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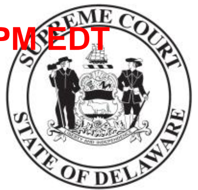

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HUFF FUND INVESTMENT PARTNERSHIP d/b/a MUSASHI II LTD. and BRYAN E. BLOOM,	:	No. 348, 2014
Petitioners Below/Appellants,	:	(Appeal from Court of Chancery C.A. No. 6844-VCG)
v.	:	
	:	Original Filing Date: August 11, 2014
CKx, INC.,	:	Public Filing Date: August 26, 2014
Respondent Below/Appellees.	:	

APPELLANTS' OPENING BRIEF

PROCTOR HEYMAN LLP
Samuel T. Hirzel, II (# 4415)
Dawn Kurtz Crompton (# 5579)
300 Delaware Avenue, Suite 200
Wilmington, DE 19801
302-472-7300

Attorneys for Petitioners Below/Appellants

OF COUNSEL:

LOWENSTEIN SANDLER LLP
Lawrence M. Rolnick
Thomas E. Redburn, Jr.
65 Livingston Avenue
Roseland, NJ 07068

TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES iii

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 2

STATEMENT OF FACTS 4

A. The Business of CKx and the Failed Take-Private Transaction 4

B. The Far-From-Pristine Auction 10

C. The Sharp Acquisition 15

D. Petitioners' Market-Approach Valuation Methodologies 18

E. The Court of Chancery's Decision 21

ARGUMENT 23

I. THE COURT OF CHANCERY ERRED BY FAILING TO INDEPENDENTLY DETERMINE THE FAIR VALUE OF CKX AND DEFERRING CONCLUSIVELY TO THE MERGER PRICE BY DEFAULT 23

A. Question Presented 23

B. Standard of Review 23

C. Merits of the Argument 23

II. THE COURT OF CHANCERY ERRED BY REJECTING PETITIONERS' MARKET-BASED METHODS FOR VALUING CKX 32

A. Question Presented 32

B. Standard of Review 32

C. Merits of the Argument 32

III. THE COURT OF CHANCERY ERRED BY EXCLUDING THE INCREMENTAL VALUE OF THE SHARP OPPORTUNITY FROM ITS APPRAISAL AWARD 34

A. Question Presented 34

B. Standard of Review 34

C. Merits of the Argument 34

CONCLUSION 35

TABLE OF AUTHORITIES

PAGES

CASES

Agranoff v. Miller,
791 A.2d 880 (Del. Ch. 2001) 33

Andalaro v. PFPC Worldwide, Inc.,
2005 WL 2045640 (Del. Ch. Aug. 19, 2005) 14, 33, 35

Bomarko, Inc. v. Int'l Telecharge, Inc.,
794 A.2d 1161 (Del. Ch. 1999) 33

Cavalier Oil Corp. v. Harnett,
564 A.2d 1137 (Del. 1989) 24

Cede & Co. v. Technicolor, Inc.,
684 A.2d 289 (Del. 1996) 24, 34

Delaware Open MRI Radiology Assocs., P.A. v. Kessler,
898 A.2d 290 (Del. Ch. 2006) 34

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

Gonsalves v. Straight Arrow Publishers, Inc.,
701 A.2d 357 (Del. 1997) 25, 26, 27, 31

Highfields Capital, Ltd. v. AXA Financial, Inc.,
939 A.2d 34 (Del. Ch. 2007) 30

M.P.M. Enters., Inc. v. Gilbert,
731 A.2d 790 (Del. 1999) 24, 26, 29

Merion Capital, L.P. v. 3M Cogent, Inc.,
2013 WL 3793896 (Del. Ch. July 8, 2013) 29

Montgomery Cellular Hldg. Co., Inc. v. Dobler,
880 A.2d 206 (Del. 2005) 23

Paskill Corp. v. Alcoma Corp.,
747 A.2d 549 (Del. 2000) 28

Rapid-Am. Corp. v. Harris,
603 A.2d 796 (Del. 1992) 26

In re Rural Metro Corp. Stockholders Litig.,
88 A.3d 54, 93-96, 101-03 (Del. Ch. 2014) 30

Tri-Cont'l Corp. v. Battye,
74 A.2d 71 (Del. 1950) 24

Union Illinois 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.,
847 A.2d 340 (Del. Ch. 2004) 30

Weinberger v. UOP, Inc.,
457 A.2d 701 (Del. 1983) 24

STATUTES

8 *Del. C.* § 262 .... *passim*

OTHER AUTHORITIES

SHANNON P. PRATT, ET AL., VALUING A BUSINESS (5th ed. 2008) 33

JOSHUAH ROSENBAUM, ET AL., INVESTMENT BANKING: VALUATION, LEVERAGED BUYOUTS, AND MERGERS AND ACQUISITIONS (2009) 11

NATURE OF PROCEEDINGS

Petitioners Huff Fund Investment Partnership d/b/a Musashi II, Ltd. (the "Huff Fund"), an investment fund, and Bryan Bloom ("Bloom"), a Huff employee and former Board member of CKx, Inc. ("CKx," "Respondent" or the "Company"), brought this statutory appraisal action pursuant to 8 *Del. C.* § 262 ("Section 262") following the merger of CKx with subsidiaries of Apollo Global Management, LLC ("Apollo"). Petitioners beneficially owned 13,728,196 shares of CKx common stock as of June 21, 2011 (the "Merger Date"). Under the terms of the Merger, CKx shareholders received $5.50 per share in cash (the "Merger Price").

Following a three-day trial held in March 2013, and several rounds of post-trial briefing and oral argument, the Court of Chancery rejected all valuation methods proposed by the parties, used no valuation method of its own and instead deferred conclusively to the Merger Price as the sole basis for determining CKx's going concern value as of the Merger Date. (Ex. A at 4; Ex. B at 19-20; Ex. C at 2-4.) Final judgment was entered on June 17, 2014 for $5.50 per share plus interest at the statutory rate. (Ex. C at 1.)

Contrary to Section 262, the Court failed to independently assess the value of Petitioners' shares, failed to perform a valuation, and rejected all valuation evidence presented. Accordingly, the Judgment should be reversed and remanded.

