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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF ON APPEAL AND CROSS-APPELLEE'S ANSWERING BRIEF ON CROSS-APPEAL

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INTRODUCTION

Delaware appraisal actions mostly fall within one of two categories. In some cases, the Court of Chancery finds that the sales process was inherently flawed in some way, in which case it has undertaken an independent valuation that gives little or no weight to the deal price.[1] In other cases, the court finds that the sales process was robust, arm's-length, and conflict-free, in which case the court typically has deferred entirely to the market-based deal price.[2]

This case falls within a smaller but troublesome third category, in which the Court of Chancery concludes that the sales process is "robust," "arm's-length," and free of "conflicts of interest," Op. at 59, 62, but nevertheless declines to defer to the market price. It is this third category of cases that poses substantial problems for corporate transactions. As one Harvard law and finance scholar describes in a forthcoming article analyzing this very case, "[a]warding anything less than 100% weight to the deal price when the deal process is good … create[s] unnecessary

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[1] *See, e.g.*, *In re Dole Food Co. S'holder Litig.*, 2015 WL 5052214 (Del. Ch. Aug. 27, 2015); *Laidler v. Hesco Bastion Envt'l, Inc.*, 2014 WL 1877536, at *6 (Del. Ch. May 12, 2014); *Global GT LP v. Golden Telecom, Inc.*, 993 A.2d 497, 499 (Del. Ch.), *aff'd*, 11 A.3d 214 (Del. 2010).

[2] *See, e.g.*, *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 6164771, at *14–16, *18 (Del. Ch. Oct. 21, 2015); *In re Appraisal of Ancestry.com, Inc.*, 2015 WL 399726, at *16, *23–24 (Del. Ch. Jan. 30, 2015); *Huff Fund Inv. P'Ship v. CKx, Inc.*, 2013 WL 5878807, at *13 (Del. Ch. Nov. 1, 2013), *aff'd*, 2015 WL 631586 (Del. Feb. 12, 2015) (TABLE); *Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.*, 847 A.2d 340, 359 (Del. Ch. 2004).

appraisal risk and … unnecessarily chill[s] value-creating deals." Guhan Subramanian, *Using the Deal Price for Determining "Fair Value" in Appraisal Proceedings*, 28 (forthcoming in *The Corporate Contract in Changing Times: Is the Law Keeping Up?* (U. Chicago Press)); *see also* Br. of Law & Corp. Fin. Profs. as *Amici Curiae* in Support of DFC ("DFC *Amici*") at 3–11.

Petitioners' brief demonstrates a keen awareness that these two findings—first, that the sales process was fair and robust, yet second, that the "fair value" for appraisal purposes is substantially higher than the deal price—are incongruous and irreconcilable. That is why petitioners devote a substantial portion of their brief to arguing that the DFC transaction was *un*fair; that the sales process was flawed and unreliable. They argue, for example, that the purchaser's bid reflected a game of "bait and switch," and suggest that other bidders lacked the time or access to make a competitive bid. Appellees/Cross-Appellants' Answering Brief ("Ans. Br.") at 3, 17–21.

But the Court of Chancery rejected those exact arguments, finding instead that "[t]he sale process … lasted approximately two years and involved … dozens of financial sponsors as well as several potential strategic buyers," with three potential buyers conducting due diligence and ample opportunity for others to "renew[] their interest after the transaction was announced." Op. at 9, 59, 63. Indeed, whereas the Statement of Facts in Appellant's Opening Brief draws directly from the Court of Chancery's findings, the Counter-Statement of Facts presented by petitioners consists largely of arguments and characterizations they asserted below, with which the trial court explicitly disagreed. The Court of Chancery's findings should have led it to the inexorable conclusion that the deal price was the best, and only relevant, measure of fair value.

In addition, as petitioners' brief confirms, the Court of Chancery's post-trial adjustment to DFC's perpetuity growth rate (for purposes of its discounted cash flow valuation) was unsupported by the evidence and requires reversal. Petitioners' own valuation expert repeatedly and correctly testified at trial that DFC's perpetuity growth rate could not exceed 3.1%, based on the same March Projections that petitioners now say compel a staggering 4.0% growth rate.[3] The court's unwarranted and arbitrary manipulation of its discounted cash flow inputs underscores the solid public policy grounds for deferring to the sales price where, as here, the merger process was robust and fair.

Finally, if this Court concludes that measures of value other than the arm's-length deal price are relevant, then it should defer to the trial court's use of a comparable companies analysis. That analysis, predicated on a comparison of DFC to similarly sized peer companies offering the same products in the same

[3] All defined terms herein shall have the same definition as in Appellant's Opening Brief ("AOB").

geographies, provides an objective, market-oriented valuation of DFC—a far superior technique in these circumstances than the speculative discounted cash flow analysis, which the trial court recognized was based on "unreliable" data. Op. at 61 & n.238.

DFC does not seek to "eviscerate" the appraisal remedy or establish an impermissible "one-size-fits-all" rule, as petitioners contend. Ans. Br. at 2, 25–26. To the contrary, DFC seeks a rule that would apply only to mergers featuring a robust, competitive bidding process that results in an arm's-length sale to a disinterested buyer, as this transaction did. And in those limited circumstances, the Court of Chancery already frequently defers to the sales price, as it should. This appeal simply seeks reversal of a decision where the Court of Chancery made all the predicate factual findings of a fair and robust sales process and yet declined to defer to the sales price.

This Court should reverse and instruct the Court of Chancery either (1) to find that the transaction price represents the "fair value" of DFC, or (2) to return to its original "fair value" determination but correct the undisputed, inadvertent error in its original discounted cash flow analysis.

SUMMARY OF ARGUMENT ON CROSS-APPEAL[4]

3. Denied. Compared to the arm's-length transaction price, the Court of Chancery's comparable companies analysis was the next-best measure of DFC's fair value, and it was certainly more reliable than a discounted cash flow analysis. The comparable companies analysis relied to a much lesser extent on DFC management's financial projections, which proved to be inaccurate almost immediately after the merger was announced. As the Court of Chancery correctly found, the comparable companies analysis was "less prone to long-term uncertainty," and its reliability was bolstered by averaging three years of data and "by selecting a suitable peer group, using correct multiples." Op. at 57, 64.

[4] This Summary addresses only petitioners' arguments in support of their Cross-Appeal.

ARGUMENT

I. DFC'S ARM'S-LENGTH SALES PRICE REFLECTED THE COMPANY'S "FAIR VALUE."

Because DFC was sold in an arm's-length transaction to the highest bidder after a robust, competitive sales process, DFC's sales price was the most reliable measure of its fair value. *See* AOB at 19–37.[5] The trial court erred by averaging the arm's-length sales price with a speculative discounted cash flow model that valued DFC at 40% more than anyone was willing to pay for it in a competitive bidding process. Petitioners' attempts to defend that error fail.

