IN THE SUPREME COURT OF THE STATE OF DELAWARE

DFC GLOBAL CORPORATION, Respondent-Below, Appellant, v. MUIRFIELD VALUE PARTNERS, L.P., OASIS INVESTMENTS II MASTER FUND LTD., CANDLEWOOD SPECIAL SITUATIONS MASTER FUND, LTD., CWD OC 522 MASTER FUND LTD., and RANDOLPH WATKINS SLIFKA, Petitioners-Below, Appellees.	No. 518, 2016 On Appeal from the Court of Chancery of the State of Delaware, Consolidated C.A. No. 10107-CB

MOTION OF LAW, ECONOMICS AND CORPORATE FINANCE PROFESSORS TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS-APPELLEES AND AFFIRMANCE

Pursuant to Rule 28, movants seek leave to file the *amici curiae* brief attached as **Exhibit A** in support of Petitioners-Appellees and Affirmance.

1. *Amici* are law and economics professors with expertise in the areas of, *inter alia*, corporation law, finance, governance, mergers and acquisitions, auction design, game theory, management and valuation. They have taught and commented on appraisal litigation and are cited authorities on the subject. Proposed *amici curiae* have no financial or personal interest here.

2. *Amici* are:

- **Jennifer H. Arlen** is the Norma Z. Paige Professor of Law at New York University School of Law, the founder and a Faculty Director of the Program on Corporate Compliance and Enforcement and the Director of the Center for Law, Economics and Organization.
- **Robert Bartlett** is Professor of Law at UC Berkeley and Faculty Co-Director of the Berkeley Center for Law, Business, and the Economy.
- **Antonio E. Bernardo** is a professor of finance at the UCLA Anderson School of Management. His research covers corporate finance, optimal contracting, and information in financial markets.
- **Bernard S. Black** is a Nicholas D. Chabraja Professor at Northwestern University, Pritzker School of Law, Institute for Policy Research, and Kellogg School of Management (Finance Department). His research includes law and finance, international corporate governance, and corporate and securities law.
- **Patrick Bolton** is the Barbara and David Zalaznick Professor of Business and member of the Committee on Global Thought at Columbia University. He is also Co-Director of the Center for Contracts and Economic Organization at Columbia Law School.

- **Brian J. Broughman** is the Associate Dean for Research and Professor of Law at Indiana University, Maurer School of Law, where he teaches Corporations, Corporate Finance, Mergers and Acquisitions, and Corporate Governance. His research focuses on financial contracting (particularly in venture capital), mergers and acquisitions, and related topics.
- **Albert H. Choi** is BeVier Research Professor of Law at the University of Virginia School of Law. His research and teaching includes law and economics, contract theory, corporate law, and corporate finance and organization. He was a director for the American Law and Economics Association from 2011 to 2014, and serves as an associate editor of the American Law and Economics Review and of the International Review of Law and Economics.
- **John C. Coffee** is the Adolf A. Berle Professor of Law and director of the Center on Corporate Governance at Columbia Law School. He is a fellow at the American Academy of Arts & Sciences and has been repeatedly listed by the National Law Journal as among its "100 Most Influential Lawyers in America." Coffee has served as a reporter to The American Law Institute for its Corporate Governance Project and

is a member of the SEC's advisory committee on the capital formation and regulatory processes.

- **Peter Cramton** is Professor of Economics at the University of Maryland and European University Institute, and on the International Faculty at the University of Cologne. His research on auction theory and practice is widely cited.
- **Charles M. Elson** is the Edgar S. Woolard, Jr., Chair in Corporate Governance and the Director of the John L. Weinberg Center for Corporate Governance at the University of Delaware. He is Vice Chairman of the ABA Business Law Section's Committee on Corporate Governance and a director of two public companies.
- **Jesse M. Fried** is the Dane Professor of Law at Harvard Law School, where he teaches corporate law, governance, and venture capital. Fried authored over 30 articles on executive compensation, insider trading, corporate governance, and venture capital.
- **Eric S. Maskin** is the Adams University Professor at Harvard. He received the 2007 Nobel Memorial Prize in Economics (with L. Hurwicz and R. Myerson) for laying the foundations of mechanism design theory. His writings also cover game theory, contract theory, social choice theory, political economy, and economics.

- **W. Bentley MacLeod** is Sami Mnaymneh Professor of Economics, Professor of International and Public Affairs, and an affiliated Law Faculty at Columbia University. He is a specialist in law, labor and contract economics, focusing on incentives and the interplay between reputation effects, market competition, and social norms.
- **Justin McCrary** is a Professor of Law at UC Berkeley. He is a Faculty Research Fellow at the National Bureau of Economic Research (Cambridge), and a Fellow of the Criminal Justice Research Program, Institute for Legal Studies (Berkeley).
- **Alan Schwartz** is a Sterling Professor at Yale University. His academic work covers corporate finance and governance, mergers and acquisitions, contract theory, and commercial transactions. He was President of the American Law and Economics Association and Editor of the Journal of Law, Economics and Organization.
- **Kathryn E. Spier** is the Domenico De Sole Professor of Law at the Harvard Law School and President Emeritus of the American Law and Economics Association. She is currently serving as a co-editor of the RAND Journal of Economics and is a Research Associate in the Law and Economics Group of the National Bureau of Economic Research.