SUMMARY OF ARGUMENT

1. By deferring conclusively to the Merger Price without conducting any independent valuation to determine the Company's going concern value, the Court of Chancery abandoned its duty to dissenting shareholders to independently determine the fair value of their shares. A judicial appraisal under Section 262 does not contemplate deference to the price negotiated in the transaction being challenged as determinative (or even as evidence) of fair value, because to do so impermissibly delegates to the parties to that transaction the power to determine the fair value of dissenting shareholders' shares. As recognized by this Court in *Golden Telecom, Inc. v. Global GT LP*, 11 A.3d 214 (Del. 2010), that result is inconsistent with the General Assembly's intent that shareholders who dissent from a merger and exercise their appraisal rights obtain an independent judicial determination of the fair value of their shares. Dissenting shareholders should not be compelled to accept the price that a seller was able to negotiate on a given day (even where the auction was "pristine" – which the one in this case surely was not). The Court's failure to make such an independent valuation assessment requires reversal, as it defeats the very purpose of the appraisal statute.

2. Moreover, ample evidence existed that the Merger Price was based on the stock trading price of CKx, which was unresponsive to information about the Company's business fundamentals and, hence, did ***not*** reflect the Company's long-

term going concern value. Since the shares themselves were traded at a depressed, inefficient price, the unsolicited merger bids based on that price could not possibly be fair value.

3. The Court also committed legal error and abused its discretion by rejecting Petitioners' guideline publicly-traded companies and precedent transactions valuation methodologies on the grounds that the guideline companies utilized by Petitioners' expert were not identical, or sufficiently comparable, to CKx. Petitioners' expert made careful adjustments to the guideline companies to account for their differences – a process the Court failed to recognize. Instead, the Court applied a requirement of "perfect comparability" that is legally erroneous and factually impossible, and ignored the use of these same guideline companies by market participants valuing CKx in real time.

4. Finally, the Court erroneously refused to award any value to Petitioners for a major corporate acquisition – Sharp Entertainment ("Sharp") – that the Board authorized management to move forward with ***after*** the Merger Price was negotiated but ***before*** the Merger Date. The Court's findings that market participants were aware of that opportunity, and implicitly incorporated its value into their bids, have no support in the record. Neither Apollo nor any other prospective bidder knew about CKx's material, non-public, advanced negotiations with Sharp. Petitioners are entitled to share in the value of the Sharp acquisition.

STATEMENT OF FACTS

A. The Business of CKx and the Failed Take-Private Transaction

Robert F.X. Sillerman ("Sillerman"), one of the most successful media entrepreneurs in the country, founded CKx in 2005 on the concept that media entertainment content would become increasingly more valuable as distributors sought to attract and retain viewers in an environment of increasing audience "fragmentation." (A1035.) Historically, the market for television content was dominated by the four national broadcasters, ABC, NBC, CBS and Fox. (A1385.) This began to change when the creation of cable networks – and later satellite television – introduced opportunities for a far greater amount of content. The number of channels available to American households grew from three or four to many hundreds. (A1385.) Then, with the rise of the Internet, still newer forms of distribution became available through digital platforms; viewers began to watch media entertainment content on their computers, tablets, smart phones and even through their television sets using digital wireless streaming technology. As ever-increasing numbers of distribution channels became available to view media content, content itself became more valuable as the insatiable demand to fill the competing distribution channels continued to grow. (A711-12.)

Sillerman foresaw this development and sought to capture the coming wave of value by building a company – CKx – to control iconic media content assets.

(A1035-36.) CKx acquired exactly the type of valuable entertainment assets that Sillerman envisioned, thereby becoming a thriving and highly profitable company as of the Merger Date. Although Apollo purchased CKx for just $550 million, in 2010 alone, CKx earned $92.2 million in normalized EBITDA (nearly $1 per share) on $262 million in normalized revenue. (A804.) CKx's evergreen, non-replicable assets were in three principal business divisions: (i) Elvis Presley Enterprises, which owns the rights to the iconic name, image, likeness and a library of recording rights of Elvis Presley, the most successful recording star of all time, as well as the Graceland tourist attraction in Memphis, Tennessee; (ii) 19 Entertainment, which owned rights to the blockbuster, number one-rated television program *American Idol*, as well as the highly successful *So You Think You Can Dance* television show, both of which aired on the FOX television network; and (iii) Muhammad Ali Enterprises ("MAE"), which owns the rights to the name, likeness and image of Muhammad Ali, the most recognizable professional sports figure of the last century. (*See* A138-39.) CKx stock traded publicly on NASDAQ until the Merger. (A1464.)

As the Company experienced explosive growth, it was subjected to a failed take-private buyout attempt that significantly impaired its strategic objectives and caused its public share price to trade at a depressed and inefficient level. In June 2007, Sillerman led a takeover bid for CKx at $13.75 per share. (A318; A1564-

65.) That transaction failed to materialize when the financial crisis caused credit lines to be canceled. (A318.) Thereafter, a series of would-be acquirors – unsolicited by CKx – emerged with failed takeover attempts of their own (including Apollo). (A320-24.)

As a result, the stock began trading only in reaction to positive or negative takeover speculation. Dr. Laura Robinson, Petitioners' expert economist, conducted an unrebutted 10-model event study of CKx common stock that demonstrated that the stock price did not respond to news concerning CKx's business or value fundamentals. (A1306-20; A884-903, A942-1010.) The stock price only responded to news concerning the prospects for a sale of the Company. For example, of the eighteen trading days during the year between May 10, 2010 and May 9, 2011 on which CKx's stock price experienced statistically-significant abnormal returns using her 4-Factor, 100 Trading Day Estimation Window Model, (a) seven of them coincided with the release of news about a possible sale of the Company, (b) eleven of them could not be associated with the release of ***any*** CKx-related news at all, and (c) ***none*** of them coincided with news about CKx's ongoing business operations. (A1312-16; A898, A901-02.) These results were consistent among Dr. Robinson's other nine models. (A1316-17; A896-903, A1009-10.) Thus, for a substantial period of time prior to the Merger, short term speculators would enter the market for CKx stock either buying on hopes of a sale

of the Company or selling on the belief that a transaction would not occur. (A1319-20; *see also* A1016 ("If the market for CKx stock was efficient, we would expect the market to respond to unexpected news and we did not observe that the market responded in that way so that is consistent with the idea that it is not efficient.").)

Indeed, if one looks at the CKx stock price and compares it to the NASDAQ composite over the five-year period prior to the Merger, the implications of Dr. Robinson's study become even clearer. Prior to the period studied by Dr. Robinson, CKx's stock price movement was generally correlated with the broader market. (A1915.) After the 2008 financial crisis, the rest of the market returned to (and even exceeded) pre-crisis prices. However, the ***opposite*** was true of CKx stock because the Company's stock price was no longer moving in response to market or company fundamentals. Indeed, CKx moved in an opposite direction from the broader market even though CKx had a CAGR on EBITDA between 2006 and 2011 of over 20% (far more than the NASDAQ composite). (A804.)

