APPRAISAL RIGHTS AND "FAIR VALUE"

Steven J. Cleveland†

Appraisal rights (or dissenter's rights) entitle a shareholder to the judicially determined "fair value" of her shares upon the occurrence of a merger that she does not support. Once a quiet corner of corporate law, appraisal rights have recently given rise to significant litigation and a growing body of scholarship. Whereas existing scholarship commonly has focused on improvements to be implemented by the judiciary, I propose a legislative improvement.

In appraising "fair value," courts have failed to give force to the legislative mandate to "exclude any element of value arising from the accomplishment or expectation of the merger," which has prompted scholarly criticism of the courts. In failing to give force to that statutory exclusion, courts routinely have appraised "fair value" to be the merger price, which necessarily reflects elements of value arising from the merger. Courts have favored the merger price as representing "fair value" because courts lack training and experience in financial valuation; because the merger price is commonly the market-based result of arm's length negotiations (so it is likely more reliable than the court's own freewheeling valuation); and because the usage of the preannouncement market-based stock price—which some scholars favor and which necessarily excludes value arising from the merger, consistent with the appraisal statute—would enable exploitation of minority shareholders, whom the courts typically protect.

Given recent judicial developments that render breach-of-duty claims less effective in disciplining directors, appraisal litigation has assumed additional significance. The statutory exclusion, however, contributes to the courts' common conclusion that "fair value" equals, or is less than, the merger price. Capping the appraised "fair value" at the merger price undermines the disciplinary effect on directors provided by appraisal litigation. Moreover, recent empirical studies reveal that enhanced appraisal rights redound to the benefit of shareholders, whether they support the merger or exercise appraisal rights. Consequently, this Article advocates

† Alfred P. Murrah Professor of Law & Thomas P. Hester Presidential Professor, University of Oklahoma.

for legislative deletion of the statutory exclusion, which would provide courts with greater freedom to determine that "fair value" exceeds the merger price. Such deletion would better reflect the courts' existing analyses, better reflect apparent legislative intent, and better protect shareholders.

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INTRODUCTION

Appraisal rights (or dissenter's rights) entitle a shareholder to the judicially determined "fair value" of her shares upon the occurrence of a merger that she does not support.[1] Given that any dissenting shareholder does not support the merger, legislatures sensibly exclude from the "fair value" determination any element of value arising from

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[1] *See, e.g.*, DEL. CODE ANN. tit. 8, § 262 (2020); MODEL BUS. CORP. ACT § 13.02 (1950) (AM. BAR ASS'N, amended 2016).

the expectation or accomplishment of the merger.[2] Courts, however, have narrowly construed that statutory exclusion, prompting scholarly criticism.[3] Courts routinely conclude that the value of the merger consideration constitutes "fair value,"[4] even though the merger price necessarily reflects value attributable to the merger, which, by statute, must be excluded. Notwithstanding the statutory exclusion of value attributable to the merger, judges have favored appraising "fair value" as the merger price because their training is in law, not financial valuation; because the merger price commonly results from arm's length negotiations and necessarily received the support of a majority of shares; and because the use of the market-tested preannouncement stock price, as favored by some scholars, would encourage exploitation of minority shareholders.[5] Recently, however, courts have accorded the statutory exclusion some weight by subtracting the value of any synergies attributable to the merger from the merger price when appraising "fair value."[6] Such deference to the merger price as reflecting "fair value" contravenes the legislative text and judicial precedent.[7]

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2 *See, e.g.*, CAL. CORP. CODE § 1300 (Deering 2020); DEL. CODE ANN. tit. 8, § 262(h) (2020); TEX. BUS. ORGS. CODE ANN. § 10.362(a) (West 2020). Though once sensible, the statutory exclusion no longer appears to reflect legislative intent or current judicial practice. *See infra* Part IV. The statutory exclusion weakens appraisal rights, whereas empirical studies suggest that enhanced appraisal rights improve shareholder value and serve as an important check on corporate boards. *See infra* Part IV. Consequently, this Article ultimately proposes deletion of the statutory exclusion.

3 *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 128–29 (1991); Richard A. Booth, *Minority Discounts and Control Premiums in Appraisal Proceedings*, 57 BUS. LAW. 127, 128 (2001); William J. Carney & Mark Heimendinger, *Appraising the Nonexistent: The Delaware Courts' Struggle with Control Premiums*, 152 U. PA. L. REV. 845, 852 (2003); Daniel R. Fischel, *The Appraisal Remedy in Corporate Law*, 8 AM. BAR FOUND. RSCH. J. 875, 902 (1983); Lawrence A. Hamermesh & Michael L. Wachter, *Rationalizing Appraisal Standards in Compulsory Buyouts*, 50 B.C. L. REV. 1021, 1046–47 (2009) [hereinafter Hamermesh & Wachter, *Rationalizing Appraisal Standards*]; Lawrence A. Hamermesh & Michael L. Wachter, *The Fair Value of Cornfields in Delaware Appraisal Law*, 31 J. CORP. L. 119, 154 (2005) [hereinafter Hamermesh & Wachter, *Cornfields*]; Jonathan Macey & Joshua Mitts, *Asking the Right Question: The Statutory Right of Appraisal and Efficient Markets*, 74 BUS. LAW. 1015, 1017 (2019).

4 *See, e.g.*, *In re* Appraisal of Stillwater Mining Co., No. 2017-0385, 2019 WL 3943851, at *1 (Del. Ch. Aug. 21, 2019), *aff'd*, Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co., 240 A.3d 3 (Del. 2020). Certain scholars agree. *See* Brief of Law & Corp. Finance Professors as *Amici Curiae* in Support of Reversal at 3, DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346 (Del. 2017) (No. 518, 2016).

5 *See, e.g.*, *In re Stillwater Mining Co.*, 2019 WL 3943851, at *43–44; *infra* Section III.B.

6 *See infra* Section II.C.4.

7 *See* Golden Telecom, Inc. v. Glob. GT LP, 11 A.3d 214, 217 (Del. 2010); Eric L. Talley, *Finance in the Courtroom: Appraising Its Growing Pains*, 35 DEL. LAW. 16, 17 (2017) ("[A] strong deal price deference requirement is functionally equivalent to a judicial repeal of the appraisal statute, improperly bypassing the Delaware General Assembly.").

Moreover, such deference wrongly caps "fair value," a problem exacerbated by a synergy deduction.

Shareholders' breach-of-duty claims, as well as appraisal claims, serve as important checks on boards of directors in the context of mergers. Recent opinions, however, have lessened the check provided by breach-of-duty claims, elevating the importance of appraisal litigation.[8] Empirical studies reveal that appraisal litigation is more likely to occur in conflict-of-interest transactions, where exploitation of minority shareholders is most likely, and in situations where the merger price falls short of expectations.[9] Recent opinions that cap "fair value" at the merger price (or worse, subtract synergy value from the merger price) risk undermining the increasingly important check on corporate boards provided by appraisal litigation.[10] Recent empirical studies also reveal that enhanced appraisal rights benefit shareholders, including those shareholders who support the merger, by prompting directors of the target corporation to extract more value during merger negotiations, and by prompting directors of the acquiring corporation to pay more value to avoid appraisal litigation.[11]

Whereas existing scholarship has focused on improvements to be implemented by the judiciary, this Article contributes to that body of scholarship by proposing a legislative improvement. This Article—which focuses on Delaware as the leading provider of corporate law[12]—proposes deletion of the statutory exclusion of any "value arising from the accomplishment or expectation of the merger" from the appraised "fair value."[13]

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8 *See* Matthew D. Cain, Jill Fisch, Steven Davidoff Solomon & Randall S. Thomas, *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 606, 633 (2018).

9 *See* Jonathan Kalodimos & Clark Lundberg, *Shareholder Rights in Mergers and Acquisitions: Are Appraisal Rights Being Abused?*, 22 FIN. RSCH. LETTERS 53, 57 (2017); Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551, 1593–97 (2015) [hereinafter Korsmo & Myers, *Appraisal Arbitrage*].

10 *See* Cain, Fisch, Solomon & Thomas, *supra* note 8, at 633–34; Albert H. Choi & Eric Talley, *Appraising the "Merger Price" Appraisal Rule*, 34 J.L. ECON. & ORG. 543, 543 (2018); Charles Korsmo & Minor Myers, *The Flawed Corporate Finance of* Dell *and* DFC Global, 68 EMORY L.J. 221, 269–73 (2018) [hereinafter Korsmo & Myers, *Flawed Corporate Finance*].

11 *See* Audra Boone, Brian Broughman & Antonio J. Macias, *Merger Negotiations in the Shadow of Judicial Appraisal*, 62 J.L. & ECON. 281, 314 (2019); Scott Callahan, Darius Palia & Eric Talley, *Appraisal Arbitrage and Shareholder Value*, 3 J.L. FIN. & ACCT. 147, 147 (2017); *see also* Charles Korsmo & Minor Myers, *Reforming Modern Appraisal Litigation*, 41 DEL. J. CORP. L. 279, 317 (2017) [hereinafter Korsmo & Myers, *Reforming Modern Appraisal*] (same, but not an empirical study).

12 *See* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON & ORG. 225, 226–27 (1985).

13 DEL. CODE ANN. tit. 8, § 262(h) (2020).

Such deletion would bring the statute more in line with the valuation process currently undertaken by the courts. As mentioned, the Delaware courts' prevailing analysis places great weight—even if not presumptive weight—on the merger price, which runs contrary to the statutory exclusion, as the merger price necessarily includes value attributable to the merger. So, deletion of that statutory exclusion would better reflect the Delaware courts' current appraisal process. Deletion of the statutory exclusion would not prevent the Delaware courts, if so inclined, from employing the merger-price-minus-synergies analysis, given other language in the appraisal statute, including the legislative mandate that the courts take into account "all relevant factors" when determining "fair value."[14] Moreover, such deletion would seemingly better reflect legislative intent, as the Delaware courts have accorded little weight to the statutory exclusion, but the Delaware legislature—despite repeatedly amending the appraisal statute[15]—has not reacted legislatively to the courts according little weight to that statutory exclusion. Most importantly, deletion of the statutory exclusion would better free the courts—but not require those courts—to determine that "fair value" is greater than the merger price, which, given those recent empirical studies, would redound to the benefit of all of the shareholders of the target corporation, not just those dissenting shareholders.

In proposing that the Delaware legislature delete the statutory exclusion, this Article proceeds as follows. Part I offers a brief historical account of appraisal rights. Part II explains the ways in which courts have failed to abide by the legislative mandate to exclude from the "fair value" determination any value attributable to the accomplishment or expectation of the merger. Part III explains two critical reasons why courts have failed to abide by that legislative mandate. First, judges are trained in law, not financial valuation, prompting them to favor a market-based value—the merger price. Second, consistent with the legislative purpose of appraisal rights, courts protect minority shareholders from exploitation by the majority, where exploitation would be more likely if the courts favored a different market-based value—the unaffected, preannouncement stock price, which some

[14] *Id.*; *see infra* Part IV.

[15] *See* H.R. 341, 150th Gen. Assemb., Reg. Sess. § 15 (Del. 2020) (amending DEL. CODE ANN. tit. 8, § 262(b)); S. 88, 150th Gen. Assemb., Reg. Sess. § 15 (Del. 2019) (amending DEL. CODE ANN. tit. 8, § 262(d)–(e)); S. 180, 149th Gen. Assemb., Reg. Sess. §§ 9–10 (Del. 2018) (amending DEL. CODE ANN. tit. 8, § 262(b), (e)); H.R. 371, 148th Gen. Assemb., Reg. Sess. §§ 8–11 (Del. 2016) (amending DEL. CODE ANN. tit. 8, § 262(c), (d), (g), (h), in the last instance, to permit prepayment to minimize the accrual of interest, but not impacting the per-share valuation).

scholars favor. Part IV formally proposes deletion of the statutory exclusion. A brief conclusion follows.

I. APPRAISAL RIGHTS: ORIGIN AND PURPOSES

Appraisal rights entitle a shareholder to the judicially determined fair value of her shares if the corporation undergoes a fundamental change that she does not support.[16] Individual states create and regulate corporations,[17] and the states differ on the types of fundamental changes that entitle shareholders to appraisal rights. Some states grant appraisal rights to shareholders if the corporation engages in a merger or sells all of its assets, or if its shareholders amend the corporate charter.[18] The market recognizes Delaware as the leading provider of corporate law,[19] so this Article focuses on Delaware law, which limits appraisal rights to certain mergers.[20] Moreover, as will be discussed, this Article focuses on publicly traded corporations that are acquired by merger.[21]

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16 *See, e.g.*, DEL. CODE ANN. tit. 8, § 262 (2020). Any shareholder exercising appraisal rights must not have voted in favor of the merger nor consented in writing to approve the merger. *See id.* § 262(a). Moreover, any such shareholder must comply with specified procedural requirements. *See id.* § 262(e)–(f).

17 *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 91 (1987) ("It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares.").

18 *See* CAL. CORP. CODE § 1300 (West 2020) (entitling shareholders to appraisal rights for mergers and sale-of-asset transactions); MD. CODE ANN., CORPS. & ASS'NS § 3-202 (West 2020) (entitling shareholders to appraisal rights for mergers, sale-of-asset transactions, and charter amendments); MODEL BUS. CORP. ACT § 13.02 (1950) (AM. BAR ASS'N, amended 2016) (same).

19 Steven J. Cleveland, *Process Innovation in the Production of Corporate Law*, 41 U.C. DAVIS L. REV. 1829, 1832 & n.10 (2008) ("Roughly one-half of the publicly traded companies, including those companies listed on the NYSE, are incorporated in Delaware. . . . According to two recent studies, 90% of firms going public—specifically those that did not incorporate in the jurisdiction in which they would operate—incorporated in Delaware. . . . Delaware is also a leading innovator. . . . Delaware raises a significant portion of its annual budget through fees paid by corporations that are attracted to its corporate law system." (citations omitted)).

20 *See* DEL. CODE ANN. tit. 8, § 262 (2020).

21 If the target corporation is not publicly traded, then the courts commonly resort to a valuation model based upon discounted cash flows (DCF). *See* Andaloro v. PFPC Worldwide, Inc., No. CIV.A. 20336, 2005 WL 2045640, at *9 (Del. Ch. Aug. 19, 2005) ("The DCF method is frequently used in this court and, I, like many others, prefer to give it great, and sometimes even exclusive, weight when it may be used responsibly."); *see also In re* Appraisal of Jarden Corp., No. 12456, 2019 WL 3244085, at *36 (Del. Ch. July 19, 2019) ("[The parties] agree that DCF is a widely used and industry-accepted means of calculating the value of a corporation as a going concern."), *aff'd*, Fir Tree Value Master Fund, LP v. Jarden Corp., 236 A.3d 313 (Del. 2020) (en banc); *In re* Appraisal of Columbia Pipeline Grp., Inc., No. 12736, 2019 WL 3778370, at *50 (Del. Ch. Aug. 12, 2019) ("The DCF method is a technique that is generally accepted in the financial community."); *In re* Appraisal of PetSmart, Inc., No. 10782, 2017 WL 2303599, at *2 (Del. Ch.

One cannot discern a completely coherent purpose of Delaware's appraisal statute because it has been amended repeatedly over time to create numerous exceptions.[22] While, in isolation, an exception may be easily explained by a coherent rationale,[23] no single rationale accounts for all of the statute's nooks and crannies. Historically, mergers could not be approved over the objection of a single shareholder.[24] Perhaps, the unanimity requirement to approve a merger early in American history was sensible, when corporations were held by few shareholders. However, as corporations grew, as the shareholder base became large, and as connections between shareholders became more tenuous, the unanimity requirement lost any logical force that it may have once possessed. Consequently, by 1899, Delaware no longer required unanimous approval from shareholders to effect a merger.[25] When the legislature removed the veto authority previously enjoyed by every shareholder with respect to any merger, the legislature created new rights—appraisal rights—to compensate shareholders for their lost veto rights.[26] In 1899, appraisal rights permitted any shareholder, who previously would have vetoed the merger, to avoid becoming a shareholder of the acquiring corporation.[27]

May 26, 2017) (terming DCF analysis as "a tried and true valuation methodology," before ultimately rejecting it).

22 *See In re* Appraisal of AOL Inc., No. 11204, 2018 WL 1037450, at *1 (Del. Ch. Feb. 23, 2018) (describing the appraisal statute as the "[b]roth of many cooks and opaque of intent").

23 For example, liquidity at a judicially determined value may prove unnecessary if a public market already provides liquidity and a value. So, Delaware generally provides a "market-out" exception to the availability of appraisal rights with respect to publicly traded shares. *See* DEL. CODE ANN. tit. 8, § 262(b)(1) (2020).

24 *See In re* Solera Ins. Coverage Appeals, 240 A.3d 1121, 1133 (Del. 2020) (en banc); Edward F. Greene, *Corporate Freeze-Out Mergers: A Proposed Analysis*, 28 STAN. L. REV. 487, 508 (1976) (referencing the "common law approach of requiring unanimous consent for all major transactions" including mergers).

