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DELAWARE CORPORATE LAW BULLETIN

Jarden Appraisal: Delaware Supreme Court Affirms Chancery Court's Exclusive Reliance on Unaffected Market Price in Determining "Fair Value" Under DGCL § 262

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Juxtaposed with Aruba Court's reversal of Chancery Court reliance on unaffected market price, Jarden demonstrates the highly fact-based nature of DGCL § 262 appraisal analysis

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INTRODUCTION

For (at least) the fourth time since 2017, the Delaware Supreme Court ("*Supreme Court*") has weighed in on the proper analysis for determining "fair value" in an appraisal proceeding under Delaware General Corporation Law § 262 ("*DGCL § 262*"). In *Fir Tree Value Master Fund, LP v. Jarden Corp.*, 236 A.3d 313 (Del. 2020) ("*Jarden*"), the Supreme Court affirmed the decision by Vice Chancellor Joseph R. Slights III of the Delaware Court of Chancery ("*Chancery Court*") to rely exclusively on a target company's "unaffected market price" in determining its "fair value."

Jarden arose from the 2016 acquisition by Newell Brands Inc. ("*Newell*") of Jarden Corporation ("*Jarden*") *via* merger ("*Transaction*"). The Transaction featured a cash and stock structure valuing Jarden at $59.21 per share. Not satisfied with the purchase price, several large Jarden stockholders ("*Petitioners*") brought a DGCL § 262 appraisal action seeking a judicial determination of the "fair value" of their shares. Vice Chancellor Slights "found that, of all the valuation methods presented by the parties' experts, only the $48.31 unaffected market price of Jarden stock could be used reliably to determine the fair value." Petitioners, obviously not pleased with a valuation nearly 20% lower than what they would have received had they accepted the Transaction price, appealed to the Supreme Court.

I. LEGAL BACKGROUND

In 1899, the Delaware General Assembly ("*General Assembly*") established dissenting stockholders' right to an appraisal remedy "after amending the corporate code to allow a corporation to be sold upon the consent of a majority of stockholders instead of unanimous approval as was previously required." DGCL § 262 allows target company stockholders to dissent from a merger and seek an alternative, and hopefully higher, valuation from the Chancery Court. DGCL § 262 directs the Chancery Court to "determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger," effectively eliminating any synergistic value captured in the purchase price. Moreover, in "determining such fair value, the Court shall take into account all relevant factors." Thus, as explained by the *Jarden* Court, "[f]air value 'is a jurisprudential, rather than purely economic, construct,' meaning fair value is a law-created valuation method that excludes elements of value that would normally

be captured in economic models." The Chancery Court also is required to "assess the fair value of each share of stock 'on the closing date of the merger' and determine the value of the pre-merger corporation as a going concern." Finally, unlike other Chancery Court litigation, each side has " 'the burden of proving their respective valuation positions by a preponderance of [the] evidence.' In the end, the trial judge must determine fair value, and 'fair value is just that, "fair." It does not mean the highest possible price that a company might have sold for.' "

Notably, DGCL § 262 gives the Chancery Court significant leeway in determining "fair value." The Chancery Court typically prefers using the negotiated deal price (less synergies) as the basis for determining fair value. Nevertheless, the Supreme Court has steadfastly refused to adopt a bright-line rule favoring negotiated deal price, or any other methodology, as the preferred valuation methodology. Rather, it has directed the Chancery Court to consider "all relevant factors" in discerning fair value, which may include (i) negotiated deal price, (ii) stock market trading price if the target is a public company, (iii) a comparable companies analysis, (iv) a discounted cash flow ("*DCF*") analysis, (v) myriad other measures, or (vi) a combination of any of the foregoing. As such, appraisal litigation is usually highly fact specific and vary in outcomes.

