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Deal Price v. Appraised Value: A Bird in the Hand...or Diminishing Appraisal Rights in Delaware

Client Advisories

Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

July 27, 2020 - In the latest in a series of rulings regarding stockholder appraisal rights, the Delaware Supreme Court (the "Court") has further clarified the applicable principles when determining the fair value of shares. In its most recent decision, *Fir Tree Value Master Fund, LP v. Jarden Corp.*, No. 454-2019, 2020 WL 3885166 (Del. July 9, 2020), the Court affirmed a decision of the Delaware Court of Chancery pursuant to which the value of each share of Jarden Corporation (the "Company"), as of the closing of its merger with Newell Brands in 2016, was determined to be the unaffected market price (i.e., the price before news of a potential transaction was known in the marketplace) of $48.31.

Notably, the appraised valuation was not only less than the $71.35 per share claimed by certain former stockholders of the Company (the "Petitioners") but it is also less than the deal price of $59.21 per share. The Petitioners had maintained that the deal price should constitute a "floor" for fair value because a better sale process would have resulted in a higher deal price. Nevertheless, even though the Court of Chancery accepted that the sale process in the merger, led by the Company's CEO, was flawed, it still appraised the shares at a lower price than the one established in the deal. As the Court explained, such a result is possible in part because, per Delaware's appraisal rights statute, 8 Del. C. § 262(h), synergies expected to result from a merger may not be taken into account (as they often would be in pricing a deal) when appraising the value of shares.

The Petitioners had contended that the Court's ruling in *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128 (Del. 2019), reversing a decision of the Court of Chancery which had relied on the trading price in determining the fair value of Aruba Networks, Inc.'s shares, foreclosed the use of unaffected market price as evidence of fair value. The Court in *Fir Tree Value* rejected this argument and upheld the conclusion drawn by the Court of Chancery in this case from recent Court decisions such as *Verition, DFC Global Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346 (Del. 2017), and *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd*, 177 A.3d 1 (Del. 2017). Namely: when valuing shares, "all relevant factors" (excluding synergies, per the Delaware statute) must be taken into account, no recognized valuation method is ruled out and even the unaffected market price alone, as a single valuation metric, may be used where appropriate (as in the case of an informationally efficient market in which a buyer is not privy to material non-public information that would lead it to value shares above their market price).

If a company's stock price is depressed, including due to the COVID-19 pandemic, a buyer might be apprehensive about target stockholders exercising appraisal rights and challenging the pricing of the deal that is perceived to be undervalued. However, the Court's ruling in *Fir Tree Value*, combined with the decisions in *DFC*, *Dell* and *Verition* reflecting a tendency to rule that deal price generally *is* fair absent flaws in the negotiation process, could increase buyers' confidence that target stockholders will acquiesce to a negotiated deal price rather than risk exercising appraisal rights. This is especially so where the deal price in question accounts for expected synergies, which, as noted above, may not be considered by a court adjudicating appraisal actions. All this recent litigation follows a 2016 amendment to Delaware's appraisal statute, which, among other things, allows a buyer to prepay (after closing and before judgment) the merger consideration to dissenting stockholders and thus avoid incurring interest at what would otherwise be the statutory rate of 5% over the Federal Reserve discount rate. This amendment served to dampen the incentive that had been created by a guarantee of above-market interest, so called "appraisal arbitrage". After *Fir Tree Value*, stockholders contemplating exercising appraisal rights will have to carefully consider doing so in light of the risk of receiving significantly less than the deal price in an appraisal action.

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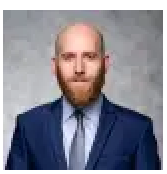

David Adler

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