25 *See* DEL. CODE ANN. tit. 10, § 54 (1899), https://delawarelaw.widener.edu/files/resources/dgcl1899.pdf [https://perma.cc/XZ7R-N899] (requiring approval by the board of directors and two-thirds of outstanding shares, not all outstanding shares). Today, the threshold for shareholder approval is no longer a supermajority. *See id.* tit. 8, § 251(c) (2020) (requiring approval by a majority of outstanding shares entitled to vote).

26 *See In re Solera*, 240 A.3d at 1133.

27 *See* DEL. CODE ANN. tit. 10, § 56 (1899), https://delawarelaw.widener.edu/files/resources/dgcl1899.pdf [https://perma.cc/XZ7R-N899]. In 1899, upon the effective date of the merger, a shareholder of the acquired corporation became a shareholder of the acquiring corporation, but today, Delaware authorizes other forms of merger consideration, so, for example, a shareholder may be cashed-out and no longer hold shares of any corporation involved in the transaction. *Compare id.* § 54 (providing for "conver[sion of] the shares of . . . the old corporation[] into the new [corporation]"), *with id.* tit. 8, § 251(b)(5) (2020) (providing for conversion of shares into shares of the acquiring corporation, shares of another corporation, cash, property, rights, or other securities). The availability of appraisal rights may hinge on the nature of the consideration received by a shareholder. *See id.* § 262(b)(2).

Without appraisal rights, the dissenting shareholder could suffer a fundamental change to her investment to which she did not consent, regarding a transaction that she could no longer veto. An example may clarify the import of the veto right and, given its repeal, appraisal rights. Mr. Investor considers whether to acquire shares of Butter Co. or Gun Co. He loves butter and hates guns, so he invests in Butter Co. Subsequently, the boards of directors of those two corporations agree to merge, and, though Mr. Investor votes in opposition to the merger, the shareholders provide the statutorily required approval of the merger. The terms of the merger call for the shares of Butter Co. to be converted into shares of Gun Co. and for the assets of Butter Co., which previously were used to make tasty butter, to be deployed to make guns. Having lost veto authority, Mr. Investor would become a shareholder of Gun Co.—a fundamental change in his investment, and a change that he does not support. Appraisal rights protect an investor in several regards. First, as mentioned above, the legislature—having withdrawn the shareholder's veto rights over a merger—provided a means to avoid becoming an unwilling shareholder in another corporation.[28] Second, appraisal rights provide a liquidation right to the shareholder, even if the change in the nature of the investment is not as dramatic as butter-to-guns, but, instead, involves the merger of one butter company into another butter company.[29] Third, appraisal rights protect the minority from exploitation by the majority.[30] Fourth, and related to the other reasons, appraisal rights provide a shareholder with protective rights when a merger—approved by the board of directors and a majority of shares[31]—includes any terms opposed by that shareholder. This fourth reason looms large in modern appraisal cases, which are driven by shareholders who believe that the board and other shareholders approved the merger for a price that is too low.[32] So, an eligible

28 The example in the text is symbolic. Today, given statutory exceptions, and given a *direct* merger of Gun Co. and Butter Co., a shareholder of Butter Co. may not be entitled to appraisal rights. *See id.* tit. 8, § 262(b)(2). However, a *subsidiary* merger, which would not implicate that exception, is more likely than a *direct* merger. *See infra* note 47.

29 *See* DEL. CODE ANN. tit. 8, § 262(b) (2020) (entitling shareholders to appraisal rights in mergers, not just mergers that change the nature of the business).

30 *See* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 33 (Del. 2017) (en banc) (describing appraisal as an attempt to ensure that shareholders are "not exploited").

31 While the 1899 version of Delaware's corporate code required supermajority approval, the current Delaware corporate code requires approval by a majority of shares entitled to vote. *Compare* DEL. CODE ANN. tit. 8, § 251(c) (2020), *with id.* tit. 10, § 54 (1899), https://delawarelaw.widener.edu/files/resources/dgcl1899.pdf [https://perma.cc/XZ7R-N899].

32 *See* Cede & Co. v. Technicolor, Inc., 542 A.2d 1182, 1186 (Del. 1988) ("An appraisal proceeding is a limited legislative remedy intended to provide shareholders dissenting from a merger on grounds of inadequacy of the offering price with a judicial determination of the intrinsic worth (fair value) of their shareholdings."); Macey & Mitts, *supra* note 3, at 1023 ("The

shareholder who exercises appraisal rights is entitled to receive "fair value," but not any value "arising from the accomplishment or expectation of the merger."[33]

II. Disregarding the Statutory Mandate to Exclude from Fair Value Any "Element of Value Arising from the Accomplishment or Expectation of the Merger"

Delaware's corporate code provides that "[t]hrough [the appraisal] proceeding 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 . . . . In determining such fair value, the Court shall take into account all relevant factors."[34] The Delaware legislature sensibly excluded any value attributable to the merger from the amount payable to the dissenting shareholder, because the dissenting shareholder did not support the merger.[35] Of course, if the shareholder wanted to receive any value attributable to the merger, then she simply could have collected the merger consideration and not exercised appraisal rights.[36] Notwithstanding the legislative mandate to exclude from "fair value" any value attributable to the merger, the Delaware courts have, in many important respects, ignored that statutory exclusion. That is, the Delaware courts routinely conclude that the value of the consideration offered in the merger, which necessarily includes value attributable to the merger, constitutes "fair value" for purposes of

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purpose of appraisal proceedings is to protect minority shareholders against being forced to sell their shares at prices that are unfairly low."). The first two reasons appear inconsistent with modern portfolio theory, under which one should focus upon the characteristics of one's entire portfolio of investments, rather than the characteristic of any individual investment. *See* Harvey E. Bines, *Modern Portfolio Theory and Investment Management Law: Refinement of Legal Doctrine*, 76 COLUM. L. REV. 721, 738–41 (1976); Michael T. Johnson, *Speculating on the Efficacy of "Speculation": An Analysis of the Prudent Person's Slipperiest Term of Art in Light of Modern Portfolio Theory*, 48 STAN. L. REV. 419, 421 (1996). Nonetheless, some investors care about things beyond risk-adjusted return. *See* Paul Sullivan, *A Call for Investors to Put Their Money Toward a Green Future*, N.Y. TIMES (Jan. 24, 2020), https://www.nytimes.com/2020/01/24/business/green-investments-climate-change.html [https://perma.cc/8NBB-PDKY].

[33] DEL. CODE ANN. tit. 8, § 262(h) (2020).

[34] *Id.*; *see* Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1144 (Del. 1989) (stating that the target should be valued "as an operating entity . . . without regard to post-merger events or other possible business combinations").

[35] *See* DEL. CODE ANN. tit. 8, § 262(a) (2020); *Cede*, 684 A.2d at 298 ("The underlying assumption in an appraisal valuation is that the dissenting shareholders would be willing to maintain their investment position had the merger not occurred."). Though once sensible, this Article proposes legislative deletion of that statutory exclusion. *See infra* Part IV.

[36] *See generally* DEL. CODE ANN. tit. 8, § 262(e) (2020) (noting that a shareholder may "withdraw [the] demand for appraisal and . . . accept the terms offered upon the merger").

the appraisal statute,[37] rather than, for example, the per-share market price that preceded the announcement of the merger, which necessarily excluded any value attributable to the merger.[38] And, in several recent decisions, when the Delaware courts did not conclude that the value of the consideration offered in the merger constituted "fair value," the courts nonetheless used the value of the merger consideration, before deviating downward to ultimately determine "fair value."[39] Rather than giving force to the statutory exclusion, the Delaware courts have interpreted the statutory exclusion extremely narrowly and given excessive weight to the legislative instruction to "take into account all relevant factors,"[40] thereby eviscerating the statutory exclusion.

Section II.A provides background information regarding mergers involving publicly traded corporations, including the concept of control and the consequent disparity between the preannouncement market price and the merger price. Section II.B discusses the value of "control," which, arguably, should be excluded from an appraisal of "fair value" because it is value attributable to "the accomplishment or expectation of the merger."[41] Section II.C introduces factors that impact the acquirer's payment of a "control" premium and examines their effect on "fair value."

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37 *See In re* Appraisal of Stillwater Mining Co., No. 2017-0385, 2019 WL 3943851, at *1 (Del. Ch. Aug. 21, 2019), *aff'd*, Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co., 240 A.3d 3 (Del. 2020); *In re* Appraisal of Columbia Pipeline Grp., Inc., No. 12736, 2019 WL 3778370, at *1 (Del. Ch. Aug. 12, 2019); *In re* Appraisal of PetSmart, Inc., No. 10782, 2017 WL 2303599, at *2 (Del. Ch. May 26, 2017); Merion Cap. L.P. v. Lender Processing Servs., Inc., No. 9320, 2016 WL 7324170, at *1, *11 (Del. Ch. Dec. 16, 2016); Merlin Partners LP v. AutoInfo, Inc., No. 8509, 2015 WL 2069417, at *1, *18 (Del. Ch. Apr. 30, 2015); Huff Fund Inv. P'ship v. CKx, Inc., No. 6844, 2013 WL 5878807, at *1 (Del. Ch. Nov. 1, 2013); Choi & Talley, *supra* note 10, at 544 (noting that Delaware has grown "increasingly willing to defer to *the merger price itself* as evidence (if not *the decisive* piece of evidence) of fair value"); Talley, *supra* note 7, at 17 ("[A] strong deal price deference requirement is functionally equivalent to a judicial repeal of the appraisal statute, improperly bypassing the Delaware General Assembly.").

38 *See In re* Appraisal of Jarden Corp., No. 12456, 2019 WL 3244085, at *4 (Del. Ch. July 19, 2019) (determining that "fair value" equals "unaffected market price," not the "deal price"), *aff'd*, Fir Tree Value Master Fund, LP v. Jarden Corp., 236 A.3d 313 (Del. 2020) (en banc).

39 *See* Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 130 (Del. 2019) (en banc) (per curiam) (determining that "fair value" equals the value of the merger consideration minus synergies); *In re* Appraisal of Panera Bread Co., No. 2017-0593, 2020 WL 506684, at *1 (Del. Ch. Jan. 31, 2020) (same).

40 DEL. CODE ANN. tit. 8, § 262(h) (2020); *see* Weinberger v. UOP, Inc., 457 A.2d 701, 713 (Del. 1983) (en banc) ("Only the speculative elements of value that may arise from the 'accomplishment or expectation' of the merger are excluded. We take this to be a very narrow exception to the appraisal process, designed to eliminate use of *pro forma* data and projections of a speculative variety relating to the completion of a merger." (quoting DEL. CODE ANN. tit. 8, § 262(h) (2020))).

41 DEL. CODE ANN. tit. 8, § 262(h) (2020).

A. *Disparity Between the Preannouncement Market Price and the Merger Price*

In the appraisal context, the Delaware courts have rejected arguments based upon the positive impact of the announcement of the merger transaction on the corporation's stock price,[42] even though the Delaware courts acknowledge, and give great effect to, that impact in other contexts.[43] For those unfamiliar with mergers, a timeline of events may be helpful. When two corporations—acquirer and target—contemplate a merger, they zealously guard the confidentiality, not only of any information that might be exchanged, but of the existence of the negotiations.[44] The acquirer generally prefers to maintain the confidentiality of the negotiations to avoid attracting other bidders, which could generate a bidding war, and increase the acquirer's costs.[45] The target generally prefers to maintain the confidentiality of the negotiations, which commonly do not yield a successfully consummated transaction,[46] because failed negotiations might attract unwanted bidders; because failed negotiations might cause the target to appear to be damaged goods; and because failed negotiations might jeopardize the target's negotiating power against suppliers and customers, who might have doubts about the target's future. With the confidentiality of the negotiations secure, the market has no

42 *See* Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1144–45 (Del. 1989) (rejecting claim of minority discount).

43 *See* Smith v. Van Gorkom, 488 A.2d 858, 875–76 (Del. 1985) (en banc) (referencing that the market price reflects the price of a share, not the per-share price for all of the corporation's shares); Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del. 1994) (subjecting to enhanced scrutiny the directors' decision to approve a sale of control merger transaction, where shareholders rightly expect to receive a premium over the market price).

44 Martin Marietta Materials, Inc. v. Vulcan Materials Co., 68 A.3d 1208, 1212 (Del. 2012) (en banc) (discussing confidentiality agreement that "prohibited the disclosure of the merger negotiations"). Though negotiations may quickly yield an agreement, negotiations involving publicly traded companies routinely extend over the course of months and may continue even longer. *Compare Van Gorkom*, 488 A.2d at 866–69 (reporting that only one week passed from initial contact to a signed agreement), *with* Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1144–46 (Del. 1989) (reporting initial contact in late spring 1987 and agreement reached in March 1989).

45 Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 922–23 (Del. 2003) (en banc) (discussing bidder #1's concern that bidder #2 would enter the fray). The parties to merger negotiations commonly include exclusivity provisions in the confidentiality agreement. *See In re* Talley Indus., Inc. S'holders Litig., No. CIV-15961, 1998 WL 191939, at *3 (Del. Ch. Apr. 13, 1998) ("Talley agreed to Carpenter's request for . . . a limited form of exclusivity . . . . The confidentiality agreement provided that Talley would not initiate, solicit, or encourage other offers for Talley during this period.").

46 Basic Inc. v. Levinson, 485 U.S. 224, 233 (1988) (referencing the "substantial risk that preliminary merger discussions may collapse: because such discussions are inherently tentative").

information to which to respond, so the target's market price generally will not be impacted. One generally focuses on appraisal rights exercised by shareholders of the target, not of the acquirer.[47] When the acquirer and the target reach an agreement, the transaction will be announced to the public.[48] Though the parties may have executed an agreement to merge, time will pass before the parties may consummate the merger because the approvals of shareholders and the government must be obtained[49] and the parties must assemble and distribute information to secure the approvals of shareholders and the government.[50] Even though the merger may not be consummated—because, for example, the necessary approval from the government cannot be obtained[51]—the market promptly responds to the

47 One generally focuses on appraisal rights exercised by shareholders of the target, not of the acquirer, for several reasons. First, and perhaps most importantly, even though Delaware's appraisal statute generally bestows appraisal rights on the shareholders of each of the corporations that are merging, the acquirer typically is not a constituent party to the merger. *See* DEL. CODE ANN. tit. 8, § 262(b) (2020) ("Appraisal rights shall be available for the shares of any class or series of stock of a constituent corporation in a merger . . . ."). Rather than directly merging with the target, the acquirer commonly creates a wholly owned subsidiary (sub) and effects the merger between the sub and the target. *See* Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co., 240 A.3d 3, 5 (Del. 2020); *Van Gorkom*, 488 A.2d at 863. When the sub and the target merge, the acquirer would become a shareholder of the target, and would be shielded from the target's liabilities. *See* DEL. CODE ANN. tit. 8, § 102(b)(6) (2020). Whereas, in a direct merger of the acquirer and the target, the acquirer's assets would be available to the target's creditors. *See id.* § 259(a). So, because the acquirer is not actually a merging party, shareholders of the acquirer generally are not entitled to appraisal rights. Second, and assuming away the first reason, unless the merger requires the acquirer to issue more than twenty percent of its outstanding stock, the shareholders of the acquirer likely will not be entitled to appraisal rights. *See id.* § 262(b)(1); *see also id.* § 251(f) (providing an exception to a general statutory requirement: a corporation's shareholders must approve a merger if (1) the corporation's certificate of incorporation is not amended, (2) the corporation's shares are the same before and after the merger, and (3) no more than twenty percent of the corporation's shares will be issued in the merger). Third, if the acquirer's shares are publicly traded, then the acquirer's shareholders will not be entitled to appraisal rights. *See id.* § 262(b)(1).

48 *See* Item 1.01, S.E.C. Form 8-K, Current Report (OMB No. 3235-0060) (2021) https://www.sec.gov/files/form8-k.pdf [https://perma.cc/4BDS-UG8X] (requiring disclosure of entry into a material definitive agreement outside the ordinary course of business); *see also* 15 U.S.C. § 78m(a) (requiring disclosures by publicly traded corporations).

49 *See* Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a; DEL. CODE ANN. tit. 8, § 251(c) (2020); *see also* 16 C.F.R. §§ 801.1–803.90 (2021).

50 *See* 15 U.S.C. § 18a; DEL. CODE ANN. tit. 8, § 251(b), (c) (2020).

51 *See* Michael J. de la Merced & Rachel Abrams, *Office Depot and Staples Call Off Merger After Judge Blocks It*, N.Y. TIMES (May 10, 2016), https://www.nytimes.com/2016/05/11/business/dealbook/staples-office-depot-merger.html#:~:text=A%20federal%20judge%20on%20Tuesday,administration%20one%20more%20antitrust%20victory [https://perma.cc/6MCJ-ACGG] (reporting that a federal judge blocked a planned merger due to antitrust considerations raised by the FTC).

announcement that the parties have entered into a merger agreement.[52] Typically, the target's stock price immediately rockets upward and nears the value of the offered merger consideration when news of the parties' agreement becomes public.[53] Typically, immediately after the announcement, the stock price stops short of the value of the offered merger consideration, discounted by the likelihood that the transaction will not be consummated.[54] And, as time passes, and as the likelihood that the transaction will be consummated increases, the target's stock price moves closer and closer to the offered merger consideration, as reflected in the diagram below.[55]

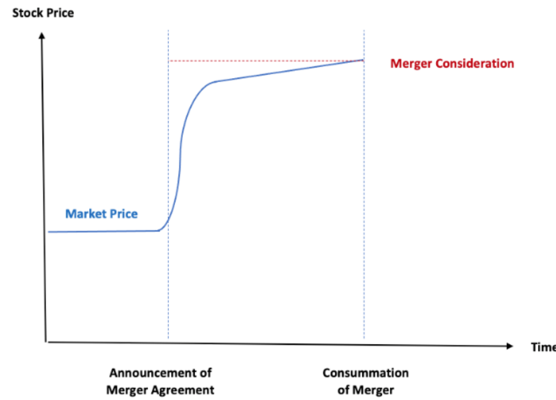
52 *See* Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988) ("[M]ost publicly available information is reflected in [the] market price . . . .").

