

2007

William Borghetti v. System & Computer Technology Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

WILLIAM BORGHETTI, et al.

Plaintiffs/Appellants,

v.

SYSTEM & COMPUTER
TECHNOLOGY, INC., et al.

Defendants/Appellees.

No. 20070513 -SC

BRIEF OF APPELLEES BENDINGER, CROCKETT, PETERSON & CASEY AND
JEFFREY S. WILLIAMS

**APPEAL FROM A FINAL JUDGMENT OF THE THIRD DISTRICT COURT,
THE HONORABLE JOHN PAUL KENNEDY PRESIDING**

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LA DOZZINA SPORCA, LLC.,
LA FAMIGLIA BORGHETTI, LLC.,

Plaintiffs/Appellants,

SYSTEM & COMPUTER TECHNOLOGY, INC.,
THOMAS LEWIS, JR.,
DARIN GILSON,
CHAD MUIR,
FRED HARMON,
DAVID PETERSCHMIDT,
DAVID GARDNER,
ALLEN FRIEDMAN,
ERIC HASKELL,
MICHAEL CHAMBERLAIN,
DAVID MURRAY,
ANDY COOLEY,
SCOTT DOUGHMAN,
JOHN DUNN,
TYLER THATCHER,
THOMAS WEISEL, & PARTNERS,
SUNGARD/SCT, INC.,
CAMPUS PIPELINE, INC.,
FRED HARMAN,
OAK INVESTMENT PARTNERS,
BENDINGER, CROCKETT, PETERSON & CASEY,
JEFFREY S. WILLIAMS,

Defendants/Appellants.

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STATEMENT OF JURISDICTION

This is an appeal from a summary judgment issued by the Honorable John Paul Kennedy, Third District Court, dismissing a legal malpractice action by William Borghetti (“Borghetti”), against Appellees Bendinger, Crockett, Peterson & Casey and Jeffrey S. Williams, Esq. (collectively “Bendinger Crockett”). The Utah Supreme Court has original appellate jurisdiction pursuant to Utah Code Annotated § 78-2-2(3)(j).

STATEMENT OF ISSUES PRESENTED

ISSUE #1: Did the trial court correctly grant summary judgment on the ground that Borghetti incurred no damages as a result of Bendinger Crockett not advising him of the deadline for filing a Delaware appraisal action because the “fair value” of Campus Pipeline at the time of the Acquisition was less than the preferred shareholders’ \$80,880,000 liquidation preference?

Standard of Appellate Review: The Utah Supreme Court reviews a trial court’s decision granting summary judgment for correctness, giving no deference to its legal conclusions. See Progressive Cas. Ins. Co. v. Ewart, 2007 UT 52, ¶9, 167 P.3d 1011. All facts and reasonable inferences are viewed in the light most favorable to the non-moving party. See id. at ¶2.

Preservation of Issue: Bendinger Crockett raised and briefed this issue in their summary judgment memoranda. (R. 1982-2534; 4777-4882.)

ISSUE # 2: Can summary judgment be affirmed on the alternative ground that Bendinger Crockett and Borghetti had no attorney-client relationship, and therefore Bendinger Crockett owed no duty to Borghetti regarding Delaware appraisal actions?

Standard of Appellate Review: Although the trial court did not reach this issue because it granted summary judgment based on Issue # 1, the Utah Supreme Court can affirm summary judgment on any basis appearing on the record, regardless of whether the trial court relied on it, see Dipoma v. McPhie, 2001 UT 61, ¶18, 29 P.3d 1225, if the record shows that there are no disputed material facts and the movant is entitled to judgment as a matter of law. See Atkinson v. Stateline Hotel Casino & Resort, 2001 UT App 63, ¶23, 21 P.3d 667.

Preservation of Issue: Bendinger Crockett raised and briefed this issue in their summary judgment memoranda. (R. 1982-2534; 4777-4882.)

ISSUE # 3: Can summary judgment be affirmed on the alternative ground that it is undisputed that Borghetti was advised by separate counsel of the 120-day appraisal filing deadline and therefore Bendinger Crockett owed no duty to so advise and caused no damage by failing to advise?

Standard of Appellate Review: Same as issue # 2 above.

Preservation of Issue: Same as issue # 2 above.

**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES, AND REGULATIONS**

Delaware Code Annotated title 8 section 262 is of central importance to the issues presented and is included in the Addendum due to its length. Del. Code Ann. tit. 8, § 262.

Rule 56 of the Utah Rules of Civil Procedure is determinative of the issues presented and is included in the Addendum due to its length. Rule 56, Utah R. Civ. P.

Rule 702 of the Utah Rules of Evidence has importance to the issues presented and states: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Rule 702, Utah R. Evid.¹

STATEMENT OF THE CASE

A. Nature of the Case.

This is a legal malpractice case by Borghetti against Bendinger Crockett. It arises out of a business transaction in which System & Computer Technology, Inc. (“SCT”) acquired Campus Pipeline, Inc. (“CPI”), a Delaware corporation, on October 23, 2002 for a purchase price of \$42,000,000 (the “Acquisition”). (R. 2131; 2144.) Borghetti was a common shareholder in CPI. (R. 2140.) Preferred shareholders in CPI held a liquidation preference of \$80,800,000 which was required to be satisfied from the proceeds of a sale of CPI before CPI’s common shareholders would receive anything from a sale. (R. 2132.) Because the sale price was \$42,000,000, well short of the \$80,800,000 liquidation preference, the common shareholders’ stock, including Borghetti’s, was cancelled and they received nothing from the sale. (R. 2132.)

Borghetti opposed the Acquisition. Under Delaware Code Annotated title 8 section 262 (“Section 262”), any common shareholder who opposed the Acquisition could demand an appraisal of the value of their common shares in writing within 20 days

¹ Bendinger does not cite Rule 702 as amended on November 1, 2007, since the trial court entered Summary Judgment at a time when former Rule 702 was still effective.

of the effective date of the Acquisition and thereafter file an appraisal action in Delaware court (“appraisal action”) within 120 days of the same effective date to determine value. (R. 2122-2127.) In order for common shareholders to recover damages in such an appraisal action in this case, they were required to prove that the fair value of CPI as of the date of the Acquisition was more than the \$80,800,000 liquidation preference.

Borghetti submitted the written demand for appraisal within the 20-day deadline, but failed to initiate an appraisal action within the 120-day deadline. (R. 1-21; 2129.) Borghetti claimed Bendinger Crockett was his counsel and failed to advise him of the 120-day deadline. (R. 19.) Among other things, Bendinger Crockett denied that it represented Borghetti and also claimed that Borghetti was not damaged by not filing the appraisal action because the undisputed evidence established that the fair value of CPI at the effective date of the Acquisition was far less than the liquidation preference. (R. 1982-2534; 3221-3224; 4777-4882.) Therefore, Bendinger Crockett’s alleged failure to advise Borghetti regarding filing an appraisal action did not cause any damages.

The nature of this case is simple. The question is whether Borghetti was able to come forward with evidence showing that the fair value of CPI as of the date of the Acquisition was more than the \$80,800,000 liquidation preference. He did not. In fact, his own expert, Avner Kalay, determined that the value of CPI was far less than the liquidation preference. This fact completely resolves this case and this appeal in favor of Bendinger Crockett. There is no need to conduct further inquiry into any other issue, or to analyze valuation methodologies as urged by Borghetti, because the failure of Borghetti to present any evidence of fair value in excess of the liquidation preference

ends all inquiries and requires that this Court affirm the trial court's summary judgment in favor of Bendinger Crockett.

B. Course of Proceedings.

After discovery was completed, Bendinger Crockett filed a Motion for Summary Judgment on Borghetti's legal malpractice claims on several grounds, including:

- (1) Borghetti never had an attorney-client relationship with Bendinger Crockett that would give rise to any duty to advise Borghetti regarding the appraisal action;
- (2) Bendinger Crockett had no duty to advise Borghetti regarding the 120-day deadline because another lawyer had already done so; and
- (3) Borghetti could not prove that missing the 120-day deadline proximately caused any damage because the "fair value" of CPI on the date of Acquisition was less than the \$80,880,000 liquidation preference.

(R. 1982-2534; 3221-3224; 4777-4882.) Each argument was asserted as a sufficient and independent basis for granting summary judgment. (R. 1982-2534.)

Borghetti filed an opposition memorandum (R. 4608-4627), supported by an affidavit from his damage expert, Avner Kalay (R. 4645-4659). In addition to its reply memorandum (R. 4777-4882), Bendinger Crockett filed a Motion to Strike Kalay's affidavit because it altered his deposition testimony in an improper attempt to create a genuine issue of material fact as to the fair value of CPI. (R. 4733-4770.)

C. Disposition in the Court Below.

The trial court held oral argument on April 23, 2007, granted Bendinger Crockett's summary judgment motion (R. 5357), and entered Summary Judgment, dismissing all

Borghetti's claims against Bendinger Crockett, with prejudice and on the merits, on May 29, 2007, on the grounds there was no genuine issue of material fact that the fair value of CPI as a going concern on the effective date of the Acquisition was less than the liquidation preference of \$80,880,000. (R. 5368-5375.) Therefore, Borghetti was not damaged by the failure to file a Delaware appraisal because he would not have recovered anything for his common stock even if a Delaware appraisal action had been filed. Borghetti could not prove the "case-within-a-case" as required in a legal malpractice claim. (R. 5368-5375.)

The trial court did not reach the attorney-client relationship argument or the other arguments and grounds asserted by Bendinger Crockett in support of summary judgment. Also, the trial court did not rule on Bendinger Crockett's Motion to Strike Affidavit of Avner Kalay. (R. 5368-5375.)

D. Statement of Relevant Facts.

(i) Borghetti's legal malpractice claims.

Borghetti is the only Appellant who brought a claim against Bendinger Crockett, and his only claim is that Bendinger Crockett allegedly failed to keep appraisal rights open as an optional remedy for Borghetti. (R. 2107.)

(ii) Borghetti incorporated Campus Communications, which became CPI.

In June 1998, Borghetti and others incorporated Campus Communications for the purpose of acquiring software known as "Campus Pipeline" owned by Digital Scientific. (R. 2051 at pp. 112-120.) The software application provided college students, teachers,

and administrators access to email, grades, transcripts, financial aid, registration, course resources, and campus news. (R. 2051 at pp. 122-123.) In 1998 or 1999, after the technology had been purchased, Campus Communications changed its name to Campus Pipeline, Inc., or CPI. (R. 2051 at pp. 122-123.)

(iii) When SCT acquired CPI, the common shareholders had their stock cancelled and received no sale proceeds.

On September 30, 2002, the Board of Directors of CPI approved a plan for SCT to acquire CPI for approximately \$42,000,000. (R. 2117; 2119-2120; 2131-2132.)

Well prior to this time and pursuant to CPI's Restated Certificate of Incorporation and terms of issuance, CPI had issued two series of Preferred Stock, Series A and Series B, which were sold to preferred stockholders in the total amount of \$80,880,000. The preferred stock held a "liquidation preference" over the interest of common stockholders, meaning that all preferred shares would receive priority to the proceeds of any sale of CPI, up to the full \$80,880,000. (R. 2131-2132.)

On October 9, 2002, CPI notified "Common Stockholders" including Borghetti indicating that the common shareholders would receive nothing from the Acquisition because of the preferred shareholders' \$80,880,000 liquidation preference. (R. 2117.) Borghetti correctly understood that his remaining common shares would not participate in the \$42,000,000 proceeds of the Acquisition, and that he would get nothing for his stock. (R. 2051 at pp. 155-156; 2117.)

The Acquisition was approved and became effective on October 23, 2002. Common shareholders were so notified by letter dated October 30, 2002. (R. 2144.)

- (iv) The undisputed evidence, including that from Borghetti's expert, established that the fair value of CPI on the date of the Acquisition was less than the \$80,880,000 priority interest held by the preferred shareholders.**

On October 23, 2002, SCT purchased CPI for approximately \$42,000,000. Borghetti held common stock in CPI but received no compensation as a result of the sale. (R. 2131-2132; 2140; 2144.)

A shareholder in a Delaware company, like Borghetti, who does not believe that he received adequate compensation in a merger or acquisition can petition the Delaware court for an appraisal. (R. 2389-2390.) The Delaware Court must assume the validity of the acquisition, determine the "fair value" of the acquired company as a whole as of the date of acquisition, and if the fair value is sufficient, then award a pro rata share to the petitioning stockholders according to their respective percentage of shares in the company. (R. 2389-2390.)

It is undisputed that at the time of the acquisition of CPI, the preferred stockholders held an \$80,880,000 "liquidation preference" over the interest of common stockholders, meaning that all preferred shares would receive priority to the proceeds of any sale of CPI, up to the full \$80,880,000. (R. 2131-2132; 2240; 2405 at p. 73.) Thus, Borghetti's common stock would have no value in an appraisal action unless the "fair value" of CPI on the effective date of the Acquisition exceeded the liquidation preference of \$80,880,000.00. (R. 2131-2132; 2240; 2398; 2405 at p. 73.)

The only evidence Borghetti submitted on value was from his damages expert, Professor Avner Kalay. Kalay never calculated a value for CPI on the effective date of

the Acquisition that exceeded the liquidation preference of \$80,880,000. Kalay valued CPI between \$63.6 million at the low end and \$72.9 million at the high end at the time of the Acquisition. (R. 2435 at pp. 10-12, 107-109, 146.) Kalay admitted that his values are less than the liquidation preference and would not be enough to pay the preferred shareholders. (R. 2435 at pp. 164, 174-176.)

All other experts agreed that the fair value of CPI at the time of the Acquisition was less than the liquidation preference. Roger J. Grabowski, Bendinger Crockett's appraisal expert, found that the fair value was \$35,000,000. (R. 2267.) Richard S. Hoffman, the appraisal expert for the co-defendants, found that the fair value was \$36,280,000. (R. 2373.) Thomas Weisel Partners, the appraisal company hired by CPI, found that the value was between \$200,000 and \$58,900,000. (R. 2137.)

Due to the \$80,880,000 liquidation amount of the preferred stock, all common stock had effectively no value on the date of the Acquisition regardless of which expert appraisal is accepted, including Kalay's. (R. 2373.)

(v) Kalay's valuation methodology.

Bendinger Crockett does not believe it is necessary for this Court to consider whether Kalay's valuation methodology was reliable in order to affirm the summary judgment since Kalay did not find a value of CPI in excess of the liquidation preference, regardless of his methodology. This fact alone conclusively disposes of this case and this appeal in favor of Bendinger Crockett. However, in the event the Court chooses to address methodology, the following facts are relevant to show that Kalay's valuation methodology was unreliable and would not have been accepted as evidence in a

Delaware appraisal action and consequently Borghetti would have no evidence of fair value whatsoever.

Kalay testified that at the time he generated his value calculations he had no familiarity or experience with the Delaware appraisal process. (R. 2435 at pp. 159, 165.) He acknowledged that he is not aware of the valuation methodologies recognized by the Delaware courts for use in a statutory appraisal action. (R. 2435 at p. 184.)

Consistent with that lack of understanding, Kalay calculated his CPI values by assuming that the Acquisition was invalid - calling it a “bad act” and “not in the best interest of the common stockholders of Campus Pipeline” - and then calculating the resulting economic damages flowing from that bad act. (R. 2239; 2267; 2273; 2277-2279; 2286; 2322; 2396-2397; 2435 at pp. 29, 164-166.) Damages flowing from a wrongful acquisition or bad act are irrelevant in the context of a statutory appraisal, and irrelevant to the acquisition date value of the stockholder’s shares. (R. 2267; 2273; 2277-2279; 2286; 2322; 2396-2397.)

The deposition testimony of Borghetti’s corporate law expert, Professor Daniel Greenwood, supports the notion that Kalay’s damage calculations flow from a bad act. Greenwood testified that absent a breach of fiduciary duty, a sale for less than the liquidation preference would render the common stock worthless. (R. 2405 at p. 111.)

By assuming the invalidity of the Acquisition, Kalay’s value calculations do not yield a fair value for CPI on the date of the Acquisition as is necessary in a Delaware appraisal action. (R. 2267; 2273; 2276-2277; 2286; 2322; 2395-2400.) Moreover, Kalay stated multiple times in his report and deposition that, rather than making an independent

determination of the value of CPI as of the date of the Acquisition, he simply assumed that the value of CPI at the time of the Acquisition was the price that SCT paid for CPI. (R. 2435 at pp. 29, 167-171.)