The *Jarden* Court cited three "important . . . appraisal decisions" decided between 2017 and 2019 in framing its analysis:

- *First*, in *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346 (Del. 2017) ("*DFC*"), the Supreme Court "took issue with the Court of Chancery's reasoning for rejecting deal price as relevant to fair value" (quoting *Jarden* here and below). While refusing to adopt a "presumption . . . favoring deal price for fair value," the *DFC* Court "noted that 'our refusal to craft a statutory presumption . . . does not in any way signal our ignorance to the economic reality that the sale value resulting from a robust market check will often be the most reliable evidence of fair value.' " The *DFC* Court instructed the Chancery Court, on remand, to better explain its decision to give equal weight to the negotiated deal price, a comparable companies analysis, and a DCF analysis in determining "fair value." For a discussion of *DFC*, see Robert S. Reder & Blake C. Woodward, *Delaware Supreme Court Refuses to Establish a Presumption Favoring Deal Price in Statutory Appraisal Proceedings*, 71 VAND. L. REV. EN BANC 59 (2018).
- *Next*, in *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017) ("*Dell*"), the Supreme Court criticized the Chancery Court's exclusive reliance on a DCF

analysis, observing that the Chancery Court "erred when it assigned no weight to market value or deal price as part of its valuation analysis" (quoting *Jarden* here and below). Further, while "in a given case, the market is not always the best indicator of value, and it need not always be accorded some weight," based on the factual record, "the market-based indicators of value—both Dell's stock price and the deal price—have substantial probative value." For a discussion of *Dell,* see Robert S. Reder & Micah N. Bradley, *Dell Appraisal: Delaware Supreme Court Rejects Chancery Court Valuation Giving No Weight to Deal Price in Connection with Management-Led LBO,* 72 VAND. L. REV. EN BANC 201 (2019).

- *Finally,* in *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128 (Del. 2019) ("*Aruba*"), the Supreme Court considered the Chancery Court's exclusive reliance on a target company's unaffected market price. Rejecting the lower court's approach, the *Aruba* Court "emphasized the 'considerable weight' a court should give to the deal price 'absent deficiencies in the deal process' " (quoting *Jarden* here and below). The *Aruba* Court also noted that "when a market was informationally efficient in the sense that 'the market's digestion and assessment of all publicly available information concerning [the Company] [is] quickly impounded into the Company's stock price,' the market price is likely to be more informative of fundamental value." However, the *Aruba* Court found that the trial court record did not support reliance on market price by the Chancery Court. For a discussion of *Aruba,* see Robert S. Reder & Martin Shepherd, *Aruba Appraisal: Delaware Supreme Court Rejects Chancery Court's Exclusive Reliance on Trading Price in Determining "Fair Value" Under DGCL § 262,* 73 VAND. L. REV. EN BANC 239 (2020).

* * * * *

Vice Chancellor Slights proceeded cautiously in considering the competing arguments of Jarden and Petitioners. While Petitioners demanded a lofty valuation of $71.35 per share based primarily on a comparable companies analysis—approximately *$12 more than Transaction value,* Jarden promoted a DCF analysis in arriving at $48.01 per share—more than *$11 less than Transaction value*. At the time, the Supreme Court had not yet issued its decision in *Aruba.* Recognizing that the lower court's exclusive reliance on unaffected market price would be the focus of *Aruba,* Vice Chancellor Slights

therefore decided to await word from the Supreme Court. Then, "[a]fter considering [*Aruba*] and receiving further submissions from the parties," the Vice Chancellor pegged "the fair value of each share of Jarden stock . . . at $48.31 using Jarden's unaffected market price." In view of the fact that *Aruba* actually *reversed* a Chancery Court valuation based solely on unaffected market price, Petitioners appealed.

The *Jarden* Court affirmed Vice Chancellor Slights's market-based valuation. *First*, the Supreme Court observed that, despite Petitioners' argument to the contrary, "[t]here is no 'long-recognized principle' that a corporation's unaffected [market] price cannot equate to fair value." *Next*, the Supreme Court noted that "Jarden's sale price does not act as a valuation floor . . . [where] the deal price resulted from a flawed sale process, and . . . Jarden probably captured substantial synergies in the sale price."