A. Petitioners' Attack on DFC's Sales Process Ignores the Court of Chancery's Well-Supported Factual Findings.

Petitioners argue that DFC's deal price is not reliable because (1) the sales process was not robust and competitive, (2) everyone (*except for the bidders*) supposedly knew that DFC was about to rebound from "trough performance," and

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[5] Petitioners' suggestion that DFC failed to preserve this issue is baffling. Ans. Br. at 1 n.3, 6 n.8, 28. DFC preserved the issue in its pretrial brief (A54–58), at trial by offering extensive evidence of a thorough sales process (*see, e.g.*, Op. at 8–12 (trial court's summary of evidence presented), A155 [22:2-24:22] (former DFC board member describing sales process), A246 [387:11-14] (petitioners' expert admitting that he had not identified any flaws in the DFC sales process)), and again in post-trial briefing (A1271–72). As the trial court noted, DFC "urge[d] the Court to consider the transaction price … as the most reliable evidence of fair value." Op. at 1. DFC's expert Daniel Beaulne did not defer to the sales price because (1) this was a *legal* argument that DFC itself presented, and (2) although Mr. Beaulne opined that the sales price was "reliable," his primary task was to conduct a separate and "independent analysis" of DFC's fair value. A309–10 [638:11-639:2], A968 n.4.

(3) the winning bidder ignored DFC's "intrinsic value." Petitioners' arguments contravene the record and the trial court's factual findings.

First, petitioners ignore the Court of Chancery's finding that the "sale process leading to the Transaction lasted approximately two years and involved DFC's advisor reaching out to dozens of financial sponsors as well as several potential strategic buyers." Op. at 59. The court concluded that "the sale process extended over a significant period of time and appeared to be robust." *Id.* at 62.

The Court of Chancery rejected petitioners' narrative that "[t]here was one private equity bidder who demanded exclusivity," "executed a bait-and-switch," and then "pressure[d] [DFC] to accept its reduced offer" by giving DFC insufficient time to consider it. Ans. Br. at 3, 21. As the court found, three potential buyers (out of the more than forty that were approached) conducted due diligence on DFC, and two of them submitted offers. Op. at 9–10.[6] Far from being the victim of a "bait and switch," it was *DFC* that announced significantly lower earnings forecasts after receiving initial bids, leading Lone Star to decrease

[6] Where, as here, the sales process engages numerous potential buyers, deference to the deal price is warranted even if few of them actually submit bids and only one bidder ultimately emerges. *See, e.g.*, *Huff Fund*, 2013 WL 5878807, at *13 (two bidders); *Merion Capital LP*, 2015 WL 6164771, at *14–16, *18 (three bidders, two of which dropped out); *LongPath Capital, LLC v. Ramtron Int'l Corp.*, 2015 WL 4540443, at *21 (Del. Ch. June 30, 2015) ("I am not aware of any case holding that a multi-bidder auction of a company is a prerequisite to finding that the merger price is a reliable indicator of fair value.")

its offer. *Id.* at 11. And after the merger was announced, DFC continued to miss the projections that management had shared with Lone Star. AOB 13–15. Indeed, Lone Star discovered at closing that it had purchased a company far more distressed than its due diligence could have revealed. A279–80 [518:2-521:18].

The trial court also correctly found that the exclusivity period and six-day acceptance window "do not undermine … confidence in the robustness of the market for DFC, … because they occurred at the end of what had been an extended (almost two-year) sale process and because any of the potential buyers … could have renewed their interest after the transaction was announced in April, particularly given that the termination fee was reasonable and bifurcated to allow for a reduced fee in the event of a superior proposal." Op. at 63. The court found that "neither J.C. Flowers nor any other potential buyer expressed any interest in competing with Lone Star's offer of $9.50." *Id.* at 64. This was not a lack of "competition," as petitioners contend (Ans. Br. at 3 n.5), but instead a situation where no competitor was willing to pay more than $9.50 per share.[7] In light of these factual findings, there is simply no basis for petitioners to suggest that different sales tactics would have fetched a higher price.

[7] Petitioners' suggestion that DFC could have persuaded J.C. Flowers to top Lone Star's bid (Ans. Br. at 3 n.5) is contrary to the record (A158–59, A642 ("they were quite firm")).

Second, petitioners argue that the sales price was not reliable because DFC was about to emerge from "trough performance," and thus it was the "worst possible time" to sell the company. Ans. Br. at 16. But the record proves the opposite. DFC's performance continued to deteriorate between signing and closing, deteriorated further *after* closing (a point petitioners do not dispute), and still had not recovered even through trial. AOB 13–15; A259–61 [438:1-446:12], A278–80 [514:2-524:16].

Far from delivering "clarity" (Ans. Br. at 17), the regulatory situation only worsened after the merger announcement. Because regulators had threatened to shut down DFC's primary loan product in the United Kingdom (single-payment loans, or SPLs), DFC planned to roll out a less profitable product (multi-payment loans, or MPLs) that might mitigate the fallout from this regulatory sea change. A256–57 [425:4-21, 430:11-432:18]. But two months after entering into the merger agreement, regulators forced DFC to suspend its rollout of MPLs. A259 [438:4-439:14], AR3. Thus, at the time of the transaction, DFC *did not have a viable loan product in its largest market*. Moreover, although petitioners state with certainty that the new regulations would drive competitors out of the industry (Ans. Br. at 6, 13), *no* major competitor had left the market when the merger closed, and still none had left by the time of trial. A258–59 [436:9-437:11], A260–61 [444:3-12, 447:14-17].

Petitioners claim that these were "known temporary conditions," and that it was all but certain that DFC "would successfully navigate the regulatory changes and that the business would rebound." Ans. Br. at 7, 16. But the Court of Chancery found exactly the opposite—that "DFC was unable to chart its own course; its fate rested largely in the hands of the multiple regulatory bodies that governed it." Op. at 60–61. Thus, calling this period a "trough" is pure speculation (and completely inaccurate in hindsight); the facts are far more consistent with a long-lasting, systemic adverse change to DFC's business than with a cyclical and temporary blip from which it would quickly rebound. *See, e.g.*, A278 [513:7-20], A280 [522:20-523:2] (explaining that regulations had made DFC's market "fundamentally different" and "smaller and certainly less profitable"). The market did not "overreact[]" to the new regulatory landscape (Ans. Br. at 16); rather, the market's predictions were validated when DFC missed its revenue projections by 44% the month after signing the merger agreement and its financial performance continued to decline through trial. A259–60 [439:15-444:12] ("It just continued to go down."). Based on this record, it is more likely that DFC secured a buyer at a particularly *opportune* time than the "worst possible time." Ans. Br. at 16.

