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Delaware Court of Chancery Confirms Importance of Merger Price in Appraisal Proceedings

The Delaware Court of Chancery today issued its post-trial decision in the appraisal of Ancestry.com, rejecting claims brought by hedge funds seeking an award substantially in excess of the merger price. *In re Appraisal of Ancestry.com, Inc.*, C.A. No. 8173-VCG (Del. Ch. Jan. 30, 2015). The decision confirms that the merger price resulting from a comprehensive, arm's-length sales process will be accorded substantial weight in Delaware appraisal proceedings.

In recent years, transaction parties have faced an increased level of post-merger appraisal litigation. Much of this litigation has been brought by hedge funds pursuing an investment strategy known as appraisal arbitrage, where the funds take significant share positions following the announcement of a merger solely for the purpose of bringing an appraisal action. The appraisal here followed this pattern. Appraisal arbitrage funds took substantial positions in Ancestry following the announcement of Ancestry's proposed acquisition by Permira, and brought appraisal proceedings immediately after completion of the transaction. At trial, petitioners presented an expert's discounted cash flow analysis purporting to show that the value of the company was more than $42 per share, well in excess of the $32 per share merger price.

The Court rejected the opinion of petitioners' expert and found that the merger price was the best indication of Ancestry's fair value. The Court noted that Ancestry had conducted a "robust" auction, involving contacts with over a dozen parties, that had produced a "motivated buyer." The Court concluded that this robust sales process was "unlikely to have left significant stockholder value unaccounted for." The Court did conduct its own discounted cash flow analysis, which resulted in a value slightly below the merger price, but ultimately concluded that fair value was "best represented by the market price." The Court's opinion reflects the understanding that a price set by the market reflects assessments about value by buyers with real money at stake. As the Court explained, "it would be hubristic indeed to advance my estimate of value over that of an entity for which investment represents a real—not merely an academic—risk, by insisting that such entity paid too much."

The recent arbitrage-fuelled surge in appraisal litigation is likely to continue. But the Court's decision in *Ancestry* confirms that the market still matters in appraisal proceedings, sometimes conclusively, and that appraisal arbitrage is not without risk. Appraisal arbitrageurs must tie up substantial capital for long periods and incur substantial litigation costs, but can still end up with nothing more than the deal price.

Stephen R. DiPrima
William Savitt
Adam M. Gogolak
Steven Winter