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

BRIEF OF LAW AND CORPORATE FINANCE PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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INTEREST OF *AMICI CURIAE*

Amici are law professors who study and teach in the areas of corporation law, corporate finance, mergers and acquisitions, and valuation. They have commented upon appraisal litigation in Delaware courts, and are regularly cited as authorities on the subject. *Amici* have also taught courses on appraisal litigation and legal valuation. The names and titles of the *Amici* are set forth in Exhibit A.

This appeal raises the question whether, in appraisal litigation challenging the acquisition price of a company, the Court of Chancery should defer to the transaction price when it was reached as a result of an arm's-length auction process. This question falls within the expertise and scholarly interest of the *Amici*, who offer their academic perspective and experience to aid in the Court's evaluation of the issues on appeal.

SUMMARY OF ARGUMENT

Judicial appraisal litigation has become one of the most uncertain and troubled areas of Delaware corporation law. This appeal affords an opportunity to simplify that litigation with respect to transactions arising out of an arm's-length auction process—meaning where the market price reflects the valuation of parties with their own funds at stake, without any conflict of interest or concealment of material information. In such circumstances, the transaction price reflects the "fair value" of the company, as the appraisal statute requires.

Without a clear rule directing courts to defer to such a transaction price, courts are left to cobble together a discounted cash flow model from the disparate proposals of the parties' experts. Respectfully, however, judges are ill-equipped to undertake that task. Although in some cases there is no alternative, there is no reason to plumb the murky waters of post-hoc discounted cash flow analysis where a transaction price arose from an arm's-length auction process. Worse, failing to privilege arm's-length sale processes imposes the prospect of costly and unpredictable appraisal litigation on all transactions, which distorts market behavior. This Court has long respected the merger decisions made by independent, informed directors and stockholders. *Amici* urge the Court to similarly respect their valuation choices.

ARGUMENT

I. WHEN A TRANSACTION IS THE RESULT OF AN ARM'S-LENGTH AUCTION PROCESS, A COURT SHOULD DEFER TO THE TRANSACTION PRICE AS THE BEST INDICATION OF "FAIR VALUE."

A. The Market Price of a Company Reflects Its Fair Value.

Delaware's judicial appraisal statute requires a court to "determine the fair value of the shares" of the target corporation in a merger or acquisition, "tak[ing] into account all relevant factors." 8 Del. C. § 262(h). In applying this statute, however, one must begin from the proposition that "[t]he value of a corporation is not a point on a line, but a range of reasonable values." Cede & Co. v. Technicolor, Inc., 2003 WL 23700218, at *2 (Del. Ch. July 9, 2004), aff'd in part, rev'd on other grounds, 884 A.2d 26 (Del. 2005); cf. Harris Trust & Sav. Bank v. Ellis, 810 F.2d 700, 706 (7th Cir. 1987) (Easterbrook, J.) ("'fairness' is a range, not a point"). In sophisticated transactions like the one at issue here, potential buyers hire investment bankers to identify, not a specific "fair value" point, but rather the "range of prices that reflect their educated guesses about the probable range of synergies available to various buyers." William J. Carney, Fairness Opinions: How Fair Are They and Why We Should Do Nothing About It, 70 WASH. U. L.Q. 523, 533 (1992). Within that range there may be multiple price points that represent fair value for a corporation.

In an appraisal proceeding, the judge must "assign one particular value within this range as the most reasonable value in light of all of the relevant evidence and based on considerations of fairness." Cede, 2003 WL 23700218, at *2. Thus, the question for the court in an appraisal proceeding is not a dichotomous "either/or," as it is in many other areas of the law. Instead, the question for the court is whether it can identify a price that falls within the reasonable range of values. And where a transaction was the product of an arm's-length process and a robust auction, the market price will necessarily represent such a point.[1]

This is so because a firm is a unique asset, and therefore the best indication of its particular value at a point in time (i.e., apart from the value of the market as a whole) is a market-based mechanism such as an auction.