In October 2010 – just seven months before the unsolicited Apollo bid in March 2011 – the Board issued a press release stating definitively that the Company was not for sale. (A96.) CKx took this unusual step because it was constantly subjected to unsolicited bids from prospective purchasers. The perennial "For Sale" sign depressed CKx's stock price, posed a huge distraction to

management and hampered the Company's strategy of growth through acquisition of other content companies, as the owners of these companies would not execute a deal without knowing who was going to own them (and, thus, who their partners in exploiting the content would be). (A1059-60.) As CEO Mike Ferrel ("Ferrel") put it, the Company was suffering from "deal fatigue," and he feared that "any prospective buyer of the company would be somebody who would try to lowball it . . . ." (A678.) Compounding the fatigue, Ferrel was not interested in a long tenure at CKx (A193), and Sillerman had sustained a huge financial set-back that had left his 30% ownership in CKx pledged as collateral to a loan that was in default (A921-23). Ferrel's fears of provoking a low-ball bid proved to be prescient.

Financial investors, including Apollo, recognized this state of affairs and CKx's depressed stock price. (A188.) Sensing an opportunistic coup – and ignoring that the Company was not for sale – three unsolicited bids were made for CKx within days of each other in March 2011. Gores Group, LLC ("Gores") offered $4.75 per share, Prometheus Global Media Holdings, LLC ("Prometheus") – a fund backed by Guggenheim Investment Management LLC – offered $4.75 per share, and Apollo $5.00 per share. (A104-07; A108-10; A111-14.) Within a few days of the initial offers, Gores increased its offer to $5.10 per share, Prometheus increased its offer to $5.25 per share, and Apollo upped its offer to $5.50 per share. (A116-19; A123; A132.)

The Company's contract with FOX for the production and airing of *American Idol* – CKx's most important asset – was set to expire in May 2011.

(A1062-64.) [redacted]

(A190-91, A199-200, A204), and after the Board accepted Apollo's bid, [redacted]

[redacted], which prevented a new agreement from being reached before the Merger and created uncertainty as to the outcome of those negotiations (A1068).

B. The Far-From-Pristine Auction

For the same reason it declared the Company was not for sale, the Board initially declined to consider the unsolicited offers made in March 2011. At Ferrell's urging, however, the Board abruptly changed directions. (A115.) On April 15, 2011, at the insistence of Bloom – who wanted to minimize management distraction from yet another set of unsolicited bids – the Board ordered its financial advisor, Gleacher, to conduct a highly-truncated sale process in which any interested bidder would be required to conduct all their due diligence and submit fully financed bids in just three weeks. (A1071-72.) Such an approach favored Apollo, which had already conducted its due diligence and lined up financing. (*See* A189.) This compressed process ultimately yielded only two bidders, both of whom had made unsolicited bids in March – Apollo at $5.50 per share, and Gores at $5.60 per share. (A255-56; A260.) Believing that Gores had not yet firmed up committed financing in the three week period allowed, the Board on May 9, 2011 rejected Gores's bid and accepted Apollo's, with Bloom dissenting. (A258-61.)

Dr. Robinson analyzed the CKx sale process in accordance with auction theory principles developed by Joshua Rosenbaum and Joshua Pearl in their book, *Investment Banking: Valuation, Leveraged Buyouts, and Mergers and Acquisitions* (2009), and concluded that it was poorly managed and not conducive to maximizing the merger consideration. (A1326-35; A908-28.) *First*, the Board never decided that it was the right time to sell the Company, and instead felt compelled to act in response to unsolicited bids that the Board had previously concluded were harming the Company. (A690; A1058-59, A1068-72.) In fact, it was the worst possible time to sell CKx because the Company's stock price traded inefficiently and had been beaten down by years of failed acquisitions. (A1915.)

Second, the Board's hurried execution of the process was poorly controlled. Gleacher, CKx management, the Board and former CEO Sillerman (whose shares in CKx were pledged on a defaulted loan) all struggled to exercise control over the process without coordination. (A1331-32; A909, A912-15.) At the outset, the process was weakened when Ferrel signaled to bidders that the Board would accept $5.50. (A1330-31; A909, A912-15; *see also* A684-88.) Then, with Gores and Apollo the only two bidders, Gleacher told Apollo that Gores's bid was not attractive to the Board because it was not fully financed. (A721-22; A1769-70.) Apollo then had no reason to raise its bid.

Third, the three-week deadline to conduct due diligence and submit fully-

financed bids discouraged new bidders, and gave Apollo a huge advantage. Rosenbaum and Pearl estimate a 22 to 32-week timeframe to complete due diligence, obtain financing and complete a bidding process. (A1334-35; A909, A926-28.) Apollo itself recognized its advantage over other bidders from its previous due diligence on CKx in 2010. (A189 [redacted]) Although numerous potential financial and strategic buyers were contacted (A1746-47), the Company never put on any testimony explaining ***why*** those parties said they were not interested. As Dr. Robinson explained at trial, the issue is "the dog that didn't bark in the night" – the absence of bidders should have alerted the Board that something was wrong. (A1361.) There was no evidence presented that any prospective bidder was told they could have more time. And, in fact, Gores was not given even one additional day to address the financing deficiency in its higher, $5.60 bid. (*See* A292-93.)

Fourth, the key participants had incentives to close a deal that did not maximize value for CKx shareholders. Sillerman – who controlled 30% of the outstanding stock – was in default on a loan that had to be repaid in August for which his CKx shares were pledged as collateral. (A1331-32; A909, A921-25.) Moreover, under the generous change-in-control provisions of his employment agreement, Ferrel stood personally to make more from the Merger than he would if

CKx continued as a going concern. (A1331-32; A909, A921.) CFO Thomas Benson ("Benson") also earned $7 million from the sale of his stock in the Merger, and retired a little more than a year later. (A1648-50.) All of these incentives made the key participants very anxious and willing sellers.

