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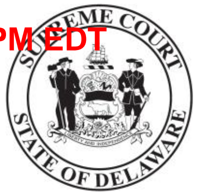

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HUFF FUND INVESTMENT PARTNERSHIP d/b/a MUSASHI II LTD. and BRYAN E. BLOOM,	
Petitioners-Below Appellants/Cross Appellees,	No. 348, 2014
v.	(Appeal from Court of Chancery C.A. No. 6844-VCG)
CKx, INC.,	REDACTED VERSION
Respondent-Below Appellee/Cross-Appellant.	Dated: September 29, 2014

RESPONDENT-BELOW APPELLEE/CROSS-APPELLANT CKX, INC.'S CORRECTED ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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NATURE OF THE PROCEEDINGS

Respondent-Below/Appellee/Cross-Appellant CKx, Inc. ("Respondent" or "CKx") submits this brief in response to the appeal of Petitioners Huff Fund Investment Partnership d/b/a Musashi II Ltd and Bryan E. Bloom ("Petitioners" or "Huff"), and in support of its cross-appeal from the Final Judgment of the Chancery Court (Glasscock, V.C.).

CKx—a public company whose shares were traded on NASDAQ—was sold after an extensive auction process to an affiliate of Apollo Investment Fund VII L.P. ("Apollo") in June 2011 for $5.50 per share (the "Merger Price"). Petitioners sought appraisal pursuant to 8 *Del. C.* § 262(h). After a three-day trial in March 2013 and post-trial argument, the Chancery Court held that the fair value of CKx was $5.50 per share. After rejecting other valuation methodologies, the Court found that because CKx was sold "after a full market canvas and auction . . . found free of fiduciary and process irregularities," the market-tested Merger Price was the "most relevant exemplar of valuation available." (Ex. A at 38.)

With the limited exception of its failure to reduce the appraised value to account for certain synergies, the Chancery Court's valuation should be affirmed. Although CKx advocated a significantly lower valuation, we recognize that the Chancery Court's valuation analysis is entitled to a high degree of deference and is fully supported by the record below. Petitioners' appeal rests on a

fundamental misreading of this Court's precedent, and depends upon deeply flawed expert opinions that the Chancery Court carefully assessed and correctly rejected. Petitioners' central argument on appeal—that the sales process was inadequate—is flatly contradicted by the unequivocal sworn testimony of Petitioner Bloom himself that the sales process for CKx was "substantively and procedurally fair."

On its cross-appeal, CKx respectfully submits that if the Chancery Court improperly relied on the Merger Price for its fair value determination, it further erred by not relying for its valuation on the discounted cash flow analysis ("DCF") sponsored by CKx's expert economist, Jeffrey Cohen, who determined a base case fair value for CKx of $4.41 per share. Separately, the Chancery Court erred by not (i) reducing the $5.50 fair value figure to reflect the expected value of the public-to-private cost savings "arising out of" the merger that must be subtracted under Section 262(h); and (ii) permitting CKx to make a prepayment of an undisputed judgment amount of $3.63 per share in order to stop the running of punitive statutory interest.

SUMMARY OF ARGUMENT

1. DENIED. This Court should reject Petitioners' appellate arguments and affirm the Chancery Court's reliance on the Merger Price. Although we believe that the fair value of the company was less than $5.50 per share (as set forth below), the Chancery Court was well within its broad discretion to rely on the Merger Price as a reliable determinant of fair value. Petitioners cannot identify any basis for overturning the Final Judgment. The Chancery Court's decision to rely on the Merger Price was not, as Petitioners cast it, a "fail[ure] to perform a valuation," but a thorough assessment of value based upon evidence of a comprehensive, arm's-length sales process undertaken by sophisticated market players that even Bloom acknowledged to be "substantively and procedurally fair." The Chancery Court's valuation analysis is amply supported by the evidence and thus entitled to strong deference. Petitioners' contention that the Chancery Court ran afoul of this Court's holding in *Golden Telecom* is meritless—the Chancery Court did not defer to the Merger Price as the presumed fair value of CKx but rather concluded it was the most reliable indicia of fair value after carefully analyzing and rejecting several other valuation methods.

2. DENIED. The Vice Chancellor properly found that Petitioners' reliance on their purported stock and sales process expert, Dr. Laura Robinson, was misplaced. Cross-examination revealed that she disregarded voluminous evidence

that contradicted her opinions; conducted an invalid event study on the trading price of CKx that, *inter alia*, never even contemplated news events involving its dominant asset, "*American Idol*"; and, apparently due to her inexperience in merger work, predicated her critiques of the CKx sales process on remarks in a handbook written by other authors. Furthermore, there is not a shred of evidence to support Dr. Robinson's suggestion that the sales process left money on the table. Large and knowledgeable shareholders like Robert Sillerman and CKx senior management had every incentive to maximize the sales price. Sillerman, moreover, chose to accept $5.50 in cash for his shares in lieu of rolling them over, further signifying that the Merger Price represented at least the fair value of CKx. This Court therefore should not disturb the Chancery Court's credibility finding that Dr. Robinson was "unpersuasive."

3. DENIED. Although Petitioners attack the Chancery Court's market-based valuation analysis as being inapplicable to a going concern appraisal, they entirely abandon the DCF analysis that was the centerpiece of their trial presentation (and that was accorded 60% weight in the valuation of their expert, Robert Reilly) and instead on appeal rely upon Reilly's analysis of "guidelines" companies and transactions—that is, a *different* market-based valuation methodology. Yet, the Chancery Court considered and properly rejected Reilly's "guidelines" valuation approach as unsupported and unreliable. The Chancery

Court relied on well-established Delaware law holding that comparable companies or transaction methodologies are only useful to the extent that the comparables are similar to the company being appraised. Here, Reilly candidly admitted that the "guidelines" companies and transactions he used were not even sufficiently similar to CKx in terms of size, industry or other characteristics to qualify as "comparables." No Delaware court has ever adopted this "guidelines" approach. And Reilly compounded the error by relying on non-comparable benchmarks when he made arbitrary adjustments to his analysis.

4. DENIED. The Chancery Court also correctly rejected Petitioners' request that the fair value figure be upwardly adjusted to account for CKx's potential acquisition of Sharp Entertainment. The record clearly demonstrates that any value of a potential acquisition of Sharp Entertainment was built into the Merger Price because the opportunity was known to Apollo and other bidders. Moreover, at the time of the merger, CKx had only just begun doing due diligence on Sharp, the price and terms of any such deal had not been agreed to, and therefore the opportunity was not part of the "operative reality" of CKx that could justify its inclusion into any valuation. The transaction was not consummated for *13 months* after the merger. Even Petitioners' expert Reilly refused to include the supposed benefit of a potential Sharp acquisition in his valuation.

5. Alternatively, should this Court hold that the Chancery Court erred in its valuation, CKx contends on its cross-appeal that the Chancery Court further erred by rejecting the DCF analysis performed by Jeffrey Cohen. Only Cohen, consistent with the Chancery Court's analysis, found management's five-year cash flow projections to be unreliable, and like the Chancery Court, rejected any "guidelines" analyses as unworkable. Instead, Cohen made reasonable adjustments to CKx's projected cash flows—based on assumptions grounded in historical evidence in the record—that support a DCF analysis resulting in a fair value base case determination of $4.41, and a range of $3.63 to $5.12 in downside and upside cases, respectively. Rather than dismissing Cohen's DCF cash flow assumptions as speculative, the Chancery Court should have adopted the set of Cohen assumptions that it determined best fit CKx's likely future cash flows.

6. Even assuming, however, that the Chancery Court correctly relied on the Merger Price, it committed clear error by not decreasing its fair value determination to account for the portion of the $5.50 merger price that included "value arising from the accomplishment or expectation of the merger" under Section 262(h). The evidence reflected that Apollo bid $5.50 per share because it had incorporated into its bid calculus approximately $4.6 million (or $0.29 per share) in public-to-private and other cost savings it "expected" it could extract simply by undertaking the transaction. The Chancery Court rejected this evidence

because it was not persuaded that the entirety of the $4.6 million in savings would "only" have been realized through a merger. But because the Merger Price relied on by the Chancery Court was reflective of Apollo's cost-savings expectations in its bid rather than CKx's going concern value, and at least half of the contemplated $4.6 million in savings were described as "Apollo Identified Cost Savings," the Chancery Court should have subtracted the value of those savings from its fair value determination.