II. FACTUAL BACKGROUND

A. Transaction Lead-Up

Jarden, founded by Martin Franklin ("*Franklin*"), operated as a "decentralized holding company with a large portfolio of consumer product brands in separate operating companies." Newell, too, "operated as a large consumer products company with a vast portfolio of products with household names." In 2014, Newell Chief Executive Officer Michael Polk ("*Polk*") began looking into "transformational M&A" to expand Newell's product offerings. To that end, Newell engaged a financial advisor to generate a list of possible targets and to arrange preliminary meetings. Although Jarden made this list, Newell was concerned that Jarden "operated in niche categories" while "Polk wanted big, global categories." Nevertheless, Franklin and Polk began discussions of the Transaction at an investor conference in 2015. Franklin did not inform Jarden's board of directors ("*Board*") of these discussions. Franklin did give the Board some "informal advance notice" of a subsequent meeting, but the Board did not authorize Franklin to engage with Newell or discuss financial parameters. Nevertheless, Franklin proceeded with the meeting.

During this meeting, Franklin advised that "Newell's offer for Jarden would have to 'start with a six' and would have to include a significant cash component if Newell's goal was to gain control of the combined company." When Polk showed interest, Franklin informed the Board about the meeting, "including the need for an offer to start with a 'six.' " The Board was supportive "and encouraged further discussions

within those parameters." Franklin then asked Barclays Capital Inc. ("*Barclays*"), who the Board later retained as its financial advisor, "to develop an 'analysis supporting a transaction in the range of $60-69 per share.' " At the time, Jarden's stock was trading in the high forties.

As discussions surrounding the Transaction continued, on October 14, 2015, Jarden announced an acquisition ("*Acquisition*") to be financed "through an equity offering priced at $49.00 per share and additional debt." This announcement triggered a drop of 12% in Jarden's trading price over the subsequent two weeks. To calm the market, the Board authorized a $50 million share buyback with purchases capped at $49 per share ("*Buyback*"). Jarden averaged approximately $45.96 per share for the first round of buybacks and $48.05 per share for the second round.

The day following Jarden's announcement of the Acquisition, Jarden and Newell signed a mutual nondisclosure agreement so that the two companies could begin due diligence. Although Jarden presented Newell with projections reflecting "5% revenue growth," Newell employed a "3.1% growth projectio[n]." Furthermore, although its financial advisors estimated significantly higher synergies from a combination with Jarden, Newell "structured the deal based on $500 million in estimated annual cost synergies, which priced Jarden at $57-$61 per share." Initially, Newell offered $57 per share, at the bottom of its range, consisting of "$20 in cash plus a fixed exchange ratio of Newell shares" and representing "an 18% premium over Jarden's then-current share price." When Franklin countered on November 16 at "$63 per share with $21 in cash," Newell abruptly broke off negotiations, only to return five days later "with an offer of $21 in cash and target price of $60 per share." The Board accepted this offer the very next day, granting Newell exclusivity to conduct "confirmatory due diligence." Because Newell's last offer reflected "a 13.5x EBITDA multiple" and offered Jarden stockholders the opportunity "to benefit from synergies above . . . $500 million by retaining shares in the combined company," the Board believed "Newell was the best and most likely acquirer, and no other companies had the same fit or ability to pay." Of course, by granting exclusivity to Newell, the Board effectively "disabled any market check."

When "[n]ews of the deal leaked on December 7," Newell's market price increased while Jarden's decreased, triggering a renegotiation of the exchange ratio. At a December 10 meeting, the Board considered "whether the transaction still made sense." Minutes of this meeting "emphasized that Jarden was not for sale and the sole alternative was remaining independent." Then, on December 13, following Barclays's delivery of its fairness opinion, the Board approved

the Transaction. The parties formally announced the Transaction the next day. In early 2016, Jarden announced disappointing year-end results, including "considerable losses . . . compared to recent years" and "weak" first quarter results. In addition, "the final 2016 budget . . . was adjusted downward due to a decline in year-end revenue." On April 15, Jarden and Newell stockholders voted to approve the Transaction. When the Transaction subsequently closed, "the mix of cash and stock valued Jarden at $59.21 per share."

B. Petitioners Seek Appraisal

Following closing, Petitioners asked the Chancery Court to appraise their shares under DGCL § 262. At trial, Petitioners' expert witness "relied primarily on his comparable companies analysis to support a fair value of $71.35 per share." Conversely, Jarden's expert witness ultimately relied on a DCF analysis to produce a fair value of $48.01 per share.

