* note 53, at 1023–25, 1046–47.

[88] *See H-W 3*, *supra* note 53, at 1023–25, 1046–47.

[89] *See H-W 3*, *supra* note 53, at 1023–25, 1046–47.

[90] *See H-W 3*, *supra* note 53, at 1023–25, 1046–47.

have strikingly different profiles.[91] A conflicted majority-minority cashout merger, even one with a well-functioning special committee of independent directors negotiating for the minority, makes for a weak case.[92] An arm's length third party merger conceivably could present a strong case for attachment of the merger price.

Like the choice between DCF and market price, the choice between CTA and the merger price has profound implications for the economics of dissent.[93] Given a disappointing deal, CTA makes possible compensatory rectification by reference to fairly-priced transactions.[94] Reference to the merger price cuts off this possibility, and, indeed, makes dissent financially unattractive.[95] Why incur the cost of a lawsuit to pick up the merger price when the merger price is already is on offer without the expense?

b. Synergy Deductions.

Whether the choice of measure is CTA or merger price, the section 262(h) barrier to inclusion of merger-related gains comes to bear as a basis for deductions.[96] But how should "element of value arising from the accomplishment or expectation of the merger" be more particularly defined? There are narrow and broad possibilities. A narrow read would pick up only traditional synergies—operating cost savings, asset redeployments, and financial savings that stem directly from the combination of the two going concerns.[97] A broad reading picks up any gain with a causal connection to the merger, sweeping in agency cost reductions and other changes in the business plan of the target not causally dependent on the combination.[98]

To get a fix on the point in the fact pattern where the narrow reading opens up into something broader, compare strategic and financial mergers. Strategic mergers join operating companies. Synergistic gains figure prominently in the description of transactional motivations.[99] In a financial merger, in contrast, the target company is acquired by a limited partnership set up by a promoter, usually private equity firm. Since only one operating company is involved, traditional synergies are not on the table--no going

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[91] *See H-W 3*, *supra* note 53, at 1023–25, 1046–47.
[92] *See H-W 3*, *supra* note 53, at 1023–25, 1046–47.
[93] *See H-W 3*, *supra* note 53, at 1023–25, 1046–47.
[94] *See H-W 3*, *supra* note 53, at 1023–25, 1046–47.
[95] *See H-W 3*, *supra* note 53, at 1023–25, 1046–47.
[96] *See H-W 3*, *supra* note 53, at 1023–25, 1046–47.
[97] *See H-W 3*, *supra* note 53, at 1023–25, 1046–47.
[98] *See* CLAIRE A. HILL, ET AL., MERGERS AND ACQUISITIONS: LAW, THEORY, AND PRACTICE 15–17, 270–71 (2d ed. 2019).
[99] *See id.*

concern assets are combined. Gains derive from a recapitalization effected in connection with the merger that adds leverage and from agency cost reduction due to tight post-closing monitoring by the promoter. The narrow definition picks up only the strategic merger. The broad definition adds in the financial merger's agency cost reductions and could go farther than that. Return to the agricultural enterprise hypothesized above[100] and make it the subject of a private equity buyout with real estate development in view. Given an arm's length negotiation, the potential development value will be reflected in the price paid and is accordingly a part of TPSV. Since its realization arises from the merger, these gains arguably should be backed out as well. As the definition of "value arising from" broadens, TPSV gets closer and closer to GCV.[101]

Once the door opens to deductions "arising from," the calculative certainty that comes from the choice of the merger price as the measure of TPSV is much diminished. Synergies must be proved[102] and accordingly are not necessarily co-equal to the premium over the pre-merger market price paid by the acquirer (even as a broad definition certainly suggests that). Projections of synergistic gains and agency cost reduction from the managers of the acquiring corporation will lack credibility, much as do incumbent managers' projections of their own future net cash flows. Comparable transactions may provide a statistical basis for roughing out a figure. But uncertainty will linger.

Once a synergy or other gain is identified and quantified a final fact question remains to be answered: how much of the value was allocated to the target company shareholders in the merger price? Given an arm's length posture, merger gains can be expected to be split at the negotiating table. Assuming a 50-50 split, synergies with $100 million should result

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[100] *See supra* text accompanying note 79.

[101] H-W advocate a broad but cautious definition of the section 262(h) barrier. They begin with the Delaware courts' definition. Under this, "value solely arising from the deal" is backed out. *See* ACP Master, Ltd. v. Sprint Corp., C.A. No. 8508-VCL, 2017 WL 3421142, at *30 (July 21, 2017). They then interpolate the principle that the value of control adheres to the controlling shareholder. Because control value is realized only when the control block springs into existence in connection with the merger, control value "arises from" the merger and should be deducted. The deduction will be substantial, for the covered gains include those from agency cost reduction as well as traditional synergies. *H-W 4*, *supra* note 66, at 997–98.

H-W draw a more generous line as regards the target's unrealized business opportunities. Under a broad definition, any business innovation foregone before the merger but later undertaken by the acquirer arguably stems from the deal and should be backed out of TPSV. H-W pose a case right at the line. A small tech company owns a patent that it lacks the capacity to exploit. A larger company acquires it and realizes on the patent, bringing its financial and marketing capability to bear. But, because the target itself could have realized on the patent by licensing it to a larger firm, its realized value should be deemed to "belong" to the pre-merger target and no deduction is justified. *Id.* at 997.

[102] *See, e.g.*, *In re* Appraisal of PetSmart, Inc., C.A. No. 10782-VCS, 2017 WL 2303599 at *40–41 (Del. Ch. May 26, 2017).

in a $50 million deduction. Such splits no more can be proved with verifiable numbers than can the value of the synergies themselves, adding to the uncertainty.

4. Discounts Related to Shareholding.

One final conceptual question arises concerning ascertainment of fair value, in particular GCV: whether the value calculation should make reference to incidents of the stockholding of the petitioner. There are two variants of the question, both of which would be posed by the respondent looking for a basis to require a deduction from fair value. One concerns the existence and quality of a trading market for the dissenter's shares: if a trading market is thin or nonexistent, the question is whether the resulting lack of marketability justifies a discount from a GCV result calculated without reference to the trading market. As to this question there is an intriguing tie to the issues related to reference to the market price as a measure of GCV. We saw that reference to market price can turn on trading market quality, with a thick, well-informed market opening the door to the market price metric and potentially cutting off a shot at a higher GCV determined by DCF analysis. Here the respondent tries to do the converse: the trading market does not make the cut, so DCF analysis must be the metric for GCV. But the trading market's low quality then becomes the ground for a deduction. From the petitioner's point of view, if the respondent wins on these conceptual points, the treatment of the trading market becomes a heads they win, tails I lose proposition.

The second variant of the question concerns the petitioner's status as a minority stockholder: whether the economic disadvantages attending minority status justify a deduction from a GCV result calculated in respect of the standalone enterprise without reference to positional differences among the shareholders. A majority-minority shareholding profile is not even a requisite for this argument, at least if we assume that control inheres in the value of the corporation. If GCV includes the value of control, then, by hypothesis, all shareholders in a corporation with dispersed owners suffer this economic disability even though the sum of the value of the shareholdings would then be less than GCV. Note that H-W's position—that control value remains unrealized until someone takes control--cuts off this line of analysis.

D. *Comment*

We close by posing a hypothesis concerning the development of Delaware's caselaw on fair value. As cases arise, all of above questions will be posed and answered by the courts. In the ordinary course of case-by-case adjudication, these judicial choices will become precedents that narrow the methodological menu available to dissenting shareholders and thereby define their entitlements as regards GCV and TPSV. This Article's subsequent Parts will falsify this hypothesis emphatically. In Delaware appraisal, law to fact application tends to lack precedential power.

II. FAIR VALUE FROM THE EARLIEST TIMES TO 1983

This Part outlines the Delaware courts' approach to the determination of fair value prior to the decision of *Weinberger v. UOP*[103] in 1983. Section A covers three landmark cases that privilege GCV over TPSV as the touchstone of fair value and make basic choices regarding its measurement, rejecting market price and modeling the target company by reference to its pre-merger business plan. A rough conceptual framework emerges. Section B turns to the era's methodological menu—the "Delaware Block," a mandated template that takes weighted average approach, sweeping in multiple approaches to valuation. The conceptual framework and the methodological menu emerge in mutual tension, for even as the framework both excludes TPSV and rejects the trading market price as a measure of GCV, the menu includes them.

A. *The Landmark Cases and the Emergent Conceptual Framework*

We will take up the three cases in chronological order. The first was the 1934 decision of *Chicago Corp. v. Munds*,[104] which concerned the merger of a closed-end investment company. The petitioners objected to a valuation based on the pre-merger market price. The Court agreed. The shareholder's entitlement was stated as follows: The dissenting shareholder had bought "an aliquot share of a business;" it accordingly had been deprived of a "proportional share of an active enterprise."[105] Thus did the Court articulate a preference for CGV. The Court then rejected market price as an appropriate measure of GCV:

[103] 457 A.2d 701 (Del. 1983).
[104] 20 Del. Ch. 142, 172. A. 452 (Del. Ch. 1934).
[105] *Munds*, 20 Del. Ch. at 149–50, 172 A. at 455.

> When it is said that the appraisal which the market puts upon the value of the stock of an active corporation as evidenced by its daily quotations, is an accurate, fair reflection of its intrinsic value, no more than a moment's reflection is needed to refute it. There are too many accidental circumstances entering into the making of market prices to admit them as sure and exclusive reflectors of fair value. The experience of recent years is enough to convince the most casual observer that the market in its appraisal of values must have been woefully wrong in its estimates at one time or another within the interval of a space of time so brief that fundamental conditions could not possibly have become so altered as to affect true worth. Markets are known to gyrate in a single day. The numerous causes that contribute to their nervous leaps from dejected melancholy to exhilarated enthusiasm and then back again from joy to grief, need not be reviewed.[106]

Fair value, then, became a search for an "intrinsic value" to be determined by an analytical exercise rather than a transactional incident. Interestingly, the preference for analysis over market price followed from a concern for calculative integrity.

The next case in the sequence is *Tri-Continental Corp. v. Battye*,[107] decided in 1950, which also concerned the merger of a closed-end investment company. The petitioner asked for an award based on the concern's asset value. The respondent argued that because the stock market discounted the prices of closed-end investment companies an average 20 percent from their net asset values, a 20 percent discount should be applied to the asset value figure in the case. The Court decided in favor of the respondent.

The Court expanded on *Munds's* statement of the shareholder's entitlement: "the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern. . . the true or intrinsic value of his stock which has been taken by the merger."[108] The Court then pushed this entitlement to GCV in the direction of what would become "Delaware Block" valuation:

> [T]he 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

[106] 20 Del. Ch. at 150–51, 172 A. at 455.
[107] 31 Del. Ch. 523, 74 A.2d 71 (Del. Ch. 1950).
[108] *Battye*, 31 Del. Ch. at 526, 74 A.2d at 71.

> prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of merger and which throw any light on future prospects[.][109]

Two of the value elements on the Court's list came to bear on the facts of the case: asset value and market value, with market value amounting to asset value net of a 20 percent discount.[110] The discount had to be imposed, reasoned the court, because the petitioner was entitled to GCV rather than "liquidation value," and asset value was a liquidation figure.[111] Meanwhile, when the market valued closed-end investment companies as going concerns, discounts resulted.[112] A comparison of the positions of shareholders of closed-end and open-end investment companies lay behind this distinction.[113] The closed-end setup locks in the assets where the open-end setup (also called a mutual fund) permits the shareholder to redeem its interest on short notice, literally withdrawing its pro rata share of liquidation value. The closed-end lock in increases agency costs and other adverse selection risks, depressing the value of the assets and leading to the discount.

To sum up, *Munds* and *Battye* both endorse a GCV approach, with *Battye* also making an affirmative statement against reference to asset value. As regards the means of measuring GCV, however, the two cases at first look like polar opposites, with *Munds* nixing market price and *Battye* going to the market. But the appearance is deceiving. In fact, there was no trading market for the *Battye* investment company's stock. The market discount was applied on a hypothetical basis as a way of backing into a going concern measure based on asset value;[114] no reference to actual market transactions was made.

The last case in trio is *Bell v. Kirby Lumber Company*,[115] decided in 1980. This was a cashout merger of a five percent minority interest of an entity that harvested a timber tract on a sustained yield basis, limiting the number of trees cut and replacing them. The petitioner wanted an appraisal based on a much higher asset value figure—the value of the tract if the trees were all cut at once.[116] The Court rejected this, instead accepting the respondent's reference to a lower going concern figure based

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[109] *Id.*
[110] *Battye*, 74 A.2d at 73.
[111] *Battye*, 74 A.2d at 75.
[112] *Battye*, 31 Del. Ch. at 530–31, 74 A.2d at 74.
[113] *Battye*, 31 Del. Ch. at 530–31, 74 A.2d at 74–75.
[114] *Battye*, 31 Del. Ch. at 534–35, 74 A.2d at 76.
[115] 413 A.2d 137 (Del. 1980).
[116] *Id.* at 140, 144.

on the sustained yield business plan. It was *Battye* all over again: the asset value figure was a liquidation figure and thus inappropriate.[117]

Battye and *Kirby Lumber*, read together and restated in the terminology of this Article, make a strong statement regarding the choice between GCV and TPSV—GCV is the appropriate measure. The "liquidation values" rejected in *Battye* and *Kirby Lumber* are the functional equivalents of TPSV. To liquidate is to sell, and, assuming that fire sale conditions are avoided, the difference between a sale of the entity's assets as a whole, whether by merger or otherwise, or in parts, as might have been the case with either of the subject companies in the cases, is an immaterial, minor detail.

The cases also make a strong statement regarding the choice between GCV as determined by analysis and GCV as determined by market price—GCV by analysis is the appropriate measure. Finally, we can look to *Kirby Lumber* for a hint about the answer to the question respecting going concern scenarios in GCV analysis—a preference for the existing business plan is clearly expressed.

But what, if anything, did the *Battye* Court mean when it said that "all factors which reasonably might enter into the fixing of value" *must* be taken into consideration?[118] If a mandate is intended and goes on to register in the law, then any exclusionary implications of the emerging conceptual framework are potentially undercut.

B. *The Methodological Menu*

1. The Delaware Block.

During the pre-*Weinberger* period, the Delaware courts mandated a methodological approach to the ascertainment of fair value. Under this, fair value was a function of three or four building blocks: earnings value, asset value, market value, and, in appropriate cases, dividend value. The value elements, once fixed, produced a final figure on a weighted average basis. The parties disputed both the amount of each value element and the appropriateness of the weights accorded to them. The final weighting was left to the discretion of the Court of Chancery, which intuited a result based on all the facts of the case. This approach was termed the "Delaware Block."

[117] *Id*. at 141–42.
[118] *Battye*, 74 A.2d at 72.

By way of example, there follows the weighting approved by the Chancery court in *Heller v. Munsingwear, Inc.*,[119] decided in 1953:[120]

Element	Weighting	Product
Asset Value		
$46.57	20%	9.314
Market Value		
$14.00	30%	4.20
Earnings Value		
$11.97	25%	2.993
Dividend Value		
$14.28	25%	3.570
Value per share		$20.08

The petitioner wanted greater weight on the higher asset value figure.[121] The Court countered by raising the weights of market value and dividend value and lowering that of asset value as a way of implementing *Battye's* preference for GCV. [122] The case is bit of an outlier as a result. In Block valuations, earnings value and asset value tended to be weighted more heavily than dividend value and market value.[123]

Let us revisit *Munds*, *Battye* and *Kirby Lumber* to get a more precise fix on their meaning in a Block context. *Munds* cannot possibly erect a barrier to consideration of market value as a yardstick for GCV, for there stands market value in the Block. Nor can *Battye* and *Kirby Lumber* mean that asset value cannot enter into fair value determinations, for we find it too in the Block. Indeed, the Block bespeaks the view that the different

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[119] 33 Del. Ch. 593, 98 A.2d 774 (Del. Ch. 1953).

[120] *Heller*, 33 Del. Ch. at 599, 593 A.2d at 777.

[121] *Id.*

[122] *Heller*, 33 Del. Ch. At 598, 595 A.2d at 777.

[123] *See* VICTOR BRUDNEY & WILLIAM W. BRATTON, BRUDNEY AND CHIRELSTEIN'S CORPORATE FINANCE CASES AND MATERIALS 708–09 (4th ed. 1993) (reporting on a survey of Block cases, with the average weight accorded to asset value was 36.0%). The average weight accorded market value was 23.1% and earnings value was 39.0%.

perspectives on value all make meaningful contributions and that a fair approach eschews exclusionary selection.

In fact, *Munds, Battye*, and *Kirby Lumber*, read carefully, are not exclusionary. *Battye* characterizes *Munds* as saying that "market value may not be taken as the *sole* measure" (emphasis added).[124] Moreover, *Battye*, although loud in its insistence on GCV, gets to its bottom line by adjusting an asset value figure.[125] In *Kirby Lumber* the question was not whether to exclude asset value entirely, but whether to sustain the petitioner's contention that it should weigh in at 90 percent. The Court, rejecting that contention, limited it to 40 percent.[126] As a practical matter then, the three cases' conceptual contributions go to the decision on Block weighting. Although they look in the direction of setting clear cut entitlements based on GCV, they fall well short of doing any such thing.

