EFiled: Feb 15 2016 10:27PM EST
Transaction ID 58577123
Case No. 9322-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: APPRAISAL OF DELL INC.	)))	Consol. C.A. No. 9322-VCL

RESPONDENT DELL INC.'S POST-TRIAL ANSWERING BRIEF

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Dated: February 15, 2016

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PRELIMINARY STATEMENT

Petitioners ask much from the Court in this appraisal proceeding. They ask that it believe that the market mispriced for years one of the largest and most widely followed companies in the world. They ask that it believe that a robust transaction process which they do not challenge, and which included both pre- and post-market checks, was insufficient to ascertain any purported market inefficiencies. They ask that it believe that sophisticated parties who reviewed the transaction simply walked away from more than $26 billion in value above the merger price. And, they ask that it ignore the evidentiary record, controlling legal authority, and common sense and award them more than 100% over the merger price based on projections their expert will not endorse, assumptions they cannot justify, and liabilities that they did not consider.

Petitioners plow no new ground in their Answering Brief. They still cling to the economically irrational position that there was a massive disconnect between the merger price and Dell's fair value. They still disregard precedent holding that the merger price is a relevant, reliable and strong indicator of fair value where there has been a proper transaction process providing for a real world market check.

Petitioners instead ask the Court to create a new rule for MBO transactions. They purport to justify this extraordinary request by imagining scenarios where information asymmetries, time constraints and other theoretical concerns identified by Professor Subramanian might create daylight between the merger price and the company's fair value. They never complete the circle, however, between their theory and the actual evidence in this case. They simply ask the Court to assume that a valuation gap existed between the merger price and Dell's fair value because the transaction was structured as a MBO.

Petitioners' labored attack on Professor Hubbard's valuation fares no better. On those limited issues on which they engage, Petitioners stretch the evidence to press their desired position. They present as fact their conclusion that Dell did not require *any* operating cash, even as contemporaneous documents and unrebutted trial testimony establish otherwise. They criticize Hubbard for using the marginal tax rate in the terminal period even as they acknowledge that the near-term rates they prefer are based on deferral, rather than avoidance, strategies. And, in doing so, Petitioners ascribe value to Dell's foreign earnings and profits while refusing to offset them to account for the taxes necessary to return that value to stockholders. Petitioners even ignore Dell's $3.01 billion FIN 48 reserve even though it was reflected on Dell's audited financial statements.

Petitioners also do little to satisfy their own burden of proving fair value. Although they continue to tout Professor Cornell's $28.61 per share valuation, they all but abandon defense of that valuation in their Answering Brief. They no longer defend, or even mention, his addition of $1 billion in extra EBITDA each year in perpetuity in his modified Bank Case model. They do not harmonize his BCG model projections with changes occurring in the competitive landscape. They never mention his idiosyncratic equity risk premium, the primary difference in discount rates between the experts. And, on those few issues on which they do engage, Petitioners' response is repetitive, untethered to the evidence and fundamentally unsound.

Petitioners jettison Cornell's model altogether in their alternate valuation. They instead make unwarranted modifications to Hubbard's Bank Case DCF model in five areas: terminal tax rate, discount rate, required cash level, FIN 48, and accounting for residual tax liability from earnings and profits that have not been repatriated. The end result of their flawed process is a new alternate valuation of $19.88 per share that deviates by more than $11 billion from the merger price. Petitioners' adjustments appear couched more as negotiating positions than principled ones based on the evidentiary record, sound economics or applicable law.

In the end, despite four days of trial testimony, hundreds of pages of briefing and an extensive document exchange, Petitioners simply cannot prove their well-traveled claim that Dell was massively undervalued at the time of the merger. A fair reading of the evidence supports Hubbard's valuation of $12.68 per share – a result wholly consistent with other confirmatory valuation metrics. The Court should adopt this figure as the fair value of Dell as of the appraisal date.

ARGUMENT

I. Petitioners Improperly Disregard The Merger Price As A Relevant Factor In This Proceeding.

Petitioners ask the Court to disregard the sale process overseen by the Special Committee and its legal and financial advisors.[1] The Committee took affirmative steps throughout the transaction process to maintain a level playing field given Michael Dell's potential participation. For example, it required him to work in good faith with potential sponsors and included in the merger agreement a provision requiring that the merger be adopted by a majority of the shares not held by Mr. Dell and his affiliates.

The Committee invited multiple bidders into the process during a pre-signing market canvass, including Silver Lake, KKR, and TPG. The Committee negotiated seven increases to the merger consideration from Silver Lake despite indications on at least two occasions that its proposal was a "best and final offer." Mr. Dell even agreed to take less for his shares to get a better offer for stockholders.

The Committee negotiated a 45-day go-shop during which the Company

[1] The record supporting that process is set forth in Respondent's Pre-Trial Brief ("RPB") and Post-Trial Opening Brief ("ROB"). RPB at 9-25 and ROB at 8-12.

could solicit and negotiate with other potential bidders. During that period, a second financial advisor contacted 67 parties: 20 strategic parties, 17 financial sponsors, and 30 other parties. The Committee offered $25 million in expense reimbursement to the two Excluded Parties. Those efforts ultimately resulted in a 28% premium over Dell's unaffected stock price.

Notwithstanding this extraordinary process, Petitioners urge the Court to ignore the resulting transaction price. That is contrary to law. Section 262(h) of the DGCL requires that the Court take into account "all relevant factors" in an appraisal proceeding. 8 *Del. C.* § 262(h). Respondent identified nearly a dozen cases in its opening brief where the Court looked to the merger price as evidence of fair value.[2] Rather than substantively address those authorities, Petitioners relegate them to a footnote in their Answering Brief.[3] They then advance unmeritorious arguments as to why the merger price should be ignored. Their conclusion, which directly contradicts the evidence in this case, is unjustified.

A. Petitioners Are Not Entitled To A Presumption Concerning The Merger Price In A MBO Transaction.

Petitioners ask the Court to disregard the merger price as an indicator of fair value because the transaction was a MBO. They cite no authority for this proposition. More importantly, their request for a *per se* presumption against the

2 ROB at 14-18.

3 Petitioners' Post-Trial Answering Brief ("PAB") at 13.

reliability of the merger price in a MBO transaction conflicts with 8 *Del. C.* § 262(h) and case authority requiring that the Court consider "all relevant factors" in an appraisal proceeding.[4] The Court recently explained:

> 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.[5]

Petitioners do not present evidence or compelling logic for their claim that MBO transactions inherently fail to reflect "the intrinsic value of the enterprise."[6] Petitioners claim that the "outsized returns" demanded by financial sponsors constrain their ability to pay fair value because such returns can only be achieved through either a fundamental change of business strategy or by acquiring the company "at a price below the intrinsic value."[7] Petitioners then reason that Mr. Dell and Silver Lake underpaid in the transaction because they did not plan a fundamental change in the business post-merger.

Petitioners' false dichotomy ignores the role of leverage in generating

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4 *Golden Telecom, Inc. v. Global GT LP*, 11 A.3d 214, 217-18 (Del. 2010).

5 *Huff Fund Investment Partnership v. CKx, Inc.*, 2013 WL 5878807, at *12 (Del. Ch. Nov. 1, 2013).

6 PAB at 8.

7 PAB at 8-10.

returns in the private equity model. Financial sponsors take on substantial risks associated with highly leveraged transactions in the hope of achieving returns if they can successfully deleverage and thereby increase the proportion of their equity in the capital structure. Their targeted returns are not certainties; and they reflect a different risk/reward calculus, rather than a limit on the ability to pay fair value for a given acquisition. Professor Hubbard explained:

> PE firms often achieve a profit through "financial engineering" (that is, buying properly valued firms using large amounts of debt and increasing the value of the equity by paying down the debt). . . . The materials I have reviewed are consistent with this LBO transaction being primarily a financial engineering opportunity. . . . Its investment returns were expected to be generated primarily through anticipated access to low-cost debt, the pay down of this debt, and thus the larger equity ownership share of a similarly-valued investment.[8]

Petitioners' statements concerning the purported limitations of the "MBO model" are not supported by the evidence.[9] They characterize the MBO model as a monolithic model supporting the same price for any equity sponsor and, therefore, not appropriate for price discovery.[10] Rajkovic testified that while financial sponsors use similar models (just as economists use similar DCF models), they "make their own judgments around the forecast and any other assumptions" and

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8 JX896A at ¶¶ 94-95.

9 There is no difference between a "MBO model" and a "LBO model."

10 PAB at 6-7.

the output of their models depends on the "assumptions around leverage and return."[11] Petitioners stretch too far in trying to paint all equity sponsors with the same broad brush.

Petitioners similarly miss the mark in suggesting that sufficient financing was not available to support a higher transaction price. Hiltz testified:

> Q. Was the ability of a strategic or private equity buyer to obtain financing for a transaction where it acquired Dell a problem for Evercore as it tried to sell the company?
>
> A. No.
>
> Q. Why not?
>
> A. You know, by the 2013 time frame, the markets had, you know, substantially recovered from the issues that they faced in 2009-2010, the mortgage crisis, et cetera. Credit availability was quite good, both in the bank market as well as the junk bond market. So leveraged transactions were getting done without significant problems. Interest rates were low. So the cost of debt was attractive.[12]

If Dell's financial prospects supported a higher valuation, sponsors would have been able to obtain financing to conduct a MBO at a higher price. The fact that lenders would not risk their capital for a transaction priced at a level that was *triple* the unaffected stock price, and unsupported by Dell's financial results or

[11] Tr. 750:9-18 (Rajkovic).

[12] Tr. 371:12-372:1 (Hiltz). Hiltz also noted that "there are also nonbank lenders out there." Tr. 402:14-20 (Hiltz).

realistic future prospects, should come as no surprise. In fact, it confirms the fallacy of Cornell's $28.61 valuation.

More to the point, Petitioners' assertion that potential bidders did not step to the plate because of some inherent attribute of the "MBO model" or leverage constraints is belied by the case record. KKR explained that it did not bid for Dell because it "could not get [its] arms around the risks of the PC business."[13] TPG explained that it did not bid for Dell because it "felt that the cash flows attached to the PC business were simply too uncertain."[14] Blackstone stated that it did not top Silver Lake's bid for Dell after extensive due diligence because of the "unprecedented 14 percent market decline in the PC volume" and "the rapidly eroding financial profile of Dell."[15] If the value of Dell were above $13.75, sophisticated buyers such as these would have "strong financial incentives to pursue such a transaction."[16] The fact that they did not do so has nothing to do with the MBO model.