Vice Chancellor Slights calculated the fair value of Jarden at "$48.31 using Jarden's unaffected market price," based primarily on the following considerations:

- *First*, because "the Jarden sale process 'raise[d] concerns' and 'left much to be desired,' " the Vice Chancellor concluded that the "deal price less synergies" was not "a reliable indicator of fair value." In particular, the Vice Chancellor noted that (i) Franklin "acted with 'little to no oversight by the Board,' " (ii) Franklin "volunteered 'a price range' " to Newell "before negotiations began in earnest," (iii) "the lack of a pre-signing or post-signing market check," and (iv) "the expert analysis of the transaction synergies raised more questions than it answered."
- *Second*, the Vice Chancellor gave no weight to Petitioners' "comparable companies analysis of $71.35 per share," noting that "Jarden had no reliable comparables" and Petitioners' expert "failed to support his selection of peer group companies."
- *Third*, the Vice Chancellor rejected the experts' "wildly divergent" DCF analyses, which "indicated upwards of a $5 billion difference in market value."
- *Fourth*, given his "significant discomfort" with the proffered valuations, the Vice Chancellor "decided to use Jarden's unaffected stock price" of $48.31 per share. In support of this decision, the Vice Chancellor pointed to the "informationally efficient" market for the stock and the currency of the "unaffected market price" following Jarden's release of disappointing year-end financial results before closing.

Petitioners appealed the Vice Chancellor's ruling to the Supreme Court.

III. THE SUPREME COURT'S ANALYSIS

On appeal, the Supreme Court considered, among other things, Petitioners' contentions that Vice Chancellor Slights (i) "abused [his] discretion by relying on [the] unaffected market price," (ii) "should have treated the deal price as a fair value floor," and (iii) should have considered other market valuations as supportive of his valuation. In this connection, the Supreme Court explained that it will defer to a Chancery Court "fair value determination if it has a 'reasonable basis in the record and in accepted financial principles relevant to determining the value of corporations and their stock.' "

A. Reliance on Unaffected Market Price

At the outset, the Supreme Court recognized that neither *DFC*, *Dell*, nor *Aruba* "foreclosed as a matter of law . . . use of unaffected market price" or, for that matter, "any recognized valuation methods to support fair value." In fact, the Supreme Court noted that Vice Chancellor Slights "got the 'takeaway' exactly right from our recent appraisal decisions: '[w]hat is necessary in any particular [appraisal] case [] is for the Court of Chancery to explain its [fair value calculus] in a manner that is grounded in the record before it.' "

Petitioners acknowledged that "Jarden stock traded in a semi-strong efficient market" which "quickly assimilated all publicly available information into Jarden's stock price." On the other hand, Petitioners argued that "the market lacked material nonpublic information and reacted strongly when it eventually received that information." For example, Jarden furnished Newell with confidential information concerning Jarden's many acquisitions pursuant to the nondisclosure agreement between the parties that was not publicly available. According to Petitioners, Newell responded positively to this information in valuing Jarden, which otherwise was difficult to value given the limited public information about these acquisitions.

The Supreme Court acknowledged that material nonpublic information typically is exchanged in M&A negotiations and that a buyer "usually has access to insiders, nonpublic projections, and the ability to ask questions and seek explanations." Consequently, "the unaffected market price is not always a better reflection of fair value than the deal price negotiated by those with better access to the

corporation and its advisors." Nevertheless, the Supreme Court concluded that Vice Chancellor Slights "did not abuse [his] discretion when [he] found that the market did not lack material nonpublic information about Jarden's financial prospects." In fact, the Vice Chancellor "did not ignore" the facts before him and considered all the arguments. Therefore, given "the record before [him], the [Vice Chancellor] could find that the 'market was well informed and the Unaffected Market Price reflects all material information.' "