Further, Kalay's value calculations are premised on the assumption that the Acquisition never occurred (R. 2435 at p. 176; 2405 at pp. 112-113), that CPI continued to operate for 9 to 13 years, and that the common shareholders would pay off the preferred shareholders' liquidation preference during that time frame. (R. 2242; 2273; 2435 at pp. 171-172; 2375.) It is impermissible in an appraisal action to use these assumptions since they alter the investment position of the shareholders and are not based on any actual business reality that CPI planned to implement at the time of the merger.

Finally, Kalay employed the Black-Scholes formula to reach his CPI value opinions. Black-Scholes is a method "used in connection with the determination of option pricing or valuing options," (R. 2528 at p. 18), and it is not a business valuation method used in a statutory appraisal action in Delaware. (R. 2528 at p. 13.) Kalay could not name one instance in his entire career where he had used the Black-Scholes option approach to value an entire business as a going concern, as he purports to be doing in the instant case, as opposed to using the Black-Scholes approach for simply valuing an option. (R. 2435 at pp. 192-195.)

Bendinger Crockett's appraisal expert Roger Grabowski testified in his deposition "that the formulation of the use of the Black-Scholes model by Dr. [Kalay], is . . . the wrong formulation of the use of an option pricing model in these circumstances and conflicts with the discussions in various texts concerning the appropriate time to use . . .

the Black-Scholes option pricing model for what is known as a distressed firm.” (R. 2486 at p. 16.) CPI was not a distressed firm as defined for use of the Black-Scholes formulation because CPI “was under operational duress, not under duress because of debt. The textbook definition or the textbook use of the word ‘financial duress’ usually means it is too highly levered; that is, too much debt.” (R. 2486 at pp. 30-32.)

Grabowski further testified that it is inappropriate to use the Black-Scholes formula to evaluate a company where the stocks and bonds are not publicly traded, as was the case with CPI. (R. 2486 at pp. 17, 32.)

Notwithstanding the obvious problems with Kalay’s methodology, even if the Court were to accept the methodology, Kalay’s opinion as to CPI’s value was still far less than the liquidation preference, thus precluding any damages.

(vi) Bendinger Crockett was never Borghetti’s lawyer.

Borghetti first spoke with Jeffery Williams of Bendinger Crockett on or about November 4, 2002. (R. 2051 at p. 217.) Thereafter, they exchanged the following numerous written statements acknowledging and confirming that Bendinger Crockett was not Borghetti’s lawyer.

On November 11, 2002, Borghetti wrote an email to Williams in which he stated: “Thank you again for spending time with me last week. I have talked with Jeff Jones and we would enjoy meeting you this week.” (R. 2155.)

On November 11, 2002, at 2:21 p.m., Williams wrote an email in response to Borghetti expressly stating: “I understand that I have said this before, but I need to confirm in writing again that we do not yet represent you and have not accepted

representation in this matter. Moreover, from your side, it is my understanding that you have not yet retained counsel, and are still considering other firms.” (R. 2155.)

Twenty-six minutes later, at 2:47 p.m., Borghetti responded to Williams’ email, confirming that Borghetti was still in the process of interviewing other lawyers: “We have spent time, as I communicated to you in our meeting together, interviewing counselors and various firms. We have narrowed our list down considerably and will be prepared to make a decision soon. An in-person meeting would be helpful for me and Jeff Jones as part of this process.” (R. 2155.)

On November 19, 2002, Borghetti met with Williams. Williams’ notes from this meeting include notations that Borghetti still had not hired a lawyer. (R. 2153.)

On December 4, 2002, Williams wrote an email to Borghetti regarding “Potential Contingency Matter” stating that Bendinger Crockett had still not made a decision whether to be involved in the case. (Unnumbered page between R. 2158-2159.)

On December 29, 2002, at 4:46 p.m., Borghetti wrote an email to Williams that confirmed that Borghetti did not have an attorney-client relationship with Bendinger Crockett, stating: “Just so you know, we have narrowed down our list of potential firms considerably.” (R. 2157.)

Bendinger Crockett made it clear to Borghetti early on that they were not going to represent Borghetti unless there were “big damages” to Borghetti as a result of the Acquisition. (R. 2051 at p. 232.) Bendinger Crockett also told Borghetti in November 2002 that they were not interested in being involved in an appraisal action (R. 2153) and

were only interested in investigating the potential of representing Borghetti against CPI, SCT, and the officers and directors for potential fraud and breach of fiduciary duty.

Accordingly, in January, February, and March of 2003, there were various emails between Borghetti, Bendinger Crockett, and damages consultant Tucker Alan Inc. as part of Bendinger Crockett's investigation into whether there were sufficient damages to make it worthwhile to represent Borghetti. (R. 2211-2226.)

In an April 4, 2003 telephone conversation, Tucker Alan reported to Bendinger Crockett that it could not find a value of CPI above \$42,000,000, which was far below the liquidation preference. (R. 2228 at pp. 211-212, 219-220.) Consequently, on April 15, 2003, Williams wrote a letter to Borghetti informing him that Bendinger Crockett would not take the case and represent him. (R. 2160.) Borghetti responded on July 1, 2003, not by claiming that Bendinger Crockett and Williams were or ever had been his lawyers, but by stating: "I am still trying to obtain counsel" (R. 2161.)

Borghetti admitted there was nothing in writing from Bendinger Crockett which expressly or impliedly stated that they were his lawyers: "Q. . . . Did you ever in an e-mail or a letter, on a napkin, in anyway say, 'Jeff, you're wrong. You are my lawyer'? A. I don't believe I put that in writing." (R. 2051 at pp. 235-236.)

At no time did Bendinger Crockett and Borghetti (a) enter into a written fee agreement, (b) enter into a written agreement as to what the scope of representation would be, or (c) agree to the terms of representation. (R. 2051 at pp. 174-175.) Bendinger Crockett never billed Borghetti for any legal services, and Borghetti never paid Bendinger Crockett for any legal services. (R. 2051 at pp. 174, 246-247.)

Borghetti never specifically discussed with anyone from Bendinger Crockett a contingency fee agreement on an appraisal case (R. 2051 at pp. 195-196), and Borghetti regularly told Bendinger Crockett that he was meeting with other law firms. (R. 2051 at p. 173.)

(vii) Even before he met with Bendinger Crockett, Borghetti knew that there was a 120-day deadline to file an appraisal action.

On October 9, 2002, CPI sent, and Borghetti received, a second letter to all stockholders with an attached Consent Solicitation Statement. (R. 2119-2120; 2131-2142; 2051 at p. 165.) Borghetti read the Consent Solicitation Statement. (R. 2051 at pp. 165, 178-179.) Borghetti also received and reviewed a copy of Section 262 which was attached to the Consent Solicitation Statement. (R. 2051 at pp. 165, 180-182; 2122-2127.) Section 262 describes the stockholders' appraisal rights and states that those rights must be perfected by filing a petition for appraisal within 120 days of the effective date of the Acquisition. (R. 2122-2127.)

On October 11, 2002, Borghetti conferred with attorney John Parsons to discuss the fast-approaching Acquisition. (R. 2177-2178.) As part of their discussion, Borghetti retained Parsons as Borghetti's lawyer to review Section 262 regarding appraisal rights, and Parsons informed Borghetti of the "critical" deadlines for preserving an appraisal. (R. 2181 at pp. 34, 40-41, 46-47.) Parsons and Borghetti specifically discussed strategy for preserving Borghetti's appraisal rights. (R. 2181 at p. 40.)

Parsons' billing records for the October 11, 2002 session confirm that Parsons reviewed the "critical deadlines," and that Parsons had two telephone calls with Borghetti

totaling one hour and 20 minutes regarding appraisal rights. (R. 2177-2178.) On October 14, 2002, Borghetti again spoke with Parsons to discuss appraisal rights. The billing entry for October 14, 2002 reads: “Final review of Delaware appraisal rights statutory procedures; telecom from and to W. Borghetti discuss/analyze/strategize appraisal rights procedures and analyze damages issues (39 mins); meeting with D. Scofield analyze shareholder rights of recovery in appraisal demand.” (R. 2179; 2181 at p. 41.)

Consistent with his billing records, Parsons acknowledged during his deposition that he had a duty to inform Borghetti of the 120-day deadline for filing an appraisal petition in Delaware and that he therefore would have informed Borghetti of the same. (R. 2181 at p. 47.)

On October 30, 2002, CPI sent correspondence to Borghetti explaining that the Acquisition had been approved and that the “effective date of the Merger was Wednesday, October 23, 2002.” (R. 2144-2145.) Borghetti received and read the October 30, 2002 correspondence, including the part that informed Borghetti of his appraisal rights under Delaware law, and also read the attached copy of Section 262, which again reminded Borghetti to demand appraisal and to file an action “[w]ithin 120 days” to preserve appraisal rights. (R. 2051 at pp. 182-186, 189-190, 193; 2122-2127; 2144-2145.)

On November 11, 2002, Borghetti wrote a letter to Williams providing some factual background relating to the Acquisition in which Borghetti stated that Borghetti was aware of his appraisal rights. (R. 2147-2151.)

Borghetti demonstrated his understanding of the appraisal rights procedures and Section 262 when he submitted a timely letter to the Executive Vice President and Secretary for CPI demanding appraisal on November 18, 2002, stating that: “Consistent with Section §262 of the Delaware General Corporation Law (DGCL), I hereby demand appraisal for my shares of Campus Pipeline, Inc.” (R. 2129.)

Prior to sending the demand letter, Borghetti asked for and received legal advice from attorney John Parsons with regard to the letter, including asking Parsons to advise him to whom the letter should be sent. Parson’s November 18, 2002 billing entry reads as follows: “Receive email from W. Borghetti regarding appraisal rights with respect to CPI merger; review Delaware appraisal rights statute and reply email to WB regarding assertion of appraisal rights.” (R. 2179; 2203-2204.)

Also, Judge Bruce Lubeck found in his Ruling on motions to dismiss that “[t]he Consent Solicitation advised plaintiffs of their appraisal rights under Delaware law.” (R. 2171-2172.)

SUMMARY OF ARGUMENT

Borghetti’s claims of legal malpractice fail as a matter of law for several reasons.

1. The fundamental, straightforward reason for granting summary judgment which the trial court understandably accepted as controlling, is that the undisputed material facts established that the fair value of CPI, at the effective date of its Acquisition by SCT, was less than the \$80,880,000 liquidation preference. (R. 2137; 2267; 2373; 2435 at pp. 10-12, 107-109, 146, 164, 174-176.) The highest value derived for CPI as of the relevant date by Borghetti’s own expert, Avner Kalay, was only \$72,900,000, far less

than \$80,880,000. (R. 2435 at pp. 10-12, 107-109, 146, 164, 174-176.) In order to recover damages in a Delaware appraisal action, Borghetti had to be able to establish that the fair value of CPI was greater than \$80,880,000, which he did not. (R. 2131-2132; 2240; 2398; 2405 at p. 73.) Thus, Bendinger Crockett's alleged failure to advise regarding the filing of a Delaware appraisal action did not cause any damage as Borghetti would have recovered nothing in such an action, in any event. This is a complete bar to all Borghetti's claims against Bendinger Crockett, and this Court should affirm on this ground alone.

The fact that Kalay's own calculations do not exceed the liquidation preference resolves this case and this appeal in favor of Bendinger Crockett. There is no need to conduct further inquiry into any other issue, or to analyze valuation methodologies as urged by Borghetti, because the failure of Borghetti to present any evidence of fair value in excess of the liquidation preference ends all inquiries and requires that this Court affirm the trial court's summary judgment in favor of Bendinger Crockett.

Bendinger Crockett does not believe that it is necessary to point out the deficiencies in the methodology used by Kalay since Kalay's highest calculations, regardless of methodology, do not exceed the liquidation preference. In the event this Court nonetheless addresses methodology, Bendinger Crockett also shows below that Kalay's valuation methodology is flawed and would not be accepted in an appraisal action. Rejection of Kalay's methodology leaves Borghetti with no evidence whatsoever of CPI's fair value, thus providing another basis for affirming summary judgment.

There are two other alternative grounds which the trial court was not required to decide, but upon which this Court may also affirm summary judgment. Bendinger Crockett will also explain those as part of its brief.

2. Borghetti cannot prove the existence of an attorney-client relationship, which is a prerequisite to a legal malpractice claim. Bendinger Crockett and Borghetti expressly confirmed in writing multiple times that there was no such relationship. (R. 2153-2159.) Because there was no attorney-client relationship, Bendinger Crockett did not have a duty to advise Borghetti of the 120-day appraisal action deadline.

3. Even assuming that an attorney-client relationship existed, Borghetti's legal malpractice claim fails because before he ever met with Bendinger Crockett, Borghetti had retained attorney John Parsons to advise him of the critical appraisal deadlines, and Borghetti had also been notified multiple times of the deadlines in the documents sent to him by CPI. (R. 2051 at pp. 165, 178-193; 2119-2120; 2122-2127; 2129; 2131-2142; 2144-2145; 2171-2172; 2177-2179; 2181 at pp. 34, 40-41, 46-47; 2203-2204.) Bendinger Crockett, therefore, had no duty to advise Borghetti about the 120-day deadline of which he was clearly already aware, and a lawyer's failure to advise a party about something he already knows cannot be the proximate cause of damage.

ARGUMENT

Point I

THE FAIR VALUE OF CPI ON THE DATE OF THE ACQUISITION WAS LESS THAN THE \$80,880,000 LIQUIDATION PREFERENCE AND THEREFORE BORGHETTI WAS NOT DAMAGED BY HIS FAILURE TO FILE A DELAWARE APPRAISAL ACTION.

Borghetti's sole claim for malpractice relates to missing the 120 day deadline for filing an appraisal action in Delaware court. But Borghetti cannot prove his "case-within-the-case" against Bendinger Crockett -- i.e., that he would have been successful in an appraisal action had one been filed -- because the value of CPI on the date of the Acquisition, even according to his own expert, was less than the \$80,880,000 priority interest held by preferred shareholders. (R. 2435 at pp. 10-12, 107-109, 146, 164, 174-176.) Therefore, Borghetti cannot prove that the alleged failure to advise or preserve appraisal rights caused him any damage and his legal malpractice claims fail as a matter of law.

A. Borghetti must prove the "case-within-the-case."

To prevail in a legal malpractice action a plaintiff must plead and prove a causal connection between the breach of duty and the resulting injury to the client. See Harline v. Barker, 912 P.2d 433, 439 (Utah 1996). To show the necessary causal connection element, Borghetti must prove the "case-within-the-case," that is, that he would have prevailed in the underlying appraisal action had one been filed. See id. at 439-40. If Borghetti would not have recovered damages in an appraisal action, his malpractice claim against Bendinger Crockett fails as a matter of law: "Lack of any damages and direct

causation is fatal to [any] malpractice claim.” Bennett v. Jones, Waldo, Holbrook & McDonough, 70 P.3d 17, 28 (internal citation omitted, bracketed insert in original).

Whether Borghetti can prove the proximate cause element, i.e., the “case-within-the-case,” is an issue that can be decided on summary judgment as a matter of law when “the facts are so clear that reasonable persons could not disagree about the underlying facts or about the application of a legal standard to the facts.” Harline, 912 P.2d at 439.

B. Delaware appraisal actions generally.

1. Purpose of Section 262.

Section 262 provides a procedure for obtaining a judicial determination of the fair value of shareholdings in an acquired Delaware company. See Del. Code Ann. tit. 8, § 262. The appraisal proceeding is “intended to provide shareholders dissenting from a merger on grounds of inadequacy of the offering price with a judicial determination of the intrinsic worth (fair value) of their shareholdings.” Cede & Co. v. Technicolor, Inc., 542 A.2d 1182, 1186 (Del. 1988) (Technicolor “I”). Because CPI was a Delaware corporation, any shareholder - including Borghetti - who felt aggrieved by the Acquisition had the right to file a petition for appraisal to determine the value of his or her shares, and then obtain a judgment for the fair value of the stock. See generally, Del. Code Ann. tit. 8, § 262.

2. To determine the fair value of shareholdings, the entire company must first be valued as a going concern.

The only litigable issue in a Delaware appraisal action is the fair value of the dissenting stockholder’s shares in the company on the date of the merger. Cede & Co. v.

Technicolor, Inc., 684 A.2d 289, 296 (Del. 1996) (Technicolor “IV”) (citing Technicolor “I”, 542 A.2d at 1187). “Fair value is, by now, a jurisprudential concept that draws more from judicial writings than from the appraisal statute itself.” Del. Open MRI Radiology Assocs., P.A. v. Kessler, 898 A.2d 290, 310 (Del. Ch. 2006).