Standard economic texts suggest two models of price formation. The first model involves "price takers," who simply accept the current market price as a given,

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[1] The appraisal statute requires that the court's determination of fair value be "exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation." 8 Del. C. § 262(h). Taking account of this directive, in some appraisal cases the Court of Chancery has deferred to the transaction price entirely, but adjusted it for any negative or positive synergies associated with the particular combination of the target with the buyer. See, e.g., LongPath Capital, LLC v. Ramtron Int'l Corp., 2015 WL 4540443, at *20, 25 (Del. Ch. June 30, 2015). This Court need not address this issue here because there are no synergies to consider. See Opinion below, attached as Exhibit 1 to Appellant's Opening Brief (hereinafter abbreviated as "Op."), at 58 n.230 (noting that the buyer here "was a financial buyer rather than a strategic acquirer").

and conduct their deals at that price. These markets are typically highly competitive, involve numerous buyers and sellers, and fungible goods. No one buyer or seller is capable of influencing these market prices because it does not individually control sufficient supply or demand to alter prices. See William J. Baumol & Alan S. Blinder, ECONOMICS: PRINCIPLES & POLICY 198 (13th ed. 2016). Moreover, buyers in such markets can diversify, offsetting the risk associated with any one stock with others in the portfolio. One description of this form of investment strategy is "seen one stock, seen them all." All that matters is the composition of a portfolio that corresponds to the risk preferences of the investor. Another form of this investment is the index fund, where investors accept the systematic risks associated with owning the entire market, but have limited exposure to the nonsystematic risks associated with a particular company.

The other form of price formation is described as price seeking or price making. Id. at 217. Here, assets are often less fungible and markets less thick. Although one might simply offer an item for sale and hope a buyer appears who is willing to pay the asking price, the more singular the item, the greater the difficulty with this method. For example, how would one price a Picasso painting? Most fine art is sold at auctions, where the price can be discovered by canvassing a group of willing and able bidders. As long as the participants in the auction have the pertinent information, are not misled, and operate at arm's-length from the seller, this price is generally described as "fair" because it involved a willing buyer and seller, each being under no constraints. See, e.g., Carney, 70 WASH. U. L. Q. at 527 (noting that a company is worth what a willing buyer would pay for it); Barry M. Wertheimer, The Shareholders' Appraisal Remedy and How Courts Determine Fair Value, 47 DUKE L.J. 613, 654 (1998) (same).

Selling a company is like selling a painting. The asset is unique, with its own set of nonsystematic risks. The buyer is not buying an asset as part of a fully diversified investment portfolio, so the nonsystematic risks become important in valuing the firm. As in this case, an experienced investment bank is typically retained to explore the universe of potential bidders, and all prospects are given the opportunity to do due diligence and make their own informed judgments about whether to make an offer at all and, if they do, at what price.

With respect to DFC, the target here, the financial results related to the asset kept worsening over the auction period. Of the 35 prospective buyers solicited in the Fall of 2013, three showed interest by late 2013, and as more bad news arrived, only two suggested a price. By March 2014, only Lone Star was left, and as financial projections became worse after the deal was announced, it ultimately offered $9.50 per share. There is no record of any other buyer making a superior offer after the deal was announced. Any of the sophisticated investors bidding (or considering bidding) for DFC would have been risking its own money to bid more. That none did demonstrates that no party with its own finances at stake saw more value in DFC than $9.50 a share.

The Court below recognized the well-settled precedent that, in the context of an arm's-length sale and robust auction, the transaction price is a reliable indicator of fair value because it is "forged in the crucible of objective market reality (as distinguished from the unavoidably subjective thought process of a valuation expert)." Op. at 58 (citing Van de Walle v. Unimation, Inc., 1991 WL 29303, at *17 (Del. Ch. Mar. 7, 1991)). Yet the Court declined to defer to the transaction price—despite the breadth of the seller's search for buyers and the vigor of the parties' negotiations—on the basis that the transaction occurred "during a period of significant company turmoil and regulatory uncertainty." Id. at 1.[2] "Although the sale process extended over a significant period and appeared to be robust," the Court added, "DFC's performance also appeared to be in a trough, with future performance depending on the outcome of regulatory decision-making that was largely out of the

[2] The Court's apparent view that the crisis was temporary appears to have been inconsistent with the views of prospective buyers. And their concerns proved justified: On June 2, 2016, the Consumer Financial Protection Bureau proposed new rules that would restrict payday lending practices. See Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Proposes Rule to End Payday Debt Traps (June 2, 2016), *available at* http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-rule-end-payday-debt-traps/.

company's control." Id. at 62. With all due respect to the Chancellor, however, this is not a reason not to defer to the transaction price produced by the auction.[3]

