# IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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| HUFF FUND INVESTMENT PARTNERSHIP d/b/a MUSASHI II LTD, and BRYAN E. BLOOM, | ) | |
| Petitioners, | ) | |
| v. | ) | *Civil Action No. 6844-VCG* |
| CKx, INC., | ) | |
| Respondent. | ) | |

## MEMORANDUM OPINION

Date Submitted: August 26, 2013
Date Decided: November 1, 2013

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GLASSCOCK, Vice Chancellor

This matter requires me to perform a statutory appraisal to determine the "fair value" of the stock of CKx, Inc. What is the fair value of an asset? For a simple asset—a piece of real property, for instance—it is the market value. If a trustee were to sell property held in trust, such a sale could be challenged by the beneficiary on a number of grounds. It would be odd, however, if the sale were an arms-length, disinterested transaction after an adequate market canvas and auction, yet the challenge was that the price received did not represent "fair" value. It would be odder still if the beneficiary presented as evidence of this proposition a post-sale appraisal, relying on speculative future income from the property not currently being realized, and stating that, notwithstanding the sales price, the true value was more than twice that received; and if the trustee's rebuttal involved a second post-facto appraisal indicating that the sales price was *higher* than the fair value of the parcel. In such a case, the appraisals would be viewed by this Court, not as some Platonic ideal of "true value," but as estimates—educated guesses—as to what price could be achieved by exposing the property to the market. A law-trained judge would have scant grounds to substitute his own appraisal for those of the real-estate valuation experts, and would have no reason to second-guess the market price absent demonstration of self-dealing or a flawed sales process.

I am faced with a similar situation in this much more complex venue of the sale of a corporate enterprise. The Petitioners are stockholders in a corporation, CKx, who have opted for appraisal rather than the cash-out price received in the sale of CKx to an acquirer. The sales process here has been challenged, reviewed and found free of fiduciary and process irregularities.[1] The company was sold after a full market canvas and auction. Under our appraisal statute, I am to determine the fair value of the shares as a going concern. The parties have submitted expert valuations of the company, ranging from an amount below the sales price (submitted by the Respondents) to more than twice the sales price (submitted by the Petitioners). Our statute and the interpreting case law direct that I not rely presumptively on the price achieved by exposing the company to the market. I must evaluate "all relevant factors," and arrive at a going-concern value inclusive of any assets not properly accounted for in the sale, but exclusive of synergy value that may have been captured by the seller.[2] In part, this directive represents the greater complexity in valuing, marketing and selling an ongoing corporate enterprise, in contrast to the simple sale of an asset, such as a parcel of real estate. Typically, therefore, this Court has relied on expert valuation, such as those employing discounted cash flow and comparable company analyses, to determine statutory fair value. Even so, market value—where reliably derived—remains

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[1] *See infra* note 53.

[2] I note that the statutory exclusion of synergy value from an appraisal valuation distinguishes "fair" value from the market value received in the real estate auction example above, where any synergies captured belong to the beneficiary.

among the "relevant factors" for arriving at fair value. In this particular case, CKx presents significant and atypical valuation challenges, for the reasons I describe below. In particular, the unpredictable nature of the income stream from the company's primary asset renders the apparent precision of the expert witnesses' cash flow valuation illusory. Because neither party has presented a reasonable alternative valuation method, and because I find the sales price here a reliable indicator of value, I find that a use of the merger price to determine fair value is appropriate in this matter.

## I. BACKGROUND

### *A. History of the Enterprise*

Prior to the CKx-Apollo merger, CKx was publically traded on NASDAQ.[3] CKx was formed by Robert F.X. Sillerman, a businessman with experience in managing and investing in media and entertainment companies, including radio, concert promotion, sports management, and television.[4] When CKx and Apollo merged, Sillerman was the company's largest stockholder, owning 20.6% of the company.[5] Sillerman created CKx to own and manage iconic entertainment properties. CKx's business strategy arose from the premise that the ever-increasing number of entertainment distribution channels—including computer,

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[3] Resp't's Op. Pre-Trial Br. at 5.
[4] Trial Tr. 11:17-12:19 (Bloom).
[5] JX 153 at 198.

smartphone, tablet, and television—would lead to an ever-increasing demand for original content. Sillerman and CKx management believed that technology would result in consumers focusing less on the distribution channel and more on the content they were interested in, thereby allowing content owners to reap increasing returns.[6]

In pursuit of this strategy, CKx focused on acquiring the rights to iconic entertainment properties. As of 2010, CKx's most significant assets were: (1) 19 Entertainment, which owned rights to the number-one-rated television show, the singing competition *American Idol*,[7] as well as the successful competitive dance show *So You Think You Can Dance* ("Dance"); (2) Elvis Presley Enterprises, which owned the rights to the name, image, and likeness of entertainer Elvis Presley, as well as some rights to Presley's recorded music catalog; and (3) Muhammad Ali Enterprises, which owned the name, likeness, and image of the boxing champion.[8] Though CKx also owned other assets, these three, and particularly *American Idol,* were by far the most valuable. In fact, *American Idol*

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[6] Trial Tr. 11:22-12:11 (Bloom). According to Bloom, the CKx name was shorthand for the company's viewpoint that "content is king." Trial Tr. 12:16 (Bloom).

[7] 19 Entertainment shared 50% of the television revenues from *American Idol* with another production company, FremantleMedia. Trial Tr. 206:3-7 (Reilly).

[8] *See* JX 116 at 4 (identifying 19 Entertainment, Elvis Presley Enterprises and Muhammad Ali Enterprises as primary sources of revenue in 5-year forecast).

and its related assets were responsible for approximately 60-75% of CKx's cash flow.[9]

*B. CKx's Business as of the Merger Date*

CKx's principle challenge was how to deal with the maturation of the *American Idol* franchise. From its peak in 2006 until the time of the merger in 2011, *American Idol* had suffered five seasons of declining ratings.[10] During that period, *American Idol*'s Nielsen ratings fell by almost 50% among the lucrative 18-49 demographic.[11] *American Idol* also faced increasing competition from other reality shows featuring musical competition. Particularly problematic in the summer of 2011 was the looming threat of the talent-competition show *X-Factor*.[12] *X-Factor* was the brainchild of former *American Idol* "judge" and prominent personality, Simon Cowell. Cowell's success with a show similar to *X-Factor* in the United Kingdom suggested that his show could pose a serious threat to *American Idol*.[13]