53 *See* sources cited *infra* note 59. Not uncommonly, the target's stock price starts to move upward before news of the parties' merger agreement becomes public, due to insider trading. *See* United States v. O'Hagan, 521 U.S. 642, 648 (1997) (noting that insider acquired shares of target at the preannouncement price of less than $39 per share, and that, after the public announcement of acquirer's offer, target's per-share price rose to nearly $60 per share).

54 *See* Fischel, *supra* note 3, at 890 (referencing the expected scenario of a bump in the market price post-announcement "discounted by the probability of [non-]occurrence"). *See generally* Paramount Comm'cns, Inc. v. Time Inc., 571 A.2d 1140, 1147 (Del. 1989) (noting that, upon Paramount's offer to acquire Time for $175 per share, the market immediately pushed Time's stock price upward from $126, but only to $170, not $175).

55 Importantly, if the merger ultimately is not consummated, the target's stock price commonly falls to its preannouncement level. *See* Sam Glasscock III, *Ruminations on Appraisal*, 35 DEL. LAW. 8, 29 (2017) (noting that if the merger transaction fails then the "stock price likely revert[s] to the pre-announcement price, typically representing a substantial discount to the merger-inflated price"). Note that the author of the just-cited article is a Vice Chancellor of the Delaware Court of Chancery.

Diagram 1. Impact of Merger Announcement on Target's Stock Price[56]



Given that diagram, it may be too obvious to state that the dramatic increase in the stock's value upon the announcement of the planned merger is "value arising from the . . . expectation of the merger," and thus must be excluded from the "fair value" to be awarded to a dissenting shareholder.[57] As we will see, however, the Delaware courts have not excluded such value.[58]

For those unfamiliar with merger transactions, one might expect that the per-share value of the offered merger consideration would equal the per-share market price at the time that the parties entered the merger agreement. Instead, the value of the offered merger consideration typically greatly exceeds the then-current market price.[59]

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56 *See* Michael Bradley, Anand Desai & E. Han Kim, *Synergistic Gains from Corporate Acquisitions and Their Division Between the Stockholders of Target and Acquiring Firms*, 21 J. FIN. ECON. 3, 22 fig.2 (1988); *see also In re* Appraisal of Jarden Corp., No. 12456, 2019 WL 3244085, at *20 (Del. Ch. July 19, 2019) ("The delta between Jarden's stock price and the implied Merger Price . . . slowly narrowed following the announcement and ultimately converged in the days leading up to the closing."), *aff'd*, Fir Tree Value Master Fund, LP v. Jarden Corp., 236 A.3d 313 (Del. 2020) (en banc).

57 DEL. CODE ANN. tit. 8, § 262(h) (2020).

58 *See, e.g.*, DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 370 (Del. 2017) (en banc) ("[T]he relationship between market valuation and fundamental valuation has been strong historically."). In *DFC*, the Delaware Supreme Court credited one market valuation—the valuation that emerged from the negotiations between the acquirer and the target—and rejected a different market valuation—the preexisting stock price. *See id.* at 351 (suggesting that the parties' agreed-upon merger price was "fair value," not the preannouncement, unaffected stock price).

59 *See, e.g.*, Katie Thomas & Michael J. de la Merced, *Botox Maker Allergan Is Sold to AbbVie in $63 Billion Deal*, N.Y. TIMES (June 25, 2019), https://www.nytimes.com/2019/06/25/business/dealbook/abbvie-allergan-acquisition.html#:~:text=The%20drugmaker%20AbbVie%20said%

So, if one can acquire stock of the target at the market price, why would the acquirer offer consideration valued at more than the market price? The preannouncement market price represents the per-share price for a relatively small block of a corporation's outstanding shares of stock; in a merger, the acquirer, loosely speaking, acquires all of the target's outstanding shares of stock, and the preannouncement market price does not reflect the per-share price for all of a corporation's stock.[60] For example, an internet search will reveal that, on the New York Stock Exchange, shares of Exxon are trading at $*X*, and if you call your broker, then you will be able to acquire one hundred shares of Exxon around that price, keeping in mind that the price is constantly moving based upon other trades. However, your broker will inform you that you cannot buy all, or even most, of Exxon's shares for $*X* per share. Given an offer to acquire all or most of Exxon's outstanding shares, the supply of shares at $*X* will quickly dry up.[61]

Given their mission of appraising the value of the dissenter's stock, the Delaware courts are quick to give credence to certain economic concepts.[62] However, the Delaware courts just as quickly reject other

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20on,health%20care%20industry%20this%20year [https://perma.cc/7CQB-AA2V] (reporting that acquirer agreed to pay a forty-five percent premium over target's preannouncement stock price); Steve Lohr, *IBM to Buy Red Hat, the Top Linux Distributor, for $34 Billion*, N.Y. TIMES (Oct. 28, 2018), https://www.nytimes.com/2018/10/28/business/ibm-red-hat-cloud-computing.html [https://perma.cc/44PM-C3XN] (reporting that acquirer agreed to pay a sixty percent premium over target's preannouncement stock price); Michael J. de la Merced, *AT&T Agrees to Buy Time Warner for $85.4 Billion*, N.Y. TIMES (Oct. 22, 2016), https://www.nytimes.com/2016/10/23/business/dealbook/att-agrees-to-buy-time-warner-for-more-than-80-billion.html [https://perma.cc/VC9E-FV9N] (reporting that acquirer agreed to pay a roughly thirty-five percent premium over target's preannouncement stock price).

60 *See* Smith v. Van Gorkom, 488 A.2d 858, 876 (Del. 1985) (en banc) ("[A] publicly-traded stock price is solely a measure of the value of a minority position and, thus, market price represents only the value of a single share."); Cheff v. Mathes, 199 A.2d 548, 555 (Del. 1964) ("[A]s conceded by all parties, a substantial block of stock will normally sell at a higher price than that prevailing on the open market, the increment being attributable to a 'control premium.'").

61 With about 4.2 billion shares of Exxon outstanding, millions—not billions—of those shares trade every day. *See* Exxon Mobil Corp., Quarterly Report (Form 10-Q) (Aug. 5, 2020) (reporting 4,228,233,288 shares outstanding as of June 30, 2020); *XOM Historical Data*, NASDAQ, https://www.nasdaq.com/market-activity/stocks/xom/historical [https://perma.cc/TW22-4MYL] (reporting trading volume during September 2020—a high of about 47 million shares on September 18, 2020, and a low of almost 21 million shares on September 29, 2020).

62 *See* Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 135 (Del. 2019) (en banc) (per curiam) (favoring arm's length negotiated price as "a strong indicator of fair value, as a matter of economic reality and theory"); *DFC*, 172 A.3d at 367, 370, 373 (referencing "economic literature," "corporate finance theory," and "prevailing economic theories"); Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 5 (Del. 2017) (en banc) (reversing the Chancery Court when it did "not follow . . . relevant, accepted financial principles"); *In re* Appraisal of Jarden Corp., No. 12456, 2019 WL 3244085, at *1 (Del. Ch. July 19, 2019) (stating that the statutory all-relevant-factors mandate "leads the court deep into the weeds of economics

economic concepts.[63] Rejection of those economic concepts results in the Delaware courts failing to abide by the legislative mandate to exclude from fair value "any element of value arising from the accomplishment or expectation of the merger."[64]

B. *Control*

While the Delaware courts, in nonappraisal contexts, have acknowledged the concept of control and its economic value, those courts have not applied the concept of control coherently in the appraisal context regarding publicly traded targets.

As discussed above, the typical merger structure involves the target surviving a merger with a wholly owned subsidiary (sub) of the acquirer.[65] This structure denies appraisal rights to the shareholders of the acquirer,[66] the exercise of which could impede the consummation of the transaction.[67] Moreover, this structure permits the acquirer to shield its assets from the target's creditors.[68] Under this structure, the target's shares would be cancelled, the sub would cease to exist, and the

and corporate finance"), *aff'd*, Fir Tree Value Master Fund, LP v. Jarden Corp., 236 A.3d 313 (Del. 2020) (en banc).

[63] *See DFC*, 172 A.3d at 367 ("[T]he definition of fair value used in appraisal cases is a jurisprudential concept that has certain nuances that neither an economist nor market participant would usually consider when either valuing a minority block of shares or a public company as a whole."); Cede & Co. v. Technicolor, Inc., 684 A.2d 289, 296 (Del. 1996) ("The Court of Chancery's construction of 'fair value' followed logically from its concept of what was economically desirable and efficient. However . . . its holding . . . [is] inconsistent with this Court's interpretation of the appraisal statute . . . ."); *In re Jarden*, 2019 WL 3244085, at *1 ("[C]orporate finance is not law."); *In re* Appraisal of PetSmart, Inc., No. 10782, 2017 WL 2303599, at *27 (Del. Ch. May 26, 2017) ("The concept of fair value under Delaware law is not equivalent to the economic concept of fair market value."); Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd., 847 A.2d 340, 356 (Del. Ch. 2004) ("[T]he definition of fair value used in a § 262 proceeding is not based on fair market value and involves policy considerations . . . .").

[64] DEL. CODE ANN. tit. 8, § 262(h) (2020).

[65] *See supra* note 47.

[66] Given this structure, the acquirer would not be a "constituent" party to the merger, so its shareholders would not be entitled to appraisal rights. *See* DEL. CODE ANN. tit. 8, § 262(b) (2020).

[67] Appraisal rights amount to a cash drain on the acquirer. Consequently, the parties' agreement may include a condition to the consummation of the merger that only a relatively low, specified number of shares have exercised appraisal rights. *See* Victor Lewkow, *Negotiating Appraisal Conditions in Public M&A Transactions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 23, 2016), https://corpgov.law.harvard.edu/2016/11/23/negotiating-appraisal-conditions-in-public-ma-transactions [https://perma.cc/9B4R-8NGY]; *see also* DEL. CODE ANN. tit. 8, § 262(d)(1) (2020) (requiring that any shareholder must provide the corporation with a written demand for appraisal *before* the shareholders vote to approve the contemplated merger); *id.* § 251(d) (permitting termination of merger agreement).

[68] *See* DEL. CODE ANN. tit. 8, § 102(b)(6) (2020).

acquirer's shares of the sub would be converted into shares of the target,[69] leaving the target as a wholly owned subsidiary of the acquirer. So, before the transaction, the shareholders of the target, in the aggregate, controlled the target, but, after the merger is consummated, the acquirer, as the lone shareholder of the target, controls the target.[70] To acquire the privilege of exercising control over a corporation, one must pay a premium over the preexisting stock price, because the preexisting stock price reflects the value of noncontrolling shares.[71]

Of course, given that the shares of the target are cancelled under the typical transaction structure, the shareholders of the target would never approve the transaction unless they received valuable consideration.[72] The two most common forms of merger consideration are the common stock of the acquirer and cash.[73] If the common stock of the acquirer is publicly traded, and if the acquirer issues its common stock as merger consideration to the shareholders of the target, then those target shareholders would not be entitled to appraisal rights.[74] If the merger consideration is cash, then the shareholders of the target end up with no stock in any corporation.[75] With cash as merger consideration, shareholders of the target would be entitled to appraisal rights.[76] With cash as merger consideration, the shareholders of the target, in the aggregate, no longer control that corporation.[77] It is the

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69 *See id.* §§ 251(b)(5), 259(a).

70 *See* Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 42–43 (Del. 1993).

71 *See* Smith v. Van Gorkom, 488 A.2d 858, 876 (Del. 1985) (en banc); Cheff v. Mathes, 199 A.2d 548, 555 (Del. 1964).

72 *See* DEL. CODE ANN. tit. 8, § 251(c) (2020) (empowering shareholders to vote on mergers so, for example, directors do not force an undesirable transaction upon them); *see also* Ann M. Lipton, *Shareholder Divorce Court*, 44 J. CORP. L. 297, 332 (2018) (noting that appraisal rights enable shareholders to exit a corporation "without suffering the effects of value-reducing corporate action").

73 *See, e.g.*, Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1146–48 (Del. 1989) (initially contemplating the usage of the acquirer's common stock as consideration but revising the agreement so that the target's shareholders received a mix of common stock and cash). The Delaware code permits other forms of consideration. *See* DEL. CODE ANN. tit. 8, § 251(b)(5) (2020).

74 *See* DEL. CODE ANN. tit. 8, § 262(b)(2)(b) (2020).

75 The Delaware courts recognize a cash-out merger as the last opportunity for the shareholders of the target to collect a control premium—a premium above market price. *See* Upper Deck Co. v. Topps Co., Inc. (*In re* Topps Co. S'holders Litig.), 926 A.2d 58, 64 (Del. Ch. 2007) ("When directors propose to sell a company for cash or engage in a change of control transaction, they must take reasonable measures to ensure that the stockholders receive the highest value reasonably attainable." (citing Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 n.16 (Del. 1985))).

76 *See* DEL. CODE ANN. tit. 8, § 262(b) (2020).

77 *See id.* § 251(b)(5) (allowing for the cancellation of shares in the merger and the use of cash as merger consideration).

sale of control that yields the merger consideration that is valued in excess of the preannouncement market price;[78] if the acquirer could not exercise control, then the acquirer would not pay a premium in excess of the preannouncement market price.[79] Consequently, any value related to the sale of control is "value arising from the accomplishment or expectation of the merger," and, under the Delaware appraisal statute, should be excluded from the "fair value" to be awarded to a dissenting shareholder.[80]

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The Delaware courts, in appraisal settings, have rejected that control is a value "arising from the accomplishment or expectation of the merger,"[81] notwithstanding their recognition of the value of control shares in other settings; notwithstanding their recognition that, for publicly traded shares, the preannouncement stock price is a "reliable assessment of fair value";[82] and notwithstanding their recognition that

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78 *See* Kahn v. Tremont Corp., No. 12339, 1996 WL 145452, at *9 (Del. Ch. Mar. 21, 1996) ("[T]he market price of minority stock, even where the market is deep, may not fairly price the shares for purposes of a cash out merger or other 'forced' sale, since for that purpose the shares, even if not entitled to participate in the majority shareholders 'control premium,' must carry at a minimum the *pro rata* value of the entire firm as a going enterprise." (citing Mendel v. Carroll, 651 A.2d 297 (Del. Ch. 1994))), *rev'd on other grounds*, 694 A.2d 422 (Del. 1997).

79 *See* Smith v. Van Gorkom, 488 A.2d 858, 876 (Del. 1985) (en banc) (noting that "a publicly-traded stock price is solely a measure of the value of a minority position" and not the per-share price for a controlling block of stock).

80 DEL. CODE ANN. tit. 8, § 262(h) (2020); *see* DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 368 (Del. 2017) (en banc) ("[T]he [*Cavalier*] Court seemed to require the excision of any value . . . left with the seller as part of compensating it for yielding control of the company."); Carney & Heimendinger, *supra* note 3, at 849 ("[W]e show that where market exceptions to appraisal are present, shareholders will always receive as 'fair value' the market price with its claimed 'minority discount,' rather than receive a control premium. To pay more when appraisal is available . . . provides those shareholders with a windfall at the expense of the majority . . . .").

81 DEL. CODE ANN. tit. 8, § 262(h) (2020); *see DFC*, 172 A.3d at 367–68 (requiring that "any minority discount be ignored in coming to a fair value determination"); Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 134 (Del. 2019) (en banc) (per curiam) (rejecting argument, for appraisal purposes, that value attributable to control should be excluded).

82 Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 24 (Del. 2017) (en banc); *see also* EASTERBROOK & FISCHEL, *supra* note 3, at 139 ("[A]ppraisals require that shareholders receive the equivalent of what they give up but do not require sharing of the gain from the change in control."); Booth, *supra* note 3, at 128 ("[T]he addition of a control premium is inconsistent with settled corporation law . . . ."); Carney & Heimendinger, *supra* note 3, at 852 ("in at a discount, out at a discount"); Fischel, *supra* note 3, at 886 ("fair value" should mean "pretransaction market value"); Hamermesh & Wachter, *Rationalizing Appraisal Standards*, *supra* note 3, at 1023 (stating the Delaware courts' appraisal decisions have a "faulty premise"

"[w]hat [a dissenting shareholder] is deprived of is what he should be paid for."[83]

C. *Sources of Premia*

In acquiring the target, the acquirer may pay a premium above the target's preexisting stock price for different reasons, many of which stem from the acquirer's acquisition of control. Some of those reasons concern value that seemingly should be excluded from the appraised "fair value," given the statutory exclusion of "value arising from the accomplishment or expectation of the merger."[84] Other reasons concern value that seemingly should be included in appraised "fair value." Section II.C.1 addresses the acquirer's acquisition and usage of the target's confidential information. Sections II.C.2 and II.C.3 address mismanagement of the acquirer and of the target. Section II.C.4 addresses synergies between the acquirer and the target.