Moreover, even assuming counterfactually that DFC was emerging from a trough, petitioners never explain how or why the sales price would have failed to take this into account. There is no suggestion (and the trial court never found) that any of DFC's potential buyers had incomplete information. If everyone knew that DFC "would successfully navigate the regulatory change" (Ans. Br. at 16), then dozens of sophisticated bidders would have incorporated this into their bids. Of course, the reality is that no one knew for certain, and the sales price represented the market's best prediction of DFC's future viability.

Third, the fact that the winning bidder was a private equity firm that allegedly did not perform its own discounted cash flow analysis is irrelevant if (as was the case here) the sales process was robust and competitive. Petitioners cite no case from this Court or the Court of Chancery holding that an arm's-length sales price is relevant only if supported by the *acquirer's* discounted cash flow calculation. The reasons for deferring to a thorough, conflict-free sale price do not depend on the acquirer's financial analyses; instead, in the case of a rigorous transactional process, the market determines fair value directly, as an alternative to—or substitute for—discounted cash flow or another theoretical method of analysis. *See Van de Walle v. Unimation, Inc.*, 1991 WL 29303, at *17 (Del. Ch. Mar. 7, 1991) ("The fact that a transaction price was forged in the crucible of objective market reality (as distinguished from the unavoidably subjective thought process of a valuation expert) is viewed as strong evidence that the price is fair.").

In any event, Lone Star *did* conduct a rigorous analysis of DFC's future earnings. And there is no reason to suspect, as petitioners argue (Ans. Br. at 18–20), that Lone Star's investment objectives caused it to undervalue DFC as a going concern. As petitioners conceded below, Lone Star's forecasts assumed that DFC—in Lone Star's hands—would *outperform* management's March Projections. B1307–08, 1315. Lone Star forecasted DFC's business with *increased profitability* due to projected initiatives that DFC's management lacked support and financing to implement on its own. A273–74 [496:21-499:13], A281 [525:8-526:3]. If anything, then, Lone Star's financial forecasts *over*estimated DFC's "intrinsic value." Moreover, it is undisputed that DFC's Board and financial advisor considered a discounted cash flow analysis before accepting Lone Star's $9.50 offer (A121), further undermining petitioners' position that DFC's "intrinsic value" was not considered.

Petitioners are also wrong that the limited availability of acquisition financing made the sales process less reliable. Ans. Br. at 6, 20. To the contrary, the decreased available financing was "emblematic of the declining financial prospects" *of DFC*. A276 [505:10-506:2]. Thus, the sales price, unlike the discounted cash flow method, took into account both bidders' *and financiers'* projections on DFC's future growth and downside risk.

At bottom, petitioners cannot explain why—if DFC's going concern value was hundreds of millions of dollars more than $9.50 per share—dozens of potential financial sponsors and strategic buyers walked away from that opportunity. Petitioners' only attempt at an explanation is to conjure up flaws in the sales process, but the record evidence and the Court of Chancery's well-reasoned findings reveal only a thorough, robust sales process.

B. DFC's Arm's-Length Sales Price Was Objectively More Reliable Than the Trial Court's Discounted Cash Flow Calculation.

Where, as here, it is *known* what willing and disinterested buyers would pay for a company, there is no more reliable measure of the company's "fair value." AOB at 19–28; *see also* DFC *Amici* at 3–11.

Petitioners respond that an arm's-length sales price could fail to account for certain "short-term factors," such as "the timing of the transaction," the "ability of potential acquirers to obtain financing," and the "bidding pool." Ans. Br. at 5. But there is no evidence of any of these potential deficiencies here. To the contrary, the record evidence and the Court of Chancery's factual findings demonstrate the opposite: dozens of potential buyers with full and complete access to all the relevant information regarding DFC, the regulatory environment, and short- and long-term trends. *Supra*, Part I.A. The fact that "general market conditions" affected the sales price (Ans. Br. at 5) makes it *more* reliable (not less) than the discounted cash flow model, which assesses value as a theoretical exercise.

Next, petitioners cite cases and texts stating that discounted cash flow is generally considered the "gold standard" of valuation techniques. Ans. Br. at 40–41; *but see* DFC *Amici* at 12–17. But Petitioners do not cite a single case or text stating that discounted cash flow is the "gold standard" when compared to an arm's-length sales price produced by a robust, competitive sales process. When the latter is available, "the use of alternative valuation techniques like a [discounted cash flow] analysis is *necessarily a second-best method* to derive value." *Union Ill.,* 847 A.2d at 359 (emphasis added); AOB at 27–28.

The record proves that the discounted cash flow method was indeed second-best here. Petitioners portray the Court of Chancery's discounted cash flow analysis as a mere extension of DFC management's "March Projections." But that ignores the court's numerous, manipulable assumptions not derived from the March Projections, including, *inter alia*: (1) an estimate of beta, which involved a complex peer analysis followed by a "crude" "smoothing methodology," and then a choice between Hamada and Fernandez formulas even though the court found neither "ideal" in this case (Op. at 18–33); (2) a speculative size premium adjustment that required the court to guess how the market would have reacted to an earnings announcement and that had a significant impact because DFC "rested on a knife's edge" between two deciles in the valuation handbook (*id.* at 34–42); and (3) an adjustment for stock-based compensation based on petitioners' "imperfect measure" that the court chose despite its "inherent" "risk of inaccuracy" (Op. at 52–54).

Petitioners also ignore the Court of Chancery's findings regarding the reliability of the March Projections themselves. While petitioners repeatedly claim that the projections accounted for "all of the regulatory changes" (Ans. Br. at 44), the Court of Chancery disagreed, finding that it was impossible for management to account for regulatory changes that were still "fluid." Op. at 61–62.[8] The court found that DFC could not adjust its revenue projections downward fast enough to keep up with the regulatory changes, and concluded that "[t]his series of adjustments *calls into question the reliability* of DFC's financial projections at the time, and *necessarily reduces one's confidence in the March Projections*." Op. at 62 (emphases added). DFC's three successive reductions of its projections over a period of less than five months also eroded the market's confidence "in not only the projections, but … management's ability to forecast the business." A274 [500:1-20], A276 [508:16-24].

The market's assessment proved accurate when DFC began missing the March Projections almost immediately after the merger was announced. *Supra*,

[8] For example, although the U.K. had announced it would implement a rate cap for payday loans (A108 [¶ 97], AR9), which could have "a significant impact" on DFC's financial results, this was not modeled into the March Projections because the FCA had not yet decided what the rate cap would be (A261 [446:13-447:13], A134 [¶ 209]).