Compounding the economic uncertainty was the pending expiration of the contract between *American Idol*'s network distributor, Fox, and 19 Entertainment. At the time of the merger, the agreement between 19 Entertainment and Fox was

[9] Trial Tr. 730:7-17 (Cooling); *see also id.* at 442:5-11 (Benson).
[10] *See* Trial Tr. 463:22-24 (Benson); JX 002 at 67 (Cohen Report Ex. 4); JX 003 at ¶ 37.
[11] JX 003 at 18.
[12] Trial Tr. 461:2-462:12 (Benson); JX 003 at ¶ 28.
[13] Trial Tr. 452:1-18, 461:18-462:12 (Benson).

set to expire, and the parties had not yet agreed to a new contract.[14] The key area of disagreement was the amount of fixed licensing fees that Fox would pay for the right to broadcast the show.[15] Although *American Idol* was one of Fox's most popular, and most profitable, shows, CKx's negotiation leverage was limited.[16] Because Fox held a perpetual license to renew its exclusive contract to broadcast *American Idol*, CKx could not threaten to shop the show to an alternative network.[17] The Respondent contends that CKx's only practical leverage was that if Fox exercised its option to renew the *American Idol* contract, CKx could refuse to produce programming in excess of 37 hours for a given season.[18] *American Idol* had been producing over 50 hours of programming in the most recent seasons.[19] In other words, CKx could extract meaningful concessions from Fox only if it could convince Fox that CKx was willing to cut off its nose to spite its face. In addition to the uncertainties surrounding *American Idol*'s prospects for future growth, *Dance*—which had always been a much less popular show than *American Idol*—also faced declining ratings.[20]

However, notwithstanding the declining ratings for CKx's two most popular television programs, other developments in the television marketplace suggested

[14] Trial Tr. 44:10-13 (Bloom); *id.* at 467:20-23 (Benson).
[15] RX 037.
[16] Trial Tr. 545:5-21 (Benson).
[17] Trial Tr. 68:7-18 (Bloom); *id.* at 454:22-455:3 (Benson).
[18] JX 162 at 78:4.
[19] Fox Dep. 128:13-15.
[20] Trial Tr. 519:15-16 (Benson).

that both programs, especially *American Idol*, could continue to generate significant revenue for CKx. The network television industry has been experiencing declining ratings but increasing advertising revenue for many years.[21] Accordingly, for any particular program, an absolute ratings decline could be offset by an increase in a show's *relative* market share. At the time of the merger, *American Idol* remained the number one show on television. The Petitioners argue that as fewer and fewer shows attract the type of mass audience enjoyed by *American Idol*, the program's value could actually increase, notwithstanding its declining ratings. At least one member of CKx management held that view at the time of the merger.[22]

*C. Sales Process*

In 2007, CKx's prospects were bright enough that Sillerman himself sought to buy out the public shareholders at a price of $13.75 per share.[23] However, his bid failed as "the recent deterioration of credit conditions in the overall market had made it uneconomic to execute the financing."[24] Perhaps because the collapse of the Sillerman buyout was caused by factors outside the parties' control, CKx

[21] Apollo, the eventual acquirer of CKx, in its investment thesis analyzing the value of CKx, described the secular trends in television viewing habits as *favorable* to CKx. "Both traditional and emerging distributors are racing to differentiate themselves by acquiring or licensing more content . . . making distribution more ubiquitous and content more valuable." PX 137 at 11.
[22] Fox Dep. 64:18-22 ("[D]espite the fact that ratings for top-rated television shows were going down, the value of that content was still going up and [we believed] that we would still extract a higher license fee going forward, despite their decline in ratings.").
[23] JX 153 at 25.
[24] *Id.*

management and the market at large believed that a sale of the company was imminent. As a result, CKx executed eight confidentiality agreements with both strategic and private equity bidders asserting some interest in the company.

The Petitioners contend that between 2008 and 2011, the possible sale of CKx disrupted the company's acquisition strategy.[25] Despite the confidentiality agreements, no proposals had arisen out of Sillerman's bid, which in itself had unproductively lengthened the sales process by sixteen months.[26] As a result, the Board "concluded that ongoing sale discussions were likely to be unproductive and disruptive . . . ."[27] CKx CFO Tom Benson's testimony confirmed that management viewed the process as "unproductive" and "disruptive" as well, testifying that he had discussed with director Bryan Bloom the fact that prospective acquisition targets had been reluctant to sell to CKx because of "the questions regarding the future ownership of the company."[28] After concluding that a possible sale was harming its business, CKx made a public announcement in October 2010 that "it was no longer discussing a potential sale of the Company or of a controlling stake in the Company."[29] By taking down the figurative "for sale" sign and refocusing on its strategy of acquiring and developing valuable

[25] Trial Tr. 35:9-36:4 (Bloom).
[26] JX 153 at 31.
[27] *Id.*
[28] Trial Tr. 623:4-6 (Benson).
[29] JX 053 at 1.

entertainment content, CKx hoped to overcome its recent inability to make valuable acquisitions.

In May of 2011, just one month before consummating the merger with Apollo, CKx began exploring a purchase of Sharp Entertainment, a television production company that focused on reality and event-based programming and was expected to generate about $11 million in operating income in 2011, roughly double its 2010 earnings.[30] Sharp had produced several popular reality shows, including the Travel Channel's *Man v. Food*, the highest rated program in channel history.[31] Sharp employed 160 people, most of whom were responsible for producing and editing the more than thirty television shows in the company's portfolio. Benson testified that CKx was involved in "advanced discussions over price and terms" before the Apollo transaction closed.[32]

The Sharp acquisition was not the only business opportunity that CKx developed after announcing its intentions to forgo a sale of the company. CKx's announcement that it was no longer for sale had the ironic—but perhaps not unintended—consequence of eliciting renewed interest from private equity funds looking to purchase CKx. Among the newly interested bidders were Apollo, the

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[30] JX 123.
[31] *Id.* at 8. *Man v. Food* features a large, bushy-haired man traveling diner-to-diner, attempting to eat enormous amounts of fried foods.
[32] Trial Tr. 486:11-12 (Benson).