7. The Chancery Court also erred by determining it did not have the power to permit CKx to pay an undisputed portion of the judgment owed to Petitioners—$3.63 plus statutory interest—prior to entry of the Final Judgment. Nothing on the face of Section 262(h) prohibits the early payment of an undisputed portion of a judgment, and the Chancery Court failed to provide a viable legal rationale for its decision. Prohibiting respondents in appraisal proceedings from making partial payments is fundamentally unfair and, particularly during periods of historically low interest rates (such as the present), would encourage petitioners to arbitrage the appraisal process in the hopes of creating delay.

COUNTER-STATEMENT OF FACTS

A. Parties

CKx was formed by Robert Sillerman to own and manage entertainment properties. As of 2010, CKx's most significant assets were (1) 19 Entertainment ("19E"), which owned rights to the popular television series *American Idol*, as well as the competitive dance show *So You Think You Can Dance*; (2) Elvis Presley Enterprises, which owned the rights to the name, image and likeness of Elvis Presley; and (3) Muhammad Ali Enterprises, which owned the name, image and likeness of the boxer and public figure. (Ex. A at 4-5.) "Though CKx also owned other assets, these three, and particularly *American Idol*, were by far the most valuable. In fact, *American Idol* and its related assets alone were responsible for approximately 60-75% of CKx's cash flow." (*Id*. at 5-6.)

Appellant Bryan Bloom was the beneficial owner of 11,187 shares of CKx common stock, and a member of the Board of Directors of CKx from December 18, 2009 until the merger. (B873; B248.) Bloom has been employed by W.R. Huff Asset Management Co., L.L.C. ("W.R. Huff") and its affiliates since 1994, and was designated by Huff as its appointee to the Board. (*Id.*) Appellant Huff Fund Investment Partnership d/b/a Musashi II, Ltd. (the "Huff Fund") is a fund managed by W.R. Huff and was the beneficial owner of 13,717,009 shares of CKx common stock at the time of the Merger. (*Id.*) The Huff Fund made its

primary investment in CKx in 2005 at approximately $3.40 per share. (B5; B1015.)

B. The Operative Reality of CKx

At the time of its June 2011 acquisition, CKx held a small number of significant but fading entertainment content assets, dominated by *Idol* and its related properties, with no identifiable avenues of growth. (Ex. A at 6-8; A1466-74; A1754.) As confirmed at trial by former CKx CFO, Tom Benson, *Idol* was heading into its second decade, had suffered consistently declining ratings since 2006, and, for the first time, faced powerful new singing show competition from *The Voice* on NBC and *X Factor*, which was being aired on Fox, the same network as *American Idol*. (A1485-87; A1546.) Fox had a perpetual right to renew *Idol*, but it made clear by June 2011 that it was intent on securing a new contract between it, CKx, and its production partner FremantleMedia ("Fremantle"), that was less favorable to CKx than the last contract, signed in 2005 during the height of *Idol*'s popularity. (Ex. A at 6-8; A1487-93.) Moreover, management viewed non-*Idol* properties such as Elvis, Ali and *SYTYCD* as "mature" assets that were not growing and would not be drivers of future growth. (A1469-70; A1502-03; B200.) Management had abandoned any strategy to develop content internally (A1494-97), and external content acquisition efforts had been unsuccessful between 2006-10. (A1504-07.)

1. *Idol Was A Valuable But Fading Asset*

American Idol premiered in the United States in the summer of 2002. (A1475.) In 2003, 19E and its production partner, Fremantle, signed a contract with Fox that granted Fox a perpetual license to renew the show, provided that Fox order at least 37 hours of programming. (A1091-93; A1476-79; B229.)

CKx acquired 19E in 2005, subject to the perpetual license agreement with Fox. (A1476-77.) That year, near the height of *Idol*'s popularity, 19E and Fremantle negotiated a supplemental agreement with Fox (the "2005 Contract") for *Idol* covering broadcast years 2006–2011. (A1480-83; B8.) The 2005 Contract did not adjust the schedule of hourly fees paid by Fox; yet, due to the success of the show, Fox also agreed to pay 19E and Fremantle an additional "fixed fee," which was not conditioned upon production costs or the show's ratings. (A1481-83; B8-9.) The fixed fee was set to climb as high as $35.5 million in 2010 and 2011, and would be split evenly between Fremantle and 19E, resulting in $17.75 million in annual payments to CKx for those two years. (A1479-80; B8.)

After *Idol* hit its peak ratings in 2006, it began a discernible ratings decline, losing some 40% of its ratings after 2006. (B1129-32; A1432.) Petitioners themselves acknowledged the show's long-term future held "limited opportunities for growth." (B13.) In 2009, a Huff Fund analyst undertook a "deep dive" analysis into CKx at the request of Bryan Bloom, and noted that *Idol* was

"capped out due to declining ratings." (B13-14; *see also* A1089.) CKx management expressed similar concern in an August 2010 strategy memorandum to the Board, cautioning that *Idol* was "in danger of losing significant value" going forward. (B200; A1108-1109; A1543-44.)

Idol was also facing serious competition for the first time. In April 2011, NBC premiered a new singing competition show called *The Voice*, which was being produced by successful reality TV producer Mark Burnett. (A1546; B1126-27.) Moreover, *X-Factor* was set to premiere in the fall of 2011. *X-Factor* was being produced by Fremantle, 19E's partner on *Idol*; it would air on the same network as *Idol* (Fox); and it would star the former mainstay of *Idol*, Simon Cowell. (A1485-86; B1126-27; *see also* Ex. A at 6.)

Compounding this uncertainty regarding *Idol* was the impending expiration of the 2005 Fox contract, with Fox, Fremantle, and 19E yet to agree to any new terms. (A1486-87.) CKx's leverage to renegotiate with Fox was limited—due to Fox's perpetual license to renew the show, CKx could not try to find a higher bidder by shopping *Idol* to other networks. (A1092; A1478-79.) CKx's negotiating strength was even further limited by Fremantle's rights in *Idol*, and Fremantle's divergent interest in working with Fox on *X-Factor*. (A1485-86.) Accordingly, during negotiations in May and June 2011, Fox proposed eliminating entirely the fixed fee under which CKx had received $17.75 million in 2011, and

an overall *decrease* in economics to CKx of $10 million per year. (A1490-92; B830.)

[1]

2. *CKx's Non-Idol Assets Were Not Profitable*

As Tom Benson testified at trial, because *SYTYCD*, Elvis and Ali were "mature" and CKx had already "largely maximized the revenue growth opportunities around those properties," none offered the potential for growth that could offset future decreases in *Idol*'s revenues and profits. (A1502-03.) *SYTYCD* was a summer series only, its ratings were also declining year-on-year, and management believed that it too was in danger of losing significant value. (*See* B14; A1543; B200; Ex. A at 7.) Elvis Presley Enterprises was considered a steady performer for CKx, but by the time of the merger, CKx had already "picked the easy fruit in terms of improving business." (A1469-70.) In 2011, Elvis generated

[1] Such post-merger evidence is appropriately considered here. *See Cede & Co.* v. *Technicolor, Inc.*, 758 A.2d 485, 499 (Del. 2000) (post-merger evidence, confirming a premerger forecast, admissible to prove a corporation's value as of the merger date).

less in profit than it had at any point since 2006. (B1087.) And Ali never delivered as management hoped. (A1474.) By 2010, CKx had written down most of Ali's value, and its financial contribution was "immaterial." (*See* B81; B372; *see also* A1109-10; B200.)

3. CKx Was Not In Position To Develop New Content Internally

CKx had long tried, but failed, to develop new entertainment content in-house. (A1496-97.) (B13; *see also* A1094-97.) Accordingly, CKx abandoned internal content development efforts and in 2010 parted ways with Simon Fuller, eliminated employees and businesses, and shuttered offices. (A1494-96; B307; B344; *see also* A1096.) In its 10-K filed in March 2011, CKx disclosed that, going forward, 19E would focus on its "two" core properties, *Idol* and *SYTYCD*, and pursue any other television content only through acquisition. (B307.)

