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Delaware Chancery Court Deals Another Blow to Appraisal Arbitrage

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Seyfarth Synopsis: *The Delaware Chancery Court issued a decision Monday in a long-running appraisal dispute following Solera Holdings Inc.'s $6.5 billion sale to Vista Equity Partners LP in 2015 that rejected investors' bid to receive a higher price for their shares than agreed to in the merger. The opinion is the latest to endorse the deal price as a measure of fair value following a pair of Delaware Supreme Court rulings last year that "heavily endorsed the application of market efficiency principles in appraisal actions." The Court determined the fair value of petitioners' shares to be the adjusted deal price of $53.95 per share (after deducting synergies worth $1.90 from the bid of $55.85) because the company's "sales process delivered for Solera stockholders the value obtainable in a bona fide arm's-length transaction and provides the most reliable evidence of fair value." In doing so, the Court rejected petitioners' contention that the fair value of their shares is equal to their discounted cash flow analysis price of $84.65 per share and also rejected a much lower value advocated by Vista in post-trial briefing of the unaffected market price at $36.39 per share.*

Background

Solera, a company that provides software to the automobile insurance industry, was founded in 2005. The founder began to engage in informal discussions with private equity firms regarding a potential transaction in late 2014. On July 20, 2015, the Board discussed an indication of interest received from Thoma Bravo and formed a Special Committee to review the Company's strategic alternatives. Between July 30 and August 4, 2015, the financial advisor to the Committee contacted 11 private equity firms and 6 potential strategic bidders. In August 2015, three financial sponsors provided indications of interest.

On September 1, 2015, IHS Inc. submitted a bid of $55 to $58 per share and raised that bid two days later to $60 per share. That bid did not specify the mix of consideration and did not include any indication of financing commitments. Vista and Thoma Bravo, who had bid previously, submitted revised bids of $55 and $56, respectively. After substantial back and forth on bids with Vista and Thoma Bravo, the Special Committee set September 11, 2015 as the deadline for final bids from Vista and Thoma Bravo. Thoma Bravo offered $54 per share on September 11, 2015, which was rejected by the Special Committee, and, the next morning, Vista submitted an all-cash bid of $55.85 per share. The Special Committee accepted Vista's offer, and the merger closed on March 3, 2016. Shareholders filed petitions for appraisal that same month. A five-day trial took place in June 2017 followed by post-trial argument in December 2017.

Takeaways

1. Reaffirmation that the deal price will be deemed strong evidence of fair value where a robust sales process took place.

The Chancery Court focused on three main factors supporting that the sale process had the requisite objective indicia of reliability emphasized in *DFC* and *Dell*: (1) the opportunity many potential buyers had to bid; (2) the Special Committee's role

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in actively negotiating an arm's-length transaction; and (3) the evidence that the market for Solera's stock was efficient and well-functioning.

The Court found that the merger was the product of a two-month outreach to private equity firms, a six-week auction by a competent and effective Special Committee that solicited 11 private equity and seven strategic firms, and public announcements alerting potential buyers to the sale process. The Special Committee expressed a willingness to walk away from unsatisfactory bids and twice rejected such bids. No one ultimately was willing to pay more than the deal price of $55.85 through a three-month window-shop and a 28-day go-shop. Thus, Solera was not worth more than the deal price.

2. Merger synergies should be taken into account in the private equity context.

While Delaware courts have traditionally viewed synergies as mainly arising in the strategic-buyer context, the Court made a point of stating that "[s]ynergies do not only arise in the strategic-buyer context. It is recognized that synergies may exist when a financial sponsor is an acquirer." Here, Vista's portfolio included 40 software businesses, and Vista said synergies in the Solera deal included revenue, private company cost savings, and tax benefits. The Court found Vista's "evidence, which petitioners made no effort to rebut, convincing" and deducted $1.90 from the deal price.

3. Unaffected market price doesn't trump adjusted deal price in determining fair value where the price is not supported by the evidence.

The Court rejected respondent's argument—raised for the first time in supplemental post-trial briefing—that the unaffected stock price rather than the deal price was the best evidence of Solera's value as of the date of the merger. The Court noted that the argument, which advocated for a fair value determination about 35% below the deal price, "reflects a dramatic change of position" that the Court found "as facially incredible as petitioners' DCF model." Because the parties never litigated what Solera's true unaffected market price was, the Court found it was in no position to reliably make such a determination. The decision also effectively called into question the role of non-synergy cost savings in appraisal actions.

4. Petitioners cannot seek merger fees in addition to the deal price.

The Court rejected petitioners' request that the court add nearly $450 million to the deal price to account for transaction costs Vista incurred in connection with the merger. Petitioners offered no precedent or legal support for this request, which asked the Court to ignore precedent indicating that the "purpose of appraisal . . . is to make sure that [petitioners] receive fair compensation for their shares in the sense that it reflects what they deserve to receive based on what would fairly be given to them in an arm's length transaction."

Policy concerns also counseled against adding transaction fees to the deal price in determining fair value. The Court noted that if stockholders received payment for such fees, rational stockholders in even the most robust sale processes would seek appraisal to receive their share of the transaction costs plus interest that would be unavailable to them in any arm's length merger without an appraisal.

For a copy of the opinion, click here.

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