2. The Block's Strengths and Weaknesses.

The Delaware Block was mandatory, and as such had one great advantage: It told the experts how to make their presentations, containing and channeling the inquiry. Things were kept simple and cheap talk inputs were avoided. Methodological integrity was the leading concern--the Block had a bias favoring verifiable numbers, and not just as regards market price. Projections of future inflows were eschewed: earnings valuation employed past verified accounting results and discount rates came from price/earnings ratios also based on past verified results.[127]

The Block had even greater disadvantages, however, and its mandatory status compounded the problems. No principles or guidelines emerged to guide the Chancery Court at the critical weighting stage,[128] at which the judges chose numbers reflecting their level of confidence in the expert presentations made in the case.[129] The Block was also increasingly out of date. Its earnings value and dividend value components reflected state of the art practice as of the end of the Second World War.[130] The

[124] *Battye*, 31 Del. Ch. at 71, 74 A.2d at 526.

[125] *See supra* text accompanying note 112.

[126] *Kirby Lumber*, 413 A.2d at 141, 145–46.

[127] *See, e.g*, *In re* Olivetti Underwood Corp., 246 A.2d 800 (Del. Ch. 1968); Sporborg v. City Specialty Stores, 35 Del. Ch. 560, 123 A.2d 121 (Del. Ch. 1956); Application of Delaware Racing Ass'n, 213 A.2d 203 (Del. 1965).

[128] Rutheford B. Campbell, Jr., *The Impact of Modern Finance Theory in Acquisition Cases*, 53 SYRACUSE L. REV. 1, 39 n.138 (2003).

[129] Joseph Evan Calio, *New Appraisals of Old Problems: Reflections on the Delaware Appraisal Proceeding*, 32 AM. BUS. L.J. 1, 37 (1994).

[130] For an exposition of valuation techniques common in the post-war period, *see* 1 ARTHUR STONE DEWING, THE FINANCIAL POLICY OF CORPORATIONS 369–401 (5th ed. 1953) (discussing the valuation of industrials in terms of earnings value based on past earnings figures,

methodological caravan had moved on, energized by insights from modern finance theory.[131] In business practice, DCF analysis based on projected figures had displaced valuations based on earnings and dividends[132] even as Delaware, as a matter of legal precedent, locked itself into the old methodologies.[133]

Worse, earnings analysis under the Block systematically understated results.[134] Delaware insisted a five-year past average of the target's earnings and then drew on current price/earnings ratios from comparable companies to capitalize them.[135] In a growth era, five year past

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liquidation value, trading market value, and sale value). The origins of the instantiation of these techniques in the Delaware Block are obscure, however. *See* Calio, *supra* note 129, at 31–32.

[131] Campbell, Jr., *supra* note 128, at 3.

[132] *Cf.* Calio, *supra* note 129, at 38 (noting the increasing criticism of the Delaware Block Method).

[133] *E.g.*, Calio, *supra* note 129, at 39 n.163.

[134] *See, e.g.*, Elmer J. Schaefer, *The Fallacy of Weighting Asset Value and Earnings Value in the Appraisal of Corporate Stock*, 55 SO. CAL. L. REV. 1031, 1032 (1982) ("[T]he weighting method consistently underestimates the value of corporate shares….").

[135] *See generally* Francis I. duPont & Co. v. Universal City Studios, Inc., 312 A.2d 344 (Del. Ch. 1973), *aff'd*, 334 A.2d 216 (Del. 1975), an appraisal in a parent-subsidiary merger, where the subsidiary's business had been growing steadily. 312 A.2d, at 347. Earnings value was the key Block component in the case. The respondent offered a five year past average of company earnings and drew on the average price-earnings ratios of other companies in the industry to derive a capitalization rate. *Id*. at 347–48. The petitioner argued for use of only the most recent year's earnings on the ground that it provided the most plausible basis for looking forward, given the record of steady growth. *Id*. at 348. The Court went with the five-year past average as a matter of precedent, *id*.:

> It is established Delaware law that for appraisal purposes earnings are to be determined by averaging the corporation's earnings over a reasonable period of time. . . . The determination must be based upon historical earnings rather than on the basis of prospective earnings. Application of Delaware Racing Association, Del.Supr., 213 A.2d 203 (1965). The five-year period immediately preceding the merger is ordinarily considered to be the most representative and reasonable period of time over which to compute the average. Application of Delaware Racing Association, supra . . . .
>
> The stockholders argue that averaging past earnings is proper only when the earnings history has been erratic. In support of that proposition, Mr. Stanley Nabi, managing partner of a NYSE brokerage house and an investment and financial analyst, testified that the accepted practice among security analysts is to capitalize present earnings, and to give the trend of earnings important consideration in the selection of the multiplier. The stockholders argue that Universal's earnings history was not erratic but, in fact, had a steady and rapid growth. They contend that the Appraiser therefore should have used the current (1965) earnings as the figure to be capitalized.
>
> This argument is not persuasive even if Mr. Nabi's testimony as to the accepted practice among security analysts for capitalizing earnings is conceded to be correct. Whatever that practice may currently be, the policy of Delaware law is that averaging earnings over the five years immediately preceding the merger should be the rule and not the exception. In short, a choice among alternative techniques for capitalizing earnings

averages have no utility as value indicators, although they might have made sense during the Depression.[136] Furthermore, current price earnings figures make sense (albeit limited sense) as capitalization rates only when applied to most recent earnings of the company being valued.[137] It is a matter of consistency. A perverse effect followed. A control-party could use its control power to put through a minority freezeout merger at a low price without having to worry about dissenter's rights.[138] Thus deployed, appraisal served neither the purpose of methodological integrity nor the purpose of transactional fairness.

III. THE *WEINBERGER* ERA, 1983–2007

In 1983, the Delaware Supreme Court withdrew the Block mandate in *Weinberger v. UOP*.[139] The case concerned a cashout merger of a 49 percent minority by a 51 percent parent corporation. It was not an appraisal proceeding, but an action for breach of fiduciary duty in which appraisal precedents on valuation were invoked at the damages phase.[140] The Chancery Court, following the Block, had rejected the plaintiff's DCF analysis.[141] The Supreme Court reversed. It did not, however, delete the Block from the methodological menu. It instead expanded the menu. The Block, said the Court, "shall no longer exclusively control. … [A] more liberal approach must include proof of value by any techniques or methods which are generally considered acceptable in the financial community"[142] subject only to limitations imposed by the statute itself,[143] in particular the bar to value elements "arising from" the merger.[144] The Court cited two factors to justify the change. First, it was time to bring appraisal valuation into "accord with the realities of present-day affairs" and open the door to consideration of the company's future prospects.[145] Second, the practice needed to be brought into accord with the statutory language.[146] Section 262 had been amended in 1976 to insert the word "fair" in front of the

has been made and no persuasive conceptual reason has been shown to change that choice now.

[136] *See, e.g.*, Schaefer, *supra* note 134, at 1043 ("If earnings are expected to increase over their recent past average, the Delaware formula can lead to an underestimation of earnings value.").

[137] Schaefer, *supra* note 134, at 1043.

[138] Schaefer, *supra* note 134, at 1043.

[139] 457 A.2d 701 (Del. 1983).

[140] *Id*. at 712.

[141] *Id*. at 712–13.

[142] *Id*.

[143] *Weinberger,* 457 A.2d at 713.

[144] *Id*. at 713–14.

[145] *Id*. at 713.

[146] *Id.*

word "value," and amended again in 1981 to mandate that the Court "take into account all relevant factors."[147] By implication, the Block regime had been neither fair nor sufficiently capacious.

Weinberger's menu expansion was a leading event in a larger exercise of judicial housecleaning. In the late 1970s, Delaware's position as the leading corporate law jurisdiction had been threatened by two federal initiatives, initiatives responding to perceived failures in Delaware's applications of fiduciary law. The first threat was legislative—a bill to federalize state corporate law had been introduced in Congress.[148] The second was judicial—the federal courts entertained an expansive reading of section 10(b) of the Securities Exchange Act of 1934[149] to cover cases where shareholder majorities treated shareholder minorities unequally, a reading that would have federalized much of state fiduciary law. The threats came to nothing. The federal incorporation initiative was stillborn[150] and the Supreme Court in 1977 decreed a narrow reading of section 10(b) in *Santa Fe Industries, Inc. v. Green,*[151] a case about the same cashout merger litigated in *Kirby Lumber*. But the experience had been destabilizing and prompted a defensive response. Fiduciary scrutiny of cashout mergers was tightened in 1977 with the imposition of a business purpose requirement.[152] Unfortunately, the new test proved ineffective—it was easily satisfied and didn't really get to the problem at hand.[153] The *Weinberger* Court retrenched, removing the business purpose test[154] and redirecting attention to fair process[155] in addition to reviving appraisal as a potential remedy.

The rest of this Part describes the evolution of fair value in quarter century after *Weinberger*. Section A looks at the Courts' strategies for managing the new, expanded menu. Standards displaced rules. The door was opened to any legitimate methodology with value relevance. As litigating parties walked through it, the spread between the petitioner and respondent showings widened, with the Chancery Court assuming a greater share of calculative responsibility as a result. Section B returns to

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[147] *Weinberger,* 457 A.2d at 713–14.

[148] *See* Joel Seligman, *A Sheep in Wolf's Clothing: The American Law Institute Principles of Corporate Governance Project*, 55 GEO. WASH. L. REV. 325, 336–40 (1987); *see also* the leading law review article arguing for federal incorporation, William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974).

[149] 15 U.S.C. § 78j(b).

[150] The Congress limited itself to the insertion of a monitoring mandate within the Foreign Corrupt Practices Act of 1977. Pub. L No. 95-213, 91 Stat. 1494.

[151] 430 U.S. 462 (1977).

[152] Singer v. Magnavox Co., 380 A.2d 969, 980 (Del. 1977).

[153] *See* Tanzer v. Int'l Gen. Indus., Inc., 379 A.2d 1121, 1124–25 (Del. 1977); Roland Int'l Corp. v. Najjar, 407 A.2d 1032, 1036 (Del. 1979).

[154] 457 A.2d, at 715.

[155] *Id*. at 709 n.7.

the conceptual framework. *Munds*, *Battye*, and *Kirby Lumber* and GCV continued as the touchstones, but there was a marked tendency toward liberality as new issues arose. Just as GCV had been honored in the breach when the Block admitted TPSV numbers under the rubric of "asset value," so did the post-*Weinberger* courts gross up in the direction of TPSV in a subset of CCA cases employing the rubric "implicit minority discount." Section C turns to a pattern-breaking conceptual development at the end of the period—the addition of merger price to the menu in a 2004 case, *Union Illinois 1995 Investment Limited Partnership v. Union Financial Group Ltd.*[156] *Union Illinois* heralded an end to liberality, for the first time articulating a policy preference for transactionally-derived methodologies over expert analyses.

A. *Managing the Expanded Menu*

Cases after *Weinberger* featured state-of-the-art expert presentations of DCF, CCA, and CTA, with more than one methodology usually put on the table in the same case[157] and DCF analysis the approach most likely to determine the result.[158] Weighted averaging across methodologies fell out of practice. The Courts instead chose among the competing methodologies, looking for the most reliable basis on the facts of the case.

The Block's components faded into the background without quite disappearing. Asset valuations determined the result in a handful of cases,[159] even as the Courts continued to repeat *Battye's* admonition against their use.[160] But the contradiction is once again more apparent than real. Rather than tell the parties which methodologies to use, as under the Block, post-*Weinberger* Courts sat back and waited for the parties to make their showings and then dealt as best they could with what the parties put on the table. Given presentations focused on one or another permutation of asset value, there resulted a determination based on asset value.[161]

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[156] 847 A.2d 340, 357 (Del. Ch. 2004).

[157] Campbell, Jr., *supra* note 128, at 41 (showing multistate survey of cases from *Weinberger* through 1999).

[158] Campbell, Jr., *supra* note 128, at 38 (showing 49 percent of the Delaware cases through 1999).

[159] Campbell, Jr., *supra* note 128, at 38. There also was an occasional weighted average determination. Campbell, Jr., *supra* note 128, at 38 (14 percent of the cases through 1999).

[160] Cede & Co. v. Technicolor, Inc., 684 A.2d 289, 297 (Del. 1996) (explaining liquidation value not appropriate as sole measure of fair value); *see also In re* Shell Oil Co., 607 A.2d 1213, 1219 (Del. 1992) (same); Rapid-Am. Corp. v. Harris, 603 A.2d 796, 802 (Del. 1992) (same).

[161] *In re* Appraisal of Shell Oil Co., 607 A.2d 1213, 1229 (Del. 1993), is a good example:

> Liquidation value is one factor relevant to a fair value inquiry and an acceptable technique, with others, upon which the Court of Chancery

The open-door approach led to some problems. There was a sharp increase in the complexity of the case.[162] The parties produced sophisticated reports from reports from highly credentialed, and presumably expensive, experts. A party had no choice but to offer multiple analyses. Since the Courts often worked from just one of the reports or methodologies on the table,[163] a litigant had to cover the entire menu as a defensive proposition.[164] Costs rose accordingly, with the open door operating as an inadvertent litigation filter.[165]

The litigants also tended to move to extremes as regarded bottom line results, relying on expert firepower to make their cases credible.[166]

> can rely. . . . Liquidation value cannot, however, be viewed as a substitute for, or interchangeable with, fair value. We do not view Wulff's technique as a pure liquidation value analysis, however, because it entailed a consideration of cash flow characteristics, future growth potential and industry recognition of the strength of Shell's downstream assets. These considerations point to more than just the reflective value of Shell's physical assets. Nothing in the record suggests that the trial court's decision to accept a method of valuation so similar to Shell's own plainly acceptable method was clearly wrong[;]

see also Paskill Corp. v. Alcoma Corp., No. C.A. 16221, 1999 WL 438832, at *7 (Del. Ch. June 23, 1999), (investment company); Kahn v. Household Acquisition Corp., Civ. A. No. 6293, 1988 WL 45474 (Del. Ch. May 6, 1988), *aff'd*, 591 A.2d 166 (Del. 1991) (asset valuation based on sale value of aircraft of profitless airline); Campbell v. Caravel Academy, Inc., C.A. No. 7830, 1988 WL 63492 (Del. Ch. June 16, 1988), aff'd 553 A.2d 638 (Del. 1988)(close corporation); Robbins & Co. v. A.C. Israel Enterprises, Inc., Civ. A. No. 7919, 1985 WL 149627 (Del. Ch. Oct. 2, 1985)(asset value analysis deemed reflective of going concern value).

[162] Campbell, Jr., *supra* note 128, at 41.

[163] Weighted average rulings still occurred but in diminishing numbers. *See* Campbell, Jr., *supra* note 128, at 38 (showing 14 percent of cases decided through 1999 employed a weighted average).

[164] Calio, *supra* note 129, at 60–64.

[165] Appraisal actions cannot be structured as class actions, because the petitioner must take affirmative steps to register dissent. *See* Thompson, *supra* note 12, at 40. It follows that recoveries must be calculated based on the number of shares held by the petitioners in the case, making litigation economically feasible only for holders of large numbers of shares.

[166] Chancellor Chandler described the adjudication of fair value as follows in Cede & Co. v. Technicolor, Inc., C.A. No. 7129, 2003 WL 23700218, at *2 (Del. Ch. July 9, 2004):

> [I]t is one of the conceits of our law that we purport to declare something as elusive as the fair value of an entity on a given date * * *. Experience in the adversarial, battle of the experts' appraisal process under Delaware law teaches one lesson very clearly: valuation decisions are impossible to make with anything approaching complete confidence. Valuing an entity is a difficult intellectual exercise, especially when business and financial experts are able to organize data in support of wildly divergent valuations for the same entity. For a judge who is not an expert in corporate finance, one can do little more than try to detect gross distortions in the experts' opinions. This effort should, therefore, not be understood, as a matter of intellectual honesty, as resulting in the fair value of a corporation on a given date. The value of a corporation is not a point on a line, but a range of reasonable values, and the judge's task is to assign one particular value within this range as the most reasonable value in light of all of the relevant evidence and based on considerations of fairness.

There was nothing to stop them from doing so, for even as cases accreted under the new regime there was no corresponding development of an exclusionary caselaw that would discipline the parties.[167] As Chancellor Allen noted in *Cede & Co. v. Technicolor, Inc.*,[168] when real world actors use DCF for business planning purposes personal interest pushes them to the best assumptions and the best methods, while in litigation contexts no such constraints apply. Completing the thought, Chancellor Allen suggested that a baseball arbitration approach be followed—the Court might accept the more plausible of the competing presentations in whole thereby pushing the parties toward reasonable presentations.[169] Whether or not such an approach would have been effective (and there are results in other contexts that suggest it would not have been[170]), the Delaware Supreme Court rejected the suggestion.[171] No lines of constraining precedent would develop as regards the calculation of fair value. The Courts, faced with implausible showings, had to take on the burden of cobbling together fair results themselves.[172]

What did emerge was a set of instructions to the Chancery Court bench as to how to go about managing fair value derivations. The statute's specification of "all relevant factors" was the centerpiece. It was taken to mean that the calculative burden fell "squarely on the court."[173] At the same time, both sides in the litigation had the burden of proving their value

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Then Vice-Chancellor Strine seconded the point in Andaloro v. PFPC Worldwide, Inc., C.A. No. 20289, 2005 WL 2045640, at *2 (Del. Ch. Aug. 19, 2005):

> In coming to my valuation, I have had to stagger through a sandstorm of contending arguments, on all points great and small. Many of these playground tussles involve issues that emerge in the actual application of broad corporate finance principles that are commonly taught in academic institutions. The real world nitty-gritty use of those principles brings to the fore problems of measurement and theory that academics, and frankly, even real world business people, have no rational reason to solve because they seek to use corporate finance principles to reach a reliable approximation of a range of values from which rational investment decisions can be made. The process of appraisal calling for the court to derive a single best estimate of value based on the "expert input" of finance professionals paid to achieve diametrically opposite objectives tends, regrettably, to surface minor, granular issues of this kind, which are not well addressed in the academic literature. The trial record in this case has more than its share of these minute disputes and the literature cited to me has done little to convince me that there are clear-cut answers to most of them.