Uncertainty about future outcomes is simply another name for risk, and risk is priced by markets. The regulatory uncertainty the Court identified did not render the price reached through a robust market process unreliable—on the contrary, it was simply one of the characteristics of DFC's profile, and as such its impact was reflected in the market price. All companies face risks, to a greater or lesser degree, and that fact alone does not suffice to reject a price negotiated under the circumstances identified by the Court here. In other words, no "real-world sales process" completely follows "a perfect, theoretical model," Merlin Partners LP v. AutoInfo, Inc., 2015 WL 2069417, at *14 (Del. Ch. Apr. 30, 2015), but that does not suggest that the market price does not capture the fair value of a company. See id. (putting full weight on the merger price after analyzing the discounted cash flow analyses of the parties' experts); see also Keith Sharfman, Contractual Valuation Mechanisms and Corporate Law, 2 VA. L. & BUS. REV. 53, 71–73 (2007) (discussing

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3 The Court also observed that Lone Star was a "financial sponsor" with "its attention on achieving a certain internal rate of return and on reaching a deal within its financing constraints, rather than on DFC's fair value." Op. at 62–63. But the same could be said of most buyers, and the fact that buyers have their financial motivations and constraints relative to a transaction does not impugn the judgments they make about the value of the target.

the Chancery Court's commendable 2005 appraisal of Nextel Partners in which the Court fully deferred to the parties' valuation agreement).

In any event, as the Court below recognized, if the "tumultuous environment in the time period leading up to DFC's sale" affected the transaction price, it also affected the other measures of value that the Court employed. Op. at 60. For example, the Court adopted the five-year working capital projections from DFC's March Projections for its discounted cash flow analysis. Those five years reflected the same regulatory uncertainty and unpredictability that affected the market price. And the multiples-based valuation that the Court also adopted "relies on two years of management's projected EBITDA" (id. at 64), again subjecting it to the regulatory uncertainty that characterized DFC's outlook. Thus, the valuation methods the Court used did not remove the supposed defect that led it to deviate from the transaction price in the first place.

A corollary of this point is that the Court's partial use of the transaction price, weighting it a third, with the two other valuation methods each also being weighted a third, should be rejected. If the transaction price is in the range of reasonable values, a court should defer to it entirely. While a partial weighting of the transaction price achieves a fairer and more accurate result than ignoring it entirely, it is a contradiction in terms to say that a transaction price is somewhat but not entirely reliable.

A market price reached after an arm's-length auction process is also the best indicium of fair value because it excludes the interestedness that inheres in expert valuations. Buyers and sellers in the market both aim to maximize value, and in order to do so they value the asset that is for sale. Each has an incentive to base its decision on the most accurate value of the asset because, if they set values too high or too low, "they are penalized in the marketplace for doing so." Daniel R. Fischel, Market Evidence in Corporate Law, 69 U. CHI. L. REV. 941, 943 (2002).

The same cannot be said for paid experts in appraisal litigation. See id. ("Paid experts in litigation who testify about values derived from analyzing comparables or discounting future cash flows to present value have very different incentives."). It is in the interest of the paid expert's client—and therefore, to a significant extent, of the expert himself—to produce a value that favors his client's litigation position. Id. None of this is to suggest that experts necessarily act improperly or frivolously, but rather to contrast the valuation incentives of actual buyers and sellers with those of litigation experts. (Indeed, as explained below, there are cases where a court quite properly relies on the presentations of the parties' experts.)

Moreover, "the large number of subjective judgments that need to be made when performing a valuation analysis (choice of comparables, estimating future cash flows, choice of a discount rate, etc.) creates fertile opportunities for widely divergent conclusions." Id.; see also Wertheimer, 47 DUKE L.J. at 629 (noting that any appraisal methodology "is very dependent on the assumptions underlying the calculations employed"). Thus, different experts using the same methodology can reach vastly different conclusions—often beyond the contours of a reasonable range of value. See id. at 630; see also, e.g., In re Appraisal of Dell, Inc., 2016 WL 3186538, at *45 (Del. Ch. May 31, 2016) ("Two highly distinguished scholars of valuation science, using similar valuation principles, thus generated opinions that differed by 126%, or approximately $28 billion."). As Vice Chancellor Hartnett summarized the dynamic in an appraisal case, "[w]hile the assumptions [used by the parties' experts] had a basis, almost every figure used, whether a base figure or a multiplier, could have just as well been a different figure and the selection of the figure to be used necessarily involved a choice or guess by the witness, who in turn was being handsomely paid by one side or the other." In re Appraisal of Shell Oil Co., 1990 WL 201390, at *6 (Del. Ch. Dec. 11, 1990). By contrast, a transaction price arising out of an arm's-length, conflict-free auction process has filtered out any such risk of skewing toward the buyer or the seller—there will be no deal unless both sides agree on a price that rests on valuation assumptions reasonable from the perspective of the buyer *and* seller.