4. CKx Was Unable To Acquire Content

As CKx management wrote to the Board in its "Strategic Vision" memorandum in August 2010, any "large scale growth [would] be driven by acquisition/investment as opposed to internally driven initiatives." (B200.) CKx had pursued growth through acquisitions since its founding in 2005, when it acquired Elvis and 19E in quick succession. After those initial acquisitions,

however, the company's track record proved to be entirely unsuccessful, culminating in the substantial write-off of Ali by 2010. (A1498-99; A1680-81; A133.)

Although new CEO Michael Ferrel continued to seek acquisitions in 2010-11, even when potentially attractive entertainment or celebrity deals were identified, CKx could not execute on sound price and terms. (A1116-19; A1504-07.) Accordingly, at the time of the merger CKx had not made a material acquisition since 2006, and no concrete transactions were on the horizon.

5. *CKx's Stock Price*

Shares of CKx were publicly traded on NASDAQ. Prior to the merger, the six-month trailing average price was $3.99 per share. (B1020.) Although Petitioners assert that the share price was depressed because of takeover speculation, between October 2010 and March 2011, CKx had been publicly removed from the sales market, yet its shares still only traded in the $3.00 to $4.00 range. (A1515.)

C. Sales Process

1. *CKx Was The Subject of Significant Market Scrutiny Over an Extended Period*

Between 2007 and 2010, numerous potential bidders considered acquiring CKx. (A316-24; A1512.) For instance, in 2010, One Equity Partners, the private equity arm of J.P. Morgan Chase, was discussing a deal for $5.50 per

share, but any deal was scuttled by regulatory changes. (A320-22; A1512-13.) Many other potential acquirers came forward and assessed CKx, including Apollo, but no deal was completed. (A1512-14; s*ee also* A316-24.) Indeed, in October 2010, the Board decided to announce publicly that the company was not for sale, in order to permit management to pursue its business strategies. (Ex. A at 9; A1514-15.)

2. Renewed Expressions of Interest

In March 2011, CKx received three unsolicited bids from private equity firms Apollo, The Gores Group ("Gores") and Prometheus/Guggenheim ("Guggenheim"). (A324-36.)[2] The CKx Board decided to engage in a sales process both to evaluate the bids before it, and to solicit bids from any other potential acquirers. (Ex. A at 11; A1071-72; A1517-18.) Bryan Bloom personally wanted this new sales process "to be in the shortest period of time" so as to minimize management distractions. (A1071.) The Board concluded that "the sales process should be of an appropriate time period of a limited duration to allow all interested bidders to complete due diligence . . . ." (A133.)

The Board then directed the investment bank Gleacher & Company, which had been retained in December 2009 in connection with the One Equity

[2] On March 18, 2011, Gores offered to purchase CKx for $4.75 per share. (Ex. A at 11; A324-26.) On March 21, 2011, Guggenheim proposed an offer price of $4.50 per share. (Ex. A. at 11; A326.) And on March 23, 2011, Apollo offered $5.00 per share. (Ex. A at 11; A326.)

Partners bid, to "go back and talk to the three parties, as well as . . . other parties that they could contact who could potentially be interested in the company." (A1072; Ex. A at 11.) In order to "put in process an attempt to motivate Gleacher to drive value over and above $5.50 per share," Bloom personally negotiated an incentive bonus providing that Gleacher would receive progressively higher additional compensation if it could secure a deal above $5.50, above $6.00, or above $6.25 per share. (A1073; A1758-59; Ex. A at 11-12; B653; B654.)[3]

Gleacher contacted other potentially interested parties, both those which examined CKx in the past and new "companies in the diversified media and content space, along with the other possibly or potentially interested financial sponsors." (A1745-46; *see also* A1072; A1518-19; B658-59.) Yet, as Tom Benson confirmed, "none expressed interest beyond the three parties that were actively involved in the [sales] conversation." (A1519.) Nor did any party "ask[ ] for more time" in which to conduct diligence. (A1747-48; *see also* Ex. A at 34.)

On April 27, 2013, Gleacher informed the Board that Apollo and Gores were the only bidders that had conducted due diligence. (Ex. A at 12.) Gleacher then took steps to solicit the highest bids possible from Apollo and Gores, which the Board considered on May 9, 2011. (A1769-70.) Guggenheim decided not to pursue the transaction.

[3] Thus, the incentive range sponsored by Bloom did not approach the $11.02 per share that Petitioners sought at trial.

3. *Management's Five-Year Projections*

After CKx had been approached by the three bidders in March 2011, CKx CFO Tom Benson asked his Vice President for Finance, Scott Frosch, to create an upside set of five-year projections for the sales process that would "ultimately [be] provided to prospective bidders to help them understand what might happen with the company over the coming years." (A1526; Ex. A at 14.) Benson specifically asked Frosch to include several assumptions in this model, most importantly, a $20 million *increase* in the economics flowing to CKx under the to-be-negotiated contract with Fox. (B496; B665.)

The record indisputably reveals that a $20 million increase in fees from Fox was a strongly optimistic assumption. (Ex. A at 15-16; A1528-33.) As Tom Benson testified, CKx wanted to put its best foot forward: "[F]or purposes of evaluating the company's value in a sale scenario or providing projections to a prospective buyer," the company "ought to take a more optimistic view." (A1529; *see also* B1009 ($20 million was an optimistic assumption designed to be shared with potential acquirers).) Accordingly, without any specific analysis justifying the increase, Scott Frosch built into a set of five-year projections a doubling of the fixed fee due CKx under the Fox television contract from $17.75 million to $35 million. (B1009; A1532-33.)

In effect, these upside five-year projections mirrored the negotiation demand CEO Mike Ferrel was making of Fox. (A1294-95; A1297-98.) Ferrel testified that these projections "are just the best case scenario[s] of what would be a very advantageous outcome if Fox were to agree to an ask that would lead to that conclusion." (B734-35.) Fox, however, was confirming in negotiations that it was looking to *decrease* the total fees it paid for *Idol*. (B720-27; B832-33.) Benson consequently reiterated at trial that such a $20 million increase in fees was "certainly optimistic[] in light of what Fox was signaling was their intentions in the renegotiation." (A1541.)

CKx gave these optimistic projections to Gleacher to use in the DCF analysis it was preparing in connection with its fairness opinion for the Board. (B665; A1752.) Yet, because Ferrel was concerned that the projections were unduly optimistic, Benson asked Gleacher to assume that CKx only received $10 million more as a result of the negotiations with Fox, but be in the position "to quantify the impact if the final Fox deal came in $10M higher or lower than the assumed $10M increase." (A1539-40; B527.) As explained by Benson at trial, he was telling Gleacher that Ferrel, "having been in the room and in the negotiations with Fox, was concerned that a $20 million increase was too high for [CKx] to be assuming" because Fox had already indicated "they did not think we were entitled

to any increase." (A1539-41.) These projections were the basis of Reilly's deeply flawed DCF valuation—a valuation even Petitioners have now abandoned.

4. *Board Approval of the Merger*

The Board met on May 9, 2011, to discuss the final bids from Apollo and Gores. (A258-60; A1770.) By this point, Apollo had made a fully-financed bid of $5.50 per share and Gores had made a bid of $5.60 per share but with contingent financing. The Board discussed: (1) CKx's poor acquisition track record; (2) the fairness of the price offered by the bidders; and (3) the advantages of Apollo's fully-financed offer. (A259-60.)

At the May 9 meeting the Board also considered financial and valuation analyses prepared by Gleacher to ascertain the fairness of the bids. (A260.) Gleacher presented the Board with a historical trading multiple analysis, a comparable companies analysis, and a DCF analysis, the last of which Gleacher relied upon most heavily. (*Id.*; A1749-50.) Gleacher used two sets of cash flow projections for its DCF: the "Fox A Case," which was based on the optimistic management projections assuming the doubling of the fixed fee from Fox and a roughly $20 million increase, and a "Fox B Case," which assumed an increase in fees that was $10 million less than the Fox A Case. (A1752.) Gleacher valued CKx at $4.56 in the Fox A Case and $4.14 in the Fox B Case. (B711-14.) Based

on its analysis, it rendered an opinion that a price of $5.50 per share was fair to stockholders. (A260; A334-36.)