Now-defunct Gleacher had similar incentives. Gleacher could receive the $4 million contingent success fee under its engagement letter only if a deal closed – at ***any*** price. (A1331-32; A909, A919-20.) Although Gleacher's engagement letter was modified at the eleventh hour (just days before CKx inked a merger agreement with Apollo), it was too little too late. The truncated bidding process had largely run its course at that point. (A1363-65.) Gleacher also had earned substantial fees from Apollo in the past, and had an incentive to please its client. (A920.) In fact, Gleacher manipulated the valuation analysis in its fairness opinion in order to justify the Merger and obtain its fee. In internal briefing materials that Gleacher prepared in December 2009 in connection with evaluating an $8.75 per share bid by One Equity Partners, Gleacher calculated CKx's value at between $6.78 per share and $10.73 per share using DCF, comparable companies and precedent transactions methodologies. (A59.) Faced with Apollo's substantially lower bid of $5.50 per share in the spring of 2011, Gleacher, among other things, dropped the precedent transactions method altogether (which a Gleacher analyst pointed out

supported a value for CKx in excess of $7.00 per share) and modified its DCF analysis to lower its estimate of CKx's value. (A263-91; A131.)

Finally, as noted above, Dr. Robinson established through a comprehensive and un-rebutted event study that, for at least a year before the Merger, CKx's stock price was not reflective of its fair value. CKx's own management and Gleacher both confirmed that investors were trading CKx stock based on positive and negative takeover speculation rather than company fundamentals, and that this activity, as well as the "overhanging" effect of the prolonged and involuntary "For Sale" sign, depressed the Company's stock price. (*See, e.g.*, A700; A682; A731-35.)

Indeed, the Court below eschewed reliance on CKx's stock trading price "because there is some evidence that stock price may have undervalued the company." (Ex. A at 32 n.124.) However, the Court failed to appreciate that a depressed stock price inexorably undermines the reliability of the Merger Price itself. An artificially depressed stock price will embolden bidders – especially opportunistic, unsolicited financial buyers. Wall Street takeover firms like Apollo generally bid against a market price. *See Andalaro v. PFPC Worldwide, Inc.*, 2005 WL 2045640, at *16 n.69 (Del. Ch. Aug. 19, 2005) (noting that "on average, entire firms sell at a premium to the pre-announcement trading in minority blocks of their shares, an unsurprising phenomena recognizing the difference in what is being

bought."). If the market price is not reliable, neither will the bids elicited by that price be reliable indicators of value.

The Court's rejection of Dr. Robinson's opinion was based on a misunderstanding of its contents. It criticized Dr. Robinson for opining that CKx's process failed to conform to the standards of a Vickrey auction (in which the highest bidder wins the right to acquire the asset at the second highest bid). (Ex. A at 35-37.) But that was not Dr. Robinson's testimony. Her expert report, which was admitted as part of her direct testimony, made clear that the standard she applied actually came from Rosenbaum and Pearl, pursuant to which an effective auction must create "competitive tension" among a sufficient number of bidders and properly position the business being sold in order to maximize shareholder value. (A1326-27, A1329; A908-09.)

C. The Sharp Acquisition

After Apollo made its first $5.50 per share offer, CKx entered into advanced discussions for a major acquisition of a large, highly-accretive media content company. (A1058-60; A244-54.) On or about May 4, 2011, COO Kraig Fox and Scott Frosch (CKx's VP of Finance) submitted a memorandum to Ferrel and the Board outlining the Sharp opportunity and attaching a detailed slide deck about the target. (A244-54.) Sharp owned content – successful television programs, including the Travel Channel's *Man v. Food* (the highest rated show in the

network's history) and TLC's *Extreme Couponing* (that network's highest rated show in its spring 2011 lineup), as well as a number of promising shows in its development pipeline. (A249-50.) According to Benson – and found by the Court below – when the deal was brought to the Board, it was "far along in the pipeline"; CKx was in "advanced discussions" with Sharp over "price and terms" and had exchanged term sheets. (A1510-11, A1523-24; Ex. A at 10 ("***Benson testified that CKx was involved in 'advanced discussions over price and terms' before the Apollo transaction closed.***" (emphasis added)).) The Sharp deal fit perfectly into CKx's overall strategy of growing the Company through acquisitions. (A1077.) In response to the Fox and Frosch memo, the Board authorized management to move ahead.[1] The only reason the deal was not completed before the Merger was the intervening sale of CKx to Apollo. (A1080; A703.) The acquisition closed approximately one year after the Merger. (A725.)

Apollo's $5.50 bid did ***not*** account for any value related to the Sharp acquisition because Apollo had no idea at the time it made that bid that CKx was in confidential, non-public negotiations to buy Sharp. Apollo confirmed to CKx CEO Ferrel that it was prepared to offer $5.50 per share for CKx ***on or about April 6,***

[1] (A1080 ("Q. Mr. Bloom, did the board take any specific action with respect to the Sharp acquisition? A. ***They authorized management to go ahead.***" (emphasis added); A709 ("Q. And the board of CKx had, in fact, authorized management ... to move forward with a potential acquisition of Sharp? THE WITNESS: We had at a board meeting in the spring of 2011 provided the board with an overview of the company and an update on our discussions. ***And the board was supportive of us moving forward.***" (emphasis added; objection and colloquy omitted).)

2011. (A326.) Management first presented the Sharp acquisition to the Board nearly a month later, on May 4. (A244.) CKx's Board authorized management to pursue the Sharp opportunity at a meeting on May 9 – the very same meeting in which it voted to approve the Merger with Apollo at $5.50 per share. (A1077-78; A334-36.) CKx did not publicly disclose its discussions with Sharp, concluding correctly that SEC rules did not require disclosure. (A1511.) And Respondent conceded (in briefing below) that Apollo did not learn of CKx's interest in acquiring Sharp ***in particular*** until ***"mid-May 2011"*** – well after CKx's Board had approved the merger with Apollo on ***May 9***. (A2092 (emphasis added).) Thus, the $5.50 Merger Price did not – and could not – account for any value relating to the Sharp acquisition.

The Court below refused to value the Sharp acquisition based on the fact that Apollo's April 30 investment memorandum contained a list of twenty-two possible acquisition targets and Sharp was on the list. (A241-43; Ex. B at 12 n.30.) But this only confirmed that when Apollo made its bid, it had no idea CKx was in advanced discussions to acquire Sharp itself. Apollo (and probably everyone else in the market) may have understood that Sharp and a plethora of other companies were theoretical acquisition possibilities, but that is a far cry from knowing that

CKx was in "advanced discussions" over "price and terms," and that the deal was "far along in the pipeline" at the time of the Merger. (A1510-11, A1523.)[2]

D. Petitioners' Market-Approach Valuation Methodologies

Petitioners' valuation expert, Robert F. Reilly ("Reilly"), applied the three most widely used valuation methods to determine the fair value of CKx as of the Merger: DCF, Guideline Publicly Traded Companies ("GPTC") and Guideline Merged and Acquired Companies ("GMAC"). Respondent's valuation expert, Jeffrey Cohen ("Cohen"), utilized only the DCF methodology to estimate the fair value of CKx. The Court rejected all the valuation methods advanced by both parties.