- **Eric L. Talley** is the Isidor and Seville Sulzbacher Professor of Law at Columbia Law School. His research focuses on corporate law, governance, incentive design, contract theory, M&A and finance. He is Chair and President Emeritus of the Society for Empirical Legal Studies, and a director of the American Law and Economics Association.
- **Robert B. Thompson** is a Professor of Law at Georgetown University, teaching corporate and securities law, including mergers and limited liability. Professor Thompson is editor of the Corporate Practice Commentator.
- **Mark I. Weinstein** is Associate Professor of Finance and Business Economics at the University of Southern California Marshall School of Business and Associate Professor of Business and Law (by Courtesy) at the University Southern California Gould School of Law. He has written on the role and effect of the appraisal remedy in mergers.
- **Ivo Welch** is Distinguished Professor of Finance and holds the J. Fred Weston Chair in Finance at UCLA Anderson. He recently won a Humboldt Research Award. He twice received the Michael Brennan Award. Known for his work on informational cascades, he has also

published regarding initial public offerings, capital structure, dividends, market-timing, performance evaluation, earnings management, overconfidence, socially responsible investing and bankruptcy.

3. The proposed *Amici Curiae* Brief is desirable and relevant because this appeal raises the question whether Delaware law should be modified so that the Court of Chancery should defer to the negotiated transaction price in appraisal litigation, an issue within the expertise and scholarly interest of *Amici*, who seek to aid the Court's evaluation of this issue. The Court previously granted a motion for leave to participate as *amici curiae* filed on behalf of certain corporate finance professors in support of Respondent-Appellant and Reversal the Court should have the benefit of hearing both sides of the issue. As set forth in the accompanying *amici curiae brief*, *Amici* argue that the Court should not change its historical approach to appraisal litigation in favor of presumptions in favor of or deference to a negotiated merger price.

4. Petitioners-Appellees consent to *Amici*'s motion, and Respondent-Appellee takes no position on the motion.

CONCLUSION

Amici respectfully request an order granting leave to file the accompanying *amici curiae* brief.

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Dated: February 3, 2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DFC GLOBAL CORPORATION, Respondent-Below, Appellant, v. MUIRFIELD VALUE PARTNERS, L.P., OASIS INVESTMENTS II MASTER FUND LTD., CANDLEWOOD SPECIAL SITUATIONS MASTER FUND, LTD., CWD OC 522 MASTER FUND LTD., and RANDOLPH WATKINS SLIFKA, Petitioners-Below, Appellees.	:	No. 518, 2016 On Appeal from the Court of Chancery of the State of Delaware, Consolidated C.A. No. 10107-CB

[PROPOSED] ORDER GRANTING LEAVE TO LAW, ECONOMICS AND CORPORATE FINANCE PROFESSORS TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS-APPELLEES AND AFFIRMANCE

WHEREAS, on February 3, 2017, certain professors of law and corporate finance (the "*Amici*") filed a Motion Of Law, Economics And Corporate Finance Professors To File Brief As *Amica Curiae* In Support Of Petitioners-Appellees And Affirmance (the "Motion") pursuant to Rule 28 of the Rules of the Supreme Court of the State of Delaware and attaching a Brief of Law, Economics and Corporate Finance Professors as *Amici Curiae* as Exhibit A thereto (the "Brief");

WHEREAS, the Court has considered the Motion and any opposition thereto, and finds the Brief desirable and relevant to the disposition of the case in accordance with Rule 28;

NOW, THEREFORE, this __________ day of February, 2017, it is hereby ORDERED:

1. The Motion is GRANTED.

2. Counsel for *Amici* are granted leave to file the Brief.

____
Justice

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DFC GLOBAL CORPORATION,	:	
	:	No. 518, 2016
Respondent-Below, Appellant,	:	
v.	:	On Appeal from the
	:	Court of Chancery of the
MUIRFIELD VALUE PARTNERS, L.P.,	:	State of Delaware,
OASIS INVESTMENTS II MASTER	:	Consolidated
FUND LTD., CANDLEWOOD	:	C.A. No. 10107-CB
SPECIAL SITUATIONS MASTER	:	
FUND, LTD., CWD OC 522 MASTER	:	
FUND LTD., and RANDOLPH	:	
WATKINS SLIFKA,	:	
	:	
Petitioners-Below, Appellees.	:	

CERTIFICATE OF COMPLIANCE WITH
TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This motion complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Office Word 2013.

2. This motion complies with the type-volume limitation of Rule 14(d)(i) because it contains 1,196 words, which were counted by Microsoft Office Word 2013.

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EXHIBIT A

MOTION OF LAW, ECONOMICS AND CORPORATE FINANCE PROFESSORS TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS-APPELLEES AND AFFIRMANCE

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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Dated: February 3, 2017

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. REQUIRING DEFERENCE TO THE MERGER PRICE CONTRAVENES THE TEXT AND PURPOSE OF THE DELAWARE'S APPRAISAL STATUTE 5

A. Section 262 Pre-Ordains Neither Merger Price Deference Nor Lockstep Symmetry with Common Law Fiduciary Standards 5

B. The Central Purposes of the Appraisal Remedy are Multi-faceted and Contingent, but Since 1967, a Key Purpose Has Been to Protect Against Opportunism in Acquisitions 7

II. SOUND ECONOMIC THEORY DEMONSTRATES THAT THE CREDIBLE THREAT OF APPRAISAL PLAYS A CRITICAL ROLE IN OBTAINING A FAIR PRICE—A ROLE NULLIFIED BY A CATEGORICAL MERGER-PRICE PRESUMPTION 11

III. SOUND LEGAL POLICY SHOULD PRESERVE THE COURT OF CHANCERY'S ACCUMULATED EXPERTISE AND DISCRETION 17

A. The Court of Chancery Has Developed a Thoughtful Approach that Assesses Merger Price Alongside Other Factors 17

B. This Court Recognizes the Fact-Intensive Nature of the Inquiry and Defers to the Expertise of the Court of Chancery in all but Extraordinary Circumstances 20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Air Prod. & Chems., Inc. v. Airgas, Inc.,
16 A.3d 48 (Del. Ch. 2011) 20