Finally, a rule foreclosing reliance on the merger price in a MBO transaction presents significant policy concerns for future transactions. Directors would face greater uncertainty in their ability to fulfill their fiduciary duties in MBO

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[13] Tr. 440:13-14 (Dell); 174:1-7 (Mandl).

[14] Tr. 160:22-161:1 and 161:10-14 (Mandl).

[15] JX476 at 2.

[16] JX896A at ¶ 122.

transactions. Financial sponsors would have an incentive to underbid for companies to the detriment of target stockholders in order to provide a substantial cushion for greater appraisal claims. MBO transactions, which often result in significant *premia* paid to stockholders, might be chilled. The better course, and the one suggested by recent authority, treats the merger price as a relevant, reliable and strong indicator of fair value where, like here, there has been a robust transaction process.

B. <u>Petitioners Cannot Show A Meaningful Disconnect Between The Merger Price And Dell's Fair Value.</u>

Petitioners suggest that the Court should ignore the merger price as a relevant factor because it represents only "the highest price someone was willing to pay in a sale transaction."[17] Petitioners contend that the price that Mr. Dell and Silver Lake paid for Dell "had nothing to do with what the Company was worth as a going concern."[18] Accordingly, so they argue, the merger price cannot serve as a valuation benchmark in this case. They are wrong.

The merger price reflects the collective view of the market, all bidders and the seller. It does not reflect the limited view of just one participant. For that reason, the Court repeatedly has held that "when there is an open opportunity to

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[17] PAB at 4.

[18] *Id.*

buy a company, the resulting market price is reliable evidence of fair value."[19] Were it otherwise, a party could always claim that the merger price is irrelevant because it simply reflects the highest price someone was willing to pay in a transaction. That is not the law.[20]

It also does not follow that the price paid by Mr. Dell and Silver Lake was disconnected from Dell's fair value. The sale process led by the Special Committee – *which Petitioners do not challenge*[21] – was designed to test those prices in the real world. Whether the successful purchaser performed a DCF analysis, a MBO analysis or some other valuation technique does not establish that

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[19] *Union Illinois 1995 Inv. Ltd. Partnership v. Union Fin. Group, Ltd*., 847 A.2d 340, 357 (Del. Ch. 2004); *LongPath Capital, LLC v. Ramtron Int'l Corp.*, 2015 WL 4540443, at *20 (Del. Ch. Jun. 30, 2015) ("in the situation of a proper transactional process likely to have resulted in an accurate valuation of an acquired corporation, this Court has looked to the merger price as evidence of fair value . . . "); *Merlin Partners LP v. AutoInfo, Inc.*, 2015 WL 2069417, at *17 (Del. Ch. Apr. 30, 2015) (merger price appropriate where "the market prices a company as a result of a competitive and fair auction"); *In re Rural Metro Corp.*, 88 A.3d 54, 102 (Del. Ch. 2014) ("[o]rdinarily this court places heavy reliance on the terms of a transaction that was negotiated at arm's length, particularly if the transaction resulted from an effective pre—or post-agreement market canvas."); *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 467 n.12 (Del. Ch. 2011) ("a transaction price [that] was forged in the crucible of objective market reality . . . is viewed as strong evidence that the price is fair.").

[20] ROB at 14-18.

[21] Tr. 862:17-863:2, 881:7-20 and 833:19-834:21(Subramanian) ("Q. You're not expressing an opinion about anything the special committee should have done differently for purposes of this case; is that correct? A. Correct.").

the merger price was disconnected from the Company's intrinsic value: it merely establishes the output of that technique or analysis.

Petitioners' reference to an October 2012 JPM presentation does not prove their point.[22] That presentation purported to show a LBO valuation of $14.13 and a DCF valuation of $20-$27.[23] The illustrative valuations in the two analyses were prepared using very different assumptions.[24]

	MBO Illustration	DCF Illustration
Exit Multiple	Same as initial multiple	Exit multiple increases
Tax Rate	FY14 – 25.3% FY15-18 – 30.1%	FY14 – 21% FY15-18 – 21%
Repatriation Tax	$2.8 billion	$0
Required Cash	$5.0 billion	$0

Petitioners' conclusion that the output differences "highlight the fact that the MBO model does not purport to arrive at the intrinsic value of the enterprise" does not follow: it simply confirms that it is dangerous to compare an apple to an orange and expect them to look the same. When similar assumptions are applied, the two models produce similar results, as reflected by a comparison of Hubbard's DCF valuation to the MBO model output and the merger price.

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22 PAB at 5-7.

23 JX238 at 2.

24 ROB at 27-28. Petitioners' statement that "the MBO model excludes any value in a DCF model of the terminal period" is also incorrect and reflects a misunderstanding of the MBO model, which employs a terminal multiple analysis to model valuation of a 5+ year liquidity event. PAB at 5 fn. 9.

Petitioners' argument further collapses from its inability to explain the absence of a topping bid from strategic investors.[25] If Dell were undervalued by $26 billion, strategic investors would have submitted a topping bid.

Finally, the market's reaction following the announcement of the transaction further rebuts the claim that the merger price and Dell's intrinsic value were disconnected. Dell's stock traded in the $9-10 range before the transaction, then increased to near the merger price after the transaction announcement.[26] Hubbard explained:

> If the stock market believed that the offers being made by Michael Dell were unreasonably low or otherwise undervalued the Company, then one would expect to see a market price meaningfully higher than the then-proposed Merger price as the market anticipated higher prices during the bidding process from other PE firms who would have been willing to top an undervalued bid by Silver Lake in order to realize the increased value.[27]

C. Subramanian's Theoretical Concerns About The Go-Shop Do Not Compel A Different Result.

Petitioners next argue that the merger price should be disregarded as a tool for price discovery because the "institutional details and practical realities of a go-

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[25] JX422 at 4. Petitioners claim that Hiltz testified that it was "unlikely that any strategic acquirer would want to acquire all of Dell's business." PAB at 20. In fact, he testified that Hewlett Packard was a potential bidder. Tr. 367:23-368:2 (Hiltz).

[26] JX896A at ¶ 122.

[27] JX896A at ¶ 123.

shop in the MBO context create an unlevel playing field."[28] Petitioners anchor this claim on Subramanian's statement that "if there was ever a situation in an MBO where you would say this deck is stacked or this train has left the station, this is pretty much as close as you can get."[29] Their reliance on this bare conclusion is inappropriate.

Subramanian acknowledged that his theory depends on the belief that Mr. Dell brings unique value to the Company that a competing bidder could not replace.[30] Petitioners have not presented evidence that whatever private value Mr. Dell brought to the table was unavailable to other potential bidders or that he was unwilling to work with potential bidders.[31]

Subramanian also provides no basis to disregard the extensive process overseen by the Special Committee.[32] He limited his opinion to the post-signing go-shop process and offered no criticism of the pre-signing process, in which KKR

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28 PAB at 21.

29 PAB at 32.

30 Tr. 778:11-17 and 900:16-19 (Subramanian) (Q (Court): "it sounds like, really, this may come down to, for you, sort of the founder/key employee, key/CEO-type problem." A: "Yeah, maybe so."); JX909 ¶ 53; JX917 at 75:6-15.

31 Tr. 866:20-870:7 (Subramanian).

32 Petitioners' contention that Subramanian was "the only expert in deal process design," PAB at 21 & n.57, is unsupported. Hubbard was proffered as "an expert … with respect to the matters set forth in his reports," and qualified without objection. Tr. 595:2-8 (Hubbard). The Court overruled an objection to his testimony concerning the effect of the process on his analysis. Tr. 669:19-670:14 (Hubbard).

and TPG participated alongside Silver Lake. He accepted that the go-shop process was "robust" and did not claim that Evercore lacked competence, had conflicting motives or failed to undertake the go-shop process in good faith.[33] His report and testimony do not establish that there were "structural impediments [that] existed that might [have] materially distort[ed] the crucible of objective market reality."[34] They also do not explain Blackstone's participation in the go-shop process.

Subramanian was unable or unwilling to explain how significant an obstacle to a topping bid his claimed tilt of the playing field may have been,[35] and instead took refuge in the argument that he was "simply responding to Professor Hubbard's claim that it was an equal playing field."[36] This strawman does not support a claim that obstacles in the sale process precluded adequate price discovery. Subramanian was unwilling to testify that any bidder was, in fact,

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[33] Tr. 881:7-882:24 (Subramanian).

[34] *Highfields Capital, Ltd. v. AXA Fin., Inc*., 939 A.2d 34, 42 (Del. Ch. 2007).

[35] Tr. 808:24-814:19 and 842:15-843:24 (Subramanian) ("I did not want to quantify the overall degree of unlevelness."); JX917 at 70-71 ("I have not done an overall quantification because I was simply responding to Professor Hubbard's claim that it was a level playing field.").

[36] That is just another way of saying that Petitioners cannot show that any claimed distortion in the sale process materially affected the merger price. Petitioners' assertion that "Dell appears to have abandoned its claim that the sale of Dell took place on a level playing field," PAB 21 & n.61, misrepresents the record, as Subramanian acknowledged. Tr. 818:11-821:17 (Subramanian).

deterred, nor did Petitioners present such evidence.[37] Subramanian implicitly acknowledged as much when he conceded that the process in this case has probative weight as to Dell's fair value even if he could not say how much.[38]

1. <u>Michael Dell's Financial Incentives Were Not A Substantial Obstacle To A Topping Bid.</u>

Petitioners claim that Michael Dell's status as a "net buyer"[39] gave him a "powerful incentive to discourage an overbid."[40] They argue that Mr. Dell wished to pay less in a transaction and that a topping bid might have required him either to pay more or to accept a smaller stake in the resulting company. Petitioners stretch too far in this argument.

Petitioners present no *evidence* that Mr. Dell discouraged a topping bid. Indeed, the Special Committee and Mr. Dell took effective steps to neutralize whatever perceived incentives did exist. Mr. Dell "encourage[d] all of the bidders

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[37] JX917: 191:19-192:2, 199:8-22 (Subramanian).

[38] Tr. 892:6-896:8 ("Q: So it has some probative weight. You just don't know how much. Right? A: I think yes, that's correct.").

[39] Subramanian claims that Mr. Dell was a "net buyer" because he made an additional cash equity contribution to the transaction, rather than cashing out some of his equity, or simply rolling all his equity. There is no claim that Mr. Dell's additional contribution was a required feature of a topping bid by any bidder. A bidder was free to propose to Mr. Dell a structure under which he would have made a larger equity contribution, a smaller one, no contribution at all, or taken cash out; how Mr. Dell would have reacted to any such proposal is entirely a matter of speculation.

