IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELL, INC.,	§	
	§	
Respondent-Below,	§	
Appellant/Cross-Appellee,	§	No. 565, 2016
	§	
v.	§	Court Below:
	§	
MAGNETAR GLOBAL EVENT DRIVEN	§	Court of Chancery
MASTER FUND LTD; MAGNETAR	§	of the State of Delaware
CAPITAL MASTER FUND LTD;	§	
GLOBAL CONTINUUM FUND, LTD;	§	Consolidated C.A. No. 9322-VCL
SPECTRUM OPPORTUNITIES MASTER	§	
FUND LTD.; MORGAN STANLEY	§	
DEFINED CONTRIBUTION MASTER	§	
TRUST; BLACKWELL PARTNERS LLC;	§	
AAMAF, LP; WAKEFIELD PARTNERS,	§	
LP; CSS, LLC; MERLIN PARTNERS, LP;	§	
WILLIAM L. MARTIN; TERENCE	§	
LALLY; ARTHUR H. BURNET;	§	
DARSHANAND KHUSIAL; DONNA H.	§	
LINDSEY; DOUGLAS J. JOSEPH ROTH	§	
CONTRIBUTORY IRA; DOUGLAS J.	§	
JOSEPH & THUY JOSEPH, JOINT	§	
TENANTS; GEOFFREY STERN; JAMES	§	
C. ARAMAYO; THOMAS RUEGG;	§	
CAVAN PARTNERS LP; and RENE A.	§	
BAKER,	§	
	§	
Petitioners-Below,	§	
Appellees/Cross-Appellants.	§	

Submitted: September 27, 2017
Decided: December 14, 2017

Before **STRINE**, Chief Justice; **VALIHURA**, **VAUGHN**, and **TRAYNOR**, Justices; and **LeGROW**, Judge * constituting the Court *en Banc*.

Upon appeal from the Court of Chancery. **REVERSED** in part, **AFFIRMED** in part, and **REMANDED**.

VALIHURA, Justice:

* Sitting by designation pursuant to Del. Const. art. IV § 12.

I.

A. Dell

In June 2012, Dell was a mature company on the brink of crisis: its stock price had dropped from $18 per share to around $12 per share in just the first half of the year. The advent of new technologies such as tablet computers crippled the traditional PC-maker's outlook. The Company's recent transformation struggled to generate investor optimism about its long-term prospects. And the global economy was still hungover from the financial crisis of 2008.

Other than a brief hiatus from 2004 to his return in 2007, Michael Dell had led Dell as CEO, from the Company's founding in his first-year dorm room at the University of Texas at Austin when he was just nineteen years old, to a Fortune 500 behemoth with global revenues hitting $56.9 billion in the fiscal year ending February 1, 2013. Dell was indisputably one of the world's largest IT companies.

i. Michael Dell's Return and the Company's Challenges

Upon his return to the Company in 2007, Mr. Dell[6] perceived three key challenges facing Dell. First, low-margin PC-makers such as Lenovo were muscling into Dell's market share as the performance gap between its higher-end computers and the cheaper alternatives narrowed. Second, starting with the launch of Apple's iPhone in 2007, the impending onslaught of smartphones and tablet computers appeared likely to erode traditional PC sales. Third, cloud-based storage from the likes of Amazon.com threatened the Company's traditional server storage business.

In light of these threats, Mr. Dell believed that, to survive and thrive, the Company should focus on enterprise software and services, which could be accomplished through acquisitions in these spaces. From 2010 through 2012, the Company acquired eleven companies for approximately $14 billion. And Mr. Dell tried to sell the market on this transformation. He regularly shared with equity analysts his view that the Company's

[6] As the Court of Chancery did in its opinion, we use the honorific "Mr. Dell" to distinguish Michael Dell from Dell, the company.

enterprise solutions and services divisions would achieve annual sales growth in the double-digits and account for more than half of Dell's profits by 2016.

Yet despite Dell's M&A spurt and Mr. Dell's attempts to persuade Wall Street to buy into the Company's future, the market still "didn't get" Dell, as Mr. Dell lamented. It still viewed the Company as a PC business, and its stock hovered in the mid-teens.

ii. The Market for Dell's Stock

Dell's stock traded on the NASDAQ under the ticker symbol DELL. The Company's market capitalization of more than $20 billion ranked it in the top third of the S&P 500. Dell had a deep public float[9] and was actively traded as more than 5% of Dell's shares were traded each week.

It was also widely covered by equity analysts, and its share price quickly reflected the

[9] As of August 3, 2012, Dell approximated the aggregate market value of its common stock held by non-affiliates to be $17.1 billion. The public float was 84.29% in 2012. . At the time of the transaction, Dell had 1,765,369,276 publicly traded shares outstanding.

market's view on breaking developments. Based on these metrics, the record suggests the market for Dell stock was semi-strong efficient, meaning that the market's digestion and assessment of all publicly available information concerning Dell was quickly impounded into the Company's stock price. For example, on January 14, 2013, Dell's stock jumped 9.8% within a minute of Bloomberg breaking the news of the Company's take-private talks, and the stock closed up 13% from the day prior—on a day the S&P 500 as a whole fell 0.1%.

