Securities Regulation Daily Wrap Up, TOP STORY—Del. Ch.: Deal price is right, court says in Columbia Pipeline appraisal, (Aug. 12, 2019)

Securities Regulation Daily Wrap Up

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By Anne Sherry, J.D.

The decision hews to a trio of recent Delaware Supreme Court cases emphasizing the importance of deal price in appraisal proceedings.

Hoping that the third time's a charm, a Delaware vice chancellor has ruled that the deal price was the best evidence of the fair value of Columbia Pipeline Group just before its 2016 acquisition by TransCanada Corporation. Two of the vice chancellor's appraisal decisions were reversed in the last few years by the Delaware Supreme Court, which stressed that the merger price should carry considerably weight in valuations (*In re Appraisal of Columbia Pipeline Group, Inc.*, August 12, 2019, Laster, J.).

The weighty opinion goes to some lengths to shore up its analysis to withstand an appeal to the Delaware Supreme Court. Recently, the high court has reversed three appraisal decisions of the trial court, returning to the refrain that deal price should factor strongly into a valuation analysis without rising to the level of a presumption. Two of those trial court decisions (*Dell* and *Aruba*) were authored by Vice Chancellor Laster, who also conducted the instant appraisal, and a hint of salt can be found in his mentions of the reversals (See, e.g., *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.* ("In this case, I regard the petitioners' evidence of market mispricing as considerably weaker than what I abused my discretion by crediting in *Dell*")).

Columbia became a public company in 2015 when it was spun off from NiSource Inc. The company anticipated that it would become an acquisition target after the spinoff, and it had several interested suitors by late 2015, but it called them off to conduct an equity offering at $17.50 per share. Columbia then resumed its sale efforts. Ultimately, the board unanimously approved a merger agreement between Columbia and TransCanada in March 2016. That June, nearly three-fourths of the outstanding shares voted in favor of the merger, which was an all-cash deal at $25.50 per share.

In upholding the deal price, the chancery court cites heavily from the Supreme Court's appraisal trilogy, comparing the facts in the Columbia transaction with the facts and factors set forth in those opinions. The three key cases are:

- *DFC Global Corporation v. Muirfield Value Partners, L.P.* (2017) (chancery gave deal price only one-third weight')'
- *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.* (2017) (chancery gave deal price no weight')'
- *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.* (2019) (chancery found unaffected trading price, rather than deal price, to be a more reliable measure of value')'

Fairness of sale process. First, the court examined the Supreme Court's findings that "objective indicia" of the fairness of the deal price outweighed shortcomings in the sale processes. This factor favored the deal price because: (1) the merger was an arm's-length transaction with a third party; (2) the board was not conflicted; (3) TransCanada conducted due diligence and obtained confidential insights about the company's value; (4) other potential buyers were free to pursue a merger, but did not do so; (5) Columbia extracted multiple price increases in negotiations with TransCanada; and (6) no bidders emerged during the post-signing phase. Deal protections, which included a 3 percent termination fee, a no-shop provision, and a fiduciary out, fell within the norm, so the absence of a topping bid was significant.

The court next seriously considered, but ultimately rejected, the petitioners' attacks on the sale process. Claims that Columbia's CEO and CFO were conflicted had some merit, but the conflicts were less than those present in *Dell*, which the Supreme Court held did not undermine the sales process. Furthermore, while Columbia did eventually begin to favor TransCanada over other buyers, that was because a deal with TransCanada offered higher and more certain value.

There was also no evidence that TransUnion's breach of its standstill agreement hindered other buyers; no buyers came forward when Columbia waived standstills. Similarly, the court was unpersuaded by the petitioners' arguments that the CEO and CFO mislead the board or otherwise ran the sale process without supervision. These assertions were largely unsupported, and although the petitioners did identify a flaw in the process (a meeting and disclosures that were not authorized by, or reported to, the board), they failed to show that this flaw led to a price below fair value.

Another flaw that the petitioners identified was a materially misleading proxy. The court found that the proxy created the false impression that three parties were not bound by standstills during the pre-signing period; failed to mention the CEO's and CFO's plans to retire in 2016; and failed to mention a meeting where TransCanada was informed it did not face competition. Due to these deficiencies, the court did not give any weight to the fact that a majority of the outstanding shares approved the merger.

The court concluded, however, that the deal protections did not undermine the sales process according to the Supreme Court precedents because they would pass muster under enhanced-scrutiny review in a breach of fiduciary duty case. *Aruba* involved a similar array of deal protections, and the Supreme Court found that potential buyers had an open chance to bid.

Finally, the sale process, while not perfect, on a whole was at least on par with the facts in *DFC*, *Dell*, and *Aruba*. The Vice Chancellor said, however, that he does not read those cases as establishing minimum requirements in order for deal price to be afforded weight: "The decisions did not address when a sale process would be sufficiently bad that a trial court could give the deal price no weight. The decisions also did not address when a sale process that was not as good would still be good enough for a trial court to give the deal price weight. Technically, the holdings did not delineate when a sale process was sufficiently good that the trial court should give it heavy if not dispositive weight."

Other factors. Turning to other considerations in the valuation analysis, the court declined to adjust the deal price downward for synergies, finding that TransCanada failed to meet its burden of proving its assertion that the deal price included synergies worth $4.64 per share. Conversely, the petitioners failed to satisfy their burden of proving that Columbia's value increased between signing and closing. Furthermore, their arguments for an upward adjustment were unpersuasive as they relied on facts—a recovered market for equity in Columbia's subsidiary and improved commodity prices—for which they did not provide persuasive evidence.

Perhaps learning a lesson from *Aruba*, the court did not factor in trading price because on the facts of the case, deal-price-less-synergies is the most reliable valuation approach, and the analysis of the trading price is comparatively unimportant. The court posited that in some cases parties could anchor deal negotiations off the trading price, but said this is not one of those cases.

Finally, the court took issue with the discounted cash flow methodology presented by the petitioners' expert and noted that *Dell* and *DFC* caution against using discounted cash flow when market indicators are available. Here, Columbia was publicly traded, was widely held, and sold in a process beginning with pre-signing outreach and ending with a post-signing market check. At 27 percent higher than the deal price and 64 percent higher than the unaffected trading price, the discounted cash flow valuation conflicted with contemporaneous market evidence. It was also contradicted by the absence of a topping bid.

The case is No. 12736-VCL.

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Companies: Columbia Pipeline Group, Inc.; TransCanada Corporation; Columbia Pipeline Partners, L.P

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