1. Target's Confidential Information

As mentioned above, in a negotiated transaction, the target routinely grants the acquirer access to material nonpublic information, as the acquirer must be convinced: (a) to pay a premium above the per-share trading price, and (b) that it is not buying damaged goods.[85] Material nonpublic information could be negative or favorable. The target may withhold negative information from the public for many reasons, including that the disclosure of any information—whether negative or favorable—is not costless.[86] Perhaps counterintuitively, the target may withhold favorable information from the public. The target

that "corporate control—a key component of acquisition premiums—inherently belongs to the enterprise itself and must be deemed part of going concern value and the 'fair value' of dissenting shares"); Macey & Mitts, *supra* note 3, at 1020 ("[G]enerally speaking, market prices of publicly traded companies that are informationally efficient will also be fundamentally efficient.").

[83] Chi. Corp. v. Munds, 172 A. 452, 455 (Del. Ch. 1934).

[84] DEL. CODE ANN. tit. 8, § 262(h) (2020).

[85] *See supra* notes 44–46 and accompanying text (addressing confidential exchange of material nonpublic information); Section II.B (addressing control premia).

[86] *See* Robert A. Prentice, *The Inevitability of a Strong SEC*, 91 CORNELL L. REV. 775, 824 n.304 (2006) ("[D]isclosure is expensive."); Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2186 (2010) ("Disclosure is expensive, and a firm's agents must make judgment calls about the volume of information to collect, verify, and release.").

may do so because disclosure of the information could benefit the target's competitors more than itself or its shareholders.[87]

Any such negative information regarding the target would be less likely to induce an acquirer to pay a premium above the market price. Nonetheless, access to such negative information comforts the acquirer that the target has nothing to hide. If the target's material nonpublic information is favorable (and overwhelms any such negative information),[88] then the acquirer may be more willing to pay a premium above the per-share trading price to acquire the target. The acquirer would possess information about which the market was unaware.

Because the acquirer's offer reflects any such favorable nonpublic information, one may contend that the acquirer's offer (or, at least, some component of its premium offer) represents the statutory "fair value" for purposes of appraisal, in a way that the market price that predated the offer did not.[89] Though sound in theory, the contention

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87 *See* SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 843–44 (2d Cir. 1968) (addressing the discovery of favorable minerals; the temporary withholding of the information from officers, directors, employees, and shareholders; the scattering of "barren core[s]" to mislead any snoopers who might compete for the acquisition of property rights; and the eventual acquisition of those valuable property rights before disclosing news of the discovery); *see also* Asher v. Baxter Int'l Inc., 377 F.3d 727, 733 (7th Cir. 2004) ("Suppose, for example, that Baxter had revealed its sterility failure in the BioSciences Division, the steps it had taken to restore production, and the costs and prospects of each. Rivals could have used that information to avoid costs and hazards that had befallen Baxter, or to find solutions more quickly . . . . Baxter's shareholders would have been worse off.").

88 Alternatively, negative nonpublic information is otherwise overwhelmed by synergies or other factors favoring the transaction. *See infra* Sections II.C.2–II.C.4.

89 This argument—regarding favorable material nonpublic information—could be extended beyond the time of the acquirer's offer, to include the time period between the announcement of the merger and the consummation of the merger, because the court is charged with determining "fair value" at the time of the consummation of the merger, which commonly trails the time of the offer by months or years. *See In re* Solera Ins. Coverage Appeals, 240 A.3d 1121, 1137 (Del. 2020) (en banc) (addressing the point in time at which "fair value" should be determined). *Compare* Floyd Norris, *Time Inc. and Warner to Merge, Creating Largest Media Company*, N.Y. TIMES, Mar. 5, 1989, at A1 (reporting agreement between Time and Warner in March 1989), *with* Reuters, *Time Finishes Warner Buyout*, N.Y. TIMES, Jan. 11, 1990, at D19 (reporting consummation of Time's acquisition of Warner in January 1990). However, in seeking shareholder approval, the target must disclose material information regarding that decision, so any such information may no longer be nonpublic. *See In re* Appraisal of Jarden Corp., No. 12456, 2019 WL 3244085, at *2 (Del. Ch. July 19, 2019) ("[T]here was no credible evidence that material information bearing on Jarden's fair value was withheld from the market as of the Merger."), *aff'd*, Fir Tree Value Master Fund, LP v. Jarden Corp., 236 A.3d 313, 321–22 (Del. 2020) (en banc). Nonetheless, this Article addresses only the presigning period, because the arguments regarding both time periods largely resemble one another. Moreover, the Delaware courts commonly do not reevaluate "fair value" based upon postsigning events. *See In re* Appraisal of Stillwater Mining Co., No. 2017-0385, 2019 WL 3943851, at *45 (Del. Ch. Aug. 21, 2019) ("Despite the customary existence of a temporal gap between signing and closing, Delaware appraisal decisions have typically not made adjustments to the deal price to reflect a valuation

falls flat in practice. First, given that acquirers routinely offer sizable premia, perhaps thirty to sixty percent over the market price,[90] what is the secret information that justifies such premia and that explains how the market could misprice the stock by such a degree?[91] Any such information should be easily identified and explained to the court in an appraisal proceeding.[92] If such information cannot be identified and explained to the court, then the shareholder seeking appraisal should not be entitled to any value supposedly attributable to such information.

Second, if the basis for the acquirer's above-market bid was material nonpublic information regarding the target, then the existence of the acquirer's bid, when made public, should communicate the favorability of nonpublic information, even if the details of that information remain confidential.[93] And, if the acquirer's bid fails, then the target's stock price should still reflect the existence of that favorable nonpublic information and remain elevated, to some extent, over the unaffected pre-offer stock price. However, empirical studies consistently find that, upon a failed acquisition, the target's stock price—elevated due to the acquirer's (now failed) offer—falls to the pre-

change during the post-signing period."), *aff'd*, Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co., 240 A.3d 3 (Del. 2020). *But see In re* Appraisal of Regal Ent. Grp., No. 2018-0266, 2021 WL 1916364, at *1 (May 13, 2021) (adjusting "fair value" upward due to passage of a federal statute that reduced the corporate tax rate and that occurred postsigning and premerger).

90 *See supra* note 59.

91 Of course, as the significance of the material nonpublic information decreases, then its contribution to any premium offer decreases, as does its contribution to "fair value." Moreover, the reliability of any such nonpublic information is at issue. *See In re* Appraisal of PetSmart, Inc., No. 10782, 2017 WL 2303599, at *2 (Del. Ch. May 26, 2017) (rejecting shareholders' asserted "fair value" because the "management projections upon which Petitioners rely . . . are, at best, fanciful"); *id.* at *10 (reporting that management's initial projections were "not aggressive enough," as potential buyers would discount those projections); *In re* Appraisal of AOL Inc., No. 11204, 2018 WL 1037450, at *14 (Del. Ch. Feb. 23, 2018) ("My purpose here is to determine the fair value of AOL, and not AOL's value as-advertised.").

92 Appraisal litigation is unusual in that each party bears the burden of proving its view of "fair value." *See In re Solera*, 240 A.3d at 1135–36.

93 *See* Bernard S. Black, *Bidder Overpayment in Takeovers*, 41 STAN. L. REV. 597, 607 (1989) ("If targets were commonly mispriced, the bidder's willingness to offer a premium ought to give investors some information about the target's true value."); *see also* George W. Dent, Jr., *Unprofitable Mergers: Toward a Market-Based Legal Response*, 80 NW. U. L. REV. 777, 799–800 (1986) ("[I]t is unlikely that the acquirer would have material nonpublic information. When the target company is public (as is usually the case; we already assume that the acquiring company is public), the market should already know of any possible synergy between the merger partners."). Given periodic disclosure obligations under federal law, it is difficult for publicly traded companies to withhold material information from the public forever. *See* JAMES D. COX, ROBERT W. HILLMAN, DONALD C. LANGEVOORT, ANN M. LIPTON & WILLIAM K. SJOSTROM, SECURITIES REGULATION: CASES AND MATERIALS 696 (9th ed. 2020).

offer stock price.[94] Those empirical studies undermine the contention that favorable nonpublic information justifies the acquirer's above-market offer.

2. Mismanagement of Acquirer

Mismanagement of the acquirer may result in the acquirer offering a per-share price higher than both the preexisting market price and the target's true "fair value." Such mismanagement may manifest itself by an overvaluation of the target or by self-interested empire building by the acquirer's managers. Neither manifestation of mismanagement of the acquirer provides a solid foundation for determining the target's "fair value."

a. Overvaluation of Target

Consider a bell curve of potential acquirers' valuations of a target. Some potential acquirers value the target, on a per-share basis, at less than the existing per-share stock price, but no shareholder would be willing to sell her shares of the target for less than the existing per-share stock price. Some potential acquirers value the target, on a per-share basis, around the existing per-share stock price, but, as discussed above, the shareholders of the target expect to receive a premium above the per-share stock price in any acquisition of the target, so offers around the existing per-share stock price will not command the necessary support from the shareholders of the target. So, the focus eventually falls on one end of the bell curve. One can imagine a bidding war for the target, with the winning bidder falling near the extreme end of the bell curve.[95] To oversimplify, two possibilities exist. First, it could be that the

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94 *See* Paul Asquith, *Merger Bids, Uncertainty, and Stockholder Returns*, 11 J. FIN. ECON. 51, 62 (1983); Michael C. Jensen & Richard S. Ruback, *The Market for Corporate Control: The Scientific Evidence*, 11 J. FIN. ECON. 5, 8–9 (1983); F.M. Scherer, *Corporate Takeovers: The Efficiency Arguments*, 2 J. ECON. PERSPS. 69, 73–74 (1988); *see also* Black, *supra* note 93, at 607 (noting studies and emphasizing their import); Gregg A. Jarrell, James A. Brickley & Jeffry M. Netter, *The Market for Corporate Control: The Empirical Evidence Since 1980*, 2 J. ECON. PERSPS. 49, 55 (1988) (addressing hostile acquisitions, not friendly negotiated mergers).

95 Nikhil P. Varaiya & Kenneth R. Ferris, *Overpaying in Corporate Takeovers: The Winner's Curse*, 43 FIN. ANALYSTS J. 64, 65 (1987) ("[A] corporate bidder will tend to win in a biased set of situations—namely, in those instances in which the corporate bidder has perceived the highest value in the target company."). In the appraisal setting, the Delaware courts accord great weight to the market's determination, but the preannouncement trading market involves many buyers and sellers, whereas the merger price is not the collective judgment of many bidders. *See* DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 369–70 (Del. 2017) (en banc) (referring to the "collective judgment of the many" regarding the trading price in the market). The merger price reflects only one bidder's valuation, and the target is under no obligation to say

winning bidder properly valued the target—given potential synergies unavailable to other bidders—which possibility is addressed below in Section II.C.4.[96] On the other hand, it could be that the winning bidder—falling at the extreme end of the bell curve—was an outlier that simply misjudged the value of the target. The latter possibility seems more likely, given the findings of empirical studies.[97] Commentators have termed this possibility the "Winner's Curse."[98] The acquirer may have "won" the bidding war, but, in so doing, the acquirer actually loses by overpaying for the target.[99]

Empirical studies seemingly confirm the validity of the Winner's Curse—the bidder's stock price falls at the time of the announcement of the transaction because the market recognizes that the bidder agreed to a price that is too high, or the bidder's performance following the acquisition trails the performance of its peers.[100] If the winning bidder

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"no" to an overly generous offer. *See* Korsmo & Myers, *Flawed Corporate Finance*, *supra* note 10, at 227; *infra* Part IV (discussing deal protection and its deterrent effect on subsequent bidders).

96 *See* JENS KENGELBACH, DENNIS UTZERATH, CHRISTOPH KASERER & SEBASTIAN SCHATT, BOS. CONSULTING GRP. & TECHNISCHE UNIVERSITÄT MÜNCHEN, DIVIDE AND CONQUER: HOW SUCCESSFUL M&A DEALS SPLIT THE SYNERGIES 3 (2013), https://image-src.bcg.com/Images/BCG_Divide_and_Conquer_Mar_2013_tcm9-62259.pdf [https://perma.cc/N5PF-FALN] ([A]cquirers . . . create value—provided the transaction is accurately priced and specific value-creation strategies are executed effectively."); *infra* Section II.C.4.

97 Mike Burkart, *Initial Shareholdings and Overbidding in Takeover Contests*, 50 J. FIN. 1491, 1492 (1995) (discussing the "observed tendency of winning bidders to overvalue the target"); Varaiya & Ferris, *supra* note 95, at 66 ("[B]idding firms, on average, are paying too high a price.").

98 *See, e.g.*, Richard H. Thaler, *Anomalies: The Winner's Curse*, 2 J. ECON. PERSPS. 191, 192 (1988).

99 *Id.* at 192 ("[T]he winner of the auction is likely to be a loser. The winner can be said to be 'cursed' in one of two ways: (1) the winning bid exceeds the value of the [asset], so the firm loses money; or (2) the value of the [asset] is less than the expert's estimate so the winning firm is disappointed.").

100 *See* Anup Agrawal, Jeffrey F. Jaffe & Gershon N. Mandelker, *The Post-Merger Performance of Acquiring Firms: A Re-Examination of an Anomaly*, 47 J. FIN. 1605, 1605 (1992) ("[S]tockholders of acquiring firms suffer a statistically significant loss of about 10% over the five-year post-merger period . . . ."); Gregor Andrade, Mark Mitchell & Erik Stafford, *New Evidence and Perspectives on Mergers*, 15 J. ECON. PERSPS. 103, 111 (2001) ("[A]cquiring firm shareholders appear to come dangerously close to actually subsidizing [gains enjoyed by target shareholders]."); Sanjai Bhagat, Ming Dong, David Hirshleifer & Robert Noah, *Do Tender Offers Create Value? New Methods and Evidence*, 76 J. FIN. ECON. 3, 25 (2005) (finding consistent negative returns for bidders); Black, *supra* note 93, at 622 ("[T]he available theories and evidence are consistent with a substantial amount of overpayment."); *id.* at 607 (noting that studies show that the market punishes a bidder's stock when it announces an acquisition, and that if the bidder correctly perceived value, then the bidder's stock should recover, but cited studies establish that the bidder's stock does not recover); Bradley, Desai & Kim, *supra* note 56, at 12–13 (1988) (describing that from January 1981 to December 1984, "acquiring firms actually suffered a significant abnormal loss"); Dent, *supra* note 93, at 778 ("Corporate acquisitions often send the market value of the acquiring company's stock plummeting. The losses can be dramatic."); *id.* at 798 ("Nor is there any evidence that declines in buyers' stock prices after announcements are

secured value, even when paying a price above the target's preexisting per-share stock price, then the bidder should increase in value, as reflected by an increase in its own stock price. If the winning bidder paid exactly the right price, even when paying a price above the target's preexisting per-share stock price, then the bidder should neither increase nor decrease in value, as reflected by no change in its own stock price. However, empirical studies consistently reflect that bidders' stock prices fall when transactions are announced.[101] Moreover, empirical

routinely followed by a rebound. Quite the contrary, following acquisitions acquiring companies may tend to underperform the market."); Michael Firth, *Takeovers, Shareholder Returns, and the Theory of the Firm*, 94 Q.J. ECON. 235, 254 (1980) ("[T]he gains to the acquired firm represent[] an 'overpayment,' and . . . the acquiring company's shareholders will suffer corresponding losses."); Tim Loughran & Anand M. Vijh, *Do Long-Term Shareholders Benefit from Corporate Acquisitions?*, 52 J. FIN. 1765, 1765 (1997) ("[F]irms that complete stock mergers earn significantly negative excess returns of -25.0 percent . . . ."); Gregg A. Jarrell, James A. Brickley & Jeffry M. Netter, *The Market for Corporate Control: The Empirical Evidence Since 1980*, 2 J. ECON. PERSPS. 49, 53 (1988) (reporting that acquiring firms commonly lose on the deal); Gregg A. Jarrell & Annette B. Poulsen, *The Returns to Acquiring Firms in Tender Offers: Evidence from Three Decades*, 18 FIN. MGMT. 12, 12–13 (1989) (addressing tender offers, not specifically mergers, and explaining that "[i]n the 1980s . . . abnormal returns to acquiring firms were negative on average"); Jensen & Ruback, *supra* note 94, at 20 ("Several studies show indications of systematic reductions in the stock prices of bidding firms in the year following the event."); Mark L. Mitchell & Kenneth Lehn, *Do Bad Bidders Become Good Targets?*, 98 J. POL. ECON. 372, 374–75 (1990) (finding that an acquirer's stock price routinely falls on the announcement of an acquisition); *id.* at 386 (offering bidder overpayment as a possible explanation for the negative abnormal stock price performance associated with acquisitions made by companies that become targets); Sara B. Moeller, Frederik P. Schlingemann & René M. Stulz, *Wealth Destruction on a Massive Scale? A Study of Acquiring-Firm Returns in the Recent Merger Wave*, 60 J. FIN. 757, 761 (2005) ("From 1980 through 1997, acquiring-firm shareholders lose $32 billion when acquisitions are announced, while acquiring-firm shareholders lose almost eight times more from 1998 through 2001."); *id.* at 757 (finding that "[a]cquiring-firm shareholders lost 12 cents around acquisition announcements per dollar spent on acquisitions for a total loss of $240 billion from 1998 through 2001," but emphasizing that if a small number of massive losses were ignored, then acquirers would have gained collectively); Randall Morck, Andrei Shleifer & Robert W. Vishny, *Do Managerial Objectives Drive Bad Acquisitions?*, 45 J. FIN. 31, 31 (1990) ("[R]esults suggest that managerial objectives may drive acquisitions that reduce bidding firms' values."); Scherer, *supra* note 95, at 71 (collecting studies that reflect "[l]ong-[t]erm [l]osses for [a]cquiring [f]irms"); Varaiya & Ferris, *supra* note 93, at 64 ("An examination of 96 acquisitions completed between 1974 and 1983 reveals that the winning bid premium did, on average, overstate the market's estimate of the expected takeover gain. Furthermore, the cumulative average excess return to the winning bidder, measured over the period from 20 days before to 100 days after the acquisition announcement, was significantly negative."). *But see* Julian Franks, Robert Harris & Sheridan Titman, *The Postmerger Share-Price Performance of Acquiring Firms*, 29 J. FIN. ECON. 81, 85 (1991) ("[O]ur focus is on postmerger performance . . . . Acquirers appear to have no gains around the announcement date, but there is no evidence of significant losses . . . . [A]ll-equity bids show significant bidder losses, likely reflecting downward revaluation of the bidders' assets-in-place.").

