July 25, 2019

# Delaware Court of Chancery Bases Appraisal Value on Unaffected Market Price

Recently in *In re: Appraisal of Jarden Corporation* (found here), the Delaware Court of Chancery appraised the fair value of Jarden Corporation to be the unaffected market price of the company's shares, which was approximately 18% less than the merger price. Vice Chancellor Slights rejected the merger-price-less-synergies metric as an indicator of fair value due to flaws in the deal process and uncertainties in estimating synergies. Notably, this decision comes on the heels of the Delaware Supreme Court's decision in *Veriton Partners Master Fund Ltd.* v. *Aruba Networks, Inc.* (discussed here), which reversed the Court of Chancery's exclusive reliance on pre-announcement stock trading price in its fair value determination in favor of a valuation equal to deal price less synergies. Despite *Aruba* and other cases urging reliance upon the deal price in appraisal actions, *Jarden* indicates a willingness by the Court of Chancery to scrutinize closely the relevant sale process and illustrates that appraisal is heavily dependent on the particular facts of each case.

## Background

Jarden's Chairman began negotiations with Newell Rubbermaid, Inc. regarding a potential sale of Jarden in late 2015, although he initially did not have board approval to have these talks. Shortly after his first meeting with Newell, the Chairman briefed the board and received its support to pursue the deal, but did not receive board approval or guidance at key points in the sale process (*e.g.*, when entering into a confidentiality agreement and negotiating deal protections). Moreover, before ultimately approving the merger, the board did not engage in a market check. Shortly before finalizing the merger, the transaction leaked, causing an increase in both parties' stock price. This led the parties to renegotiate the exchange ratio (which prior to the leak was tied to the 10-day trailing VWAP as of the day of signing) to a fixed ratio. The final merger consideration paid to Jarden stockholders was a mix of cash and Newell stock valued at $59.21 per share.

Jarden and Newell stockholders approved the merger, but certain Jarden stockholders sought appraisal of their shares. During a four-day trial, the parties' experts presented very different fair value determinations. The petitioner stockholders' expert opined that the fair value of Jarden on the merger date was $71.35 per share based on a comparable companies analysis. The respondent's expert valued the company at $48.01 per share based on a discounted cash flow analysis.

## Analysis

In its decision, the court considered "all relevant factors" and determined that fair value was $48.31 per share (about 18.4% less than the merger consideration). In so finding, the court made the following key holdings regarding the reliability of the various fair value indicators:

### *Reliable Indicators of Fair Value*

- *Because there was an efficient market for Jarden stock, the court determined that the unaffected market price of Jarden before the leak of the transaction was the most reliable indicator of fair value for the company and afforded it "substantial weight" in its analysis.* The court cited several factors that indicated that Jarden stock traded in an efficient market including that Jarden traded on the New York Stock Exchange; was a member of the S&P 400 index; had high trading volume and a large market capitalization; had a 94% public float; had a bid-ask spread of only 0.02% (meaning there was a lack of arbitrage opportunities); was widely covered by market analysts; and had a stock price that historically reacted appropriately to material information. The court did not find persuasive petitioners' arguments that unaffected market price was unreliable because there was information asymmetry in the market, that a conglomerate or minority discount applied, or that the unaffected market price prior to the leak was stale by the time of closing.

- *The purchase price set by Jarden in a stock offering and buyback program provided reliable evidence of fair value, as it gave an assessment of value "uncluttered by transactional or forensic incentives."* In the weeks before the leak of the merger, Jarden initiated a $49.00 per share offering, and the board authorized a $50 million stock buyback, with a price cap of $49.00. In the buyback program, the company repurchased stock on two separate occasions at an average per share price of $45.96 and $48.05, respectively. While the court stated that this evidence was "by no means dispositive," it was persuasive evidence that Jarden's value was well below what the petitioner stockholders sought and aligned with the unaffected market price.

- *The court's own discounted cash flow model comported with the unaffected market price and other market evidence, thereby providing a useful check on its fair value determination.* After engaging in a lengthy discussion of the proper inputs and adjustments for a discounted cash flow analysis, which the court drew from both experts' analyses, the court's discounted cash flow analysis yielded a per share value for Jarden of $48.13, which it noted as being consistent with the $48.31 unaffected market price.