C&J Energy Serv., Inc. v. City of Miami Gen. Emps' & Sanitation Emps' Ret. Trust, 107 A.3d 1049 (Del. 2014) 7

Cede & Co. v. Technicolor, Inc.,
1990 WL 161084 (Del. Ch.)..6

Cede & Co. v. Technicolor, Inc.,
884 A.2d 26 (Del. 2005).. 22, 23

Corwin v. KKR Fin. Holdings LLC,
125 A.3d 304 (Del. 2015)..7

Dunmire v. Farmers & Merchants Bancorp of W. Pennsylvania, Inc.,
2016 WL 6651411 (Del. Ch.)..17

Francis I. duPont & Co. v. Universal City Studios, Inc.,
343 A.2d 629 (Del. Ch. 1975) 8

Glob. GT LP v. Golden Telecom, Inc.,
993 A.2d 497 (Del. Ch.), *aff'd*, 11 A.3d 214 (Del. 2010) 17, 18

Golden Telecom, Inc. LP,
11 A.3d at 219 (Del. 2010)..21

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

Gonsalves v. Straight Arrow Publishers, Inc.,
701 A.2d 357 (Del. 1997)..4, 23

Huff Fund Inv. P'ship v. CKx, Inc.,
2013 WL 5878807 (Del. Ch.)..4

M.G. Bancorporation, Inc. v. Le Beau,
737 A.2d 513 (Del. 1999) 20-21, 22

Matter of Shell Oil Co.,
607 A.2d 1213 (Del. 1992) 4, 21, 23

Merion Capital v. BMC Software Inc.
2015 WL 6164771 (Del. Ch.) 17, 19

Merion Capital v. Lender Processing Servcs., Inc.,
2016 WL 7324170 (Del. Ch.) 6, 17, 19

Merlin Partners LP v. AutoInfo, Inc.,
2015 WL 2069417 (Del Ch.) 19

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74 A.3d 656 (Del. Ch. 2013) 12

Phil H. Neal, Jr. v. Alabama By–Products Corp.,
1990 WL 109243 (Del. Ch.), *aff'd* 588 A.2d 255 (Del. 1991) 6

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877 A.2d 975 (Del. Ch. 2005) 6, 9

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847 A.2d 340 (Del. Ch. 2004) 19

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457 A.2d 701 (Del. 1983) 2, 9, 21

Statutes

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Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 Del. J. Corp. L. 731, 740 (2013) 21

Daniel R. Fischel, *The Appraisal Remedy in Corporate Law*, 1983 AM. B. FOUND. RES. J. 875, 876...9

Ernest L. Folk III, *De Facto Mergers in Delaware: Hariton v. Arco Electronics, Inc.*, 49 Va. L. Rev. 1261, 1293 (1963)...8

Ernest L. Folk, III *The Delaware General Corporation Law*, 324 (1972)................9

J. Kirkland Grant, *"The Delaware Appraisal Statute,"* 6 Del. J. Corp. Law 590 (1981)...7

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Paul Klemperer, *Auctions: Theory and Practice*, Ch. 3, "What Really Matters in Auction Design" (Princeton Press, 2004).. 11, 13

Charles R. Korsmo & Minor Myers, Appraisal Arbitrage and the Future of Public Company M&A, 92 Wash. U.L. Rev. 1551, 1608 (2015) 6, 15

Maskin, Eric, *"Auctions and Privatization,"* in *Privatization* (H. Siebert ed. 1992) 16

Paul Milgrom, *"Auction Theory,"* in Advances in Economic Theory: 5th World Congress of the Econometric Society 12:1–32 (T. Bewley, ed., Cambridge Press) (1987)...12

Guhan Subramanian, *Using the Deal Price for Determining "Fair Value" in Appraisal Proceedings* 15

Robert B. Thompson, *"The Case for Iterative Statutory Reform: Appraisal and the Model Business Corporation Act,"* 74 L. & Contemp. Probs. 253 (2011)............8

INTEREST OF *AMICI* CURIAE

Amici are professors who research and teach in the areas of corporate law, corporate finance, mergers and acquisitions, valuation, and economic analysis of law. Their research examines stockholder rights, including appraisal, and they are regularly cited as authorities in corporate law and governance. *Amici* have no economic interest in the case on appeal, but seek a legal regime comporting with economic common sense and good public policy. The names and titles of the *Amici* are set forth in Exhibit 1.

This appeal raises the question whether, in a judicial appraisal determining the fair value of dissenting stock, the Court of Chancery must automatically award the merger price where the transaction appeared to involve an arm's length buyer in a public sale. *Amici*'s academic work addresses this question.

SUMMARY OF ARGUMENT

Appellant urges the Court to adopt a rule of law in appraisal proceedings that presumptively requires the Court of Chancery to defer exclusively to the transaction price unless that price does not result from an arm's-length process. *Amici* disagree: Doing so would be a trifecta of bad law, bad economics, and bad policy.

A categorical/presumptive rule is bad law. The mandatory language of Section 262 of the Delaware General Corporate Law (DGCL) directs the Court of Chancery to "take into account all relevant factors" in determining fair value. As explained below, the appraisal remedy is separate and distinct from the common law governing fiduciary duties and cleansing conflicts of interest. A merger-price presumption would also disregard the principles enunciated in *Weinberger v. UOP*, 457 A.2d 701 (Del. 1983), directing the Court of Chancery to value companies using methodologies recognized and applied by professionals in the field, including (but not limited to) discounted cash flow (DCF) analysis. Instead, a broadly hewn "Merger Price" rule would effectively nullify the appraisal remedy, undermining the statutory mandate of § 262.