The Board discussed the final bids from both Apollo and Gores and the "advantages and disadvantages of the two proposals." (A260.) Because the Gores proposal "was not fully funded," the Board "concluded that The Gores Group proposal was not superior to the Apollo Management proposal and presented a substantially higher risk of not ultimately being consummated and therefore was not in the best interest of the stockholders." (*Id.*) The Board then approved the acceptance of Apollo's offer of $5.50 with only Bloom dissenting. (*Id*. at 261.) There is no evidence that either bidder intended to offer a higher bid, and no topping bid materialized later.

D. <u>Assessments of the Merger Price</u>

1. <u>Apollo's Offer</u>

The Apollo Investment Memo lays out Apollo's investment thesis justifying a bid for CKx at $5.50 per share. (A186.) On April 30, 2011, the Apollo Investment Memo was circulated internally to senior Apollo management to introduce the opportunity to acquire CKx. Among other things, the document clearly sets forth Apollo's expectation that it would save $4.6 million from converting CKx to a private company. A back-up model supporting the Apollo Investment Memo details the specific line items that Apollo considered in

calculating the $4.6 million in annual cost savings. (B570.) These line items include, *inter alia*: the reduction of redundancies, elimination of the NASDAQ listing fee, elimination of public relations costs, and reductions in the directors' and officers' insurance policy. (B570-72.) Apollo further estimated that the one-time cost to achieve these annual cost-savings synergies would amount to 75% of one year's savings, or a one-time cost of $3.45 million. (A225.) Apollo repeated these proposed cost savings estimates in presentations to its lenders.[4]

2. *Petitioners' Contemporaneous Views of the Transaction*

Although Bryan Bloom voted against the transaction, he approved and praised the sales process at the time, confirming in an SEC filing that the sales process conducted by the Board of CKx had been "substantively and procedurally fair." (A1120-22; A316.) Bloom subsequently confirmed during his deposition in the related shareholder action that he "really didn't have a criticism of the process." (B737.)

[4] *See, e.g.,* B550, B730, B826, B863, B911, B1000.

<u>ARGUMENT</u>

I. THE CHANCERY COURT'S FAIR VALUE DETERMINATION IS AFFORDED SUBSTANTIAL DEFERENCE AND SHOULD NOT BE OVERTURNED

A. *Question Presented*: Did the Chancery Court act within its discretion in relying upon a post-auction merger price as the determinant of fair value of CKx where it found that alternative expert valuation methodologies were unreliable and not supported by the factual record?

B. *Standard of Review*: In assessing a Chancery Court's determination of fair value under Section 262(h), questions of law are reviewed under a *de novo* standard. *Golden Telecom, Inc.* v. *Global GT LP*, 11 A.3d 214, 216-17 (Del. 2012). The Chancery Court's findings of fact are reviewed under an abuse of discretion standard. *Id*. at 217. Under this "formidable standard," this Court grants a "high level of deference" to the Chancery Court's appraisal findings because the Chancery Court "has developed an expertise in cases of this type." *Id.* at 219. "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." *Id*., *citing Cede & Co.* v. *Technicolor, Inc.*, 884 A.2d 26, 35 (Del. 2005).

C. *Merits*: As it was the product of a fair and comprehensive arm's-length sales process involving sophisticated parties, the Chancery Court's reliance upon the Merger Price for its fair value determination was grounded in Delaware

law and well-supported by the evidence. Consistent with *Golden Telecom*, the Chancery Court did not presume that a transactional price equates to fair value; instead, after a lengthy analysis of the evidence and alternative valuation methods, it chose the Merger Price as the best evidence of fair value on the facts of this case. In no sense did the Chancery Court "fail to perform a valuation." (Br. at 1.)[5] And the Vice Chancellor's rejection of Dr. Robinson's "unpersuasive" testimony on CKx's "depressed" stock price and inadequate sales process was based on his assessment of the expert at trial and should not be disturbed on appeal.

1. *The Chancery Court Has Broad Discretion In Determining Fair Value*

In determining the fair value of CKx under Section 262(h), the Chancery Court has wide discretion to assess and select one of the valuation methodologies advocated by the parties at trial, "or fashion its own." *Cede & Co.* v. *Technicolor, Inc.*, 684 A.2d 289, 299 (Del. 1996) (citation omitted). The Chancery Court may consider "proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible . . . ." *Weinberger* v. *UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983).

The Chancery Court properly may rely upon the merger price for the corporation at issue in assessing appraised value. *See Montgomery Cellular Holding Co., Inc.* v. *Dobler*, 880 A.2d 206, 220 (Del. 2005). Where, as here, the

[5] Citations to "Br. __" refer to Appellant's Opening Brief filed August 11, 2014.

merger price is a product of arm's-length, competitive bidding among potential acquirers, the Chancery Court has held that the transaction price—less any component for an acquisition premium or synergistic value arising out of the expectation of the merger per Section 262(h)—is a strong determinant of fair value. *See Union Ill. 1995 Inv. Ltd. P'ship* v. *Union Fin. Grp., Ltd.*, 847 A.2d 340, 354-58 (Del. Ch. 2004); *Highfields Capital, Ltd.* v. *AXA Fin., Inc.*, 939 A.2d 34, 56-57 (Del. Ch. 2007).

Petitioners suggest that the Merger Price is insufficient unless accompanied by evidence that it represents the going concern value of CKx. (Br. at 26.) But as then-Vice Chancellor Strine has observed, "[i]n the real world, market prices matter and are usually considered the best evidence of value." *Gotham Partners, L.P.* v. *Hallwood Realty, L.P.*, 855 A.2d 1059, 1080 (Del. Ch. 2003). Here, the market evidence of CKx's value as reflected in the bid prices and stock trading price is consistent with the fair value of $5.50. Indeed, as the Chancery Court here noted, it is well-settled in appraisal jurisprudence that "'an arm's-length merger price resulting from an effective market check is entitled to great weight in an appraisal.'" (Ex. A at 29, *citing Global GT LP* v. *Golden Telecom*, *Inc.*, 993 A.2d 497, 507 (Del. Ch. 2010), *aff'd* 11 A.3d 214 (Del. 2010).)

To be sure, this Court has squarely held that the Chancery Court is not required to defer to the merger price in an appraisal proceeding. *See Golden*

Telecom, 11 A.3d at 218. But Petitioners' heavy reliance on *Golden Telecom* in support of its argument is fundamentally misplaced. In *Golden Telecom*, this Court never overturned settled Delaware law that the Chancery Court may look to the merger price in an appraisal; it held only that due to the flexibility of the appraisal process the Chancery Court could not presumptively defer to the merger price but should consider "all relevant factors." *Id*. There is nothing in *Golden Telecom* that precludes the Chancery Court from relying on a well-vetted merger price when other approaches were inapplicable; indeed, unlike in *Golden Telecom*, here the Chancery Court made findings that other valuation methodologies were unreliable or unsupported by the record.[6] Nor does this Court eschew market-based approaches to assess value. Petitioners implicitly concede the point—while attacking the Chancery Court's reliance on the Merger Price, they argue for the application of Reilly's "guidelines" method, which is a different, and far less reliable, market-based method.

In short, no Delaware case requires the Chancery Court to employ an invalid or unreliable methodology that does not fit the facts, as Petitioners contend. Petitioners' identification of other approaches they neither sponsored nor proved

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[6] As the Chancery Court also discussed in its opinion, *Merion Capital, L.P.* v. *3M Cogent, Inc.*, 2013 WL 3793896 (Del. Ch. July 8, 2013), is not to the contrary. In *3M Cogent*, the court had reliable alternative valuation methodologies to assess, and the Respondent did not advocate for use of the merger price as a determinant of fair value. (*See* Ex. A at 31-32.) Nothing in *3M Cogent* prevents the Chancery Court from relying on a merger price where the other valuation methodologies available are insufficient.

are irrelevant in the face of the Chancery Court's decision to adopt the valuation method it thought most reliable. The Chancery Court assessed all relevant factors, including the viability of alternative valuation methodologies and the record evidence surrounding the sales process for CKx. Having conducted a thorough evidentiary analysis, its decision to rely upon the Merger Price as the most reliable determinant of fair value was squarely within its discretion and consistent with *Golden Telecom*.[7]

2. *The Merger Price is a Reliable Indicator of CKx's Fair Value*

The Chancery Court correctly found that the proof surrounding the sales process for CKx reflected a reliable means for determining the company's fair value. The $5.50 per share Merger Price paid by Apollo was the product of an extensive, arms-length bid process in which CKx was well-vetted by potential acquirers. Petitioners failed to muster any factual or expert evidence that could undermine the Chancery Court's use of the Merger Price.