B. The Sale Process

The first inkling of a Dell MBO can be traced to June 2012, when private equity executive Staley Cates of Southeastern Asset Management suggested to Mr. Dell that he might consider taking the Company private. Mr. Dell was intrigued as he believed it would be easier to execute the Company's transformation plan unencumbered by stockholder pressure. However, the Company's financial advisor, Goldman Sachs, warned that an MBO would be too difficult to pull off. But after Silver Lake's Egon Durban also proposed the idea of an MBO that August, Mr. Dell enlisted the advice of friend and private equity executive George Roberts of Kohlberg Kravis Roberts & Co. L.P. ("KKR"). This time, he received positive feedback, including an indication that KKR might be interested in participating should the Company go that route. Mr. Dell then brought the idea to Dell's Board by calling the Company's lead independent director, Alex Mandl, on Friday, August 14, 2012.

The following Monday, the Board met and created an independent special committee composed of four independent directors (the "Committee") to evaluate possible transactions to acquire the Company proposed by Mr. Dell and/or any other party, as well as to explore possible strategic alternatives. The Board empowered the Committee to hire its own legal and financial advisors, and the Committee selected Debevoise & Plimpton LLP as legal counsel and JP Morgan Chase & Co. as financial advisor. (The Committee eventually hired Evercore Partners as a second financial advisor in January 2013.) The Committee also had full and exclusive authority to recommend to the Board a course of action regarding any proposed transaction, and the Board vowed not to recommend that stockholders approve a transaction without receiving a prior favorable recommendation from the Committee.

Dell's earnings for the second quarter of Fiscal 2013, announced the following day, August 21, 2012, underscored the Company's challenges: revenue was down 8% from the prior year, and earnings per share dropped 13%. The Company's revenue fell short of expectations, and its management further revised its EPS forecast down 20% for Fiscal 2013. Dell management said that the Company was amid a "long-term strategy" expected to "take time" to reap benefits. But one analyst called the Company a "sinking ship" and emphasized that "Dell's turnaround strategy is fundamentally flawed [and] the fundamentals are bad. Dell may have responded too late to save itself." Many analysts also revised their price targets downward.

i. The Pre-Signing Canvass

The following month, September, after entering into confidentiality agreements with the Committee, Silver Lake and KKR began evaluating Dell's proprietary data

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Mr. Dell, who owned 13.9% of the Company's outstanding shares as of August 2012 and 15.4% as of September 2012, also entered into a confidentiality agreement. Mr. Dell's confidentiality agreement required him to, among other things, "explore in good faith the possibility of working with any such potential counterparty or financing source if requested by the Committee," a provision designed to prevent his prior involvement with KKR and Silver Lake from deterring other possible bidders.

By December 3, 2012, KKR withdrew its proposal as it was unable to "get [its] arms around the risks of the PC business."

For its part, Silver Lake remained interested in a deal through it all. Over the course of negotiations, the Committee persuaded Silver Lake to raise its offer six times from its initial proposal of $11.22-to-$12.16 per share. It helped that, after the Board resolved to seek $13.75 per share and settle for no less than $13.60 per share, Mr. Dell agreed to accept a lower price to roll over his shares than unaffiliated stockholders were to receive.

The Committee met with its financial advisors on the afternoon of February 4: both Evercore and JPMorgan indicated that they considered $13.65 per share fair to the unaffiliated stockholders from a financial point of view. The Committee recommended that the Board accept Silver Lake's offer, and, aside from Mr. Dell, who was not present, the Board unanimously adopted resolutions approving the transaction. The next morning, February 5, 2013, the Company and three entities affiliated with Silver Lake and Mr. Dell (collectively the "Buyout Group") entered into the merger agreement dated February 5, 2013 (collectively with amendments, the "Merger Agreement"), and they publicly announced the planned transaction.

The Merger Agreement also provided for a forty-five-day go-shop period ending March 23, 2013; a one-time match right for the Buyout Group available until the stockholder vote; and termination fees of $180 million if the Company agreed to a Superior Proposal as defined in the Merger Agreement that materialized during the go-shop period, or $450 million if the Company agreed to a non-Superior Proposal or to bids produced after the go-shop period.

ii. The Go-Shop Period

Led by Evercore, the go-shop period began on February 5, 2013. Within ten days, Evercore had surveyed the interest of sixty parties, including Blackstone and Hewlett-Packard ("HP"), the two parties that Evercore had identified as Dell's top prospects for a deal aside from the Buyout Group.

As the Company's closest competitor, HP appeared the natural strategic partner for a deal. Though Evercore told HP that a deal with Dell could realize between $3 and 4 billion in annual cost savings through synergies and HP signed a confidentiality agreement, HP's representatives never logged into the data room.

The Company received its first non-binding proposal of the go-shop period on March 5, 2013, when Carl Icahn of Icahn Enterprises L.P. (“Icahn”) wrote a letter to the Board opposing the MBO as announced and proposing a leveraged recapitalization instead. After signing a confidentiality agreement, Icahn accessed the data room on March 11.