Delaware law requires that the fair value of an individual’s shares is determined by first valuing the company as a whole as a going concern as of the date of the merger, and then calculating the shareholder’s proportionate interest in the total value according to their number of shares, rather than attempting to value the individual shareholdings. See Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1144 (Del. 1989) (“the dissenting shareholder’s proportionate interest is determined only after the company as an entity has been valued.”); Technicolor “IV”, 684 A.2d at 298 (“[T]he Court of Chancery’s task in an appraisal proceeding is to value what has been taken from the shareholder, i.e., the proportionate interest in the going concern. . . . Thus the company must first be valued as an operating entity.”); LeBeau v. M.G. Corp., Inc., 1998 Del. Ch. LEXIS 9, 23 (“It is a well-established principle of Delaware law that the objective of a section 262 appraisal is to value the *corporation itself*, as distinguished from a fraction of its *shares* as they may exist in the hands of a particular shareholder”) (emphasis in original and internal citations and quotation marks omitted); Highfields Capital, Ltd. v. AXA Fin., Inc., 2007 Del. Ch. LEXIS 126, 19-20 (“In a section 262 appraisal proceeding, the court must

determine the fair value of 100% of the corporation [and award] the dissenting stockholder his proportionate share of that value”) (quotation and citations omitted).²

3. The merger is assumed to be valid.

The court conducting the appraisal is required to assume the validity of the merger and to simply value the dissenters’ equity ownership. Inquiries into corporate wrongdoing, such as whether the Acquisition was valid, or whether the sale was in the best interests of the shareholders are irrelevant. Economic damages flowing from corporate wrongdoing in connection with an Acquisition are irrelevant in the context of a statutory appraisal. See Technicolor “I”, 542 A.2d at 1189.

4. The company is valued based on the “operative reality.”

The fair value of the going concern includes future business prospects of the company that are subject to proof at the time of the merger. But elements of future value

² The factors to consider to determine the going concern’s fair value are pronounced in Weinberger v. UOP, Inc., 457 A.2d 701, 713 (Del. 1983):

The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern. By value of the stockholder’s proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock which has been taken by the merger. In determining what figure represents this true or intrinsic value, the appraiser and the courts must take into consideration all factors and elements which reasonably might enter into the fixing of value. Thus, market value, asset value, dividends, earning prospects, the nature of the enterprise and any other 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 are not only pertinent to an inquiry as to the value of the dissenting stockholders’ interest, but must be considered by the agency fixing the value.

that are speculative and not subject to proof cannot be considered. See Weinberger v. UOP, Inc., 457 A.2d 701, 713 (Del. 1983). In other words, the court must consider the “operative reality” of the company when making its fair value determination. See Montgomery Cellular Holding Co., Inc. v. Dobler, 880 A.2d 206, 222 (Del. 2005). Similarly, the court must further assume that “the dissenting shareholders would be willing to maintain their investment position had the merger not occurred.” Technicolor “IV”, 684 A.2d at 298.

C. Based on these principles of Delaware law, Borghetti would not have prevailed in an appraisal action because he has no evidence establishing a value of CPI on the effective date of the Acquisition in excess of the liquidation preference.

Borghetti would be entitled to an appraisal award only if the fair value of the company on the effective date of the Acquisition (October 23, 2002) were to exceed \$80,880,000.00, which is the sum of the liquidation preference held by preferred shareholders on that date. Borghetti has the burden of proving this fair value as part of his prima facie “case-within-a-case” against Bendinger Crockett. He has failed to meet this burden, for at least the following reasons.

1. Borghetti’s own damages expert, Professor Avner Kalay, arrives at a value of CPI between \$63,600,000 at the low end and \$72,900,000 at the high end, both less than the \$80,880,00 liquidation preference.

Borghetti would not have recovered anything had he filed a Delaware appraisal action, even using his own expert’s calculations. Kalay used the Black-Scholes method and calculated a value for CPI of between \$63,600,000 and \$72,900,000. (R. 2235-2255; 2435 at pp. 10-12, 107-109, 146.) It is undisputed that the preferred shareholders of CPI

held an \$80,880,000 liquidation preference on the date of the merger. (R. 2131-2132; 2240; 2405 at p. 73.) If the company sold for Kalay's highest figure of \$72,900,000, only the preferred shareholders would realize any value. Because of the \$80,880,000 liquidation preference, there would be nothing left to divide among the common stockholders like Borghetti. (R. 2131-2132; 2240; 2398; 2405 at p. 73.) Using Kalay's numbers, Borghetti's proportionate interest in CPI on the date of the merger was zero. The simple fact that \$72,900,000 is less than \$80,880,000 means that Borghetti's common shares in CPI had no "fair value." Kalay's value opinions are fatal to the claim that the loss of appraisal rights was the proximate cause of any damage.

The record is devoid of any evidence that places the fair value of CPI as a going concern on the date of the merger above the liquidation preference. Like Kalay, every other expert in this case concludes that the value of CPI was less than the liquidation preference. According to the expert report of Roger J. Grabowski, Bendinger Crockett's appraisal expert, the fair value of CPI, as of the date of the Acquisition in October 2002, was only \$35,000,000. (R. 2267.) According to the report of Richard S. Hoffman, the expert for the other defendants, the fair value of CPI as of the date of the Acquisition was only \$36,280,000. (R. 2373.) Finally, according to the report of Thomas Weisel Partners, the company hired by CPI to determine its value before the Acquisition, the value of CPI was between \$200,000 and \$58,900,000. (R. 2137.)

Thus, all experts, including Kalay, share the opinion that the value of CPI was less than the liquidation preference. Due to the \$80,880,000 liquidation value of the preferred stock, all common stock including Borghetti's had effectively no value on the date of

Acquisition, regardless of which expert's appraisal is accepted. Therefore, Borghetti would not have recovered anything in a Delaware appraisal action and Borghetti can not prove the "case-within-the-case" as a matter of law.

In an attempt to remedy this fatal weakness in his case, Borghetti attempted to oppose Bendinger Crockett's summary judgment motion by modifying Kalay's written opinions and deposition testimony via a supplemental affidavit, which stated that Kalay's calculations generated a "fair value" of Borghetti's shares as of the time of the Acquisition of between "\$4.2 million and \$6.706 million." (R. 4648.) This affidavit does not create a genuine issue of material fact as to whether Borghetti would have prevailed in an appraisal action.

First, the conclusion lacks foundation. As stated above, the Delaware court must first value the entity as a whole to determine what a particular shareholder's fractional interest may be. See Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1144 (Del. 1989); Cede & Co. v. Technicolor, Inc., 684 A.2d 289, 298 (Del. 1996); LeBeau v. M.G. Corp., Inc., 1998 Del. Ch. LEXIS 9, 23; Highfields Capital, Ltd. v. AXA Fin., Inc., 2007 Del. Ch. LEXIS 126, 19-20. Given the \$80,880,000 liquidation preference, if Borghetti owned 8.8% of the common stock at the time of the Acquisition (R. 2140),³ and if the "fair value" of Borghetti's shares as of the time of the Acquisition was "\$4.2 million and \$6.706 million" as stated by Kalay in his supplemental affidavit (R. 4648), then the fair value of CPI as a whole would need to be between \$128,000,000 and \$157,000,000. However, Kalay did not find these values with respect to CPI on the date of the

³ This percentage also includes Borghetti's affiliates.

Acquisition. (R. 2435 at pp. 10-12, 107-109, 146.) Therefore, there is no foundation for the conclusory assertion in Kalay's supplemental affidavit that the "fair value" of Borghetti's shares as of the time of the Acquisition was "\$4.2 million and \$6.706 million."

Next, the affidavit fails to create a genuine issue of material fact because this Court has long held that when a party takes a clear position in a deposition, which is not modified on cross-examination, "he may not thereafter raise an issue of fact by his own affidavit which contradicts his deposition, unless he can provide an explanation of the discrepancy." Webster v. Sill, 675 P.2d 1170, 1172-73 (Utah 1983) ; see also Harnicher v. Univ. of Utah Med. Ctr., 962 P.2d 67 (Utah 1998); Hackman v. Valley Fair, 932 F.2d 239, 241 (3d Cir. 1991).

Kalay's supplemental affidavit directly contradicts his expert report and deposition. Specifically, Paragraph 27 of the Kalay affidavit should not be considered because, contrary to his deposition and report, Kalay claims to have offered "fair value" calculations under the Delaware statute. (R. 4651.) Kalay testified that he had no experience or familiarity with the Delaware appraisal process when he reached his value calculations. (R. 2435 at pp. 159, 165, 184.) To the extent that paragraph 27, or in any other paragraph in the supplemental affidavit states that Kalay performed a fair value calculation of CPI, those paragraphs should not be considered.

Further, in paragraphs 14 and 28 of the affidavit, Kalay states that the "fair value" of Borghetti's shares as of the time of the Acquisition was between "\$4.2 million and \$6.706 million." (R. 4648; 4651-4652.) However, Kalay testified that the highest values

that he could find for CPI were \$63,600,000 to \$72,900,000. (R. 2435 at pp. 10-12, 107-109, 146). To the extent that the reference to “\$4.2 million and \$6.706 million” in paragraphs 14 and 28 is meant to imply that Kalay reached a corporate value in excess of \$72,900,000, they should not be considered since they are directly contrary to Kalay’s deposition testimony.

Further, Kalay states in paragraph 13 of the affidavit that he once determined that the value of CPI was “\$73.7 million to \$83.2 million.” (R. 4648.) He then admits in paragraph 14 that he modified his opinions, but neglects to inform the reader that the modification was the result of a mathematical error noted by expert Richard Hoffman and which resulted in a reduction of Kalay’s value range to \$63,600,000 at the low end and \$72,900,000 at the high end, both well below the liquidation preference. (R. 2435 at pp. 10-12.) Kalay clearly testified in his deposition that “\$73.7 million to \$83.2 million” is no longer his opinion on value, and that \$63,600,000 to \$72,900,000 is his adjusted range. (R. 2435 at pp. 10-12, 107-109, 146.) To the extent that Borghetti intends for the Kalay affidavit to imply that the value of CPI was “\$73.7 million to \$83.2 million,” paragraph 13 should not be considered because Kalay clearly testified to the contrary.

In summary, Borghetti cannot prove “the case within the case” because Borghetti would not have prevailed in a Delaware appraisal action had one been filed where the fair value of CPI on the date of the Acquisition was less than the \$80,880,000 liquidation preference. Kalay’s belated supplemental affidavit does not change this result since it lacks foundation and contradicts his deposition testimony.

2. In the alternative, Kalay's value calculations should be rejected because they are based on improper assumptions and methodology.

Bendinger Crockett does not believe that this Court needs to address whether Kalay's reliance on the Black-Scholes method or other valuation assumptions were appropriate. The dispositive question is whether Borghetti was able to come forward with evidence showing that the fair value of CPI as of the date of the Acquisition was more than the \$80,800,000 liquidation preference. He did not, and therefore there is no need to conduct further inquiry into valuation methodologies because the failure of Borghetti to present any evidence of fair value in excess of the liquidation preference, regardless of methodology, ends all inquiries and requires that this Court affirm the trial court's summary judgment in favor of Bendinger Crockett.

However, in the alternative, if this Court chooses to address methodology, Bendinger Crockett submits that the valuation methodology and assumptions relied on by Kalay to reach his opinions are unreliable and invalid, and therefore should be rejected entirely by the Court. If this Court does so, then Borghetti has no evidence of fair value whatsoever. Although the trial court never reached this issue, the problems with Kalay's methodology are a separate and independent basis on which to affirm summary judgment in favor of Bendinger Crockett.

The first problem with Kalay's methodology is that his value calculations impermissibly rely on the assumption that the Acquisition was wrongful. Kalay was not asked by Borghetti to, nor did Kalay perform or intend to perform, any analysis of the fair value of CPI on the date of the Acquisition. (R. 2273.) Kalay was not even familiar with

the standards for Delaware appraisal valuations when he reached his value opinions. (R. 2435 at pp. 159, 165, 184.) Instead, Kalay measured economic damages resulting from alleged corporate wrongdoing by individuals who approved the Acquisition. Kalay found that the Acquisition transaction was a “bad act” that was not in the “best interests” of the shareholders, and he then calculated the damages arising out of that “bad act” and equated those damages with the value of CPI.⁴ (R. 2239; 2267; 2273; 2277-2279; 2286; 2322; 2396-2397; 2435 at pp. 29, 164-166.) As set forth above, damages arising out of the wrongful nature of the Acquisition are irrelevant to the fair value of CPI under Delaware law.⁵

The second problem with Kalay’s methodology is that he employed the Black-Scholes option pricing method to reach his value for CPI. Black-Scholes is not a valid valuation methodology in Delaware appraisal actions. (R. 2528 at p. 13.) There is no evidence that the Black-Scholes method has ever been recognized in the financial community as a method that yields a fair value of a going concern, which is the issue in a Delaware appraisal proceeding. Even Kalay admitted that he cannot name a single instance where he has used Black-Scholes to value a company like CPI (R. 2435 at pp.

⁴ Paragraph 27 of Kalay’s supplemental affidavit states that the “bad act” of CPI, i.e., breaching fiduciary duties by freezing out the minority shareholders, was irrelevant to his valuation of CPI. (R. 4651.) This should not be considered by the Court because it is directly contrary to his deposition testimony in which he states that his opinions, analysis and calculations were all based on the wrongful sale of CPI, which he refers to as the “bad act.” (R. 2435 at pp. 29, 164-166.)

⁵ Damages flowing from bad acts, if any, could be relevant to the claims against the corporate Appellees. They are irrelevant, however, in the context of an appraisal action, which is the only damages issue relevant to Bendinger Crockett in this appeal.

192-195), and he admitted further that he does not know the proper valuation methods for Delaware appraisal actions. (R. 2435 at pp. 159, 165, 184.) Black-Scholes has valid uses, but it cannot and does not generate a fair value of CPI, which is the dispositive issue in a Delaware appraisal action. Therefore, it would not be accepted under Delaware law, nor would it pass the test for novel scientific evidence under Utah law set forth in State v. Rimmasch, 775 P.2d 388 (Utah 1996).⁶

The third problem with Kalay's methodology is that he made assumptions that are prohibited by law in Delaware appraisal actions. By assuming that CPI was not sold and that it continues to operate for 9 to 13 years during which time the common shareholders gradually pay off the liquidation preference, Borghetti improperly ignores the operative reality of CPI as of the date of the merger. (R. 2242; 2273; 2375; 2405 at pp. 112-113; 2435 at pp. 171-172, 176.) There was an \$80,880,000 liquidation preference on that date and there is no evidence that a pay-off was a business reality at the time of the merger.

⁶ The following three elements must be satisfied under the Rimmasch test: (1) the scientific principles and techniques must be shown to be "inherently reliable"; (2) the scientific principles and techniques must have been properly applied to the facts by qualified experts; and (3) the scientific evidence must be more probative than prejudicial. See State v. Crosby, 927 P.2d 638, 641 (Utah 1996) (quoting Rule 702, Utah Rules of Evidence).

On November 1, 2007, Rule 702 of the Utah Rules of Evidence regarding the admissibility of expert opinions was amended, which may affect the application of the Rimmasch test. Rule 702, Utah R. Evid. (2007). However, the trial court entered Summary Judgment at a time when former Rule 702 was still effective. Since this Court reviews the trial court's decision for correctness, it should rely on old Rule 702 and Rimmasch on this appeal as that was the rule in effect at the time the trial court reached its decision. However, even if new Rule 702 did apply, the result would be the same since there continues to be a requirement that the scientific method be both reliable and reliably applied to the facts of the case.

By assuming a scenario in which the common shareholders eliminate the liquidation preference through a pay-off, Borghetti engages in pure speculation and has destroyed the operative reality to be appraised. Also, by assuming that the common shareholders would pay off the preferred shareholders, Kalay assumes a substantial change in Borghetti's investment position contrary to the Delaware case law cited above.

Point II

BORGHETTI CANNOT SUE BENDINGER CROCKETT FOR LEGAL MALPRACTICE BECAUSE THEY NEVER HAD AN ATTORNEY-CLIENT RELATIONSHIP.

It is well established that the existence of "an attorney-client relationship is an indispensable element of a cause of action for legal malpractice." Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 UT 9, ¶43, 70 P.3d 17. The existence of an attorney-client relationship can be either express or implied. As set forth below, there was neither an express nor an implied attorney-client relationship between Borghetti and Bendinger Crockett, so Borghetti's malpractice claims fail as a matter of law.

A. Borghetti admits that there was never any express attorney-client relationship with Bendinger Crockett.

It is undisputed that Borghetti and Bendinger Crockett never entered into any express attorney-client relationship. Borghetti admitted, and it is otherwise clear from his deposition testimony that there was never any written or verbal agreement that Bendinger Crockett would represent him in an appraisal action, or in any other matter.