[40] PAB at 23.

to bid as high as possible."[41] He agreed to "explore in good faith the possibility of working with [a] potential counterparty or financing source if requested by the Company."[42] He was contractually obligated to support a superior proposal.[43] Mr. Dell even agreed to take a discount on his own shares so that Silver Lake could increase its offer to the other stockholders.[44] Petitioners cannot dispute these facts, nor does Subramanian or anyone else claim that Mr. Dell did anything to deter anyone from making a bid.[45]

Subramanian's hypothetical calculations about how much a topping bid might have cost Mr. Dell in various scenarios misses the point. If a prospective topping bidder agreed with Petitioners that a proposed transaction undervalued the Company by billions of dollars, and that bidder persuaded Mr. Dell of this view, the topping bidder's returns would have been much higher than those assumed in the proposed transaction, and any concern about Mr. Dell's personal contribution

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[41] Tr. 432:9-15 and 465:8-9 (Dell).

[42] JX945 at 2. Much of Petitioners' argument about Mr. Dell's lack of obligation to "work with other bidders," including their reference to the Thirteenth Amendment, PAB 26 n.74, relies on equivocation. Mr. Dell was contractually obliged to "work with other bidders" in the sense of cooperating as an executive with due diligence and participating in meetings and negotiations regarding a potential topping bid. JX 945 at 2; JX 355 at 3-4. He was only obliged to consider in good faith "working with other bidders" in the sense of co-investing in a topping bid. Dell has never claimed otherwise.

[43] JX944.

[44] Tr. 432:15-19 (Dell).

[45] Tr. 851:16-852:1 and 874:7-877:4 (Subramanian).

to the transaction would have washed away on the rising tide of increased profit.[46] Indeed, Subramanian himself recognized that this argument is based on a hypothetical assumption that a topping bid would be structured in the same way as the Silver Lake offer.[47] That no bidder with real money spotted the massive hidden value that Petitioners claim to see supports the conclusion that no such hidden value exists.

2. Michael Dell's Availability To Potential Bidders Did Not Present A Substantial Obstacle To A Topping Bid.

Petitioners next suggest that the merger price should be looked at with skepticism because "[f]ear that they might not have access to [Mr. Dell] served as a powerful deterrent to submission of a competing bid."[48] Petitioners claim that this is so because Mr. Dell "at all times retained full discretion to refuse to work with anyone but Silver Lake."[49] This unsubstantiated concern lacks evidentiary support.

The Special Committee was in charge of the sale process, including both the pre-signing market check and the go-shop. Mr. Dell committed "at the very beginning that he would be available to any potential bidder."[50] He kept those

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[46] Tr. 791:23-792:12 (Subramanian).

[47] JX917 at 203:9-14 (Subramanian).

[48] PAB at 25.

[49] PAB at 26.

[50] Tr. 745:13-15 (Rajkovic); JX355 at 3-4. Petitioners inaccurately state that Southeastern Asset Management was "completely frozen out of the process." PAB at 26; *see* SF Nos. 207-212; Tr. 184:17-185:11 (Mandl).

promises. He advised Mandl that "he was prepared to work with others, support others, play the CEO role with others."[51] He cooperated with KKR and TPG before signing the deal with Silver Lake, and with Blackstone and Mr. Icahn during the go-shop process.[52] Mr. Dell told Blackstone that he was "open to considering all alternatives in the context of the full picture of how it would work, including the equity capital structure and governance."[53] He met with Blackstone and Francisco Partners at his home and had other meetings with them in Austin and New York.[54] Mr. Dell testified that he had no reservations about working with KKR, TPG, Blackstone or anyone else if they were the winning bidder.[55] He even was willing to consider a transaction in which he did not obtain control of the

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[51] Tr. 159:11-18 (Mandl); JX224.

[52] Tr. 439:9-21, 441:13-20 and 446:3-7 (Dell). Petitioners suggest that the *Special Committee's* offer to grant Mr. Icahn expense reimbursement on condition that he drop his proxy contest calls into question *Mr. Dell's* willingness to work with Mr. Icahn. PAB at 26. Mr. Dell had no control over the Special Committee's negotiations with Mr. Icahn, expense reimbursement or any other matter. Tr. 382:15-383:16 (Hiltz).

[53] Tr. 447:20-448:11 (Dell); JX430.

[54] Tr. 446:1-449:24 (Dell).

[55] Tr. 439:2-5, 442:4-6, 450:1-6 (Dell). Subramanian conceded that his theory largely collapses without contrary evidence because if a "third party could have the same access to valuable management, then you can mitigate the valuable management problem." Tr. 783:17-784:1 and 896:1-4 (Subramanian).

Company.[56] Blackstone commended Dell on the support that Mr. Dell personally provided.[57]

Petitioners' real complaint appears to be that Mr. Dell was not obliged to participate as an investor in a topping bid group, and that potential bidders likely understood that. That is true, although in the event the Board approved a topping bid in which he declined to participate, Mr. Dell was still obligated to vote his shares at least *pro rata* with the unaffiliated stockholders in favor of that bid or tender them *pro rata* into such an offer.[58] The possibility that a topping bidder might have had to find capital to replace Mr. Dell's investment was true of any topping bid, not a reflection of an unequal playing field. Subramanian did not claim that this was a material obstacle to any serious bidder.[59]

3. **<u>Information Asymmetries Were Not A Substantial Obstacle To A Topping Bid.</u>**

Petitioners theorize that information asymmetries dissuaded potential

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56 Tr. 433:22-434:4 (Dell).

57 Tr. 184:8-13 (Mandl).

58 JX355 at 2-3. Subramanian did not even look at Mr. Dell's voting agreement in preparing his opinion. Tr. 855:16-19 (Subramanian).

59 Petitioners' suggestion that Mr. Dell's subjective good faith was less important than potential bidders' perception is pure speculation. What a potential bidder would have seen was a Special Committee with reputable advisors and a promise of good faith exploration by Mr. Dell. There is no evidence that anyone had or should have had the perception that Mr. Dell's commitment to explore potential alternatives was not real. Tr. 853:22-855:14 (Subramanian).

bidders from participating in the go-shop process.[60] Petitioners do not back up their speculation with evidence.[61]

Subramanian disclaimed knowledge of what actual or prospective bidders knew or believed.[62] He disclaimed knowledge of what information Mr. Dell knew that was supposedly unavailable to other bidders,[63] or how important that information was to the value of the Company.[64] Subramanian similarly disavowed any claim that Mr. Dell opportunistically timed the merger, delayed positive net present value projects, or otherwise manipulated the process for his own benefit.[65] And, he could not show that Mr. Dell had any input into the price that Silver Lake was willing to pay[66] – the very predicate for his "winner's curse" theory.

Petitioners simply ask the Court to assume that unidentified bidders must have believed that Mr. Dell knew *something* – though nothing in the record

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[60] PAB at 27-30.

[61] Tr. 808:24-811:8, 858:7-859:16 (Subramanian).

[62] Tr. 845:20-846:15, 848:15-849:13 (Subramanian).

[63] Tr. 847:15-19 (Subramanian) ("Q. Now, you have no reason to believe that any bidder who actually signed a confidentiality agreement and asked for access to management didn't get what it asked for. Correct? A. I have no evidence to that effect.").

[64] Tr. 856:7-858:15, 861:8-862:16 and 865:18-866:19 (Subramanian) ("I don't know what the special sauce is.").

[65] Tr. 833:19-834:21, 846:16-847:3 and 862:17-863:8 (Subramanian).

[66] Tr. 432:9-433:21 (Dell).

suggests what that something might have been[67] – that public investors in one of the most widely covered and widely traded stocks in the world did not know, and that as a result it was not worth their time to participate in the sale process, understand what Mr. Dell knew or believed, or explore a topping bid with him. That is not a basis to disregard the merger price.[68]

Subramanian also agreed that due diligence could substantially reduce information asymmetries, even to the vanishing point.[69] Petitioners point to the burden and expense of due diligence, but that cost was not unique to the go-shop process, and both Blackstone and Mr. Icahn attained "Excluded Party" status

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[67] Tr. 598:23-600:22 (Hubbard); Tr. 808:24-811:8 (Subramanian). Petitioners complain that it is unfair to expect them to identify bidders who might have been deterred by the lack of information or the cost of due diligence, but they made the tactical choice not to seek discovery from KKR, TPG, Blackstone, Icahn or any of the parties who participated in the go-shop process. *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1999) ("[B]oth sides have the burden of proving their respective valuation positions by a preponderance of evidence."). In contrast, Respondent presented affirmative evidence that these bidders declined to move forward with a transaction for reasons other than information asymmetries. Tr. 465:8-9, 440:13-14 (Dell); Tr. 160:22-161:14 and 174:1-7 (Mandl); JX476 at 2.

[68] The generality of the "winner's curse" argument further undercuts its probative value in this case. There is nearly always some information asymmetry among participants in any sale process for a complex asset. Tr. 860:5-19 (Subramanian). Subramanian agreed that the issue is a matter of degree – a topic on which he made no effort to determine whether information asymmetries created an obstacle to a topping bid. Tr. 861:14-17 and 862:11-16 (Subramanian).

[69] Tr. 856:12-15, 859:21-860:4 and 861:2-7 (Subramanian).

before engaging in substantial due diligence.[70] The record is devoid of evidence that information asymmetries presented a substantial obstacle to any plausible bidder for Dell – and certainly no obstacle to bidders such as Blackstone, Francisco Partners, Insight Venture Partners, Riverwood Capital, GE or Carl Icahn who were not dissuaded from participating in the go-shop.[71] Blackstone even employed Dave Johnson, who had just left Dell as the Senior Vice President for Corporate Strategy. Mr. Johnson was very familiar with Dell, so Blackstone's decision not to make a topping bid seems more likely to derive from their knowledge of Dell and the industry rather than their ignorance or some information asymmetry.

4. **<u>The "Ticking Clock" Problem Did Not Present A Substantial Obstacle To A Topping Bid.</u>**

Petitioners claim that the 45-day go-shop window "served as a very real obstacle to alternative bids."[72] Petitioners present as unassailable their bare conclusion that the evidence confirms "just how much work it took to get to

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70 Petitioners state that bidders did not get identical due diligence materials. PAB at 29. They claim that Blackstone "had to fight hard to get access to the documents that were voluntarily provided to Silver Lake." In fact, "there was no indication whatsoever that somehow they did not get all the necessary information that was relevant for moving the project forward." Tr. 184:11-16 (Mandl); *see also* Tr. 377:16-378:16 and 405:3-14 (Hiltz). Subramanian did not question that KKR and TPG had a full opportunity to conduct due diligence. Tr. 854:24-855:14 (Subramanian).