By the time the go-shop period ended on March 23, Evercore had contacted sixty-seven parties, including twenty potential strategic buyers and seventeen financial sponsors, about their interest in a transaction involving Dell. Evercore also received unsolicited inquiries from two strategic parties and two financial sponsors.

Mr. Dell was available to all parties throughout the go-shop period.

ii. Stockholder Vote

At the special meeting held September 12, 2013, 57% of all Dell shares approved the Merger (70% of the shares present at the meeting). The Merger closed October 29, 2013, and the shares of non-dissenting Dell stockholders were converted into $13.75 per share in cash.

D. The Appraisal Trial

The four-day appraisal trial in October 2015 featured 1,200 exhibits, seventeen depositions, live testimony from seven fact witnesses and five expert witnesses, a 542-paragraph-long pre-trial order, and 369 pages of pre- and post-trial briefing. Petitioners argued that, the fair value of the Company's common stock at the effective time of the Merger was actually $28.61 per share—more than double the deal price of $13.75. If this valuation were correct, the Buyout Group obtained Dell at a $26 billion discount to its actual value. In contrast, Dell maintained that its DCF analysis yielding a $12.68 per share valuation was a more appropriate approximation of fair value, but that, in light of the uncertainties facing the PC industry, fair value could be as high as the deal price (but not greater).

the Court of Chancery

arrived at its “fair value” determination of $17.62 per share

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Appraisals are odd. Unlike other cases, where one side loses if the other side fails to persuade the court that the evidence tilts its way,[82] appraisals require the court to determine a number representing the fair value of the shares after considering the trial presentations and submissions of parties who have starkly different objectives: petitioners contend fair value far exceeds the deal price, and the company argues that fair value is the deal price or lower. In reality, the burden "falls on the [trial] judge to determine fair value, using 'all relevant factors.'"[83]

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[82] *M.G. Bancorp.*, 737 A.2d at 520 ("In a statutory appraisal proceeding, both sides have the burden of proving their respective valuation positions by a preponderance of the evidence.").

[83] *In re Appraisal of Ancestry.com*, 2015 WL 399726, at *1 (Del. Ch. Jan. 30, 2015) (quoting 8 *Del. C.* § 262(h)); Eric L. Talley, *Finance in the Courtroom: Appraising Its Growing Pains*, Del. Lawyer, Summer 2017, at 16-17 ("[U]nlike highly trained (and highly remunerated) investment bankers — whose job requires generating a 'football field' *range* of discounted cash flow (DCF) valuations — a judge presiding over an appraisal proceeding must conjure up a *single number* at the end of the process.").

i. "What" the Court is Valuing

We have explained that the court's ultimate goal in an appraisal proceeding is to determine the "fair or intrinsic value" of each share on the closing date of the merger.[88] To reach this per-share valuation, the court should first envisage the entire pre-merger company as a "going concern," as a standalone entity, and assess its value as such.[89] "[T]he corporation must be viewed as an on-going enterprise, occupying a particular market

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[88] *Cavalier Oil*, 564 A.2d at 1142-43.

[89] *Id.* at 1144 ("The dissenting shareholder's proportionate interest is determined only after the company as an entity has been valued.").

position in the light of future prospects."[90] The valuation should reflect the "'operative reality' of the company as of the time of the merger."[91]

Because the court strives "to value the *corporation* itself, as distinguished from a specific fraction of its *shares* as they may exist in the hands of a particular shareholder," the court should not apply a minority discount when there is a controlling stockholder.[92] Further, the court should exclude "any synergies or other value expected from the merger giving rise to the appraisal proceeding itself."[93]

Then, once this total standalone value is determined, the court awards each petitioning stockholder his pro rata portion of this total—"his proportionate interest in [the] going concern"[94] plus interest.

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[90] *Shell Oil*, 607 A.2d at 1218.

[91] *M.G. Bancorp.*, 737 A.2d at 525.

[92] *Cavalier Oil*, 564 A.2d at 1144 (internal quotation marks omitted).

[93] *Global GT LP v. Golden Telecom, Inc.*, 993 A.2d 497, 507 (Del. Ch. 2010), *aff'd*, 11 A.3d 214 (Del. 2010); *DFC*, 2017 WL 3261190, at *16 (The Court should exclude "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." (quoting *Union Ill. 1995 Inv. LP v. Union Fin. Grp., Ltd*, 847 A.2d 340, 356 (Del. Ch. 2004))). As noted in *DFC*, there are policy reasons for excising the synergistic value: "the specific buyer [should] not end up losing its upside for [the] purchase by having to pay out the expected gains from its own business plans for the company it bought to the petitioners." 2017 WL 3261190, at *16. Further, "the broader excision of synergy gains could have also been thought of as a balance to the Court's decision to afford pro rata value to minority stockholders." *Id.*

[94] *Cavalier Oil*, 564 A.2d at 1144 (quoting *Tri-Continental*, 74 A.2d at 72).

ii. "How" the Court Should Approach Valuation

By instructing the court to "take into account all relevant factors" in determining fair value, the statute requires the Court of Chancery to give fair consideration to "proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court."[95] Given that "[e]very company is different; every merger is different,"[96] the appraisal endeavor is "by design, a flexible process."[97]

[95] *Weinberger v. UOP*, 457 A.2d 701, 713 (Del. 1983).