The evidence at bar demonstrates that CKx was well-known to the investment community, as dozens of companies in the years prior to 2011 engaged in due diligence and contemplated an acquisition of the company. In March 2011, however, CKx received unsolicited bids to acquire CKx from Gores ($4.75 per

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[7] Nor did the Chancery Court violate *Gonsalves* v. *Straight Arrow Publishers, Inc.*, 701 A.2d 357, 362 (Del. 1997), by pre-deciding that it would accept "either/or" expert approach and not perform its own independent valuation.

share), Guggenheim ($4.50 per share) and Apollo ($5.00 per share). (B770.) In response, the CKx Board utilized Gleacher to conduct a sales process for the company in order to evaluate the offers from the current bidders, and to solicit bids from other potential acquirers. (B770-72.)

The Chancery Court correctly found that the manner in which Gleacher marketed CKx "to potential buyers was thorough, effective, and free from any spectre of self-interest or disloyalty." (Ex. A at 32.) In contrast to a case where a majority shareholder was attempting to "freeze out" a minority shareholder, here, "multiple entities made unsolicited, credible bids for CKx in March 2011" and the CKx "Board and its advisors successfully instigated a bidding war for CKx, and also canvassed the market for other potentially interested bidders." (*Id*. at 33.) Having entered into an incentive contract at the behest of Bryan Bloom, Gleacher contacted multiple parties, including those which had been interested in the past, to determine whether any were keen on making additional bids for the company. The record reflected that no other company was interested, or sought additional time to make a decision. (A1747-48.) By May 2011, after Guggenheim had dropped out of the bidding, Gleacher sought to maximize the final bids from Apollo ($5.50 per share, fully financed) and Gores ($5.60 without full financing commitments). Testimony by Apollo principal, Aaron Stone,

confirmed that [redacted] and no topping bid was ever received. (B1012.)

Petitioners' attack on Gleacher's efforts falls flat. Petitioners complain that Gleacher "manipulated the valuation analysis" in May 2011 because higher valuation numbers had been included in prior "internal briefing materials" from November 2009. (Br. at 13.) But the stray pages that Petitioners cite are marked as "Preliminary Draft"; they are dated before Gleacher's retention by CKx; and Gleacher's William Cooling had never seen, and in no way relied on, such a "preliminary" set of numbers that was more than a year old by the time Gleacher was re-engaged in 2011. (A1758-59.) Further, the Chancery Court rejected Petitioners' argument that somehow Gleacher leaked information to Apollo about Gores' lack of financing. (Ex. A at 37.) Cooling unequivocally testified that Gleacher would not have risked its reputation to favor any bidder, and Stone of Apollo confirmed that [redacted] (A1760; B1012; A332-34.)

Finally, although Petitioners rely heavily on Dr. Robinson's critique, the Chancery Court concluded that her opinion was "unpersuasive," and declined to rely on it. (Ex. A at 34.) This is well-supported: Dr. Robinson's work was severely flawed and she had virtually no experience with the merger transaction process on which she purported to opine. The Vice Chancellor's assessment of Dr.

Robinson's credibility and testimony thus is entitled to great deference. *See Ala. By–Products Corp.* v. *Neal*, 588 A.2d 255, 259 (Del. 1991).

Calling Dr. Robinson's work "unpersuasive" was kind. Petitioners contend that the Chancery Court's reliance on the Merger Price was invalid because that bid was dependent on market trading prices for CKx that Dr. Robinson contended were not reflective of the value of the company. Dr. Robinson based her conclusion on the fact that two market analysts had higher target prices for shares than the current market price; and she conducted an event study that purported to show that the price of shares "did not respond to news concerning CKx's business." (Br. at 6.) Dr. Robinson, however, inexcusably ignored evidence that contradicted her conclusion—her analysis disregarded five contemporaneous, *negative*, analyst reports about CKx that she admitted at her deposition she did not know existed at the time she wrote her report. (A1343-46.)

Further, her event study was hopelessly flawed, as shown on cross-examination. In her attempt to show that the stock price did not move in response to "news concerning CKx's business," she never searched for news events involving CKx's primary business, *American Idol*. (A1349-50.) Thus, she never evaluated events such as Simon Cowell's announcement that he was leaving *American Idol* to join *X Factor*, an event that caused CKx's shares to drop by 15% in the four days thereafter. (A1351.) In contrast, in numerous instances she

analyzed price movements on event days with "news" that was either immaterial or that had already been reflected in the price. (A1353-54.)[8] In the end, even Dr. Robinson would not conclude the market for CKx shares was actually inefficient. (A1347-48.) And even during the October 2010—March 2011 period, when CKx was "off the market" and presumably free of the speculation that "depressed" its share price, the stock still only traded between $3.00 and $4.00 per share.

Petitioners also chose to have Dr. Robinson opine on the adequacy of the CKx sales process, despite the undisputed testimony that she had never testified on the topic of a merger sales process, had never participated in a merger transaction as an investment banker or otherwise, and had written no academic articles on the subject. (A1356-57.) Accordingly, she simply relied on her interpretation of a practical manual written by two investment bankers, Rosenbaum and Pearl, and applied those authors' views to the record. (*See* Br. at 11-12, 15.) Despite the acknowledged fact that CKx had been the subject of inquiry and diligence for years prior to 2011, Dr. Robinson concluded that because the sales process was not as long as the 32 weeks referenced by Rosenbaum and Pearl, it was insufficiently short. She also opined that the sales process did not conform to a theoretical "Vickrey auction," in which bidders submit a sealed bid and the

[8] For example, she found no stock price movement after a June 17, 2010 announcement about Sillerman's potential purchase of additional CKx shares, but the substance of that announcement had already been made public in a May 21, 2010 SEC filing. (B196-97; *see also* B1183.)

highest bidder wins the right to acquire the asset at the price of the second-highest bidder (in order to provide the victor with a surplus). (Ex. A at 35.)

The Chancery Court squarely addressed Dr. Robinson's testimony and properly rejected the opinion that the process followed by the CKx Board did not operate to obtain the highest price. The evidence fully supports the Chancery Court's conclusion that the bidders effectively engaged in an ascending bid English auction which resulted in the highest price available for CKx. (*Id*. at 36.) The Chancery Court also rightly found that any of the evidence of communications between the parties and the respective bidders only promoted that outcome, resulting in the highest bid and fair value for CKx. (*Id*.) Finally, the Chancery Court found that "there is no evidence in the record to suggest that any bidder was deterred by the expedited pace of the sale, and it was the *Petitioner's representative* on the CKx Board, Bryan Bloom, who was most insistent that the merger process be resolved quickly." (*Id*. at 33 (emphasis in original).)

The Chancery Court's valuation opinion is consistent with settled law. Its factual findings and assessments of the experts should be afforded great deference by this Court.

II. THE CHANCERY COURT PROPERLY REJECTED THE "GUIDELINES" ANALYSIS ADVOCATED BY PETITIONERS' EXPERT

A. *Question Presented*: Did the Chancery Court properly reject the unprecedented "guidelines" valuation approach proffered by Petitioners' expert, Robert Reilly, where the expert admitted that there were no comparable companies or transactions for CKx?

B. *Standard of Review*: In assessing a Chancery Court's determination of fair value under Section 262(h), questions of law are reviewed under a *de novo* standard. *Golden Telecom*, 11 A.3d at 216-17. The Chancery Court's findings of fact are reviewed under an abuse of discretion standard. *Id*. at 217.