101 *See* Macey & Mitts, *supra* note 3, at 1054, 1056 ("Surprisingly, when adjudicating appraisal actions, the Delaware courts have given zero weight to the magnitude, or even direction, of the

studies further indicate that, postacquisition, acquirers underperform their peers.[102]

Notwithstanding the consistency of those empirical studies, the Delaware courts have expressly rejected the Winner's Curse when determining "fair value" in appraisal proceedings.[103] "Fair value" should not be based upon the merger consideration offered by a winning bidder, especially when the winning bidder's stock price falls on the announcement of the merger, as is typically the case, or as reflected by its own postacquisition underperformance and when the appraisal statute expressly excludes value attributable to the merger.[104]

b. Empire Building

For many people, and in many instances, bigger is better. Why run a smaller corporation, when you can acquire another corporation and then run the resulting bigger corporation? Commentators term this "empire building."[105] Salaries, perquisites, and prestige tend to be greater for larger corporations relative to smaller corporations.[106] In those regards, any acquisition would be self-interested, in the sense that it furthered the interests of the acquirer's managers,[107] not necessarily

change in the acquirer's stock price upon announcement of the M&A transaction."); *supra* sources cited note 100.

102 *See* sources cited *supra* note 100.

103 *See* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 32–33 (Del. 2016) (en banc).

104 *See* Dent, *supra* note 93, at 784 (recommending that courts "recognize[] that unprofitable acquisitions are common, perhaps even the norm rather than the exception").

105 Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 835 (2005); John C. Coffee, Jr., *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145, 1156–57 (1984); Murray Weidenbaum & Stephen Vogt, *Takeovers and Stockholders: Winners and Losers*, 29 CAL. MGMT. REV. 157, 163–64 (1987).

106 *See* Weidenbaum & Vogt, *supra* note 105, at 165 ("[M]anagerial compensation is directly proportional to firm size."); INTERNAL REV. SERV., PUB. 535, BUSINESS EXPENSES 1, 8 (2021), https://www.irs.gov/pub/irs-pdf/p535.pdf [https://perma.cc/MK7M-CH7L] ("To determine if pay is reasonable, also consider . . . [t]he volume of business handled [and] [t]he character and amount of responsibility."); *see, e.g.*, BRYAN BURROUGH & JOHN HELYAR, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO 94 (1990) ("Johnson ordered a new hangar built to house RJR Nabisco's growing fleet of corporate aircraft . . . . When it was finished, RJR Nabisco had the Taj Mahal of corporate hangars, dwarfing that of Coca-Cola's next door.").

107 Dent, *supra* note 93, at 781–82 ("[U]nprofitable acquisitions can enhance the compensation, perquisites, and promotion opportunities of the acquiring company's management . . . ."); Richard Roll, *The Hubris Hypothesis of Corporate Takeovers*, 59 J. BUS. 197, 199 (1986) ("[E]conomists disregard the evidence on individual decision making because it usually has little predictive content for market behavior . . . . I believe . . . takeovers reflect individual decisions.").

the interests of the acquirer's shareholders,[108] but it would not be self-interested in the sense that those managers were on both sides of the transaction, and thus would not be subject to heightened judicial scrutiny.[109] Moreover, if the acquirer is publicly traded, then the acquirer's managers would be spending "other people's money"[110] in furthering their own interests. Self-interested behavior by the acquirer's managers—perhaps even hubristic overconfidence[111]—and the consequent merger price form poor bases for the "fair value" of the dissenting shares.

3. Mismanagement of Target

Just as individuals could mismanage the acquirer, individuals could mismanage the target.[112] Just as the acquirer's managers might engage in self-interested conduct in pursuing the acquisition, so too might the target's managers engage in self-interested conduct in pursuing the acquisition.[113] Just as the acquirer's managers might have

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108 Morck, Shleifer & Vishny, *supra* note 100, at 31 ("In a sample of 326 US acquisitions between 1975 and 1987, three types of acquisitions have systematically lower and predominantly negative announcement period returns to bidding firms . . . . These results suggest that managerial objectives may drive acquisitions that reduce bidding firms' values.").

109 *See In re* Invs. Bancorp, Inc. S'holder Litig., 177 A.3d 1208, 1217 (Del. 2017) (en banc).

110 LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (1914); *see* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933) (discussing the separation of ownership and control).

111 Jarrell & Poulsen, *supra* note 100, at 14 ("Evidence of relatively small or negative returns to acquiring firms in tender offers and mergers can be evidence that many takeovers are poor investments . . . [perhaps due to] 'hubris,' and . . . 'overbearing' confidence . . . ."); Roll, *supra* note 107, at 197 ("Hubris on the part of individual decision makers in bidding firms can explain why bids are made even when a valuation above the current market price represents a positive valuation error. Bidding firms infected by hubris simply pay too much for their targets.").

112 *See* Dent, *supra* note 93, at 783 n.34 (listing improved management as motivating some acquisitions).

113 *See* Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co., 240 A.3d 3, 13 (Del. 2020) (agreeing with the Chancery Court that the target's chief executive officer "appear[ed] to have been motivated by his desire to maximize his personal wealth and retire," but concluding that those personal interests did not conflict with the shareholders' interests); Julie Wulf, *Do CEOs in Mergers Trade Power for Premium? Evidence from "Mergers of Equals*,*"* 20 J.L. ECON. & ORG. 60, 60 (2004) (concluding that, in merger-of-equals transactions, target CEOs "trade power for premium by negotiating shared control in the merged firm in exchange for lower shareholder premiums"). In a merger-of-equals transaction, the parties are viewed as "equals," such that neither party is viewed as the acquirer and neither party is viewed as the target. *See* Daniel E. Wolf, *Are All MOEs Created Equal?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 25, 2013), https://corpgov.law.harvard.edu/2013/03/25/are-all-moes-created-equal [https://perma.cc/23KT-RVUY] ("[In a merger-of-equals transaction,] there is some meaningful sharing or participation by both parties in 'social' aspects of the surviving company."). Without an acquirer or a target, neither party is willing to pay, and neither party expects to receive, much of a

implemented an ill-conceived plan—the acquisition—that does not maximize the value of the acquirer's assets, the target's managers may be pursuing an ill-conceived plan that does not maximize the value of the target's assets, prompting its acquisition. For example, in *Cede & Co. v. Technicolor, Inc.*, the target's incumbent management focused on developing photos in one hour, and the acquirer intended to sell the target's one-hour-photo business and enhance other products and services.[114] An acquisition could displace the target's managers who were pursuing an ill-conceived plan—as well as halt that ill-conceived plan—so that the target, under new management, maximizes the value of the target's assets and, in so doing, maximizes the target's value.[115] One might contend that the appraised "fair value" of the target's shares should be based upon the acquirer's plan, which puts the target's assets to their highest and best use. Of course, in most instances,[116] the value attributable to the acquirer's plan would constitute "value arising from the accomplishment or expectation of the merger."[117] Consequently, the Delaware courts have determined the appraised "fair value" must be determined just prior to the consummation of the merger,[118] which would mean the lower-valued plan of the target's incumbent managers,

premium. So, merger-of-equals transactions are characterized by low premia, even though, in reality, one party is the acquirer and the other party is the target. *See* Andrew Ross Sorkin, *When Unequals Try to Merge as Equals*, N.Y. TIMES (Feb. 25, 2007), https://www.nytimes.com/2007/02/25/business/yourmoney/25deal.html [https://perma.cc/N2E7-C7BD] ("In most mergers of equals these days, the buyer—and there is always a buyer—pays little or no premium."). In those circumstances, the merger consideration could be considered too low, and, perhaps, should not represent "fair value."

114 *See* Cede & Co. v. Technicolor, Inc., 684 A.2d 289, 293–94 (Del. 1996).

115 Scherer, *supra* note 94, at 69–70 ("[A] well-functioning market for corporate control comes to the rescue. Outside interests, seeing that profits would be higher if different strategic choices were made, bid on the stock market for a controlling stake in the firm, take the company over, enforce new profit-maximizing policies, and live happily (efficiently) ever after."); *see* Jensen & Ruback, *supra* note 94, at 24 (listing the "eliminat[ion of] inefficient target management" as a source of potential gain).

116 In some instances, like a so-called two-step acquisition, the acquirer first acquires control of the target via a stock acquisition, and, after obtaining control of a majority of the target's stock, the acquirer then effectuates a merger with the target. In those instances, just before the effectiveness of the merger, the target would have been pursuing the acquirer's plan for the target—not the target's preexisting plan. *See Cede*, 684 A.2d at 298–99. Thus, an appraised "fair value" would be based upon the acquirer's presumably higher-valued plan. *See id.*; Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785, 786–89 (2003) ("[T]he presence of a controlling shareholder benefits the non-controlling shareholders [by] . . . reduc[ing] . . . managerial agency costs . . . .").

117 DEL. CODE ANN. tit. 8, § 262(h) (2020).

118 *See Cede*, 684 A.2d at 298 (holding that target should be valued as a "going concern" on the date of the merger, as if the merger had not occurred).

rather than the higher-valued plan of the acquirer that can be implemented only postacquisition, in most instances.[119]

Commentators include losses attributable to mismanagement within the generic term "agency costs."[120] A reduction in agency costs is more likely if the corporation is controlled by a single shareholder or a small, affiliated group of shareholders, rather than a large, diffuse group of shareholders. A single shareholder or a small, affiliated group of shareholders is better able to monitor managers, which lessens the occurrence and likelihood of mismanagement.[121] In *Aruba*, the Delaware Supreme Court reversed the chancery court, when the chancery court contemplated subtracting value attributable to reduced agency costs from the merger price, because, according to the lower court, that value would have arisen from the "accomplishment . . . of the merger."[122] The Delaware Supreme Court explained its rejection of the chancery court's position as follows: "[T]he merger at issue in this case would not replace Aruba's public stockholders with a concentrated group of owners; rather, it would swap out one set of public stockholders for another: HP's."[123] The Delaware Supreme Court's explanation is problematic. First, although a reduction in agency costs may be more likely if the acquirer is controlled by one or a few shareholders, a well-managed, publicly traded acquiring corporation is perfectly capable of reducing agency costs in a poorly managed, publicly traded target corporation. Commentators routinely argue that any appraised "fair value" should exclude value attributable to a reduction in agency costs.[124] Second, in one sense, the Delaware Supreme Court

119 *See supra* note 116.

120 *See, e.g.*, EASTERBROOK & FISCHEL, *supra* note 3, at 10 (referencing monitoring costs, bonding costs, and residual loss, which would include loss attributable to mismanagement).

121 *See id.* (discussing monitoring costs).

122 Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., No. 11448, 2018 WL 922139, at *3 (Del. Ch. Feb. 15, 2018) (quoting DEL. CODE ANN. tit. 8, § 262(h) (2020)) ("A buyer's willingness to pay a premium over the market price of a widely held firm reflects not only the value of anticipated synergies but also the value created by reducing agency costs. The petitioners are not entitled to share in either element of value, because both 'aris[e] from the accomplishment or expectation of the merger.' The synergy deduction compensates for the one element of value arising from the merger, but a further downward adjustment would be necessary to address the other." (alteration in original)), *rev'd*, 210 A.3d 128 (Del. 2019) (en banc) (per curiam).

123 *Aruba*, 210 A.3d at 134.

124 *See* Hamermesh & Wachter, *Rationalizing Appraisal Standards*, *supra* note 3, at 1050 ("[T]he aggregation of shares, which eliminates agency costs in the process, is a value-creating transaction."); Hamermesh & Wachter, *Cornfields*, *supra* note 3, at 154 ("'[F]air value' should be determined on the basis of future free cash flows associated with the going concern, including the agency costs inherent in the enterprise prior to the merger."); *id.* at 148 (excluding from "fair value" "gains . . . resulting from . . . the acquirer's plans to operate the post-merger enterprise more efficiently").

acknowledged the importance of control in reducing agency costs, which control could be wielded more effectively by one or a few shareholders compared to a large, diffuse group of shareholders. However, in another sense, the *Aruba* court failed to appreciate the importance of control. In *Aruba*, the merger agreement called for the shareholders of the target to receive cash as consideration,[125] which presented the last opportunity for those shareholders to collect a control premium.[126] Whether HP, the publicly traded acquirer, could effectively reduce agency costs in Aruba, the publicly traded target, is irrelevant, because the shareholders of the target would insist on compensation for what they were selling—the opportunity to control Aruba and reduce agency costs. In settings outside of appraisal, the Delaware Supreme Court has acknowledged the value of control,[127] and it has recognized that one selling control will reasonably insist on compensation for ceding that control,[128] whether or not the buyer can exercise that control. For example, in *Cheff v. Mathes*, the corporation repurchased shares from a shareholder who owned a significant block of stock.[129] The corporation could not vote its own shares, so the corporation was not buying control of itself.[130] Nonetheless, the Delaware Supreme Court recognized that the selling shareholder was sacrificing its ability to collect a control premium in the future, and in so doing, the selling shareholder required the payment of a control premium.[131]

Nonetheless, in the appraisal context, the Delaware Supreme Court has rejected the control-based argument. In *Cavalier*, two controlling shareholders effected a merger, displacing the plaintiff, who exercised appraisal rights.[132] The controlling shareholders argued that, in appraising the "fair value" of the plaintiff's shares, the value of those shares should be reduced to reflect their lack of control, a so-called "minority discount."[133] In rejecting that argument, the Delaware Supreme Court concluded that, in appraising "fair value,"

125 *Aruba*, 2018 WL 922139, at *1.

126 *See* Upper Deck Co. v. Topps Co., Inc. (*In re* Topps Co. S'holders Litig.), 926 A.2d 58, 64 (Del. Ch. 2007).

127 Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 42 (Del. 1993).

128 *Id.* at 43.

129 Cheff v. Mathes, 199 A.2d 548, 549–50 (Del. 1964).

130 *See* DEL. CODE ANN. tit. 8, § 160 (2020).

131 *Cheff*, 199 A.2d at 555 ("[I]t is elementary that a holder of a substantial number of shares would expect to receive the control premium as part of his selling price, and if the corporation desired to obtain the stock, it is unreasonable to expect that the corporation could avoid paying what any other purchaser would be required to pay for the stock.").

132 Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1139–40 (Del. 1989).

133 *Id.* at 1144.

> the company must be first valued as an operating entity by application of traditional value factors . . . . The dissenting shareholder's proportionate interest is determined only after the company as an entity has been valued. In that determination the Court of Chancery is not required to apply further weighting factors at the shareholder level, such as discounts to minority shares . . . .[134]

The statute requires the valuation of "the shares,"[135] which the court's analysis accomplishes indirectly—by first determining the "fair value" of the corporation, and then awarding their pro rata share to the dissenting shareholders—rather than a direct valuation of the dissenting shares. A direct valuation of "the shares"[136] would seemingly require a minority discount because the merger, which gives rise to appraisal rights, must be approved by a majority of shares, leaving only minority shares eligible for appraisal. Moreover, control flows from the right to vote, and the right to vote attaches to shares,[137] not the corporation itself. So, courts should not include the value of control when appraising the "fair value" of minority shares. Nonetheless, a long string of cases, many of which cite *Cavalier*, have refused to accord a minority discount to appraised shares.[138] In so doing, the Delaware courts have recognized their rejection of economic principles.[139] Given that the Delaware courts routinely embrace economic principles when

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134 *Id.*; *see also id.* at 1145 ("[T]o fail to accord to a minority shareholder the full proportionate value of his shares imposes a penalty for lack of control . . . ."). Relatedly, the Delaware code treats all shares equally, unless the corporate charter provides otherwise. *See* DEL. CODE ANN. tit. 8, §§ 102(a)(4), 151 (2020).