Gores Group ("Gores"), and Prometheus/Guggenheim ("Guggenheim").[33] On March 18, 2011, Gores and financial sponsor "Party B" offered to purchase CKx for $4.75 per share.[34] On March 21, 2011, Guggenheim and financial sponsor "Party C" proposed an offer price of $4.50 per share.[35] Then, on March 23, 2011, Apollo offered $5.00 per share.[36] After receiving these offers, the Board considered its options and decided to again pursue a sale of the company, but to do so expeditiously in an attempt to avoid sending negative signals to the market or to distract CKx management.[37] The Board retained Gleacher as its financial advisor, since Gleacher had assisted the company during Sillerman's attempted buyout in 2007.[38] Gleacher would receive a success fee of $4 million on the successful completion of a transaction.[39]

The Board directed Gleacher to run an auction among the interested buyers as well as solicit interest from third parties.[40] Interested bidders would be given three weeks to conduct due diligence and negotiate a transaction.[41] The three parties who had already submitted bids were told that they were required to submit

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[33] Trial Tr. 492:2-15 (Benson); JX 153 at 31-43.
[34] JX 153 at 31-33.
[35] *Id.* at 33.
[36] *Id.*
[37] Trial Tr. 47:11-21 (Bloom).
[38] Trial Tr. 48:4-8 (Bloom).
[39] Trial Tr. 734:19-735:4 (Cooling).
[40] JX 153 at 33.
[41] *Id.* at 35.

their final, fully-funded and committed offers by May 6, 2013.[42] On April 18, 2013, Gleacher reached out to other potential bidders,[43] including three prospective financial buyers and nine strategic acquirers.[44] As a result, two financial buyers (and no strategic buyers) expressed interest by signing confidentiality agreements.[45]

On April 27, 2013, the Board met to discuss the status of the negotiations with the various bidders.[46] Gleacher informed the Board that Apollo and Party B were the only bidders that had conducted any due diligence, and that the two prospective financial bidders who had signed confidentiality agreements were no longer interested in conducting due diligence or pursuing an acquisition of CKx.[47] Gleacher also informed the Board that neither of the two remaining interested bidders had raised their offer price above the initial non-binding bids.[48] To incentivize Gleacher to solicit bids exceeding $5.50 per share, the CKx Board modified the terms of Gleacher's engagement letter so as to provide for additional compensation if the merger price were to exceed $5.50 per share.[49] In addition,

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[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] JX 153 at 35.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*

Sillerman spoke with both Apollo and Party B to express his support of each party's proposed transaction.[50]

Ultimately, Apollo submitted a bid to purchase CKx for $5.50 per share, and Party B submitted a bid for $5.60 per share.[51] Despite the marginally lower price, the Board ultimately selected the Apollo bid because Party B's financing was uncertain,[52] and because the Apollo bid granted CKx the right to seek specific performance in certain instances, while the Party B bid lacked any such right.[53] Gleacher opined that the Apollo transaction represented a fair price to CKx stockholders, and the CKx Board accepted Apollo's bid.[54] Bryan Bloom was the only director who dissented.[55] Although class action litigation was brought challenging the Apollo transaction, it was ultimately settled in exchange for some additional disclosures and a slight modification to the termination fee.[56]

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[50] JX 153 at 37.
[51] *Id.*
[52] *Id.* In addition to not having binding funding commitments, Party B also refused to provide documentation which would have allowed CKx to verify its representations. *Id.* at 41. Other conversations between CKx's counsel and Party B suggested that there were legal obstacles to a potential deal with Party B, because "the equity commitment required to fund the transaction [with CKx] exceeded the allowable investment basket provided for in the fund's documentation." *Id.*
[53] JX 153 at 41.
[54] *Id.* at 43.
[55] *Id.*
[56] *In re CKx, Inc. S'holders' Litig.*, C.A. No. 5545-CS, at ¶ 1 (Dec. 22, 2011) (Stip. of Settlement & Release). The Court approved the settlement on April 11, 2012, determining that the settlement was "fair, reasonable and adequate to the Settlement Class, and in the best interest of the Settlement Class, under Rule 23 of the Delaware Court of Chancery Rules." *In re CKx, Inc. S'holders' Litig.*, C.A. No. 5545-CS, at ¶ 6 (April 11, 2012) (ORDER). At the settlement hearing, plaintiffs' counsel agreed that CKx had been "shopped more than adequately," and

*D. Management Projections*

It was in connection with expressions of interest from potential acquirers that CKx management created its five-year projections (the "Management Projections").[57] Tom Benson, the CFO and one of the original founders of CKx, instructed Scott Frosch, CKx's Vice President for Finance, to make certain assumptions in preparing the Management Projections, including an assumption that revenues under the to-be-negotiated *American Idol* contract would increase by approximately $20 million each year.[58] The parties now contest whether this estimate of future revenues from Fox was a genuine prediction or a marketing ploy designed to produce a high bid from potential acquirers.

Benson himself described his thought process when he asked Frosch to include the additional $20 million in payments from Fox:

> Q. Why did you ask Mr. Frosch to build in another $20 million?
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> A. Again, at that time we were in conversations with Fox. We had no actual agreement. We were making an assumption about what might happen when that deal ultimately was consummated. And I

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further stated that "[t]here was a competitive process, and that's why we are satisfied in releasing the Revlon claim." *Id.* at 7-8; 9; *see also id.* at 12-13 ("[W]ith the discovery that we developed, we saw that there was no ability for the Plaintiffs to prevail in a Revlon claim, and that's why we felt—we took comfort in being able to release those claims."). As a result, the benefit of the settlement arose primarily from disclosures, including corrections to disclosed EBITDA projections, and rescinded deal protection measures, including lowering the termination fee from 4% to 3.5%. *Id.* at 7-8.

[57] Trial Tr. 502:16-21 (Benson) ("But being on and off in a sales process, being approached by potential bidders, we created a five-year long-term model that we used and ultimately provided to prospective bidders to help them understand what might happen with the company over the coming years.").

[58] Trial Tr. 270:20-22.