71 JX532 at 55-57, 59.

72 PAB at 32.

excluded party status."[73] Petitioners do not identify evidence supporting this claim. Instead, as with so much of their case, they just claim that it is so.

In fact, all that was required for a bidder to become an "Excluded Party" was to submit a general outline of the structure of the transaction so that the Special Committee could determine if it "could reasonably be expected to result in a superior proposal."[74] A party then had months to complete due diligence, arrange committed financing, and negotiate the terms of a definitive agreement.[75] Hiltz testified:

> [W]hat you had to accomplish in the 45 days of the go-shop was a relatively limited number of things. You just had to submit a letter. You were then going to have a period of several months between the end of the go-shop right up until the shareholder vote to spend as much time as you wanted doing due diligence, to arrange your financing, to do all of those things and get to submitting a superior proposal. We felt that that was more than enough time.[76]

The evidence establishes that half a dozen potential debt and equity financing sources conducted due diligence as part of Blackstone's consortium after

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[73] PAB at 30.

[74] *See* JX349 at 51; *see also* Tr. 377:1-10, 365:10-366:11 (Hiltz).

[75] Subramanian's contention that Blackstone faced "this constant question how do we play catch up," JX917 at 198:8-9 (quoted at PAB at 31-32), is pure speculation. Subramanian had no basis to believe that Blackstone did not reach information parity with Silver Lake. Tr. 848:15-19 and 854:3-19 (Subramanian).

[76] Tr. 377:2-10 and 365:10-366:11 (Hiltz).

the 45-day go-shop period expired on March 23.[77] The Icahn group also continued to refine its proposals and financing for several months after the go-shop period expired. Thus, even if there were merit to the "ticking clock" theory, Petitioners have not presented evidence establishing that it was an obstacle to a topping bid in this case.[78]

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Petitioners have not met their burden of demonstrating that the merger price should be disregarded as a tool for price discovery. Subramanian testified that he never "assessed whether there was a disconnect between the market price and the intrinsic value" of Dell stock.[79] His abstract views therefore provide no basis on which the Court can conclude that "obstacles" deterred a bid higher than the merger price.[80] The sale process provides powerful support that the merger price provided more than fair value.[81] Petitioners cannot credibly suggest otherwise.

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[77] JX532 at 59.

[78] Tr. 366:12-15 (Hiltz) ("Q. Did any party interested in bidding on Dell indicate to Evercore that the length of the go-shop was problematic? A. No.").

[79] Tr. 825:8-12 (Subramanian) (Q. . . . Now, you have not tried in your report in this matter to assess whether there was a disconnect between the market price and the intrinsic value of Dell stock in this case; correct? A. Correct."). Cornell did not attempt to reach this issue either. Tr. 57:16-62:13 (Cornell) ("I'm afraid I really don't have an explanation"; "I don't think I'm, unfortunately, in a position to answer that for you").

[80] Tr. 827:18-828:13, Tr. 843:8-15, 862:11-16 and 880:12-15 (Subramanian). Petitioners do not challenge the steps taken by the Special Committee to equalize the playing field, including providing expense reimbursement, limiting

D. Petitioners' Collateral Attacks On The Merger Price Are Misplaced.

Petitioners also suggest that the merger price should be disregarded because of the existence of other factors.[82] They reach this conclusion through a recitation of evidence that is incomplete, overstated and/or incorrect.

1. The Claim That The Market Mispriced Dell For Years Defies Credulity.

Petitioners contend that the merger price should be disregarded because of a "long recognized disconnect" that existed between Dell's stock price and its fair value, and that strategic actions taken by management heightened that disconnect.[83] This claim is inconsistent with the efficient market hypothesis and lacks credible proof.

Petitioners ask the Court to believe that the market fundamentally misunderstood and undervalued one of the most heavily traded and widely covered companies in the world, not simply at the time of the going private transaction, but *for years*. Petitioners contend that Dell's fair value was $28.61 per share at the merger date even though its stock price (i) *never* traded at that level during the five

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Silver Lake to a single match right, and incentivizing Evercore to obtain a superior proposal. Tr. 796:4-16 (Subramanian); 372:22-373:10 (Hiltz).

81 Hubbard used Subramanian's own research to show that the perceived obstacles are not as daunting as Petitioners suggest – and may be nonexistent. ROB at 20-26.

82 PAB at 13-18.

83 PAB at 7-8.

years preceding the transaction; (ii) traded in a range from $8-16 per share during that period; and (iii) fell below $10 per share in September 2012 after the Company reported lower earnings and remained at or below that level prior to the announcement of a potential transaction.[84]

Petitioners further ask the Court to accept their hypothesis without identifying any evidence that would support a conclusion that the public markets got Dell so stunningly wrong. Instead, they suggest that it was so because of the optimistic *belief* of Mr. Dell and management that the Company was undervalued.[85] Petitioners do not point to any information that Mr. Dell or Dell management possessed that was not known to the market and potential bidders.

The fact that Mr. Dell or anyone else thought that Dell was undervalued does not establish that merger price was unfair. Mr. Dell and his management team were optimistic about Dell's future even as the Company consistently underperformed its forecasts.[86] Analysts were less sanguine, however, about Dell's future as they reduced their price targets below $13.75 per share and cut

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[84] PAB at 16. Petitioners' reliance on management valuations prepared in 2011 and mid-2012 does not establish Dell's fair value as of the merger date. PAB at fn.36. Those valuations, like all valuations, were grounded on the projections and assumptions embedded in those valuations.

[85] PAB at 14-17.

[86] JX896A at ¶¶ 49-50 & Figures 8-9; JX569 at 24-25; Tr. 137:17-138:14 (Mandl). Dell missed analyst's forecasts for Dell in six of eight quarters prior to the merger.

their FY14 and FY15 EBIT forecasts from over $4 billion per year to just over $2 billion per year.[87] The stock price reflected a balance of these competing viewpoints; the merger price represented the value placed on the Company by the market's most optimistic investor and a significant premium over Dell's unaffected stock price.[88]

2. The Timing Of The Merger Does Not Establish That The Merger Price Was Unfair.

Petitioners incorrectly suggest that the timing of the sale process somehow undermines the merger price as an appropriate vehicle for price discovery because strategic decisions by the Company opportunistically drove down the stock price.[89] Petitioners suggest that management's decisions to accelerate the transformation from a PC business to an enterprise business had the collateral effect of depressing the Company's stock price.[90] They further suggest that the Company's decision to

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[87] JX896A at ¶ 88; JX92 at 1; JX90 at 1. Notwithstanding his current view, Cornell described Dell's future as "bleak" in 2013. Tr. 77:4-8 (Cornell) ("As a consumer, do you want to buy a product from a company whose future is bleak? How comfortable do you feel buying a Dell computer today?"), quoting B. Cornell, Apple, Samsung and Google http://www.wbcornell.blogspot.com/2013_04_01.archive.html).

[88] JX532 at 16.

[89] PAB at 14-16.

[90] PAB at 14.

trade margin for share in 2013 caused "the Company to perform poorly in the short term."[91]

Petitioners did not complete the circle by presenting evidence that the merger was opportunistically timed or that Mr. Dell or anyone else took deliberate actions to drive down Dell's stock price. Instead, the record fairly reflects that Dell continued to execute on its publicly-disclosed and widely covered transformation strategy in order to respond to the changing competitive environment.[92] Petitioners have not presented evidence that any decision by anyone at Dell was unnecessary to meet these competitive challenges or had an adverse effect on Dell's market share or revenue. Petitioners also do not provide any link between those actions and the fair value of Dell, or its operative reality as

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[91] PAB at 17.

[92] JX896A at ¶¶ 42-49, 124, 132-33 and Ex. 8 thereto. Rajkovic testified that "Lenovo had just announced it was going to come in and compete at the high end and mid end, where most of our business was or Dell's business was. Lenovo runs 2 ½ percent operating margin. So you're having entrants come in that run at a much lower cost base or operating margins, a lot more aggressive on pricing. HP was coming into our space." Tr. 738:24-739:20 (Rajkovic). As a result, Dell lowered prices in 2013 to drive more velocity and volume in the business "[b]ecause a lot of the growth in the PC space was in the lower price band." Tr. 255:8-17 and 258:8-15 (Sweet). Dell's decision to lower PC prices resulted in market share expansion. JX807 at 16; Tr. 688:19-22 (Hubbard). It also allowed Dell to overcome a 13% decline in EUC revenue from FY12 to FY13. JX758 at 82.

of the merger date.[93]

3. **Negative Implied Perpetuity Growth Rates Are Common In Technology Companies.**

Petitioners suggest that because the fairness opinions for the transaction implied negative perpetuity growth rates, JPM and Evercore somehow modeled Dell as a failing business. The existence of negative implied growth rates is a common phenomenon for technology companies and reflects concern that such companies will not be able to replicate their past growth. Hubbard noted that many technology companies (including Apple, Microsoft, Oracle, Cisco and Hewlett Packard) carry negative implied cash flow rates.[94] That "does not mean that these companies are expected by investors to go bankrupt or cease to exist in the foreseeable future."[95] It also does not mean that the merger price is disconnected from fair value.

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[93] Petitioners' attempt to twist Mr. Dell's testimony to suggest otherwise is unhelpful. PAB at 14-15. Petitioners do not show that Mr. Dell took any intentional action to drive down Dell's stock price (of which he was the largest individual stockholder), nor do they show that the Company's transformation strategy was not known to the market. Instead, they misleadingly seize upon Mr. Dell's retrospective conclusion that the market did not reward the Company's efforts to enhance stockholder value by accelerating Dell's transformation. Tr. 431:17-432:4 (Dell) ("Q. And what was your reaction to the fact that, as the company pursued its transformation, the stock price went down? A. It was frustrating. It was disappointing. It was demoralizing.").

[94] JX896A at ¶¶ 69-70 & Figure 14; Tr. 635:21-636:15 (Hubbard); ROB at 9.

[95] JX896A at ¶ 76.

4. **<u>Petitioners' Arguments Concerning Dell's Post-Merger Performance Are Incorrect And Do Not Undermine The Significance Of The Merger Price.</u>**

Petitioners assert in a two sentence argument that Mr. Dell and Silver Lake "doubled their money inside of a year" as evidence for the claim that they "bought the Company on the cheap."[96] This argument distorts the record.[97]

- The PC market continued to deteriorate following the merger.[98]

	2016 PC Shipments (M)	Change From Aug. 2012
August 2012	483	
August 2013	319	-34%
December 2015	277	-43%

- Although the Windows XP refresh initially helped Dell (and other competitors) frontload some PC sales in 2014 and thereby allowed the Company to deleverage, the next year PC sales were at their lowest levels in six years.[99] The publicly available IDC data showed 2015 year-over-

[96] PAB at 16-17.