Like Gleacher, Apollo and other potential bidders for CKx (such as One Equity Partners) before him, Reilly relied on an analysis of guideline publicly-traded companies in valuing CKx. (A1184, A1186.) Not surprisingly, Reilly determined that there were no identical publicly-traded companies. However, Reilly selected five "guideline" companies that are in the business of managing entertainment content: Discovery Communications, Inc. ("Discovery"); Live Nation Entertainment, Inc. ("Live Nation"); The Madison Square Garden Company ("MSG"); Scripps Networks Interactive, Inc. ("Scripps"); and World

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[2] The Court also relied on a hearsay excerpt from Aaron Stone's deposition (in the shareholder litigation, not this one) stating that he was aware at some point in 2010 that CKx "had looked at" Sharp. (Ex. A at 12 n.30; A551.) That is quite different from knowing that CKx was in the midst of concrete negotiations to acquire Sharp more than six months later.

Wrestling Entertainment, Inc. ("WWE"). (A1185.) All of these companies engaged in the exploitation of entertainment content, just like CKx. (A1256-62.) All of them stood to gain from the revolution in consumption of, and demand for, entertainment content that Sillerman (and Apollo) had identified. As producers of television programming, Discovery, MSG, Scripps and WWE all compete with CKx, and Live Nation competes with CKx (specifically, the *American Idol* contestant concert tours) in the production of live music events. (*See* A826-30.)

Significantly, all five of these companies were used as "comparables" by either Apollo, Gleacher or CKx management to make business decisions about CKx before the appraisal litigation. [redacted] (A218.) Gleacher, in its fairness opinion for CKx, utilized the arithmetic mean multiples for WWE and Live Nation, which it described as "the most similar public peers" of CKx, and also considered multiples from Scripps and MSG. (A280, A282.) CKx management believed that WWE and Live Nation "were most similar" to CKx's assets. (A1537.)

After conducting an exhaustive analysis of their respective businesses and economic metrics, and accounting for any differences they had from CKx, Reilly concluded that all of these companies were sufficiently similar to CKx to enable him to conduct a reliable GPTC analysis. CKx was in the mid-range of the group

of comparable companies with respect to: (i) EBITDA to revenue profitability (third out of six); (ii) projected EBITDA growth (third out of six); (iii) current liquidity ratio (third out of six); (iv) working capital turnover (second out of six); and (v) leverage (third out of six). (A816.) Reilly made careful adjustments in his selection of relevant pricing multiples to account for the differences that existed, and concluded the fair value of CKx common stock under the GPTC method was $921 million.[3] (A1188-89; A815.) In its conclusory rejection of the methodology, the Court below never even considered Reilly's adjustments.

For his GMAC analysis, Reilly searched for guideline merger and acquisition transactions, and identified two such transactions on which to base his analysis: (i) Walt Disney Co.'s acquisition of Marvel Entertainment, LLC ("Marvel") on December 31, 2009, and (ii) the acquisition of Playboy Enterprises, Inc. ("Playboy") led by Rizvi Traverse Management, LLC on March 3, 2011. (A1189-90.) Both Marvel and Playboy were in the business of managing and selling entertainment content and were highly similar to CKx. (A833-34.) Gleacher considered the Marvel acquisition (which was still pending at the time) in its December 2009 internal briefing materials for CKx. (A64.) Following a detailed analysis of these two transactions that took account of CKx's similarities

[3] Reilly also used the GPTC method to estimate the incremental value to CKx of the Sharp acquisition. (A1200.)

and differences, Reilly concluded the fair value of CKx common stock under the GMAC method was $933 million. (A1192-93; A832.)

E. The Court of Chancery's Decision

In its Memorandum Opinion issued November 1, 2013, the Court of Chancery rejected all valuation methodologies and found that "use of the merger price to determine fair value is appropriate in this matter" given the absence of viable alternatives. (Ex. A at 4, 32-34, 38.) The Court found DCF was not appropriate for CKx because management's projected future cash flows were unreliable. (*Id.* at 28-29.) The Court of Chancery also rejected Petitioners' market-based methods because the guideline companies selected by Reilly were "not truly comparable to CKx." (*Id.* at 23.) In the Court's view, "none of the guideline companies were of comparable size [to CKx]; none owned assets resembling the assets of CKx and none competed with CKx or utilized a comparable business model." (*Id.* at 23-24.)

The Court of Chancery came to the startling conclusion that there was no way to value CKx – even though Apollo itself had used a comparable companies methodology to value the Company. Lacking any valuation method, the Court deferred conclusively to the Merger Price as the best and only indicator of long-term going concern value, finding that the "process by which CKx was marketed to potential buyers was thorough, effective, and free from any specter of self-interest

or disloyalty." (*Id.* at 32-34 (justifying complete deference to Merger Price "in light of the absence of any other reliable valuation analysis.").) The Court held that, notwithstanding the substantial time and expense incurred by Petitioners to get their shares appraised, it would be nothing more than "'reasoned guess-work'" for the Vice Chancellor, as "'a law-trained judge,'" to "'second-guess the price that resulted from that process.'" (*Id.* at 34 (quoting *Union Illinois 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.*, 847 A.2d 340, 359 (Del. Ch. 2004).) The Court held that CKx's going concern value at the time of the Merger was the $5.50 Merger Price, less any synergies that the Company might prove in further proceedings. (*Id.* at 37-38.)

Petitioners moved for reargument on the ground that, *inter alia*, even if the Court were to defer conclusively to the Merger Price, it should add the value of the Sharp acquisition. Following additional briefing and argument, the Court refused to make any adjustments to the Merger Price. (Ex. B at 3.) In particular, the Court declined to adjust the Merger Price for the Sharp transaction, finding that market participants were presumably aware of the possibility of an opportunity for CKx to acquire Sharp and, thus, likely factored that into their bids for CKx itself. (*Id.* at 11-16.)

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY FAILING TO INDEPENDENTLY DETERMINE THE FAIR VALUE OF CKX AND DEFERRING CONCLUSIVELY TO THE MERGER PRICE BY DEFAULT

A. Question Presented

Whether the Court of Chancery erred by refusing to use any valuation methodology and relying on the Merger Price as the sole evidence of CKx's going concern value. This issue was preserved below. (A1885-91.)