A categorical/presumptive rule is also bad economics: To be sure, the price resulting from an arm's-length process *may* accurately reflect fair value. But not always. In numerous seemingly benign cases, a facially disinterested process can still render a price falling short of fair value. In such situations, fair compensation requires an appraisal rule that is independent of the merger price. In fact, even *the credible threat* of an appraisal untethered to the merger price increases the chance that a market process will more accurately reflect fair value, as both bidders and target boards internalize the cost of approving a transaction at the lowest end of the range of fair values. As explained below, this *ex ante* benefit persists even if appraisals are prone to judicial error.

Finally, a categorical/presumptive rule is bad legal policy. Simply put, context matters: The evidentiary value of the deal price is a highly fact-sensitive question, ill-suited to a bright-line test. Any attempt at judicial line-drawing—preordaining circumstances where the transaction price must (or must not) be taken as conclusive—is doomed to be both over- and under-inclusive. The jurisprudential straightjacket urged by Appellant undermines the judicial discretion of Delaware's sophisticated judiciary—a key factor in Delaware's corporate law dominance.

This Court struck the correct balance in *Golden Telecom*, rejecting the rule now pressed by appellants. *Golden Telecom, Inc. v. Glob GT LP*, 11 A.3d 214, 218 (Del. 2010) ("[W]e reject Golden's contention that the Vice Chancellor erred by insufficiently deferring to the merger price, and we reject its call to establish a rule requiring the Court of Chancery to defer to the merger price in any appraisal proceeding."). The Court of Chancery's post-*Golden Telecom* opinions have embraced that valuable discretion, including the case now on appeal. Its discretion to make factual determinations as to the relative weight to be accorded evidence should persevere. *Matter of Shell Oil Co.*, 607 A.2d 1213, 1219 (Del. 1992) ("At the appellate level, when this Court reviews a Court of Chancery determination pursuant to §262, we impart a 'high level of deference' to that court's findings."). In any event, there is no need for the kind of categorical presumption advocated by appellants, since Delaware case law already specifies familiar criteria for both (a) the appropriateness of merger price deference (*see, e.g.*, *Huff Fund Inv. P'ship v. CKx, Inc.*, 2013 WL 5878807 (Del. Ch. Nov. 2013)), and (b) the grounds for reversal under an abuse-of-discretion standard. *See Matter of Shell Oil Co.*, 607 A.2d 1213, 1219 (Del. 1992).

Finally, any burden on law-trained judges to conduct a valuation can be mitigated in at least two ways: (1) judges can appoint a neutral economic expert to recommend valuation findings; or (2) this Court can tailor its prior ruling in *Gonsalves v. Straight Arrow Publishers, Inc.*, 701 A.2d 357 (Del. 1997) to permit the Court of Chancery to utilize procedures that incentivize greater moderation among competing experts.

ARGUMENT

I. REQUIRING DEFERENCE TO THE MERGER PRICE CONTRAVENES THE TEXT AND PURPOSE OF THE DELAWARE'S APPRAISAL STATUTE

A. Section 262 Pre-Ordains Neither Merger Price Deference Nor Lockstep Symmetry with Common Law Fiduciary Standards

The appraisal statute requires a court to "determine the fair value of the shares" of the target corporation in a qualifying merger or acquisition, "tak[ing] into account all relevant factors." 8 *Del. C.* §262(h). Delaware law recognizes several interdependent propositions in discharging that mandate: (1) the negotiated price *can be* reliable evidence of fair value; (2) the merger price is not necessarily the *exclusive* evidence of fair value, even in a third-party transaction; and (3) the Court of Chancery's resolution of that issue is highly fact-dependent and entitled to deference. The adoption of a single approach (such as a merger price presumption) would seemingly *abjure* the statutory mandate to take "all relevant factors" into account, swapping it for a simplistic rule inconsistent with clear statutory language. The current case-by-case approach to appraisal acknowledges the messy reality of corporate control transactions. It is also—as explained below—consistent with sound financial economics.

In addition, the text of Section 262 distinguishes the appraisal remedy from the jurisprudential contours of *common-law* fiduciary principles. While appraisal has proven a convenient template for assessing damages in fiduciary duty cases, *see*, *e.g.*, *Cede & Co. v. Technicolor, Inc.*, 1990 WL 161084, at *31 (Del. Ch. Oct. 19, 1990), the inverse proposition does not follow: fiduciary duty breaches are *not* a prerequisite to awarding meaningful appraisal. To the contrary, time and again the Court of Chancery has been careful *not* to conflate Section 262 appraisal rights with common law fiduciary obligations. *See, e.g., Phil H. Neal, Jr. v. Alabama By–Products Corp.*, 1990 WL 109243 (Del. Ch. Aug. 1, 1990), *aff'd* 588 A.2d 255 (Del. 1991); *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1023 (Del. Ch. 2005). The two inquiries are conceptually and doctrinally distinct. Directors can satisfy their fiduciary duties even when a sales process is insufficient to achieve the stock's fair value under Section 262. *See Merion Capital L.P. v. Lender Processing Servcs., Inc.*, 2016 WL 7324170, at *15 (Del. Ch. Dec. 16, 2016), judgment entered, (Del. Ch. Dec. 23, 2016) ("Because the two inquiries are different, a sale process might pass muster for purposes of a breach of fiduciary duty claim and yet still constitute a sub-optimal process of an appraisal"); *see also Charles R. Korsmo & Minor Myers, Appraisal Arbitrage and the Future of Public Company M&A*, 92 Wash. U.L. Rev. 1551, 1608 (2015) ("Satisfying one of the various *Revlon*-type tests . . . is not necessarily a market test" sufficient to demonstrate fair value in an appraisal proceeding).