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Part I.A. Petitioners claim that the March Projections are nonetheless reliable because they were not updated before the closing (Ans. Br. at 16, 42–43), but the reality was that no one requested new projections before the closing and, as DFC's Senior Vice President of Financial Planning & Analysis explained, if someone had asked for a revised set of projections, "[t]he situation was still so fluid" that DFC's management would have had *no idea what to project*. A269 [478:21-480:17].

Nor did the March Projections take into account the very real threat to DFC's existence as a going concern, which makes reliance on a discounted cash flow analysis even more inappropriate. As the Court of Chancery found, DFC's "fate rested largely in the hands of the multiple regulatory bodies that governed it." Op. at 60–61. The potential outcome "could have been very positive, leaving DFC's competitors crippled and allowing DFC to gain market dominance," or it "could have been dire, ***leaving DFC unable to operate its fundamental businesses***." *Id*. (emphasis added).[9] Ultimately, the Board concluded it should accept Lone Star's $9.50 offer, rather than "run the risk of continued deterioration

[9] In fact, DFC became concerned that it might violate its debt covenants if "major players in the market" did not "exit in line with … [the] introduction of regulatory rules" (A253 [414:9-415:23], AR11), which still had not happened at the time of trial (*supra*, Part I.A). DFC estimated that it would be "very very close to not meeting the fixed charge coverage ratio" in its revolving credit facility by June 30, 2014. AR11, AR15, A254 [418:2-20] ("unless the trend started to turn around, we would blow our revolving credit facility covenants"). DFC's bondholders also were concerned. A262 [449:18-450:8].

of the business, default on the debt, probably have the equity value go to zero, and have to reorganize the business." A166 [65:2-66:15] (explaining the situation as "an EBITDA level that ha[d] gone from [$]300 [million] to 270 to 150 to 130, a set of financial projections that's based on a product that doesn't exist yet, and a billion dollars of debt, some of which we just failed in trying to refinance").

The court decided that lack of confidence in the March Projections meant that it should accord the discounted cash flow analysis less weight. Op. at 62. But given the reality of DFC's situation, it should have given it no weight at all. As Professor Subramanian explains, only a market of disinterested buyers can properly value the "barbell" scenario that the trial court found in this case, where there is both large upside and downside potential for DFC's business. *See* Subramanian, *supra*, at 20–21 ("the correct price for a coin flip with payoffs of $1 or nothing is 50 cents, and a good deal process will find that price in the marketplace").

The Court of Chancery erred in relying on optimistic and outdated management projections (which simply *assumed* a going-concern business) to fashion a discounted cash flow model when a more reliable indication of value was available. *See, e.g.*, *Doft & Co. v. Travelocity.com Inc.*, 2004 WL 1152338, at *7 (Del. Ch. May 21, 2004) (rejecting discounted cash flow analyses because "the degree of speculation and uncertainty characterizing the future prospects of

Travelocity and the industry . . . ma[de] a DCF analysis of marginal utility"); *Huff Fund*, 2013 WL 5878807, at *11 ("The unreliability of the revenue estimates . . . is a serious impediment to creating a reliable DCF analysis."). Only an arm's-length transaction price could reliably account for the significant industry uncertainty and existential threat facing DFC at the time of the merger, and it should have been accorded complete deference.

C. Deferring to the Arm's-Length Sales Price Does Not Violate the Appraisal Statute or Eviscerate Appraisals.

Petitioners contend that deferring to the deal price contravenes the appraisal statute, creates an impermissible "one-size-fits-all" rule, and effectively eliminates the appraisal remedy. They are wrong on each count.

The appraisal statute instructs the Court of Chancery to consider all "relevant factors." 8 *Del. C.* § 262(h). But the statute does not require courts to rely, even in part, on less reliable measures of value when an objectively more reliable measure is available. AOB at 24–28; *see also* Subramanian, *supra*, at 24–25 (explaining why the "weighing approach would be a mistake" and "there can be no crossing the river halfway"). The statutory requirements are fully consistent with the common-sense approach of "put[ting] 100% weight on deal price if the deal process includes an adequate market canvass, meaningful price discovery, and an arms-length negotiation." *Id.* at 22.

This is not a "one-size-fits-*all*" approach, as petitioners suggest. Ans. Br. at 25, 26 (emphasis added). Rather, in order to qualify for deferral to the deal price, a transaction must meet the stringent requirements that were met here—a thorough, robust, and conflict-free sales process resulting in a sale to an arm's-length, disinterested buyer. The Court of Chancery already frequently defers to the sales price in cases featuring a robust, arm's-length sales process. AOB at 19–21. This appeal simply seeks reversal of a decision that refused to do the same without any proper justification.

Thus, DFC is not asking the Court to "overrul[e]" *Golden Telecom*. Ans. Br. at 1 n.2. Petitioners do not dispute that *Golden Telecom* featured a conflicted transaction (AOB at 28), and therefore the issue in *this* appeal—the degree of deference merited by a sales price produced by a conflict-free, robust sales process—was not decided by that Court.

Moreover, deferring to the arm's-length sales price in these cases will hardly "eviscerate appraisals." Ans. Br. at 2. In the many cases where the Court of Chancery has deferred to the deal price (AOB 19–20), *there was still an appraisal*. In each of those cases, the court, having heard all the evidence and evaluated the sales process, concluded that it was sufficiently robust and conflict-free that alternative valuation methods would be "necessarily … second-best." *E.g.*, *Union Ill.*, 847 A.2d at 359. In contrast, when the court finds the transaction process flawed and unreliable, it regularly relies on alternative valuation methods, such as discounted cash flow. *See, e.g.*, *Golden Telecom*, 993 A.2d at 507–08 ("the Special Committee did not engage in any sales efforts at all and instead concentrated solely on getting as good a deal as it could from [the conflicted acquirer]"). This process does not require a "bifurcated trial" or "two sets of discovery." Ans. Br. 2. It is the same analysis and process that the Court of Chancery regularly performs, and adopting DFC's position will not upend it.

Moreover, to the extent this Court's decision encourages lower courts to forgo complex and time-consuming discounted cash flow analyses once they conclude that a transaction was sufficiently robust and conflict-free, that is hardly a bad thing. *See, e.g.*, Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 DUKE L.J. 613, 676–77 (1998) (explaining that deferring to the arm's-length deal price will "deter meritless appraisal litigation" and conserve judicial resources).

Nor would deferring to the deal price "requir[e] petitioners to prove a breach of fiduciary duty claim to prevail." Ans. Br. at 27. Even well-intentioned boards can and do sell companies in less-than-robust sales processes, and that may be all a dissenting stockholder would have to prove to persuade the court not to defer to the sales price. Petitioners' *amici* agree that the fiduciary duty and appraisal tests are distinct. Pet. *Amici* at 6 (quoting *Merion Capital L.P. v. Lender Processing*

Servcs., Inc., 2016 WL 7324170, at *15 (Del. Ch. Dec. 16, 2016)). Boards also sell their companies to insiders without breaching fiduciary duties, as in *Golden Telecom*. The trial court could decline to defer to the sales price in those cases as well.