> thought, for purposes of evaluating the company's value in a sale scenario or providing projections to a prospective buyer, that we ought to take a more optimistic view.
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> Obviously there were a number of potential outcomes from that conversation. But if we were going to evaluate the value of the company versus a potential sale of the company, we ought to look at a better case scenario—best case scenario for the performance of the company on its own and match that up with what buyers might be interested in paying for the assets.[59]

Benson further testified that he was *not* making a prediction as to the most likely outcome of the Fox negotiations, but instead was projecting the "more optimistic or most optimistic" possible outcome, to give CKx the best possible negotiating position with potential buyers.[60] In deposition, Frosh indicated that he had a similar mindset, stating that "[i]t would be fair to say that this document was prepared for an outside seller with probably an optimistic view of what we thought the company was going to do for the next couple years."[61] Michael Ferrel, CKx's CEO, also testified in deposition that a $20 million increase in payments from Fox constituted "the very outside best scenario" that could result from the negotiations.[62] Notwithstanding the fact that this estimate was considered the best

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[59] Trial Tr. 505:13-506:6 (Benson).
[60] Trial Tr. 506:17-23 (Benson).
[61] Frosch Dep. Tr. 131:10-13.
[62] Ferrel Dep. Tr. 102:25-103:15.

possible outcome of the Fox negotiations, management believed such a result was "potentially achievable."[63]

The Petitioners do not, for the most part, dispute the characterization of the Management Projections as "optimistic." Rather, they simply argue that the fact that these projections were optimistic is entirely consistent with the fact that they were also management's *best* estimate of CKx's future financial performance.

They point to Ferrel's testimony that the Management Projections were the "best estimate at the time of what a forward five-year projection would look like,"[64] and that management relied on that forecast in the ordinary course of business.[65] Furthermore, Benson did not deny Ferrel's characterization of the Management Projections as the company's "best estimate," testifying that management "had a great deal of discussion around those projections and thought that that was a reasonable estimate of what the incremental revenue might be."[66] Also, in addition to being provided to potential buyers, the Management

[63] Trial Tr. 517:13-21 (Benson) ("Q. And how would you characterize both of those assumptions? Were they optimistic, level or pessimistic?

A. Based on the feedback we received from Fox at that time in the negotiation, they were on the optimistic side. We thought they potentially were achievable. We thought they were certainly optimistic, in light of what Fox was signaling was their intentions in the renegotiation.").

[64] Ferrel Dep. 98:16-20.

[65] Ferrel Dep. 100:19-101:18.

[66] Trial Tr. 589:16-19 (Benson).

Projections were used in presentations to the company's lenders for the purposes of assessing the credit risk of CKx.[67]

The Petitioners also contend that the Respondent inaccurately characterized the nature of the Fox negotiations, and that the negotiation dynamics between Fox and CKx in fact supported a prediction that CKx could obtain increased economic benefits from Fox. In August of 2010, well before CKx began the auction that ultimately resulted in the sale of the company to Apollo, Benson sent an email to Frosch outlining the many factors "support[ing] the fact that it is in Fox's self-interest to pay substantially more for the show in the upcoming re-negotiation in order to get [CKx] to agree to not reduce the number of hours we produce each year."[68] Most importantly, Benson noted that industry estimates put Fox's total *American Idol* revenues at $800-$900 million dollars per season, commanding 2.6 times as much per half-hour of advertizing sales as the next highest rated prime time broadcast show, *Two and a Half Men*.[69] Benson also pointed to additional benefits that American Idol generated for Fox:

> 1) The huge lead in audience for the time slots following Idol which Fox has used to launch key new shows including House and Glee and to generate additional viewers for the 10 pm news telecasts. . . .

[67] Ferrel Dep. 95:1-96:9.
[68] JX 41 at 1.
[69] *Id.*

2) Increased value of promotional slots within the Idol telecast which Fox uses to generate more viewers across their entire network schedule.
3) Ability to package [American Idol] with other inventory to maximize ad rates across their entire schedule.
4) Incremental payments for product placement within the show from the likes of Coke, Ford and AT&T which aren't otherwise captured in the above numbers.
5) Halo effect of being the #1 network in overall viewers in the 18-49 category over the past few years which has been driven almost entirely from the performance of Idol.[70]

Benson concluded that "Fox is making unprecedented profits [from] the show."[71] Months later, in March 2011, Benson sent another email to Ferrel and Sillerman stating that "[i]nvestors also seem to be waking up to the importance of American Idol to Fox and the potential leverage we have provided we play hardball with them."[72]

Other members of CKx management also made bullish statements as to the potential outcome of the Fox negotiations. COO Kraig Fox testified at deposition that CKx's right to produce only 37 hours of *American Idol* programming when the Fox network had previously broadcast more than 50 hours in a single season gave CKx substantial bargaining power, despite Fox's exclusive broadcast rights.[73] Fox also testified that management was convinced that the increasing value of content would lead to increased licensing revenues, notwithstanding some declines in

[70] *Id.*
[71] *Id.*
[72] JX 71 at 1.
[73] Fox Dep. 86:9-21.

absolute ratings numbers.[74] Furthermore, there were a variety of different ways in which a new Fox contract could result in increasing payments to CKx besides a simple increase in the fixed license fee, including additional reimbursements from Fox for payments made by CKx to key *American Idol* talent—namely, host Ryan Seacrest and executive producer Nigel Lythgoe—as well as additional rights to profits from internet sales of *American Idol* content.[75] And then, as it turned out, the 2010 season of *American Idol* was incredibly successful, boasting *increased* ratings notwithstanding the departure of iconic judge Simon Cowell.[76] The fact that *American Idol's* ratings had declined substantially under the previous Fox contract remained, however, as did Fox's strong negotiation position as holder of exclusive broadcast rights, and its stated intention to negotiate *reduced* licensing payments.[77]

[74] Fox Dep. 64:18-22.
[75] Trial Tr. 603:2-604:18 (Benson).
[76] Trial Tr. 39:22-40:12 (Bloom) ("Q. How did American Idol perform in the 2011 season? A. It performed exceedingly well. As—as it turned out over the course of January through the finale in May, the new judges were very—were accepted extremely well. It was a great new lift for the show. There was a return of Nigel Lythgoe, who had helped the show in years gone by, had actually been away from the show for awhile and then came back, and helped drive the talent. There was clearly an uptick in the quality of the talent on the show, that from the time of January through the finale in May, all that uncertainty as to whether Idol could survive those risks, all those risks had been taken out of the show.)
[77] Trial Tr. 517:13-21 (Benson).