[96] *In re Petsmart*, 2017 WL 2303599, at *26 (Del. Ch. May 26, 2017).

[97] *Golden Telecom, Inc. v. Global GT LP*, 11 A.3d 214, 218 (Del. 2010).

As such, "the trial of an appraisal case under the Delaware General Corporation Law presents unique challenges to the judicial factfinder."[102] And this task is complicated by "the clash of contrary, and often antagonistic, expert opinions of value," prompting the trial court to wade through "widely divergent views reflecting partisan positions" in arriving at its determination of a single number for fair value.[103]

In the end, after this analysis of the relevant factors, "[i]n some cases, it may be that a single valuation metric is the most reliable evidence of fair value and that giving weight to another factor will do nothing but distort that best estimate. In other cases, it may be necessary to consider two or more factors."[104] Or, in still others, the court might apportion

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[102] *Petsmart*, 2017 WL 2303599, at *1 (citing *Ancestry.com*, 2015 WL 399726, at *2).

[103] *Shell Oil*, 607 A.2d at 1222.

[104] *DFC*, 2017 WL 3261190, at *31; *see also M.G. Bancorp.*, 737 A.2d at 525-26 ("[T]he Court of Chancery has the discretion to select one of the parties' valuation models as its general framework or to fashion its own."); *id.* at 526 ("[A]lthough not required to do so, it is entirely proper for the Court of Chancery to adopt any one expert's model, methodology, and mathematical calculations, *in toto*, if that valuation is supported by credible evidence and withstands a critical judicial analysis on the record.").

weight among a variety of methodologies. But, whatever route it chooses, the trial court must justify its methodology (or methodologies) according to the facts of the case and relevant, accepted financial principles.[105]

Given the human element in the appraisal inquiry—where the factfinder is asked to choose between two competing, seemingly plausible valuation perspectives, forge its own, or apportion weight among a variety of methodologies—it is possible that a factfinder, even the same factfinder, could reach different valuation conclusions on the same set of facts if presented differently at trial.[106] There may be no perfect methodology for arriving at fair value for a given set of facts, and the Court of Chancery's conclusions will be upheld

[105] The statute does not instruct the Court of Chancery to create an investment bank-like football field and use it to come to a formulaic determination of value. In many situations, certain valuation methods (e.g., comparables-based analysis) may be of no reliable utility. Our cases stress that the statute assigns the Court of Chancery the duty to consider the relevant methods of valuation argued by the parties and then determine which method (and inputs), or combination of methods, yields the most reliable determination of value. *See also DFC*, 2017 WL 3261190, at *3 ("[I]f the Court of Chancery chooses to use a weighting of different valuation methodologies to reach its fair value determination, the court must explain its weighting in a manner supported by the record before it."); *id.* at *31 ("[T]he Court of Chancery must exercise its considerable discretion while also explaining, with reference to the economic facts before it and corporate finance principles, why it is according a certain weight to a certain indicator of value.").

[106] *M.G. Bancorp.*, 737 A.2d at 526 ("The Court of Chancery's role as an independent appraiser does not necessitate a judicial determination that is completely separate and apart from the valuations performed by the parties' expert witnesses who testify at trial. It must, however, carefully consider whether the evidence supports the valuation conclusions advanced by the parties' respective experts."); *see also Petsmart*, 2017 WL 2303599, at *27 n.338 ("My analysis of the reliability of deal price as a product of the efficacy of the sales process necessarily has been shaped by the arguments of counsel and the evidence they chose to present at trial."); *Merion Capital L.P. v. Lender Processing Servs.*, 2016 WL 7324170, at *16 (Del. Ch. Dec. 16, 2016) ("An argument may carry the day in a particular case if counsel advance it skillfully and present persuasive evidence to support it. The same argument may not prevail in another case if the proponents fail to generate a similarly persuasive level of probative evidence or if the opponents respond effectively.").

if they follow logically from those facts and are grounded in relevant, accepted financial principles.[107] "To be sure, "fair value" does not equal "best value."[108]

B. The Court of Chancery's Reasons for Disregarding Deal Price Do Not Follow from the Record

In fact, the record as distilled by the trial court suggests that the deal price deserved heavy, if not dispositive, weight.

[107] *DFC*, 2017 WL 3261190, at *1 ("[T]his Court must give deference to the Court of Chancery if its determination of fair value has a reasonable basis in the record and in accepted financial principles relevant to determining the value of corporations and their stock."); *id.* at *20 ("Although the Court of Chancery has broad discretion to make findings of fact, those findings of fact have to be grounded in the record and reliable principles of corporate finance and economics.").