[97] The valuation in an appraisal proceeding is constrained by "facts which were known or which could be ascertained as of the date of merger and which throw any light on future prospects of the merged corporation." *Tri-Cont'l Corp. v. Battye*, 74 A.2d 71, 72 (Del. 1950); *Montgomery Cellular Holding Co., Inc. v. Dobler*, 880 A.2d 206, 222 (Del. 2005); *Merion Capital, L.P. v. 3M Cogent, Inc.*, 2013 WL 3793896, at *3 n. 27 (Del. Ch. July 8, 2013).

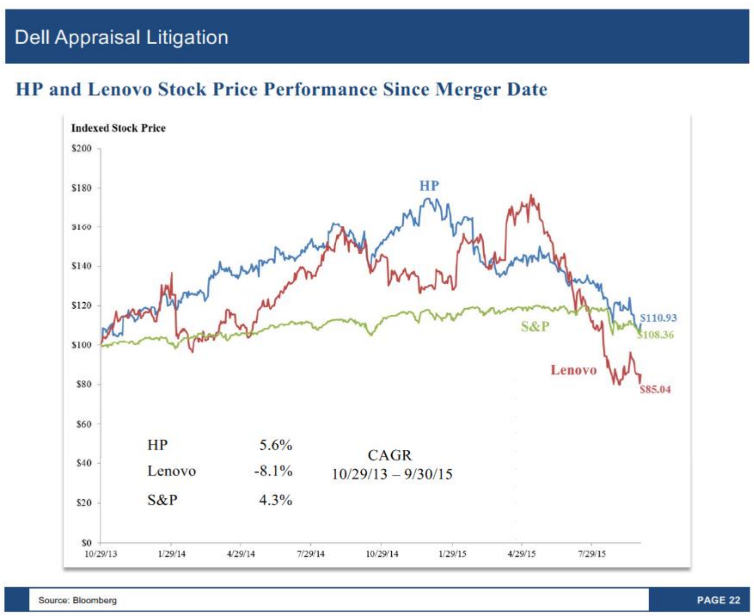
[98] Tr. 676:7-22 (Hubbard); Hubbard Demonstrative 21.

[99] JX907 at ¶¶143-146.

year *declines* for Dell of -6.3% (Q1), -8.7% (Q2), -2.9% (Q3) and -5.7% (Q4).[100]

- Dell's actual operating income for FY2014 was $1.1 billion below the BCG 25% Case.[101] In April 2014, Dell was forecasting FY2015 operating income $700 million below the BCG 25% Case.[102]

- Dell's PC competitors also experienced a short-term boost in value in 2014 before returning to more modest returns below even the S&P 500.[103]



[100] http://www.idc.com/getdoc.jsp?containerId=prUS25551715; http://www.idc.com/getdoc.jsp?containerId=prUS25742015; http://www.idc.com/getdoc.jsp?containerId=prUS25955515; http://www.idc.com/getdoc.jsp?containerId=prUS40909316.

[101] JX532 at 112; JX807 at 24.

[102] *Id.*; JX630 at 55.

[103] Tr. 676:23-677:21 (Hubbard); Hubbard Demonstrative 22; JX907 at ¶ 146.

Hubbard reviewed this evidence, among others, and testified that it cast doubt on any claim that Dell's post-merger performance exceeded projections.[104] Petitioners ignore these facts.

II. Hubbard's $12.68 Per Share Valuation Is Credible, Supported By The Evidence, And Should Be Adopted By The Court.

Professor Hubbard concluded that the fair value of Dell as of the merger date was $12.68 per share based on a DCF using the BCG 25% Case projections.[105] Hubbard detailed the reasons for this opinion in three detailed reports and in his expert testimony.[106] He also corroborated his conclusion by reviewing other methodologies and market indicators, including a DCF based on Silver Lake's projections, a comparable companies analysis, analysts' projections, and the merger price.[107] In each case, the results confirmed his opinion.[108]

Petitioners challenge Hubbard's primary DCF valuation in five areas: (i) projections; (ii) terminal tax rate; (iii) required cash; (iv) FIN 48; and (v) residual U.S. taxes.[109] Their criticisms are not supported by the record or applicable law.

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[104] Tr. 678:9-14 (Hubbard).

[105] Tr. 597:1-3 (Hubbard).

[106] JX896A; JX907; JX907A.

[107] JX896A at pp. 146-158.

[108] Hubbard Demonstrative 19.

[109] PAB at 42-52.

A. <u>Petitioners Wrongly Suggest That Hubbard Created His Own Set Of Projections.</u>

Petitioners first challenge the BCG 25% Case projections used by Hubbard in his DCF model.[110] Petitioners incorrectly contend that Hubbard "effectively created his own projections by making post-merger, litigation-driven adjustments that are outside of his expertise and are unsupported by the record evidence."[111]

BCG prepared projections for the Special Committee in January 2013 after being asked to provide an independent and objective view as to the Company's likely future performance if it were to remain a public company.[112] BCG developed and refined a detailed forecast model based on the Company's then-current business mix and geographical distribution.[113] The Base Case was predicated on delivering financial performance "given market forces, given the

[110] The BCG 25% Case was widely acknowledged by transaction participants as the most reasonable and realistic set of projections. Tr. 504:14-16 and 505:11-15 (Ning) ("given what we knew at the time, we thought that the most achievable was the 25 percent case."); 424:8-17 (Hiltz); JX335 at 5 (noting Evercore's view "that the BCG 25% productivity case represented the most likely scenario" and that JPM "independently reached the same conclusion regarding the BCG 25% productivity case."). Cornell also used the 25% Case in his valuation. Petitioners do not challenge the projections in Hubbard's Bank Case model and adopt them in their own alternative valuation. *See infra*, at 56.

[111] PAB at 43.

[112] Tr. 149:2-6 (Mandl) ("given the question around those plans in terms of being overly optimistic, we felt it would be useful to have an external management consulting firm reassess those plans and give us their perspective from an external point of view."); JX238 at 2.

[113] JX532 at 111.

company's position, and if the company continued to perform and continued to execute the strategy that they were in . . . ."[114]

Hubbard and Cornell both viewed the BCG model as an appropriate starting point for their analysis given the absence of reliable management projections.[115] The question they confronted was whether those projections were still reliable nearly ten months later when the merger occurred or, if not, what adjustments should be made to them to reflect Dell's operative reality as of the merger date.[116]

The PC market continued to deteriorate between the time BCG prepared its projections and the merger date, with IDC forecast PC shipments for 2016 dropping from 483 million units to 319 million units.[117] This development required that the experts either bring the BCG projections forward to the merger

[114] Tr. 490:12-491:2 (Ning).

[115] Tr. 601:6-21 (Hubbard); 89:7-90:16 (Cornell); JX238 at 2; JX806A at 76-85; JX897A at 32-35, 59-60; ROB at 29, 38. Both experts also agreed that management's track record in forecasting was poor. Tr. 75:7-11 (Cornell); JX896A at ¶¶ 49-50 & Figures 8-9.

[116] *Gearreald v. Just Care, Inc.*, 2012 WL 1569818, at *5 (Del. Ch. Apr. 30, 2012) ("In an appraisal proceeding, 'the corporation must be valued as a going concern based upon the "operative reality" of the company as of the time of the merger.'").

[117] Tr. 107:9-14 (Cornell) ("Q. You would agree with me, sir, wouldn't you, that the PC market deteriorated from the time of the BCG projections to the time of the transaction? . . . A. There was some evidence of that. . ."); 391:12-392:1 (Hiltz) ("the most significant thing that had changed was the continued deterioration of the company's business."); 508:1-5 (Ning); JX464; JX569 at 10; JX1211 at 3.

date in a manner that preserved the integrity of the BCG model or abandon the BCG model altogether.[118] Hubbard chose the former by updating the IDC market data in the BCG model; Cornell did neither and, instead, used stale BCG projections in his model.

Petitioners advance a three-prong attack on Hubbard's approach. They first incorrectly claim that he lacked the expertise to make the subjective decision to update the BCG forecast.[119] Hubbard simply incorporated the current IDC data into the BCG model while preserving the mechanics, formulas and internal assumptions embedded in that model.[120] In no sense did he create his own subjective set of projections in bringing the BCG model current to the merger date.[121]

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118 *Highfields Capital*, 939 A.2d at 53-54 (expert's DCF was more credible because he did not rely on "outdated management prospects which were, by any reasonable measure, not indicative of [the company's] future prospects.").

119 PAB at 43-44.

120 Tr. 603:17-23 (Hubbard) ("What I did was essentially adopt the BCG structure but bring it forward to more contemporary data.").

121 Tr. 610:8-13 (Hubbard) ("Q. Does your IDC adjustment to the BCG model require any subjective assessment on your part? A. No. BCG is quite formulaic in how the IDC inputs go. I'm not changing the structure of the BCG model; merely updating as if they were doing the exercise more contemporary in time to the transaction."). Petitioners' statement (at PAB 44) that Hubbard should have discussed with BCG and Dell management in 2015 how they thought the updated IDC forecasts would have impacted the BCG model two years earlier would have improperly introduced hindsight bias into his analysis.

Petitioners next claim that Hubbard's decision to update the BCG projections with the most recent IDC forecast was improper because BCG "specifically considered whether it was necessary to review the BCG forecasts to account for updated IDC numbers and concluded that it was not."[122] Petitioners confuse the record. Ning testified that BCG was never asked to update its projections after January 2013.[123] When BCG was asked in early May whether the release of the February 2013 IDC data required an adjustment to the BCG forecast, it determined that no adjustment was required because the BCG model anticipated the decline reflected in the February data.[124] Petitioners end their story there and never account for the further deterioration in the PC market that was reflected in the late-May and August 2013 IDC reports.[125] This latest data confirmed the continued deterioration in the PC market.[126]

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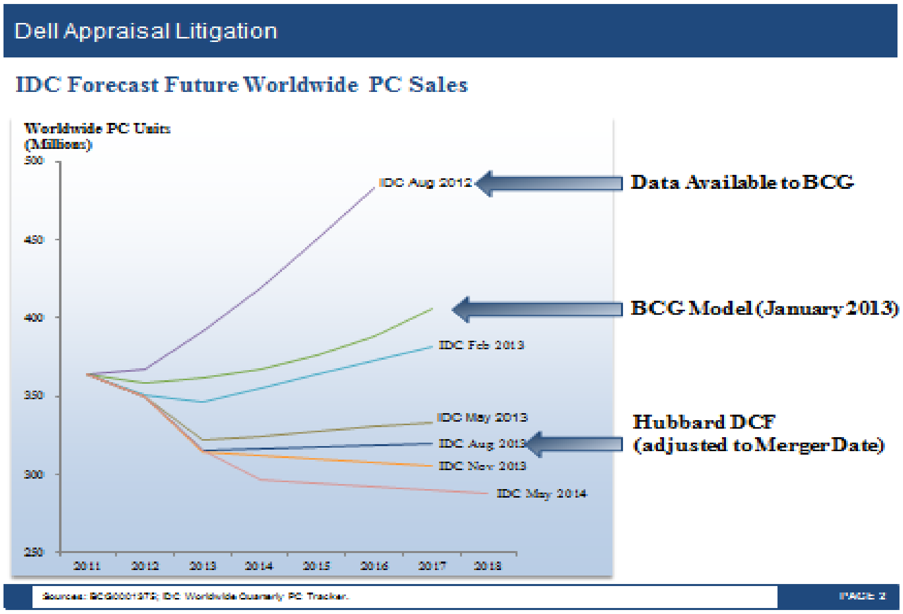
[122] PAB at 44.