C. *Merits*: Having attacked the Chancery Court's market-based valuation as improper, Petitioners inexplicably do not advocate for the DCF approach they centrally presented at trial.[9] Instead, they contend that the Chancery Court erred by not adopting the market-based "guidelines" approach sponsored by their expert, Robert Reilly. Yet, the Chancery Court correctly rejected Reilly's attempt to derive a fair value for CKx by identifying purportedly similar but non-comparable companies and transactions that could serve as potential "guidelines"

[9] Because Petitioners do not argue in favor of the DCF methodology they set out at trial, this argument has been abandoned and should not be considered by this Court. *See* Del. Sup. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal."); *see also Roca* v. *E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004).

for a CKx valuation. Although the Chancery Court acknowledged the general acceptance of comparable company and transaction methodologies, it noted that "[t]he true utility of a comparable company approach is dependent on the similarity between the company the court is valuing and the companies used for comparison." (Ex. A at 23-24 (quotation omitted).) It thus properly concluded from the evidence that the purported companies held up by Reilly were not of comparable size, and neither owned the same type of assets nor used a similar business model to be useful evidence of the fair value of CKx.

The record manifests that CKx is dramatically different from Reilly's "guidelines" companies in a wide variety of ways—they are more diversified, engage in different businesses, are all larger on a revenue basis, have all proven themselves by remaining profitable for decades, and generally have longer-lasting assets and goodwill. (A1536; A1699-1701; A1750-51; A1245-55.) For example, Madison Square Garden owns sports franchises and the world's most famous arena. (A1251-52.) Discovery Communications owns and operates nine television networks and has $2 billion in annual revenue. (A1249-51.) Live Nation promotes 20,000 live music events, owns theaters across the U.S. and has $5 billion in revenue. (B1177; A1249-51.) And Disney acquired Marvel because, as Reilly acknowledged, there "were huge anticipated synergies" between Marvel's portfolio of superhero characters and Disney's operations. (A1253-55.)

None of the guidelines companies earn the majority of their revenues from the business of licensing or creating intellectual property like CKx. (A786-87.) Whereas CKx relied on a single television franchise, *Idol*, for approximately 75% of its cash flows (A1754; *see also* A1466), all of the companies Reilly purports to compare to it derive their revenues from a diversified mix of businesses in which CKx does not compete—such as distribution through television networks and/or publishing, in-house production, real property such as arenas and theaters, services such as promotion and brokerage, and websites entirely outside of the media space. (A1251-52; A826-30; A833-34.) Many are not in the content business, and for those that are, their underlying content is far more diversified. (A826; *see also* A827-28; A833; A1251-52.)

Given CKx's unique profile, CKx's management, its investment banker and Mr. Cohen were all of the view that there were no good comparables for CKx. (*See*, *e.g.*, A1536; A1750-51; A1699-1700.) For this reason, Gleacher placed little weight on comparables in its fairness analysis for the Board. (A1750-51.) Petitioners' oft repeated argument—that the Court should look to comparables because Gleacher, Apollo and other market players who looked at CKx utilized some form of comparable companies/transactions method (A1861)—completely misses the weight that such market participants assigned to a

comparables analysis, and actually underscores that a comparables analysis was already factored into the prices that bidders were willing to pay.

Understanding the weakness of Reilly's "guidelines" method, Petitioners limited their defense of it to one and a half pages (A1861-62) of their 60-page post-trial brief. Reilly also admitted at trial that his companies were "extremely different" from CKx, which is why he did not even call them "comparables" but merely "guidelines." (A1251; A1245-46.) As a result, he had to employ numerous arbitrary adjustments to his analysis in order to manipulate the comparisons to support his conclusions. (A1189.) Even Reilly knew that this methodology was suspect, and gave it only 40% weight in his valuation analysis. (A1193-94.)

Nor did the Chancery Court hold Reilly to "a perfect comparability" standard. The differences between Reilly's "guidelines" companies were vast and "important." (Ex. A at 23-24.) The Chancery Court merely followed dozens of other Delaware cases that have rejected comparables analyses where the benchmarked companies and transactions have little in common with the company being appraised.[10] Petitioners cannot point to a single case that has adopted Reilly's insufficient "guidelines" analysis for valuation purposes.[11]

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[10] *See*, *e.g., Doft & Co.* v. *Travelocity.com Inc.*, 2004 WL 1152338, at *8 (Del. Ch. May 21, 2004) ("The true utility of a comparable company approach is dependent on the similarity between the company the court is valuing and the companies used for comparison.") (citation

III. THERE IS NO BASIS TO ADD VALUE FOR A POTENTIAL ACQUISITION OF SHARP ENTERTAINMENT

A. *Question Presented*: Did the Chancery Court properly refuse to adjust its fair value determination to account for a potential but speculative acquisition opportunity that was known to Apollo and other bidders at the time of the merger?

B. *Standard of Review*: In assessing a Chancery Court's determination of fair value under Section 262(h), questions of law are reviewed under a *de novo* standard. *Golden Telecom*, 11 A.3d at 216-17. The Chancery Court's findings of fact are reviewed under an abuse of discretion standard. *Id*. at 217.

C. *Merits*: The Chancery Court correctly rejected Petitioners' attempt to attribute additional value for a potential acquisition of Sharp Entertainment. This factual finding is entitled to substantial discretion: (i) such an opportunity was known to Apollo and other market participants and thus factored into the bidding, and (ii) Sharp was never a part of CKx's operative reality.

& internal quotation marks omitted); *In re Orchard Enters., Inc.*, 2012 WL 2923305, at *2, *9 (Del. Ch. July 18, 2012) (rejecting comparables analysis), *aff'd*, 2013 WL 1282001 (Del. Mar. 28, 2013); *Reis* v. *Hazelett Strip-Casting Corp.*, 28 A.3d 442, 477 (Del. Ch. 2011) (rejecting comparables that "are much bigger," "have more diversified customer bases" and, although they share business divisions, derive revenues from those divisions in different proportions than the subject company).

[11] Indeed, the Chancery Court again recently rejected it. *See, e.g.*, *Laidler* v. *Hesco Bastion Environmental, Inc.*, 2014 WL 1877536, at *7-8 (Del. Ch. May 12, 2014) (rejecting a "guidelines" methodology and noting that the proponent "ha[d] failed to demonstrate that the companies upon which its analyses are based are truly comparable to [the appraised company….]").

All of CKx's existing assets and potential opportunities were vetted in the sales process, in which a publicly-traded company was the subject of competing offers from numerous highly-sophisticated private equity firms. As Bryan Bloom testified, "It's a public company. . . . I think when you pull back the covers there is not much about this company that takes a long time to understand, that's not publicly disclosed." (B736.1.)

The Chancery Court properly framed the issue here "to be whether the record indicates that *market participants* were aware of the business opportunities identified by Apollo and CKx management such that the value of those opportunities was incorporated into the merger price." (*See* Ex. C at 12 (emphasis in original).) It concluded that any Sharp opportunity was known to the market and that any deal with CKx had not materialized.

First, the Chancery Court correctly found that Apollo had specifically identified a potential acquisition of Sharp in the Apollo Investment Memo; and the leader of Apollo's deal team noted at his deposition that he was aware that CKx was looking at Sharp. (B1013.) The record showed—as Petitioners concede (*see* Br. at 17)—that all other potential acquirers likely were aware of Sharp as a potential opportunity as well. (Ex. C at 12-13.)

Second, even if the market did not know that CKx had started to look at Sharp, the Chancery Court recognized that any acquisition of Sharp by CKx was

far too speculative as of the time of the merger to be included in CKx's valuation: "CKx and Sharp had not agreed to a term sheet or contract structure for a Sharp acquisition (which would not close for another year), substantial due diligence remained to be undertaken by CKx, and Sharp still had to provide CKx with proper and GAAP-compliant financial statements." (Ex. C at 15-16 n.37.)

The record evidence amply supports this finding. Tellingly, Reilly refused to consider Sharp to be appropriately included in a valuation of CKx. (A752; B1195.) Since CKx still had to undertake extensive due diligence, Sharp had to prepare audited financials, and the parties had not even agreed upon a term sheet, the status of any transaction was very preliminary. (*See* A1511; A703; B1006.1.) Contrary to Petitioners' meritless argument, the CKx Board did not "approve" a Sharp transaction, but stated that "the potential acquisitions in the reality television space . . . were the types of transactions that the Board was interested in considering and [it] directed management to continue to pursue these opportunities." (A257.) CKx management continued to look at Sharp, but not even a rough structure of a deal was in place at the time of the merger in June 2011. The Chancery Court committed no error here.[12]

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[12] Petitioners rely heavily on one fragment of Tom Benson's testimony, where he erroneously recalled that "advanced discussions" over price and terms occurred around May 2011. (Br. at 16.) But they overlook the rest of Benson's testimony, in which he made clear that "[t]here was no probable transaction" at the time of the merger (A1511), as well as the rest of the record in this case, which is clear that only preliminary discussions had taken place. Indeed,

IV. IF ITS RELIANCE ON THE MERGER PRICE WAS ERROR, THE CHANCERY COURT IMPROPERLY REJECTED THE ADJUSTED CASH FLOW PROJECTIONS AND THE DCF ANALYSIS PREPARED BY RESPONDENT'S EXPERT

A. *Question Presented*: Alternatively, did the Chancery Court err by rejecting the DCF analysis proffered by CKx's economic expert that used evidentiary-based cash flow projection adjustments to determine a base case fair value for CKx of $4.41 per share and a range of fair values between $3.63 per share and $5.12 per share? This question was preserved for appeal. (B1229-37; B1264-67; Ex. A at 26.)