### *Unreliable Indicators of Fair Value*

- *Deal-price-less-synergies was not a reliable indicator of fair value due to flaws in the sale process and the difficulty of assessing available synergies.*

- *Flaws in the sale process*. Although the court acknowledged that there was "no need for a full-blown auction of Jarden" due to the company's size and complexity and that there were "signs of arms-length, provocative negotiating," it found troubling aspects of the sale process. For example, Jarden's Chairman "laid Jarden's cards on the table" before the board and its advisors formulated a plan and before negotiations began in earnest (which may have effectively set a cap on Newell's bid for Jarden), did not inform the board of his initial meeting with Newell, recommended engagement of the board's financial advisor without discussing his prior relationships with the advisor, and did not have board authority for key aspects of the negotiations, including his initial price suggestions, counteroffers and his change-in-control compensation. The court reasoned that these flaws, coupled with the absence of any market check, raised legitimate questions regarding the usefulness of the merger price as an indicator of fair value.

- *Difficulty in assessing synergies*. Uncertainties regarding the existence or size of any anticipated synergies—arising, in part, from statements made by Newell's CEO contemporaneously with the merger suggesting that synergies were not accounted for in the deal price—further contributed to the court's conclusion that deal price less synergies was not a reliable indicator of fair value.

- *Comparable companies analyses performed by the parties' experts did not produce reliable evidence of fair value due to the inability to select a valid peer set*. The court found that Jarden had no comparable peer companies, and because the "most important" element of a proper comparable companies analysis is selection of a proper peer group, it gave no weight to the experts' comparable companies analyses in its fair value determination.

## Takeaways

*Jarden* demonstrates a continued willingness of the Court of Chancery to consider and rely upon all applicable evidence in appraisal actions, despite recent opinions, including *Aruba*, favoring a deal-price-less-synergies metric as the most reliable indicator of fair value. Importantly, this continues a line of recent decisions that have set appraisal value at or below the deal price based on different valuation methodologies, highlighting continued risk to appraisal petitioners.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:


Matthew W. Abbott
+1-212-373-3402
Email

Scott A. Barshay
+1-212-373-3040
Email

Lewis R. Clayton
+1-212-373-3215
Email

Ariel J. Deckelbaum
+1-212-373-3546
Email

Ross A. Fieldston
+1-212-373-3075
Email

Andrew G. Gordon
+1-212-373-3543
Email

Jaren Janghorbani
+1-212-373-3211
Email

Jeffrey D. Marell
+1-212-373-3105
Email

Robert B. Schumer
+1-212-373-3097
Email

Taurie M. Zeitzer
+1-212-373-3353
Email


*Counsel Daniel A. Mason and Frances F. Mi and legal consultant Cara G. Fay contributed to this client memorandum.*

## Our M&A Group

The Paul, Weiss M&A Group consists of more than 35 partners and over 125 counsel and associates based in New York, Washington, Wilmington, London, Toronto, Tokyo, Hong Kong and Beijing. The firm's Corporate Department consists of more than 60 partners and over 300 counsel and associates.

**Our M&A Partners**

| | | | |
|---|---|---|---|
| Matthew W. Abbott | Adam M. Givertz | Judie Ng Shortell | Tarun M. Stewart |
| Edward T. Ackerman | Neil Goldman | Kelley D. Parker | Michael Vogel |
| Scott A. Barshay | Bruce A. Gutenplan | Carl L. Reisner | Ramy J. Wahbeh |
| Angelo Bonvino | David K. Lakhdhir | Justin Rosenberg | Steven J. Williams |
| Jeanette K. Chan | John E. Lange | Kenneth M. Schneider | Betty Yap |
| Ellen N. Ching | Brian C. Lavin | Robert B. Schumer | Kaye N. Yoshino |
| Ariel J. Deckelbaum | Xiaoyu Greg Liu | John M. Scott | Tong Yu |
| Ross A. Fieldston | Jeffrey D. Marell | Brian Scrivani | Taurie M. Zeitzer |
| Brian P. Finnegan | Alvaro Membrillera | Sarah Stasny | |