[108] *See id.* at *18. Rather, as framed in another context, a fair price "means a price that is one that a reasonable seller, under all of the circumstances, would regard as within a range of fair value; one that such a seller could reasonably accept." *Id.* (quoting *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1143 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995)). And "[t]he fact that a transaction price was forged in the crucible of objective market reality (as distinguished from the unavoidably subjective thought process of a valuation expert) is viewed as strong evidence that the price is fair." *Van de Walle v. Unimation, Inc.*, 1991 WL 29303, at *17 (Del. Ch. Mar. 7, 1991). *See also Applebaum v. Avaya, Inc.*, 812 A.2d 880, 889-90 (Del. 2002) (stating that "in many circumstances a property interest is best valued by the amount a buyer will pay for it" and "a well-informed, liquid trading market will provide a measure of fair value superior to any estimate the court could impose.").

i. *The Trial Court Lacked a Valid Basis for Finding a "Valuation Gap" Between Dell's Market and Fundamental Values*

The Court of Chancery presumed "investor myopia" and hangover from the Company's "nearly $14 billion investment in its transformation, which had not yet begun to generate the anticipated results" produced a "valuation gap" between Dell's fundamental and market prices. That presumption contributed to the trial court's decision to assign no weight to Dell's stock price or deal price. The trial court believed that short-sighted analysts and traders impounded an inadequate—and lowball—assessment of all publicly available information into Dell's stock price, diminishing its worth as a valuation tool. But the record shows just the opposite: analysts scrutinized Dell's long-range outlook when evaluating the Company and setting price targets, and the market was capable of accounting for Dell's recent mergers and acquisitions and their prospects in its valuation of the Company.[112]

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[112] *See, e.g.*, Jefferies (May 11, 2012), at A3282 ("With half of Dell's sales still exposed to the PC market, the continuing degradation remains a worry. Recent software acquisitions provide tailwinds but in terms of size are unlikely as a whole to be big enough to completely move the needle."); Barclays (May 14, 2012), at A3426 ("We believe the biggest issues facing the stock include secular challenges in PCs, inconsistent margins & acquisition risk."); Goldman Sachs (Sept. 27, 2012), at A3427 ("We believe that PC OEMs such as Hewlett-Packard and Dell, will

Further, the Court of Chancery's analysis ignored the efficient market hypothesis long endorsed by this Court. It teaches that the price produced by an efficient market is generally a more reliable assessment of fair value than the view of a single analyst, especially an expert witness who caters her valuation to the litigation imperatives of a well-heeled client.[113]

A market is more likely efficient, or semi-strong efficient, if it has many stockholders; no controlling stockholder; "highly active trading"; and if information about the company is widely available and easily disseminated to the market.[114] In such circumstances, a company's stock price "reflects the judgments of many stockholders about the company's future prospects, based on public filings, industry information, and research conducted by equity analysts."[115] In these circumstances, a mass of investors

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remain under significant pressure, as weak unit growth, aggressive PC pricing, and relatively firm component prices (particularly HDDs) combine to pressure both revenues and margins."); Cowen (Nov. 16, 2012), at A3427 ("Dell's PC issues are unlikely to be solved by the Windows 8 launch as the market's structure has fundamentally shifted away from the paradigm that dominated the last two decades."); Goldman Sachs (Dec. 2, 2012), at A3832 ("Dell still likely has billions more in acquisitions ahead of it if it plans on fully executing on its mission to become an enterprise solutions company.").

[113] *See DFC*, 2017 WL 3261190, at *18 (also noting that "the relationship between market valuation and fundamental valuation has been strong historically"); *id*. at *21 (describing the price produced by an efficient market as "informative of fair value"); *id.* at *21 n.144 ("In an efficient market you can trust prices, for they impound all available information about the value of each security." (quoting Richard A. Brealey et. al., *Principles of Corporate Finance* 214 (2008))). And, even if the market were not precisely efficient, petitioners' own expert has conceded that "[a] market that is not perfectly efficient may still value securities more accurately than appraisers who are forced to work with limited information and whose judgments by nature reflect their own views and biases." Bradford Cornell, *Corporate Valuation* 46 (1993).

[114] *DFC*, 2017 WL 3261190, at *21.

[115] *Id.*

quickly digests all publicly available information about a company, and in trading the company's stock, recalibrates its price to reflect the market's adjusted, consensus valuation of the company.[116]

The record before us provides no rational, factual basis for such a "valuation gap." Indeed, the trial court did not indicate that Dell lacked a vast and diffuse base of public stockholders, that information about the Company was sparse or restricted, that there was not an active trading market for Dell's shares, or that Dell had a controlling stockholder—or that the market for its stock lacked any of the hallmarks of an efficient market. In fact, the record shows that Dell had a deep public float, was covered by over thirty equity analysts in 2012, boasted 145 market makers, was actively traded with over 5% of shares changing hands each week, and lacked a controlling stockholder. As noted in the expert reports, Dell's stock price had a track record of reacting to developments

[116] *Id.* at *18 ("[C]orporate finance theory reflects a belief that if an asset—such as the value of a company as reflected in the trading value of its stock—can be subject to close examination and bidding by many humans with an incentive to estimate its future cash flows value, the resulting collective judgment as to value is likely to be highly informative and that, all estimators having equal access to information, the likelihood of outguessing the market over time and building a portfolio of stocks beating it is slight.").

