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MORRIS NICHOLS ARSHT & TUNNELL

Delaware Court of Chancery Awards Less Than Merger Price in Appraisal Proceeding

In a decision consistent with the outcome of a number of recent appraisal cases, the Delaware Court of Chancery in *LongPath Capital, LLC v. Ramtron International Corp.* relied on the negotiated merger price as the best evidence of "fair value" for purposes of Section 262 of the Delaware General Corporation Law.[1] And, in the most noteworthy portion of the decision, the Court took the additional step of deducting merger related synergies from the merger price to determine fair value.

The appraisal petition, filed by a stockholder who acquired its shares after the merger was announced, sought a court determination of "fair value" in connection with Cypress Semiconductor Corporation's acquisition of Ramtron in November 2012. Months earlier, Cypress had made an unsolicited offer for Ramtron followed by a hostile tender offer that the Ramtron board recommended against. For several months, Ramtron "actively solicited every buyer it believed could be interested," but the company received no formal offers. Ultimately, Cypress raised its offer five times before Ramtron agreed to merge at $3.10 per share—a 71% premium over the unaffected stock price and a 25% increase to Cypress's first offer.

In making the required determinations regarding the fair value of the petitioner's shares, the Court held that a multi-bidder auction is not a "prerequisite" to relying on the merger price and found that any "impediments to a higher bid resulted from Ramtron's operative reality, not shortcomings of the Merger process." Turning to synergies, the Court instructed that value arising from the consummation of the merger must be excluded in an appraisal proceeding, and, for that reason, excluded any amount attributable to acquiror-specific synergies from the merger price. The Court explained that "the proper way of applying a merger-price-less-synergies approach is to determine the value paid for a company and then subtract that portion of the purchase price representing synergies." Relying on expert testimony, the Court concluded that synergies were $0.03 per share—calculated by finding 10% of the merger price to represent gross cost savings and adding back "negative revenue synergies and transaction costs," which were "significant" based on the record in this case—and deducted that amount from the merger price to assess "fair value."

Also noteworthy is the Court's extended discussion of the reliability of management projections the stockholder used to argue that the fair value was $4.96 per share (significantly higher than the $3.10 merger price). The Court found that the projections were unreliable for a number of reasons, including that a new management team prepared the projections outside of the ordinary course of business, the projections failed to account for known anomalies in recent revenues, and the company had provided different projections to lenders. The Court noted that accepting the stockholder's value would have meant "the market left an amount on the table exceeding Ramtron's unaffected market capitalization" and reflected "a significant market failure, especially in the context of a well-publicized hostile bid and a target actively seeking a white knight."

LongPath demonstrates the Delaware courts' acceptance of market-tested merger values as indicative of fair value in an appraisal proceeding and the courts' willingness to make difficult determinations concerning the value attributable to synergies.

1 *See In re Appraisal of Ancestry.com, Inc.*, 2015 WL 399726 (Del. Ch. Jan. 30, 2015); *Huff Fund Inv. P'ship v. CKx*, Inc., 2013 WL 5878807 (Del. Ch. Nov. 1, 2013).

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