Distinguishing Section 262 and fiduciary duty claims is also sensible: for instance, a single-bidder scenario could satisfy minimal fiduciary duty standards while falling short of fair value pursuant to the appraisal statute. (*See* Section II, *infra*.) Indeed, under current fiduciary duty law, aggressive bidders and potentially interested insiders can argue that "full disclosure" of the deal protections and process will immunize the board from later discovery or liability so long as a bare majority accepts a questionable price. A meaningful appraisal remedy maintains this critical balance among investors, outside directors, insiders and bidders.

The independent basis of appraisal holds even *greater* importance in recent years, as the traditional common-law avenues of merger-price objection have narrowed. *See, e.g., C&J Energy Serv., Inc. v. City of Miami Gen. Emps' & Sanitation Emps' Ret. Trust*, 107 A.3d 1049 (Del. 2014) (limiting scope of pre-closing injunctive relief); *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 306 (Del. 2015) (limiting scope of post-closing monetary relief). In any event, the decision of whether to discard the longstanding independent basis of appraisal must be taken up on a *legislative* basis, and not a judicial one.

B. The Central Purposes of the Appraisal Remedy are Multi-faceted and Contingent, but Since 1967, a Key Purpose Has Been to Protect Against Opportunism in Acquisitions

The appraisal remedy dates back as far as the 19th century, and it became available in Delaware over a century ago. Despite this long history, a definitive "purpose" for the appraisal statute has remained elusive. *See, e.g.,* J. Kirkland Grant, *"The Delaware Appraisal Statute,"* 6 Del. J. Corp. Law 590 (1981) ("appraisal statutes, even fifty years later, still appear to be experimental and still leave a number of questions unanswered"); Robert B. Thompson, *"The Case for Iterative Statutory Reform: Appraisal and the Model Business Corporation Act,"* 74 L. & Contemp. Probs. 253 (2011) ("there is no longer a social consensus behind the law's original purpose"). Appraisal emerged after the abolition of unanimous consent requirements for mergers, and courts have observed that "[t]he power of a stockholder majority to override minority dissenters and remit them to the cash appraisal remedy is 'analogous to the right of eminent domain.'" *Francis I. duPont & Co. v. Universal City Studios, Inc.*, 343 A.2d 629, 634–35 (Del. Ch. 1975) (citations omitted).

Since the 1967 revisions to the DGCL, a principal use of appraisal has been to provide a broader check that disciplines both bidders and managers. Professor Folk himself highlighted more than half a century ago how appraisal helps achieve more advantageous negotiation outcomes: "Appraisal rights in the hands of 'recalcitrant' or 'troublesome' shareholders have…served as a countervailing power to force the insiders to tailor their plans to minimize the number of dissenters by getting the best deal possible." Ernest L. Folk III, *De Facto Mergers in Delaware: Hariton v. Arco Electronics, Inc.*, 49 Va. L. Rev. 1261, 1293 (1963).

Appraisal's utility as a check on misconduct or misjudgment—focusing on the *adequacy* of merger consideration rather than its form or process—found substantial academic support at the time of this Court's landmark decision in *Weinberger v. UOP*, 457 A.2d at 715. *See, e.g.* Daniel R. Fischel, *The Appraisal Remedy in Corporate Law*, 1983 AM. B. FOUND. RES. J. 875, 876 ("[A]ppraisal is best understood as an *implied contractual term that sets the minimum price* at which the firm, or a part thereof, can be sold in situations where certain groups are more likely to attempt to appropriate wealth from other groups than to maximize the value of the firm.") (emphasis added). Thus, a credible appraisal right as an independent backstop has long been a feature of Delaware's merger jurisprudence, providing scrutiny against opportunism that may escape the reach of blunter equitable remedies. *See, e.g., In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1023 (Del. Ch. 2005) (denying an injunction and noting that stockholders "merely face the loss of dollar value from the theoretical possibility that the deal protections have precluded a topping bid" and that such a harm "can be rectified adequately in a later appraisal proceeding"); *see also* Ernest L. Folk, III *The Delaware General Corporation Law*, 324 (1972) ("[T]he favorable attitude towards mergers shapes the general rule that courts should remit a dissenting stockholder to his statutory appraisal remedy under § 262 rather than readily grant injunctive relief.").

At core, and as elaborated below, the complementarity between appraisal rights and common law rights is multi-fold: the availability of appraisal helps outside directors best comply with their duties, and it gives bidders reason to offer a "more fair" price, even if fiduciary liability is indeterminate.

II. SOUND ECONOMIC THEORY DEMONSTRATES THAT THE CREDIBLE THREAT OF APPRAISAL PLAYS A CRITICAL ROLE IN OBTAINING A FAIR PRICE—A ROLE NULLIFIED BY A CATEGORICAL MERGER-PRICE PRESUMPTION

Beyond its statutory pedigree, the credible threat of appraisal plays a critical role in market design. A foundational result from auction theory in economics is that setting a credible "reserve price" (below which a sale cannot occur) is an essential design feature for any reasonable sales process. *See,* Paul Klemperer, *Auctions: Theory and Practice,* Ch. 3, "What Really Matters in Auction Design" (Princeton Press, 2004) ("The credibility of reserve prices is of special importance. If a reserve price is not a genuine commitment to not sell an object if it does not reach its reserve, then it has no meaning and bidders will treat it as such."). In fact, failing to establish a credible reserve price can result not only in depressed sales revenues, but also in inefficient transfers to buyers whose valuations fall short of the seller's going-concern value. *See, e.g.*, Choi, Albert H. and Talley, Eric L., *Appraising the 'Merger Price' Appraisal Rule (2017)* (Available at https://ssrn.com/abstract=2888420).