DFC's proposed rule, far from eviscerating the appraisal remedy, is consistent with and furthers the primary objective of appraisal—to protect minority stockholders from conflicted and poorly executed transactions. AOB at 36–37. In cases where that safeguard has already been provided through the sales process, it is entirely appropriate to defer to the resulting arm's-length sales price. Indeed, the appraisal statute mandates deference to that objectively superior measure of fair value.

D. There Are Significant Policy Reasons for Deferring to Arm's-Length Sales Prices in Appraisal Actions.

The Delaware courts' failure to defer to arm's-length sales prices is increasing appraisal litigation and spawning a cottage industry of appraisal arbitrageurs. AOB at 35–37; *see also* Subramanian, *supra*, at 7 ("appraisal has gone from a trickle in 2009 to approximately $2.0 billion in face value of claims in each of 2015 and 2016 – yielding a 70% cumulative annual growth rate over the past five years."). Although petitioners wrap themselves in the cloak of vulnerable, dissatisfied minority stockholders, many of them are in fact hedge funds and arbitrageurs—"highly sophisticated shareholders engag[ed] in massive appraisal arbitrage and a multi-round, high-stakes game with M&A practitioners and the Delaware courts." Subramanian, *supra*, at 10–11.

Petitioners and their *amici* cannot dispute that the failure to defer to arm's-length deal prices is creating uncertainty, raising transaction costs, and deterring strategic mergers. AOB at 35–36; DFC *Amici* at 17–20. In fact, "[i]n view of *DFC Global* [i.e., *this particular appraisal action*], transactional attorneys wondered out loud how they could provide any assurances (or even guidance) for their clients regarding appraisal risk." Subramanian, *supra*, at 5. And "[w]hat is not known (and cannot be known) are the deals that are entirely deterred due to appraisal risk." *Id.* at 3.

Petitioners contend that this case proves there is no "chilling effect on deals" because the appraisal premium represents "only an additional one percent of the total merger consideration." Ans. Br. at 27 n.17. But appraisal premiums are often far more than one percent of the deal. *See, e.g.*, *In re Sunbelt Beverage Corp. S'holder Litig.*, 2010 WL 26539, at *1 (Del. Ch. Feb. 15, 2010) (22.2% of deal value, not including interest and attorneys' fees). And petitioners themselves requested—and are *still* requesting (Ans. Br. at 40–45)—a much larger appraisal premium. At trial, petitioners requested $17.90 per share—almost *double* the deal price for their shares. Op. at 1.

Petitioners and their *amici* ignore these substantial costs and ask the Court to take solace in the fact that appraisals "generally" are not abused and benefit stockholders. Ans. Br. at 29–31. But this appraisal action—featuring a robust, conflict-free sales process—is not the typical or "general" case, and petitioners' empirical studies do not even attempt to isolate this subset of appraisal actions. Petitioners offer no argument that deferring to the sales price *in these cases* will dilute appraisal generally. Indeed, the authors of one of the empirical studies cited by petitioners have stated that they are "sympathetic" to the argument that "the transaction price itself should generally be treated as the best evidence of fair value," and "believe the set of situations where the appraisal given by a judge will be superior to that given by the deal market will be relatively small." Charles Korsmo & Minor Myers, *Reforming Modern Appraisal Litigation*, Brooklyn Law School, Legal Studies Research Paper No. 431, at 49 (Jan. 6, 2016). And the authors of another study cited by petitioners conclude that there are certain "specific conditions under which [deference to the merger price] may be … optimal," and that "[t]hese situations square reasonably well with what appear … to be the several contours of the [merger price] rule as it is developed thus far by courts." Albert Choi & Eric Talley, *Appraising the "Merger Price" Appraisal Rule*, Virginia Law & Economics Research Paper No. 2017-01, at 35 (Jan. 18, 2017).

As petitioners concede, appraisal "serves as an effective market check on *potentially abusive sales processes*." Ans. Br. at 30 (citing Korsmo & Myers, *supra*) (emphasis added). That check will not disappear if courts defer to sales prices in conflict-free and robust transactions. To the contrary, it is hard to imagine a more efficient way to protect minority stockholders than to *incentivize* management to conduct a thorough and conflict-free sales process by deferring to the deal price in such situations. This incentive does not currently exist, given the lottery-like character of appraisal actions. AOB at 35–36; *see also* James C. Morphy, *Doing Away with Appraisal in Public Deals*, 26 DEL. LAW. 30 (2008) ("Judges should not be called upon to enter the 'appraisal casino,' seeking to guesstimate the fair value of a company, unless there is no public market to look to for value.").

Petitioners speculate that arm's-length transactions fail to protect stockholders because of "inefficient contracting" due to "inexperience and busyness of target firm leadership." Ans. Br. at 31 (quoting Jonathan Kalodimos & Clark Lundberg, *Shareholder Rights in Mergers and Acquisitions: Are Appraisal Rights Being Abused?*, Finance Research Letters, at 9 (Jan. 2, 2017)). But if management's inexperience or "busyness" undermines the sale in some tangible way, then the sales process may not be the type of robust and thorough process that commands deference. *See* Subramanian, *supra*, at 29 (courts should "defer entirely to the deal price when the deal process is good … but cast a 'hard look' as to whether the deal process included an adequate market canvass, meaningful price discovery, and an arms-length negotiation"). In this case, that "hard look" took the form of DFC engaging an experienced and reputable financial advisor to help evaluate and sell the company; reaching out to dozens of potential bidders; and forming a Special Committee dedicated to evaluating bids and controlling and directing negotiations, subject to Board approval. A117; Op. at 9.

Petitioners also speculate that some companies fail to set a "reserve price," causing the board to act irrationally and accept a bid that is lower than what it believes the company is actually worth. Ans. Br. at 30. But there is no evidence that a reserve price is necessary or useful where, as here, the company conducts a robust, conflict-free sales process. *See* Jeremy Bulow & Paul Klemperer, *Auctions Versus Negotiations*, 86 AM. ECON. REV. 180 (1996) (proper sales process is more critical than having a reserve price).

Finally, petitioners' *amici* suggest that the legislature has already addressed the significant problems with appraisal arbitrage and industry uncertainty when it recently revised the appraisal statute. Pet. *Amici* Br. at 15. To the contrary, "the data provides suggestive evidence that the 2016 statutory reforms have not been effective in meaningfully slowing down appraisal arbitrage and highlights the need for safe harbors in appraisal *doctrine*." Subramanian, *supra*, at 8–9 (emphasis added).