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concerning the Company. For example, the stock climbed 13% on the day the Bloomberg first reported on Dell's talks of going private.

Further, the trial court expressly found no evidence that information failed to flow freely or that management purposefully tempered investors' expectations for the Company so that it could eventually take over the Company at a fire-sale price, as in situations where long-term investments actually led to such valuation gaps. In fact, Mr. Dell tried to persuade investors to envision an enterprise solutions and services business enjoying double-digit sales growth and which would more than compensate for any decline in end-user computing. And he pitched this plan for a "prolonged" period, approaching nearly three years.

ii. The Lack of Strategic Bidders Is Not a Credible Reason for Disregarding the Deal Price

The trial court's complete discounting of the deal price due to financial sponsors' focus on obtaining a desirable IRR and not "fair value" was also error. Although the trial court did not have the benefit of our opinion in *DFC*, we rejected this view there and do so again here given we see "no rational connection" between a buyer's status as a financial sponsor and the question of whether the deal price is a fair price.[132] After all, "all disciplined buyers, both strategic and financial, have internal rates of return that they expect

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> a pretty difficult time forecasting what was an uncertain and volatile business, with many, you know, changing factors, new products being introduced, all sorts of competitive forces that were hard to predict. And we were not very good at doing it.

[132] *DFC*, 2017 WL 3261190, at *22; *id.* at *2 ("To be candid, we do not understand the logic of [diminishing the weight of a sale process that involved only financial sponsors and not strategic buyers]. Any rational purchaser of a business should have a targeted rate of return that justifies the substantial risks and costs of buying a business. That is true for both strategic and financial buyers. It is, of course, natural for all buyers to consider how likely a company's cash flows are to deliver sufficient value to pay back the company's creditors and provide a return on equity that justifies the high costs and risks of an acquisition.").

in exchange for taking on the large risk of a merger, or for that matter, any sizeable investment of its capital."[133]

We found in *DFC* that the notion of a "private equity carve out" stood on especially shaky footing where other objective indicia suggested the deal price was a fair price.[134] Such objective factors in *DFC* included that "every logical buyer" was canvassed, and all but the buyer refused to pursue the company when given the opportunity; concerns about the company's long-term viability (and its long-term debt's placement on negative credit watch) prevented lenders from extending debt; and the company repeatedly underperformed its projections.[135]

Here, it is clear that Dell's sale process bore many of the same objective indicia of reliability that we found persuasive enough to diminish the resonance of any private equity carve out or similar such theory in *DFC*. For example, JPMorgan and Evercore choreographed the sale process to involve competition with Silver Lake at every stage, both pre-signing and during the go-shop.

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[133] *Id.* at *22; *see also id.* at *2 ("The 'private equity carve out' that the Court of Chancery seemed to recognize, in which the deal price resulting in a transaction won by a private equity buyer is not a reliable indication of fair value, is not one grounded in economic literature or this record.").

[134] *Id.* at *22.

[135] *Id.* at *22-23.

Moreover, JPMorgan did not initially solicit the interest of strategic bidders because its analysis suggested none was likely to make an offer. Further, given leaks that Dell was exploring strategic alternatives, record testimony suggests that Evercore presumed that any interested parties would have approached the Company before the go-shop if serious about pursuing a deal.

The Committee, composed of independent, experienced directors and armed with the power to say "no," persuaded Silver Lake to raise its bid six times. Nothing in the record suggests that increased competition would have produced a better result. JPMorgan also reasoned that any other financial sponsor would have bid in the same ballpark as Silver Lake.

Other than the Buyout Group, as mentioned, all prospective buyers who reviewed the Company's confidential information retreated for the same reasons that the public markets were purportedly undervaluing Dell—trepidation about the future of the PC industry and the prospects of Dell's long-term turnaround strategy. This consistency confirms that management did not intentionally depress the Company's stock price in order to take advantage of a "trough" that public investors failed to recognize.[147] In fact, the trial court expressly found that, "unlike other situations that this court has confronted, there is no evidence that Mr. Dell or his management team sought to create the valuation disconnect so that they could take advantage of it," and "[t]o the contrary, they tried to convince the market that the Company was worth more." Prospective buyers just did not believe the potential for a turnaround outweighed the risk of further erosion of PC sales and, accordingly, the Company's balance sheet. This coherence in views also makes it hard to

[147] *Cf. Glassman v. Unocal Expl. Corp.*, 777 A.2d 242, 248 (Del. 2001) ("[I]f the merger was timed to take advantage of a depressed market, or a low point in the company's cyclical earnings, or to precede an anticipated positive development, the appraised value may be adjusted to account for those factors.").

take seriously the notion that Dell investors were incapable of accounting for Dell's long-term strategy. And it reinforces the integrity of both Dell's stock price and deal price.[149]