In certain cases, a target company's board can serviceably establish a reserve price for prospective bidders. But such procedural safeguards are far from inevitable: Even in contexts involving no clear financial conflicts at the board level, a credible reserve price can be difficult to set and maintain. For example, other non-board participants in the sales process (such as financial advisers) tend to receive compensation only once a deal closes, and they may pressure for sales process that ensures a deal by weakening a credible reserve. *E.g., In re Morton's Rest. Grp S'holders Litig.*, 74 A.3d 656 (Del. Ch. 2013). Alternatively, a target's board may be unable to commit credibly to a reserve if (for example) initial expressions of interest among bidders appear tepid. In fact, bidders may have a strategic incentive to *appear* hesitant, exploiting the board's inability to commit. *See, e.g.,* Paul Milgrom, *"Auction Theory,"* in Advances in Economic Theory: 5th World Congress of the Econometric Society 12:1–32 (T. Bewley, ed., Cambridge Press) (1987).

The appraisal remedy—at least when pegged against factors *independent* of the merger price—can provide a credible and value-enhancing proxy for a reserve price. By preserving investors' right to obtain their aggregate going-concern value (as the appraisal statute requires), the appraisal right helps protect against unfair and inefficient transfers to lower valuing buyers, providing more credible minimum price protection than the target's board itself may be willing/able to muster.

If, in contrast, fair value hinged presumptively or exclusively on the merger price, this credible minimum price protection disappears. Indeed, exclusive reliance on the merger price is *functionally equivalent to eliminating the appraisal remedy altogether*. The reason is simple: Under such a rule, the reserve price implicitly set by appraisal mechanically floats up and down with the winning bid, and appraisal can never represent an independent, objectively-determined option for dissenting target shareholders. Moreover, because seeking appraisal imposes direct costs on the petitioning shareholder, no shareholder would realistically pursue appraisal under a merger price rule, paying litigation expenses only to gain admission to an echo chamber that mechanistically returns the same price fed into it. The functional nullification of appraisal—through a judicially adopted merger price presumption—contravenes both statutory command and sound economics.

Economic analysis of appraisal, moreover, reveals that several of the purported justifications for deferring to the merger price are either misplaced or misleading. For example, advocates of merger price deference often maintain that "The Market" is a better bellwether of fair value than a court's *ex post* reckoning, and that such judicial tinkering only distorts market outcomes. Such arguments erroneously presume that "The Market" somehow operates separately and independently from its underlying legal environment. That presumption is facially appealing, but conceptually circular. All markets *must*—by definition—be governed by legal institutions. In the acquisitions market, appraisal is one such institution, sitting alongside contract law, fiduciary obligation, tax, securities, antitrust and many others. It is unhelpful, therefore, to assert that the appraisal right "distorts" market outcomes. *Of course* it does; all market-governing institutions do. That is their purpose—a feature, not a bug. *Accord Klemperer*, *supra*, at 112 ("It is tempting to simply 'let the market decide'…[b]ut the auction's outcome is driven by bidders' profits, not by the welfare of …society as a whole.").

The more relevant economic question is whether the "distortion" created by appraisal (or contract law, or corporate governance, etc.) is socially valuable. As demonstrated above, the availability of appraisal clearly can be valuable—a value lost if courts defer categorically to the merger price.

The convincing analytic case for the *status quo* approach in appraisal is corroborated by mounting empirical evidence. To be sure, recent years have seen growth in appraisal litigation as other litigation avenues have narrowed; but empirical evidence repeatedly shows that such litigation is predominantly focused—where it should be—on transactions where there are reasons to doubt the adequacy of the merger price. *See* Jonathan Kalodimos & Clark Lundberg, *"Shareholder Rights in Mergers and Acquisitions: Are Appraisal Rights Being Abused?,"* Financial Research Letters (forthcoming), working draft of January 2, 2017, at 9 ("Deals petitioned for appraisal tend to have substantially lower premia than a matched sample. Moreover, the acquiring firms of petitioned targets have substantially higher cumulative abnormal returns around the merger announcement relative to a matched sample."); Wei Jiang, Tao Li, Danquig Mei, & Randall Thomas, *"Appraisal: Shareholder Remedy or Litigation Arbitrage?,"* working draft of July 2016, at 4 ("[L]ow takeover premiums are an invitation to appraisal arbitrageurs: for every 10 percentage point decrease in the deal premium, the probability of an appraisal petition being filed increases by about 72 basis points.");

and Charles Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 Wash U. L. Rev. 1551 (2015) ("[A]ppraisal petitioners target transactions with lower deal premia and also going-private transactions, where minority shareholders are most likely to face expropriation.").

While nuisance suits are, no doubt, a legitimate concern in general, the privately-borne costs and risks associated with bringing an appraisal claim make large scale nuisance claims unlikely. *See Korsmo & Myers*, at 1584-88. Transactional trends appear to bear this point out: the use of appraisal-out (or "blow") provisions in Delaware deals has actually *declined* in recent years—from around 25% of transactions in 2008 to around 5%-7% of deals today. *See* Guhan Subramanian, *Using the Deal Price for Determining "Fair Value" in Appraisal Proceedings* (working paper 2017). Moreover, in response to calls to revisit the appraisal statute, the Delaware legislature last year enacted prophylactic measures against the most serious forms of appraisal abuse (including minimum holding requirements and a pre-payment option allowing respondents to avoid statutory interest). The legislature's tailored response and disinclination to neuter the statute's core attributes deserves deference.