II. THE COURT OF CHANCERY ERRED BY ARBITRARILY ALTERING ITS PERPETUITY GROWTH RATE ON REARGUMENT.

The Court of Chancery significantly increased the perpetuity growth rate on reargument from 3.1% to 4.0%, bringing its discounted cash flow figure back in line with the court's original opinion after correcting a significant clerical error. Petitioners' brief confirms that there was no factual or economic support for the court's arbitrary adjustment, and this error warrants reversal.

As an initial matter, petitioners ignore the fact that the Court of Chancery, in its initial opinion (Op. at 44–47), carefully selected the 3.1% perpetuity growth rate based on the *same* March Projections (and *same* working capital figures) that they now say compel a 4.0% perpetuity growth rate. The correction to working capital that DFC sought in its reargument motion was solely for the purpose of correcting a *clerical* error, thereby bringing the working capital figures back in line with the figures the court intended to use *together with a 3.1% perpetuity growth rate.* Op. Appendix A; A1330. Petitioners did not ask the court to change the perpetuity growth rate to 4.0% until *after* DFC filed its motion, after petitioners realized the impact the correction of the clerical error would have on overall value. A1341 (filed five days after DFC's motion).

Petitioners have no answer for the fact that their own valuation expert proposed, and repeatedly defended, the 3.1% growth rate at trial (AOB at 41), and so they simply ignore the point. And while petitioners now say that the March Projections "require" a 4.0% perpetuity growth rate, they do not dispute the fact that their expert used his 3.1% growth rate for a discounted cash flow analysis *based on those same March Projections*. *See* AOB 41–43; *see also* A904, A222 [290:15-18]; AR5–6 (Dages' trial demonstrative). Petitioners cannot point to a single piece of evidence or testimony offered at trial even suggesting that the 3.1% growth rate is inconsistent with the March Projections. Indeed, all of petitioners' record citations in support of a 4.0% growth rate reference a new declaration attached to their reargument motion. *See* Ans. Br. at 33 (citing A1352–53, A1360). This was brand-new testimony that petitioners submitted after the close of evidence, and it directly contradicted the sworn testimony they offered at trial.[10]

Here, as on reargument, petitioners mischaracterize the perpetuity growth rate as a dependent variable that is dictated by a company's working capital levels and the discount rate. *See, e.g.*, Ans. Br. at 4 ("One input is a function of the other"). Tellingly, petitioners cite no evidence or scholarly support for this proposition. As petitioners seem to recognize later in their brief, a company's

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[10] *See Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007) (holding that "[r]eargument under Court of Chancery Rule 59(f) is only available to re-examine the existing record; therefore, new evidence generally will not be considered," and "an applicant must show the newly discovered evidence came to his knowledge since the trial and could not, in the exercise of reasonable diligence, have been discovered for use at the trial").

projected growth rate may inform its working capital needs (*id.* at 33 ("When a specific PRG is selected …, the underlying projections and assumptions must support that growth")), but they offer no support for the inverse proposition. It defies logic and economics to suggest that adjustments to *short*-term working capital projections would require dramatic adjustments to a company's *perpetuity* growth rate. AOB at 43. And again, it bears repeating that petitioners' expert used a 3.1% perpetuity growth rate together with those same working capital figures (Op. at 28-29), belying petitioners' claim that the two are somehow inconsistent.[11]

Petitioners misrepresent DFC's brief as endorsing a staggering growth rate of 4.4 percent for DFC. Ans. Br. at 34. As DFC explained, the maximum ceiling for *any* company's perpetuity growth rate is the economy's GDP growth rate, which in one of DFC's markets was as high as 4.4%. In DFC's other markets, the GDP growth rate was much lower. For example, in Spain—one of DFC's most promising markets (A258, A1005)—the GDP growth rate was 2.3%.[12] Where, as here, a company operates in multiple economies, the rates must be blended

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[11] Nor are petitioners correct that the discount rate drives the perpetuity growth rate. The latter is based on the "business's performance and industry and overall economic expectations" and is selected independently from the discount rate. Shannon P. Pratt & Roger J. Grabowski, *Cost of Capital: Applications and Examples* 46–47, 197 (5th ed. 2014) (describing five-step discounted cash flow calculation).

[12] *See* International Monetary Fund, World Economic Outlook Database April 2014, available at http://www.imf.org/external/pubs/ft/weo/2014/01/weodata/index.aspx.

together.[13] But the point petitioners miss is that, no matter what final value this exercise produces, there is nothing in the trial record that supports a perpetuity growth rate for *this* company at (or anywhere near) the GDP growth rate ceiling. *See* Pratt & Grabowski, *supra*, at 859 (noting that, in practice, "the real growth rate of existing businesses is considerably less than real GDP").

In fact, petitioners' expert explicitly rejected the GDP growth rate as an appropriate ceiling in this case. Due to industry "uncertainty" and "regulatory issues," he testified that the risk-free rate (3.14%) was the more appropriate ceiling for DFC's growth rate. *See* A227 [311:18-19]. Petitioners' expert also repeatedly testified that the "reasonable range" for DFC's perpetuity growth rate was between "2.3%" and "3.1%" (*id.* [310:15-311:2], A879–80), and that he was "capp[ing]" DFC's perpetuity growth rate at 3.1%. A199 [197:5-6] ("I capped it at the 3.1 percent, the high end, meaning the risk-free rate"); *see also, e.g.*, A205 [223:16-224:3] (3.1% is the "high end of the range"), A228 [316:2-4] (3.1% "went to the high end"), *id.* [316:5–8] ("Q. You picked the cap of your reasonable estimate for your long-term growth rate in the two-stage model, didn't you? A. That's correct,

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[13] *See* Aswath Damodaran, *Investment Valuation: Tools and Techniques for Determining the Value of Any Company* 305–07 (2002) (explaining that a company growing faster than the economy would eventually overtake the economy and that "[i]f the company is a multinational …, the growth rate in the global economy (or at least the parts of the globe that the firm operates in) will be the limiting value").

sir."); AR7 (3.1% "is the high-end of the range"). Relying on this unequivocal testimony, the Court of Chancery, in its well-reasoned original opinion, adopted a 3.1% perpetuity growth rate.

Petitioners now reverse course and argue that 3.14% is *not* an appropriate ceiling because the risk-free rate is reserved for "steady-state" companies, and DFC had yet to reach steady state. Ans. Br. at 34. Petitioners' reasoning is flawed. If DFC was not already in steady state,[14] then a higher rate would have been sensible for, at most, a short-term period of higher growth before a perpetual period of *steady-state* growth at a lower rate. The two-stage discounted cash flow model that the trial court selected follows this prescription, allowing for higher growth during the first stage, but *requiring* a steady-state perpetuity growth rate in the second stage. AOB at 43 & n.4.[15]

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[14] DFC was formed in 1990 and became publicly traded on the NASDAQ in 2005. A844. It entered the Canadian market in 1996 and made its first acquisition in the U.K. in 1999. *Id.* Over the five years preceding the transaction, DFC's revenues grew at an average rate of 14.4%, driven mostly by expansion in Europe. A845. During the same time period, DFC's more established and most profitable Canadian business grew at a modest average rate of just 2.9%, and DFC's U.S. revenues actually declined by an average of 4.1% per year. A845–47.