B. The Results of Post-Hoc Discounted Cash Flow Analysis, Such as the Court of Chancery Used Here, Have Been Chaotic and Costly.

As one of the *Amici* has argued, "[a]ppraisal proceedings have hardly been the Delaware courts' finest moments." William J. Carney & Mark Heimendinger, Appraising the Nonexistent: The Delaware Courts' Struggle with Control Premiums, 152 U. PA. L. REV. 845, 845 (2003). The recent history of appraisal valuation illustrates the point. In Weinberger v. UOP, Inc., this Court rejected the backward-looking method of valuation that had previously been employed in appraisal actions (known as the Delaware block method) in favor of "a more liberal approach." 457 A.2d 701, 712–13 (Del. 1983).[4] This more liberal approach included discounted cash flow analysis, which emphasizes future earnings. See William T. Allen, Securities Markets as Social Products: The Pretty Efficient Capital Market Hypothesis, 28 J. CORP. L. 551, 560 (2003). Despite its virtues, however, discounted cash flow analysis is volatile and sensitive to the assumptions on which a given model is based. See id. ("Because the DCF method is so subject to manipulation and guesswork, the valuation results that it generates in the setting of a litigation are almost certainly much more volatile than the values that the Delaware block method would yield."); see also Steven M. Davidoff, Fairness Opinions, 55 AM. U. L. REV.

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[4] For a criticism of the former "Delaware block" method, rejecting protections in favor of history when a business model had changed, see David Cohen, Comment, Valuation in the Context of Share Appraisal, 34 EMORY L.J. 117 (1985).

1557, 1577 n.85 (2006) ("It is no understatement to assert that there can be vast disagreement on what constitutes the best estimates of future performance and the appropriate future forecasted free cash flows of a corporation.").

Compared to the clarity of a transaction price reached after an arm's-length auction process, the post-hoc discounted cash flow analysis adopted in appraisal litigation has proven to be fraught with speculation, uncertainty, and imprecision. For example, in Rapid-American Corp. v. Harris, 603 A.2d 796 (Del. 1992), an investor who bought the company's stock the day before a cash-out was announced would have paid $28, yet the appraisal process produced a price of $73.28—a return of 262 percent. An even more dramatic example is the Cede & Co. v. Technicolor, Inc. appraisal litigation, a judicial saga that two of the *Amici* have described as "Delaware's version of Jarndyce v. Jarndyce," from Dickens' Bleak House. William J. Carney & George B. Shepherd, The Mystery of Delaware Law's Continuing Success, 2009 U. ILL. L. REV. 1, 44 (2009). The litigation produced at least twenty-one decisions in as many years.[5] During the various proceedings that took place, the

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[5] See Cede & Co. v. Technicolor, Inc., 1984 WL 8247 (Del. Ch. Oct. 22, 1984); Cede & Co. v. Technicolor, Inc., 1987 WL 4768 (Del. Ch. Jan. 13, 1987), aff'd in part, rev'd in part, 542 A.2d 1182 (Del. 1988); Cede & Co. v. Technicolor, Inc., 1989 WL 110543 (Del. Ch. Sept. 6, 1989); Cede & Co. v. Technicolor, Inc., 1990 WL 161084 (Del. Ch. Oct. 19, 1990), aff'd in part & rev'd in part, 634 A.2d 345 (Del. 1993), modified on reh'g, 636 A.2d 956 (Del. 1994); Cinerama, Inc. v. Technicolor, Inc., 1991 WL 111134 (Del. Ch. June 24, 1991); Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134 (Del. 1994), aff'd, 663 A.2d 1156 (Del. 1995);

appraised value of the target went from Chancellor Allen's $21.60 in 1990 (Cede & Co. v. Technicolor, Inc., 1990 WL 161084, at *2 (Del. Ch. Oct. 19, 1990)), to Chancellor Chandler's award of $21.98 in 2003 (Cede & Co. v. Technicolor, Inc., 2003 WL 23700218, at *1 (Del. Ch. Dec. 31, 2003)). This $0.38 difference, on 201,200 shares, amounted to $76,456—after two decades of litigation. See id. And even after the best efforts of those two distinguished chancellors, this Court ultimately held that the correct valuation was $28.41—an increase of $5,716,092 over Chancellor Allen's award. Cede & Co. v. Technicolor, Inc., 884 A.2d 26, 30 (Del. 2005).