We emphasize that the economic case for/against a merger price presumption is not categorical. In a rich and robust auction with multiple bidders, for example, competition can prove more determinative than a credible reserve price. Jeremy

Bulow & Paul Klemperer. *"Auctions Versus Negotiations." American Economic Review* 86(1):180–94 (1996). Where there are significant asymmetries among bidders, or bidders have common values, appropriate safeguards in the sale process may change as well. *See, e.g.*, Maskin, Eric, *"Auctions and Privatization,"* in *Privatization* (H. Siebert ed. 1992). Alternatively, when mergers are conditioned on super-majority voting/approval, the added deterrent of an appraisal reserve price can be trivial. In such situations, a court has reason to place significant weight on the merger price. But that is precisely the point: such contexts are necessarily highly fact intensive. The Court of Chancery should be permitted to marshal its equitable discretion to decide—on a case-by-case basis—how much weight merger price warrants relative to other factors.

III. SOUND LEGAL POLICY SHOULD PRESERVE THE COURT OF CHANCERY'S ACCUMULATED EXPERTISE AND DISCRETION

A. The Court of Chancery Has Developed a Thoughtful Approach that Assesses Merger Price Alongside Other Factors

In its appraisal jurisprudence, the Court of Chancery correctly conducts a fact-intensive inquiry to determine the informational content of the negotiated merger price. This process has often determined the merger price to be the most compelling piece of evidence, warranting exclusive evidentiary weight. *See, e.g., Merion Capital v. Lender Processing Servcs., Inc.*, 2016 WL 7324170, at *15 (Del. Ch. Dec. 16, 2016); *Dunmire v. Farmers & Merchants Bancorp of W. Pennsylvania, Inc.*, 2016 WL 6651411 (Del. Ch. Nov. 10, 2016), *judgment entered sub nom. In re Dunmire v. Farmers & Merchants Bancorp of W. Pennsylvania, Inc.* (Del. Ch. Dec. 5, 2016), and *reargument denied sub nom. In re Dunmire v. Farmers & Merchants Bancorp of W. Pennsylvania, Inc.* (Del. Ch. Dec. 5, 2016); *Merion Capital v. BMC Software Inc*. WL 6164771 (Del. Ch. Oct. 21, 2015), *judgment entered,* (Del. Nov. 3, 2015). In each of these decisions, the Court of Chancery carefully assessed the sales structure and process to determine that the merger price truly reflected "fair value."

Even in cases that do not place 100% weight on the merger price, the Court of Chancery has acknowledged the deal price's relevance. *See Glob. GT LP v. Golden Telecom, Inc.*, 993 A.2d 497, 507 (Del. Ch.), *aff'd*, 11 A.3d 214 (Del. 2010)

("It is, of course, true that an arm's-length merger price resulting from an effective market check is entitled to great weight in an appraisal.").

Nevertheless, an independent point of reference is preferable—indeed critical—for the Court to glean confidence from the deal price. The merger price is surely suspect where the target company's board has breached its fiduciary duties. But even outside that context, sales processes are far from uniform. Time or business constraints can limit the depth and breadth of a market check. Deal protections—including no-shop provisions, matching rights, asset lockups and termination fees—may impede a true auction dynamic. Target boards may face difficulty committing to a credible reserve price. The lack of strategic bidders can hamper price discovery, as financial buyers will typically suffer from winner's curse fears, borrowing limitations and the need to achieve outsized internal rates of return expected by their investors. Even shareholder approval is not always an effective elixir against opportunistic acquisitions. *See, e.g.*, Henry T. C. Hu and Bernard Black, *"Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications, and Reforms,"* 61 Business Lawyer 1011 (May 2006) (documenting how financial derivatives can distort voting incentives). *Accord Glob. GT LP*, 993 A.2d at 508–09 ("[C]ertain institutional investors may be happy to take a sizeable merger-generated gain on a stock for quarterly reporting purposes, or to offset other losses, even if that gain is not representative of what the company should have yielded in a genuinely competitive sales process.”).

Finally, even a process free from these shortcomings may *still* culminate in a price that proves inadequate *as of the transaction date*. For example, a price that was fair at the time it was negotiated may be rendered badly out of date by intervening company-specific or industry-wide events. *See Union Illinois 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.*, 847 A.2d 340, 358 (Del. Ch. 2004) (“Nothing in the record persuades me that [the respondent company] was more valuable by December 31, 2001 than it was when the Merger terms were set.”).

The Court of Chancery uses a sophisticated approach to determine the weight to accord transaction price based on indicia of reliability. *BMC Software, Inc.*, 2015 WL 6164771, at *11 (“[T]he court will give little weight to a merger price unless the record supports its reliability”); *Merlin Partners LP v. AutoInfo, Inc.*, 2015 WL 2069417, at *11 (Del Ch. Apr. 30, 2015). The court utilizes a “multifaceted, fact-specific inquiry” that includes: the existence of meaningful pre-signing competition, the involvement of heterogeneous bidders, the adequacy and reliability of information available to bidders, and the lack of collusion and unjustified favoritism towards bidders. *Lender Processing Servs. Inc.*, 2016 WL 7324170, at *16. Attempting to subsume all of these factual determinations into a single bright-line rule undermines judicial accuracy with few associated benefits.