B. *Standard of Review*: In assessing a Chancery Court's determination of fair value under Section 262(h), questions of law are reviewed under a *de novo* standard. *Golden* Telecom, 11 A.3d at 216-17. The Chancery Court's findings of fact are reviewed under an abuse of discretion standard. *Id*. at 217.

C. *Merits*: Should this Court conclude that the Chancery Court erred by relying upon the Merger Price, the Chancery Court compounded the problem by failing to adopt Jeffrey Cohen's approach. Although the Chancery Court correctly rejected Robert Reilly's invalid DCF analysis—an analysis that Petitioners have abandoned on appeal—the Chancery Court plainly erred by not adopting Cohen's

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management did not include the value of a Sharp deal in any of its contemporaneous projections. (A1200.)

DCF, which is not only a settled methodology in appraisal cases,[13] but here was free of the problems that infected Reilly's model, and was grounded in the evidence. The Chancery Court rejected Cohen's approach because in one respect Cohen employed reasonable assumptions adjusting the CKx management "optimistic" cash flow projections that both he and the Chancery Court found unreliable. Because Cohen's adjustments were reliably supported by the record, the Chancery Court abused its discretion by dismissing Cohen's DCF analysis in its entirety instead of adopting the adjustment assumptions that squared with the Chancery Court's evaluation of the proof.

In assessing the upside, "sales case" cash flow projections prepared by CKx management, the Chancery Court concluded that "the evidence is overwhelming that the disputed portion of management projections—the $20 million increase in licensing fees from Fox—was not prepared in the ordinary course of business, and was otherwise unreliable." (Ex. A at 25.) For this reason, the Chancery Court flatly rejected Reilly's unexamined use of these management projections in his DCF, a ruling that Petitioners do not challenge on appeal.

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[13] "The discounted cash flow technique is in theory the single best technique to estimate the value of an economic asset." *Cede & Co.* v. *Technicolor, Inc.*, 1990 WL 161084, at *7 (Del. Ch. Oct. 19, 1990). *See also Andaloro* v. *PFPC Worldwide, Inc.*, 2005 WL 2045640, at *20 (Del. Ch. Aug. 19, 2005) ("[A] DCF valuation is the best technique for valuing an entity when the necessary information regarding the required inputs is available. . . .").

CKx's expert agreed with the Chancery Court's conclusion and did not rely on these faulty management projections in crafting his DCF. Rather, Cohen carefully studied the evidence and created three separate sets of adjusted cash flow projections based on reasonable assumptions of the financial impact of a new Fox contract. In his base case, which is optimistic given Fox's position, he assumed a four-percent (4%) growth in total television fees over the five-year projection period. This was based on the historical 2003 contractual relationship between Fox and CKx that guaranteed to CKx a yearly four percent increase in the hourly rates on variable TV fees for *Idol* under Fox's perpetual license. (A1666-72.) Cohen also used four-percent because it was the projected increase in revenue under the Fox contract made by Standard & Poors, when it rated CKx debt around the time of the merger. (A1673.) Cohen also created an "upside case," in which he applied a twelve-percent (12%) annual increase in television fees. This projection was based on the historical increase in CKx's "fixed" license fees under the 2005 Contract, negotiated during the height of *Idol*'s popularity. (A1674.) Finally, Cohen also created a downside case that simply held all television fees flat over the projection period. (A1675.)

The Chancery Court nonetheless concluded that Cohen's "prediction that CKx would receive marginal additional value from a new contract with Fox is [not] any more reliable than management's prediction that the increased benefit

would be $20 million per year." (Ex. A at 26.) In fact, there is a fundamental difference: CKx management did not attempt to make a reasoned projection based on business realities or historical performance, while Cohen's assumptions are all reasonably grounded in the evidence. Both the Chancery Court and Cohen had before them evidence of the state of the Fox negotiations, the prior contracts and *Idol's* performance. Cohen provided the Chancery Court with tools to adopt a DCF analysis that could be customized to the Court's assessment of how CKx cash flows under a new Fox contract likely would differ from prior years.

The Chancery Court concluded that the Fox negotiations were a "one-time, unpredictable, irreversible, and immitigable increase or decrease in the fixed licensing fee . . . that would have a large effect on the company's future value." (Ex. A at 26-27.) While the impact of the new contract would be significant, it does not follow that making any reasonable cash flow assumptions in a DCF analysis would be "lend[ing] a faux-mathematic precision to a patently speculative enterprise." (*Id.* at 29 & n.113.) Because every DCF analysis incorporates projections, they all include an element of speculation; yet this technique remains a bedrock valuation method under Delaware appraisal law. Further, this is not an extraordinary circumstance like the September 11 events at the heart of the *Travelocity.com* case pointed to by the Chancery Court—the assumptions here merely involve a renegotiated contract between parties with a documented

history.[14] Indeed, Delaware courts recognize that it is entirely appropriate for an appraisal expert or the court to make reasonable adjustments or weightings to management projections that may be unreliable in some manner.[15]

If this Court concludes that the Chancery Court's valuation was improper, the Chancery Court should be directed to adjust one or more of Mr. Cohen's cash flow assumptions and his corresponding DCF analysis supporting a $4.41 base case and a $3.63 to $5.12 per share fair value range. Accordingly, if the case is remanded, the Chancery Court should consider Cohen's DCF along with the Merger Price as determinants of CKx's fair value.

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[14] The Chancery Court likened this situation to *Doft & Co.* v. *Travelocity.com Inc.*, 2004 WL 1152338, at *6-7 (Del. Ch. May 21, 2004), where the court chose not to rely on cash flow projections regarding travel bookings after the September 11 events. (Ex. A at 27-28.) But the exercise here does not involve predicting the future after an historic global terrorist incident. The Chancery Court was well-positioned to make a reasonable judgment regarding the appropriate commercial inputs based on a renegotiated business contract. *See, e.g.*, *Towerview LLC* v. *Cox Radio, Inc.*, 2013 WL 3316186, at *16 (Del. Ch. June 28, 2013) (noting the difficulty of determining future projections but still employing DCF); *Cede & Co.* v. *Technicolor, Inc.*, 2003 WL 23700218, at *2 (Del. Ch. July 9, 2004) ("The value of a corporation is not a point on a line, but a range of reasonable values, and the judge's task is to 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.") (footnote omitted).

[15] *See*, *e.g.*, *In re Orchard*, 2012 WL 2923305, at *20 (asserting that the appropriate mechanism for an expert confronted with a projection that "seems to be infected with a bias" is for the expert to "directly express his skepticism by adjusting the available projections directly in some way"); *Gearreald* v. *Just Care, Inc.*, 2012 WL 1569818, at *7 (Del. Ch. Apr. 30, 2012) (assigning probability weighting to projections used in DCF); *Highfields Capital*, 939 A.2d at 62-63 (adopting expert adjustments to projections).

V. THE CHANCERY COURT ERRED IN NOT REDUCING THE FAIR VALUE TO ACCOUNT FOR "APOLLO IDENTIFIED" COST-SAVINGS THAT APOLLO EXPECTED TO ARISE FROM THE MERGER

A. *Question Presented*: If the Chancery Court properly relied on the Merger Price, did it err by not reducing its determined fair value of CKx to account for public-to-private cost savings expected by the acquirer to arise from accomplishment of the merger? This question was preserved for appeal. (B1327-29; B1336-47; Ex. C at 5-8.)