[167] Campbell, Jr., *supra* note 128, at 44–45.
[168] Civ. A. No. 7129, 1990 WL 161084 (Del. Ch. Oct. 19, 1990)
[169] *Id.*
[170] *See H-W 4*, supra note 66, at 973–74 (reviewing the literature).
[171] Cede & Co. v. Technicolor, Inc., 684 A.2d 289, 300 (Del. 1996).
[172] Campbell, Jr., *supra* note 128, at 44–45.
[173] Gonsalves v. Straight Arrow Publ'rs, Inc., 701 A.2d 357, 361 (Del. 1997).

positions by a preponderance of the evidence,[174] including the appropriateness of the methodology employed.[175] There being no doctrinal preference regarding methods of calculation, there followed no evidentiary presumptions that could shorten a litigant's route to a persuasive fair value showing.[176] It could not be otherwise if "all relevant factors" were to be placed before the judge.

Once the relevant factors were on the table, the court was to exercise its discretion.[177] Some possible approaches were spelled out. The Court could simply take one of the parties' presentations, not as a disciplinary practice as Chancellor Allen had suggested, but because the "valuation is supported by credible evidence and withstands a critical judicial analysis on the record."[178] Alternatively, the Court could also select one analysis and use it as a framework, making modifications.[179] Or the Court could work from its own framework.[180] But a result must be forthcoming: if neither of the parties met their burdens of proof, "the court must then use its own independent judgment to determine fair value."[181]

Thus did an appraisal case potentially pose a formidable technical challenge to the Court. The experts could be expected to tweak inputs in aid of a high (for petitioner) or a low (for respondent) figure, leaving the judge to reconstruct the economic background and redo the math. The judge's choice among methodologies and applications was a function of a technical, fact intensive sorting under the reliability rubric. The opinion's report of the judge's succession of sorting choices amounted to a statement of reasons for the outcome. The greater the technical wherewithal of the judge, the stronger the outcome.

[174] M.G. Bancorp., Inc. v. Le Beau, 737 A.2d 513, 520 (Del. 1999).

[175] Jesse A. Finkelstein & John D. Hendershot, *Appraisal Rights in Mergers and Consolidations*, CORP. PRAC. SERIES (BNA) NO. 38-5TH, at A-90 (2010).

[176] Pinson v. Campbell-Taggart, Inc., CIV. A. No. 7499, 1989 WL 17438, at *6 (Del. Ch. Feb. 28, 1989).

[177] M.G. Bancorp., Inc. v. Le Beau, 737 A.2d 513, 525–26 (Del. 1999).

[178] *Id.* at 526.

[179] *Id.* at 525–26.

[180] *Id.*

[181] Gholl v. eMachines, Inc., No. 19444-NC, 2004 WL 2847865, at *5 (Del. Ch. Nov. 24, 2004).

B. *The Conceptual Framework*

1. The GCV Tradition.

The *Weinberger* court might have taken the opportunity presented by amendment of the statute to insert the word "fair" before the word "value" to reject the conceptual tradition of *Munds*, *Battye*, and *Kirby Lumber*. The "fair" value of the firm could have been held to include TPSV as well as GCV, with the prohibition of value "arising from" the merger read to exclude elements of value connected to the merger in question but not to exclude evidence of pre-merger sale value.

But the opportunity was not taken and the conceptual overlordship of *Munds*, *Battye*, and *Kirby Lumber* continued: "the court should first envisage the entire pre-merger company as a 'going concern,' as a standalone entity, and assess its value as such;"[182] the court should value the company " as a going concern based upon the 'operative reality' of the company as of the time of the merger," taking into account its particular "market position in light of future prospects."[183] GCV and not TPSV was the goal: the court was to assess "the value of the company ... as a going concern, rather than its value to a third party as an acquisition."[184]

Two cases elaborated on the meaning of these directives. One of these, *Cede & Co. v. Technicolor, Inc.*, highlighted the importance of the statute's choice of the merger's effective date (as opposed to the date of the merger agreement), as the date of determination.[185] The acquirer there had stepped into control and commenced its restructuring of the target's business during a lapse of time prior to the merger's effective date.[186] The petitioner got the economic benefit of the improvements—they were not "arising from" the merger since they had been instituted prior to the determination date.[187] A tendency toward liberality was thereby displayed. Both parties in the case argued from literal readings of the statute, with the respondent also having the benefit of the announced preference against awards of TPSV.[188] It lost anyway.[189]

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[182] Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 20 (Del. 2017) (quoting Cavalier Oil Corp. v. Hartnett, 564 A.2d 1137, 1144 (Del. 1989)).

[183] Merion Cap. L.P. v. Lender Processing Servs., Inc., No. CV 9320-VCL, 2016 WL 7324170, at *13 (Del. Ch. Dec. 16, 2016) (quoting M.G. Bancorp., Inc. v. Le Beau, 737 A.2d 513, 525 (Del. 1999)).

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

[185] 684 A.2d 289 (Del.1996).

[186] *Id.* at 290.

[187] *Id.* at 298.

[188] *Id.* at 295.

[189] Cede, 684 A.2d at 302.

The second case, *Cavalier Oil Corp. v. Hartnett*, took up the "marketability discount."[190] The case's respondent, pointing to the petitioner's holding of only 1.5 percent of the stock of a close corporation, argued that the GCV result should be discounted to reflect value-depressing impact of the holding's illiquidity.[191] *Battye* was the precedent: the market discount applied there should be reapplied in this case.[192] The Supreme Court rejected the analogy.[193] The discount in *Battye* was "corporate level" rather than "shareholder level"—it stemmed from the nature of the company's business and capital structure not the situation of the individual shareholder.[194] The discount posed in *Cavalier Oil* was at the shareholder level—it concerned neither the company, its going concern value, nor the petitioner's pro rata share thereof, but the petitioner's particular stockholding, and as such would be inappropriate.[195] Moreover, "to fail to accord to a minority shareholder the full proportionate value of his shares imposes a penalty for lack of control."[196]

The distinction between the corporate and shareholder levels ever since has been a part of appraisal's conceptual framework. Professor John Coates has challenged it with a hypothetical. He poses a succession of cashout mergers of minority shareholders of a closed-end investment company, each being paid fair value net of the closed-end company discount.[197] Once all the minority shareholders have been cashed out, the majority holder is left as sole-owner, free to sell out and pocket TPSV without being subject to a discount.[198] The shareholder level and the corporate level in effect collapse into one another at this stage, with a wealth transfer effected.[199] Says Professor Coates:

> [T]here is no substance to the pro rata value doctrine. If the pro rata value doctrine requires only that no discount be imposed at the "shareholder level," but permits a discount to be imposed at the "corporate level," then controlling shareholders seeking to obtain more than a pro rata share of the corporation's aggregate value only need to find some way to build in their discount at the stage of "corporate-level"

[190] 564 A.2d 1137 (Del. 1989).
[191] *Id.* at 1144.
[192] *Id.*
[193] *Id.*
[194] *Cavalier Oil Corp.*, 546 A.2d at 1144–45.
[195] *Id.*
[196] *Id.* at 1145.
[197] Coates, *supra* note 55, at 1270–71.
[198] Coates, *supra* note 55, at 1271.
[199] Coates, *supra* note 55, at 1269–70.

valuation. . . .[200]

It is a solid analysis. But the result depends on bringing forward a succession of transactions to the present, much as occurs in an economic model. Were the Delaware courts presented with a "step-transaction" with the freezeout economics Professor Coates describes, one suspects that they would have no trouble undoing the discount on the facts of the case.[201] The assumptions about time informing *Battye* and *Cavalier Oil* are very different from those informing an equilibrium model. Delaware appraisal, like DCF analysis, views the producing assets as a perpetuity. Given that assumption, which is integral to going concern valuation, the corporate level discount persists indefinitely, as do the cash flows being discounted. It follows that there is indeed substance to the pro rata value doctrine. It is not inviolable as an analytical proposition, but it does work as a practical matter.

2. The Implicit Minority Discount.

We have seen that post-*Weinberger* cases adhere to the conceptual inheritance of *Munds*, *Battye*, and *Kirby Lumber*: the dissenter is entitled to a pro rata share of GCV and not of TPSV.[202] But we also have seen that during the Block era this entitlement rule was more apparent than real—under the Block, petitioners did in fact access TPSV via asset value appraisals unto twenty, thirty or forty percent of their recoveries. The question post-*Weinberger* was whether, now that the Block was gone, the doctrinal choice of GCV over TPSV now would harden into to a clear-cut limitation on the shareholder's entitlement.

It did not, for the "implicit minority discount" (IMD) appeared and prospered during the period. The IMD is not a blanket grant of access to TPSV, just a material exception to the GCV rule. It applies to CCA presentations. Recall that CCA builds ratios based on the stock prices of other, publicly traded companies. The theory of the IMD is that, because these yardsticks build on stock prices, they come net of a shareholder level discount stemming from the fact that the shares in the trading market are not control shares. Since fair value is established at the corporate level, it follows that the discount should be made up, or so goes the theory. As the Court of Chancery said in *Doft & Co. v. Travelocity*:[203] "appraisal cases ...

[200] Coates, *supra* note 55, at 1271–72.

[201] For Delaware's definition of a step transaction, see Noddings Investment Group, Inc. v. Capstar Communications, Inc., No. 16538, 1999 WL 182568, at *6–*7 (Del. Ch. Mar. 24, 1999), , *aff'd*, 741 A.2d 16 (Del. Sept. 22, 1999) (unpublished table decision).

[202] *See* discussion *supra* Section III.B.1.

[203] No. 19734, 2004 WL 1152338, at *11 (Del. Ch. May 20, 2004).

correct the valuation for a minority discount by adding back a premium 'that spreads the value of control over all shares equally' ...." The usual magnitude was 30 percent.[204] The gross up did not obtain in DCF contexts, for DCF analysis proceeds entirely at the corporate level, posing the stand-alone company's future in the abstract with no reference to shareholding. Nor would there be any discount to make up in a CTA context, for there the ratios build on the comparable companies' TPSVs.

The Court of Chancery rejected IMD adjustments when first posed in expert reports.[205] But the IMD simultaneously entered through a back door in *Rapid-American Corp. v. Harris*.[206] *Harris* concerned a holding company as to which all going concern value was vested in wholly-owned subsidiaries, each of which was valued by CCA.[207] Since the holding company owned and controlled each one of the subsidiaries, a gross up was deemed appropriate as a matter of consistency: the CCAs came in subject to a minority discount while the holding-company's asset included control power.[208] The concession in *Harris* did not as a matter of logic or consistency dictate an adjustment in a case involving an operating company without a control block being valued pursuant to a CCA involving similarly situated companies.

Even so, the experts kept adding on the IMD in just such cases and the Chancery Court eventually went along,[209] By the turn of this century, IMD adjustments were standard practice given CCA.[210] A further question

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[204] *See, e.g.*, Borruso v. Commc'ns Telesys. Int'l, 753 A.2d 451, 459 (Del. Ch. 1999); Bomarko, Inc. v. Int'l Telecharge, Inc., 794 A.2d 1161, 1186 n.11 (Del. Ch. 1999); Agranoff v. Miller, 791 A.2d 880, 887 (Del. Ch. 2001); Doft & Co. v. Travelocity.com Inc., No. Civ. A. 19734, 2004 WL 1152338, at *10–*11 (Del. Ch. May 20, 2004). *See also* Andaloro v. PFPC Worldwide, Inc., Nos. Civ. A. 20336, 20289, 2005 WL 2045640, at *18 (Del. Ch. Aug. 19, 2005)(38 percent).

[205] *In re* Radiology Assocs., Inc. Litig., 611 A.2d 485, 487–88, 494 (Del. Ch. 1991)(rejecting a 30 percent gross up to a DCF result); Salomon Bros. v. Interstate Bakeries Corp., No. 10054, 1992 WL 94367, at *5 (Del. Ch. May 1, 1992)(rejecting a 15% gross up of a CCA). For a more complete account, *see H-W 2*, *supra* note 56, at 16–21.

[206] 603 A.2d 796, 806–07 (Del. 1992).

[207] *Id.* at 807.

[208] *Id*. at 806–07; *see also* Le Beau v. M.G. Bancorporation, Inc., No. CIV. A. 13414, 1998 WL 44993, at *10–*11,*25 (Del. Ch. Jan. 29, 1998), aff'd 737 A.2d 513 (Del. 1999)(accepting an add-on to CCA and declining to discount CTA results respecting controlled subsidiaries and noting acceptance of IMD in economic literature).

[209] Hodas v. Spectrum Technology, Inc., No. 11265, 1992 WL 364682, at *2, *5 (Del. Ch. Dec. 8, 1992)(stating that the Chancery Court accepts IMD without comment when both petitioner's and respondent's experts include it); Kleinwort Benson Ltd. v. Silgan Corp., No. 11107, 1995 WL 376911, at *3–*4 (Del. Ch. June 15, 1995)(stating that the Chancery Court accepts IMD when both experts include it, noting inconsistency in the caselaw).

[210] *See, e.g*., Borruso v. Commc'ns Telesys. Int'l, 753 A.2d 451, 458 (Del. Ch. 1999); Bomarko, Inc. v. Int'l Telecharge, Inc., 794 A.2d 1161, 1185 (Del. Ch. 1999); Agranoff v. Miller, 791 A.2d 880, 892–93, 897 (Del. Ch. 2001); Doft & Co. v. Travelocity.com Inc., No. Civ. A. 19734, 2004 WL 1152338, at *10–*11 (Del. Ch. May 20, 2004); Andaloro v. PFPC Worldwide Inc., Nos. Civ. A. 20336, 20289, 2005 WL 2045640, at *18 (Del. Ch. Aug. 19, 2005).

followed: whether IMD adjusted results implicitly award synergies forbidden by the statutory barrier to gains "arising from" the merger. At least one case notes the problem and roughs out a downward adjustment.[211]

CCA results modified to make up for the IMD are not, strictly speaking, TPSV figures. But they amount to a rough approximation thereof, and so manifestly traverse the teaching of *Munds*, *Battye*, and *Kirby Lumber*. Academics have noticed. Recall that Hamermesh and Wachter make an incentive-based case for strict adherence to GCV, insisting that (1) the value of control belongs not to the company but to the shareholder who acquires it, (2) GCV does not include the value of control, and (3) higher TPSV recoveries in appraisal would deter valuable control-acquisition transactions.[212] Unsurprisingly, they take a dim view of IMD recoveries,[213] for IMD gross ups push the result in the direction of TPSV, depriving the acquirer of a cut of the value created in the control acquisition transaction.[214]

H-W moderate their criticism when they shift their analysis from arm's length mergers to majority-minority freezeouts.[215] In their view, it is the arm's length acquirer whose incentives need protecting.[216] In a freezeout, the acquirer already has control and GCV already will incorporate whatever efficiency gains the controller can bring to the company.[217] The picture of transactional motivation changes drastically—additional gains from agency cost reduction mostly disappear from the frame while opportunistic gains loom large.[218] As to these mergers, H-W step back from the teachings of *Munds*, *Battye*, and *Kirby Lumber*. Here they find IMD adjustments acceptable, not as an across-the-board retreat from GSV but as a proxy for a grant of prospective damages from opportunistic exercises of control power.[219] Since most of the IMD cases involve freezeouts rather than arm's length deals, H-W conclude that the results are acceptable despite the shortcomings of the Courts' theory of decision.[220]

Professor Coates offers a contrasting analysis, also employing a welfare-based lens, but looking at the policy territory differently.[221] Unlike

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[211] *Andaloro*, 2005 WL 2045640, at *18 n.74.
[212] *See supra* text accompanying notes 66–77.
[213] *See H-W 2 supra* note 56, at 36–38, 52–54; *H-W 3 supra* note 53, at 1023–25, 1046–47. *See also* Carney & Heimendinger, *supra* note 66, at 849, 860–61.
[214] *H-W 3*, *supra* note 53, at 1052.
[215] *H-W 3*, *supra* note 53, at 1052–53.
[216] *H-W 3*, *supra* note 53, at 1052.
[217] *H-W 3*, *supra* note 53, at 1052–53.
[218] *H-W 3*, *supra* note 53, at 1059–60.
[219] *H-W 3*, *supra* note 53, at 1024.
[220] *H-W 3*, *supra* note 53, at 1062.
[221] Coates, *supra* note 55, at 1311–13 (introducing Coates' policy analysis).

H-W, he lumps all mergers into one category and asks whether or not making up the discount makes aggregate cost-benefit sense.[222] Pluses and minuses are recognized on both sides.[223] In the end he comes down in favor of making up the discount, because lower GCV recoveries would encourage conflicted transactions and accompanying economic distortions, even as he recognizes that such a regime would carry some costs of incentive impairment.[224] As a practical matter, H-W and Coates are not all that far apart at their bottom lines.