Furthermore, while the merger price *is one* potentially informative signal of fair value, there is no ground for forcing the Court to determine that it is the *only* informative signal. The Court may justifiably have reason to question the informational value of the merger price, as Chancellor Bouchard did here, finding insufficient confidence that the transaction price "was the product of a robust competitive bidding process with potential buyers who understood DFC's intrinsic value." Op at 62 n. 241. "Fair value" cannot robotically be equated with the highest amount any single buyer would pay, because such a formulation ignores the possibility—which was deemed unusually plausible in this case—that the firm would be worth more by remaining public. *See Air Prod. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 55–56 (Del. Ch. 2011) ("The Airgas board has repeatedly expressed the view that Airgas is worth at least $78 per share in a sale transaction—and at any rate, far more than the $70 per share Air Products is offering."). In any event, even if the Chancellor's findings in this case were unsupported (a question on which *Amici* take no position), they are subject to reversal on abuse-of-discretion grounds. No new legal presumption is needed.

B. This Court Recognizes the Fact-Intensive Nature of the Inquiry and Defers to the Expertise of the Court of Chancery in all but Extraordinary Circumstances

This Court has recognized both the multi-faceted nature of the inquiry, and the unique expertise of the Court of Chancery. *M.G. Bancorporation, Inc. v. Le*

Beau, 737 A.2d 513, 526 (Del. 1999), as modified on denial of re-argument (May 27, 1999) ("Appraisal actions are highly complicated matters that the Court of Chancery is uniquely qualified to adjudicate in an equitable manner.").

Respecting the Court of Chancery's nuanced discretion credits what is widely regarded as a principal benefit of Delaware incorporation: the expertise of the Court of Chancery. *See* Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 Del. J. Corp. L. 731, 740 (2013) ("[T]he Delaware Court of Chancery is drawn from experts in the corporate law community. Because of these judges' detailed knowledge of business and business law, their decisions are informed, realistic, and highly respected."). Since *Weinberger*, that Court has accumulated over thirty years of experience in applying sophisticated and widely accepted financial tools, including DCF analysis. The appellant's favored rule would both prevent the Court of Chancery from deploying its accumulated expertise and compel it to ignore misgivings about deal price from a fair review of the evidence.

Accordingly, this Court has disturbed a determination in an appraisal proceeding only for abuse of discretion. *See, e.g., Golden Telecom, Inc. LP*, 11 A.3d at 219 (Del. 2010) ("As long as they are supported by the record, we will defer to the Court of Chancery's factual findings even if we might independently reach a different conclusion."); *Shell Oil Co.*, 607 A.2d at 1219 ("Recognizing that the Court of Chancery, over time, has developed an expertise in cases of this type, we will accept the court's findings if supported by the record and the product of an orderly and logical deductive process.”); *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 35 (Del. 2005) (“[T]he Court of Chancery, as the finder of fact in an appraisal case, enjoys the unique opportunity to examine the record and assess the demeanor and credibility of witnesses.”). While current law clearly allows this Court to overturn a judicial appraisal, such disposition is appropriately limited to settings where the Court of Chancery’s rulings “do not have record support or its valuation is not the result of an orderly and logical deductive process.” *M.G. Bancorporation, Inc.*, 737 A.2d at 526.

Finally, purported concerns about asking legally trained judges to undertake the financial analyses required in appraisal cases are limited for at least four reasons. *First*, the expertise gap is overstated: the Court of Chancery is, by design, a business-oriented court, whose members know when seeking appointment that basic financial aptitude is required. *Second*, the economic benefits from appraisal emerge from its *potential* availability, since the credible threat of judicial appraisal—even if subject to statistical noise—can discipline a sales process in beneficial ways. Viewed in this light, much of the benefit of appraisal is realized by the dog that doesn’t bark: acquisitions where appraisal is never sought because the threat of appraisal has catalyzed aggressive bidding.

Third, while this practice was more commonly pursued in the 1990s and early 2000s, nothing in the statute prevents trial judges from engaging independent valuation experts to make a neutral recommendation to the court. *See, e.g., Shell Oil Co*, 607 A.2d at 1222 (Del. 1992) ("the Court of Chancery has the inherent authority to appoint neutral expert witnesses"); *Cede & Co.*, 884 A.2d 26 at 34 (noting that "Court of Chancery … appoint[ed] a non-lawyer to serve concurrently as an independent expert witness on valuation matters and as a special appraisal master"). *Fourth*, if this Court were to limit or adjust the reasoning of *Gonsalves v. Straight Arrow Publishers, Inc.*, the trial judge could employ approaches that incentivize greater moderation among competing experts (such as "baseball arbitration" mechanisms), thereby narrowing the valuation gaps between their analyses. 701 A.2d 357, 361-362 (Del. 1997).

CONCLUSION

For the reasons set forth herein, *Amici* respectfully urge this Court to reject the adoption of any presumption equating fair appraisal value to transaction price.

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DFC GLOBAL CORPORATION,	:	
	:	No. 518, 2016
Respondent-Below, Appellant,	:	
v.	:	On Appeal from the
	:	Court of Chancery of the
MUIRFIELD VALUE PARTNERS, L.P.,	:	State of Delaware,
OASIS INVESTMENTS II MASTER	:	Consolidated
FUND LTD., CANDLEWOOD	:	C.A. No. 10107-CB
SPECIAL SITUATIONS MASTER	:	
FUND, LTD., CWD OC 522 MASTER	:	
FUND LTD., and RANDOLPH	:	
WATKINS SLIFKA,	:	
	:	
Petitioners-Below, Appellees.	:	

CERTIFICATE OF COMPLIANCE WITH
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CERTIFICATE OF SERVICE

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