These precedents are not offered to criticize the dedicated members of the Court of Chancery—including Chancellor Bouchard, the judge in this case—but rather to recognize that manipulating highly sensitive economic formulas in search of the exact price of a company is an enterprise for which, respectfully, judges are not well suited. This is because the assumptions on which a discounted cash flow

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Cede & Co. v. Technicolor, Inc., 684 A.2d 289 (Del. 1996); Cede & Co. v. Technicolor, Inc., 1998 WL 780119 (Del. Ch. Oct. 9, 1998); Cede & Co. v. Technicolor, Inc., 1999 WL 65042 (Del. Ch. Jan. 29, 1999); Cinerama, Inc. v. Technicolor, Inc., 1999 WL 135242 (Del. Ch. Feb. 25, 1999), rev'd sub nom. Cede & Co. v. Technicolor, Inc., 758 A.2d 485 (Del. 2000); Cede & Co. v. Technicolor, Inc., 2001 WL 515106 (Del. Ch. May 7, 2001); Cede & Co. v. Technicolor, Inc., 2002 WL 749183 (Del. Ch. Apr. 23, 2002); Cede & Co. v. Technicolor, Inc., 2003 WL 23700218 (Del. Ch. Dec. 31, 2003), aff'd in part, rev'd in part, 884 A.2d 26 (Del. 2005).

analysis rests are speculations about future performance, which are inherently uncertain. See Warren E. Buffett & Lawrence A. Cunningham, The Essays of Warren Buffett: Lessons for Corporate America 226 (4th ed. 2016) ("intrinsic value is an estimate . . . that must be changed if interest rates move or forecasts of future cash flows are revised"). Chancellor Allen has pointed out, as inherent aspects of discounted cash flow analysis, the "speculative nature of all cash flow estimates more than one year or eighteen months out" and "the difficulty for even well-intentioned persons to arrive at an economically sound cost of capital of the firm (meaning all of its future projections)." Allen, 28 J. CORP. L. at 561. There is little judges can do to address these problems.

Thus, because of the volatility of discounted cash flow analysis, its application in litigation "generate[s] a wide range of estimates." Cede, 1990 WL 161084, at *8 n.17. Indeed, Chancellor Bouchard recognized in his opinion below that "the subjective thought processes of two well-credentialed valuation veterans have led to chiasmic differences in their estimated fair values, despite their using similar methodologies and the same baseline set of financial projections." Op. at 58.

Yet judges, who are "[i]ll-equipped to perform valuations themselves" (Keith Sharfman, Valuation Averaging: A New Procedure for Resolving Valuation Disputes, 88 MINN. L. REV. 357, 359 (2003)), are left to pick one of two dramatically different valuations or to adopt some combination thereof, a decision for which judges are similarly ill-equipped. As Vice Chancellor Glascock wryly stated while evaluating discounted cash flow techniques, "I freely admit that the formulas did not spring from the mind of this judge, softened as it has been by a liberal arts education." In re Appraisal of Ancestry.com, Inc., 2015 WL 399726, at *19 (Del. Ch. Jan. 30, 2015). In short, a post-hoc discounted cash flow analysis is hardly more likely to arrive at a price within the reasonable range of values than a transaction price reached after an arm's-length auction.

To be sure, where the transaction price bears indications of misinformation or bias, a post-hoc discounted cash flow analysis, despite all its faults, will be appropriate. In the context of claims for breach of fiduciary duty related to mergers, this Court has imposed, in order for the decision of a board of directors to merit deference, certain procedural requirements. For example, directors must make an informed decision about value (see Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985)), and their decision must be disinterested (see Revlon, Inc. v. McAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Barkan v. Amsted Indus., Inc., 567 A.2d 1279 (Del. 1989)). See also Kahn v. M&F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014) (holding that the business judgment rule applies to mergers between a controlling shareholder and its corporate subsidiary, "where the merger is conditioned ab initio upon both the approval of an independent, adequately empowered Special Committee that fulfills its duty of care; and the uncoerced, informed vote of a majority of the minority shareholders.").

Similar principles should apply in the context of appraisal litigation. Thus, where material information is withheld from the market, discounted cash flow or other valuation analyses are necessary because the deal price will not reflect that insider information. See, e.g., In re Emerging Cmmc'ns, Inc. S'holders Litig., 2004 WL 1305745, at *23 (Del. Ch. May 3, 2004). But where, as here, the Court itself acknowledges that the circumstances surrounding the deal provide "a reasonable level of confidence that the deal price can fairly be used as one measure of [the company's] value" (Op. at 59), then the Court should fully accept the market price.