C. *The Menu Expands Again: Merger Price*

Our review of post-*Weinberger* cases has made no mention of two of the items on the basic methodological menu, pre-merger trading market price and merger price. Recall that during the early period, market price had a place in the Block where merger price did not. In contrast, for most of post-*Weinberger* period neither had a place on the menu. Not that they were without relevance. Parties routinely invoked them as "reality check" data points.[225] For example, a respondent faced with a petitioner DCF presentation claiming 50 percent over the merger price might reference the merger price and an antecedent arm's length negotiating process to back up the argument that the DCF analysis was unreliable.[226]

Then, all of a sudden, merger price found its way onto Delaware's menu in *Union Illinois 1995 Investment Limited Partnership v. Union Financial Group Ltd.*,[227] decided in 2004 by (then) Vice Chancellor Leo Strine.[228]

There was at least one precedent. Vice Chancellor Hartnett had anchored a fair value determination in the merger price in a 1993 case, *Cooper v. Pabst Brewing Co.*[229] But he did so covertly. *Pabst* was one of those cases where the parties had failed to provide any credible evidence of value.[230] Indeed, the respondent had not even bothered to make an affirmative case, contenting itself with producing evidence undermining

[222] *Compare* Coates, *supra* note 55, at 1311–13 (introducing Coates' analysis that does not differentiate between types of mergers), *with H-W 3*, *supra* note 53, at 1054–63 (analyzing different types of mergers separately).

[223] *See Coates*, *supra* note 55, at 1311–49.

[224] Coates, *supra* note 55, at 1313, 1323–26.

[225] *See, e.g.*, Gholl v. eMachines, Inc., No. Civ. A. 19444-NC, 2004 WL 2847865, at *15 (Del. Ch. Nov. 24, 2004), aff'd, 875 A.2d 632 (Del. 2005).

[226] *See, e.g.*, *id.*

[227] 847 A.2d 340, 357 (Del. Ch. 2004).

[228] For a more detailed exposition of the sequence of events, *see H-W 4, supra* note 66, at 969–71, 977–81.

[229] No. 7244, 1993 WL 208763 (Del. Ch. June 8, 1993).

[230] *Id.* at *8. For a recent case in this mode, *see* Kruse v. Synapse Wireless, Inc., No. 12392-VCS, 2020 WL 3969386 at *2 (Del. Ch. July 14, 2020).

the presentation of the petitioner's expert.[231] The Vice Chancellor settled on the merger price, making a small, roughed out, deduction for value "arising from" the merger.[232] But he avoided denominating the approach as "merger price," "deal price," or anything similar, apparently out of recognition that merger price was an inappropriate basis for decision under *Munds*, *Battye*, and *Kirby Lumber*. Instead, harking back to precedent from the Block era,[233] he described the result it as the estimated market price as of the time of the merger. He also looked to the precedent to note two objections to merger price: (1) it was inappropriate to award the merger premium;[234](2) there would be a perverse effect. More particularly:

> To allocate a pro rata share of a premium to dissenting shareholders would, in effect, make the deal price a "floor" for the appraisal value. . . . By making the deal price a "floor" for the appraised value, minority shareholders would be presented with a "no-lose" situation if they seek an appraisal and dissents from mergers would therefore be encouraged.[235]

Restating, although *Weinberger* had righted the Block's tilt in the respondent's direction, there would be no counter-tilting favoring the petitioner. A merger price entitlement would do just that, cutting off the possibility of persuasive showing by respondent of a GCV below the merger price.

The merger price question would not come up again until 2004, when *Union Illinois* abruptly added it to the menu.[236] It was not a difficult case for merger price on the facts. The petitioners held a large family block in a bank called Union Financial Group or UFG.[237] UFG had gotten into distress and the petitioners had lost control of its executive suite in the process.[238] They came to court with a Hail Mary DCF analysis that

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[231] *Pabst*, 1993 WL 208763, at *4-*5.

[232] The $29.50 blended price of a two-step front-end loaded tender offer and back- end merger was reduced to $27. *Id*. at *9.

[233] *Id*. at *8.

[234] *Id*. at *9 (citing Bell v. Kirby Lumber Corp., Del.Supr., 413 A.2d 137, 140–42 (1980); Cede & Co. v. Technicolor, Inc., C.A. No. 7129-NC, slip op. at 50–51 (Del. Ch. Oct. 19, 1990); Salomon Brothers Inc. v. Interstate Bakeries Corp., C.A. No. 10,054-NC, slip op. at 12–13 (Del. Ch. May 1, 1992)).

[235] *Pabst*, 1993 WL 208763 at *9 (citing Cede & Co. v. Technicolor, Inc., C.A. No. 7129-NC, slip op. at 51 n. 41 (Del. Ch. Oct. 19, 1990)).

[236] Union Illinois 1995 Investment Ltd. P'ship v. Union Fin. Grp. Ltd., 847 A.2d 340, 342 (Del. Ch. 2004).

[237] *Id.* at 342.

[238] *Id*.

doubled the merger price.[239] Respondents countered with a DCF coming in well below the merger price.[240]

Vice Chancellor Strine awarded the merger price minus synergies, and not, as in *Pabst*, because it was the only plausible figure on the table.[241] Explicating and expanding on *Pabst*, he articulated a positive justification, making the classic argument for transactionally-based figures. The merger price was the most "reliable evidence of fair value"[242] because it represented the "market's" opportunity to price the company directly as an entity.[243] Significantly, the value elements coming to bear on that entity-based market price include TPSV. DCF analysis, in comparison was "second-best.":

> A DCF analysis depends heavily on an assumption about the cost of capital that rational investors would use in investing in UFG, and assumptions about the accuracy of UFG's cash-flow projections. The benefit of the active market for UFG as an entity that the sales process generated is that several buyers with a profit motive were able to assess these factors for themselves and to use those assessments to make bids with actual money behind them.
>
> For me (as a law-trained judge) to second-guess the price that resulted from that process involves an exercise in hubris and, at best, reasoned guess-work.[244]

Resort to merger price would not be automatic, however. The critical "market pricing opportunity" had to be qualified affirmatively by the respondent. And the merger in question had qualified. The auction sale process had been "sound[:]" there had been no haste, there was no sell-side conflict, and the auction had been conducted "fairly and openly[.]"[245]

The worries expressed in *Pabst* about a petitioner friendly "floor"[246] no longer seemed to merit mention. Indeed, the shoe was on the other foot. The menu expansion in *Union Illinois* is manifestly petitioner unfriendly because it threatens to raise the level of difficulty facing a petitioner

[239] *Id.* at 351–52.
[240] *Union Illinois*, 847 A.2d at 353–54.
[241] *Compare Union Illinois*, 847 A.2d at 347 *with Pabst*, 1993 WL 208763, at *4–*5.
[242] *Union Illinois*, 847 A.2d at 357.
[243] *Id.* at 359.
[244] *Id.*
[245] *Id.* at 357–58.
[246] *See Pabst*, 1993 WL 208763 (describing the consequences of presenting a deal price as a "floor" for an appraised value).

looking for a jackpot recovery based on a DCF presentation. Of course, a merger price bar would go up only in a qualifying transaction—as a practical matter, the necessary "market pricing opportunity" could obtain only given an arm's length, unconflicted transaction. Thus pitched, the *Union Illinois* menu expansion arguably ameliorated a point of statutory over-inclusion—section 262's provision of appraisal rights in respect of an arm's length cash sale of a thickly-traded company.[247]

As the post-*Weinberger* era closed in 2007, Vice Chancellor Strine appeared to have carried his point. *Union Illinois* was not a fluke; merger price was indeed on the menu,[248] and with it a measure of TPSV.

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[247] *Cf.* Hon. Sam Glasscock III, *Ruminations on Appraisal*, DEL. LAW., Summer 2017, at 8, 29: ("I find little to recommend extending an appraisal right to dissenters in the case of a 'clean' merger . . .where the stock is readily transferable, approved by a disinterested board independent of any controller or other conflict, and where the sale is consummated after an exposure to the market.")

[248] *See* Highfields Cap., Ltd. v. AXA Fin., Inc., 939 A.2d 34, 61 (Del. Ch. 2007)(allocating merger price minus synergies 75 percent in a weighted average result). *See also* Gholl v. eMachines, Inc., No. 19444-NC, 2004 WL 2847865 (Del. Ch. Nov. 24, 2004), aff'd, 875 A.2d 632 (Del. 2005) and Cede & Co. v. MedPointe Healthcare, Inc., No. 19354-NC, 2004 WL 2093967 (Del. Ch. Aug. 16, 2004), both decided immediately after *Union Illinois*. Both cases rejected resort to merger price. The fact patterns ran in parallel. In both, a DCF presentation persuaded the Court to assign a fair value higher than the merger price. In *Gholl*, the Court's own DCF yielded $1.64 compared to a merger price of $1.04. 2004 WL 2847865, at *1, *18. In *MedPointe*, the Court's own DCF yielded $24.45 compared to a merger price of $20.44. This put the shoe on the other foot. 2004 WL 2093967, at *1, *16–*17. Now the respondent argued in favor the lower merger price figure: values agreed on in real world negotiations were better than expert guesstimates and the negotiations in question had been arm's length. In *Ghoul*, the merger price was presented as a "reality check" to deflect the possibility of selection of a higher DCF, with the respondent stressing the size of premium (96 percent) over the pre-merger market price. 2004 WL 2847865, at *15. In *MedPointe*, the Court also used the "reality check" term, apparently drawing on the parties' presentations. *See* 2004 WL 2093967, at *17.

In both cases, the Court deflected the argument but did not say that merger price was irrelevant in a fair value inquiry. In *Gholl*, the Court commented that the facts showing an impaired process "prevent the Court from relying on the auction price as strong evidence of fair value and leave the Court with the difficult task of valuing the Company by other means." 2004 WL 2847865, at *17. In *MedPointe*, the Court commented: "As a general matter, an arms length transaction may be a good indication of value. See Union Ill.1995 Inv. Ltd. P'ship, 847 A.2d at 357 & n. 37." 2004 WL 2093967, at *17 n.107. But the Court noted that the sales process in both cases had significant defects. In *Gholl*, the Court found "that the auction completed in this case was not sufficiently open to ensure an adequately level playing field to warrant giving great weight to the resulting price." 2004 WL 2847865, at *15. In *MedPointe*, the Court weighed the factors as follows:

> Both the Asset Sale and the Merger were the product of "arms length" negotiations. Carter–Wallace was aided by experienced and sophisticated investment bankers who devoted several years to the effort. Except possibly for JP Morgan's relationship with Armkel, there is no suggestion that the sales effort was not professionally handled. . . . In addition, van Biema concedes that the value of Carter–Wallace as a pre-transaction whole was less than the sum of the values of its two divisions. This all suggests that the Court's conclusion may be high. Yet, it must be remembered that, to use JP Morgan's Boothby's telling choice of words,

D. *Summary*

Weinberger tore up the precedent and started over, displacing legal conceptualism with a widened menu filled in by business technicians, technicians who unfortunately made their inputs as litigants' paid experts. The Chancery Court was left to sort it all out within the four corners of the case, subject to minimal instructions—let the parties cover the bases as they choose and then review their presentations for reliability; if the parties failed to provide such a basis, the Court itself bore the burden to establish a reliable basis for establishing fair value. The new instructions posed a considerable challenge. But the Chancery bench rose to the occasion, with DCF as the most likely determinative methodology.[249] The Block era's pattern of systematically low determinations of GCV was thereby broken. Indeed, some thought the pattern had been reversed, as DCF results well-above deal price were occurring in respect of arm's length mergers.[250]

The conceptual framework remained constant even as valuation practice was largely reinvented. The preference for GCV articulated in *Munds*, *Battye*, and *Kirby Lumber*, continued to be endorsed, with an emphatic reconfirmation in *Cavalier Oil*. But the conceptual framework turned out to be no more outcome determinative than it had been during the early period, when the Block had undercut GCV. Now, in the absence of the earlier doctrinal mandates respecting the ascertainment of fair value, the Chancery Court took an active and flexible approach regarding methodologies and their application. So active and flexible did it become in pursuit if fairness as occasionally to depart from adherence to the official GCV line, most notably when cases grossed up for IMD and when the Court turned away from parties' GCV presentations and went with merger price in *Union Illinois*. The latter development ended the period

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> the sales effort was "desperate." The result of a "desperate" sales effort is not a compelling indicator of value.

2004 WL 2093967, at *17 n.107.

[249] Campbell, Jr., *supra* note 128, at 38.

[250] *See, e.g.*, Gholl v. eMachines, Inc., No. Civ. A. 19444-NC, 2004 WL 2847865 (Del. Ch. Nov. 24, 2004), aff'd, 875 A.2d 632 (Del. 2005); Cede & Co. v. MedPointe Healthcare, Inc., No. Civ.A. 19354, 2004 WL 2093967 (Del. Ch. Aug. 16, 2004). *See also H-W 4*, *supra* note 66, at 970 ("As the courts became more comfortable with DCF analysis, however, something interesting happened. Contrary to the tenor of the debate in the 1970s and 1980s, when petitioners argued for deal price and respondents argued for less, courts applying DCF analysis increasingly arrived at valuations greater than the deal price. In some cases, this was not at all surprising: for example, where the deal price is established unilaterally in a freezeout by a controlling stockholder and, accordingly, the market for corporate control does not afford any corroboration of the deal price as fair value, a responsible DCF analysis may well result in a fair value in excess of the deal price. But, as it turned out, that sort of case was by no means the only circumstance in which a DCF-based fair value was found to exceed deal price.").

in the same way the period had started, with an expansion of the permissible methodological menu.

Union Illinois stood for more than that, however. Its expressed preference for transactionally based valuations made it the harbinger of a new period in the history of fair value.

IV. *TRANSKARYOTIC*, APPRAISAL ARBITRAGE, AND MERGER PRICE

Appraisal's arbitrage era began in 2007. During this period merger price abruptly displaced DCF analysis at the top of appraisal's methodological menu and the trading market price made a surprise menu reappearance. The Delaware Supreme Court revised the fair value playbook to make these changes in a series of decisions—*DFC*[251] in 2017, *Dell*[252] also in 2017, and *Aruba*[253] in 2019. The resulting framework builds on the post-*Weinberger* practice: the door remains open for DCF, CCA, and CTA presentations and the cases continue to stress that approaches to fair value must be made on all the facts of the case.[254] But the new cases also make it clear that transactional artifacts like merger and market prices are preferred to expert analyses in the proper case.[255]

It was *Weinberger* in reverse. A new era began in 1983 when the Delaware Supreme Court threw out a directive methodological playbook to reset the balance between methodology and fairness in favor of the latter. With *DFC*, *Dell*, and *Aruba* the Court reset the balance again, moving away from fairness with methodological directives that make the appraisal remedy less attractive to petitioners.[256] The intervention did not follow from any reordering of thinking about the operative economics, but instead occurred as an exercise of docket management.[257] Appraisal had become a platform for strategic investment in litigation recovery by hedge funds.[258] The phenomenon, known as "appraisal arbitrage" raised policy questions about the role of Delaware law in the M&A market.[259] The Court resolved the questions by changing the law of fair value.

Section A describes the appearance and operation of appraisal arbitrage, which was the inadvertent result of a procedure case, *In re*

[251] DFC Global Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346 (Del. 2017).
[252] Dell Inc., v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 5 (Del. 2017).
[253] Verition Partners Master Fund Ltd. v. Aruba Networks, Inc. (*Aruba*), 210 A.3d 128 (Del. 2019).
[254] *See, e.g., DFC*, 172 A.3d at 346; *Dell*, 177 A.3d at 5; *Aruba*, 210 A.3d at 128.
[255] *See, e.g., DFC*, 172 A.3d at 346; *Dell*, 177 A.3d at 5; *Aruba*, 210 A.3d at 128.
[256] *See generally*, *DFC*, 172 A.3d at 346; *Dell*, 177 A.3d at 5; *Aruba*, 210 A.3d at 128.
[257] *See generally*, *DFC*, 172 A.3d at 346; *Dell*, 177 A.3d at 5; *Aruba*, 210 A.3d at 128.
[258] *See generally*, *DFC*, 172 A.3d at 346; *Dell*, 177 A.3d at 5; *Aruba*, 210 A.3d at 128.
[259] *See generally*, *DFC*, 172 A.3d at 346; *Dell*, 177 A.3d at 5; *Aruba*, 210 A.3d at 128.

Appraisal Transkaryotic Therapies, Inc.,[260] decided in 2007. Section B turns to fair value with a chronological account of caselaw developments from 2007 to the decision of the trio of *DFC*, *Dell*, and *Aruba*. Section C looks at the cases since the trio's appearance. Section D comments.

A. *Appraisal Arbitrage*

To see why the fair value playbook changed, we need to make a quick side-trip to section 262's process instructions, in particular the matter of petitioner standing.