*E. Expert Valuations*

The Petitioners' expert witness, Robert Reilly, utilized a variety of valuation methods—the discounted cash flow ("DCF") method, a "guideline" publicly traded company method, and a "guideline" merged and acquired company method[78]—in valuing CKx stock as of the merger date, and concluded that the fair value was $11.02 per share.[79] The Respondent's expert witness, Jeffrey Cohen, conducted a discounted cash flow ("DCF") analysis in which he concluded that the value of CKx was $4.41 per share.[80]

Though the gulf between the two estimates is wide, the disparate prices are the result of just a few different assumptions. First, and most significantly, Cohen and Reilly use different figures in their five-year cash flow projections. Cohen disregarded the forecasted $20 million increase in fixed licensing fees under the to-be-negotiated *American Idol* contract that was initially included in the Management Projections, instead assuming that the fees from Fox would grow at four percent per year for five years.[81] Reilly did not adjust the cash flows he used in his DCF analysis, and relied wholly on the revenues forecast in the Management

[78] JX 1 at ¶ 53.
[79] JX 1 at ¶¶ 5-7. This figure includes an additional $1.99 added to a $9.03 figure generated by the DCF analysis and the guideline analyses, in order to account for unexploited opportunities. Pet'r's Op. Post-Trial Br. at 40.
[80] JX 2 at ¶ 18.
[81] Trial Tr. 647:2-650:1 (Cohen).

Projections.[82] Second, Cohen and Reilly used different growth rates to calculate the terminal value in their DCF analyses. Reilly used a long-term nominal growth rate of 4%,[83] while Cohen used a long-term nominal growth rate of 0%.[84] Finally, Reilly and Cohen used different estimates for CKx's weighted-average cost of capital ("WACC"), principally as a result of using different betas and size premia.[85]

*F. Nature and Stage of the Proceedings*

I presided over a three-day trial in this matter from March 11, 2013 through March 13, 2013. The parties provided post-trial briefing, and I heard post-trial oral argument on August 14, 2013. This is my Post-Trial Opinion.

## II. ANALYSIS

*A. The Appraisal Statute*

The appraisal statute, 8 *Del. C.* § 262, provides stockholders who choose not to participate in certain merger transactions an opportunity to seek appraisal in this Court.[86] When a stockholder has so chosen, Section 262 provides that:

> [T]he Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest, if any, to be

[82] Trial Tr. 136:10-20 (Reilly).
[83] JX 1 at ¶ 117.
[84] JX 2 at ¶ 91; Trial Tr. 694:12-15 (Cohen).
[85] Trial Tr. 668:19-669:2 (Cohen).
[86] 8 *Del. C.* § 262. The Respondent has not argued that the Petitioners have failed to meet the procedural requirements of Section 262.

> paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors.[87]

The principal constraint on my analysis is that I must limit my valuation to the firm's value as a going concern[88] by excluding "the speculative elements of value that may arise from the accomplishment or expectation of the merger."[89]

Our Supreme Court has interpreted the language of Section 262(h)—which provides for consideration of all relevant factors—to preclude the use of "inflexible rules" or presumptions favoring any particular valuation method or analysis.[90] Rather, Section 262 "vests the Chancellor and Vice Chancellors with significant discretion" to consider the data and use the valuation methodologies they deem appropriate.[91] For example, this Court has the latitude to "select one of the parties' valuation models as its general framework, or fashion its own, to determine fair value in an appraisal proceeding."[92]

Both parties bear the burden of establishing fair value by a preponderance of the evidence.[93] In assessing the evidence presented at trial, I may consider "proof of value by any techniques or methods which are generally considered acceptable

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[87] 8 *Del. C.* § 262(h).
[88] *See Golden Telecom, Inc. v. Global GT LP*, 11 A.3d 214, 217 (Del. 2010) ("Importantly, this Court has defined 'fair value' as the value to a stockholder of the firm as a going concern, as opposed to the firm's value in the context of an acquisition or other transaction.").
[89] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983) (quotations omitted).
[90] *Golden Telecom, Inc*, 11 A.3d at 218.
[91] *Id.* at 217-18.
[92] *Cede & Co. v. Technicolor, Inc.*, 684 A.2d 289, 299 (Del. 1996).
[93] *M.G Bancorp., Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1999).

in the financial community and otherwise admissible in court."[94] "Among the techniques that Delaware courts have relied on to determine the fair value of shares are the DCF approach, the comparable transactions approach, and comparable companies analyses."[95] This Court has also relied on the merger price itself as evidence of fair value, "so long as the process leading to the transaction is a reliable indicator of value and merger-specific value is excluded."[96]

*B. "Guideline" Companies and Transactions*

First, I will not rely on either of Reilly's "guideline" analyses: the guideline publicly traded company ("GPTC") analysis, or the guideline merged and acquired company ("GMAC") analysis. "The true utility of a comparable company approach is dependent on the similarity between the company the court is valuing and the companies used for comparison."[97] Here, the evidence is abundantly clear that the "guideline" companies used by Reilly are not truly comparable to CKx. In fact, Reilly admitted at trial that he found no companies he could describe as "comparable" to CKx, which was why he labeled his analyses as consisting of "guideline" public companies and acquisitions.[98] Reilly's trial testimony confirmed important differences between the "guideline" companies and CKx:

[94] *Weinberger*, 457 A.2d at 713.
[95] *Merion Capital, L.P. v. 3M Cogent, Inc.*, 2013 WL 3793896, at *4 (Del. Ch. July 8, 2013).
[96] *Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.*, 847 A.2d 340, 357 (Del. Ch. 2004).
[97] *Doft & Co. v. Travelocity.com Inc.*, 2004 WL 1152338, at *8 (Del. Ch. May 21, 2004) (internal quotations omitted).
[98] Trial Tr. 222:19-21.

none of the guideline companies were of comparable size; none owned assets resembling the assets of CKx; and none competed with CKx or utilized a comparable business model.[99] Notwithstanding these weaknesses in Reilly's "guideline" valuation methodology, the GPTC and GMAC analyses constituted 40% of his estimate of CKx's value. Accordingly, I cannot rely on the conclusion reached in Reilly's report in determining the fair value of CKx.