135 DEL. CODE ANN. tit. 8, § 262(h) (2020).

136 *Id.*

137 *Id.* § 212(a).

138 *See, e.g.*, Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 20–21 (Del. 2017) (en banc) (refusing to apply a minority discount if there is a controlling shareholder); DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 367–68 (Del. 2017) (en banc) (eschewing economic considerations and refusing to apply a minority discount); *In re* Appraisal of Columbia Pipeline Grp., Inc., No. 12736, 2019 WL 3778370, at *47 (Del. Ch. Aug. 12, 2019) (rejecting minority discount in favor of merger price minus synergies); *In re* Appraisal of Jarden Corp., No. 12456, 2019 WL 3244085, at *2, *31 (Del. Ch. July 19, 2019) (concluding that preannouncement stock price constituted "fair value" rendering it unnecessary to discount for minority position, which discount was already embedded in the preannouncement stock price), *aff'd*, Fir Tree Value Master Fund, LP v. Jarden Corp., 236 A.3d 313, 326 n.62 (Del. 2020) (en banc); *In re* Appraisal of Solera Holdings, Inc., No. 12080, 2018 WL 3625644, at *33–34 (Del. Ch. July 30, 2018) (rejecting argument for minority discount and noting cases that added a control premium to arrive at "fair value" when determining value based upon comparable companies, which companies' stock prices did not reflect a control premium); *In re* Appraisal of AOL Inc., No. 11204, 2018 WL 1037450, at *8 (Del. Ch. Feb. 23, 2018) (disregarding claim of minority discount).

139 *See, e.g.*, *DFC*, 172 A.3d at 367–68 (eschewing economic considerations and refusing to apply a minority discount).

appraising "fair value," their rejection of a minority discount—as reflected by the preannouncement stock price[140]—has invited criticism.[141] Nonetheless, for reasons unrelated to the statutory exclusion, the Delaware courts' conclusion in this regard may be correct.[142]

4. Synergies

If an acquirer is willing to buy the target, especially at a premium over the preexisting per-share stock price, then the acquirer must expect to achieve a return above the cost of that investment. Synergies—reasons that the whole is worth more than the sum of the parts—may motivate the acquisition.[143] Merger partners that seek approval from shareholders routinely cite synergies as justifying their combination.[144] Certain synergies may enable the combined company to operate at a lower cost than the sum of the costs of each of the acquirer and the target operating as stand-alone entities.[145] These cost synergies might

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140 *See generally* Cede & Co. v. Technicolor, Inc., 684 A.2d 289, 298 (Del. 1996) ("The underlying assumption in an appraisal valuation is that the dissenting shareholders would be willing to maintain their investment position had the merger not occurred."); *Jarden*, 2019 WL 3244085, at *31 ("Jarden's agency costs were embedded in its operative reality and reflected in its Unaffected Market Price.").

141 *See, e.g.*, *In re* Appraisal of Stillwater Mining Co., No. 2017-0385, 2019 WL 3943851, at *51 & n.22 (Del. Ch. Aug. 21, 2019) ("Reliance on the trading price of a widely held stock is generally accepted in the financial community, and the trading price or metrics derived from it are regularly used to estimate the value of a publicly held firm based on its operative reality in that configuration. For purposes of determining fair value in an appraisal proceeding, therefore, the trading price has a lot going for it."), *aff'd*, Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co., 240 A.3d 3 (Del. 2020).

142 *See* Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1145 (Del. 1989) ("[T]o fail to accord to a minority shareholder the full proportionate value of his shares . . . unfairly enriches the majority shareholders who may reap a windfall[,] . . . a clearly undesirable result."); *infra* Part IV.

143 *See* Randall Rothenberg, *Time Warner's Merger Payoff*, N.Y. TIMES, Dec. 31, 1990, at A29 (commenting on the one-plus-one-equals-three concept of synergy and explaining that "[a] year after the merger of Time Inc. and Warner Communications . . . Time Warner Inc. is finding that the combination adds up to a lot less than three, but something more than two").

144 *See, e.g.*, Occidental Petrol. Corp., Registration Statement (Form S-4), at 53–54 (June 7, 2019) ("Occidental believes that its acquisition of Anadarko will . . . generate significant cost and capital synergies . . . ."); *id.* at 54 ("[F]ollowing the merger, Anadarko stockholders will also have the opportunity as stockholders of Occidental to participate in the upside of the combined company, including . . . anticipated synergies . . . .").

145 *See, e.g.*, Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1144 (Del. 1989) (discussing the vertical integration of Time's movie channels and Warner's movie studies, which would enable Time to provide lower-cost content); Ricard Gil, *Does Vertical Integration Decrease Prices? Evidence from the Paramount Antitrust Case of 1948*, 7 AM. ECON J. 162, 166 (2015) ("[V]ertical integration may decrease prices . . . ."); KENGELBACH, UTZERATH, KASERER & SCHATT, *supra* note 96, at 3 ("Most acquirers seek to create value by capturing cost synergies.").

include the closing of a redundant plant or product line,[146] the termination of executives,[147] the shift of work to whichever company provides labor at lower cost,[148] and tax savings.[149] Moreover, the combined companies may experience lower costs due to economies of scale, such as greater leverage when negotiating with third parties or greater risk-bearing regarding, for example, research and development. Other synergies may enable the combined company to generate revenue greater than the sum of the revenues of each of the acquirer and the target operating as stand-alone entities. Such revenue synergies might include the bundling of complementary products,[150] entry into new markets,[151] and the exercise of quasi-antitrust power.[152]

The merger facilitates any such cost or revenue synergies. Any appraised value attributable to synergies should be excluded as "value

146 KENGELBACH, UTZERATH, KASERER & SCHATT, *supra* note 96, at 3 ("Potential synergies may include closing redundant plants or production lines, realizing economies of scale in purchasing, centralizing administrative functions, reducing headcount, or pushing forward other forms of streamlining.").

147 *See id.*; Verition Partners Master Fund, Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 134 (Del. 2019) (en banc) (per curiam). Termination of the target's executive team is common. First, if the acquirer believed that the target was being mismanaged, then the acquirer would be unlikely to retain those underperforming executives following the acquisition. Second, the combined company does not require two chief executive officers, two chief operating officers, two chief financial officers, etc. The threat of termination of the target's executive team may lead those individuals to oppose an acquisition that could be in the interests of the target and its shareholders; golden parachutes are thought to lessen the risk of their opposition. *See* Richard P. Bress, Note, *Golden Parachutes: Untangling the Ripcords*, 39 STAN. L. REV. 955, 955 (1987).

148 The termination of executives and the shift to lower-cost labor amount to transfers of wealth from employees to shareholders. *See* KENGELBACH, UTZERATH, KASERER & SCHATT, *supra* note 96, at 3 (noting that potential synergies include "reduc[ed] headcount"); Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1361 (2020) (discussing studies that indicate that mergers negatively impact wages); *supra* note 147 (discussing termination of executives).

149 A reduction in taxes amounts to a transfer of wealth from the government to shareholders. *See* Carl Hulse, *Pfizer's Merger Proposal with Irish Company Rekindles Fight over Tax "Inversions*,*"* N.Y. TIMES: FIRST DRAFT (Nov. 24, 2015, 6:15 AM), https://www.nytimes.com/politics/first-draft/2015/11/24/pfizers-merger-proposal-with-irish-company-rekindles-fight-over-tax-inversions (last visited Jan. 14, 2022) (reporting criticism of the "tax-driven merger" when Pfizer benefitted from U.S.-funded research, U.S. tax incentives, and U.S. patent protection).

150 *See Aruba*, 210 A.3d at 134 ("Synergies . . . involve the benefits when, for example, two symbiotic product lines can be sold together.").

151 *See, e.g.*, Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1144–45 (Del. 1989) (discussing how Time's acquisition of Warner would permit expansion of Time's market via Warner's international distribution system).

152 Any exercise of antitrust power amounts to a transfer of wealth from consumers to shareholders. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 369 (8th ed. 2011) (noting that anticompetitive behavior benefits firms at the expense of consumers).

arising from the accomplishment . . . of the merger."[153] And, Delaware courts have, relatively recently, begun to exclude *some* value traceable to synergies from their appraisals of "fair value."[154] The Delaware courts acknowledge that the merger typically will generate some synergy value,[155] that each of the acquirer and the target will command a portion of that value in agreeing to the merger price, and that some portion of the merger price should be excluded from the appraised "fair value" as "arising from the accomplishment . . . of the merger."[156] While the Delaware courts have been willing to exclude synergy value from their appraisals of "fair value," doing so is difficult.[157]

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153 DEL. CODE ANN. tit. 8, § 262(h) (2020).

154 Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd., 847 A.2d 340, 356 (Del. Ch. 2004) (excluding "from any appraisal award the amount of any value that the selling company's shareholders would receive because a buyer intends to operate the subject company, not as a stand-alone going concern, but as a part of a larger enterprise, from which synergistic gains can be extracted"); *see also* KENGELBACH, UTZERATH, KASERER & SCHATT, *supra* note 96, at 2 ("[A]cquirers do not give more than one-third of estimated synergies to the target shareholders in the form of acquisition premiums.").

155 Strategic buyers—for example, a company with existing operations commonly in the target's industry—are more likely to generate synergy value than financial buyers—for example, an investment fund. *See In re* Appraisal of Jarden Corp., No. 12456, 2019 WL 3244085, at *25 (Del. Ch. July 19, 2019) ("[S]ynergies were realized in the Merger, as one would expect when two strategic partners combine."), *aff'd*, Fir Tree Value Master Fund, LP v. Jarden Corp., 236 A.3d 313 (Del. 2020) (en banc). So strategic buyers commonly can outbid financial buyers. *See* Alexander S. Gorbenko & Andrey Malenko, *Strategic and Financial Bidders in Takeover Auctions*, 69 J. FIN. 2513 (2014). It may be that a financial buyer cannot generate any synergy value by acquiring the target, but that is not necessarily the case. *See In re* Appraisal of PetSmart, Inc., No. 10782, 2017 WL 2303599, at *31 n.364 (Del. Ch. May 26, 2017) (refusing to deduct synergy value from merger price where acquirer was a financial buyer when appraising "fair value"); Hamermesh & Wachter, *Rationalizing Appraisal Standards*, *supra* note 3, at 1050–51 (stating that a financial buyer may generate synergy value by combining a target with other companies in its portfolio).

156 DEL. CODE ANN. tit. 8, § 262(h) (2020); *see* DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 371 (Del. 2017) (en banc) ("Part of why the synergy excision issue can be important is that it is widely assumed that the sales price in many M&A deals includes a portion of the buyer's expected synergy gains, which is part of the premium the winning buyer must pay to prevail and obtain control."); Verition Partners Master Fund, Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 130 (Del. 2019) (en banc) (per curiam) (determining that "fair value" equals the value of the merger consideration minus synergies); *In re* Appraisal of Panera Bread Co., No. 2017-0593, 2020 WL 506684, at *1 (Del. Ch. Jan. 31, 2020) (same); *Union Ill.*, 847 A.2d at 343 (same); *see also* Hamermesh & Wachter, *Cornfields*, *supra* note 3, at 148 (explaining that a determination of "fair value" which excludes "any element of value arising from the accomplishment or expectation of the merger" excludes from "fair value" "gains . . . resulting from economies of scale or increased market share"); Macey & Mitts, *supra* note 3, at 1036–37 (arguing that synergies should be excluded from "fair value" calculations).

157 *See Aruba*, 210 A.3d at 141 ("Of course, estimating synergies and allocating a reasonable portion to the seller certainly involves imprecision . . . ."); *DFC*, 172 A.3d at 358 ("[I]t is difficult to obtain accurate information regarding expected synergies in the price paid for a particular business . . . ."); *Jarden*, 2019 WL 3244085, at *25–26 ("[W]hether Jarden captured the synergies

III. Reasons that Courts Disregard the Statutory Exclusion

When appraising "fair value," judges routinely disregard the statutory mandate to exclude value attributable to the merger—favoring the merger price—because they lack training in finance and the valuation of businesses and because of their desire to protect the minority from exploitation.

A. *Legal, Not Financial, Training*

Judges attend law school, not business school, and are educated in legal theories, not valuation theories.[158] Delaware judicial officers repeatedly have acknowledged the limitations in their training and experience when appraising "fair value."[159] Given that, in other settings, "fair" commonly means a "range of possible prices that might have been paid in [a] negotiated arms-length" transaction,[160] it is understandable that the Delaware courts might favor the merger price negotiated by the acquirer and the target, which necessarily was approved by a majority of the target's shares, rather than undertaking a freewheeling valuation, for which the courts lack training and experience, and for which the courts must identify a specific point (*the* "fair value") within an extremely wide range.[161] Thus, the courts emphasize market principles

in the Merger, the evidence is less clear . . . . [T]he expert analysis of the transaction synergies raised more questions than it answered."); Lawrence A. Hamermesh & Michael L. Wachter, *Finding the Right Balance in Appraisal Litigation: Deal Price, Deal Process, and Synergies*, 73 BUS. LAW. 961, 961–63 (2018) (noting that the law is not well-developed regarding valuation of synergies to be deducted from deal price in appraisal proceedings).

158 *See, e.g.*, DEL. CONST. art. IV, § 2 ("There shall be five Justices of the Supreme Court who shall be citizens of the State and learned in the law . . . . In addition to members of the Supreme Court there shall be other State Judges, who shall be citizens of the State and learned in the law. They shall include . . . the Chancellor and the Vice-Chancellors . . . .").

159 *See* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 35 (Del. 2017) (en banc) ("[H]azards . . . always come when a law-trained judge is forced to make a point estimate of fair value . . . ."); *Union Ill.*, 847 A.2d at 359 ("For me (as a law-trained judge) to second-guess the price that resulted from that process involves an exercise in hubris and, at best, reasoned guess-work."); Manichaean Cap., LLC v. SourceHOV Holdings, Inc., No. 2017-0673, 2020 WL 496606, at *16 (Del. Ch. Jan. 30, 2020) (expressing "exasperation with the task of sifting through complex financial data"), *aff'd*, 246 A.3d 139 (Del. 2021) (en banc).

160 HMG/Courtland Props., Inc. v. Gray, 749 A.2d 94, 116 (Del. Ch. 1999).

161 *See Dell*, 177 A.3d at 35 (referring to "a point estimate of fair value based on widely divergent partisan expert testimony"); Golden Telecom, Inc. v. Glob. GT LP, 11 A.3d 214, 218 (Del. 2010) ("[I]t is difficult for the Chancellor and Vice Chancellors to assess wildly divergent expert opinions regarding value . . . ."); *Manichaean Cap.*, 2020 WL 496606, at *1 (noting that competing experts generated valuations that were "solar systems apart"). *See generally* Paramount Comm'cns Inc. v. Time Inc., No. 10866, 1989 WL 79880, at *13 (Del. Ch. July 14,

in according great weight, commonly conclusive weight, to the negotiated merger price when determining "fair value." In *Aruba*, the Delaware Supreme Court wrote:

> [W]hen [the informationally efficient market] price is further informed by the efforts of arm's length buyers of the entire company to learn more through due diligence, involving confidential non-public information, and with the keener incentives of someone considering taking the non-diversifiable risk of buying the entire entity, the price that results from that process is even more likely to be indicative of so-called fundamental value . . . .[162]

While understandable,[163] a court's undue emphasis on the value of the merger consideration, when determining "fair value," to avoid a complicated valuation exercise amounts to judicial shirking of a legislative mandate to exclude "value arising from the accomplishment . . . of the merger."[164] More generally, courts commonly are asked to undertake complicated valuation exercises in other corporate law settings.[165] Finally, deference to a market-based valuation does not necessitate emphasis on the parties' negotiated merger price, as opposed to the market-based, preannouncement stock price.[166]

1989) ("In the longer term, Time's advisors have predicted [a] trading range[] of . . . $208–$402 for 1993 . . . [,] a range that a Texan might feel at home on." (citation omitted)), *aff'd*, 565 A.2d 280 (Del. 1989).

162 *Aruba*, 210 A.3d at 138. Note that the court referred to the acquisition of control—"buyers of the entire company" and the attendant "non-diversifiable risk." *Id.*; *see supra* Section II.B.

163 *See* Choi & Talley, *supra* note 10, at 544 ("[C]ourts have begun to search for a convenient exit ramp from this computational conundrum.").

164 *See Golden Telecom, Inc.*, 11 A.3d at 217 ("Determining 'fair value' through 'all relevant factors' may be an imperfect process, but the General Assembly has determined it to be an appropriately fair process. Section 262(h) controls appraisal proceedings, and there is little room for this Court to graft common law gloss on the statute even if we were so inclined. Section 262(h) unambiguously calls upon the Court of Chancery to perform an *independent* evaluation of 'fair value' . . . ." (quoting DEL. CODE ANN. tit. 8, § 262(h) (2020))); *see also Dell*, 177 A.3d at 21 (rejecting "an invitation to create a presumption in favor of the deal price"); *DFC*, 172 A.3d at 366–67 (rejecting the "argument that the Court of Chancery was required to give presumptive weight to the deal price" when appraising "fair value").