Under DGCL section 213, the record date that determines which shareholders have the right to vote on a merger is set between 60 and 10 days prior to the meeting.[261] Record date practice triggers a question regarding appraisal standing: whether the petitioner is required to be the record owner of the stock on the record date. Section 262(a) does not state this explicitly, requiring only that (1) the petitioner make a written demand before the vote on the merger, (2) the petitioner hold shares of company stock on the day the demand is made and continue to hold the shares through the effective date of the merger, and (3) the petitioner not vote in favor of the merger.[262]

In *In re Appraisal of Transkaryotic Therapies, Inc.*,[263] decided in 2007, a respondent challenged the standing of petitioners who bought their shares after the record date and before making the demand. The court, reading section 262 literally, held that the petitioners had standing.[264] It was enough, said the court, that the petitioner be a record holder on the demand date and show that it itself had not voted in favor of the merger.[265]

It follows that a potential dissenter can buy into the company (and an appraisal action) after the merger's announcement date right up to the date of the shareholders' meeting. This vastly expands the set of potential petitioners. An actor looking for a potentially lucrative lawsuit can review the terms of new mergers, availing itself of the targets' proxy materials,

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[260] No. 1554-CC, 2007 WL 1378345 (Del. Ch. Feb. 9, 2007).

[261] DEL. CODE ANN. tit. 8, § 213(a). As a practical matter, the date selected will be much closer to the date of the announcement of the merger than to the date of the meeting. *See generally*, CLAIRE A. HILL, ET AL., MERGERS AND ACQUISITIONS: LAW, THEORY, AND PRACTICE 163-67 (2d ed. 2019).

[262] DEL. CODE ANN. tit. 8, § 262(a).

[263] No. 1554-CC, 2007 WL 1378345 (Del. Ch. Feb. 9, 2007).

[264] *Id.* at *4.

[265] There was no additional requirement of showing that the shares the plaintiff had purchased after the record date had not been voted in favor of the merger, a showing that a plaintiff purchasing after the record date could not make as a practical matter due to street and nominee name registration. The defendant can rebut the plaintiff's standing case only by showing that the number of shares seeking appraisal exceed the total number of "no" votes and abstentions in the holding of the depository, Cede & Co. *Id.* at *4.

and look for a merger price at the low end of the range along with evidentiary materials conducive to proof of a higher value, all before risking capital in the target's stock.

Hedge funds—including some newly organized for the purpose—took advantage of this window of opportunity, an enterprise called "appraisal arbitrage."[266] Appraisal, long said to be a plaintiff-unfriendly legal remedy,[267] suddenly became a play space for Wall Street smart money looking for Alpha. The game lay in ginning up persuasive DCF valuations well above the merger price. Appraisal litigation volume increased from a trickle at the beginning of this century to a flood—during the period 2015-2017, 25 percent of mergers eligible for appraisal triggered a petition.[268]

Proponents and opponents argued back and forth. Shareholder advocates saw much to like. Statistical analysis showed that the merits mattered in arbitrage cases: the arbitrageurs targeted low premium transactions,[269] conflicted cash out mergers principally.[270] With the step up in volume, the appraisal remedy was serving a robust policing function for the first time in its history. Social welfare, said the proponents, was thereby enhanced.[271] The Delaware bar and judiciary, along with most of the rest of the establishment, saw things differently--this was yet another example of opportunistic abuse of the litigation system; deals would be chilled and merger prices would drop.[272]

In 2016, Delaware legislature responded to the critics with two modest amendments of section 262. The first, a "de minimis exception," requires that the petitioners hold an aggregate of at least 1 percent of the company's outstanding shares or shares receiving merger consideration worth more than $1,000,000.[273] This filters petitions by small holders but

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[266] *See generally*, *DFC*, 172 A.3d at 346; *Dell*, 177 A.3d at 5; *Aruba*, 210 A.3d at 128.

[267] Charles Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551, 1560–69 (2015).

[268] *See* Wei Jiang, Tao Li & Randall Thomas, *The Long Rise and Quick Fall of Appraisal Arbitrage*, VANDERBILT UNIV. L. SCH. (2020), http://ssrn.com/abstract=3546281 at 5. *See also* Guhan Subramanian, *Using Deal Price for Determining "Fair Value" in Appraisal Proceedings*, *available at* http://www.hbs.edu/faculty/Publication%20Files/20170206_Subramanian-draft_9aa5b475-ed61-4fae-8b39-9b2de9d09425_78008941-390f-458a-a0e0-92863f300dc8.pdf. at 2 (forthcoming publication). The volume of actual litigation understates the level of arbitrage activity. In many cases, the hedge fund would threaten an appraisal or an appraisal plus class action and then accept a settlement, with the settlement concluded on a confidential basis.

[269] Korsmo & Myers, *supra* note 267 at 1593–97.

[270] Jiang, Li & Thomas, *supra* note 268, at 5.

[271] Korsmo & Myers, *supra* note 267, at 1598.

[272] *See H-W 4, supra* note 66, at 964–65.

[273] DEL. CODE ANN. tit. 8, § 262(g) ("[T]he Court shall dismiss the proceedings as to all holders of such shares who are otherwise entitled to appraisal rights unless (1) the total number of shares entitled to appraisal exceeds 1% of the outstanding shares of the class or series eligible

not petitions by hedge funds, the profit of which depended on the accumulation of stock positions much larger than $1,000,000.[274] The second revision, called the interest reduction amendment, potentially reduces the benefits of the statute's mandated payment to the petitioner of interest on the fair value award at the rate of 5 percent over the Federal Reserve discount rate.[275] This is a super normal return in a low interest rate era and is seen as an assured source of compensation for litigation expenses in an unsuccessful case. The interest reduction amendment gives respondent corporations an option to prepay to appraisal petitioners all or part of the merger price.[276] Exercise of the option stops the prejudgment interest clock. The amendment did not, however, do much to lessen the flow of new petitions from arbitrageurs. Any advantage the respondent derives from the prepayment is countered and perhaps outweighed by the fact that an early recovery of even less than half of the merger consideration offers cash flow support to the petitioner during the proceeding's pendency.[277]

The amendments, then, did not stop the show. It was left to Delaware's bench to shut down the arbs. The bench rose to the occasion.

B. *The New Playbook*

1. Merger Price on the Menu, 2007–2017.

Developments during this period come in chronological segments. During the first segment, from 2007 to 2017, the Courts addressed the implications of *Union Illinois*, determining which mergers qualify, addressing the implications of qualification, and wrestling with adjustments for synergies.

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for appraisal, (2) the value of the consideration provided in the merger or consolidation for such total number of shares exceeds $1 million.").

[274] Jiang, Li & Thomas, *supra* note 268, at 15–16.

[275] DEL. CODE ANN. tit. 8, § 262(h) (2022).

[276] DEL. CODE ANN. tit. 8, § § 262(h) (2022) ("At any time before the entry of judgment in the proceedings, the surviving corporation may pay to each stockholder entitled to appraisal an amount in cash, in which case interest shall accrue thereafter as provided herein only upon the sum of (1) the difference, if any, between the amount so paid and the fair value of the shares as determined by the Court, and (2) interest theretofore accrued, unless paid at that time.").

[277] Jiang, Li & Thomas, *supra* note 268, at 17–18.

a. The Problem of Status.

When *Transkaryotic* was decided, merger price was still the new menu item. How it worked in tandem with the rest of the menu was far from clear. Was it of equal status with DCF, to be selected when, in the Chancery Court's discretion, it happened to be the most reliable metric on the table? Or did it have a junior status, to be considered only when all other metrics failed reliability inspection? Or was it a superior metric, to be preferred, once the merger was qualified, due to the negotiated price's credible transactional origins? A range of answers to these questions appeared in the cases

A blow was struck against the proposition of superior status for merger price in 2010. In *Global GT LP v. Golden Telcom, Inc.*, Vice Chancellor Strine rejected reference to merger price given a conflicted transaction with a flaccid special committee process.[278] On appeal, the respondent sought to deflect this factually-based outcome by elevating merger price to the legal status of *primus inter pares*—merger price should be accorded "conclusive, or, in the alternative presumptive deference."[279] The Delaware Supreme Court responded emphatically—merger price should not be deemed presumptively reliable even given a pristine deal process.[280] So doing would traverse the statute's directive to consider all relevant factors.[281]

If merger price was not *primus inter pares*, then was it *pari pasu* with the rest of the menu? Different opinions offered different answers. The Chancery Court signaled a negative answer in 2013 in *Huff Fund Investment Partnership v. CKx, Inc.*[282] A result based on merger price, it said, required not only an endorsement of transaction quality but a finding that other techniques were unreliable.[283] Other cases, however, could be read to view merger price as standing equal to the menu alternatives—both parties bore the burden to prove their positions and the Court should simply select the most reliable basis.[284] Still other cases picked up the

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[278] 993 A.2d 497, 499, 503 (Del. Ch. 2010), *aff'd*, 11 A.3d 214 (Del. 2010).

[279] *Id*. at 216.

[280] *Id.* at 218. For further discussion *see H-W 4*, *supra* note 66, at 979–80.

[281] *Golden Telecom*, 11 A.3d at 218.

[282] No. 6844-VCG, 2013 WL 5878807 (Del. Ch. Oct. 31, 2013), *aff'd* No. 234, 2015 WL 631586 (Del. 2015).

[283] *Id*. at *15; *see also* In re Appraisal of PetSmart, Inc., No. 10782-VCS, 2017 WL 2303599 at *2 (Del. Ch. May 26, 2017) ("Petitioners have failed to carry their burden of persuasion that a DCF analysis provides a reliable measure of fair value in this case. . . . Nor is there a foundation in the evidence for concluding that some other valuation methodology might lead to a reliable determination of fair value.")

[284] Merion Capital LP v. BMC Software, Inc., No. 8900-VCG, 2015 WL 6164771, at *18 (Del. Ch. Oct. 21, 2015) ("I am charged with considering all relevant factors bearing on fair value. A merger price that is the result of an arm's-length transaction negotiated over multiple

invitation issued in *Union Illinois*, deeming a qualified merger price preferable to a plausible DCF presentation. In a role reversal, the reliable DCF result became a "reality check" card played in support of the merger price.[285]

Summing up, even as merger price became a menu fixture, its more particular status remained far from clear.

b. Synergy Deductions.

Meanwhile, the development of a law of deductible synergies remained in an early stage. The caselaw timeline on synergies traces back to *Weinberger*, in which the court signaled a narrow reading of the statute's "arising from" exclusion, a reading focused on reliability concerns.[286] Said the *Weinberger* court:

> We take this to be a very narrow exception to the appraisal process, designed to eliminate use of pro forma data and projections of a speculative variety relating to the completion of a merger.[287]

Union Illinois substituted a more complicated analysis, coming in two modules: (1) a narrow reading of section 262, and (2) an articulation of a separate, broader basis for exclusion under the GCV standard of *Munds*,

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rounds of bidding among interested buyers is one such factor. A DCF valuation model built upon management's projections and expert analysis is another such factor. In this case, for the reasons above, I find the merger price to be the most persuasive indication of fair value available."); LongPath Capital, LLC v. Ramtron Int'l Corp., No. 8094-VCP, 2015 WL 4540443, at *1 (Del. Ch. June 30, 2015) ("I conclude that a DCF analysis is not an appropriate method of determining fair value in this instance. The utility of a DCF ceases when its inputs are unreliable; and, in this instance, I conclude that the management projections that provide the key inputs to the petitioner's DCF analysis are not reliable. The parties agree that there are no comparable companies. The petitioner relies, in part, upon a comparable transactions approach, but I conclude that his two-observation data set does not provide a reasonable basis to determine fair value. Although the petitioner thoroughly disputes this point, I conclude that the sales process in this instance was thorough and that the transaction price less synergies provides the most reliable method of determining the fair value of the petitioner's shares."); Merlin Partners LP v. AutoInfo, Inc., No. 8509-VCN, 2015 WL 2069417, at *18 (Del. Ch. Apr. 30, 2015) ("AutoInfo's expert, a tenured professor at the University of Chicago Booth School of Business, concluded that there is no reliable data to input into a DCF or comparable companies model. He determined that the process by which AutoInfo was marketed and sold would be expected to have led to a price indicative of the fair value of the Company's stock. The Court has independently reached these same conclusions.").

[285] *In re* Appraisal of Ancestry.com, Inc., No. 8173-VCG, 2015 WL 399726 at *23 (Del. Ch. Jan. 30, 2015); Merion Capital LP v. Lender Processing Servs. Corp., C.A. No. 9320-VCL, 2016 WL 7324170, at *33 (Del. Ch. Dec. 16, 2016).

[286] *Weinberger*, 45 A.2d at 713.

[287] *Id.*

Battye, and *Kirby Lumber*. The first module, the reading of section 262, turned on a distinction between (a) compensation for value "arising from" and realized ex post by the acquirer, which is excluded under the section, and (b) compensation for the sale of control, which is not covered by the section.[288] This is more of less the *Weinberger* reading of section 262 and applies to valuations pursuant to any methodology on the menu. The second module applied only to valuations based on the merger price.[289] This exclusion was potentially broader:

> The exclusion of synergy value, rather, derives from the mandate that the subject company in an appraisal be valued as a going concern. Logically, if this mandate is to be faithfully followed, this court must endeavor to exclude from any appraisal award the amount of any value that the selling company's shareholders would receive because a buyer intends to operate the subject company, not as a stand-alone going concern, but as a part of a larger enterprise, from which synergistic gains can be extracted.[290]

Restating, the merger price may have to be modified downward to serve as a plausible proxy for CGV. Merger gain allocated to the target and tied to future modifications of the business plan in a strategic merger certainly would be excluded. The question was whether merger gain allocated to the target and tied to future agency cost reduction in the wake of a financial merger would be treated similarly.

Subsequent cases on synergy deductions were variegated, with a tendency toward judicial hostility. A two-step inquiry was contemplated. First, the synergistic gain needed to be identified; second, the gain needed to be allocated between the target and the acquirer, with the deduction applied only as to the target's share.[291]

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[288] *Union Illinois*, 847 A.2d, at 356. The Court offered the following example:

> The literal terms of § 262 do not preclude a court from considering, in using a comparable-companies analysis for example, that acquirers typically share a portion of synergies with sellers in sales transactions and that that portion is value that would be left wholly in the hands of the selling company's stockholders, as a price that the buyer was willing to pay to capture the selling company and the rest of the synergies.

Id.

[289] *Id.*

[290] *Id.*

[291] *See, e.g.*, Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., No. 11448-VCL, 2018 WL 922139, at *45 (Del. Ch. Feb. 15, 2018), *rev'd* 210 A.3d 128 (Del. 2019). The *Union Illinois* language was taken as the test, but there also was a tendency to mention section

Two bedrock points on synergy deductions were laid down: evidentiary backing would be required, and the burden lay on the respondent to make the showing. The deduction was not made automatically—if the respondent made no case specific presentation the court did not rough out a deduction *sua sponte*.[292] There was also resistance to structural inference—absent more particular evidence, a synergy deduction will not imposed in a financial merger on the ground that private equity sponsors invariably seek gain from post-closing tax benefits and cost reductions.[293] Where deductions were granted, the evidentiary sources tended to be deal specific—bankers' opinions[294] and acquirer estimates.[295] A skeptical judicial reception was a distinct possibility. In one case, cost savings projected by the acquirer were not deducted because cost slashing was a game anyone can play--the target was as well situated to reduce costs as was the acquirer.[296] In another case, a deduction for projected cost savings was flatly dismissed as unreliable.[297]

Summing up, once one got past the bedrock points the picture on synergies was far from clear.

c. Interplay with Appraisal Arbitrage.

But one thing was certain. As the probability that merger price would determine fair value increased along with the possibility of a generous synergy deduction, expected returns from appraisal arbitrage decreased. The arbitrage upside came from DCF, CCA, and CTA analyses above merger price, which would now be less likely to pass the reliability test. A shareholder could, after all, receive the merger price free of litigation costs simply by standing pat. And litigation costs were not going down. Given the "all relevant factors" directive, a petitioner had to come

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262 as the exclusive source of the mandate. *See, e.g.,* Merlin Partners LP v. AutoInfo, Inc., No. 8509-VCN, 2015 WL 2069417, at *16–*17 (Del. Ch. Apr. 30, 2015).

[292] *In re* Appraisal of PetSmart, Inc., No. 10782-VCS, 2017 WL 2303599 at *40–*41 (Del. Ch. May 26, 2017).

[293] Merion Capital LP v. BMC Software, Inc., No. 8900-VCG, 2015 WL 6164771, at *17 (Del. Ch. Oct. 21, 2015).

Problems with synergy evidence also mean problems for CTA presentations. If synergies have to be deducted from a merger price showing, then, by hypothesis, they also need to be deducted from a CTA result. Getting from here to there was a problem, increasing the likelihood that the CTA would be ruled unreliable. *See* Dunmire v. Farmers & Merchants Bancorp of Western Pennsylvania, Inc., No. 10589-CB, 2106 WL 6651411, at *6 (Del. Ch. Nov. 10, 2016).

[294] *Union Illinois*, 847 A.2d, at 353 n.26.

[295] Highfields Capital, Ltd. v. AXA Fin., Inc., 939 A.2d 34, 61 (Del. Ch. 2007).

[296] Huff Fund Inv. P'ship v. CKx, Inc., No. 6844-VCG, 2013 WL 5878807, at *3 (Del. Ch. Oct. 31, 2013), *aff'd* No. 234, 2015 WL 631586 (Del. 2015).

[297] Merlin Partners LP v. AutoInfo, Inc., No. 8509-VCN, 2015 WL 2069417, at *17 (Del. Ch. Apr. 30, 2015).

to court armed with presentations across the entire menu. The addition of merger price meant additional investment in proof, for there were potentially complicated factual matters concerning deal quality and qualification and the synergy deduction.