B. Borghetti never had an implied attorney-client relationship with Bendinger Crockett.

To the extent Borghetti is asserting an implied attorney-client relationship, that claim must fail as a matter of law because Borghetti could not have reasonably believed that Bendinger Crockett was his counsel based on the undisputed facts in the record.

This Court held in Kilpatrick v. Wiley, Rein & Fielding, 2001 UT 107, ¶40, 37 P.3d 1130,, that “the proper determination of whether an implied attorney-client relationship exists hinges on whether the party had a reasonable belief that it was represented.” In making that determination, “a court looks at the totality of the circumstances.” Id. at ¶ 49. In order for a person to “reasonably believe” that an attorney represents the person, “(1) the person must subjectively believe the attorney represents him or her and (2) this subjective belief must be reasonable under the circumstances.” Roderick v. Ricks, 2002 UT 84, ¶40, 54 P.3d 1119.

Borghetti could not have subjectively believed that Bendinger Crockett was his lawyer. He was told in writing that Bendinger Crockett did not represent him, and Borghetti confirmed that fact in writing, stating that he had not yet made any hiring decisions. (R. 2155-2159.) It is therefore clear that Borghetti subjectively believed that Bendinger Crockett and Williams were not his lawyers. Therefore, under Roderick and Kilpatrick, there was never any implied attorney-client relationship as there was no true subjective belief of representation, and Borghetti’s malpractice claims should therefore be dismissed as a matter of law on summary judgment.

Even assuming that Borghetti subjectively believed that Bendinger Crockett was his counsel for advising regarding his appraisal rights, his malpractice claim still fails as a matter of law because such belief was not reasonable under the circumstances. He claimed during his deposition that he and Williams entered into an attorney-client relationship “almost immediately after we met,” which meeting he testified occurred about November 4, 2002. (R. 2051 at pp. 170, 217.) Yet, the parties exchanged numerous written communications subsequent to November 4, 2002 acknowledging and confirming that Williams was not Borghetti’s lawyer, as follows:

- * On November 11, 2002, Williams wrote Borghetti an email stating: “we do not represent you and have not accepted representation in this matter.” (R. 2155.)
- * Also on November 11, 2002, Williams wrote: “moreover, from your side, it is my understanding that you have not yet retained counsel, and are still considering other firms.” (R. 2155.)
- * Borghetti responded 26 minutes later by email, stating: “We have narrowed our list down considerably and will be prepared to make a decision soon.” (R. 2155.)
- * On December 4, 2002, Williams wrote Borghetti an email stating that he had not yet agreed to be involved in the case: “I believe that I should be in a position to discuss this case (including a conclusion regarding whether the firm is prepared to go forward on a contingency basis, or be involved in the case) by sometime next week.” (Unnumbered document between R. 2158-2159.)
- * On December 29, 2002, Borghetti continued to acknowledge in writing that he was still narrowing down the list of potential firms: “Just so you know, we have narrowed down our list of potential firms considerably.” (R. 2157.)

It is unreasonable, as a matter of law, for Borghetti to claim that he subjectively believed that Williams was his attorney during this time in light of the several written

statements in which the parties confirm that Bendinger Crockett was not Borghetti's lawyer.

All other evidence confirms the written disclaimers and defies any reasonable belief of representation. For instance, it is undisputed that:

- * Borghetti never agreed with Bendinger Crockett on the scope and terms of representation. (R. 2051 at pp. 174-175.)¹
- * Bendinger Crockett never billed Borghetti and was never paid for any services. (R. 2051 at pp. 174-175.)
- * Borghetti regularly met with other law firms to decide who he should hire. (R. 2051 at p. 173; 2155-2159.)
- * Borghetti in fact had an express attorney-client relationship with and received advice relating to appraisal rights and deadlines from attorney John Parsons. Borghetti was billed for these legal services and paid the bills. (R. 2177-2179; 2181 at pp. 34, 40-41, 46-47; 2203-2204.)
- * Bendinger Crockett would not allow Borghetti to see their research. (R. 2206 at pp. 115-116.)
- * At no time did Borghetti ever dispute in writing the November 11, 2002 email where Jeff Williams said that Bendinger Crockett did not represent Borghetti. (R. 2051 at pp. 235-236.)
- * Borghetti admits that there was never anything in writing from Bendinger Crockett to him which either expressly or impliedly stated that they were his lawyers. (R. 2051 at pp. 236-236.)
- * Borghetti never specifically discussed with anyone from Bendinger Crockett a contingency fee agreement on an appraisal case. (R. 2051 at pp. 174, 195-196.)
- * Borghetti has no idea how a contingency fee would work on an appraisal. (R. 2051 at pp. 174, 195-196.)

¹ "An implied agreement needs to contain all the terms of an express agreement." Mallen & Smith, Legal Malpractice, 2005 Ed., § 8.3, pp. 928-929.

- * There is a total absence in the record of any verbal or written request or agreement that Bendinger would advise Borghetti regarding appraisal rights deadlines.

These undisputed facts, and the numerous express writings confirming no attorney-client relationship, show that Borghetti could not have reasonably believed that Bendinger Crockett represented him and had a duty to advise him regarding appraisal rights. At best, Borghetti had an unreasonable, subjective, and unilateral belief that Bendinger Crockett represented him. As the court stated in Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 727 (Utah App. 1990), such unilateral belief is insufficient: “[a]n attorney-client relationship cannot be created unilaterally in the mind of a would-be client; a reasonable belief is required.” (Quotations and citations omitted.)

C. Whether an attorney-client relationship existed is a pure question of law under the undisputed facts of the case.

Where the underlying facts are not subject to dispute, the question of whether an attorney-client relationship exists is a question of law: “Whether a given set of facts creates an attorney-client relationship typically presents an issue of law for the court . . .

”⁷

⁷ Mallen & Smith, Legal Malpractice, 2005 Ed., § 8.3, p. 926; see also Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187 (5th Cir. 1995) (deciding no attorney-client relationship existed as a matter of law on summary judgment); First Nat’l Bank v. Lane & Douglass, 961 F. Supp. 153, 155 (D. Tex. 1997); Williams v. Fortson, 441 S.E.2d 686 (Ga. Ct. App. 1994); Moore v. Harris, 372 S.E.2d 654, 655 (Ga. Ct. App. 1988); Carmichael v. Barham, Bennett, Miller & Stone, 370 S.E.2d 639, 640 (Ga. Ct. App. 1988).

The most compelling of the undisputed facts discussed above establishing the lack of representation are the express written statements between the parties that Bendinger Crockett was not representing Borghetti. It is well established that an attorney-client relationship does not exist where express written disclaimers are made and acknowledged. Mallen & Smith, Legal Malpractice, 2005 Ed., § 8.3, pp. 944-945. Courts have routinely granted summary judgment to lawyers where express written disclaimers of representation were made and received by other persons.

For instance, in Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187 (5th Cir. 1995), the plaintiff investors contributed and later lost significant sums in a company called FilmDallas. The investors sued a law firm who prepared and sent an opinion letter to FilmDallas stating that “all of FilmDallas’ material contracts and agreements had been disclosed.” The investors claimed that this statement was false and caused them damage, and claimed legal malpractice against the firm, arguing that it was rendering professional services directly to them as investors of FilmDallas. The court granted summary judgment and held that there was insufficient evidence of intent to form an attorney-client relationship as a matter of law given an express written disclaimer that stated:

This opinion is furnished by us, as counsel for the company, to you, solely for your benefit, and we are not hereby assuming any professional responsibility to any other person whatsoever.

Id. at 1199.

Similarly, in Williams v. Fortson, 441 S.E.2d 686 (Ga. Ct. App. 1994), the plaintiffs were real estate buyers at a residential real estate closing who interacted with a lawyer from the bank. During the closing, the buyers signed a disclaimer of legal

representation indicating that the lawyer did not represent the plaintiffs, only the bank. When the home was later discovered to have termite problems, the plaintiffs sued the lawyer for malpractice. The plaintiffs alleged that the lawyer represented that “she was their attorney and would take care of them.” The court granted summary judgment to the lawyer, holding that the written “representation disclaimer, precluded an actionable reliance on any promise” by the attorney as a matter of law, and affirmed summary judgment. Id. at 688.

The same result occurred in Moore v. Harris, 372 S.E.2d 654, 655 (Ga. Ct. App. 1988), where the plaintiffs in a legal malpractice case had signed an agreement that “The parties hereto further acknowledge and agree that the law firm of Harris & Lister, P. C. was retained by and did in fact represent the seller in this transaction and that Harris & Lister, P. C. did not nor does not represent the purchaser in this transaction. . . .” The court granted summary judgment for the law firm and held that because “Harris made it clear to the appellants that he represented only the sellers . . . [t]he evidence demanded a finding that no attorney-client relationship existed, at least in the classic sense of the term.” Id.

The same result was again reached in Carmichael v. Barham, Bennett, Miller & Stone, 370 S.E.2d 639, 640 (Ga. Ct. App. 1988), where the plaintiffs in a legal malpractice case had signed an agreement that “This firm does not represent you as your attorney and you are entitled to retain counsel of your choice if you desire to do so.” The court granted summary judgment for the law firm and held that “we do not find that an attorney-client relationship existed. . . . [T]here is no issue of fact requiring jury

resolution and that the court below properly granted summary judgment in favor of the law firm.” Id.

As in the Banc One, Williams, Moore, and Carmichael cases, Borghetti both received and sent written correspondence confirming that Bendinger Crockett was not his lawyer and that Borghetti had not decided who to hire. Borghetti cannot contend that an attorney-client relationship existed contrary to these express writings, including his own.

In an analogous situation, the Utah Supreme Court in Gold Standard v. Getty Oil Co., 915 P.2d 1060, 1068 (Utah 1996) affirmed the trial court’s dismissal of plaintiff’s fraud claim on judgment notwithstanding the verdict on the grounds that there was no reasonable reliance on allegedly fraudulent oral misrepresentations which were contrary to written communications. The Supreme Court stated: “Under the law of this state, a party cannot reasonably rely upon oral statements by the opposing party in light of contrary written information.” Thus, Borghetti cannot establish a reasonable belief of an implied attorney-client relationship based on any alleged oral statements where all the written information is directly contrary to such a conclusion.

In addition to the express statements between Borghetti and Bendinger Crockett confirming that there was no attorney-client relationship (R. 2155-2159), Borghetti’s express attorney-client relationship with John Parsons and Mr. Parsons’ firm to provide legal advice on appraisal rights under Delaware law (R. 2177-2179; 2203-2204), including deadlines, shows that he understands how to form an attorney-client relationship, which he clearly did not do with Bendinger Crockett, and further precludes

any claim that Borghetti reasonably believed Bendinger Crockett was his counsel on that subject.

D. Investigative activities alone do not give rise to an attorney-client relationship.

Attorneys frequently investigate potential litigation matters before that attorney can agree to enter into an attorney-client relationship with a client for the purpose of pursuing litigation. This insures that attorneys do not bring frivolous lawsuits and that would-be clients do not waste their money paying attorneys to pursue frivolous lawsuits. To that end, during the time the attorney is investigating a case, that attorney does not have an attorney-client relationship with the would-be client. See Mallen and Smith, Legal Malpractice, 5th ed., § 8.3, p. 935:

[I]nvestigative activities by attorneys do not constitute undertaking a representation. The courts have recognized that an attorney may need to investigate the client's case before agreeing to undertake representation or even before proposing a fee agreement. Thus, preliminary interviews, without a commitment or follow up activities, do not create an attorney-client relationship.

The investigation provides the additional benefit of allowing an attorney to evaluate whether a contingency fee arrangement would be prudent. Without the safe harbor for investigative activities by the attorney, many plaintiffs' cases would never be brought because a prospective plaintiff's attorney could not properly assess the value of the contingency fee arrangement.

In this case, prudence required that Bendinger Crockett conduct a thorough investigation before agreeing to represent Borghetti. From the time Bendinger Crockett agreed to look into Borghetti's case to determine whether they were interested, to the

time that Bendinger Crockett declined the representation of Borghetti, there is nothing in the record to suggest that Bendinger Crockett was doing anything other than investigating whether to pursue the representation.

While Bendinger Crockett investigated, they told Borghetti expressly and in writing that they did not represent him, such that during the investigative period, Borghetti was free to seek other counsel, which he prudently did. As commonly happens, Borghetti “shopped” the case to various attorneys. Borghetti also consulted independent counsel with whom he had an existing attorney-client relationship, John Parsons, concerning his appraisal rights and the applicable limitations period to pursue such rights. (R. 2177-2179; 2181 at pp. 34, 40-42, 46-47; 2203-2204.) Borghetti was billed by Parsons for this legal advice. (*Id.*) Borghetti paid these bills. Notwithstanding the advice, Borghetti did not timely file an action to enforce his appraisal rights.

The various investigative activities were necessary and prudent before Bendinger Crockett could agree to represent Borghetti. Bendinger Crockett did not, under these circumstances, establish any attorney-client relationship with Borghetti. Therefore, Bendinger Crockett had no duty to either file an appraisal action in Delaware or to advise Borghetti of his rights under Delaware law.

At best, the communications between Bendinger Crockett and Borghetti were preliminary steps toward an agreement for legal services, but not sufficient to establish an implied attorney-client relationship. See e.g., Farmer v. Mount Vernon Realty, Inc., 720 F. Supp. 223, 225 (D.C. 1989) (holding that a preliminary conversation regarding potential litigation did not create an attorney-client relationship but was merely a

“preliminary step to establishment of an attorney client relationship”); McGlenn v. Gurda, 184 N.Y.S. 2d 608, 608 (N.Y. Sup. Ct. 1992) (holding that an attorney-client relationship did not exist because, “although defendants were contacted by plaintiff regarding the malpractice claim, there was never any agreement to undertake representation of plaintiff.”).

Immediately after Williams met with Borghetti, he issued express written statements disclaiming any legal representation. (R. 2155-2159.) Because Borghetti’s case involved complex issues of corporate wrongdoing in a large transaction, it was clear that Bendinger Crockett would need to investigate and research the case extensively to determine whether prudence and good faith would justify representation. After disclaiming representation, Bendinger Crockett needed the freedom to conduct an investigation without being subject to the unreasonable belief that those efforts constituted legal advice.

Bendinger Crockett did research various legal, procedural, and damages issues, and had some communications with Borghetti regarding the same. But this does not evidence that legal advice was sought and received or that an implied attorney-client relationship was established. Rather, all of Bendinger Crockett’s work and communications with Borghetti were subject to the initial and subsequent express written disclaimers of representation. Moreover, it was all part of the necessary investigation into whether Bendinger Crockett could even consider representing Borghetti.

Allowing Borghetti’s malpractice action to withstand summary judgment in the face of express written disclaimers would endorse a policy that leaves no safe harbor for

attorneys. If Borghetti's view is accepted, lawyers who prudently disclaim representation in writing could still be subject to malpractice claims. This would have a significant chilling effect by discouraging lawyers from ever investigating complex contingency cases for fear that their preliminary investigative efforts would create an attorney-client relationship despite written agreements to the contrary.

E. Summary: no attorney-client relationship existed and summary judgment should be affirmed.

Based on the foregoing, there was never any express or implied agreement that Bendinger Crockett would represent Borghetti with respect to appraisal rights, or for any other matter. Absent an attorney-client relationship, no duty existed for Bendinger Crockett to advise Borghetti regarding the appraisal action deadline that Borghetti missed. Borghetti's malpractice claims against Bendinger Crockett should therefore be dismissed. The existence of an attorney-client relationship is a pure question of law under the facts of this case and the Court can affirm summary judgment, as many other courts have done where the facts are undisputed showing that no attorney-client relationship ever existed.²

² In addition to the cases already cited, see also Wong v. Aragona, 815 F. Supp. 889, 896 (D. Md. 1993) (finding that implied attorney-client relationship requires a request for legal services and an acceptance by the attorney); Capitol Surgical Supplies, Inc. v. Casale, 86 Fed. Appx. 506, 2004 WL 180412, at 2-3 (3rd Cir. 2004) (granting summary judgment in favor of attorney who drafted exclusive distribution agreement when attorney was not asked for legal advice, did not agree to provide legal assistance, and distributor did not pay or agree to pay any legal fees); SMWNPF Holdings, Inc. v. Devore, 165 F.3d 360, 365 (5th Cir. 1999) ("In the absence of evidence that the attorney knew a party had assumed he or she was representing it in a matter, the attorney has no affirmative duty to inform the party that he is not its attorney."); Stratagene v. Parsons Behle & Latimer, 315 F. Supp. 2d 765, 773 (D. Md. 2004) (dismissing patent owner's

Point III

BENDER CROCKETT DID NOT OWE A DUTY TO ADVISE BORGHETTI OF THE 120-DAY DEADLINE, NOR WAS THE FAILURE TO ADVISE A PROXIMATE CAUSE OF ANY DAMAGE SINCE BORGHETTI ALREADY KNEW OF THE DEADLINE.