165 *See In re* S. Peru Copper Corp. S'holder Derivative Litig., 52 A.3d 761, 816 (Del. Ch. 2011) ("Of course, this valuation is not a straightforward exercise and inevitably involves some speculation. There are many ways to fashion a remedy here, given that the parties have provided no real road map for how to come to a value, and the analyses performed by Goldman and the Special Committee do not lend themselves to an easy resolution. I will attempt to do my best on the record before me."); *see also* Brazen v. Bell Atl. Corp., 695 A.2d 43, 47–48 (Del. 1997) (noting the difficulty of determining damages if one party breaches the merger agreement and enforcing liquidated damages).

166 *See* Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co., 240 A.3d 3, 9 (Del. 2020) (agreeing with the chancery court that the preannouncement stock price is "a persuasive indicator of value"); *DFC*, 172 A.3d at 369–70 ("Market prices are typically viewed

If courts give effect to the statutory mandate to exclude any value attributable to the merger and if courts favor emphasis on a market-based price, then courts should not emphasize the market-based merger price; instead they should emphasize the market-based preannouncement stock price. First, the statute itself requires exclusion of value attributable to the merger,[167] so starting with the merger price flies in the face of the statutory mandate, whereas starting with the preannouncement stock price does no such thing. Second, the market for noncontrolling shares of the target is "thicker" than the market to acquire the target itself; that is, the number of buyers and sellers of noncontrolling shares of the target is high compared to the number of buyers and sellers of the target itself.[168] Thick markets generate more reliable pricing.[169] So, price reliability favors the preannouncement stock price over the merger price. Recall also the typical postannouncement negative impact suffered by the bidder—which market-based reaction suggests that the bidder agreed to a price too high—also counsels in favor of the reliability of the preannouncement price over the merger price.[170]

If a court begins its analysis of "fair value" with either market-based price—merger price or preannouncement stock price—then the

superior to other valuation techniques because, unlike, e.g., a single person's discounted cash flow model, the market price should distill the collective judgment of the many based on all the publicly available information about a given company and the value of its shares.").

167 DEL. CODE ANN. tit. 8, § 262(h) (2020) (excluding from the "fair value" determination "any element of value arising from the accomplishment or expectation of the merger").

168 *See* Korsmo & Myers, *Flawed Corporate Finance*, *supra* note 10, at 227 ("The market for corporate control, dealing with a limited universe of buyers for companies that generally lack exact substitutes, is unavoidably less efficient than the market for individual shares."). For publicly traded corporations, millions of shares trade every day. *See* sources cited *supra* note 61. The law treats a merger transaction as a fundamental change, which is not an everyday occurrence. *See, e.g.*, DEL. CODE ANN. tit. 8, § 251 (2020) (requiring approval by a majority of outstanding shares entitled to vote). Negotiated merger agreements commonly include deal protection that deters alternative bidders from pursuing the target. *See* Fernán Restrepo & Guhan Subramanian, *The New Look of Deal Protection*, 69 STAN. L. REV. 1013 (2017). To be enforceable, deal protection must not preclude other bidders from acquiring the target. *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (Del. 1995); Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1286 (Del. 1989). It does, however, generally deter alternative bidders, and may deter higher-valued bidders. *See* Upper Deck Co. v. Topps Co., Inc. (*In re* Topps Co. S'holders Litig.), 926 A.2d 58, 86 (Del. Ch. 2007) ("[T]he termination fee . . . is not of the magnitude that I believe was likely to have deterred a bidder with an interest in *materially outbidding* [the initial bidder with whom the target contracted]." (emphasis added)).

169 *See* Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. CORP. L. 565, 568–71 (2003); *cf.* Kahn v. Tremont Corp., No. 12339, 1996 WL 145452, at *9 (Del. Ch. Mar. 21, 1996) ("[I]f the market is thin and irregular it may not acceptably (for these purposes) price the commodities traded."), *rev'd on other grounds*, 694 A.2d 422 (Del. 1997).

170 *See supra* Section II.C.2.a.

court may be required to make adjustments thereto,[171] but the adjustments to the latter may prove unnecessary or may be easier, which counsels in favor of the preannouncement stock price. Adjustments to the merger price typically require subtraction of merger synergies when determining "fair value."[172] Synergies, however, are difficult to quantify.[173] Relatedly, synergy value will vary from acquirer to acquirer; there is no market-tested synergy value. Information quantifying the synergy value of the winning bidder would reside with that bidder,[174] who could try to behave opportunistically by seeking to lower the amount payable to the dissenting shareholders. For instance, in *Stillwater Mining Co*., the acquirer argued that "fair value" was less than the merger price due to synergies, after the acquirer's chief executive officer testified that there were no synergies, the acquirer's valuation expert found no quantifiable synergies, and the acquirer informed shareholders that there were no synergies.[175] In *Columbia Pipeline Group*, the court was prepared to deduct synergies from the merger consideration in determining "fair value," except that the acquirer overplayed its hand, by arguing that the entire control premium was attributable to synergies.[176]

Moreover, now that the Delaware courts have emphasized that any synergy value should be excluded from the appraised "fair value," one

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171 *In re* Appraisal of Stillwater Mining Co., No. 2017-0385, 2019 WL 3943851, at *59 (Del. Ch. Aug. 21, 2019) ("This decision does not find that the trading price was so unreliable that it could not be used as a valuation indicator. If a market-tested indicator like the deal price was unavailable, then this decision might well have given weight to the trading price. Had this decision been forced to take that route, it would not have relied on the unaffected trading price . . . but instead would have taken into account the adjusted trading price."), *aff'd*, Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co., 240 A.3d 3 (Del. 2020).

172 *See* DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 371 (Del. 2017) (en banc) (discussing the "synergy excision issue"); *supra* Section II.C.4.

173 *See DFC*, 172 A.3d at 358 ("[I]t is difficult to obtain accurate information regarding expected synergies in the price paid for a particular business . . . ."); KENGELBACH, UTZERATH, KASERER & SCHATT, *supra* note 96, at 6 ("[C]ost synergies are relatively easy to quantify [but] . . . . realizing those synergies can hardly be called easy . . . . Revenue synergies, on the other hand, are more difficult both to realize and to quantify . . . .").

174 For example, in *Aruba*, after the chancery court doubted its ability to value deal synergies, the Delaware Supreme Court accepted the acquirer's estimated synergy value. *See* Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 130 (Del. 2019) (en banc) (per curiam) ("On remand, the Court of Chancery shall enter a final judgment for the petitioners awarding them $19.10 per share, which reflects the deal price minus the portion of synergies left with the seller as estimated by the respondent in this case, Aruba.").

175 *In re Stillwater Mining Co*., 2019 WL 3943851, at *45.

176 *In re* Appraisal of Columbia Pipeline Grp., Inc., No. 12736, 2019 WL 3778370, at *45 (Del. Ch. Aug. 12, 2019) ("I am not able to credit TransCanada's position that Columbia received 100% of synergies . . . . TransCanada likely could have justified a smaller synergy deduction, but it claimed a larger and unpersuasive one.").

should expect acquirers, during their negotiations with targets, to craft documents that reflect more and more of the control premia being attributable to such synergies for which they need not compensate any dissenting shareholders, thereby lowering total acquisition costs.[177] Although the Delaware courts have not embraced such adjustments when appraising dissenting shares, "fair value"—excluding "value arising from the accomplishment or expectation of the merger" and considering "all relevant factors"[178]—requires other adjustments, if courts implicitly—not presumptively—begin with the merger price. As mentioned above, control has a value, which attaches to majority shares—not minority shares—and which does not inhere to the target itself.[179] Given that empirical studies support the Winner's Curse and consistent bidder overpayment, courts should be inclined to adjust the merger price downward when appraising "fair value," to account for such overvaluation, particularly when the acquirer's stock price falls upon announcement of the merger.[180] Self-interested conduct by the target's management may necessitate an upward adjustment to the merger price when "fair value" is appraised.[181]

If, on the other hand, a court begins its "fair value" analysis with the market-based, preannouncement stock price, then the court *may* have to adjust that price to reflect any value attributable to the acquirer's access to material nonpublic information.[182] First, the target may not possess material nonpublic information, in which case no adjustment would be required.[183] Second, recall that the target's stock price, which rose upon announcement of the parties' agreement, routinely falls to the preannouncement level, if the acquisition is never consummated.[184] If the bidder possessed material nonpublic information that justified the elevated bid, then one would expect the target's stock price to remain

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177 *See* Choi & Talley, *supra* note 10, at 546 (arguing against the merger price as "fair value," notwithstanding the common contention that that merger price was market based, because "the 'market' is itself an endogenous byproduct of its own legal and regulatory environment (including fair-value criteria)").

178 DEL. CODE ANN. tit. 8, § 262(h) (2020).

179 *See supra* Section II.B; DEL. CODE ANN. tit. 8, § 212(a) (2020).

180 *See supra* Section II.C.2.a; Macey & Mitts, *supra* note 3, at 1056 ("Surprisingly, when adjudicating appraisal actions, the Delaware courts have given zero weight to the magnitude, or even direction, of the change in the acquirer's stock price upon announcement of the M&A transaction.").

181 *See supra* Section II.C.3.

182 *See supra* Section II.C.1.

183 *See In re* Appraisal of Jarden Corp., No. 12456, 2019 WL 3244085, at *2 (Del. Ch. July 19, 2019) ("[T]here was no credible evidence that material information bearing on Jarden's fair value was withheld from the market as of the Merger."), *aff'd*, Fir Tree Value Master Fund, LP v. Jarden Corp., 236 A.3d 313 (Del. 2020) (en banc).

184 *See supra* Diagram 1 and notes 55–56.

somewhat elevated if the planned merger failed, but empirical studies establish that the target's stock price does not remain elevated after a failed acquisition.[185] Those empirical findings undermine the suggestion that material nonpublic information composes an important part of the acquirer's premium offer over the target's preexisting stock price. If material nonpublic information composed an important part, then the target's dissenting shareholders should be able to identify it, even if a court may not easily quantify its value.

Judges' lack of training and experience regarding valuation helps explain their preference for a market-based valuation over their own free-wheeling valuation, especially when the litigating parties generate wildly divergent valuations. However, the courts' preference for a market-based valuation, standing alone, does not explain the preference for the merger price over the preannouncement stock price.

B. *Protection of the Minority*

If the Delaware courts, due to a lack of applicable training, seek to avoid computing "fair value" by according great weight to a market-based valuation, then why don't those courts accord great weight to the market-based preannouncement stock price, which seems more in line with the statutory exclusion of "value arising from the accomplishment or expectation of the merger," rather than the market-based merger price, which seems less in line with the statutory exclusion? Strictly applying the statutory exclusion when appraising "fair value" risks affording too little protection to minority shareholders. The Delaware courts have long protected minority shareholders.[186] Moreover, one of the legislative rationales that undergirds appraisal rights is the protection of the minority from exploitation by the majority.[187] For example, in *Cavalier*, where the Delaware Supreme Court rejected the suggestion of a minority discount when appraising "fair value," the court noted the risk of an "undesirable result," whereby the majority shareholders could "unfairly enrich[] [themselves and] . . . reap a windfall from the appraisal process by cashing out a dissenting

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185 *See supra* Section II.C.1.

186 *See, e.g.*, McMullin v. Beran, 765 A.2d 910, 920 (Del. 2000) (imposing on directors "an affirmative responsibility to protect . . . minority shareholders' interests"); Weinberger v. UOP, Inc., 457 A.2d 701, 703–04, 711 (Del. 1983) (en banc) (requiring close judicial scrutiny of merger transaction whereby the majority eliminates minority shareholders in cash-out merger).

187 *See* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 33 (Del. 2017) (en banc) (describing appraisal statute as an attempt to ensure that shareholders are "not exploited").

shareholder"[188] Though the circumstances of *Cavalier*—where a two-person majority allegedly sought to exploit a one-person minority[189]—may not apply to many transactions that give rise to appraisal rights, many other transactions involve controlling shareholders.[190] Further, a disaggregated majority of shares—the owners of which understandably are rationally ignorant—could approve a merger transaction at a price above the preexisting stock price, but at a price that is less than "fair value."[191] So, while the merger price *may* undervalue those shares, the preexisting stock price would undervalue those shares even further. Consequently, the Delaware courts commonly favor the former value and disregard the latter value. Nonetheless, given the statutory exclusion, the Delaware courts routinely award the dissenting shareholders with a "fair value" amount that is less than the value of the merger consideration due to the statutory exclusion.[192] The prevailing "fair value" award equals merger-price-minus-synergies.[193]

IV. PROPOSAL TO DELETE THE STATUTORY EXCLUSION

Because of the statutory exclusion of "any element of value arising from the accomplishment or expectation of the merger" when appraising "fair value," this Article presents many arguments against usage of the merger price, which necessarily reflects value components relating to the "accomplishment or expectation of the merger," as well

188 Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1145 (Del. 1989).

189 *See id.* at 1139–40; *cf.* Blueblade Cap. Opportunities LLC v. Norcraft Cos., No. 11184, 2018 WL 3602940, at *1–3 (Del. Ch. July 27, 2018) (appraising "fair value" at $26.16, when the merger price was $25.50, and when the two-shareholder majority took out the publicly traded minority shares that were thinly traded).

190 *See* Cede & Co. v. Technicolor, Inc., 542 A.2d 1182 (Del. 1988); *In re* Volcano Corp. S'holder Litig., 143 A.3d 727 (Del. Ch. 2016); Boone, Broughman & Macias, *supra* note 11, at 285 (noting that appraisal actions are most likely in conflict-of-interest transactions).

191 *See* Boone, Broughman & Macias, *supra* note 11, at 285 (noting that appraisal actions are most likely where deal premia are low). *See generally* Cede & Co. v. Technicolor, Inc., No. 7129, 2005 WL 5755422, at *1 (Del. Ch. July 11, 2005) (appraising "fair value" at $28.41); Cede & Co. v. Technicolor, Inc., No. CIV.A. 7129, 1987 WL 4768, at *2 (Del. Ch. Jan. 13, 1987) (addressing a tender offer for publicly traded shares at $23, followed by a second-step merger at $23), *rev'd on other grounds*, 542 A.2d 1182 (Del. 1988).

192 *See, e.g.*, *In re* Appraisal of Solera Holdings, Inc., No. 12080, 2018 WL 3625644, at *1 (Del. Ch. July 30, 2018) (determining that "fair value" equals merger price less synergies); *id.* at *12 (providing that "fair value" shall be determined "exclusive of any element of value arising from the accomplishment or expectation of the merger" (citing DEL. CODE ANN. tit. 8, § 262(h) (2020)) ("Appraisal excludes any value resulting from the merger, including synergies that may arise . . . .").

193 *See* DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 371 (Del. 2017) (en banc) (discussing the "synergy excision issue"); *supra* Section II.C.4.

as many arguments in favor of usage of the preannouncement stock price, which necessarily excludes value components relating to the "accomplishment or expectation of the merger." The purpose of that presentation was not to excoriate the Delaware courts' seeming disregard of the statutory exclusion. Rather, this Article ultimately proposes deletion of that statutory exclusion.

As set forth in Parts I and II, the Delaware courts have interpreted the statutory exclusion extremely narrowly, rendering those legislative words meaningless in many regards. The Delaware legislature, which has been troubled by an increase in arguably misguided appraisal litigation,[194] has repeatedly amended the appraisal statute to narrow the availability of appraisal rights.[195] However, the legislature does not appear troubled by the courts' narrow interpretation of the statutory exclusion nor by the courts' analysis of "fair value," as indicated by the absence of statutory amendments addressing "fair value" or exclusions therefrom. Given the regularity with which Delaware amends its corporate code and given the State's intent to remain the leading provider of corporate law,[196] Delaware's legislative inaction proves more meaningful than legislative inaction in other jurisdictions. Legislative deletion of the statutory exclusion would more closely align the statutory language with the legislature's apparent intent and the courts' actual decision-making process.

Relatedly, legislative deletion of the statutory exclusion would end the Delaware courts' ongoing addition of a "judicial gloss" to the clear statutory exclusion.[197] Contrary to the interpretive canon that the

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194 *See* Callahan, Palia & Talley, *supra* note 11, at 149 (noting that an investor could "accumulate shares in the target company *after an announced merger*, perfect appraisal rights, and put forward a sophisticated expert to challenge the merger consideration" (emphasis added)); Wei Jiang, Tao Li, Danqing Mei & Randall Thomas, *Appraisal: Shareholder Remedy or Litigation Arbitrage?*, 59 J.L. & ECON. 697, 727 (2016) (finding that "half of the returns to appraisal filings come from prejudgment interest accruals rather than valuation improvements, [and] suggest[ing] that a significant number of petitions may not have been driven by genuine differences of opinion over valuation").