The questions concerning merger price and fair value loomed ever larger as appraisal arbitrageurs crowded the docket looking to score with expert presentations. The arbs had some success: Jiang and Thomas find that during the period 2000-2014 the average gross return to appraisal arbitrage was 98.2 percent.[298] Members of the Delaware bench noted their disquiet. The spreads between petitioner and respondent DCF presentations were getting wider,[299] with the judges displaying less and less willingness to take on the job deriving a plausible DCF result by patching together their own analyses.[300]

2. *DFC*, *Dell*, and *Aruba*.

We turn now to a trio of Delaware Supreme Court reversals of Chancery Court appraisals: *DFC Global Corporation v. Muirfield Value Partners, L.P.*,[301] decided in 2017, *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd*,[302] also decided in 2017, and *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc*.,[303] decided in 2019. The three opinions, read cumulatively, approach *Weinberger* in magnitude of their impact on the law of fair value. But they accomplish this without any fundamental disruption of the received conceptual framework. *Battye*, and *Kirby Lumber* are still there. *Weinberger* is also still there, along with DCF, CCA, CTA, and merger price minus synergies. The new cases operate at the level of menu management—merger price minus synergies now clearly has *primus inter pares* status. There is also yet another menu

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[298] Jiang, Li & Thomas, *supra* note 268, at 6.

[299] *See, e.g*., Dunmire v. Farmers & Merchants Bancorp of Western Pennsylvania, Inc., No. 10589-CB, 2106 WL 6651411, at *6 (Del. Ch. Nov. 10, 2016); LongPath Capital, LLC v. Ramtron Int'l Corp., C.A. No. 8094-VCP, 2015 WL 4540443 at * 9 (Del. Ch. June 30, 2015) ("Much has been said of litigation-driven valuations, none of it favorable."); *In re* Appraisal of Dole Food Co., 114 A.3d 541, 557 (Del. Ch. 2014) ("In appraisal proceedings, the battling experts tend to generate widely divergent valuations as they strive to bracket the outer limits of plausibility.") For further discussion see *H-W 4, supra* note 66, at 971–72.

[300] See, e.g., Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd., 177 A.3d 1, 36 (Del. 2017)(recommending that Chancery Court judges be "chary" about constructing their own valuations from divergent presentations); Huff Fund Inv. P'ship v. CKx, Inc., No. 6844-VCG, 2013 WL 5878807, at *1 (Del. Ch. Oct. 31, 2013), *aff'd* No. 234, 2015 WL 631586 (Del. 2015)(warning against substitution of analyses by "law-trained" judges). For further discussion see *H-W 4, supra* note 66, at 972–73.

[301] 172 A.3d 346 (Del. 2017).

[302] 177 A.3d 1 (Del. 2017).

[303] 210 A.3d 128 (Del. 2019).

expansion: for the first time since the Block era, pre-merger market price joins the menu.

The motivation for change appears to be a need to dampen incentives to pursue appraisal arbitrage. But differing prevailing perspectives on the legal theory of fair value also come to bear. Whereas previously in the history of appraisal, these questions always had concerned GCV and TPSV and their measurement, now attention concerned the incidents of a qualifying merger.

a. Merger Price.

DFC and *Dell* were financial mergers—private equity buyouts. In *DFC* the Chancery Court split the result across three menu items in a Block-like weighted averaging—one-third weight to each of merger price, DCF, and CCA.[304] In *Dell* the Chancery Court gave 100 percent weight to its own DCF analysis.[305] Both opinions, in their reliability assessments, had reduced the weight accorded to merger price due to constraints particular to the pricing of financial mergers.[306] Private equity buyers price their deals with reference to their own requirements of internal rate of return (IRR). If a given price causes projected IRR to drop below an internal hurdle rate, they do not pay the price. Private equity buyers also are unlikely to poach on one another's merger processes to make a topping bid. Both Chancery Courts found these structural limitations disqualifying: a sale process deflected from pursuit of top dollar could not be considered reliable.[307]

In both cases the Supreme Court ruled that the Chancery Court had improperly dismissed a qualified merger price, requiring reversal and remand.[308] It rejected the requirement of a "top dollar" process qualification in strong terms.[309] Such a requirement in effect remitted merger price to a subordinate place on the menu—anything short of best price would be completely or partially disqualifying.[310] There was no underlying shareholder entitlement to support such an approach. The

[304] *In re* Appraisal of DFC Glob. Corp., No. 10107-CB, 2016 WL 3753123, at *23 (Del. Ch. July 8, 2016).

[305] *In re:* Appraisal of Dell, C.A. No. 9322-VCL, 2016 WL 3186538, at *22, *29 (Del. Ch. May 31, 2016), *aff'd in part, rev'd in part* sub nom. Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1 (Del. 2017).

[306] *See DFC*, 2016 WL 3753123, at *32; *Dell*, 2016 WL 3186538, at *33–*36.

[307] *DFC*, 2016 WL 3753123, at *32; *Dell*, 2016 WL 3186538, at *33–*36.

[308] DFC Global Corp. v. Muirfield Value Partners, L.P., 173 A.3d 246, 351 (Del. 2017); Dell, Inc. v. Magnetar Global Event Driven Master Fund LTD, 177 A.3d 1, 23 (Del. 2017).

[309] *DFC*, 172 A.3d, at 351; *Dell*, 177 A.3d, at 23.

[310] *DFC*, 172 A.3d, at 366; *Dell*, 177 A.3d, at 23, 35–36.

question was fair value, and fair value did not mean the highest price payable by the particular buyer or by any buyer, just a price on a range of fair prices that a reasonable seller would accept.[311] Concomitantly, in both cases, the Court subjected the Chancery Court's DCF analyses to exacting review, both being found wanting.[312] A qualifying merger negotiation amounted to a *market* test of GCV, and so provided a more reliable grounding for a fair value finding than did cheap talk projections and expert ministrations.[313]

No legal presumption favoring a qualified merger price should be inferred, however. The Court adamantly rejects any such suggestion.[314] All relevant factors still must be considered once the merger qualifies.[315] But, as Vice Chancellor Sam Glasscock later put it, there is a such a thing as a "Dell compliant" merger:

> Where . . . transaction price represents an unhindered, informed, and competitive market valuation, the trial judge must give particular and serious consideration to transaction price as evidence of fair value. Where information necessary for participants in the market to make a bid is widely disseminated, and where the terms of the transaction are not structurally prohibitive or unduly limiting to such market participation, the trial court in its determination of fair value must take into consideration the transaction price as set by the market.[316]

b. Market Price.

Pre-merger trading market price joined the menu in the wake of the *DFC* and *Dell*. It was a back-door entry, for neither case even came close to putting market price on the menu.

The opinion in *DFC* does make much of the pre-merger market price. It tells us (1) that financial economics assumes that trading prices in a thick trading market offer a reliable estimate of GCV because they

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[311] *DFC*, 172 A.3d, at 370.

[312] *DFC*, 172 A.3d, at 350; *Dell*, 177 A.3d, at 37–38.

[313] *DFC*, 172 A.3d, at 360-61; *Dell*, 177 A.3d, at 35–36. The Dell Court added a criticism of the Chancery Court's ultra-sensitive critique of the deal process. The process had left open a door for a topping bidder. The fact that no one walked through it was not due to some sort of structural bias but to the fact that no strategic bidder thought it could profit by doing so. *Dell*, 177 A.3d, at 37–38.

[314] *DFC,* 172 A.3d, at 366, 388-89.

[315] *Dell*, 177 A.3d, at 21.

[316] *In re* Appraisal of AOL Inc., No. 11204-VCG, 2018 WL 1037450, at *1 (Del. Ch. February 23, 2018).

reflect the collective judgement of properly incented actors;[317] and (2) that such estimates are more reliable than the good faith estimates of a single individual[318] and are "informative" of fair value in an appraisal.[319] *DFC* also gives us a double negative read of the precedent: *Weinberger's* rejection of the Block does not mean the trading price is not relevant in an appraisal.[320] But these comments bear neither on the case's holding nor on the contentions of the parties. They are backing for the point that transactionally based valuations are superior to expert estimates, toward the end of holding that merger price was entitled to a heavier weighting on the facts of the case.

Dell was similar. The opinion extolls the efficiency of the Company's pre-merger trading market as it goes about undermining the assumptions that underlay the Chancery Court's determination that the merger price was unreliable. More particularly, the Chancery Court had dismissed the Company's market price as a myopic undervaluation.[321] It had followed that the market price could not play a role as a reality check endorsement of the merger price. The Supreme Court displaced the "myopia" read by reference to the efficient market hypothesis, thereby bolstering the reliability of the merger price.[322]

On a literal read, *DFC* and *Dell* stand for the proposition that a pre-merger market price yielded by an efficient marketplace is an important evaluative factor, particularly in respect to determinations respecting the reliability of the merger price and of DCF analyses. Yet somehow *DFC* and *Dell* were taken to mean that market price was on the menu. And so, in *Aruba* early in 2018, did the Chancery Court, per Vice Chancellor Laster, base its entire valuation on a thirty-day pre-merger average of the company's market price,[323] rejecting reference to the merger price. It was, quite literally, an unprecedented result.[324] The Supreme Court reversed, but not on the ground that market price was not on the menu.[325]

Thus did the market price reach the menu by implication. Somewhat contradictorily, the Supreme Court in *Aruba* added two

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[317] *DFC*, 172 A.3d, at 360–61.
[318] *Id.*
[319] *Id.* at 373.
[320] *Id.*
[321] *Dell*, 177 A.3d, at 36.
[322] *Id.* at 23–24, 36.
[323] Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., No. 11448-VCL, 2018 WL 922139, at *51–*55 (Del. Ch. Feb. 15, 2018).
[324] Pre-*DFC* cases cited as precedent for market price are anything but. See Gonsalves v. Straight Arrow Publishers, Inc., 793 A.2d 312, 396 (Del. Ch. 1998)(rejecting reference to market price but conceding that in the proper case it could be relevant); ONTI, Inc. v. Integra Bank, 751 A.2d 904, 915 (Del. Ch. 1999)(rejecting reference to post-merger market price in a case where the market was constrained by transfer restrictions).
[325] *Aruba*, 210 A.3d, at 142.

powerful reasons for *not* weighting it heavily. First, pre-merger figures tend to be stale, as they arise from market transactions concluded months before the valuation date.[326] Second, the pre-merger price is likely to be underinformed. An acquirer will have done a more thorough analysis than will any pre-merger market trader, and, in addition, will likely have had access to material nonpublic information.[327]

c. Synergy deductions.

Aruba, like *DFC* and *Dell*, reversed the Chancery Court for failing to give the merger price its due. In *Aruba*, one of the Chancery Court's reasons concerned synergies. It was a strategic merger. Classic synergies were on the table for deduction—there were estimates from the acquirer and from the target. The Chancery Court took the acquirer's figure and then split the amount between the two parties by reference to a statistical study of division of merger gain in multiple transactions.[328] But the Court then rejected the resulting figure on the ground that it reflected an incomplete base of inputs.[329] Citing Hamermesh and Wachter,[330] it ruled that the synergy deduction needed to reflect not only gain stemming from the asset combination but not gain stemming from post-merger agency cost reductions.[331] The Supreme Court rejected this treatment for two reasons.[332] First, this had been a strategic merger and not a financial merger.[333] Agency cost reduction accordingly was not a major factor in the economics of the deal.[334] Second, the Court, putting the burden of proof on the evidence on the table to show that agency costs had *not* been included in the acquirer and target synergy estimates, ruled that those figures should be deemed to include agency costs.[335] It followed that the Court of Chancery had "double counted" agency costs[336] and that the merger price was fully qualified for appraisal purposes. And, as between a qualifying merger and pre-merger market price, the former was entitled to much the greater weight.[337]

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[326] *Id*. at 138–39.
[327] *Id*.
[328] Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., No. 11448-VCL, 2018 WL 922139, at *45 (Del. Ch. Feb. 15, 2018).
[329] *Aruba*, 210 A.3d, at 142.
[330] *Id.* at 133–34.
[331] *Id*. at 134.
[332] *Id.* at 135.
[333] *Aruba*, 210 A.3d, at 133–34.
[334] *Id.*
[335] *Id*.
[336] *Id.* at 139.
[337] *Aruba*, 210 A.3d at 133–34.

Even as it faulted the Court of Chancery for its laser focus on proof of an agency cost component in estimated synergies, the Supreme Court did not contest the point that deductible synergies should include agency costs.[338] But then neither did it hold that to be the case.[339] The matter remains murky.

C. *Applying the New Playbook*

This section takes up cases decided subsequent to *DFC*, *Dell* and *Aruba*.

There is a new routine. Merger price takes center stage, and, indeed, several cases endorse the merger process as qualified and go on to weight it 100 percent.[340] Indeed, this is the modal treatment. But there also are several cases that find the merger not to qualify, eschew the trading market price as too thin or otherwise unreliable, and attach a value derived from DCF analysis.[341] Weighted averages are not in evidence.[342]

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338 *Id.* at 134.

339 *Id.*

340 *See, e.g.*, BCIM Strategic Value Master Fund, L.P. v. HFF, Inc., No. 2019-0558-JTL, 2022 WL 304840, at *1, *34–*39 (Del. Ch. Feb. 2, 2022); *accord In re* Appraisal of Regal Entertainment Group, No. 2018-0266-JTL, 2021 WL 1916364, at *1, *21 (Del. Ch. May 13, 2021); *accord In re* Appraisal of Panera Bread Co., No. 2017-0593-MTZ, 2020 WL 506684 at *1, *18–*19 (Del. Ch. Jan., 21, 2020); *accord In re* Appraisal of Stillwater Mining Co., at *1, *44, No. 2017-0385-JTL, 2019 WL 3943851 (Del. Ch. Aug. 21, 2019); *accord In re* Appraisal of Columbia Pipeline Group, Inc., No. 12736-VCL, 2019 WL 3778370 (Del. Ch. Aug. 12, 2019);); *accord In re* Appraisal of Solera Holdings, Inc., at *1, No. 12080-CB, 2018 WL 3625644 (Del. Ch. July 30, 2018); *accord In re* Appraisal of Petsmart, Inc., No. 10782-VCS, 2017 WL 2303599, at *2 (Del. Ch. May 26, 2017)

341 Kruse v. Synapse Wireless, Inc., No. 12392-VCS, 2020 WL 3969386 at *1–*2 (July 14, 2020); Blueblade Capital Opportunities LLC v. Norcraft Companies, Inc., No. 11184-VCS, 2018 WL 3602940, at *1, *36–*38 (Del. Ch. Jan. 31., 2020); Hoyd v. Trussway Holdings, LLC, No. 2017-0260-SG, 2019 WL 994048, at *1, *6–*7 (Del Ch. Feb. 28, 2019); *In re* Appraisal of AOL Inc., C.A. No. 11204-VCG, 2018 WL 1037450, at *1–*2, *21 (Del Ch. Feb. 23, 2018); *In re* Appraisal of SWS Group, Inc., C.A. No. 10554-VCG, 2017 WL 2334852, at *1, *10, (Del. Ch. May 30, 2017).

342 *See, e.g., AOL*, 2018 WL 1037450, at *2. The outcome makes sense. Recall that in *DFC*, the Chancery Court did a Block-type three-part weighted average only to be reversed by a Supreme Court, which was looking for more weight on merger price. *See DFC*, 172 A.3d at 378–85. In reversing, the Supreme Court did not reject the practice of blending results from different methodologies into a weighted average derivation of a single figure result. It explained that it rejected the average because the assigned weights were unsupported by reference to specific evidence. *DFC*, 172 A.3d at 388–89.

As a practical matter, however, this means that averaged solutions now face a high bar. The Chancery Court in *DFC* reached its three-way split after an exhaustive review of the value presentations, a review identifying an array of specific plusses and minuses. *DFC*, 2016 WL 3753123, at *21–*23. Said the Chancery Court, all the presentations were probative, all had problems, and all were within the range, so an even split made sense. *Id*. at *23. It was a well-informed but intuited result. This is about as good as it gets when it comes to weighting, In the merger price cases, the respondent still has the burden to qualify a synergy deduction. The results continue to depend on the particular showing.[343] One case, *Stillwater Mining,*[344] makes a theoretical contribution. The respondent, the Canadian acquirer in a strategic merger, offered no concrete evidence of gains arising from the transaction, but cited the strategic considerations motivating its premium bid—expanded market share, entry into the United States market, and a boost to its credit rating.[345] The Court rejected the play—none of this was value "arising from."[346] Expanding, merger premiums, whatever their constituents, are not automatically deductible as synergies.

Meanwhile, pre-merger market price has not conquered appraisal jurisprudence as the menu item of choice for nonqualified mergers, even as market price was finally squarely accepted on the menu by the Supreme Court in *Fir Tree Master Fund LP v. Jarden Corp*.[347] The acceptance came with a *caveat*: the Chancery Court could base fair value on the market price only after considering all alternatives.[348] As it happened, the Chancery Court in the *Jarden* appraisal had taken great pains to qualify the market price, looking not only at the depth of the trading market but making sure that it reflected all material information and that no new developments between the merger announcement and the merger date made it stale.[349] Meanwhile, *Jarden* is the only case in which market price has determined the fair value result.[350] Market price otherwise does not appear to be a favored alternative and even triggers flashes of resistance.[351]

Jarden also makes crystal clear the negative implications of market price for petitioner litigation incentives. The case shows a post-*Dell* petitioner get hoisted on its own petard. The petitioner successfully knocked down a $59.21 merger price in an attempt to open the door to an

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there being no meta-template offering more specific directions. But it wasn't enough. It follows that it is very unlikely that weighted results will return to the fore, at least for the moment.