Borghetti's claim that Bendinger Crockett failed to advise him of the 120-day deadline for filing an appraisal action must fail as a matter of law because it is undisputed that he was already aware of the deadline. Therefore, even assuming an attorney-client relationship existed (which it did not), Bendinger Crockett had no duty to advise him, nor was the failure to advise the cause of any damage.

A. Bendinger Crockett did not have a duty to advise Borghetti regarding the 120-day deadline because Borghetti already had knowledge of the deadline.

To prevail in a legal malpractice action a plaintiff must plead and prove: “. . . (ii) a duty of the attorney to the client arising from their relationship.” See Harline v. Barker, 912 P.2d 433, 439 (Utah 1996). Whether a duty exists “is a question of law.” AMS Salt Indus. v. Magnesium Corp. of Am., 942 P.2d 315, 320 (Utah 1997).

Once an attorney-client relationship has been established, the attorney “impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.”

claim against law firm for failure to allege it had consulted, hired or retained the law firm); In re Infocure Securities Litigation, 210 F. Supp. 2d 1331, 1369 (N.D. Ga. 2002) (refusing to recognize implied attorney-client relationship when plaintiff paid no legal fees, had independent counsel, and never told attorney he was relying on him for legal advice); Douglas v. Monroe, 743 N.E.2d 1181, 1184-85 (Ind. Ct. App. 2001) (“[A] would-be client’s unilateral belief cannot create an attorney-client relationship.”) (emphasis added.)

Williams v. Barber, 765 P.2d 887, 889 (Utah 1988). The scope of that duty is determined by public policy considerations. See Mallen and Smith, Legal Malpractice, 5th ed., § 8.3, p. 913.

Borghetti claims that Bendinger Crockett failed to advise him of the 120-day deadline for filing an appraisal action. But there was no duty of Bendinger Crockett to advise him of that deadline because Borghetti already knew about it. Borghetti was advised on October 30, 2002, that the effective date of the Acquisition was October 23, 2002. (R. 2144.) He was advised that a 120-day deadline ran from the effective date on one or more of the following occasions: 1) the October 9, 2002 letter and Consent Solicitation Statement and attachments, including a copy of the Delaware appraisal statute, from CPI (R. 2122-2127; 2131-2142); 2) the October 11, 2002 conference with Parsons (R. 2177); 3) the October 14, 2002 conference with Parsons (R. 2177); and 4) the October 30, 2002 letter from CPI, which included another copy of the Delaware appraisal statute. (R. 2122-2127; 2144-2145.) Borghetti in fact filed a written demand for appraisal in November 2002 with the advice of Parsons. (R. 2129; 2179; 2203-2204.) Also, Judge Lubeck found in his Ruling on the other defendants' early motions to dismiss that "[t]he Consent Solicitation advised plaintiffs of their appraisal rights under Delaware law." (R. 2171-2172.)

Bendinger Crockett should not have a duty to advise Borghetti of appraisal deadlines when it is undisputed that he already knew about them from other sources. As a matter of public policy, a lawyer should not be under a duty to advise clients or prospective clients of deadlines of which the client has already been made aware. Such a

duty would impose an unreasonable obligation on the lawyer, and it would not be a client's expectation to hire and pay for advice that the client does not need.

This position finds support in the Washington case of State v. O'Connell, 523 P.2d 872, 884 (Wash. 1974) (overruled in part on other grounds), where the court discussed with approval an instruction of law stating that a lawyer does not have a fiduciary duty to advise a client on matters which the client already knows:

. . . . It has been stated in other jurisdictions that the lawyer's fiduciary duty to his client requires him to advise his client "of any facts or circumstances which reasonably appear to be important to the client in connection with the matter being handled" but "that this duty does not require a lawyer to advise his client of matters which the client already knows or which the lawyer reasonably believes the client has already learned or will be advised from some other source"

Because Borghetti unequivocally knew of the 120-day appraisal action deadline, Bendinger Crockett could not have been under a duty to advise him in that regard. Therefore, the dismissal of his claim of malpractice on summary judgment should be affirmed.

B. Bendinger Crockett's alleged failure to advise Borghetti regarding the 120-day deadline was not the proximate cause of any damage since Borghetti already knew the deadline.

To prevail in a legal malpractice action, Borghetti must also prove "a causal connection" between the failure to advise and "the resulting injury to the client" Harline, 912 P.2d at 439. Assuming that Borghetti suffered an injury when he lost his appraisal rights, Borghetti must be able to show that Bendinger Crockett's failure to advise him of the 120-day appraisal action deadline was the proximate cause of Borghetti's failure to file.

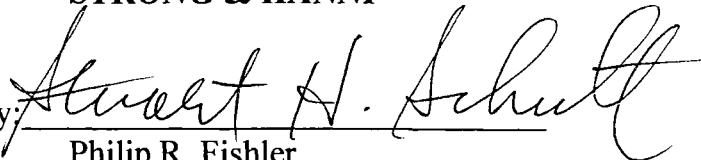
Borghetti cannot prevail on this argument. Borghetti did not miss the deadline because Bendinger Crockett failed to tell him what it was. Rather, it was Borghetti's failure to act on existing knowledge of the deadline. It would not be sound public policy if lawyers in Bendinger Crockett's position could be found to have proximately caused damage to a party in Borghetti's position for failing to advise him of a deadline of which that party (Borghetti) was already aware and with respect to which he had previously received express legal advice from separate retained counsel (Parsons). (R. 2122-2127; 2131-2142; 2144-2145; 2177.) Because Borghetti knew about the deadline, Bendinger Crockett owed no duty to advise him, and the failure to advise could not be the proximate cause of the failure to file. Borghetti's claims against Bendinger Crockett fail as a matter of law and this court should affirm the dismissal with prejudice on the merits.

CONCLUSION

For the foregoing reasons, Bendinger Crockett requests that this Court affirm the trial court's Summary Judgment.

Dated this 7th day of December, 2007.

STRONG & HANNI

By: 

Philip R. Fishler

Stuart H. Schultz

Byron G. Martin

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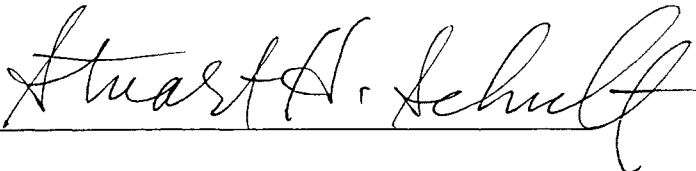
Certificate of Service

I HEREBY CERTIFY that on the 7th day of December, 2007, I caused two true and correct copies of the foregoing BRIEF OF APPELLEES BENDINGER, CROCKETT, PETERSON & CASEY, AND JEFFREY S. WILLIAMS to be served via U.S. Mail postage prepaid to each the following:

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Stuart H. Schult

ADDENDUM

- A. Del. Code Ann. tit. 8, § 262.**
- B. Rule 56, Utah R. Civ. P.**
- C. Summary Judgment.**
- D. Deposition Excerpts of Professor Avner Kalay.**
- E. Deposition Excerpts of John Parsons.**
- F. Billing Records of John Parsons.**
- G. Correspondence between William Borghetti and John Parsons.**
- H. Correspondence between William Borghetti and Jeffrey Williams.**
- I. LeBeau v. M.G. Corp., Inc., 1998 Del. Ch. LEXIS 9.**
- J. Highfields Capital, Ltd. V. AXA Fin., Inc., 2007 Del. Ch. LEXIS 126.**

Tab A

LEXSTAT DEL. CODE ANN. TIT. 8 SEC. 262

DELAWARE CODE ANNOTATED
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*** THIS DOCUMENT IS CURRENT THROUGH 76 DEL. LAWS, CH 181 ***
*** ANNOTATIONS CURRENT THROUGH SEPTEMBER 7, 2007 ***

TITLE 8. CORPORATIONS
CHAPTER 1. GENERAL CORPORATION LAW
SUBCHAPTER IX. MERGER, CONSOLIDATION OR CONVERSION

GO TO DELAWARE STATUTES ARCHIVE DIRECTORY

8 Del. C. § 262 (2007)

§ 262. Appraisal rights

(a) Any stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, who has otherwise complied with subsection (d) of this section and who has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228 of this title shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock under the circumstances described in subsections (b) and (c) of this section. As used in this section, the word "stockholder" means a holder of record of stock in a stock corporation and also a member of record of a nonstock corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words and also membership or membership interest of a member of a nonstock corporation; and the words "depository receipt" mean a receipt or other instrument issued by a depository representing an interest in one or more shares, or fractions thereof, solely of stock of a corporation, which stock is deposited with the depository.

(b) Appraisal rights shall be available for the shares of any class or series of stock of a constituent corporation in a merger or consolidation to be effected pursuant to § 251 (other than a merger effected pursuant to § 251(g) of this title), § 252, § 254, § 257, § 258, § 263 or § 264 of this title:

(1) Provided, however, that no appraisal rights under this section shall be available for the shares of any class or series of stock, which stock, or depository receipts in respect thereof, at the record date fixed to determine the stockholders entitled to receive notice of and to vote at the meeting of stockholders to act upon the agreement of merger or consolidation, were either (i) listed on a national securities exchange or (ii) held of record by more than 2,000 holders; and further provided that no appraisal rights shall be available for any shares of stock of the constituent corporation surviving a merger if the merger did not require for its approval the vote of the stockholders of the surviving corporation as provided in subsection (f) of § 251 of this title.

(2) Notwithstanding paragraph (1) of this subsection, appraisal rights under this section shall be available for the shares of any class or series of stock of a constituent corporation if the holders thereof are required by the terms of an agreement of merger or consolidation pursuant to §§ 251, 252, 254, 257, 258, 263 and 264 of this title to accept for such stock anything except:

a. Shares of stock of the corporation surviving or resulting from such merger or consolidation, or depository receipts in respect thereof;

b. Shares of stock of any other corporation, or depository receipts in respect thereof, which shares of stock (or depository receipts in respect thereof) or depository receipts at the effective date of the merger or consolidation will be either listed on a national securities exchange or held of record by more than 2,000 holders;

8 Del. C. § 262

c. Cash in lieu of fractional shares or fractional depository receipts described in the foregoing subparagraphs a. and b. of this paragraph; or

d. Any combination of the shares of stock, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in the foregoing subparagraphs a., b. and c. of this paragraph.

(3) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under § 253 of this title is not owned by the parent corporation immediately prior to the merger, appraisal rights shall be available for the shares of the subsidiary Delaware corporation.

(c) Any corporation may provide in its certificate of incorporation that appraisal rights under this section shall be available for the shares of any class or series of its stock as a result of an amendment to its certificate of incorporation, any merger or consolidation in which the corporation is a constituent corporation or the sale of all or substantially all of the assets of the corporation. If the certificate of incorporation contains such a provision, the procedures of this section, including those set forth in subsections (d) and (e) of this section, shall apply as nearly as is practicable.

(d) Appraisal rights shall be perfected as follows:

(1) If a proposed merger or consolidation for which appraisal rights are provided under this section is to be submitted for approval at a meeting of stockholders, the corporation, not less than 20 days prior to the meeting, shall notify each of its stockholders who was such on the record date for such meeting with respect to shares for which appraisal rights are available pursuant to subsection (b) or (c) hereof that appraisal rights are available for any or all of the shares of the constituent corporations, and shall include in such notice a copy of this section. Each stockholder electing to demand the appraisal of such stockholder's shares shall deliver to the corporation, before the taking of the vote on the merger or consolidation, a written demand for appraisal of such stockholder's shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such stockholder's shares. A proxy or vote against the merger or consolidation shall not constitute such a demand. A stockholder electing to take such action must do so by a separate written demand as herein provided. Within 10 days after the effective date of such merger or consolidation, the surviving or resulting corporation shall notify each stockholder of each constituent corporation who has complied with this subsection and has not voted in favor of or consented to the merger or consolidation of the date that the merger or consolidation has become effective; or

(2) If the merger or consolidation was approved pursuant to § 228 or § 253 of this title, then either a constituent corporation before the effective date of the merger or consolidation or the surviving or resulting corporation within 10 days thereafter shall notify each of the holders of any class or series of stock of such constituent corporation who are entitled to appraisal rights of the approval of the merger or consolidation and that appraisal rights are available for any or all shares of such class or series of stock of such constituent corporation, and shall include in such notice a copy of this section. Such notice may, and, if given on or after the effective date of the merger or consolidation, shall, also notify such stockholders of the effective date of the merger or consolidation. Any stockholder entitled to appraisal rights may, within 20 days after the date of mailing of such notice, demand in writing from the surviving or resulting corporation the appraisal of such holder's shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such holder's shares. If such notice did not notify stockholders of the effective date of the merger or consolidation, either (i) each such constituent corporation shall send a second notice before the effective date of the merger or consolidation notifying each of the holders of any class or series of stock of such constituent corporation that are entitled to appraisal rights of the effective date of the merger or consolidation or (ii) the surviving or resulting corporation shall send such a second notice to all such holders on or within 10 days after such effective date; provided, however, that if such second notice is sent more than 20 days following the sending of the first notice, such second notice need only be sent to each stockholder who is entitled to appraisal rights and who has demanded appraisal of such holder's shares in accordance with this subsection. An affidavit of the secretary or assistant secretary or of the transfer agent of the corporation that is required to give either notice that such notice has been given shall, in the absence of fraud, be prima facie evidence of the facts stated therein. For purposes of determining the stockholders entitled to receive either notice, each constituent corporation may fix, in advance, a record date that shall be not more than 10 days prior to the date the notice is given, provided, that if the notice is given on or after the effective date of the merger or consolidation, the record date shall be such effective date. If no record date is fixed and the notice is given prior to the effective date, the record date shall be the close of business on the day next preceding the day on which the notice is given.

(e) Within 120 days after the effective date of the merger or consolidation, the surviving or resulting corporation or any stockholder who has complied with subsections (a) and (d) of this section hereof and who is otherwise entitled to

appraisal rights, may commence an appraisal proceeding by filing a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders. Notwithstanding the foregoing, at any time within 60 days after the effective date of the merger or consolidation, any stockholder who has not commenced an appraisal proceeding or joined that proceeding as a named party shall have the right to withdraw such stockholder's demand for appraisal and to accept the terms offered upon the merger or consolidation. Within 120 days after the effective date of the merger or consolidation, any stockholder who has complied with the requirements of subsections (a) and (d) of this section hereof, upon written request, shall be entitled to receive from the corporation surviving the merger or resulting from the consolidation a statement setting forth the aggregate number of shares not voted in favor of the merger or consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares. Such written statement shall be mailed to the stockholder within 10 days after such stockholder's written request for such a statement is received by the surviving or resulting corporation or within 10 days after expiration of the period for delivery of demands for appraisal under subsection (d) of this section hereof, whichever is later. Notwithstanding subsection (a) of this section, a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person may, in such person's own name, file a petition or request from the corporation the statement described in this subsection.

(f) Upon the filing of any such petition by a stockholder, service of a copy thereof shall be made upon the surviving or resulting corporation, which shall within 20 days after such service file in the office of the Register in Chancery in which the petition was filed a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the surviving or resulting corporation. If the petition shall be filed by the surviving or resulting corporation, the petition shall be accompanied by such a duly verified list. The Register in Chancery, if so ordered by the Court, shall give notice of the time and place fixed for the hearing of such petition by registered or certified mail to the surviving or resulting corporation and to the stockholders shown on the list at the addresses therein stated. Such notice shall also be given by 1 or more publications at least 1 week before the day of the hearing, in a newspaper of general circulation published in the City of Wilmington, Delaware or such publication as the Court deems advisable. The forms of the notices by mail and by publication shall be approved by the Court, and the costs thereof shall be borne by the surviving or resulting corporation.

(g) At the hearing on such petition, the Court shall determine the stockholders who have complied with this section and who have become entitled to appraisal rights. The Court may require the stockholders who have demanded an appraisal for their shares and who hold stock represented by certificates to submit their certificates of stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings; and if any stockholder fails to comply with such direction, the Court may dismiss the proceedings as to such stockholder.