*C. Discounted Cash Flow Analysis*

Second, the deficiencies of both DCF analyses lead me to conclude that they are unreliable measures of CKx's value. DCF, in theory, is not a difficult calculation to make—five-year cash flow projections combined with a terminal value are discounted to their present value to produce an overall enterprise value. However, without reliable five-year projections, any values generated by a DCF analysis are meaningless. The reliability of a DCF analysis therefore depends, critically, "on the reliability of the inputs to the model."[100] Under Delaware appraisal law, "[w]hen management projections are made in the ordinary course of business, they are generally deemed reliable."[101] But this Court has disregarded management projections where the company's use of such projections was unprecedented, where the projections were created in anticipation of litigation, or

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[99] Trial Tr. 225:10-12; 227:13-15; 228-229 (Reilly).
[100] *In re US Cellular Operating Co.*, 2005 WL 43994, at *10 (Del. Ch. Jan. 6, 2005).
[101] *Cede & Co. v. Technicolor, Inc.*, 2003 WL 23700218, at *7 (Del. Ch. Dec. 31, 2003).

where the projections were created for the purpose of obtaining benefits outside the company's ordinary course of business.[102]

Here, the evidence is overwhelming that the disputed portion of management projections—the $20 million increase in licensing fees from Fox—was not prepared in the ordinary course of business, and was otherwise unreliable. Management provided inconsistent testimony as to what, exactly, its basis was for making such a prediction in the first place. Though the record includes substantial evidence that management was bullish regarding the likely outcome of the Fox negotiations, Benson's own trial testimony indicates that he had low expectations that CKx could realize any additional value from the new Fox contract.[103] Indeed, Benson testified that Fox had indicated that it wanted its licensing costs to go down, not up.[104] The weight of the evidence adduced at trial supports a conclusion that the "optimistic" management projections were made not because they constituted management's estimate of the most likely outcome of contract negotiations, but because a high estimate of future licensing payments from Fox could generate value for CKx in the short-term in the form of lower interest rates and a potentially higher merger price. Accordingly, the use by Reilly of

[102] *Gearreald v. Just Care, Inc.*, 2012 WL 1569818, at *4 (Del. Ch. April 30, 2012).
[103] *See, e.g.*, Trial Tr. 545:10-21 (Benson).
[104] Trial Tr. 517:13-21 (Benson).

projections based on a $20 million increase in *Idol* revenue leads to a speculative DCF valuation.

On the other hand, as the Petitioners accurately point out, there were numerous ways in which the economic benefit to CKx under the contract could have improved. Benson testified that different options were on the table in the Fox negotiations, including variable fees that would be tied to the show's financial performance, or reimbursements to CKx for the costs of its contracts with Ryan Seacrest and Nigel Lythgoe.[105] Simply ignoring that fundamental uncertainy does not make it disappear. Accordingly, I cannot conclude that Cohen's prediction that CKx would receive marginal additional value from a new contract with Fox is any more reliable than management's prediction that the increased benefit would be $20 million per year.

For the same reasons that management was unable to confidently predict the outcome of negotiations for, and therefore the likely revenue generated by, the *American Idol* contract, I do not have any basis to determine whether cash flows under that contract would have increased by $20 million per year, $0 per year, or some figure in between. The result of the Fox contract negotiations would be a one-time, unpredictable, irreversible, and immitigable increase or decrease in the fixed licensing fee. Unlike normal projections, which also involve some level of

[105] Trial Tr. 603:2-604:18 (Benson).

uncertainty, here, management attempted to account for a single superseding event beyond the company's control involving idiosyncratic actors making decisions that would have a large effect on the company's future value. The evidence before me indicates that *management* believed that predicting the outcome of those negotiations would be little more than guesswork. The offhand, almost casual manner in which the fees were generated—Benson simply told Frosh to assume their existence—indicates that this was not a serious estimate.

I therefore find that I cannot employ a DCF analysis in this case for the same reason that the Court in *Doft & Co. v. Travelocity.com Inc.* declined to rely on a DCF analysis.[106] There, as here, management had prepared a set of uncertain and therefore unreliable financial projections.[107] In *Travelocity.com*, the uncertainty of management projections arose from the inherent unpredictability of the financial performance of a travel and booking company in the aftermath of the terrorist attacks on September 11, 2001.[108] The Court disregarded the DCF analyses in that case, one based on management projections, and the other on the projections of a valuation expert, because "the degree of speculation and uncertainty characterizing the future prospects of Travelocity and the industry in which it operates ma[de] a

[106] *Doft & Co. v. Travelocity.com Inc.*, 2004 WL 1152338, at *6-7 (Del. Ch. May 21, 2004).
[107] *Id.*
[108] *Id.* at *1.

DCF analysis of marginal utility as a valuation technique."[109] Here, I come to the same conclusion. The future revenue streams generated by *American Idol* when the merger took place were in a state of flux. Initial internal estimates of those revenues were markedly lower than projections provided to potential buyers and lenders.[110] It is apparent that a $20 million change in estimated future licensing fees would have a significant impact on per-share value.[111]

The unreliability of the revenue estimates, both including and excluding the $20 million estimate, is a serious impediment to creating a reliable DCF analysis. As noted above, "methods of valuation, including a discounted cash flow analysis, are only as good as the inputs to the model."[112] Because I have little confidence in the reliability of using *or* excluding the estimated $20 million increase in revenues under the to-be-negotiated *American Idol* contract, I conclude that a DCF analysis is not the appropriate method of valuation in this case. Without projections of cash

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[109] *Id.* at *7.

[110] *See* Frosch Dep. at 87:18-88:9 (explaining that internal projections were modified for buyers to include the $20 million estimate); Ferrel Dep. 95:1-96:9 (stating that the projections provided to lenders were not substantially different from the projections provided to potential buyers).

[111] The potential $20 million increase in licensing fees is substantial in light of the fact that, as set out in Mr. Reilly's export report, historical revenues between 2006 and 2010 ranged from roughly $328 million to $210 million, and historical net income throughout that period ranged from $26.4 million to negative $12.5 million. JX 1 at 52.

[112] *Neal v. Ala. By-Products Corp.*, 1990 WL 109243, at *9 (Del. Ch. Aug. 1, 1990), *aff'd*, 588 A.2d 255 (Del. 1991).

flows to discount, I cannot calculate the enterprise's fair value with a DCF analysis.[113]

*D. Merger Price*

In the absence of comparable companies or transactions to guide a comparable companies analysis or a comparable transactions analysis, and without reliable projections to discount in a DCF analysis, I rely on the merger price as the best and most reliable indication of CKx's value. This Court has previously recognized that "an arms-length merger price resulting from an effective market check is entitled to great weight in an appraisal."[114] Indeed, when this Court has evaluated claims that transactions between a corporation and its fiduciaries were not entirely fair, we have identified the paradigm of an arms-length negotiation or public auction as the standard against which an interested transaction should be compared.[115] In at least one case involving judicial appraisal under Section 262, the Court decided to place 100% weight on the merger price.[116]

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[113] If I were to apply a DCF analysis in this matter, by choosing between speculative revenue estimates—a choice that would result in a valuation fundamentally different compared with the other option—I would simply lend a faux-mathematic precision to a patently speculative enterprise: I would become, to use Twain's memorable locution, no better than a hair-ball oracle. Mark Twain, The Adventures of Huckleberry Finn 21-25 (1909).