B. Standard of Review

The Court of Chancery's determination that Section 262 permitted it to defer to the Merger Price is a question of law implicating the proper interpretation of the appraisal statute, and is reviewed *de novo* by this Court. *Golden Telecom, Inc. v. Global GT LP*, 11 A.3d 214, 216-17 (Del. 2010). The Court of Chancery's factual findings concerning the sale process may be reversed on appeal if "they are clearly wrong and the doing of justice requires their overturn." *Montgomery Cellular Hldg. Co., Inc. v. Dobler*, 880 A.2d 206, 219 (Del. 2005).

C. Merits of the Argument

The appraisal statute requires the Court to appraise "the fair value" of Petitioners' shares in CKx. 8 *Del. C.* § 262(h). "Fair value, as used in § 262(h), is more properly described as the value of the company to the stockholder as a going concern . . . . [F]ailure to value a company as a going concern may result in an

understatement of fair value." *M.P.M. Enters., Inc. v. Gilbert*, 731 A.2d 790, 795 (Del. 1999). Section 262 assumes that the dissenting shareholder would have been willing to maintain his equity position in the company had the merger not occurred. *See Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1145 (Del. 1989). Thus, Petitioners are "entitled to be paid for that which has been taken from [them], viz., [their] proportionate interest in a going concern." *Tri-Cont'l Corp. v. Battye*, 74 A.2d 71, 72 (Del. 1950); *see also Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983).[4]

"Section 262(h) unambiguously calls upon the Court of Chancery to perform an *independent* evaluation of 'fair value' . . . ." *Golden Telecom*, 11 A.3d at 217. In the case at bar, the Court of Chancery abdicated that statutory duty and conducted no valuation at all. The Court failed to distinguish between a transactional "market price" and an appraisal "fair value." A transactional "market price" is one agreed to by a willing seller at a given time. However, an "appraisal" is a determination of the fair value of the subject company as a going concern. In the everyday business world, there are many examples in which a "transaction price" is distinguished from an "appraised" value. For example, a mortgage lender will demand an "appraisal" of property rather than rely on the "transaction price"

[4] To determine "fair value," the Court is to consider "all relevant factors" and must value the company based on its "operative reality" on the merger date. *See Cede & Co. v. Technicolor, Inc.*, 684 A.2d 289, 297-300 (Del. 1996); *Weinberger*, 457 A.2d at 713; 8 *Del. C.* § 262(h).

to ensure that its loan is sufficiently secured. An insurer may require similar "appraisals" of art or jewelry. These valuations are meant to provide a check against the price of a transaction and, if the appraiser simply deferred to the transaction price, the entire purpose of the appraisal would be defeated. Consistent with the purpose of an appraisal, this Court has emphasized in a long line of decisions that a Section 262 appraisal must be an "independent" valuation that does not simply defer to the price set by the parties who negotiated the very transaction that is the subject of the appraisal.

In *Gonsalves v. Straight Arrow Publishers, Inc.*, 701 A.2d 357, 360-62 (Del. 1997), the Court reversed an appraisal award where the Court of Chancery erroneously announced in advance of trial that it would accept one expert's valuation or the other. To do so violated the appraisal statute's requirement that the Court of Chancery independently determine the value of the corporation's shares. *Id.* at 361 ("The role of the Court of Chancery has evolved over time to the present requirement that the Court independently determine the value of the shares that are the subject of the appraisal action."). Indeed, the deferential standard of appellate review normally accorded to valuation decisions by the Court of Chancery "assumes that the court will employ its own acknowledged expertise, which is essential to the appraisal task." *Id.* at 360. Where the Court of Chancery fails to employ any valuation methodology or expertise and simply defers to the

transaction price, it has failed to discharge its obligation under the statute. The Court of Chancery cannot avoid its duty to utilize valuation methods to independently determine value merely because it consists of law-trained judges.

Two years after *Gonsalves*, the Court explained that, although a merger price resulting from arm's-length negotiation can provide "a very strong indication of fair value," in "***an appraisal action, that merger price must be accompanied by evidence tending to show that it represents the going concern value of the company rather than just the value of the company to one specific buyer.***" *M.P.M. Enters.*, 731 A.2d at 797 (emphasis added). Arm's-length negotiation is not enough to justify deferring to the merger price because"[u]nder section 262, the fairness of the price on the open market is not the overriding consideration." *Id.*; *see also Rapid-Am. Corp. v. Harris*, 603 A.2d 796, 806 (Del. 1992) (rejecting valuation model that placed too much emphasis on market value).

Most recently, in *Golden Telecom*, this Court rejected a rule requiring the Court of Chancery to defer, either conclusively or presumptively, to the merger price in an appraisal proceeding, even where that price resulted from a "pristine" auction. 11 A.3d at 217-18. This Court held that the appraisal statute does "no[t] even contemplate[] that the Court of Chancery should consider the transactional market price," and to defer to the merger price would contravene Section 262's requirement that the Court conduct an "independent" determination of going

concern value. *Id.* Even worse, it would delegate the Court's task to the very acquiror whose activities the appraisal statute was designed to protect against. *Id.* at 218. As the Court explained in greater detail:

> In an appraisal proceeding, the Court of Chancery "shall determine the fair value of the shares . . . together with interest, if any, to be paid upon the amount determined to be the fair value." ***Section 262(h) neither dictates nor even contemplates that the Court of Chancery should consider the transactional market price of the underlying company***. . . . [T]his Court has defined "fair value" as the value to a stockholder of the firm as ***a going concern, as opposed to the firm's value in the context of an acquisition or other transaction***. . . .
>
> Section 262(h) unambiguously calls upon the Court of Chancery to perform an *independent* evaluation of "fair value" at the time of a transaction. It vests the Chancellor and Vice Chancellors with significant discretion to consider "all relevant factors" and determine the going concern value of the underlying company. ***Requiring the Court of Chancery to defer—conclusively or presumptively—to the merger price, even in the face of a pristine, unchallenged transactional process, would contravene the unambiguous language of the statute and the reasoned holdings of our precedent. It would inappropriately shift the responsibility to determine "fair value" from the court to the private parties.***

Id. at 217-18 (bolded emphasis added).

The reasoning of *Gonsalves* and *Golden Telecom* requires reversal of the Court of Chancery's decision in this case. The Court did not conduct a valuation or any independent determination of the going concern value of CKx, as the statute requires. Instead, after rejecting all of the valuation methodologies proffered by the parties, the Vice Chancellor decided that the Merger Price was conclusive evidence of fair value because the sale process was fair and he should not "second-

guess" it. (Ex. A at 34.) In doing so, the Court of Chancery delegated the responsibility to determine CKx's fair value to Apollo and CKx's pre-Merger management – which is exactly what the appraisal statute prohibits.