Overall, the weight of evidence shows that Dell's deal price has heavy, if not overriding, probative value. The transaction process exemplifies many of the qualities that Delaware courts have found favor affording substantial, if not exclusive, weight to deal price in the fair value analysis. Even the Court of Chancery's own summary remarks suggest the deal price deserves weight as the court characterized the sale process as one that "easily would sail through if reviewed under enhanced scrutiny" and observed that "[t]he Committee and its advisors did many praiseworthy things," too numerous to catalog in its opinion, as the trial court noted.[150] Given the objective indicia of the deal price's reliability and our rejection of the notion of a private equity carve out, to the extent that the Court of Chancery chose to disregard Dell's deal price based on the presence of only private equity bidders, its reasoning is not grounded in accepted financial principles, and this assessment weighs in favor of finding an overall abuse of discretion.

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[149] *See DFC*, 2017 WL 3261190, at *20 (rejecting the argument that the market was incapable of accounting for regulatory risk and positing instead that such risk was, in fact, baked into the equity market price); *id.* at *21 ("That these other potential buyers dropped out of the sales process after receiving confidential information about DFC suggests that these parties were aware of the 'trough' DFC was in at the time and the uncertain future regulatory risk it faced, and ultimately did not think a transaction with DFC was worth pursuing. Indeed, [one of the two possible buyers who submitted a non-binding indication of interest] cited the regulatory risk facing the company as its reason for not wanting to pursue a transaction with DFC.").

[150] *Dell Trial Fair Value*, 2016 WL 3186538, at *29.

iii. Features of MBOs Which Could Theoretically Undermine the Probative Value of the Deal Price Are Not Present Here.

a. The record does not show that structural issues inhibited the effectiveness of the go-shop

The trial court determined "[t]he main structural problem that [petitioners' expert] identified did not result from the terms of the go-shop in the abstract, but rather stemmed from the size and complexity of the Company." But the "size and complexity" of Dell is not a characteristic unique to MBO go-shops, but a feature inherent to Dell. And, if size and complexity of a company were enough to render the ultimate deal price undeserving of any weight in the fair value analysis, it would deprive the deal price of any deference whenever any large and complex company is appraised.

b. The threat of a "winner's curse" does not provide a valid reason for disregarding the deal price based on this record.

The "winner's curse" describes a theory that, in outbidding incumbent management to "win" a deal, a buyer likely overpays for the company because management would presumably have paid more if the company were really worth it. Recognizing this phenomenon, prospective bidders supposedly resist outbidding incumbent management for fear they might later discover the information that prevented management from bidding even higher in the first place. But the likelihood of a winner's curse can be mitigated through a due diligence process where buyers have access to all necessary information.

the Court of Chancery found that "[t]he record provided no reason to harbor any concern about Mr. Dell's level of cooperation or responsiveness," and "all of the bidders received access to the data they requested."[160] The

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[160] *Dell Trial Fair Value*, 2016 WL 3186538, at *42.

trial court even concluded that "the Committee appears to have addressed the problem of information asymmetry and the risk of the winner's curse as best they could."[161] Yet in spite of Dell's efforts, the court concluded, the threat of a winner's curse is nonetheless "endemic to MBO go-shops" and imposes a "powerful disincentive for any competing bidder," even though Blackstone and Icahn surfaced with non-binding proposals.[162] But, aside from the theoretical, the Court of Chancery did not point to any bidder who actually shied away from exploring an acquisition out of fear of the winner's curse phenomenon.

The Court of Chancery's analysis of the winner's curse phenomenon also suggests that "[s]trategic buyers are less subject to the winner's curse because they typically possess industry-specific expertise and have asset-specific valuations that incorporate synergies."[163] Therefore, the "winner's curse" theory cannot explain the lack of strategic buyers—one of the primary faults the court found with the sale process.

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[161] *Id.* at *43.

[162] *Id.*

[163] *Id.* at *42.

[164] *Id.*

Thus, while the notion of a "winner's curse" might deter rival bids in some MBOs, the record in this case does not provide a basis for suspecting that it did so here—especially given the theory is rebutted directly in the record by two proposals from financial sponsors during the go-shop.[166] The more likely explanation for the lack of a higher bid is that the deal market was already robust and that a topping bid involved a serious risk of overpayment. If a deal price is at a level where the next upward move by a topping bidder has a material risk of being a self-destructive curse, that suggests the price is already at a level that is fair. The issue in an appraisal is not whether a negotiator has extracted the highest possible bid. Rather, the key inquiry is whether the dissenters got fair value and were not exploited.

c. Management's Inherent Value to the Company

The Court of Chancery also presumed that "Mr. Dell's value to the Company" imposed another impediment to the likelihood of rival bidders succeeding and thus dissuaded them from even trying. But, again, the Court of Chancery's own fact findings contradict and do not rationally support this conclusion.

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[166] The record also suggests that Mr. Dell believed private equity firms were just as capable of assessing Dell's prospects. After both KKR and TPG passed on continuing to pursue the Company during the pre-signing phase, Mr. Dell recalled, "I was disappointed. I was starting to think that maybe *we* were missing something."