[114] *Global GT LP v. Golden Telecom, Inc.*, 993 A.2d 497, 507 (Del. Ch. 2010), *aff'd*, 11 A.3d 214 (Del. 2010).

[115] *See Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 467 (Del. Ch. 2011) ("The range of fairness concept has most salience when the controller has established a process that simulates arm's-length bargaining, supported by appropriate procedural protections."); *Van de Walle v. Unimation, Inc.*, 1991 WL 29303, at *17 (Del. Ch. Mar. 7, 1991) ("The fact that a transaction price was forged in the crucible of objective market reality (as distinguished from the

The Petitioners argue that the Supreme Court's decision in *Golden Telecom*[117] and this Court's analysis of *Golden Telecom* in *Merion Capital v. 3M Cogent*[118] stand for the proposition that merger price is now irrelevant in an appraisal context and that I am required to accord it no weight when determining fair value.[119] However, I read those cases differently.

The appellants in *Golden Telecom* asked the Supreme Court to reform Delaware appraisal law by imposing a new presumption in favor of merger price as evidence of fair value.[120] The Supreme Court declined to take up that invitation, stating:

> Requiring the Court of Chancery to defer—conclusively or presumptively—to the merger price, even in the face of a pristine, unchallenged transactional process, would contravene the unambiguous language of the statute and the reasoned holdings of our precedent. . . . [W]hile it is difficult for the Chancellor and Vice Chancellors to assess wildly divergent expert opinions regarding value, inflexible rules governing appraisal provide little additional benefit in determining "fair value" because of the already high costs of appraisal actions. Appraisal is, by design, a flexible process. Therefore, we reject Golden's contention that the Vice Chancellor

unavoidably subjective thought process of a valuation expert) is viewed as strong evidence that the price is fair.").

116 *Union Illinois 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.*, 847 A.2d 340, 357 (Del. Ch. 2004).

117 *Golden Telecom, Inc. v. Global GT LP*, 11 A.3d 214 (Del. 2010).

118 *Merion Capital, L.P. v. 3M Cogent, Inc.*, 2013 WL 3833763 (Del. Ch. July 8, 2013).

119 Post-Trial Oral Arg. Tr. 144:17-145:3 ("Everyone . . . in this room [besides Respondent's counsel] interprets Golden Telecom, as now preventing the Court of Chancery from deferring, even presumptively, to the merger consideration in an appraisal proceeding. . . . So as a legal matter, the merger consideration is really off the table.").

120 *Golden Telecom, Inc. v. Global GT LP*, 11 A.3d 214, 216 (Del. 2010) ("Golden requests that this Court adopt a standard requiring conclusive or, in the alternative, presumptive deference to the merger price in an appraisal proceeding.").

> erred by insufficiently deferring to the merger price, and *we reject its call to establish a rule requiring the Court of Chancery to defer to the merger price in any appraisal proceeding.*[121]

The Supreme Court's holding is clear. The Court of Chancery has a statutory mandate to consider "all relevant factors" in conducting an appraisal proceeding, and, accordingly, the Supreme Court declined to impose a presumption systematically favoring one of those factors—merger price—over the others. The Petitioner's position here, that I should *ignore* the merger price in appraising CKx, is in my view directly at odds with the holding and rationale of *Golden Telecom*, which is that the Court of Chancery has an obligation to consider all relevant factors, and that no per se rule should presumptively or conclusively exclude any of those factors from consideration. In fact, the ruling in *Golden Telecom*—like the appraisal statute itself—is inclusive, rather than exclusive. It recognizes that differing circumstances may support reliance on one or another valuation method under the particular circumstances there presented, and provides a trial court with latitude to consider "all relevant factors" to determine fair value.

Further, *Merion Capital, L.P. v. 3M Cogent* is entirely consistent with the expansive holding of *Golden Telecom*. In *3M Cogent*, the Court declined to rely on merger price where a DCF analysis was available to reliably measure the

[121] *Golden Telecom, Inc.*, 11 A.3d at 218 (emphasis added).

company's value.[122] Furthermore, the deficiencies that made the merger price irrelevant in *3M Cogent* are not at issue here.[123] Here, the Respondent has consistently pointed to the merger price as supporting its valuation, even when it sought to prove an even lower value through Cohen's DCF analysis. Furthermore, as I will discuss shortly, I am allowing the parties additional time to develop further evidence of what portion, if any, of the merger price consists of excludable synergies, as opposed to going-concern value.

Having concluded that our law recognizes merger price as an acceptable factor that I may consider in conducting my appraisal of CKx, I also find that the evidence demonstrates in this case, where no comparable companies, comparable transactions, or reliable cash flow projections exist, that the merger price is the most reliable indicator of value.[124] The record and the trial testimony support a conclusion that the process by which CKx was marketed to potential buyers was thorough, effective, and free from any spectre of self-interest or disloyalty. This is

[122] *Merion Capital, L.P.*, 2013 WL 3833763, at *5.

[123] *Id.* at *12 ("Respondent did not seek to use the merger price of $10.50 per share, but instead relies on the Gordian Experts' analyses to arrive at a lower price of $10.12. Respondent and its experts also did not attempt to adjust the merger price to remove the speculative elements of value that may arise from the accomplishment or expectation of a merger.") (internal quotations omitted).

[124] The Respondents also suggest that in addition to merger price, CKx's stock trading price suggests that the fair value of the company is significantly lower than that advocated by the Petitioners. However, because there is some evidence that stock price may have undervalued the company due to the company's inability to make acquisitions while it was up for sale, and because it is not unlikely that the stock price failed to reflect material non-public information available to bidders who signed confidentiality agreements, I find that the merger price is a better indicator of fair value here.

not a case where a controlling stockholder froze out a minority stockholder.[125] Nor is this a case where the only evidence that a merger price was the result of "market" forces was a post-signing go-shop period (which failed to produce competing bids) relied on to demonstrate that the transaction represented market price, and thus fair value.[126]

Here, multiple entities made unsolicited, credible bids for CKx in March 2011. The Board immediately engaged in a conscientious process with the assistance of a reputable financial advisor, Gleacher, to maximize the price. The Board and its advisors successfully instigated a bidding war for CKx, and also canvassed the market for other potentially interested bidders. One aspect of the process that has been criticized by the Petitioner here is the haste with which the sales process advanced. However, there is no evidence in the record to suggest that any bidder was deterred by the expedited pace of the sale, and it was the *Petitioner's representative* on the CKx Board, Bryan Bloom, who was most insistent that the merger process be resolved quickly. As Bloom himself explained at trial, there was a sound business justification for that decision: the uncertainty

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[125] *See, e.g.*, *Golden Telecom, Inc. v. Global GT LP*, 11 A.3d 214 (Del. 2010) (rejecting merger price as a good indication of fair value where the target was purchased by an acquirer controlled by the target's two largest stockholders, who threatened to block any alternative transactions).