[343] *See, e.g.*, *In re* Appraisal of Panera Bread Co., No. 2017-0593-MTZ, 2020 WL 506684, at*35-*40 (Del. Ch. Jan. 21, 2020)(accepting some but not all of respondent's synergy scenarios); *In re* Appraisal of Columbia Pipeline Group, Inc., No. 12736-VCL, 2019 WL 3778370, at *45 (Del. Ch. Aug. 12, 2019)(no showing, no deduction).

[344] *In re* Appraisal of Stillwater Mining Co., No. 2017-0385-JTL, 2019 WL 3943851 (Del. Ch. Aug. 21, 2019), *aff'd* sub nom Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co., 240 A.3d 3 (Del. 2020).

[345] *Id.* at *18, *42.

[346] *Id*. at *45.

[347] 236 A.3d 313, 315 (Del. 2020).

[348] *Id.* at 316.

[349] *In re* Appraisal of Jarden Corp., No. 12456-VCS, 2019 WL 3244085, at *27–*31 (Del. Ch. July 19, 2019); Fir Tree Master Fund LP v. Jarden Corp., 236 A.3d 313, at 326–27 (Del. 2020).

[350] *Appraisal of Jarden*, 2019 WL 3244085, at *27–*31.

[351] *In re* Appraisal of Solera Holdings, Inc., at *32, No. 12080-CB, 2018 WL 3625644, at *32 (Del. Ch. July 30, 2018).

inflated DCF showing, only to go home with the sucker payoff of a pre-merger $48.31 trading price.[352] The petitioner made a fairness pitch on appeal, asking that the merger price be made a floor below which fair value could not go. The Supreme Court acknowledged the logic of the suggestion. *DFC*, *Dell*, and *Aruba* required that merger price be given heavy weight.[353] Here the petitioner had shown a flawed process, the flaw lying in the probability that the merger price was *below* fair value.[354] So why not cut the petitioner's losses there? The Supreme Court refused to do so on a technical ground. The petitioner, as it went about undermining the merger process, had taken the position that synergies did not need to be shown until the merger price had been qualified, and so had made no showing. There accordingly was no present basis for accepting the merger price as a proxy for GCV, particularly given the fact that there had been evidence that the merger price reflected a sharing of synergistic gain. The merger price minus synergies calculation on the table was, quite simply, incomplete.[355] Another technical point follows: the value floor argument remains open on the right fact pattern.

D. *Conclusion*

DFC, *Dell*, and *Aruba* accord *primus inter pares* menu status to a qualified merger and admit pre-merger market price to the menu. They otherwise leave the menu untouched. One result is that appraisal adjudications are more complicated than ever. The technical demands made by DFC analysis, CCA, and CCT remain in place. Two fact-intensive litigation issues have been added, the matters of merger process qualification and qualification of the pre-merger market price as efficient. Expenses go up accordingly.

In addition, the elevation of merger price and the admission of market price substantially reduce the expected value of appraisal litigation. Incentives to pursue appraisal arbitrage are much reduced, if indeed they persist at all. Jiang, Li, and Thomas show this with stark statistical findings. From 2015 to 2017, 25 percent of eligible mergers triggered appraisal proceedings.[356] In 2019, the number was down to 5 percent.[357] Returns to appraisal arbitrage, which were 98.2 percent from 2000 to 2014, are down to 13.2 percent from 2015 to 2019, with all those returns coming

[352] *Appraisal of Jarden*, 2019 WL 3244085, at *2–*3.
[353] *See DFC*, 172 A.3d at 346; *Dell*, 177 A.3d at 5; *Aruba*, 210 A.3d at 128.
[354] Fir Tree Master Fund LP v. Jarden Corp., 236 A.3d 313, at 328 (Del. 2020).
[355] *Id.*
[356] Jiang, Li & Thomas, supra note 268, at 5.
[357] Jiang, Li & Thomas, *supra* note 268, at 5.

from pre-judgment interest accrual.[358] In short, appraisal arbitrage is a thing of the past due to the ministrations of the Delaware Supreme Court in *DFC*, *Dell*, and *Aruba*.

V. THE CONCEPTUAL FRAMEWORK TODAY

Whither the conceptual framework of fair value in the wake of *DFC*, *Dell* and *Aruba*? On the surface, *Munds*, *Battye*, *Kirby Lumber* and GCV still stand, albeit with *Munds's* rejection of market price now erased to some undefined extent. *Dell* compliance introduces a limitation on the Chancery Court's discretion as regards the selection of the measure of GCV, tilting the reliability inquiry in the direction of a qualifying merger price. *DFC*, *Dell* and *Aruba* double down on that result by resisting attempts to make it harder to qualify the merger, whether it be by insisting on a sell side pursuit of a "best price" outcome or requiring an upfront deduction of verified agency costs.

That much is clear on the surface. This Part goes below the surface to unpack the cases' further implications for the conceptual framework of fair value. Section A rehearses the GCV-TPSV distinction one more time, asserting that merger price, although admitted to the menu as a measure of GCV, is in fact closer to TPSV. Merger price minus synergies might have been a robust proxy for GCV had the Delaware Courts defined deductible synergies in terms of merger gain and merger premium. But the Courts have proved consistently unwilling to push the conceptual framework in this direction. Fair value ends up back where it began during the Block era--committed to GCV in theory but open to TPSV in practice. Section B expands on this discussion, reviewing the conceptual framework's evolution in history in a minimalist, process-oriented direction. Since *Weinberger*, the Delaware Courts have eschewed theoretical logic and entitlement thinking when describing fair value. They instead view of fair value as an outcome of an open-ended process in which facts are gathered, considered, and sifted in light of a menu of methodologies. The Courts manipulate the process in response to institutional concerns. They bring theoretical logic to bear in justifying such interventions, but otherwise disregard it. Section C considers additional possible explanations for the recent redirection of the case law, asking whether anything other than docket management can be ascribed a motivating role. An objective to promote certainty is considered and rejected. So is an objective to retreat from shareholder protection. *DFC*, *Dell* and *Aruba* should be seen instead as a part of a larger pattern of reexamination of corporate law's inherited

[358] Returns on appraisal recovery over merger price were negative 5.3 percent. Jiang, Li & Thomas, *supra* note 268, at 5.

features to accommodate the enhanced self-protective capabilities of twenty-first century shareholders. Any retreat is strategic and leaves doors open for stern policing as occasions arise. Section D closes the discussion with some observations on the interplay between financial economics and the jurisprudence of fair value.

A. *GCV v. TPSV, Merger Price v. Market Price*

Even as *DFC*, *Dell*, and *Aruba* effect the biggest change in the law of fair value since *Weinberger*, they do relatively little to disrupt the received body of doctrine. The new cases do not reverse *Weinberger* to reintroduce and mandate an exhaustive methodological template, even as they do reach back in the Block's direction by constraining the Chancery Court's reliability determination and pushing it toward a favored methodology. Nor do the new cases admit TPSV into the conceptual framework, at least as a formal matter. *Union Illinois* took pains to make its continued exclusion clear at the outset: merger price minus synergies joins the menu only because it can offer a credible measure of GCV.[359] The recent cases, on this read, concern the GCV menu and its management rather than the conceptual framework, where GCV remains the constant lodestar. They lengthen the menu, adding market price, and, more importantly, make merger price *primus inter pares*. Notions of reliability are modified as well, now admitting a bias for transactional origins over expert analysis. The strength of the bias is as yet unclear, however. Yes, a qualifying merger trumps an otherwise credible but higher DCF analysis. Whether a qualifying pre-merger market price trumps an otherwise credible but higher DCF analysis remains to be seen.

All of this gives rise to a practical question going to the historic diremption between GCV and TPSV. Although *Munds*, *Battye*, *Kirby Lumber* nominally remain the fair value's conceptual cornerstone, do results on the ground reconfirm the persistence of a conceptual commitment to GCV? Let us pose an argument to the contrary. Hypothesize a qualifying merger, the $135 price of which embodies a 35 percent premium over the pre-merger market price of $100, a price established in a robust marketplace. Suppose the parties offer no evidence on synergies. The result is that fair value equals a transactionally verified TPSV of $135. Now suppose that synergies are established by the acquirer at 10 percent of merger price and allocated 50-50 based on evidence of comparable transactions. The fair value is now $135 minus $6.75 or $128.25, which leaves $28.25 of the merger premium unaccounted for and

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[359] *See* Union Illinois 1995 Inv. Ltd. P'ship v. Union Fin. Group, Ltd., 847 A.2d 340, 342 (Del. Ch. 2004).

an outcome much closer to TPSV than to GCV. Indeed, $128.25 might well be in the middle of an investment banker's range of fair sale prices. In sum, argues the proponent, the theoretical commitment to GCV is an antique formality; in practice TPSV is preferred.

Now let us hear from the argument's opponent, who begins by noting that the above numerical outcomes prove nothing. Such are the vagaries of fair value determination on all the facts of the case. Suppose that we turn back the clock and enter the *Weinberger* world prior to the *Union Illinois* modification. We take the same merger and hypothesize a credible petitioner's DCF showing of $150 as against a respondent's unreliable DCF of $95. No one would have reported theoretical disquiet from a fair value determination of $150, even though it was higher than the credible TPSV established by the merger price. *DFC*, *Dell* and *Aruba*, with their bias against expert analysis, make such disquieting outcomes much less likely. They at the same time carefully refrain from establishing a shareholder entitlement to TPSV. That the final modification that reduces the merger price of $135 to the putative GCV—the synergies deduction—is left over to an evidentiary showing is just an incident of litigation management in an imperfect world.

At this point the side arguing that Delaware appraisal honors GCV only in the breach has one last move to make: there is a presumption lurking within. Once the $135 merger is qualified, its TPSV stands as the measure of GCV unless the respondent meets the burden of proof to justify a synergy deduction. This is effectively a presumption favoring a TPSV measure of value, given proof of a qualifying merger.

The proponent's last point is correct. That *Union Illinois* and its progeny term this a measure of GCV as a matter of convenience does not rebut it. We are left at an inconvenient juncture of theoretical inconsistency.

The reason for the inconsistency is that fair value's conceptual framework, nominally centered on GCV, has been left incomplete. It has never included a further articulation of two central concepts, merger premium and merger gain, and then proceeded to draw a line between them and GCV. It instead leaves these factors over for *ad hoc* determination on the case's facts under the vague rubric of "synergies."

If this is a problem (and it may not be), one finds a ready solution in Hamermesh and Wachter's articulation of a shareholder's GCV entitlement. Recall that, in H-W's conceptualization and given a qualified merger, the acquirer, having paid for control, is entitled to retain its value. It follows that the sell-side shareholder has no entitlement to any part of the merger price above GCV, also known as the merger premium. Assuming that the acquirer is rational, it would not pay this premium unless it expects to realize value ex post from control's acquisition. This added value is the merger gain. It is comprised of business plan modifications related to the combination, including costs savings, which savings include gains from agency cost reduction. In terms of the above hypothetical, the GCV accordingly equals the $100 pre-merger market price.

Following this analysis out to its logical conclusion, the favored measure of GCV in appraisal should be the pre-merger market price. The same conclusion follows from the passages in the *DFC* and *Dell* opinions that extol transactionally-based valuation measures.[360] The conclusion also follows from the semi-strong version of the efficient market hypothesis. Recent commentaries on Delaware appraisal assert this point forcefully.[361]

B. *Fact Over Law, Practice Over Theory*

The cases do not confirm the foregoing analysis, even as commentators have read them as trending in the direction of primacy for the market price.[362] Although market price is now on the menu, it does not appear to enjoy the special status of a qualifying merger price. In fact, it is not even clear that an efficient market price trumps a cogent DCF showing. Quite simply, the powerful theoretical logic behind market price as the measure of GCV has not registered in the law of appraisal.

It would be very surprising if it had. Since *Weinberger*, Delaware's fair value jurisprudence has focused on appraisal as a process of derivation and made a commitment to decision on all the facts. The process commitment consistently trumps theoretical logic.[363] For even as *Munds*,

[360] Vice Chancellor Laster noted in a letter to counsel in the Dell case. *See* Letter from J. Travis Laster, Vice Chancellor, Del. Court of Chancery, to Counsel in In re Appraisal of Dell Inc. (Jan. 3, 2018), cited in Macey & Mitts, *supra* note 9, at 1037–38 & n.96.

[361] *See* William J. Carney & Keith Sharfman, *The Death of Appraisal Arbitrage: Ending Windfalls for Deal Dissenters*, 43 DEL. J. CORP. L. 61, 104–06 (2018)(asserting that pre-merger market price should be hard-wired into the statute as the measure of fair value); Macey & Mitts, *supra* note 9, at 1032–38, 1047–48 (asserting that market price should usually take precedence over merger price and that even prices of trading markets not qualifying as semi-strong efficient should be considered as relevant factors); *see generally* Charles Korsmo & Minor Myers, *What Do Stockholders Own: the Rise of the Trading Price Paradigm in Corporate Law*, 47 J. CORP. L. 389, 433 (2022).

[362] *See* Macey & Mitts, *supra* note 9, at 1035 ("While the Delaware Supreme Court did not utilize actual pre-bid market prices in determining the fair value of Aruba stock, the opinion left open the possibility that our preferred approach, the utilization of market prices, might be used in the future."). *But cf.* Carney & Scharfman, *supra* note 361, at 85–86 (commending the powerful logic of Vice-Chancellor Laster's Aruba decision but expressing doubt regarding the result on appeal).

[363] For pointed criticism of this phenomenon, see Campbell, *supra* note 128, at 44–45; Carney & Scharfman, *supra* note 361, at 106 (suggesting hard-wired reforms and noting that

Battye, *Kirby Lumber* do bequeath a conceptual framework, the Delaware Courts avoid making reference to the framework as a constraining source of law when deciding actual cases. The framework instead amounts to a gesture in the direction of GCV, a gesture of indeterminate force. This process approach has the great advantage of leaving open room to maneuver on the facts of a case, even as it prompts criticism from academic observers.

The recent cases emphatically confirm the process commitment. When theoretical logic rears its head to signal constraints on Chancery Court discretion, the signal is ignored. The notable exception is Vice Chancellor Laster's *Aruba* opinion, which follows the logic of H-W's picture of merger economics and shareholder entitlements[364] when it attempts to require affirmative evidence of agency cost reduction as a condition to merger qualification. The idea is to take GCV seriously: the merger price makes sense as a measure of GCV only to the extent that no merger gain is included in the award. It follows that a Court qualifying a merger price as a proxy for GCV must consider more than the process that brought about the merger. It also should unpack the price itself to assure against contamination by elements of value as to which the petitioner had no entitlement. Given this logic, it made perfect sense for Vice Chancellor Laster to put the burden of proof on the merger's proponent to show that all necessary deductions had been made.

When the Supreme Court reversed in *Aruba*, it rejected this theoretical logic in addition to the market price result. One should follow its reasoning with care, though. The Court did not reject the proposition that agency costs have a place in deductible synergies.[365] It instead rejected the proposition that synergies showings (whether of agency costs or anything else) play a frontline role in merger qualification.[366] The Court went on to decide the case on a minimalist ground, citing the *absence* of supporting evidence on agency costs.[367] But there was more there than met

while "courts could implement the reforms we suggest under existing statutory law . . . . [L]egislative codification of this approach is certainly welcome, because codification would make it more difficult for courts to resist this approach and substitute their own discretionary valuations for the pre-deal market prices.")

[364] *See supra* text accompanying notes 66–74.

[365] *See Aruba*, 210 A.3d, at 142.

[366] *See id.*

[367] *Id.*:

> As Verition points out, this aspect of the decision is not grounded in the record. Judging by the law review articles cited by the Court of Chancery, the theory underlying the court's decision appears to be that the acquisition would reduce agency costs essentially because the resulting consolidation of ownership and control would align the interests of Aruba's managers and its public stockholders. In other words, the theory goes, replacing a dispersed group of owners with a concentrated group of owners

the eye: the ruling quietly ushers in a presumption in favor of the unmodified merger price as GCV.

The *Jarden* appraisal provides another excellent example of theory-avoidance in the law of fair value. Recall that *Jarden* is the one case in which pre-merger market price determined GCV.[368] An interesting doctrinal question came up on the way to this bottom line: whether the market price should be grossed up to make up for the implicit minority discount. The theoretical way to answer the question in the negative would be to hold that the IMD gross up in earlier CCA cases had been a conceptual mistake and that the fulsome praise of efficient market prices as measures of GCV in the *DFC* and *Dell* opinions more than adequately confirms the point. The theoretical way to answer that question in the affirmative would be to reconfirm the IMD cases and the proposition that the corporation and its shareholders have a property right in the value of control. The Chancery Court opinion in *Jarden* finessed the theoretical question by reference to a lack of evidence respecting a minority discount,[369] answering in the negative without creating a binding precedent or adding anything to the conceptual framework.