(h) After the Court determines the stockholders entitled to an appraisal, the appraisal proceeding shall be conducted in accordance with the rules of the Court of Chancery, including any rules specifically governing appraisal proceedings. Through such proceeding the Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors. Unless the Court in its discretion determines otherwise for good cause shown, interest from the effective date of the merger through the date of payment of the judgment shall be compounded quarterly and shall accrue at 5% over the Federal Reserve discount rate (including any surcharge) as established from time to time during the period between the effective date of the merger and the date of payment of the judgment. Upon application by the surviving or resulting corporation or by any stockholder entitled to participate in the appraisal proceeding, the Court may, in its discretion, proceed to trial upon the appraisal prior to the final determination of the stockholders entitled to an appraisal. Any stockholder whose name appears on the list filed by the surviving or resulting corporation pursuant to subsection (f) of this section and who has submitted such stockholder's certificates of stock to the Register in Chancery, if such is required, may participate fully in all proceedings until it is finally determined that such stockholder is not entitled to appraisal rights under this section.

(i) The Court shall direct the payment of the fair value of the shares, together with interest, if any, by the surviving or resulting corporation to the stockholders entitled thereto. Payment shall be so made to each such stockholder, in the case of holders of uncertificated stock forthwith, and the case of holders of shares represented by certificates upon the surrender to the corporation of the certificates representing such stock. The Court's decree may be enforced as other decrees in the Court of Chancery may be enforced, whether such surviving or resulting corporation be a corporation of this State or of any state.

(j) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances. Upon application of a stockholder, the Court may order all or a portion of the expenses incurred by any stockholder in connection with the appraisal proceeding, including, without limitation, reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares entitled to an appraisal.

(k) From and after the effective date of the merger or consolidation, no stockholder who has demanded appraisal rights as provided in subsection (d) of this section shall be entitled to vote such stock for any purpose or to receive payment of dividends or other distributions on the stock (except dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the merger or consolidation); provided, however, that if no petition for an appraisal shall be filed within the time provided in subsection (e) of this section, or if such stockholder shall deliver to the surviving or resulting corporation a written withdrawal of such stockholder's demand for an appraisal and an acceptance of the merger or consolidation, either within 60 days after the effective date of the merger or consolidation as provided in subsection (e) of this section or thereafter with the written approval of the corporation, then the right of such stockholder to an appraisal shall cease. Notwithstanding the foregoing, no appraisal proceeding in the Court of Chancery shall be dismissed as to any stockholder without the approval of the Court, and such approval may be conditioned upon such terms as the Court deems just; provided, however that this provision shall not affect the right of any stockholder who has not commenced an appraisal proceeding or joined that proceeding as a named party to withdraw such stockholder's demand for appraisal and to accept the terms offered upon the merger or consolidation within 60 days after the effective date of the merger or consolidation, as set forth in subsection (e) of this section.

(l) The shares of the surviving or resulting corporation to which the shares of such objecting stockholders would have been converted had they assented to the merger or consolidation shall have the status of authorized and unissued shares of the surviving or resulting corporation.

HISTORY: 8 Del. C. 1953, § 262; 56 Del. Laws, c. 50; 56 Del. Laws, c. 186, § 24; 57 Del. Laws, c. 148, §§ 27-29; 59 Del. Laws, c. 106, § 12; 60 Del. Laws, c. 371, §§ 3-12; 63 Del. Laws, c. 25, § 14; 63 Del. Laws, c. 152, §§ 1, 2; 64 Del. Laws, c. 112, §§ 46-54; 66 Del. Laws, c. 136, §§ 30-32; 66 Del. Laws, c. 352, § 9; 67 Del. Laws, c. 376, §§ 19, 20; 68 Del. Laws, c. 337, §§ 3, 4; 69 Del. Laws, c. 61, § 10; 69 Del. Laws, c. 262, §§ 1-9; 70 Del. Laws, c. 79, § 16; 70 Del. Laws, c. 186, § 1; 70 Del. Laws, c. 299, §§ 2, 3; 70 Del. Laws, c. 349, § 22; 71 Del. Laws, c. 120, § 15; 71 Del. Laws, c. 339, §§ 49-52; 73 Del. Laws, c. 82, § 21; 76 Del. Laws, c. 145, §§ 11-16.

Tab B

1 of 1 DOCUMENT

UTAH COURT RULES ANNOTATED
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*** THIS DOCUMENT IS CURRENT THROUGH CHANGES RECEIVED AS OF AUGUST 14, 2007 ***

STATE RULES
UTAH RULES OF CIVIL PROCEDURE
PART VII. JUDGMENT

URCP Rule 56 (2007)

Review Court Orders which may amend this Rule

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

URCP Rule 56

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

HISTORY: Amended effective November 1, 1997; November 1, 2004

Tab C

Philip R. Fishler, #1083
Stuart H. Schultz, #2886
Byron G. Martin, #8824
STRONG & HANNI
Attorneys for Defendants Bendinger, Crockett,
Peterson & Casey and Jeffery S. Williams
3 Triad Center, Suite 500
Salt Lake City, Utah 84180
Tele: (801) 532-7080
Fax: (801) 596-1508

FILED DISTRICT COURT
Third Judicial District

MAY 29 2007

SALT LAKE COUNTY

By [Signature]
Deputy Clerk

ENTERED IN REGISTRY
OF JUDGMENTS

DATE 05/31/07

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

WILLIAM BORGHETTI, et al.,

Plaintiffs,

v.

SYSTEM & COMPUTER TECHNOLOGY,
INC., et al.,

Defendants.

SUMMARY JUDGMENT

Case No. 040921012

Judge John Paul Kennedy

The Motion for Summary Judgment of Defendants Bendinger, Crockett, Peterson & Casey and Jeffrey S. Williams (hereinafter "Bendinger Crockett") was heard, pursuant to notice, on April 23, 2007, before the Honorable John Paul Kennedy, District Judge. Philip R. Fishler and Stuart H. Schultz of the law firm of Strong & Hanni appeared on behalf of Bendinger Crockett. Martin L. Stanley and Curtis L. Wenger appeared on behalf of Plaintiffs. John A. Pearce, Andrew H. Stone and Mark D. Tolman of Jones Waldo Holbrook & McDonough appeared on behalf of all other



defendants of record and argued their separate motions for summary judgment.

The Court, having received and reviewed extensive briefing from the parties, including numerous exhibits, both in favor of, and in opposition to, Bendinger Crockett's Motion, having considered oral argument from the parties, and being fully advised in the premises, grants Bendinger Crockett's Motion for Summary Judgment. In so doing, the Court finds and concludes as follows:

1. William Borghetti (hereinafter "Borghetti") is the only Plaintiff who asserts any claim against Bendinger Crockett.
2. This case arises out of a business transaction in which System & Computer Technology, Inc. (hereinafter "SCT") acquired Campus Pipeline, Inc., a Delaware corporation (hereinafter "CPI"), on October 23, 2002 for a purchase price of \$42,000,000 (hereinafter the "Acquisition").
3. Borghetti owned common stock in CPI.
4. The effective date of the Acquisition was October 23, 2002. Borghetti was so notified by correspondence dated October 30, 2002, from CPI.
5. Borghetti's common stock, which was subject to an \$80,800,000 liquidation preference held by preferred shareholders, was canceled and he received nothing for it as a result of the Acquisition.
6. Borghetti claims that CPI should not have approved the Acquisition because it was unfair to the common shareholders. He claims that the directors of CPI committed fraud, misrepresentation, breached their fiduciary duties, and were unjustly enriched by agreeing to a

purchase price with SCT that was so low that it extinguished all common shares in CPI.

7. Because Borghetti opposed the Acquisition, he was entitled under Delaware law to sue SCT, CPI, and its officers and directors for fraud, breach of fiduciary duty, and other related claims based on his claim that the Acquisition was improper. He was also entitled under Section 262 of the Delaware General Corporation Law (DGCL) to file an appraisal action in Delaware to seek a determination of the fair value of CPI as of the effective date of the Acquisition.

8. In an appraisal action under Section 262 of the DGCL, the Acquisition is presumed to be fair and proper, and the exclusive purpose of the appraisal action is to determine the fair value of the acquired entity, in this case CPI, as a going concern as of October 23, 2002, the effective date of the Acquisition.

9. Section 262 of the DGCL requires that an appraisal action be filed within 120 days after the effective date of the Acquisition.

10. Prior to the time of the Acquisition of CPI by SCT, CPI had issued two series of preferred stock referred to as Series A and Series B Preferred Stock.

11. Pursuant to CPI's Restated Certificate of Incorporation and the terms of issuance of the Series A and Series B Preferred Stock, preferred shareholders held an \$80,880,000 liquidation preference over the interest of common shareholders, meaning that all preferred shareholders would receive priority and have first right to the proceeds of the Acquisition of CPI, up to the full amount of \$80,880,000.

12. In order for Borghetti or any other common shareholder to receive any payment for

their common stock from the Acquisition, the consideration received as a result of the Acquisition had to exceed the liquidation preference of \$80,880,000.

13. The fair value of CPI as a going concern on the October 23, 2002, effective date of the Acquisition did not exceed the preferred shareholders' liquidation preference of \$80,880,000, and therefore Borghetti and all other common shareholders were not entitled to any consideration from the \$42,000,000 that SCT paid for the Acquisition of CPI.

14. Borghetti alleges that Bendinger Crockett had an attorney-client relationship with Borghetti and that Bendinger Crockett committed legal malpractice because Bendinger Crockett did not advise Borghetti of the 120-day statute of limitations for filing a Delaware appraisal action and did not file such an appraisal action within the 120-day deadline.

15. Bendinger Crockett claims that no attorney-client relationship existed, either express or implied, between Borghetti and Bendinger Crockett, that no duty was owed to Borghetti by Bendinger Crockett, and that any alleged failure of Bendinger Crockett to advise Borghetti of the 120-day deadline was not a breach of duty or the proximate cause of any damage to Borghetti because Borghetti was advised of the 120-day deadline by his own separate and independent legal counsel, John Parsons, before the deadline expired.

16. In order to establish a legal malpractice claim, Borghetti must prove (1) an attorney-client relationship; (2) a duty owed by the attorney; (3) a breach of the duty; (4) a causal connection between the breach of duty and the alleged damages; and (5) actual damages. *See Harline v. Barker*, 912 P.2d 376, 379 (Utah 1998). The causal connection element requires that Borghetti prove a

“case-within-a-case,” which means that Borghetti must establish that but for Bendinger Crockett’s alleged malpractice, Borghetti would have prevailed in a Delaware appraisal action.

17. Specifically, the case-within-a-case causal connection requirement in Borghetti’s action against Bendinger Crockett requires that Borghetti prove that if an appraisal action had been timely filed in the Delaware court, Borghetti could have proven that the fair value of CPI as a going concern as of the effective date of the acquisition, October 23, 2002, exceeded the liquidation preference of \$80,880,000, thereby allowing Borghetti to receive consideration equal to his percentage ownership (approximately 8%) of the fair value in excess of \$80,880,000.

18. Borghetti failed to present evidence sufficient to create a genuine issue of material fact on the question of whether the fair value of CPI exceeded the liquidation preference of the Campus Pipeline preferred shareholders as of the effective date of the Acquisition.

19. Specifically, Borghetti’s expert, Avner Kalay, assigned a value to CPI of between \$63.6 million and \$72.9 million which fell well short of the liquidation preferences held by the CPI preferred shareholders.

20. Because there is no genuine issue of material fact that the fair value of CPI as a going concern as of the effective date of the Acquisition was less than \$80,880,000, and therefore did not exceed the liquidation preference of the preferred shareholders, Borghetti was precluded from receiving any consideration from the Acquisition, and even if a Delaware appraisal action had been timely filed, the fair value of CPI would not have been sufficient to provide for any recovery by Borghetti.

21. Absent a finding that the fair value of CPI as of the effective date of the Acquisition exceeded the \$80,880,000 liquidation preference of the preferred shareholders, Borghetti could not establish a fair value in a Delaware appraisal action which would result in him receiving any damages. Therefore, the allegation that Bendinger Crockett was negligent in failing to advise of the 120-day deadline and in failing to file the Delaware appraisal action within that time frame did not proximately cause any damage to Borghetti, as a matter of law, because even if the Delaware appraisal action had been timely filed, it would not have resulted in a judgment of any damage award for common shareholders because the value of CPI did not exceed the liquidation preference.

Based on the foregoing findings, undisputed material facts, and conclusions, and good cause appearing, now, therefore;

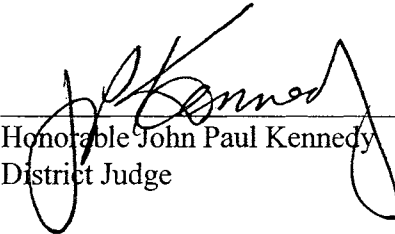
IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

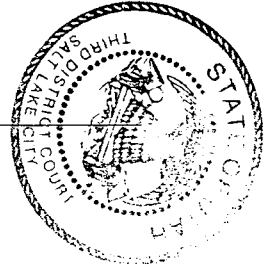
1. Summary Judgment is granted in favor of Bendinger Crockett and against Borghetti, and Borghetti's complaint against Bendinger Crockett and all causes of action and claims against Bendinger Crockett contained therein or arising therefrom, alleged or which could have been alleged, are hereby dismissed, with prejudice, and on the merits, no cause of action; and

2. Judgment is entered in favor of Bendinger Crockett and against Borghetti for Bendinger Crockett's costs of court incurred in the amount of \$ 8,643.16.

DATED this 29 day of May, 2007.

BY THE COURT


Honorable John Paul Kennedy
District Judge



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of May 2007, I caused a true and correct copy of the foregoing SUMMARY JUDGMENT ORDER to be served on the following in the method shown:

By hand-delivery to:

Curtis L. Wenger
175 East 400 South, Suite 900
Salt Lake City, UT 84111

John A. Pearce
JONES WALDO HOLBROOK & McDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, UT 84101

By mail, postage pre-paid, to:

Martin L. Stanley
LAW OFFICES OF MARTIN STANLEY
9701 Wilshire Blvd., 10th Floor
Beverly Hills, CA 90212



Tab D

Videotape Deposition of Avner Kalay, 8/7/2006

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16	TAKEN AT The Law Offices of	16	.
17	Jones, Waldo Holbrook & McDonough	17	.
18	170 South Main Street, Suite 1200	18	.
19	Salt Lake City, Utah 84111	19	.
20	DATE Monday, August 7, 2006	20	.
21	TIME 10 33 a m	21	.
22	REPORTED BY Scott M Knight RPR	22	.
23		23	.
24		24	.
25		25	.
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1	APPEARANCES	1	Videotape Deposition of Avner Kalay
2	FOR PLAINTIFFS	2	August 7, 2006
3	MARTIN STANLEY, ESQ	3	PROCEEDINGS
4	1541 Ocean Avenue, Suite 200	4	THE VIDEOGRAPHER: All right Today is
5	Santa Monica, California 90401	5	August 7, 2006. The approximate local time is
6	CURTIS L WENGER, ESQ	6	a m. Location is Jones, Waldo, Holbrook &
7	175 East 400 South, Suite 900	7	McDonough, PC, 170 South Main Street, Suite 1500,
8	Salt Lake City, Utah 84111	8	Salt Lake City, Utah, 84101. My name is Brad
9	FOR DEFENDANTS SUNGARD DATA SYSTEMS, TYLER THATCHER, FRED	9	Fischer, video specialist from I-Dep, LLC, located
10	HARMAN, OAK INVESTMENT PARTNERS, CHAD MUIR, DARIN GILSON,	10	at 1 South 443 Summit Avenue, Oakbrook Terrace,
11	SYSTEM & COMPUTER TECHNOLOGY, INC , THOMAS WEISEL PARTNERS,	11	Illinois. This is Case No. 040921012, entitled
12	MICHAEL CHAMBERLAIN, DAVID MURRAY, ERIC HASKELL, THOMAS K	12	Borghetti, et al., vs System & Computer
13	LEWIS JR , ANDY COOLEY, SCOTT DOUGHMAN, JOHN DUNN, AND DR	13	Technology, Incorporated, et al. The name of the
14	DAVID GARDNER	14	deponent is Avner Kalay. The video deposition is
15	ANDREW H STONE, ESQ , JONES, WALDO, HOLBROOK & McDONOUGH	15	requested by the defense. Will the counsel for
16	170 South Main Street, Suite 1500	16	all--all present please identify themselves for
17	Salt Lake City, Utah 84101	17	the record.
18	FOR DEFENDANTS BENDINGER, CROCKETT, PETERSON & CASEY, AND	18	MR. STANLEY: Martin Stanley and Curt
19	JEFFERY S WILLIAMS	19	Wenger for the plaintiff.
20	STUART H SCHULTZ, ESQ ,	20	MR. STONE: Andrew Stone for certain of
21	STRONG & HANNI	21	defendants, excluding the Bendinger, Crockett firm
22	3 Triad Center, Suite 500	22	and Jeffrey Williams.
23	Salt Lake City, Utah 84180	23	MR. SCHULTZ: Stuart Schultz for
24	Also Present Richard Hoffman	24	Bendinger, Crockett and Jeff Williams.
25	Videographer Brad Fischer	25	THE VIDEOGRAPHER: The deponent may now