[15] *See also* Pratt & Grabowski, *supra*, at 40–41 (explaining that the Gordon Growth Model assumes "that net cash flows will grow evenly into perpetuity" and cash flow "must represent a normalized amount of net cash flow from the investment for the previous year, from which a ***steady rate of growth*** is expected to proceed"), 47 ("residual period begins at the time when … the net cash flows will begin growing at a constant growth rate"), 859 (valuation

Here, the March Projections that the trial court used for its discounted cash flow analysis in fact reflected a higher growth rate during the initial five-year stage. Op. at App'x A; *see also* A945 (calculating average growth rates of 10% and 23% for revenue and EBITDA, respectively). Petitioners argue that DFC's near-term projections required selecting an exceptional growth rate in the second stage as well, but that approach is fundamentally inconsistent with the two-stage model—as petitioners implicitly recognize when they suggest in a footnote that the court should have used a *three*-stage model, which would have allowed for a longer period of exceptional growth. Ans. Br. at 34 n.31. Petitioners fail to mention that their expert presented a three-stage model with a ***2.7%*** perpetuity growth rate. A198–A199 [196:22-197:2], A905; AR7–8. Petitioners' expert further explained that this would translate to no more than a 3.5% growth rate in a two-stage model. A905. Petitioners do not dispute that their expert never proposed a perpetual growth rate above 3.5% under *any* model (AOB at 39)—another dispositive fact they simply ignore in their brief.

For these same reasons, whether DFC was "coming out of trough financial performance" (Ans. Br. at 34–35; *but see supra* Part I.A) is irrelevant to the perpetuity growth rate, which, once again, estimates DFC's steady-state long-term

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analyst should "chang[e] the growth rate of a company in a currently high-growth industry to a more ***steady-state growth*** as the industry moves from high growth to a mature stage.") (emphasis added).

growth rate at the end of the projection period. In fact, petitioners' expert testified that he chose the 3.1% perpetuity growth rate ceiling to account for the near-term industry uncertainty and DFC's short-term forecasts. A205 [223:5-224:3], A227 [311:18-19]. The perpetuity growth rate was applied at the *end* of the initial five-year stage, and petitioners cite no evidence that DFC would be "coming out of trough performance" at that time.

Finally, petitioners claim that DFC's expert Daniel Beaulne's model "impl[ied]" a perpetuity growth rate of 4.5%. Ans. Br. at 35 & n.22. That is simply false. As an initial matter, a 4.5% growth rate would have been higher than the GDP growth rate of any of DFC's markets, an absurd assumption that would have resulted in DFC overtaking the entire economy. *See* note 13, *supra*. In fact, Mr. Beaulne's model did not rely on any perpetuity growth rate at all, either express or implied. Because DFC's long-term growth was uncertain, Mr. Beaulne used a "convergence" growth model that does not require selecting such a rate. AOB at 41 n.2 (citing A307, A351–52). The perpetuity growth rate "disappear[s] from the equation," and Petitioners' attempt to calculate one from Mr. Beaulne's model is unfounded and contrary to the purpose of the convergence model. James R. Hitchner, *Financial Valuation: Applications and Models* 153–54 (3d ed. 2011); A307, A351–52.

III. THIS COURT SHOULD REJECT PETITIONERS' CONCLUSORY ATTACK ON THE COURT'S COMPARABLE COMPANIES ANALYSIS.

A. Question Presented.

Whether, if measures of value other than the arm's-length sales price are probative of DFC's fair value, the trial court abused its discretion by relying in part on a comparable companies analysis.

B. Scope of Review.

The standard of review is abuse of discretion. *M.G. Bancorp., Inc. v. Le Beau*, 737 A.2d 513, 526 (Del. 1999).

C. Merits of the Argument.

This Court should conclude that the arm's-length deal price was the only relevant evidence of DFC's fair value. *Supra*, Part I. However, if this Court holds that other measures of value are relevant, then the trial court's comparable companies analysis was the next-best measure of value. Such an analysis is distinct from a discounted cash flow analysis because it is predicated on observable market data, not speculative prognostications. *See* Joshua Rosenbaum & Joshua Pearl, *Investment Banking: Valuation, Leveraged Buyouts, and Mergers & Acquisitions* 52 (2009) (one advantage of comparable company valuations is that "information used to derive valuation for the target is based on actual public market data, thereby reflecting the market's growth and risk expectations, as well as overall sentiment"); Hitchner, *supra*, at 262 (key advantage of comparable companies analysis is that it "*uses actual data*," and "estimates of value are based on actual stock prices or transaction prices, not estimates based on a number of assumptions or judgments"). A comparable companies analysis is therefore considered "in many cases … [to be] more relevant than intrinsic valuation analysis, such as discounted cash flow analysis." Rosenbaum & Pearl, *supra*, at 11.[16]

Petitioners contend that the trial court's reliance on this useful and analytically independent valuation methodology was flawed for three reasons. None of them withstands scrutiny.

First, petitioners rehash their argument that any market-based valuation of DFC was unreliable because it was obvious (apparently to everyone except all the bidders and potential bidders) that DFC was about to emerge from "trough performance." Ans. Br. at 37. As explained, the evidence, both pre- and post-deal, proves that DFC's declining performance reflected not a temporary trough but instead a structural change in DFC's core businesses resulting from sweeping regulatory fluctuations. *Supra*, Part I.A.

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[16] Indeed, the Court of Chancery regularly relies on comparable companies analyses in appraisal decisions. *See, e.g.*, *Travelocity.com Inc.*, 2004 WL 1152338, at *9–11; *Gray v. Cytokine Pharmasciences, Inc.*, 2002 WL 853549, at *11–12 (Del. Ch. Apr. 25, 2002); *Borruso v. Commc'ns Telesys. Int'l*, 753 A.2d 451, 455 (Del. Ch. 1999).