But why should evidence have been needed? IMD gross ups proceeded on the assumption that the discount was embedded in the ownership structure of a company with dispersed shareholders. No more particular evidentiary showing was needed. But then going ahead with an IMD adjustment today would present theoretical difficulties that were not on the radar screen the last time a Delaware Court did so back in 2005.[370] H-W have repeatedly made it clear that admitting IMD in appraisal implies acceptance of the principle that the corporation and its shareholders have property rights in the inchoate value of control.[371] One doubts that today's Delaware Supreme Court would be willing squarely to affirm such a

> can be expected to add value because the new owners are more capable of making sure management isn't shirking or diverting the company's profits, and that added value must be excluded under § 262 as "arising from the accomplishment or expectation of the merger or consolidation." However, unlike a private equity deal, the merger at issue in this case would not replace Aruba's public stockholders with a concentrated group of owners; rather, it would swap out one set of public stockholders for another: HP's.

[368] *See* discussion *supra* Section IV.C.

[369] *In re* Appraisal of Jarden Corp., No. 12456, 2019 WL 3244085, at *31 (Del. Ch. July 19, 2019). The expert for the respondent, Glenn Hubbard, eased the way to this result by fusing together the notion of minority discount with the point that the market price will reflect a discount for management agency costs, id., which is the economically correct way to think about this. *Cf.* Kraakman, *supra* note 58, at 897–98 (describing discount theories of merger pricing).

[370] Andaloro v. PFPC Worldwide, Inc., Nos. Civ. A. 20336, 20289, 2005 WL 2045640, at *18 (Del. Ch. Aug. 19, 2005).

[371] *See supra* text accompanying notes 66–74, 212–214 (making a case against a corporate property right and rejecting discount theories of merger pricing).

principle. But one simultaneously wonders whether the Court would be willing squarely to reject such a principle. The safest prediction is that any invitation explicitly to embed either the positive or negative assertion into fair value's conceptual framework likely will be rejected or ignored in favor of a decision on the facts of the case.

Meanwhile, reference to one last bit of caselaw shows that it would be precipitous to declare IMD adjustments dead. In 2018 decision of *In re Appraisal of Solera Holdings, Inc.*,[372] Chancellor Bouchard confronted a post-trial pitch for market price, mounted by the respondent in the wake of the appearance of Vice Chancellor Laster's *Aruba* opinion.[373] Chancellor Bouchard deflected the showing, citing various factors including IMD caselaw: "[A] number of this court's appraisal decisions, one of which was affirmed in relevant part on appeal, suggest that the value of control is properly part of the going concern and not an element of value that must be excised under Section 262(h)."[374] So far as the Chancellor was concerned, then, the IMD remained on the books.

Summarizing, the courts keep appraisal's conceptual framework spare to leave open elbow room to do justice when the reliability determination is made on the facts of the case. Since *Weinberger*, the reliability determination has been the place where the balance between methodological integrity and fairness is set. This remains the case in part. The part as to which it does not remain the case is the qualifying merger. There is a cogent reason for this. Section 262, in the view of many, is overinclusive because it opens the door for appraisal in arm's length cash mergers of public companies[375] even as it closes the door for arm's length stock-for-stock mergers of public companies. The easy solution to this problem, amending the statute to extend the market out to all public companies would make the section 262 underinclusive because it would exclude appraisal for poorly conducted or conflicted mergers. *DFC*, *Dell* and *Aruba* amend the statute *sub silentio*, excluding arm's length mergers, but only those that pass a rigorous inspection. This is a reasonable development.

[372] No. 12080-CB, 2018 WL 3625644 (Del. Ch. July 30, 2018).
[373] *Id.* at *32–*33.
[374] *Id.* at *33.
[375] *See* Glasscock, *supra* note 247.

C. *Explaining the Pattern*

We have seen that *DFC*, *Dell* and *Aruba* had the effect of tamping down appraisal arbitrage.[376] Working back from the effect, it is fair to ascribe docket management a leading causal role. Just as *Weinberger* reinvented the methodological menu as an incident of a broader campaign to import credibility to Delaware lawmaking on the national stage by removing embedded barriers to challengers,[377] so do *DFC*, *Dell* and *Aruba* modify the *Weinberger* inheritance to serve the converse function erecting new barriers to challengers in response to a litigation surge and a resulting policy problem. No contradiction should be perceived. The Delaware Courts are doing the same thing in *DFC*, *Dell*, and *Aruba* that they did in *Weinberger*: acting with a view to the sustenance and advancement of their state's position as the leading corporate law jurisdiction.

What else, if anything, is going on?

1. Certainty.

Perhaps we can infer a purpose to make deal-making and litigation more certain and thereby to reduce costs and risks, creating value. Two means to the end can be cited. First, it is now less likely that a merger will be challenged. Second, the preference for transactionally grounded methodologies imports certainty by simplifying the factual inquiry and shutting down the excesses of paid experts.

The first point is solid.[378] The second is not. Merger prices and market prices are indeed easily verified. The accompanying qualification questions, however, are fact intensive. Merger qualification is a quasi-*Revlon* inquiry into all aspects of the process surrounding the deal.[379] Once qualification is confirmed, attention may turn to synergies, which are no less slippery than the inputs in a DCF analysis. Market price qualification presupposes a series of statistical showings from an expert that confirm the trading market's quality.[380] There are ancillary questions beyond that, especially one concerning undisclosed material information. In all, the menu expansion may make appraisal litigation a bit less uncertain, but

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[376] *See* discussion *supra* Section IV.B.2.

[377] *See supra* text accompanying note 152.

[378] But it is not at all clear that the resulting certainty enhancement creates value, for there remains a cost trade-off in decreased policing.

[379] For a summary of the qualification factors, see BCIM Strategic Value Master Fund, L.P. v. HFF, Inc., No. 201-0558, 2022 WL 304840, at *17–*24 (Del. Ch. Feb. 2, 2022).

[380] *See Jarden*, 2019 WL 3244085, at *26–*31.

only because it also makes merger price a more likely outcome. In all other respects it imports additional complications and variability.[381]

2. Policing, Fairness, and Standards of Review.

Arbitrage brought appraisal to the front lines of merger policing. Where before the arbs' appearance fiduciary law performed the policing function more or less alone by facilitating review of defective and conflicted processes, now appraisal worked in tandem, zeroing in on the bottom line and reviewing for defective pricing without explicit reference to the fairness rubric. *DFC*, *Dell*, and *Aruba* put an abrupt stop to this, returning policing to the pre-arbitrage status quo in which appraisal proceedings had such a high level of difficulty as to provide only the weak policing assist. Indeed, it may be that the subordination of DCF, CCA, and CTA to merger price makes the appraisal assist even weaker than in the *Weinberger* era. *DFC* and *Dell* also put a collar on fairness as a background motivator of discretionary choices in the Chancery Court when they ruled that a qualifying merger does not need the support of evidence of a pursuit of top dollar. This reverses the tilt in the direction of fairness effected in *Weinberger*.

It would be a mistake, however, to infer that the Delaware courts are engineering a wholesale withdrawal from shareholder protection.[382] *DFC*, *Dell* and *Aruba* should be read together with contemporary developments in Delaware fiduciary caselaw which retreat from direct fairness review of suspicious transactions. We will cite three examples. First, the comes duty of loyalty as applied to conflicted transactions. Delaware has conceded that approval of a self-dealing transaction by independent and disinterested directors results in business judgment review.[383] Second comes majority-minority fiduciary duty as applied to conflicted mergers. Previously, given a conflicted cashout merger, fairness review always was available, but either of delegation to an independent committee or majority-of-the-minority shareholder ratification earned a burden shift on the fairness question from the

[381] This inquiry can be reversed to pose a public choice explanation. To wit, the menu expansion adds complications and makes appraisal litigation more expansive, thereby generating more work for the Delaware bar. This is utterly unconvincing. When the Delaware courts narrow the pleading and proof space of the plaintiff's bar, so to materially reduce the number of complaints, they are not shaping the law so as to generate business for the local bar.

[382] For contrasting commentary, see Korsmo & Meyers, *supra* note 361; Charles R. Korsmo, *Delaware's Retreat from Judicial Scrutiny of Mergers,* 10 U.C. IRVINE L. REV. 55 (2019).

[383] *See generally* Benihana of Tokyo, Inc. v. Benihana, Inc., 891 A.2d 150 (Del. Ch. 2005).

defendant to the plaintiff.[384] Now, under *Kahn v. M&F Worldwide Corp.*,[385] an appropriately structured decisional delegation to an independent committee combined with majority-of-the minority shareholder ratification can lead to business judgment review of a transaction between a controlling shareholder and the company.[386] Third comes *Revlon's* regime of reasonableness review of sell-side merger decisions.[387] *Revlon* originally was seen as an arm of the duty of loyalty but became disaggregated between duty of care fact patterns and conflict of interest fact patterns with the result that duty of care opt outs in corporate charters could block *Revlon* actions for damages.[388] Most recently, in *Corwin v. KKR Financial Holdings LLC*,[389] the Delaware Supreme Court ruled that, given a loyalty-based, post-closing action for *Revlon* damages, business judgment is the appropriate standard of review given approval of the merger by a fully informed, uncoerced majority of the disinterested stockholders. This means as a practical matter that *Revlon* is no longer about damages and that its zone of operation is largely restricted to suits for pre-closing equitable relief. Each of these developments, considered in their respective spheres, were as disruptively restrictive as were *DFC*, *Dell*, and *Aruba* in appraisal.

The pull backs reflect a judgment about the self-protective capabilities of dispersed shareholders. In the classical corporate governance picture, directors, even independent directors, are incapable of standing up to management and shareholders are incapable of using their franchise to self-protect against a bad deal.[390] But the classical picture no longer is accurate. Today, in the wake of hedge fund activism and increased awareness and discrimination on the part of other institutional investors, the franchise is a potent weapon against both bad managers and bad deals.[391] The Delaware courts recognize these changes. There follow conforming adjustments to the enforcement superstructure.

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384 *See generally* Kahn v. Lynch Communications Systems, Inc., 638 A.2d 1110 (Del. 1994).

385 88 A.3d 635 (Del. 2014).

386 *Id.* at 653, confirming that the business judgment standard of review applies to a parent-subsidiary merger that cashes out minority shareholders where the merger has been conditioned upon the approval of both an independent and adequately-empowered special committee of directors and an uncoerced and informed vote of a majority of the minority stockholders.

387 Revlon v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 181 (Del. 1986).

388 *See* Malpiede v. Townson, 780 A.2d 1075, 1083–85, 1089 (Del. 2001).

389 125 A.3d 304 (Del. 2015).

390 See William W. Bratton, *Reconsidering the Evolutionary Erosion Account of Corporate Fiduciary Law*, 76 BUS. LAW. 1157, 1208–10 (2021).

391 William W. Bratton & Simone Sepe, *Corporate Law and The Myth of Efficient Market Control*, 105 CORNELL L. REV. 675, 728–37 (2020).

Significantly, the pull back in fiduciary review is not absolute. Inquiry into the determinative questions--director independence, shareholder noncoercion, and full disclosure--occasions searching review of all the transactional facts. Policing goes on. seen from a litigator's perspective, the new conditions to fiduciary scrutiny serve a common purpose—they make it harder to compose a complaint that automatically survives motion to dismiss. It does not follow that judicial review is unavailable. It just comes at the transaction from a different angle. The threshold questions come up in connection with a process inquiry into board independence rather than in connection with a substantive inquiry into transactional fairness. The transactional facts still get put on the table. Once there for inspection they can influence the process inquiry—the critical independence standard is not only open-ended but is being applied with increasing strictness.[392] More broadly, the Delaware courts are developing a standards-based fiduciary jurisprudence in spare process terms, eschewing review for "fairness" in favor of consideration of "disinterest," "independence," "full disclosure," and "noncoercion." The process review, always available, assures that all management conduct is potentially vulnerable to scrutiny.[393]

Appraisal runs on a parallel line. The path to a shot at a high DCF valuation is no longer open as of right, as has happened to the path to fairness scrutiny. But the block depends on the merger's qualifying status and arm's length mergers do not qualify automatically. If in the future *DFC*, *Dell*, and *Aruba* trigger disquiet due to fairness concerns an exit door remains open to the reviewing court. A disquieting merger can be found not to qualify, and disqualification opens the path to DCF valuation, as has indeed happened in the wake of *DFC*, *Dell* and *Aruba*.[394]

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[392] The classic, much criticized case Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 833 A.2d 961, 980 (Del. Ch. 2003), held that a close long-term friendship and independence were compatible. The recent case of Sandys v. Pincus, 152 A.2d 124, 129 (Del. 2016), finds that co-ownership of a private plane is incompatible with independence.

[393] Recent Delaware opinions routinely reference Berle's "twice testing" rubric. This is by way of saying that there are no completely safe harbors navigable by adherence to form. *See, e.g., In re* Investors Bancorp, Inc. Stockholder Litigation, 177 A.3d 1208, 1222 (Del. 2017); Brown v. Kellar, C.A. No. 2018-0687-MTZ, 2018 WL 6721263 at *7 n.52 (Del. Ch. Dec. 21, 2018); *see also* Brian R. Cheffins, *Delaware and the Transformation of Corporate Governance*, 40 DEL. J. CORP. L. 1, 29 (2015)("[L]egal doctrine and case law precedent likely do less to tie the hands of the Delaware judiciary dealing with corporate oriented litigation than is the judicial norm. Given that corporate law cases brought in Delaware are often characterized by a high degree of fact specificity and given that many such cases will be governed by broadly cast fiduciary duty principles, Delaware judges often have as a practical matter substantial scope to be innovative.")

[394] *See supra* note 341 and accompanying text.

D. *The Role of Financial Economics*

Weinberger came forth as a triumph of financial economics over ossified legal doctrine. Academic commentators have been complaining ever since that the caselaw fails to follow through and use financial economics as a channel that restricts shareholder entitlements.[395] Some thought that *DFC* and *Dell* heralded a correction of the pattern—Macey and Mitts, for example, read the opinions to endorse market price as the best measure of GCV.[396] Their reading is not unreasonable. But, with the benefit of hindsight, there does not seem to have been such an endorsement. The opinions' paragraphs extolling the virtues of markets were advocacy writing in aid of a result, nothing more. The Delaware courts continue to keep appraisal's conceptual framework as minimal and free of theory, including financial economic theory, as possible.[397]

There is an irony here. Appraisal cases, after all, are suffused with financial economics. But the economics has its impact in on the ground, at the fact-to-law stage, in expert presentations on DCF, CCA, CTA, synergy deductions, and trading market qualification. Its influence at the conceptual level is minimal. Institutional concerns stand behind this relegation. The Delaware courts mediate the interests of multiple constituents—some local, some national, some in the law, some in business and finance—even as they work to protect and enhance their own position on the local and national stage and do justice in the case. This mediation process is dynamic. There is no way to tell what problem is going to crop up tomorrow. A spare conceptual framework keeps options open, and in the politically sensitive area of merger litigation, optionality has tremendous value.

Financial economics, moreover, is not monolithic. The closer one looks the more variegated the financial economic landscape becomes. As the territory becomes more complex, the teaching becomes

[395] *See* Campbell, Jr., *supra* note 128, at 44–45 (arguing that court's should constrain the menu by reference to financial economics, privileging DCF); *H-W 2*, *supra* note 56, at 36–38 (arguing that financial economics determines that control value belongs to the controller); Macey & Mitts, *supra* note 9, at 1017–18 (arguing that financial economics teaches that market price is the best measure of GCV); Carney & Scharfman, *supra* note 361, at 104–06 (arguing that financial economics teaches that pre-merger market price should be hard-wired into the statute as the measure of fair value). But see Charles Korsmo & Minor Myers*, The Flawed Corporate Finance of Dell and DFC Global*, 68 EMORY L.J. 221, 226–27(arguing that the Delaware courts are misreading financial economics in order to restrict shareholders' rights).

[396] Macey & Mitts, *supra* note 9, 1032–38.

[397] Vice Chancellor Laster's opinion in *Aruba* is the one exception. *See* Verition Partners Master Fund Ltd. v. Aruba Networks, Inc. No. 11448-VCL, 2018 WL 922139, at *1, *23 (Del. Ch. Feb. 15, 2018).

indeterminate.[398] Just as the *DFC* and *Dell* opinions can be read to bring a healthy financial economic perspective to bear on fair value, so can they be criticized for failing to follow more particular instructions yielded by research in the field.[399] Generalizing, while the law of fair value must of necessity be well-informed by financial economics, it cannot be determined by it.

VI. CONCLUSION

Back in 1934, the Delaware Chancery Court established a conceptual framework for the statutory appraisal remedy when it ruled that a dissenter was entitled to a pro rata share of the corporation's going concern value.[400] In the ensuing 89 years, only one point of consequence has been added to that pronouncement—*Cavalier Oil's* distinction between corporate and shareholder level discounts. The law that further articulates the dissenter's fair value entitlement is generated when going concern value is ascertained on the facts of a case and has a more practical than theoretical character. Delaware appraisal is close to being a pure process jurisprudence, endlessly addressing the problem of how to go about realizing on an underspecified entitlement while avoiding substantive contact with the entitlement itself. It amounts to a legal valuation practice, a practice that has had a volatile evolution as the Courts, driven by institutional concerns, have lurched back and forth between constraining notions of methodological integrity and worries about fairness to shareholders.

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[398] *Cf. H-W 1*, *supra* note 51, at 25 ("The finance theory, however, is highly stylized and dependent on a host of assumptions that are rarely met, and the theory is in fact weakest in those areas where appraisal is available.").

[399] Korsmo & Myers, *supra* note 395, at 226–27.

[400] Chicago Corp. v. Munds, 20 Del.Ch. 142, 172. A. 452 (Del. Ch. 1934).