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<p>1 be sworn in by Scott Knight of Thacker + Company. 2 AVNER KALAY, called as a witness for 3 and on behalf of the Defendants SunGard Data 4 Systems, Tyler Thatcher, Fred Harman, Oak 5 Investment Partners, Chad Muir, Darin Gilson, 6 System & Computer Technology, Inc., Thomas Weisel 7 Partners, Michael Chamberlain, David Murray, Eric 8 Haskell, Thomas K. Lewis Jr., Andy Cooley, Scott 9 Doughman, John Dunn, and Dr. David Gardner, being 10 first duly sworn, was deposed and testified as 11 follows: 12 EXAMINATION 13 BY-MR.STONE: 14 Q. Good morning, Professor. 15 A. Good morning. 16 Q. Why don't we go ahead and get this 17 marked as Exhibit 1. 18 Exhibit-1 marked 19 MR. STANLEY: Do you have a copy for 20 us? 21 MR. STONE: Oh, I'm sorry. 22 BY-MR.STONE: 23 Q. Professor, you've had your deposition 24 taken before, haven't you? 25 A. Yes.</p>	<p>1 assignment since being engaged in this case? 2 A. Yes. 3 Q. And approximately when were you first 4 engaged in this case? 5 A. A long time ago. It could be two, 6 three years ago. I don't exactly remember the 7 date. 8 Q. Okay. Had you-- 9 A. Maybe 2003, summer of 2003. That could 10 be . . . 11 Q. Had you known Mr. Borghetti before 12 then? 13 A. No. 14 Q. Ever met him prior to that? 15 A. No. 16 Q. Okay. And was that how you were 17 approached was to do an analysis of his economic 18 damages? 19 A. Yes. 20 Q. In the course of analyzing Mr. 21 Borghetti's economic damages, did you do what you 22 would consider a valuation of Campus Pipeline? 23 A. I have evaluated the damages to Mr. 24 Borghetti under the assumption that the total 25 compensation paid by SCT to purchase Campus</p>
Page 6	Page 8
<p>1 Q. About how many occasions? 2 A. Quite a few. I don't remember exactly. 3 Q. So you know the drill. 4 A. Yes. 5 Q. I'm going to ask you a series of 6 questions, most of them focused on Exhibit 1, your 7 report that I've just placed in front of you. If 8 you don't understand one of my questions, please 9 feel free to ask me to rephrase it. If you need 10 to take a break, let me know that too. 11 A. Okay. 12 Q. And I'll try to make this as quick and 13 as painless as possible. 14 Turn to page .2 of your report, which is 15 probably about page .4 of this Exhibit. 16 A. Yes. 17 Q. First sentence there, it says, "I was 18 asked to determine the economic damages to the 19 holders of common stock of Campus Pipeline, Inc." 20 Was that your assignment here? 21 A. My assignment was to determine the 22 damage to the common stock or in particular I was 23 asked to assess economic damage to Mr. William 24 Borghetti. That was my assignment. 25 Q. Was that--has that always been your</p>	<p>1 Pipeline is valid. My own opinion is that 2 probably the true value's higher than that, but I 3 have--to minimize conflict, I have assumed that 4 what they paid is the total things that they have 5 paid, the total economic value they gave up is 6 the value of the firm, and from that, I derive 7 Mr. Borghetti's damages. 8 Q. Okay. And we're maybe getting ahead of 9 our ourselves a bit, but when you talk about 10 total economic value, you are talking about the 11 approximately 42 million dollars paid, as well as 12 the value of SCT's common stock; is that correct? 13 A. What I'm saying is it is the sum of the 14 cash payment and the forgone value of the equity 15 they gave up-- 16 (Reporter/witness discussion to clarify record.) 17 THE WITNESS: --the forgone value of 18 the equity they gave up. 19 BY-MR.STONE: 20 Q. Is that the same as the fair market 21 value of Campus Pipeline at the time of the 22 transaction? 23 MR. STANLEY: I'm going to object. 24 Vague. Go ahead. 25 THE WITNESS: Are you asking me from a</p>

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<p style="text-align: right;">Page 9</p> <p>1 legal point of view or as an economist?</p> <p>2 BY-MR.STONE:</p> <p>3 Q. As an economist.</p> <p>4 A. As an economist, this is a lower bound</p> <p>5 on what the fair market value is. The fair</p> <p>6 market value is probably, in all likelihood,</p> <p>7 higher than that, but that is the value that was</p> <p>8 actually paid.</p> <p>9 Q. So this would be the lower bounds of</p> <p>10 fair market value?</p> <p>11 A. Yes.</p> <p>12 Q. In other words what--if the firm were</p> <p>13 sold to any willing buyer and a willing seller;</p> <p>14 is that right?</p> <p>15 A. Basically, I have--I have adopted the</p> <p>16 valuation of SCT, the amount that they were</p> <p>17 willing to pay as the value, to estimate damages.</p> <p>18 I don't assume anything above it.</p> <p>19 Q. Okay. So did you perform a traditional</p> <p>20 business valuation in this case?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. And that is by adopting the</p> <p>23 price actually paid by SCT and adding to the</p> <p>24 amount of their equity that they gave up?</p> <p>25 A. The economic value of the equity that</p>	<p style="text-align: right;">Page 11</p> <p>1 so essentially, the fraction, as argued by Mr.</p> <p>2 Hoffman in his report of SCT on a fully diluted</p> <p>3 basis is--is lower and I have computed--I</p> <p>4 recomputed the damage using exactly the same</p> <p>5 methodology that I have used before, only</p> <p>6 correcting for this lower fraction. Resulting</p> <p>7 from that is a conservative estimate to the</p> <p>8 damages to Mr. Borghetti that are from a low of</p> <p>9 \$4.2 million to a high of \$6.7 or \$6 million. I</p> <p>10 want to give you a copy of this computation. It</p> <p>11 is in Table 1, panels A, B, C, and D.</p> <p>12 BY-MR.STONE:</p> <p>13 Q. I think at the next break, what we'll</p> <p>14 do is make some copies of this and have it marked</p> <p>15 as--</p> <p>16 A. Oh, sure. I will give you some more</p> <p>17 things.</p> <p>18 Q. Based on that correction, then, did</p> <p>19 that change your estimate of the value of Campus</p> <p>20 Pipeline at the time of the transaction?</p> <p>21 A. Yes. If you would look on the range of</p> <p>22 possible values in this table, you will see that</p> <p>23 Table--in Table 1, the value is from a low of</p> <p>24 \$63.6 million to a high of \$72.9 million. You</p> <p>25 can see in the value in Panel A on the bottom</p>
<p style="text-align: right;">Page 10</p> <p>1 they gave up.</p> <p>2 Q. So what was the value of Campus</p> <p>3 Pipeline on September 30, 2002?</p> <p>4 A. In order to answer this question--</p> <p>5 MR. STANLEY: I'm sorry. I have to</p> <p>6 object. Vague as to value, but go ahead.</p> <p>7 MR. SCHULTZ: Object to foundation</p> <p>8 also.</p> <p>9 THE WITNESS: I have here for you a</p> <p>10 modification to my report--I have here for you a</p> <p>11 very slight modification to my report.</p> <p>12 Conceptually, my report is totally accurate and I</p> <p>13 have used in my report an incorrect table as a</p> <p>14 data point in order to estimate the fraction of</p> <p>15 ownership of SCT in the common equity of Campus</p> <p>16 Pipeline.</p> <p>17 In Mr. Hoffman's report, Mr. Hoffman</p> <p>18 pointed out--and I myself have checked it--he</p> <p>19 points out that the fraction that I've used is</p> <p>20 too high. As a matter of fact, I have checked it</p> <p>21 and I have adopted and revised my report to</p> <p>22 correct for this use of the incorrect data--data</p> <p>23 point. So I thank Mr. Hoffman for pointing it</p> <p>24 out to me. He is correct in this point.</p> <p>25 And I have further assumed that--that--</p>	<p style="text-align: right;">Page 12</p> <p>1 left side of the table, you could see \$63.6. And</p> <p>2 on the right, you can see \$72.9.</p> <p>3 Let me just add for clarification, so</p> <p>4 that everybody will be on board. I have also</p> <p>5 done another modification to the report. In my</p> <p>6 original report, I have used the time it would</p> <p>7 take to pay the liquidation value to the preferred</p> <p>8 stockholders. I have used 10.78 as my estimate.</p> <p>9 I still think that this is the best guess of what</p> <p>10 would happen. But in order to be more</p> <p>11 conservative, I have allowed for a range of</p> <p>12 possible time period and you can see in the</p> <p>13 computation that I have nine years, which are</p> <p>14 panels A and B. You can see the second column,</p> <p>15 time, it says nine. And in Panel C and D, it is</p> <p>16 13 years, so I have kind of a breakout of time</p> <p>17 around and, in fact, the range of values for the</p> <p>18 firm--the range of values for the damages are</p> <p>19 around the value that would come out with 10.78.</p> <p>20 Q. Very good.</p> <p>21 A. These are the modification. And I</p> <p>22 really thank Mr. Hoffman for pointing that out to</p> <p>23 me and to help me correct it.</p> <p>24 Q. And these--this range of payouts--this</p> <p>25 modification to your report that you've handed</p>

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<p style="text-align: right;">Page 29</p> <p>1 have to get help. 2 So we have all kind of method. We have 3 the market method and the income method and the 4 cost method and the prior transaction and equity-- 5 (Reporter/witness discussion to clarify record.) 6 THE WITNESS: And typically, when we 7 don't know and only when we don't know, we are 8 developing all kinds of models looking at firms 9 that we know are not the same and trying to infer 10 from them value. Looking at transactions that we 11 know are historical and try to learn from them. 12 But if we know there is a transaction 13 at the time of--in absence of other words, I call 14 it a bad act, if you don't mind. At the time of 15 the event, we know what the value is. All we 16 have he to do is look on SCT how much they paid, 17 and from that, we can learn what the value was. 18 And that's what I have done. 19 BY-MR.STONE: 20 Q. There are pretty generally accepted 21 methods of business valuations; is that correct? 22 A. The--as I said before, there is one--as 23 a finance professor, I can tell you that in the 24 finance profession, we develop valuation. 25 Valuation is developed in academic research and</p>	<p style="text-align: right;">Page 31</p> <p>1 are derived from transaction of significant 2 interest in companies in similar lines of 3 business. And Mr. Hoffman has used the same 4 definition and I'm trying to use even the same 5 words so that we will--so anything that is not a 6 dispute will be off the table. 7 And then there is Mr. Garbowski--am I 8 pronouncing it right? Mr. Garbowski, the other 9 expert, has mentioned market approach 10 consideration of prior sales of company stock. 11 That is, you can look at what happened to your 12 own company in order to value it. So that is one 13 approach. 14 And then there's the income approach, 15 which--which essentially is the discount cash flow 16 method, essentially. You're looking at a 17 projected cash flows. You are finding the right 18 discount rate and you bring it to the future. 19 And then there's a cost approach that is based on 20 the theory that the prudent investor would pay no 21 more than the cost of constructing a similar asset 22 of-- 23 (Reporter/witness discussion to clarify record.) 24 THE WITNESS: I'm sorry. Let me 25 repeat, yeah. So the cost approach is based on</p>
<p style="text-align: right;">Page 30</p> <p>1 then applied later on in the world. And--and we 2 know what we need for a valuation. What we need 3 for a valuation is the projection of the cash 4 flow or the benefit that the holders will receive 5 and the right discount rate to bring it in. 6 And as I said before, the world is not 7 as perfect and we don't always know what is 8 exactly the discount rate and we don't always know 9 what exactly are the expected cash flows. So we 10 use any help that we can get. 11 And in this process, let me just 12 mention--and--to you--and here I am looking at my 13 notes just to be precise--there are--there are 14 different ways to evaluate companies. There is 15 something that is called the market approach. And 16 the market approach has some subcategories to it. 17 There's the market approach guideline, public 18 companies, which--which is stated also by Mr. 19 Hoffman--is a method using the market approach 20 whereby market multiples are derived from market 21 prices of traded stocks of companies in similar 22 lines of business. 23 And then there's a market approach, 24 mergers and acquisition basis, which is--this is a 25 method within the market method whereby multiples</p>	<p style="text-align: right;">Page 32</p> <p>1 the theory that the prudent investor would pay no 2 more than the cost of constructing a similar asset 3 of like utility at prices applicable at the time 4 of the appraisal. I'm using the language used by 5 Mr. Hoffman, again, to make sure that things that 6 are not in dispute are off the table. 7 So these are method by which we can get 8 help to get into the valuation. And they are 9 accepted method I used--there are some practical 10 books helping the appraiser to use them, the 11 association--the different association of 12 appraisers are recommending to use them, and I am 13 using them, too. 14 BY-MR.STONE: 15 Q. Okay. Looking at the cases listed on 16 pages .36 through 37 of your report-- 17 A. Of my report? 18 MR. STANLEY: Give us I'd second here 19 so we can turn to that. 20 THE WITNESS: Which page? 21 BY-MR.STONE: 22 Q. Yeah, 36 through 37. You listed, 23 "Selected Activities as an Expert Witness." 24 A. Oh, on my resume. I have different 25 page numbers, so I apologize. Mine is . . .</p>

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<p style="text-align: right;">Page 105</p> <p>1 Q. --cost approach?</p> <p>2 A. Yes.</p> <p>3 Q. Now, in that statement, you appear to</p> <p>4 be drawing a distinction between option</p> <p>5 methodology and income approach?</p> <p>6 A. I don't.</p> <p>7 Q. Okay. There is no distinction?</p> <p>8 A. There is no distinction. It's</p> <p>9 consistent completely.</p> <p>10 Q. Now, what I am suggesting is using</p> <p>11 income approach--using a risk-adjusted discount</p> <p>12 rate to work up to see if we can get to the same</p> <p>13 valuation you did using the Black-Scholes method.</p> <p>14 A. I'm sorry?</p> <p>15 Q. What I am suggesting is what--it'll</p> <p>16 come as no surprise, I'm sure--is we intend to</p> <p>17 use the discounted cash flow method using a risk-</p> <p>18 adjusted discount rate to see if we can work</p> <p>19 towards the results you obtained using the Black-</p> <p>20 Scholes formulation.</p> <p>21 A. You can do some other valuation. I</p> <p>22 mean, obviously, people have different opinion.</p> <p>23 Q. How would you go about establishing a</p> <p>24 risk-adjusted discount rate to do so?</p> <p>25 A. Okay. As I said, the advantage of</p>	<p style="text-align: right;">Page 107</p> <p>1 rate might be below that rate.</p> <p>2 A. It could.</p> <p>3 Q. Do you think it is reasonable to assume</p> <p>4 in this case that the risk-adjusted rate in this</p> <p>5 industry, for this company, should be below the</p> <p>6 risk-free rate?</p> <p>7 A. I think that most likely it is above</p> <p>8 the risk-free rate. It's the most likely range</p> <p>9 of risk-adjusted discount rate.</p> <p>10 Q. Can you give any more precise range</p> <p>11 than that, something above the risk-free rate?</p> <p>12 A. As I say, I really don't want to sit</p> <p>13 here and speculate. It would be really misleading</p> <p>14 to the jury.</p> <p>15 Q. What would you then do--you looked at</p> <p>16 the--you look at cash flows, projected cash flows.</p> <p>17 Would you study the industry?</p> <p>18 A. We would.</p> <p>19 Q. You didn't study the industry in this</p> <p>20 case?</p> <p>21 A. I didn't have to.</p> <p>22 Q. Your opinion is that this company, as I</p> <p>23 understand it, at the time of the sale, would</p> <p>24 have been worth between \$63.6 million and \$72.9</p> <p>25 million?</p>
<p style="text-align: right;">Page 106</p> <p>1 using the option methodology is that when use the</p> <p>2 certainty equivalent approach and one gets</p> <p>3 valuation that is consistent with infinitely many</p> <p>4 different discount rates. Thus, one shy away from</p> <p>5 the tremendously difficult problem of determining</p> <p>6 what's the risk-adjusted discount rate. I didn't</p> <p>7 have to do it in my evaluation and--and in order</p> <p>8 to come up with any number, I'd have to really</p> <p>9 seriously work on that. It's not something that</p> <p>10 I can just sit here and tell you: I think the</p> <p>11 number is X, Y, or Z.</p> <p>12 Q. I understand.</p> <p>13 A. It could be a number. It could be many</p> <p>14 numbers. You could choose X. Somebody else</p> <p>15 could choose Y.</p> <p>16 Q. What would be the process you would</p> <p>17 follow in order to come up with that number?</p> <p>18 A. Well, it's a very lengthy process.</p> <p>19 First of all, I have to study the projected cash</p> <p>20 flows of the firm. I have to follow, basically,</p> <p>21 the guidelines that we develop in financial</p> <p>22 economics, and as I've stated before, just go out</p> <p>23 and do it.</p> <p>24 Q. Okay. We talked about the risk-free</p> <p>25 rate and the possibility that the risk-adjusted</p>	<p style="text-align: right;">Page 108</p> <p>1 A. You're referring to Tables 1, Panel A</p> <p>2 to D?</p> <p>3 Q. Yes.</p> <p>4 A. \$63.6 to \$72.9--</p> <p>5 Q. Okay.</p> <p>6 A. --yeah.</p> <p>7 Q. In your opinion, does that mean that</p> <p>8 the preferred shareholders did a lousy job of</p> <p>9 negotiating?</p> <p>10 A. The preferred shareholders?</p> <p>11 Q. Yeah.</p> <p>12 MR. STANLEY: Well, I'm going to--I'm</p> <p>13 going to object that it calls for a legal</p> <p>14 opinion. From an economic standpoint, I guess he</p> <p>15 can give an opinion, if he has an opinion.</p> <p>16 BY-MR.STONE:</p> <p>17 Q. Let me ask it another way. Did they</p> <p>18 leave money on the table?</p> <p>19 A. Who?</p> <p>20 Q. The preferreds.</p> <p>21 A. The preferred shareholders?</p> <p>22 Q. Yeah.</p> <p>23 MR. STANLEY: I have to object. I'm</p> <p>24 going to object. It's an incomplete hypothetical.</p> <p>25 It's vague, but go ahead.</p>