195 *See* H.R. 371, 148th Gen. Assemb., 2d Reg. Sess. § 10 (Del. 2016) (amending DEL. CODE ANN. tit. 8, § 262(g) and creating de minimis exception to appraisal rights); S. 180, 149th Gen. Assemb., 2d Reg. Sess. § 9 (Del. 2018) (amending DEL. CODE ANN. tit. 8, § 262(b)(1) and generally eliminating appraisal rights for certain second-step mergers that follow successful tender offers for publicly traded shares). Aside from narrowing the availability of appraisal rights, the Delaware legislature also made their pursuit less enticing. *See* H.R. 371, 148th Gen. Assemb., 2d Reg. Sess. § 11 (Del. 2016) (amending DEL. CODE ANN. tit. 8, § 262(h) and permitting prejudgment payment to minimize payment of statutory interest that would otherwise accrue).

196 *See* Cleveland, *supra* note 19, at 1832 & n.10; Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1754 (2006) (referencing amendments to the corporate code essentially every year); *supra* note 15.

197 *See DFC*, 172 A.3d at 348 (rejecting acquirer's argument that the court "should establish, by judicial gloss, a presumption that in certain cases involving arm's-length mergers, the price of

specific trumps the general,[198] the Delaware courts emphasize the *general* statutory mandate to consider "all relevant factors" in according little or no weight to the *specific* statutory mandate to exclude "any element of value arising from the accomplishment or expectation of the merger."[199] Historically, the Delaware courts have strived to give effect to all of the legislature's words, eschewing interpretations that render the legislature's words as surplusage.[200]

Akin to Delaware law, the Model Business Corporation Act requires that the court appraise "fair value" as of the date of the merger, which may follow the date of the parties' entry into the merger agreement by months, but, unlike Delaware's appraisal statute, the Model Act does not specifically exclude from "fair value" any value attributable to the transaction giving rise to appraisal rights.[201] The Official Comments to the Model Act specifically reference concern regarding the majority's exploitation of the minority in refusing to exclude value that may be attributable to the transaction.[202] So, deletion of Delaware's statutory exclusion would bring Delaware law in line with a majority of jurisdictions,[203] where Delaware apparently has no interest in deviating from the norm, given judicial precedent in Delaware and the absence of a legislative response thereto.

One might argue that the deletion of the statutory exclusion would contradict the Delaware courts' prevailing analysis that "fair value" equals merger-price-minus-synergies, because the exclusion of synergy value follows from the statutory exclusion of "value arising from the accomplishment . . . of the merger."[204] However, such an argument would be misguided because other statutory language would empower

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the transaction giving rise to appraisal rights is the best estimate of fair value"); Hollinger Inc. v. Hollinger Int'l, Inc., 858 A.2d 342, 377 (Del. Ch. 2004) (criticizing "inquiry more focused on the judicial gloss put on the statute than on the words of the statute itself").

198 *See* Adams Fruit Co. v. Barrett, 494 U.S. 638, 646 (1990); Lazard Debt Recovery GP, LLC v. Weinstock, 864 A.2d 955, 974 (Del. Ch. 2004).

199 DEL. CODE ANN. tit. 8, § 262(h) (2020).

200 *See* Grimes v. Alteon Inc., 804 A.2d 256, 264 (Del. 2002) (en banc); Nixon v. Blackwell, 626 A.2d 1366, 1380–81 (Del. 1993) (en banc); Quadrant Structured Prods. Co. v. Vertin, 102 A.3d 155, 201–02 (Del. Ch. 2014).

201 *See* MODEL BUS. CORP. ACT § 13.01 (1950) (AM. BAR ASS'N, amended 2016) (defining "fair value"); *id.* § 13.02 (providing for appraisal rights in specified mergers as well as other transactions).

202 *See id.* § 13.01 cmt. 2.B.

203 *See 2016 Revision to Model Business Corporation Act Makes Its Debut*, AM. BAR ASS'N (Dec. 20, 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/12/10_mbca [https://perma.cc/N62V-A7HJ] ("This Model Act is the basis for the business corporation statute in 32 states and the District of Columbia and is the source for many provisions in the general corporation statutes of other states.").

204 DEL. CODE ANN. tit. 8, § 262(h) (2020); *see supra* Section II.C.4.

the court, if so inclined, to exclude synergy value from its appraised "fair value." First, the statute requires that the court appraise the "*fair* value" of any dissenting shares, and one could easily conclude that, if a shareholder does not support the merger, then it is *fair* to exclude "value arising from the accomplishment . . . of the merger" when appraising the value of her shares.[205] A reasonable definition of "*fair*" accounts for the existing statutory exclusion, such that the deletion of the statutory exclusion would not disrupt the prevailing analysis of "fair value." In fact, when addressing breach-of-duty claims against directors, the Delaware courts undertake a "fairness" inquiry that the courts refer to as "quasi-appraisal."[206] When analyzing "fairness," the courts focus not only on price, but also on the process that gave rise to that price, which includes the shareholder vote.[207] Second, even if the legislature deleted the statutory exclusion, the statute would continue to empower the Delaware courts to consider "all relevant factors" when determining "fair value."[208] A "relevant factor" in determining the "fair value" of dissenters' shares would be the fact of their dissent; why should those shareholders be entitled to "value arising from the accomplishment . . . of the merger," whether or not that language appears in the statute, given their lack of support for the merger?[209] Deletion of the statutory exclusion would not undermine the Delaware courts' prevailing analysis of "fair value."

Deletion of the statutory exclusion would preserve appraisal as an important check on the board of directors.[210] A shareholder's breach-of-duty claim also serves as an important check on the board of directors.[211] However, appraisal has increased in importance as a check on directors due to legal developments that render breach-of-duty claims more difficult for shareholders to pursue.[212] In a breach-of-duty claim, the shareholder seeks either an injunction or damages. For purposes of appraisal, an injunction to halt the merger is irrelevant, because there are no appraisal rights unless the merger has already

205 *See* DEL. CODE ANN. tit. 8, § 262(h).

206 Weinberger v. UOP, Inc., 457 A.2d 701, 711–15 (Del. 1983) (en banc); Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 114 (Del. Ch. 1952).

207 *See Weinberger*, 457 A.2d at 711–15.

208 DEL. CODE ANN. tit. 8, § 262(h) (2020).

209 *See id.*

210 *See* Jiang, Li, Mei & Thomas, *supra* note 194, at 727 (describing appraisal actions as "serving [a] traditional role as a shareholder governance remedy").

211 *See* Cain, Fisch, Solomon & Thomas, *supra* note 8, at 611–12 ("[C]lass actions alleging a breach of fiduciary duty have traditionally been the dominant litigation strategy . . . .").

212 *See id.* at 611–14, 633.

occurred,[213] and courts do not "undo" mergers that have already occurred.[214] A shareholder's breach-of-duty claim that seeks damages, though never easy,[215] has become more difficult in recent years. In *Corwin*, a 2015 decision, the Delaware Supreme Court concluded that two prior landmark decisions—decisions that elevated judicial expectations of directors in merger transactions—were "primarily designed to give stockholders and the Court of Chancery the tool of injunctive relief . . . before closing. [Those earlier landmark decisions] were not tools designed with post-closing money damages claims in mind . . . ."[216] Under *Corwin*, following an informed, uncoerced shareholder vote regarding a merger, a dissatisfied shareholder is precluded from pursuing a breach-of-duty claim.[217] Litigants reacted to *Corwin* by pursuing claims in other jurisdictions,[218] but director-amended bylaws that require such claims to be pursued in Delaware were embraced by the Delaware courts.[219] Wide director discretion regarding mergers that result in unsuccessful challenges by

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213 *See* Cede & Co. v. Technicolor, Inc., 542 A.2d 1182, 1187 (Del. 1988) ("[In an appraisal proceeding,] the only relief available is a judgment against the surviving corporation for the fair value of the dissenters' shares. . . ."). A recent decision rejected a proposed settlement that released directors from substantive claims that could have yielded monetary relief in exchange for additional disclosure regarding a proposed merger. *See In re* Trulia, Inc. S'holder Litig., 129 A.3d 884 (Del. Ch. 2016).

214 *See* Gimbel v. Signal Cos., 316 A.2d 599, 603 (Del. Ch. 1974); Harman v. Masoneilan Int'l, Inc., 418 A.2d 1004, 1006–07 (Del. Ch. 1980), *rev'd on other grounds*, 442 A.2d 487 (Del. 1982).

215 *Supra* note 206 (noting that courts employ similar analyses when determining "fairness" for a breach-of-duty claim and "fair value" under the appraisal statute); *see, e.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7) (2020) (permitting charter provision that limits or eliminates director liability for monetary damages to the corporation or to shareholders for breach of fiduciary duty); Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985) (en banc) (requiring that shareholders establish gross negligence when attacking a decision by a disinterested board regarding a merger). For example, in *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015) (en banc), the board members breached their fiduciary duties to be informed by, among other things, running an auction when the highest-value bidder could not participate because that bidder was still digesting a different company. Though the directors breached their fiduciary duties, shareholders could not pursue them for monetary damages because of an exculpatory provision in the corporate charter. *Id.* at 834, 854–55. A quasi-appraisal claim generated a "fair value" at slightly above the merger price. *See In re* Rural/Metro Corp. S'holders Litig., 102 A.3d 205, 226 (Del. Ch.), *appeal dismissed*, 105 A.3d 990 (Del. 2014).

216 Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 312 (Del. 2015) (en banc) (first citing Revlon v. MacAndrews & Forbes Holdings, Inc. 506 A.2d 173 (Del. 1986); and then citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985)). In *Volcano*, the chancery court extended the *Corwin* analysis to tender offers accepted by a majority of outstanding shares. *In re* Volcano Corp. S'holder Litig., 143 A.3d 727 (Del. Ch. 2016).

217 *See* Singh v. Attenborough, 137 A.3d 151, 151–52 (Del. 2016) (en banc).

218 *See* Cain, Fisch, Solomon & Thomas, *supra* note 8, at 608 (reporting, post-*Corwin*, a substantial decline in merger litigation in Delaware and increased litigation in other states' courts and federal courts).

219 *See* Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013).

shareholders may not seem problematic when shareholders seek to impose personal liability on directors. However, appraisal rights never entailed imposing personal liability on directors and were never intended to address wrongdoing.[220] Moreover, a shareholder's inability to succeed on a breach-of-duty claim against the directors does not mean that the resulting merger price equals (or should be used as a starting point to determine) "fair value."[221] In fact, mergers for which appraisal has been sought "tend to have substantially lower premia than a matched sample."[222]

So, even in the absence of a fiduciary breach, appraisal actions lead the target's directors to extract greater value in the merger and prompt the acquirer's directors to pay greater value in the merger in hopes of avoiding appraisal litigation.[223] This assumes that the Delaware courts faithfully fulfill their statutory obligation to determine "fair value." If, however, the Delaware courts set "fair value" at the preannouncement stock price or they cap "fair value" at the merger price, then the discipline of appraisal will be lost.[224] Discipline by appraisal would seem nonexistent if the inquiry shifts from a determination of "fair value" to a determination that, notwithstanding a "flawed" deal process, the dissenting shareholders were not "being exploited."[225] Deletion of the statutory exclusion would enhance the disciplinary effect provided by

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220 *See In re* Solera Ins. Coverage Appeals, 240 A.3d 1121, 1136 & n.99 (Del. 2020) (en banc) (emphasizing that appraisal does not involve an inquiry into wrongdoing); Cede & Co. v. Technicolor, Inc., 542 A.2d 1182, 1187 (Del. 1988) (explaining that in an appraisal proceeding, "the only party defendant is the surviving corporation").

221 *See* Korsmo & Myers, *Flawed Corporate Finance*, *supra* note 10, at 269–73.

222 Kalodimos & Lundberg, *supra* note 9, at 57; *see* Boone, Broughman & Macias, *supra* note 11, at 285 (noting that appraisal actions are most likely where deal premia are low or in conflict-of-interest transactions).

223 *See* Boone, Broughman & Macias, *supra* note 11, at 314 (finding that "target shareholders receive higher premiums and greater announcement returns after events that increase the strength of the appraisal remedy" and that "bidders respond by increasing the offer terms and improving the price-setting process"); Callahan, Palia & Talley, *supra* note 11, at 147 ("[A]ppraisal-liberalizing events of 2007 were associated with *a significant increase in deal premia*, as the enhanced credibility of appraisal had the effect of raising the *de facto* 'reserve price' associated with M&A auctions.").

224 *See* Boone, Broughman & Macias, *supra* note 11, at 286 ("Our results caution . . . that giving greater deference to the negotiated merger price could ultimately harm Delaware shareholders."); Callahan, Palia & Talley, *supra* note 11, at 182 ("[R]ecent judicial opinions in Delaware have acted substantially to undercut the credible threat (and risk) of post-merger appraisal."); Choi & Talley, *supra* note 10, at 547 (predicting that "fair-value assessments will tend (in equilibrium) to skew *above* the deal price").

225 Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co., 240 A.3d 3, 11, 13 (Del. 2020) (quoting *In re* Stillwater Mining Co., No. 2017-0385, 2019 WL 3943851, at *31, *44 (Del. Ch. Aug. 21, 2019)).

appraisal rights by giving courts greater freedom to conclude that "fair value" exceeds the merger price.[226]

In giving great weight to the merger consideration when determining "fair value," the Delaware courts frequently emphasize the absence of a higher offer from bidder #2 between (a) the announcement of the merger agreement between bidder #1 and the target, and (b) the consummation of the merger between bidder #1 and the target.[227] However, bidder #1 and the target typically include provisions in their merger agreement designed to deter a higher bid.[228] Such provisions are enforceable so long as they do not preclude a higher bid, but they may reasonably deter higher bids.[229] Thus, deal protection may "ward off subsequent bids in the first place" and "substantially impede an auction dynamic," giving "reasons to doubt the efficiency" of the supposed market to acquire the target that gave rise to the merger price to which the Delaware courts accord undue weight.[230]

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226 *See* Boone, Broughman & Macias, *supra* note 11, at 281 ("[T]arget shareholders receive higher abnormal returns as the strength of the appraisal remedy increases. . . .").

227 Recall that months may separate the signing of the agreement and the consummation of the transaction contemplated thereby. *See supra* note 89; *see also* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 34 (Del. 2017) (en banc) (referencing a "robust post-signing go-shop process"); DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 366 (Del. 2017) (en banc) ("[W]e have little quibble with the economic argument that the price of a merger that results from a robust market check, against the back drop of a rich information base and a welcoming environment for potential buyers, is probative of the company's fair value.").

228 *See* Restrepo & Subramanian, *supra* note 168, at 1017–19.

229 *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (Del. 1995); Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1286 (Del. 1989); *see also* Upper Deck Co. v. Topps Co. (*In re* Topps Co. S'holders Litig.), 926 A.2d 58, 86 (Del. Ch. 2007) ("[T]he termination fee . . . is not of the magnitude that I believe was likely to have deterred a bidder with an interest in *materially outbidding* [the initial bidder with whom the target contracted]." (emphasis added)).

230 Korsmo & Myers, *Reforming Modern Appraisal*, *supra* note 11, at 324; *see* Cain, Fisch, Solomon & Thomas, *supra* note 8, at 634 ("Our analysis suggests that, rather than adopting a broad presumption either in favor or against deal price in appraisal litigation, the Delaware Supreme Court should be cautious. . . . [C]utting too big a swath out of shareholders' potential remedies for corporate malfeasance opens up the possibility that managerial wrongdoing will go undetected. In other words, a broad appraisal remedy may be a necessary additional safeguard to protect shareholder interests."); Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 9, at 1609 (proposing the merger parties opt for either (1) no deal protection and a proposed safe harbor from appraisal litigation, or (2) deal protection and be subject to true appraisal); *cf.* Blueblade Cap. Opportunities LLC v. Norcraft Cos., No. 11184, 2018 WL 3602940, at *2 (Del. Ch. July 27, 2018) (appraising "fair value" at slightly above the negotiated merger price because of "a clutch of deal-protection measures").

CONCLUSION

The Delaware legislature requires the exclusion of value attributable to a merger when a *dissenting* shareholder—a shareholder that did *not* support the merger—seeks the judicially appraised "fair value" of her shares. Though originally sensible, the statutory exclusion has lost logical force over time. Contrary to the statutory exclusion, the Delaware courts routinely include value attributable to the merger when appraising "fair value," and the Delaware legislature—which annually updates the corporate code, and which recently and repeatedly has amended the appraisal statute—has acquiesced to the courts' precedents that accord little weight to the statutory exclusion. Given such judicial precedent and legislative acquiescence, the statutory exclusion should be deleted to better reflect the courts' current practices and the legislature's intent. Moreover, given recent judicial decisions that render breach-of-duty claims less effective as a check on the board of directors, appraisal litigation has served as an increasingly important check on directors. The statutory exclusion, however, contributes to the courts' common conclusion that "fair value" equals, or is less than, the merger price. Capping "fair value" at the merger price undermines the disciplinary effect on directors provided by appraisal rights. Deletion of the statutory exclusion would better free the courts, when appropriate, to conclude that "fair value" exceeds the merger price, which would benefit shareholders, not just dissenting shareholders, according to recent empirical studies.