[123] Tr. 507:18-20 (Ning) ("Q. Was BCG asked to update the model after February 5? A. We were not."); 527:8-11.

[124] At the time BCG prepared its model in January 2013, the August 2012 IDC data was the most recent market data available. Hubbard Demonstrative 2.

[125] PC Outlook Falls as Market Increasingly Looks to Tablets, According to IDC, *available at* http://www.reuters.com/article/ ma-idc-idUSnBw285471a+100+BSW 20130528.

[126] Hubbard Demonstrative 2.



Accordingly, Hubbard concluded that the BCG projections required updating if they were going to be used in this case.

Finally, Petitioners state that "even if it were appropriate to update the BCG Case to reflect the August 2013 IDC numbers, it was not possible to engage in the simple 'plug and play' exercise Professor Hubbard claims to have performed."[127] In reaching this conclusion, Petitioners confuse testimony from Ning as to whether BCG just inserted the stale August 2012 IDC forecast when preparing its model in January 2013.[128] Ning's unsurprising acknowledgement that BCG did not just "plug and play" that stale data into its January 2013 model does not allow Petitioners to leap the chasm and conclude that the substitution of current IDC data at the merger date was somehow improper. Hubbard did not make adjustments

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[127] PAB at 44-45.

[128] PAB at 45 n.147.

beyond what the IDC data indicated and observed that "BCG actually has a very detailed model to map that in."[129] Hubbard used projections in his DCF that were reasonable, appropriate and based on evidence.

B. <u>Hubbard Appropriately Applied The Marginal Tax Rate In The Terminal Period.</u>

Petitioners next join issue on the appropriate tax rate for use in the terminal period. Hubbard used a 17.8% rate in the projection period and a 35.8% marginal rate in the terminal period.[130] Cornell used a 21% rate in both the projection and terminal periods. Petitioners claim that the "use of the federal marginal rate in the terminal period undervalues Dell."[131] Not so.

The experts agree that tax strategies are deferral strategies, not avoidance strategies.[132] By definition, the terminal period is the point at which all metrics, including taxes, have settled at their final steady state rate.[133] At that point, the marginal tax rate should be applied.[134] This fundamental concept does not mean

[129] Tr. 604:23-606:2 (Hubbard).

[130] Tr. 637:7-14 (Hubbard).

[131] POB at 26.

[132] Tr. 656:13-19 (Hubbard), 913:14-22 (Shay); JX914 at 55:18-25 (Steines).

[133] Tr. 636:16-637:6 (Hubbard).

[134] Tr. 636:23-24 (Hubbard) ("the steady state tax rate has to be the marginal statutory tax rate"); *see also* JX751 at 229-30 ("[I]t is critical to use the marginal rate in calculating after-tax operating income in perpetuity. Otherwise, the implicit assumption is that taxes can be deferred indefinitely."); Koller, *Valuation*, at 234 ("The marginal tax rate used to determine the after-tax cost of

that different rates cannot be modeled during earlier periods.[135] In fact, that is precisely the approach that Hubbard used in his DCF model. And, it is consistent with the Court's holding in *Ancestry.com* that it is "overly speculative to apply the current tax rate in perpetuity."[136]

Petitioners defend their application of a 21% unitary rate with a series of misguided arguments.[137] First, Petitioners point to the fact that Dell's current tax rates are lower than the marginal rate.[138] While relevant to the rate used during the projection period, it has no bearing on the proper rate for the terminal period. Second, Petitioners claim that the use of the marginal rate does not make "sense at all in the context of a multinational corporation that earns most of its income overseas."[139] That claim reflects a fundamental misunderstanding of the U.S. tax

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debt must match the marginal tax rate used to determine free cash flow."); Subramanyam, *Investment Banking: Concepts, Analysis and Cases*, at 218 ("[I]t is always the marginal tax rate that has to be used since all deferred tax assets get neutralized over a period of time and the company will eventually pay tax at the marginal rate.").

[135] Damodaran, *Investment Valuation*, at 252 ("There is no reason . . . why the tax rates used to compute the after-tax cash flows cannot change over time.").

[136] *In re Appraisal of Ancestry.com, Inc.*, 2015 WL 399726, at *20 (Del. Ch. Jan. 30, 2015) (quoting *Henke v. Trilithic Inc.*, 2005 WL 2899677, at *9 (Del. Ch. Oct. 28, 2005)). Petitioners suggest *Ancestry.com* is distinguishable because Dell is a multinational corporation, but that is plainly irrelevant to the proposition for which the case is cited.

[137] PAB at 46-48, 54.

[138] PAB at 46-47.

[139] PAB at 47-48.

system and the manner in which it accounts for the payment of foreign taxes. It has nothing to do with the appropriate tax rate in the terminal period. Third, Petitioners speculate that future changes in the statutory rate may result in a lower marginal rate. A valuation should not incorporate speculative changes in the tax code that were not known as of the merger date.

Petitioners also cite two treatises for the supposed proposition that "the practice of using the marginal tax rate in the terminal period for multinational corporations is disputed in valuation textbooks."[140] Petitioners misinterpret the treatises: the statement they reference in *Koller* concerns the appropriate tax rate in the *projection* period and the statement they reference in *Holthausen* had nothing to do with the marginal rate. Instead, the finance literature provides for use of the marginal tax rate in the terminal period.[141] Hubbard did that in his analysis.

Unable to dispute the common sense notion that Dell's tax deferral strategies will end at some point, Petitioners attempt to recast the inquiry as to when that point will occur.[142] In doing so, they criticize Hubbard for commencing his terminal period in 2023 even as they omit that Cornell commenced his five years earlier. Petitioners also ignore that Dell's "significant tax holidays expire in whole or in

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[140] PAB at 48.

[141] *See* fn. 134, *supra*.

[142] PAB at 52.

part during Fiscal 2016 through Fiscal 2022."[143] And, they ignore the fact that whenever that terminal period commences, the marginal rate should be used. Hubbard appropriately modeled the marginal rate in his DCF model.[144]

C. <u>**Hubbard Correctly Concluded That Dell Required $5 Billion In Cash.**</u>

Petitioners challenge Hubbard's determination that Dell required $5 billion in cash at the time of the merger.[145] Hubbard relied on testimony from Sweet and contemporaneous documents showing that Dell required at least $5 billion in cash to support its operations.[146] Hubbard also noted that Silver Lake, the party with an

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[143] JX404 at 47; Tr. 284:13-285:5 (Sweet); 1037:11-14 (Steines).

[144] In its comments at the end of trial, the Court stated that "while applying the marginal tax rate in most cases has both intuitive as well as academic support, this may be a place where the real world doesn't fit neatly into the high church model." Tr. 1045:9-13. As a result, the Court appeared to wrestle with the question whether an appropriate DCF model could accommodate "some intermediate zone." Tr. 1046:1-3. Hubbard provided a useful balance between pure economic theory and the practical realities that confront Dell by (i) adopting a rate for 10 years before the terminal period that is significantly below Dell's 25-year historical average tax rate of 28.1%; (ii) using a split rate that accommodates both the long run use of the marginal rate and the near-term deferral opportunities created by Dell's lawful tax planning activities; (iii) including a five-year transition period that delays the commencement of the terminal period; and (iv) maintaining a low tax rate in the transition period rather than stepping up the rate over time to the marginal rate or adjusting the rate to account for the loss of Dell's significant tax holidays. Tr. 641:6-642:4 (Hubbard); JX896A at ¶¶ 220-225; JX908A at Ex. 5.

[145] PAB at 49-51.

[146] Tr. 277:14-278:2 and 279:3-13 (Sweet) (explaining that cash needs were $3.2-$3.4 billion for working capital and $2 billion for restricted cash); JX623 at 38 ("Estimate $5 billion minimum cash balance (including $2 billion restricted

incentive to reduce leverage by drawing down cash, left $5.665 billion in cash on the balance sheet immediately after the closing.[147] Notwithstanding these facts, Petitioners claim that "there is no reason to make any deduction from Dell's cash balance in order to account for the Company's working capital requirements."[148] In doing so, they advance the same misplaced arguments made in their opening brief.

- Petitioners assert that Dell "typically generated sufficient free cash flow from operations to fund its working capital needs."[149] Respondent explained in its opening brief that Dell required cash to address mismatches between disbursements and receipts related to (a) the "seasonality" associated with the business; and (b) "geographical friction."[150] Hubbard testified that "there is sometimes a confusion that if you generate additional cash for working capital in the future, that somehow you don't need cash for your base of working capital. That's just not true."[151] Petitioners ignore this evidence.

- Petitioners fall back to the claim that Dell "needed far less than $5 billion

cash) is adequate to support operating needs"); JX685 at 12 ($5.167 billion required working capital/restricted cash); JX701 at 3 ("minimum cash balance" of $5.0 billion); JX255, at 3 ($5.0 billion "Cash to Keep").

147 Tr. 279:8-13 (Sweet); Tr. 652:20-653:5 (Hubbard); JX736, at 4.

148 PAB at 49.

149 POB at 34; PAB at 49.

150 ROB at 52 *citing* Tr. 278:6-279:1 (Sweet).

151 ROB at 51-52 *citing* Tr. 651:19-652:2 (Hubbard).

in cash to run its business."[152] They exclude restricted cash from their calculation.[153] They also recycle their claim that the Court should credit them for post-merger changes as a private company that allowed Dell to reduce its required working capital.[154] In doing so, they ignore Sweet's testimony that those post-closing actions were unappealing in a public company setting because Dell was "concerned from a perception with our investors and analysts around what we called our negative cash conversion cycle."[155]

- Petitioners assert that Dell could "make use of a credit line to smooth cash flow fluctuations."[156] As Hubbard explained, and Petitioners ignore, that would be "like canceling your checking account and just using your Visa card. You would typically think of a line of credit as being contingent financing, not your base of working capital."[157]

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[152] POB at 33; PAB at 50-51.