The very purpose of Section 262 is to provide a remedy to dissenting shareholders who are not willing sellers of their stock and would prefer to remain owners in the company continuing as a going concern. Section 262 assures that these shareholders are not compelled to accept the merger price that negotiations have produced, but may instead obtain an independent judicial determination of the fair value of their shares – much like a landowner in a condemnation proceeding. *See Paskill Corp. v. Alcoma Corp.*, 747 A.2d 549, 553 (Del. 2000).

The appraisal remedy is illusory, however, if the standard for "fair value" applied by the Court of Chancery amounts to nothing more than deferring to the price to which the negotiating parties agreed. That leaves dissenting shareholders with the choice to either surrender their shares against their will at a price determined by third parties or spend millions of dollars for a judicial determination that consists of empty deference to the acquiror's price. *See Golden Telecom*, 11 A.3d at 218. No wonder the defense bar has applauded the decision.[5] Defaulting

[5] *See, e.g.*, Gibson, Dunn & Crutcher LLP, *2013 Year-End Securities Litigation Update*, at 24 (Jan. 21, 2014) (to contest the "nuisance" to M&A transactions posed by appraisal lawsuits, *CKx* provides "some ammunition to companies in appraisal actions claiming that the merger price is the best determinant of a target company's value," a decision that "is sure to be cited by companies arguing that the merger consideration was the best indicator of fair value").

to the merger price with no evidence that it is fair value also inserts a substantial degree of arbitrariness into the appraisal process. CKx never proffered any expert testimony concerning the relationship between the Merger Price and the Company's going concern value, despite having the burden of proof on that issue. (A1710-11; A1022.) *See Merion Capital, L.P. v. 3M Cogent, Inc.*, 2013 WL 3793896, at *5 (Del. Ch. July 8, 2013) (refusing to rely on merger price where respondent's expert did not do so and, in fact, advocated for a lower fair value amount, just as Cohen did below). Merger prices for publicly-traded companies are a function of market prices, and market prices change for macroeconomic reasons unrelated to the condition of the individual firms. For example, the 2008 financial crisis produced market-wide effects that depressed the stock prices of many companies, including CKx, for reasons having nothing to do with CKx's value. (A1915.) And, in the year prior to the Merger, CKx's stock price continued to be depressed due to takeover speculation. (A1915.)

The Court's decision below was not only devoid of evidence that the Merger Price constituted fair value, but actually relied on the purported ***absence*** of reliable valuation evidence, coupled with a supposedly "pristine" auction, to conclude that it was. This reasoning has it exactly backwards. *See M.P.M. Enters.*, 731 A.2d at 797. The absence of evidence is not evidence of value. In any event, the three-week auction attended by just two of three original unsolicited bidders was far

from pristine.[6] CKx's Board stumbled into the process in reaction to unsolicited bids after it had deliberately taken the Company off the market only seven months earlier; utilized the services of a financial advisor incentivized to close a deal at any price and ingratiate one of its significant customers (as it did when it gave Apollo inside information about the Board's reaction to Gores's bid) while other key participants also had unique incentives to sell; allowed the Company's CEO to signal to potential bidders the price the Board would accept; gave preferential due diligence access to one bidder; and embarked upon a truncated, three week "auction" process that failed to generate interest even from all of the original unsolicited bidders.[7] (*See* pp. 10-15, *supra.*) The Board did these things at a time when the Company's stock trading price was depressed from prior takeover activity (a fact the Court below found). (Ex. A at 32 n.124.)

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[6] The two Court of Chancery cases that relied on merger price prior to the decision in this case – *Highfields Capital, Ltd. v. AXA Financial, Inc.*, 939 A.2d 34 (Del. Ch. 2007), and *Union Illinois 1995 Investment Ltd. Partnership v. Union Financial Grp., Ltd.*, 847 A.2d 340 (Del. Ch. 2004) – are readily distinguishable (even assuming they survive this Court's more recent decision in *Golden Telecom*). Not only did the respondents' experts in both cases opine that the merger consideration was indicative of fair value, but, unlike CKx, the companies both were on the verge of financial collapse at the time of their respective mergers, which saved them from insolvency, implying the merger consideration substantially exceeded their going concern value. *Highfields Capital*, 939 A.2d at 38-41, 49; *Union Illinois*, 847 A.2d at 345-47, 353. More importantly, the sales processes in both cases were not susceptible to the kinds of structural flaws that afflicted CKx's sales process in the case at bar. *See Highfields Capital*, 939 A.2d at 59-61; *Union Illinois*, 847 A.2d at 357-58.

[7] *See In re Rural Metro Corp. Stockholders Litig.*, 88 A.3d 54, 93-96, 101-03 (Del. Ch. 2014) (finding, in aiding and abetting breach of fiduciary duty litigation, numerous problems with the sale process, including a compromised financial advisor with a contingency fee arrangement, a poorly-timed and artificially truncated sale process, leaking of information about boardroom dynamics to the purchaser by the financial advisor and manipulation of the fairness opinion to justify the transaction).

Finally, the Court of Chancery was not without options for valuing CKx independently of the Merger Price. CKx was a publicly-traded company that filed financial reports with the SEC. It was followed by Wall Street analysts and had experienced management who prepared financial projections, and was not so unique that it was incapable of being accurately valued under any number of widely-used valuation methodologies. (A98; A137-56.) In addition to Petitioners' market-based approaches, the Court could have employed direct capitalization of cash flows (which the Vice Chancellor used in a subsequent case) or used asset approaches and transaction multiples to value the different components of CKx's business.[8] It could have employed DCF analysis (as both parties did) but applied a stress/probability test to different projection scenarios based on possible outcomes from the FOX contract negotiations. The Court also had the authority to appoint a neutral expert to develop his or her own valuation of CKx if it found the parties' submissions wanting. *Gonsalves*, 701 A.2d at 362. What the Court could not do, however, was employ no methodology at all and delegate to Apollo the power to determine the fair value of Petitioners' shares based on the Merger Price it was willing to pay. The Judgment should be reversed, and this matter remanded for an independent determination of the fair value of Petitioners' shares.

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[8] Indeed, to address the issue of comparability

II. THE COURT OF CHANCERY ERRED BY REJECTING PETITIONERS' MARKET-BASED METHODS FOR VALUING CKX

A. Question Presented

Whether the Court of Chancery erred in rejecting the GPTC and GMAC valuation methodologies proffered by Petitioners. This issue was preserved below. (*E.g.*, A1861-62.)