B. Deal Price (Less Synergies) Not a Floor

The Supreme Court acknowledged "some appeal" in Petitioners' argument that "[b]ecause a better [sales] process would have resulted in a higher deal price, and . . . Jarden failed to prove synergies, . . . the deal price is 'logically the minimum for any fair value determination.' " Ultimately, though, the Supreme Court rejected this argument and deferred to Vice Chancellor Slights's approach. The Vice Chancellor, relying on expert testimony, concluded that "there were synergies in the deal, and Jarden 'probably' captured those synergies in the merger price." And while he found it difficult to assign a specific numerical weight to the deal price less synergies because the "expert analysis of the transaction synergies raised more questions than it answered," the Vice Chancellor concluded that Jarden stockholders received the value of synergies and was satisfied, after weighing the evidence, that the Transaction price exceeded fair value. On this basis, the Supreme Court concluded that the Vice Chancellor "did not err for failing to treat the deal price as a floor for fair value."

C. Other Market Valuations

The Supreme Court also took issue with Petitioners' argument that other market factors cited by Vice Chancellor Slights did not support using Jarden's unaffected market price to determine "fair value," and conversely, that the Vice Chancellor ignored other market evidence that supported Petitioners' valuation.

- *First,* Petitioners argued that market analyst price targets of $58–$65 per share supported the conclusion that the unaffected market price was low. The Vice Chancellor concluded that there were too many market professionals with divergent opinions to reach a consensus about the proper price. Further, the Vice Chancellor found Petitioners' reliance on fairness opinions issued by the parties' financial advisors that valued Jarden between $60–$68 per share to be misplaced, given that

"Franklin . . . instructed [his advisor] to start developing an analysis supporting a transaction in the range of $60–$69 per share."

- *Second*, Petitioners argued that the Board's rejection of Newell's opening $57 per share bid proved that Jarden thought $57 per share was an inadequate representation of its fair value. Petitioners also cited management change-in-control compensation valued at $71.04, $76.11, and $81.69 per share as representative of fair value. To the contrary, the Supreme Court observed that "deal price may be higher than the unaffected market price for reasons other than the seller's going concern value, and Polk testified that Newell paid a premium for control and anticipated synergies." Further, "[t]he record supports [the Vice Chancellor's] view that the increased management compensation could be attributed to amended employment agreements, extended non-compete agreements, and an acceleration of certain restricted stock awards, which do not affect management's valuation of Jarden."
- *Third*, the Petitioners complained that the Vice Chancellor pointed to the $49 per share equity offering to finance the Acquisition, as well as the $49 per share cap on the Buyback, as "persuasive evidence" that the Board believed this amount "reflected Jarden's value." To the contrary, Petitioners countered that the Buyback "indicate[d] that Jarden's stock was undervalued because the 'rationale behind a stock repurchase is the Company's belief that its stock is undervalued.' " The Supreme Court disagreed, noting "[t]here are additional reasons for buybacks, like signaling confidence, beyond the petitioners' assertion that the only rationale for buyback is a belief that the stock is undervalued. Further, even if it was indicative of such a belief, a price cap of $49 per share could also indicate where that belief ends and the board believes the company is valued more accurately."

CONCLUSION

The *Jarden* Court affirmed the Chancery Court's exclusive reliance on a target company's unaffected market price in a DGCL § 262 appraisal proceeding a little more than a year after the *Aruba* Court reversed the lower court's exclusive use of the same valuation methodology. What does that tell us?

- *First*, appraisal actions under DGCL § 262 require an intensely fact-based analysis. One set of facts can lead a Delaware court

to rely exclusively on unaffected market price, while another can point in the opposite direction. In other words, there are no bright-line rules in this arena.

- *Second*, while transaction price remains the typical methodology for a DGCL § 262 appraisal, flaws in the sales process can lead the Chancery Court to select another, or a weighted combination of, valuation methodologies. All in all, the Chancery Court has been granted considerable flexibility under DGCL § 262 to determine "fair value" by considering "all relevant factors."
- *Third*, the Supreme Court places a premium on the explanation given by the Chancery Court for the valuation methodology it adopts in any particular DGCL § 262 proceeding, with due regard for the trial court record and adherence to the traditional valuation methodologies. Under those circumstances, the Supreme Court is reluctant to find that the Chancery Court abused its discretion or otherwise second guess a Chancery Court value determination.