[153] PAB at 50-51. Petitioners assert that prior to the merger, Dell "secured access" to restricted cash providing approximately $800 million in additional liquidity. PAB at 51. What they leave out is that the document they cite for that proposition also noted that Dell required $4.9 billion in cash. JX626 at 4.

[154] POB at 33; PAB at 50-51.

[155] Tr. 280:8-282:23 (Sweet).

[156] POB at 34; PAB at 51.

[157] Tr. 653:10-17 (Hubbard). Petitioners also attempt to reframe the required cash discussion around wasting cash and Dell's ability to invest that cash and earn a market rate return. PAB at 50-51. Petitioners present no evidence to support

In the end, Petitioners offer no response to the arguments made by Respondent in its opening brief. Instead, they just hope that repetition of their arguments will serve as an adequate substitute for validity. Dell required at least $5 billion in cash to fund its operations and account for restricted cash.

D. <u>Hubbard Correctly Accounted For Dell's FIN 48 Reserve.</u>

Petitioners next challenge Hubbard's deduction for liabilities associated with Dell's FIN 48 reserve.[158] FIN 48 is a measurement of expected tax obligations related to ***past*** tax positions taken in various countries.[159] It represents a "reserve reflected on the balance sheet in the liability section in accordance with generally accepted accounting principles."[160] As such, it should be subtracted from enterprise value when converting to equity value.[161] Dell had "a reserve of $3.01 billion in contingent tax liabilities, penalties, and interest under FIN 48" as of the merger date.[162]

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this latest theory, which is inconsistent with the contemporaneous evidence and record developed at trial.

[158] PAB at 51.

[159] ROB at 53-54; Financial Accounting Standards Board, "FASB Interpretation No. 48: Accounting for Uncertainty in Income Taxes," *Financial Accounting Series*, June 2006, ("FASB Interpretation No. 48"), codified as FASB Accounting Standards Codification 740-10-55-3.

[160] Tr. 126:5-11 (Cornell).

[161] JX896A at ¶¶ 265-67.

[162] SF 310.

Respondent provided a detailed response to the various arguments made by Petitioners concerning FIN 48 in its opening brief.[163] Respondent pointed to specific evidence and testimony establishing that Dell's FIN 48 reserve is audited, real, and reasonably estimable.

Unable or unwilling to address Dell's arguments, Petitioners dismiss them in a four sentence section in their Answering Brief.[164] They assert that Dell's FIN 48 reserve should be ignored because it represents contingent liabilities. In its ASC 805 valuation, Ernst & Young followed FASB standards and recognized that Dell's FIN 48 liability impacts value.[165] That approach was consistent with Damodaran's view that there "may be other claims on the firm that do not show up in debt that you should subtract from firm value."[166] Damodaran specifically called out contingent liabilities as an example that should be accounted for in a valuation.[167] As reflected by the attention devoted to this issue in their latest brief, it is clear that Petitioners have no credible basis for ignoring this liability.

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[163] ROB at 53-57.

[164] PAB at 51.

[165] JX764 at 356.

[166] Damodaran, *Investment Valuation*, at 441.

[167] *Id*.

E. **Hubbard Correctly Accounted For Dell's Residual Tax Liability.**

Petitioners challenge Hubbard's decision to include an offset in his valuation for Dell's residual U.S. tax liability.[168] Hubbard demonstrated that with $19 billion in undistributed book earnings from its foreign subsidiaries, Dell confronted a tax liability of approximately $6.3 billion to repatriate those earnings.[169] That liability will continue to increase so long as the tax rate is less than the marginal rate.[170] Hubbard spread out Dell's deferred tax payments over 25 years starting in 2023.[171] In doing so, he adopted a more petitioner-friendly approach than if he had discounted the full tax liability all at once in 2023 or spread it over 10 years as suggested in an example by Damodaran.[172]

Petitioners criticize Hubbard for accounting for these liabilities. They claim that Dell "had no plans to repatriate its foreign cash" and, therefore, the assumption that repatriation will commence in 2023 does not reflect Dell's operative reality.[173] Cornell conceded that "if you can't return your cash flows to investors, you're not

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[168] PAB at 52.

[169] SF 281; Tr. 658:2-4 (Hubbard); Tr. 920:8-20 (Shay); Tr. 1036:1-11 (Steines).

[170] SF 326-327; Tr. 1036:6-11 (Steines).

[171] This approach to modeling the deferred tax liabilities is roughly equivalent to applying a 6-7% flat rate on overseas earnings and profits. ROB, at 60.

[172] JX922 at ¶ 48 and Ex. 5; JX896A at Ex. 23; Shay Demonstrative 5; Hubbard Demonstrative 17; *see also* Damodaran, *Investment Valuation*, at 254 ("The most sensible way of dealing with this item is to consider it an obligation . . . .")

[173] PAB at 52.

going to be worth anything."[174] If Dell's residual tax liabilities are ignored, then the corresponding earnings and profits should be as well because they would also be unavailable to stockholders.[175]

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[174] Tr. 82:22-83:1 and 84:12-16 (Cornell); Tr. 662:1-3 (Hubbard) ("if you can never bring back money, you don't add value to shareholders"); 925:18-20 (Shay) ("These earnings can't be kept off-shore forever or else they don't provide value to the shareholders.").

In comments during trial, the Court queried whether permanently maintaining the foreign earnings and profits overseas would negate the need to deduct for residual U.S. tax liabilities when converting from enterprise to equity value. Hubbard explained: "At the end of the day, the value of the firm is cash, dividends, share repurchases . . . The notion that money never comes back [means you] aren't adding value." Tr. 662:6 (Hubbard). He also noted that one could exclude such liabilities and offset the relevant cash, but "those would roughly cancel each other out." Tr. 662:7-14 (Hubbard).

The Court also questioned whether there was some intermediate position based on a deferral of taxes on the foreign earnings and profits. Tr. 640:13-24 (Hubbard). Allowing for deferral of taxes entails a tradeoff, as it entails delaying both the cost of the taxes and the benefit of the corresponding profits. The value associated with deferral also hinges on the rate of return earned on the foreign profits before they are repatriated. Absent evidence that Dell was able to achieve supernormal returns on its offshore profits, there is no difference between repatriating those profits now and deferring repatriation of them until some later time. Petitioners presented no evidence that Dell achieved supernormal returns on those profits.

[175] *Delaware Open MRI Radiology Assocs., P.A. v. Kessler*, 898 A.2d 290, 329 (Del. Ch. 2006) ("No one should be willing to pay for more than the value of what will actually end up in her pocket."). Petitioners' claim that such earnings could be invested overseas does not change the fact that those investments will have no value if their earnings stream can never be returned to stockholders. Tr. 82:22-83:1 and 84:12-16 (Cornell); Tr. 662:1-3 (Hubbard); Tr. 925:17-20 (Shay).

III. Cornell's Valuation is Fundamentally Unsound And Should Be Rejected.

Petitioners state that "Cornell's valuation is based on the most reasonable projections available, applies inputs that most closely reflect Dell's operative reality, and is faithful to valuation theory."[176] Petitioners are wrong on all three counts.

A. <u>Cornell's Valuation Does Not Rely On The Most Reasonable Projections Available.</u>

Petitioners state that Cornell's valuation "is based on the most reasonable projections available."[177] There are many reasons why that statement is wrong.

First, Cornell testified that he made no effort to determine whether the projections used in his DCF analyses were reasonable or realistically achievable.[178] Instead, he mechanically calculated an output from projections provided to him by counsel.[179] Cornell opined that the difference between his valuation and the merger

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[176] PAB at 32-33.

[177] PAB at 32.

[178] JX920 at 215:22-25 (Cornell) ("Q. . . . And you haven't made the determination as to the reasonableness of those projections, have you, sir? A. No."). Petitioners attempt to unwind this testimony by claiming that what Cornell really meant was that he did not create his own set of projections. PAB at 34-35. This *post hoc* explanation does not reconcile with other testimony claiming that he was relieved of any such obligation to assess reasonableness because the projections used in his model were prepared by "professional people" who had "access to the company." Tr. 86:6-87:12 (Cornell).

[179] Tr. 88:13-17 (Cornell) ("Q. In fact, what you did was value a set of assumed projections. Correct? A. Correct. . .").

price reflects a disagreement between a "pessimistic view of the market and some of the buyers" and an "optimistic view of the company and its advisors." [180] Cornell's failure to test the reasonableness of his projections is inexplicable since his "valuation depends centrally on the projections."[181]

Second, Cornell attributed 25% of his valuation to a DCF based on the BCG 75% Case projections. The Special Committee noted that these projections "would imply margins in fiscal year 2016 . . . higher than those ever achieved by the Company or its principal competitors."[182] Rajkovic testified that the projections "did not seem realistic"[183] and were "aspirational at best."[184] No bidder considered those projections credible either, as reflected by the absence of a topping bid.

Third, Cornell attributed 25% of his valuation to a DCF based on the BCG 25% Case projections. While appropriate as a starting point, Cornell failed to take the next step and bring those projections forward in light of IDC data documenting the continued deterioration of the PC market in 2013.

Fourth, Cornell attributed 50% of his valuation to a DCF based on modified Bank Case projections. Petitioners state that Cornell "reasonably relied on the

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[180] Tr. 61:8-24 (Cornell).

[181] Tr. 88:23-89:5 (Cornell).

[182] JX532 at 63-64; JX569 at 28.

[183] Tr. 739:2-20 (Rajkovic).

[184] JX621 at 9; *see also* JX896A at ¶¶ 172-75; JX907 ¶¶ at 57-64.

Bank Case,"[185] but never mention that he created his own litigation-driven set of projections by adding $1 billion in extra EBITDA each year *in perpetuity* to the projections prepared by Silver Lake.[186] Cornell's modified Bank Case projections did not represent the "most reasonable projections available."[187]

Fifth, Petitioners attempt to justify Cornell's projections by trumpeting Dell's success in achieving cost savings during FY14, while ignoring Dell's eroding margins from price competition.[188] Peering at only one element in a dynamic model does not provide visibility into the reasonableness of projections. Had Cornell looked at the full canvas before him, it would have been obvious that using the cash flow projections in his model was not reasonable, as those projections estimated margins and operating income that were dramatically in

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[185] PAB at 40-41.