First, the trial court supports its assessment that "the Company's relationship with Mr. Dell was an asset in itself" through event studies showing that Dell's stock dropped when he left in 2004 and jumped upon his return in 2007.[168] But it does not explain why it could trust the market's ability to assess the value of Mr. Dell's leadership but not its ability to serve as a reliable indicator of the value of Dell's stock. Further, assuming *arguendo* that market data from 2007 demonstrated Mr. Dell's value to the Company in 2007, it does not follow that such evidence showed his value six years later, in 2013, at the time of the Merger—after Dell's stock had languished for several years and investors questioned Mr. Dell's strategy for transforming the Company (another finding of the trial court). Stale event studies and a single, self-serving e-mail from Mr. Dell suggesting that a *potential* customer might not engage the Company if he were replaced do not amount to sufficient evidence of Mr. Dell's actual value. The Court of Chancery's view of this issue is also in tension with its myopia theory. If Mr. Dell was as valued by market players and as trusted by the stock market as this aspect of the Court of Chancery's decision implies, then the decision's failure to give any weight to the stock market's reaction to Mr. Dell's lengthy efforts to convince it of the bright future that the transformation plan augured for Dell stockholders is difficult to understand.

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168 (citing event studies showing the Company lost $1.2 billion in market value upon Mr. Dell's departure from the Company in March 2004 and gained $2.5 billion in market value upon his return in January 2007).

And, even if one could accept the trial court's view that Mr. Dell's service as CEO added per-share value to the Company's stock, the record does not suggest that he would have stopped serving the Company if Blackstone, TPG, or another reputable buyer had prevailed. He was contractually obligated to explore "any such potential counterparty or financing source if requested by the Committee," though he had "discretion" as to whether to continue after such exploration.[173] Significantly, based on Mr. Dell's good faith during the go-shop and "credibl[e]" testimony at trial, the Court of Chancery concluded that "the record indicated that Mr. Dell actually was willing to work with other buyout groups."

Thus, it is difficult to discern how "Mr. Dell's unique value and his affiliation with the Buyout Group were negative factors that inhibited the effectiveness of the go-shop process." The Court of Chancery even acknowledged that "[e]xceptional bidders like

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173 Given Mr. Dell's testimony and actions, the Court of Chancery suggested, "[i]n a different case in which a key employee was less forthcoming, a comparable commitment might not be as persuasive."

Blackstone and Icahn could overcome" such barriers, and the court did not identify any possible bidders that were actually deterred because of Mr. Dell's status.

C. Market Data Conclusion

The actual facts concerning Dell's market values—the particularities of its stock market and the sale process—demonstrate that the Court of Chancery's reasons for assigning no weight to the market values are flawed. The apparent efficiency of Dell's pre-signing stock market and the long-term approach of its analysts undermine concerns of a "valuation gap." Competition limited to private equity bidders does not foreclose the sale price reflecting fair value, especially where the special committee instituted and oversaw a robust post-signing go-shop process. And, though the Court of Chancery's theories about MBOs might hold up as applied to other facts, they are not supported by the facts here. This was a case where the supposed prerequisite elements for problematic MBOs did not exist: rival bidders faced minimal structural barriers to a deal; extensive due diligence and cooperation from the Company helped address any information asymmetries that might otherwise imply the possibility of a winner's curse; and, assuming his value, Mr. Dell would have participated with rival bidders.

Taken as a whole, the market-based indicators of value—both Dell's stock price and deal price—have substantial probative value. But here, after examining the sale process, the Court of Chancery summarized that, "[t]aken as a whole, the Company did not establish that the outcome of the sale process offers the *most reliable* evidence of the Company's value as a going concern." These two statements are not incongruous, and the Court of Chancery's statement is not a rational reason for assigning no weight to market data. There is no requirement that a company prove that the sale process is the *most reliable* evidence of its going concern value in order for the resulting deal price to be granted any weight. If, as here, the reasoning behind the decision to assign no weight to market data is flawed, then the ultimate conclusion necessarily crumbles as well—especially in light of the less-than-surefire DCF analyses—as demonstrated below.

In so holding, we are not saying that the market is always the best indicator of value, or that it should always be granted some weight. We only note that, when the evidence of market efficiency, fair play, low barriers to entry, outreach to all logical buyers, and the chance for any topping bidder to have the support of Mr. Dell's own votes is so compelling, then failure to give the resulting price heavy weight because the trial judge believes there was mispricing missed by all the Dell stockholders, analysts, and potential buyers abuses even the wide discretion afforded the Court of Chancery in these difficult cases. And, of course, to give no weight to the prices resulting from the actions of Dell's stockholders and potential buyers presupposes that there is a more plausible basis for determining Dell's value in the form of expert testimony, such as from the petitioners' expert, who argued that his DCF analysis showed the fair value of Dell's stock is $28.61 per share —almost three times higher than the unaffected stock price of $9.97 per share and more than two times higher than the deal price of $13.75 per share.