C. Permitting Courts to Deviate from the Transaction Price Risks Distorting the Behavior of Participants in the Marketplace.

The indeterminacy of appraisal litigation has generated a cottage industry of valuation experts and appraisal litigators who benefit from that indeterminacy. See Keith Sharfman, Judicial Valuation Behavior: Some Evidence from Bankruptcy, 32 FLA. ST. U. L. REV. 387, 387 & n.1 (2005) ("Valuation litigation is notoriously unpredictable"); see also Raluca Papadima et al., Shareholder Exit Signs on American and European Highways: Under Construction, 18 U. PENN. J. BUS. L. 1059, 1073–80 (2016) (recognizing the conflicting case law in Delaware and noting the recent rise of participants taking part in appraisal activism). The profits enjoyed by this industry come at the expense of stockholders everywhere, even those whose sale transactions are not litigated. The likelihood of appraisal litigation chills some bidders from participating in a sale process, and encourages bidders who do participate to bid less, as they must factor in the tax imposed by litigation after the transaction closes. Cf. William J. Carney, MERGERS AND ACQUISITIONS: CASES AND MATERIALS, (4th ed. 2016) (referring to the prospect of post-transaction litigation as a "merger tax"). Even stockholders of companies not involved in a transaction are adversely affected. The risk and uncertainty of potential judicial valuation affects the price of every stock, as prices reflect the possibility of a future transaction that now includes the drag of follow-on appraisal litigation.

The specter of appraisal litigation not only affects prices, it also distorts negotiating behavior. For example, transaction contracts increasingly include an appraisal rights closing condition designed to protect the acquirer against excessive use of appraisal rights. See Recent Delaware Appraisal Rights Developments Address Interest Rate Risk but Leave Certain Transactions Vulnerable on Deal Price, DAVIS POLK (Aug. 18, 2016), *available at* https://www.davispolk.com/publications/recent-delaware-appraisal-rights-developments-address-interest-rate-risk-leave-certain ("[G]iven the recent case law, we can envision that parties to vulnerable M&A transactions, and their lenders, may seek to negotiate appraisal conditions to address the deal price risk associated with appraisal rights."); 2016 M&A Report, WILMERHALE 15, *available at* https://www.wilmerhale.com

/uploadedFiles/Shared_Content/Editorial/Publications/Documents/2016-WilmerHale-MA-Report.pdf (appraisal rights closing conditions were included in 49 percent of all private company acquisitions in 2014). Such closing conditions include, for example, a provision excusing the acquirer from closing a transaction "if appraisal rights are exercised for more than a specified percentage of the outstanding shares." Victor Lewkow & Rob Gruszecki, Negotiating Appraisal Conditions in Public M&A Transactions, CLEARY GOTTLIEB (October 26, 2016), *available at* http://www.clearymawatch.com/2016/10/negotiating-appraisal-conditions-public-ma-transactions/. See generally Sharfman, 2 VA. L. & BUS. REV. at 75–76 (suggesting parties should choose Delaware law, which defers to contractual valuation mechanisms, to govern anticipated appraisal litigation). Thus, acquirers now must bargain, likely giving up something else in exchange, for a protection that should not be necessary.

These consequences are most severe when courts do not defer to transaction prices reached after arm's-length auctions. Imposing the cost of appraisal litigation regardless of whether the transaction was at arm's length reduces the incentives of corporate buyers and sellers to transact, while also raising the costs and reducing the benefits for those that do. By contrast, a safe harbor for arm's-length auction transactions would limit appraisal litigation to those situations where it belongs without imposing external costs on market-based, fairly conducted transactions.

As noted above, in fiduciary duty litigation this Court has done much to encourage director diligence in assuring the best price reasonably possible, by incentivizing directors to conduct themselves according to the standards of entire fairness. See supra 16–17. Refusing to defer, in the context of appraisal litigation, to transaction prices generated by arm's-length auction processes risks undermining that positive reinforcement.

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The discriminating approach urged here would create a welcome safe harbor for properly conducted transactions and do much to improve the market for corporate control. It would also do much to ensure that Delaware remains the best jurisdictional choice for stockholders when they incorporate, when they transact, and when they litigate. *Amici* respectfully urge the Court to seize this opportunity.

CONCLUSION

For the reasons set forth herein, *Amici* respectfully support the position advanced by Appellant.

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