Second, petitioners are incorrect that the comparable companies analysis "yielded wildly divergent results." Ans. Br. at 37–38. DFC's financial performance was unsettled in this period of substantial regulatory uncertainty, but Mr. Beaulne used a blended-valuation model to account for the volatility. Specifically, Mr. Beaulne calculated DFC's market value of invested capital ("MVIC") over a three-year period, taking into account the changing financial performance of DFC (EBITDA in each period) and the variables impacting the broader consumer lending industry (implied by the EBITDA multiple for each year). *See* A1033 (taking average of MVIC for last twelve months, 2014, and 2015). Mr. Beaulne then used that blended MVIC figure to generate a single valuation. *See id.* (subtracting debt from MVIC and dividing fair value of equity across outstanding shares to arrive at price per share). His methodology therefore reflects sensitivity to the very concern identified by petitioners—that DFC's financial performance in any given year might be abnormally positive or negative. A302 [609:6-19] (explaining importance of taking an average of these three years because "you could have situations where EBITDA is low, and you could get a high outlier or low outlier for [the] EBITDA multiple. So it's appropriate to look at [the average]"), A335 [741:6-17] (disparity across years is "not unusual," and Mr. Beaulne deliberately assessed fluctuations in EBITA to capture "the impact on different periods"). This practice conforms with industry practice. *See* Hitchner, *supra*, at 285, 294 ("[T]he denominator is usually based on the most recent 12 months' or latest fiscal year's historical information…. If, however, the company's performance has been volatile and this latest period is either especially high or low relative to what is expected, then a longer-term … average might be more appropriate").

Third, petitioners are wrong that the six comparable companies on which the trial court relied were poor comparators for DFC. Ans. Br. at 39. As an initial matter, everyone—DFC's expert, petitioner's own expert, six different firms evaluating the value of DFC, and the trial court itself—agreed on the list of comparable companies. *See* Op. at 24–25 ("Each of the six companies both experts used was comparable to DFC, as evidenced by the experts' agreement on them and by their use in peer group analyses that six different firms . . . used to evaluate DFC for various reasons"). The only firms that were not comparable to DFC—and that were therefore excluded from the trial court's analysis—were the three additional firms suggested by petitioners' expert. *Id.* at 25. What is more, petitioners' expert relied on the same set of comparable companies for both his comparable company analysis and his calculation of beta—an important and hotly disputed variable in the competing discounted cash flow analyses. *See id.* at 24–26 (noting that "[t]he experts agree that using a peer group tends to be preferable to using only DFC's beta" and relying on Mr. "Beaulne's selection of six peers, all of which [Mr.] Dages also selected"). Accordingly, petitioners are fighting against a broad consensus that they helped build, and even against the assumptions undergirding the discounted cash flow analysis that they contend is so accurate that it alone should be the measure of DFC's value.

Moreover, even if there were no such consensus, petitioners' quibbles with the list of comparable companies ring hollow. Petitioners focus on differences in market capitalization, but the trial court's model relied on a measure of value more accurate than market capitalization—MVIC. Op. at 56; *see also* A1031 (defining MVIC as "the sum of the company's market capitalization, total debt, preferred stock, and minority interest"). Delaware courts regularly rely on MVIC or a nearly identical measure, enterprise value, in performing comparable company analyses.[17] *See, e.g.*, *Agranoff v. Miller*, 791 A.2d 880, 892 (Del. Ch. 2001) ("Comparable companies analyses are frequently calculated on a debt free basis, to derive the fair market value of the company's [MVIC]."); *Prescott Grp. Small Cap, L.P. v. Coleman Co.*, 2004 WL 2059515, at *16 (Del. Ch. Sept. 8, 2004) ("Common multiples are the ratio of total enterprise value . . . to EBIT or EBITDA of the peer companies."); *Taylor v. Am. Specialty Retailing Grp., Inc.*, 2003 WL 21753752, at *7–9 & n.23 (Del. Ch. July 25, 2003) (preferring EBITDA-to-MVIC analysis over

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[17] MVIC is different from enterprise value only insofar as the former includes cash and cash equivalents, whereas the latter does not. Elaine H. Pinto et al., *Equity Asset Valuation* 325 (2010).

competing price-to-earnings and price-to-book-value analyses). Nothing in petitioners' own cases, which rely on a wide range of valuation measures—*see, e.g.*, *In re PNB Hldg. Co. S'holders Litig.*, 2006 WL 2403999, at *25 n.125 (Del. Ch. Aug. 18, 2006) (total assets); *Merion Capital, L.P. v. 3M Cogent, Inc.*, 2013 WL 3793896, at *6 (Del. Ch. July 8, 2013) (enterprise value)—suggests that MVIC is an inappropriate measure of value. On an MVIC basis, half of the peer companies the court selected for its comparable companies analysis were larger than DFC and the other half smaller. A308 [633:13-634:14]. Petitioners' argument reduces, then, to largely unexplained invocations of inapposite cases. *See, e.g.*, *3M Cogent*, 2013 WL 3793896, at *6–7 (five supposedly comparable companies were not even in the same business as the target, and six had enterprise values under $50 million and had never turned a profit, whereas the target was profitable and had an enterprise value of almost $400 million).

Petitioners' contentions regarding the geographic scope of DFC and its peer companies are equally conclusory and meritless. Most of these companies, DFC included, generated a substantial portion of their earnings in North America and from their consumer lending businesses,[18] and they largely operated in markets

[18] DFC's single biggest market by revenue was the U.K., but Canada and the United States together accounted for roughly the same amount of revenue. *See* A383, A385, A408. Store-based consumer lending was the single biggest product, accounting for over 42% of revenue.

where DFC either was already established or was contemplating expanding in the short term. *See* A845–57, A972–76 (expert reports outlining DFC's geographic footprint and product offerings); A308 [631:18-633:12] (DFC operated mostly in the United Kingdom and North America and was looking to expand in Continental Europe); A938–39 (outlining geographic footprint and product offerings of peers); A1029–31 (same). Further, some of these peer companies were being buffeted by the same regulatory headwinds facing DFC. *See*, *e.g.*, A308 [632:15–633:4] (one peer company was "one of the big three U.K. . . . unbanked lenders" and "was facing a lot of the same regulatory issues that DFC was"); A938, A1029–31 (peers such as Cash America and Cash Converters directly competed against DFC in key markets, including the United States and the United Kingdom); Op. at 3–8 (there was substantial regulatory uncertainty in these same markets).

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In sum, if any measure of value other than the deal price is relevant, then it is the comparable companies analysis, which took account of observable market data, including the value of peer companies competing with DFC in its primary markets and DFC's volatile financial performance. The discounted cash flow analysis touted by petitioners, in contrast, was unduly speculative, sensitive to even small changes in multiple input variables, and dependent on management projections that had already proven unreliable by the time the transaction closed.

CONCLUSION

The Court should vacate the trial court's order and final judgment, and instruct the court either (1) to find that the transaction price represents the "fair value" of DFC shares, or (2) to return to its original "fair value" determination, after correcting the undisputed, inadvertent error in the working capital figures but leaving the perpetuity growth rate at 3.1%.

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