[186] Tr. 91:21-92:3 (Cornell) ("the bank case base case did not include those incremental savings, that's correct."); 272:20-23 (Sweet) ("Q. Did the plan actually have this extra billion dollars in it? A. No . . .").

[187] Petitioners suggest that the Silver Lake projections should be accorded special weight even though prepared for operation of the company as a private entity. Those projections were prepared by Silver Lake for post-merger operation as a private company and reflected "the Company's refined operational strategies post-Transaction" and "new ownership represented by Silver Lake establishing a view." JX722 at 18 Thus, while they do have confirmatory value as Hubbard testified, that value is limited to avoid introducing unnecessary error into the valuation. JX896A at ¶¶ 178-81.

[188] ROB at 32-34 and 40-42.

excess of actual results.[189]

Finally, Cornell never considered whether his results made sense. His valuation was more than 100% higher than the merger price. His projections were tracking significantly behind Dell's actual performance in a deteriorating market. His valuation was inconsistent with the trading range of Dell's primary competitors. And, his result was nearly 80% higher than Petitioners' own internal valuations.[190] It simply is not credible to claim that Cornell's valuation "is based on the most reasonable projections available."

B. <u>Cornell Did Not Apply Inputs That Most Closely Reflect Dell's Operative Reality.</u>

Petitioners' statement that Cornell applied inputs that most closely reflected Dell's operative reality is unsubstantiated by the evidence.

First, Cornell failed to deduct *any* required cash in his conversion from enterprise to equity value even as he acknowledged that "[t]o the extent that they have to have a working cash balance to operate, that would be a reduction in the

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[189] JX758; ROB at 36-44.

[190] Petitioners' Rule 30(b)(6) witness, Kenneth Allen, a fund manager at T. Rowe, penned memorandum in April 2013, remarking that his "DCF value [for Dell] is $16 [per share], or 12% above the current [trading] price." JX445 at 3. He lowered his assessment three months later in light of the deteriorating PC business: ***"[m]y view of Dell's value has fallen by roughly 10% since the deal was initially announced as a result of the outlook for its PC business getting even worse.*** " JX564 at 1.

enterprise value."[191] Cornell never considered documents showing that Dell required at least $5 billion in cash to fund its operations.[192]

Second, Cornell failed to take into account Dell's FIN 48 reserve.[193] He testified that he *assumed* that Dell's FIN 48 exposure was somehow included in Dell's effective tax rate, but did not know if that was true and could not present any facts to support that assertion.[194] In ignoring Dell's $3.01 billion FIN 48 reserve, Cornell modeled a company that did not reflect Dell's operative reality.[195]

Third, Cornell failed to account for residual U.S. tax liabilities related to undistributed earnings from Dell's foreign subsidiaries even though he acknowledged that "if you can't return your cash flows to investors, you're not

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[191] Tr. 118:18-23 and 122:4-7 (Cornell). At trial, Cornell tried to explain away this omission by suggesting that he "was waiting for the testimony of Mr. Sweet, who is the current CFO. I don't think I had that at the time." Tr. 120:10-14 (Cornell). When it was noted that Sweet had testified in his deposition that Dell required $5 billion in cash to support its operations, Cornell simply admitted that he "did not adjust the model for that testimony." Tr. 122:8-12 (Cornell).

[192] *See supra*, at 42-45.

[193] Tr. 123:1-3 (Cornell) ("Q. In fact, your initial report made no mention of FIN 48. Correct? A. Correct.").

[194] Tr. 123:19-124:15 and 127:11-23 (Cornell). Other witnesses lay bare the invalidity of Cornell's assumption. Sweet testified how the FIN 48 reserve is calculated, audited, and adjusted each year to account for uncertain tax benefits the Company has taken on past-filed tax returns. Tr. 291:10-297:10 (Sweet). Shay further confirmed that "the effective tax rate wouldn't include the historic 3 billion." Tr. 995:12-14 and 994:18-995:5 (Shay).

[195] *See supra*, at 45-47.

going to be worth anything."[196] He further compounded that error by failing to account for future increases in the liability resulting from his decision to use a tax rate less than the U.S. marginal rate. In ignoring Dell's liability for undistributed book earnings from foreign subsidiaries, Cornell modeled a company that did not reflect Dell's operative reality.[197]

C. Cornell's Valuation Is Not Faithful To Valuation Theory.

Petitioners claim that Cornell was faithful to valuation theory. He was not.

First, Cornell presented no evidence or authority justifying a 21% tax rate for the terminal period. Cornell testified that he did not obtain the rate from Steines.[198] He testified that he "didn't make an independent decision that it was an appropriate terminal tax rate" and did not perform any analysis to determine whether Dell's "business and tax strategies will allow it to pay a lower effective tax rate in perpetuity."[199] Instead, he simply took the *projection period* tax rate used by JPM and then inserted it into his model as the terminal rate. His terminal rate never equals the marginal rate, or even comes close. Accordingly, his

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[196] Tr. 82:22-83:1 and 84:12-16 (Cornell).

[197] *See supra*, at 47-49.

[198] Tr. 114:10-12 (Cornell).

[199] Tr. 114:3-6 and 114:16-21 (Cornell).

valuation incorrectly applies the DCF methodology and overstates the value of Dell's future cash flows.[200]

Second, Cornell used an idiosyncratic equity risk premium in calculating his discount rate that he admits cannot be verified or replicated, and cannot be found in any treatise or manual.[201] Petitioners do not defend – or even mention – Cornell's calculation of the discount rate in their Answering Brief.[202]

Third, although applying lip service to the basic economic principle that growth requires investment[203], Cornell did not follow that methodology in his BCG model. The evidence is clear that Cornell assumed (i) $400 million in annual incremental investment was necessary to support a 1% perpetuity growth rate in his Bank Case valuation[204]; and (ii) that same growth rate could be achieved *in perpetuity* in his BCG case without *any* incremental investment. Cornell's inconsistent modeling defies the laws of economics.[205]

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At bottom, Cornell's valuation fails any credible standard of reliability. It does not use the most reasonable projections available. It does not apply inputs

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[200] *See supra*, at 39-42.

[201] Tr. 117:9-118:5 (Cornell).

[202] ROB at 48-49.

[203] Tr. 109:13-18 (Cornell).

[204] Tr. 111:21-112:8 (Cornell).

[205] Tr. 644:12-645:20 (Hubbard); Hubbard Demonstrative 12; ROB at 46-47.

that reflect Dell's operative reality. It is not faithful to valuation theory. Instead, it is a litigation-driven model that produces an absurd result. Cornell was correct when he wrote: "a market that is not perfectly efficient may still value securities more accurately than appraisers who are forced to work with limited information and whose judgments by nature reflect their own views and biases."[206]

IV. Petitioners' Alternative Valuation Remains Fundamentally Unsound.

Petitioners continue to press their alternative valuation "to address concerns expressed by the Court during trial."[207] In doing so, they jettison Cornell's model in favor of Hubbard's Bank Case model as the launch point for their alternative analysis. Petitioners assert that this "removes much of the dispute between the parties."[208] It does not.

First, Hubbard's actual model should be used as the starting point for any valuation based on his work. The Bank Case is instructive for corroboration, but it introduces unnecessary error into the valuation process because it assumes post-merger operation of the Company as a private company.[209]

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[206] Cornell, *Corporate Valuation*, at 46.

[207] PAB at 3.

[208] POB at 56-57.

[209] JX896A at ¶¶ 280-284; Tr. 664:14-23 (Hubbard).

Second, Petitioners' adjustments to Hubbard's model lead to an alternative valuation more than $11 billion above the merger price. That should have been a flag to Petitioners that something is amiss with their alternative valuation.

Third, Petitioners present no new justification or evidence supporting their proposed adjustments to Hubbard's model.

1. Terminal Tax Rate

Petitioners continue to model a 21% terminal tax rate in their alternative valuation. In doing so, they double down on one of the major errors in Cornell's original valuation.[210]

2. Discount Rate

Petitioners model a 9.34% discount rate in their alternative valuation after abandoning Cornell's "idiosyncratic" approach to the equity risk premium and using the Ibbotson supply-side figure. Their appropriate discount rate range, therefore, is 9.34% to 9.67% (midpoint of 9.51%), depending on whether the Court adopts Cornell's or Hubbard's other inputs.

3. Required Cash

Petitioners repeat their position that deducting $2.2 billion for required cash "represents a generous compromise position."[211] Petitioners continue to create a

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[210] *See supra*, at 39-42.

[211] PAB at 55.

false construct that the required cash ranges from \$2.2-\$3.3 billion rather than the \$5+ billion reflected in testimony and contemporaneous documents.[212]

4. Residual U.S. Tax Liability

Petitioners propose "splitting the difference" between Shay's calculation of Dell's residual U.S. tax liabilities and Cornell's omission of it in his model. Petitioners do not propose removing or delaying the earnings and profits associated with that position, nor do they account for residual tax liabilities that will continue to accrue until Dell starts paying the U.S. marginal tax rate.

5. FIN 48

Petitioners repeat their claim that deducting \$650 million for Dell's FIN 48 liability strikes a fair balance between Dell's actual \$3.01 billion FIN 48 reserve and Cornell's complete omission of it in his model. In doing so, they continue to confuse the record on a straightforward issue.[213]

* * * * *

In sum, the differences between Hubbard's valuation and Petitioners' alternative valuation are highlighted in the following chart:

[212] ROB at 50-53 and 61-62.

[213] ROB at 53-57 and 62-63.

Alternate Valuation Summary		
	Hubbard	Cornell
Terminal Tax Rate	35.8%	21.0%
Discount Rate	9.46%	9.34%
Required Cash	$5.0 B	$2.2 B
Residual Tax Liability[214]	$2.2 B	$1.1 B
Fin 48	$3.01 B	$650 M
Fair Value	$12.68	$19.88

[214] The residual tax liability will continue to increase during any period in which the marginal tax rate is not modeled. *See supra*, at 47-49.

CONCLUSION

For the foregoing reasons, Dell respectfully requests that the Court (i) dismiss with prejudice appraisal claims as to all shares voted in favor of the merger; (ii) enter judgment determining that the fair value of Dell as of the merger date was $12.68 per share; and (iii) award Dell such further relief that the Court deems just and appropriate.

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: APPRAISAL OF DELL INC.	)))	Consol. C.A. No. 9322-VCL

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1. This brief complies with the typeface requirement of Ct. Ch. R. 171(d)(4) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2010.

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