[126] *See, e.g.*, *In re Orchard Enterprises, Inc.*, 2012 WL 2923305, at *5 (Del. Ch. July 18, 2012) (declining to give weight to the merger price in an appraisal action where "the trial record did not focus extensively on the quality of marketing Orchard by Dimensional or the utility of the 'go shop' provision contained in the merger agreement, which could obviously have been affected by Dimensional's voting power and expressed interest to acquire all of Orchard for itself.").

that CKx faced from being publicly shopped impaired CKx's ability to acquire content. Of course, the issue in this case is fair value, not fiduciary duty. The relevant point is that market exposure comes with a downside, and there is no evidence to suggest that the timeline compromised the effectiveness of the process. None of the bidders contacted by Gleacher asked for more time, or otherwise indicated that they were deterred by the CKx Board's deadlines.[127] Accordingly, I find that the process that generated the merger price supports a conclusion that the merger price is a relevant factor in determining CKx's fair value. I come to the same conclusion that the Court did in *Union Illinois*: "[f]or 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."[128] My conclusion that merger price must be the primary factor in determining fair value is justified in light of the absence of any other reliable valuation analysis.

The Petitioners did engage an expert witness, Dr. Laura Robinson, an economist, who testified to the inadequacy of the merger process in obtaining a fair price for CKx. Although the Respondents filed motions to exclude her testimony, I need not address those motions, because I found the substance of her opinion unpersuasive, and I decline to rely on it.

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[127] Trial Tr. 724:10-11 (Cooling).
[128] *Union Illinois 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.*, 847 A.2d 340, 359 (Del. Ch. 2004).

Robinson opined that the CKx auction process was ineffective because it failed to conform to what is known in auction theory as a second-price, sealed bid auction, or a Vickrey auction, in honor of William Vickrey, an economist who won the Nobel prize in economics for his work in auction theory.[129] A Vickrey auction works by having each bidder submit one secret bid, with the highest bidder winning the right to acquire the asset at the price of the *second-highest* bidder.[130] The Vickrey auction is designed to deal with the problem that exists in conventional sealed-bid auctions, where bidders are reluctant to bid at their reserve prices, because if they win they will gain no surplus.[131] By giving winning bidders a slight discount, bidders will bid their reserve price and still know that they will reap some surplus. A Vickrey auction theoretically produces the same result, or nearly the same result, as a traditional English auction.[132]

Robinson argued that the process undertaken by the CKx Board here was not designed to elicit the highest possible bid, and therefore likely failed to deliver the best possible price for shareholders. She pointed to evidence that Ferrel communicated with the bidders during the auction process; that Sillerman communicated with bidders about price and the behavior of other bidders; and that

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[129] Trial Tr. 303:18-304:2 (Robinson).
[130] Trial Tr. 304:20-305:6 (Robinson).
[131] *Id.*
[132] David Lucking-Reiley, *Vickrey Auctions in Practice: From Nineteenth-Century Philately to Twenty-First-Century E-Commerce*, 14 J. Econ. Perspectives 183, 183 (2000).

Gleacher informed Apollo that Party B's final bid was not fully financed. Robinson summed up her criticism by saying, "[s]o there are a lot of parties telling a lot of other people what's going on and conveying information, which is not appropriate in a well-run auction process which is geared toward maximizing shareholder value."[133]

I disagree with the conclusions reached by Dr. Robinson. Nothing in our jurisprudence suggests that an auction process need conform to *any* theoretical standard, whether a pure English auction, a second-price sealed bid, or Vickrey auction, or any other auction format. Furthermore, all the evidence that Robinson points to as departures from the Vickrey auction can be explained if one views the CKx auction process as a traditional English auction, in which bidders raise their prices until only one bidder remains, obtaining the same theoretical result as the Vickrey auction.[134] Here, the evidence indicates that the bidders were in fact engaged in a process resembling the English ascending-bid auction, as the bidding started low, and progressed until Apollo submitted the winning bid.[135] In an English auction, bidders are naturally aware of each other's bids, yet it still produces a price equal to the second-highest bidder's reserve price (plus one bid

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[133] Trial Tr. 306:22-307:2 (Robinson).

[134] Lucking-Reiley, *supra* note 125, at 183.

[135] Although Apollo's bid was technically $0.10 per share less than the bid from Party B, that does not change the analysis of the auction process. The certainty of financing and favorable deal terms were legitimate factors for the Board to consider when choosing the winning bidder: the various bidders were competing along more dimensions than just price.

increment, to guarantee victory).[136] Furthermore, Robinson did not fully acknowledge the reality that, despite its theoretical usefulness, the Vickrey auction remains rare in practice, perhaps because it depends, crucially, on the integrity of the auctioneer to not cheat the high bidder.[137] In short, even if I were to accept Robinson's premise—which I do not—that I must look to auction theory to determine whether the sales process here produced the best possible bid, I find that the evidence suggests that it did.

*E. Going-Concern Value*

As nearly every Delaware appraisal case makes clear, the objective of an appraisal is to determine the *going-concern value* of the target company's equity. The evidence that has been admitted so far suggests that there are few, if any, synergies for Apollo in this transaction. Because there is limited evidence in the record concerning the existence and amount of synergies that Apollo sought to realize in its acquisition of CKx, I will allow the parties, if they so desire, the opportunity to provide additional evidence on this limited issue.

## III. CONCLUSION

In this appraisal action, I am charged with considering all relevant factors bearing on fair value. An arms-length sales price—exclusive of synergies—generated at auction is one such factor. Other relevant factors typically include

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[136] Lucking-Reiley, *supra* note 125, at 183.
[137] *Id.* at 188.

DCF analyses, comparable companies analyses and comparable transaction analyses. For the reasons explained above, the latter are either unreliable or unavailable here. Accordingly, I find the sales price to be the most relevant exemplar of valuation available. The parties should confer and advise on how they intend to supplement the record to account for portions of the sales price representing the synergy value of the transaction, if any.