B. Standard of Review

The Court of Chancery's interpretation of the appraisal statute is reviewed *de novo*. *Golden Telecom*, 11 A.3d at 216-17. Its rejection of a particular valuation methodology may be reversed for abuse of discretion. *Id.* at 219.

C. Merits of the Argument

The Court rejected Reilly's GPTC and GMAC valuation methods for the sole reason that the guideline companies he selected were "not truly comparable to CKx." (Ex. A at 23.) This conclusion finds no support in either the record or the applicable law. No comparable company can be identical to the selected target. As valuation methodologies, GPTC and GMAC derive their analytical power from real-world economic information. The true test of "comparability," therefore, is whether real-world market participants utilized the selected companies to derive meaningful information concerning the subject company's value. Where such participants consistently rely on the selected comparables before the appraisal litigation to make real-world economic decisions, there is no basis for suddenly

deeming those same companies inappropriate to rely upon in the appraisal proceeding itself.[9] Here, Gleacher and Apollo itself utilized some form of comparable companies/transactions or other market-based approach in valuing CKx for investment or other purposes, and used most of the same comparables.[10]

Furthermore, every company is unique, and the companies used in a comparable companies or precedent transactions analysis will always have significant differences with, and will not be "ideal comparisons to," the subject company.[11] The Court of Chancery essentially adopted a standard of "perfect" comparability that limits the use of such analyses to situations where the companies being compared are virtually identical. That is not – and should not be – the law in Delaware.[12] At a minimum, Reilly's market-based approaches provided more useful valuation metrics for CKx than the Merger Price.

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[9] *See Andaloro v. PFPC Worldwide, Inc.*, 2005 WL 2045640, at *17 (Del. Ch. Aug. 19, 2005) (finding that plaintiffs' objections to comparable companies method "to be more convenient, than convincing" where plaintiffs "ha[d], before the litigation, viewed this as a reliable technique to help set the prices at which they could buy into [the company]").

[10] *Id.* ("[A] real world buyer would try to derive some insight into [the company]'s value by assessing what value would result if [the company] traded at multiples of cash flow similar to comparable companies in the industry.").

[11] *Agranoff v. Miller*, 791 A.2d 880, 892-93 (Del. Ch. 2001) (using comparable companies analysis even though the subject company was "far smaller than the comparison companies and [was] not traded on any exchange"); *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1186 (Del. Ch. 1999) (adopting comparables analysis even though "the group of comparables includes companies of substantially different size and scope than ITI" and concluding "that these differences are properly reflected in adjustments made to the multiples derived for comparative purposes"); SHANNON P. PRATT, ET AL., VALUING A BUSINESS 262 (5th ed. 2008) ("Obviously finding a business exactly the same as the enterprise to be valued is an impossibility. ***The standard sought is usually one of reasonable and justifiable similarity.***" (emphasis added)).

[12] *See Agranoff*, 791 A.2d at 892-93; *Bomarko*, 794 A.2d at 1186.

III. THE COURT OF CHANCERY ERRED BY EXCLUDING THE INCREMENTAL VALUE OF THE SHARP OPPORTUNITY FROM ITS APPRAISAL AWARD

A. Question Presented

Whether the Court of Chancery erred by failing to award Petitioners any value for the Sharp acquisition. This issue was preserved below. (A2155-60.)

B. Standard of Review

The standard of review is the same as for Issue II.

C. Merits of the Argument

The evidence presented below established that the concrete opportunity for CKx to acquire Sharp was part of CKx's operative reality as of the Merger.[13] The Sharp purchase was clearly a corporate opportunity belonging to CKx and had been identified as part of a business plan to pursue acquisitions, which CKx was pursuing in a concrete manner at the Board's instruction prior to the Merger through advanced discussions and the exchange of term sheets. (A1510; A1077-80; A244-54).) The Sharp transaction was a major acquisition that was indisputably in the Company's deal "pipeline."[14]

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[13] *See Technicolor*, 684 A.2d at 298-299 (holding that plan implemented by the majority acquiror after tender offer, but before the merger, "must be included in the appraisal process on the date of the merger"). Sharp was a corporate opportunity of CKx that was part of its operative reality because (i) Sharp was within CKx's line of business and of practical advantage to it; (ii) Sharp was within CKx's financial ability to capture, and (iii) CKx had a reasonable expectancy in completing the Sharp transaction. *See Delaware Open MRI Radiology Assocs., P.A. v. Kessler*, 898 A.2d 290, 317 (Del. Ch. 2006) (citing *Guth v. Loft*, 5 A.2d 503, 511 (Del. 1939)).

[14] *See Kessler*, 898 A.2d at 3115 ("Obviously, when a business has opened a couple of facilities and has plans to replicate those facilities as of the merger date, ***the value of its expansion plans***

The Court of Chancery refused to award Petitioners any value for Sharp because it found that Apollo and the rest of the market were generally aware of the opportunity for CKx to acquire Sharp and priced any value accruing from such possible transactions into their respective bids. (Ex. B at 16.) But, at best, market participants were aware of a theoretical possibility of CKx acquiring Sharp or some other company at some unspecified point in the future and on unknown terms. The opportunity that CKx actually possessed at the time of the Merger was quite different; it was in concrete negotiations to acquire Sharp on known terms in the near future, not at some unspecified point in time. And there is no evidence that the market knew about ***that*** opportunity. CKx never disclosed it publicly, and neither Apollo nor any other market bidder knew about the confidential negotiations. Thus, the Court's conclusions cannot be sustained. Petitioners are entitled to the incremental value of Sharp on remand.

CONCLUSION

For the foregoing reasons, the Order and Final Judgment should be reversed and the case remanded for further proceedings.

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must be considered in [] determining fair value. To hold otherwise would be to subject our appraisal jurisprudence to just ridicule." (emphasis added)); *Andaloro*, 2005 WL 2045640, at *11 (including proceeds of the post-merger sale of an asset because "the indication of interest that [the company] received . . . was, despite its due diligence caveat, sufficiently firm, when coupled with [the company]'s desire to sell" to include as of the merger date).

PROCTOR HEYMAN LLP

/s/ Samuel T. Hirzel, II
Samuel T. Hirzel, II (# 4415)
Dawn Kurtz Crompton (# 5579)
300 Delaware Avenue, Suite 200
Wilmington, DE 19801
302-472-7300

Attorneys for Petitioners Below/Appellants

OF COUNSEL:

LOWENSTEIN SANDLER LLP
Lawrence M. Rolnick
Thomas E. Redburn, Jr.
65 Livingston Avenue
Roseland, NJ 07068

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