B. *Standard of Review*: In assessing a Chancery Court's determination of fair value under Section 262(h), questions of law are reviewed under a *de novo* standard. *See Golden Telecom*, 11 A.3d at 216-17. The Chancery Court's findings of fact are reviewed under an abuse of discretion standard. *Id*. at 217.

C. *Merits*: Where the Chancery Court relies on a merger price to determine fair value, Section 262(h) requires the Court to subtract any portion of the merger price attributable to synergies or other cost-savings that the winning bidder expects to secure. CKx submitted ample evidence through contemporaneous documents to show that the $5.50 Merger Price incorporated the value of public-to-private cost savings that Apollo "expected" to achieve. Because the Chancery Court's fair value determination here was based upon the winning $5.50 bid by Apollo, the per share portion of that bid price attributable to value arising from the expectation of the merger (as opposed to that of CKx as a going

concern) must be subtracted from the $5.50 under well-established precedent construing Section 262(h). The Chancery Court's refusal to do so was an abuse of discretion and clear error.

Section 262(h) provides that the Court "shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation . . . ". *See also Cinerama*, *Inc*. v. *Technicolor, Inc.*, 663 A.2d 1134, 1143 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995) ("The components of value in an acquisition might be considered to be two: the going concern value of the firm as currently organized and managed and the 'synergistic value' to be created by the changes that the bidder contemplates (*e.g.*, new management, cost efficiencies, etc.)."). Only the "going concern value of the firm" is recoverable in an appraisal proceeding, not the "synergistic value." *Id.*; *see also In re Orchard Enters.,* 2012 WL 2923305, at *5. The "synergistic value" contemplated by Section 262(h) includes cost-savings that result from a public-to-private conversion that are not part of the "going-concern value."[16] Such "synergistic value," moreover, is by its terms measured by the value arising out of the "expectation" of the merger. As this Court has noted, "[i]t is the expectation of

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[16] *See Highfields Capital*, 939 A.2d at 57 n.68 ("[E]ven financial buyers have some synergies when making an acquisition, such as the ability to reduce the acquired company's cost of capital and to attract best-in-breed management and board members."); *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *14 (Del. Ch. June 4, 2004) ("It stands to reason that when a public company goes private, cost savings in some amount will be achieved.").

. . . synergies that allows a rational bidder to pay a premium when he negotiates an acquisition." *Cinerama,* 663 A.2d at 1143.

Here, the Chancery Court recognized that public-to-private cost savings should be eliminated from its fair value determination in theory. (Ex. C at 5-6.) Nevertheless, it held that the evidence did not support a reduction in the $5.50 per share price through a "*merger-specific* cost-savings." (*Id.* at 8 (emphasis in original).) CKx respectfully submits that the Chancery Court failed to link Apollo's expectations to the Merger Price, and thus committed reversible error.

The Apollo Investment Memo clearly sets forth Apollo's expected savings from taking CKx private: "Through our diligence and with the help of our advisers we have identified an additional $4.6 million of public-to-private and other corporate expense savings which would be achieved in a take-private transaction context." (A211; A220.) Half of the $4.6 million in savings was described as "[CKx] Management Identified Savings," while the other half are "Apollo Identified Savings."[17] The total $4.6 million figure was identified in multiple documents and repeated to Apollo's lenders. *See*, *supra*, at n. 4. There is no dispute that this $4.6 million was underlying support for Apollo's $5.50 bid; without this, the bid (and the Chancery Court's corresponding fair value determination) likely would have been lower.

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[17] Apollo further estimated that the one-time cost to achieve these annual cost-savings synergies would amount to 75% of one year's savings, or a one-time cost of $3.45 million. (A225.)

The Chancery Court rejected this evidence on the grounds that the cost-savings "do not speak for themselves," and that it was not clear that either the $2.3 million in "Management Identified Savings" or the $2.3 million in "Apollo Identified Savings" would have been realized "only by accomplishment of the merger." (Ex. C at 8.) Regarding the "Apollo Identified Savings" in particular, the Court held that "the Apollo Investment Memo does not on its face contain information sufficient to support a finding that Apollo believed *merger-specific* cost-savings would be realized." (*Id*.) But the Apollo Investment Memo does precisely that. The "Apollo Identified Savings" are self-evidently elements of value that were (i) identified by Apollo, not CKx management; and (ii) realizable only upon Apollo's acquisition of CKx. Notably, the "Apollo Identified Savings" include line items such as savings from a "NASDAQ listing fee" and "director's fees" (B570-72), which could not have been realizable other than through Apollo's acquisition of CKx. At a minimum, therefore, the Chancery Court erred by not reducing its fair value determination to account for the pro rata value of the $2.3 million in "Apollo Identified Savings."

VI. THE CHANCERY COURT ERRED BY NOT PERMITTING CKX TO MAKE A PREPAYMENT OF $3.63 PER SHARE TO PETITIONERS IN ORDER TO STOP THE RUNNING OF STATUTORY INTEREST

A. *Question Presented*: Did the Chancery Court commit legal error in concluding that an order stopping the accrual of statutory interest by prepayment of $3.63 per share would be "incompatible" with Section 262(h)? This question was preserved for appeal. (B1304-06; B1314-19; Ex. B at 1-8.)

B. *Standard of Review*: The Chancery Court's statutory interpretation of Section 262(h) is reviewed under a *de novo* standard. *See Del. Bay Surgical Servs., P.A.* v. *Swier*, 900 A.2d 646, 652 (Del. 2006) ("Questions of statutory interpretation are questions of law reviewed *de novo*.").

C. *Merits*: Section 262(h) provides, in relevant part, that interest shall accrue at a prescribed rate from the effective date of the merger "through the date of payment of the judgment . . . ". 8 *Del. C.* § 262(h). Prior to the Court's ruling and entry of judgment, CKx proposed to pay Petitioners an unconditional tender of $3.63 per share plus accrued statutory interest as constituting all or part of the final "judgment," and moved for an order to stop the further accrual of interest with respect to the amount of principal paid (the "Prepayment Motion"). Despite the absence of demonstrable prejudice to Petitioners, the Chancery Court held that such a prepayment is impermissible. In so ruling, the Chancery Court acknowledged that Section 262(h) "does not expressly prevent this Court from

entering a partial judgment to enable to Respondent to pay consideration, thereby stopping the accrual of interest on that amount;" yet, it concluded that such an order would be "incompatible" with the intent of the statute. (Ex. B at 4-5; *see also id.* at 6-7.) This was legal error.

The Chancery Court never explains why the revisions to Section 262(h) imposing a statutory rate of interest preclude prepayment of a judgment using that new rate. CKx did not request a different or lower interest rate; rather, it proposed to tender an amount of $3.63 per share plus the precise statutory interest thereon that effectively would be a component of any final judgment. The Delaware legislature's intent in enacting the current version of Section 262(h) providing for an express statutory interest rate prior to payment thus is irrelevant to CKx's Prepayment Motion.

If CKx is willing to agree that the fair value judgment will be at least $3.63 per share plus statutory interest, there is nothing in Section 262(h) prohibiting the payment of a partial judgment. In fact, the Chancery Court has already entered an interim judgment in another appraisal action. *See ONTI, Inc.* v. *Integra Bank*, 1999 WL 160131, at *1, *3 (Del. Ch. Mar. 2, 1999) (entering a partial judgment in the amount that the debtor party acknowledged it "owe[d] at a minimum" and rejecting the contention that "the Court of Chancery cannot issue a judgment until the completion of the appraisal process").

The only plausible reason why Petitioners would oppose such a payment is to keep earning a windfall in statutory interest at above market rates during their meritless appeal. In fact, Petitioners have subsequently refused an unconditional tender of the full judgment. The purpose of the statute is to provide stockholders with fair payment for their shares, not to create arbitrage opportunities that punish the surviving company. This Court should not endorse such a fundamentally unfair result.

CONCLUSION

For all of the foregoing reasons, Petitioners' appeal should be denied and CKx's cross-appeal should be granted.

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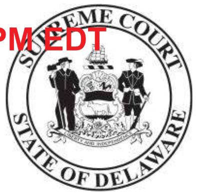

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I hereby certify that on September 16, 2014, true and correct copies of the foregoing documents were served upon the following counsel of record via File & Serve*Xpress*:

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