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<p style="text-align: right;">Page 109</p> <p>1 THE WITNESS: I don't understand what 2 you mean by leave money on the table. 3 BY-MR.STONE: 4 Q. Well, they had a right to--at this 5 point, to the first 82 and change in proceeds 6 from the sale of the company, right? 7 A. If there was a sale. 8 Q. Okay. And your opinion is the company 9 was worth as much as \$72.9 million? 10 A. Uh-huh (Affirmative). 11 Q. And they yielded 42 million. So does 12 that mean that the preferreds left \$31 million on 13 the table? 14 A. No. 15 Q. Why is that? 16 A. The preferred shareholders don't own 17 the company. There is also common equity. They 18 don't have a right necessarily to receive \$82.9 19 million. They only receive it if there is a 20 liquidation. And the decision on liquidation is a 21 decision that the common stockholders decide on 22 and the majority--the vote is decided by majority. 23 So the value of the preferred is not equal to the 24 value of the firm. It's lower. 25 Q. There are two scenarios, the one that</p>	<p style="text-align: right;">Page 111</p> <p>1 what happened to the value of Campus Pipeline 2 within SCT, what is generated there, what 3 potential synergy there is there, what's the value 4 of the tax shields to SCT. So there are so many 5 unknowns, it would be irresponsible for me to 6 answer this. 7 BY-MR.STONE: 8 Q. Okay. Just holding everything 9 constant--you can't tell me whether SCT is better 10 owning the company 100 percent now, paying off the 11 preferreds at \$42 million, and paying, under your 12 assumptions, the \$83 million to itself, owning 100 13 percent of the company in 13 years, or whether it 14 would be better off operating the company, paying 15 out the \$83 million to--to the preferreds and 16 owning 78 percent of the company in 13 years? 17 A. You can't say that because-- 18 MR. STANLEY: I have to, again, object 19 that it's an incomplete hypothetical, but go 20 ahead. 21 THE WITNESS: You can't really compare 22 it. You're comparing apples and oranges, and you 23 have here your ex-post knowledge of what happened 24 13 years later compared to a decision that had to 25 be taken at the time that it was taken. And</p>
<p style="text-align: right;">Page 110</p> <p>1 played out and the one that you project in your 2 opinion. Under the first scenario, we all know 3 what happened. SCT ends up owning the coming, 4 paying off the preferreds at \$42 million, and 5 owning the company outright. 6 I'm going to state what I believe is 7 your scenario, and then when I finish, if you'd 8 let me know if I got it right. But under your 9 scenario, we'll take the scenario where you 10 maximize the value, where SCT does not sell the 11 company, or the commons don't give up their 12 interest. They operate the company for 13 years, 13 they pay the preferred shareholders the full 14 amount of the preference over that time, and at 15 the end of it all, SCT owns 78 percent of the 16 company 13 years from now. Under which of those 17 two scenarios does SCT's financial interest--under 18 which of those scenarios is SCT better off? 19 MR. STANLEY: I'll have to object. 20 Vague, but go ahead. Incomplete hypothetical, but 21 go ahead. 22 THE WITNESS: You are--yeah, I have to 23 disagree. I mean, it's--you cannot determine 24 which is a better scenario when you're looking 13 25 years into the future. You have to think about</p>	<p style="text-align: right;">Page 112</p> <p>1 there are so many unknowns, it's really difficult 2 to say. 3 BY-MR.STONE: 4 Q. It really depends on the assumptions 5 you use as to what's going to happen in the next 6 13 years, doesn't it? 7 A. It depends also on the assumption as 8 what would have happened to Campus Pipeline in the 9 end of SCT, within SCT in the next 13 years, 10 which is something we don't have data on and we 11 didn't really look at. 12 Q. Okay. And you didn't have data for the 13 13 year projection you make here, do you? 14 A. No, I base my projection on the Tom 15 Weisel estimates to avoid conflict and to be as 16 close as possible to the other side. 17 Q. I'm saying, using that data-- 18 A. Yeah. 19 Q. --can't you make an assumption about 20 how SCT would be better off? 21 MR. STANLEY: Well, I have to again 22 object that it's an incomplete hypothetical 23 because of the amount of variables that are 24 involved, at least some of which he's talked 25 about, but go ahead.</p>

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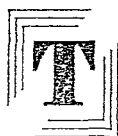
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<p style="text-align: right;">Page 145</p> <p>1 valuation, employing Black-Scholes.</p> <p>2 Q. Is it part of the paper, the</p> <p>3 Black-Scholes paper? Did they go through an</p> <p>4 iteration process?</p> <p>5 A. That's what Black-Scholes would have</p> <p>6 done in this case. If they would have applied</p> <p>7 the methodology, that's what they would do.</p> <p>8 Q. Just my question is, would the paper</p> <p>9 where the methodology is established, does it go</p> <p>10 through an iteration approach?</p> <p>11 A. The paper doesn't have to go through an</p> <p>12 iteration approach because it's a different</p> <p>13 application. But whenever an application like</p> <p>14 this is done, you have to go through iterational</p> <p>15 approach, as I explained in this example that I</p> <p>16 would--I would love to share with you.</p> <p>17 Q. It's well stated here, and this is an</p> <p>18 exhibit to your deposition.</p> <p>19 A. If you don't have to--</p> <p>20 Q. I'd let you go through it, but--</p> <p>21 A. No, if it's stated, that's fine.</p> <p>22 That's fine, then.</p> <p>23 MR. STONE: How we doing?</p> <p>24 MR. STANLEY: Take a break.</p> <p>25 MR. STONE: Change the tape. Take a</p>	<p style="text-align: right;">Page 147</p> <p>1 BY-MR.STONE:</p> <p>2 Q. The company is sold for fair market</p> <p>3 value?</p> <p>4 A. The company sold for this much--for</p> <p>5 this value.</p> <p>6 Q. And Mr. Borghetti is nevertheless</p> <p>7 damaged?</p> <p>8 A. Mr. Borghetti's damage--</p> <p>9 (Reporter/witness discussion to clarify record.)</p> <p>10 THE WITNESS: Mr. Borghetti is damaged</p> <p>11 in the sale through liquidation, because he gets</p> <p>12 zero.</p> <p>13 BY-MR.STONE:</p> <p>14 Q. Turn to page .11 of your report.</p> <p>15 MR. STANLEY: Page .11 of his report?</p> <p>16 MR. STONE: Yes.</p> <p>17 MR. STANLEY: Sometimes I can't hear</p> <p>18 you that well over here, Andy. I apologize.</p> <p>19 It's okay. I can hear you pretty well, but</p> <p>20 sometimes if I start chatting with Curt for a</p> <p>21 minute or so, then I'm not a good listener.</p> <p>22 BY-MR.STONE:</p> <p>23 Q. Last paragraph, third sentence, it</p> <p>24 says, "I assume that between the years 2004 and</p> <p>25 2005, revenues and cost of goods sold are growing</p>
<p style="text-align: right;">Page 146</p> <p>1 break.</p> <p>2 THE VIDEOGRAPHER: Time's approximately</p> <p>3 3:08 p.m. We are now off the record.</p> <p>4 (Recess taken, 3:08-3:26 p.m.)</p> <p>5 THE VIDEOGRAPHER: Time is</p> <p>6 approximately 3:26 p.m. We're now back on the</p> <p>7 record.</p> <p>8 BY-MR.STONE:</p> <p>9 Q. Professor, the high end of your</p> <p>10 estimate of value of this company is 72.9 million,</p> <p>11 as I read Table 1, Panel D.</p> <p>12 A. Table 1, Panel D. Just to make sure.</p> <p>13 It's 72--yeah, 72.9.</p> <p>14 Q. If the company sells for the value of</p> <p>15 \$72.9 million, is anyone damaged?</p> <p>16 A. When you say sell, you mean a sale that</p> <p>17 include liquidation?</p> <p>18 Q. Assume that the company is sold in 2002</p> <p>19 for \$72.9 million. Is anyone damaged?</p> <p>20 A. General liquidation--generally in</p> <p>21 liquidation?</p> <p>22 MR. STANLEY: I have to object. It's</p> <p>23 an incomplete hypothetical, but go ahead.</p> <p>24 THE WITNESS: In this case, the common</p> <p>25 stockholders are losing their claim.</p>	<p style="text-align: right;">Page 148</p> <p>1 at a rate of 20 percent per year." Do you see</p> <p>2 where that is?</p> <p>3 A. Yeah, I see that.</p> <p>4 Q. What's the basis for that assumption?</p> <p>5 A. Kind of projected forward from the--</p> <p>6 from the Weisel report.</p> <p>7 Q. Did you do any research on this</p> <p>8 industry to see if those are reasonable numbers?</p> <p>9 A. No, no, I just projected based on the</p> <p>10 research that they have done.</p> <p>11 Q. Okay. They did--they projected that</p> <p>12 for two years, correct?</p> <p>13 A. That's true. The rest, I extended it.</p> <p>14 Q. But you didn't do any independent</p> <p>15 research on the reasonableness of that assumption?</p> <p>16 A. No.</p> <p>17 Q. Next paragraph: "I assume that</p> <p>18 research and development, as well as selling</p> <p>19 general and administrative, are growing at a rate</p> <p>20 of 15 percent per year."</p> <p>21 A. Yes.</p> <p>22 Q. What's the basis for that assumption?</p> <p>23 A. Seems reasonable that it would continue</p> <p>24 to grow at this rate. And I--as I say, I only</p> <p>25 did it for getting as to the expected time to</p>

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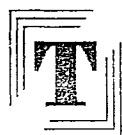
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<p style="text-align: right;">Page 157</p> <p>1 technology that Campus Pipeline had in terms of 2 access to the Web to one point-- 3 (Reporter/witness discussion to clarify record.) 4 THE WITNESS: They can--they can use 5 Campus Pipeline access to the Web to hook into 6 their own software and have some benefit from 7 that. That's what I understand it, the synergy 8 to be. 9 BY-MR.STONE: 10 Q. How would a failure of Campus Pipeline 11 have affected SCT's ability to market its own 12 products? 13 A. You mean sitting on the board, if--just 14 in terms of their investment? Well, nobody likes 15 to lose, so I assume they don't like to lose. 16 Q. I'm thinking more in terms of SCT's 17 customers. Are SCT's customers more likely to buy 18 SCT's service and products if they perceive that 19 Campus Pipeline is likely to be liquidated? 20 (Reporter/attorney discussion to clarify record.) 21 MR. STONE: Likely. 22 THE WITNESS: I'd have to study this 23 issue more. 24 BY-MR.STONE: 25 Q. Could it be a concern like that that</p>	<p style="text-align: right;">Page 159</p> <p>1 Jeffrey Williams. Have you--have you ever given 2 testimony as an expert witness in a Section 262 3 Delaware appraisal action? 4 A. No, not that I know. 5 Q. I think you'd probably know if you did, 6 wouldn't you? Have you ever testified-- 7 A. I'm not a legal expert, so maybe of 8 what I did implies it so . . . 9 Q. No, listen to my question. 10 A. Okay. 11 Q. Have you ever testified as an expert 12 witness in a Delaware appraisal action? 13 A. Not that I know--I think I did not, 14 because I would know. 15 Q. Have you ever prepared an expert report 16 that purported to provide an evaluation of the 17 appraisal value of a business for a Delaware 18 appraisal lawsuit? 19 A. Now that would mean any--valuing any 20 company that is incorporated in Delaware or a 21 particular process that I'm not familiar with? 22 Q. It's a particular process-- 23 A. Oh, no. So the answer is no. 24 Q. In your opinion, as of September- 25 October of 2002, was Campus Pipeline a company</p>
<p style="text-align: right;">Page 158</p> <p>1 might cause SCT to pay more than a third party 2 might pay for Campus Pipeline? 3 A. It's--would be speculation. I mean, I 4 didn't see the auction, didn't see the 5 participation of others, and . . . 6 MR. STONE: Let me take a quick break. 7 THE WITNESS: Okay. Sure. 8 THE VIDEOGRAPHER: Time is 9 approximately 3:40 p.m. We are now off the 10 record. 11 (Recess taken, 3:40-3:45 p.m.) 12 THE VIDEOGRAPHER: All right. Time is 13 approximately 3:45 p.m. We're now back on the 14 record. 15 MR. STANLEY: And--so by the way, he's 16 going to read and sign, just so we have an 17 understand on this deposition transcript. Okay, 18 gentlemen? 19 MR. SCHULTZ: Sounds good. 20 MR. STANLEY: Thank you. 21 EXAMINATION 22 BY-MR.SCHULTZ: 23 Q. Professor Kaley, my name is Stuart 24 Schultz. I introduced myself earlier today. I 25 represent Bendinger, Crockett, Peterson, Casey and</p>	<p style="text-align: right;">Page 160</p> <p>1 that was in financial distress? 2 A. Because a company not doing well in the 3 sense that it has historical losses has very 4 significant historical losses. If you mean--if 5 you imply financial distress as being close to 6 bankruptcy, my answer is no. 7 Q. Okay. Well, how do you define 8 financial distress? 9 A. It's not an easy thing to--to define. 10 I mean, if we're thinking about not being able to 11 meet its short-term obligation is financial 12 distress, that was not the case here. 13 Q. So in your opinion, Campus Pipeline was 14 not a company in financial distress the way you 15 define it as of September-October 2002? 16 A. It was not a company close to 17 bankruptcy in that sense. It was a company not 18 doing well given the historical losses. 19 Q. Okay. Was it a company in financial 20 distress the way you define financial distress as 21 of September-October 2002? 22 A. Given my definition, the answer is no. 23 Q. I just want to--you mentioned a few 24 times today that you tried to table anything that 25 wasn't--</p>

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<p style="text-align: right;">Page 161</p> <p>1 A. In dispute.</p> <p>2 Q. --in dispute. So I want to see if we</p> <p>3 can agree on a few things that are not in dispute</p> <p>4 in this case, okay? Do you agree that the</p> <p>5 effective date of the acquisition merger of Campus</p> <p>6 Pipeline by SCT was October 23, 2002?</p> <p>7 MR. STANLEY: I'd have to object.</p> <p>8 Calls for a legal conclusion. But as best as you</p> <p>9 know, if you have an opinion on that.</p> <p>10 THE WITNESS: As far as I could see,</p> <p>11 based on the documents, the--the acquisition was</p> <p>12 in October of 2002, as far as I can--</p> <p>13 BY-MR.SCHULTZ:</p> <p>14 Q. It's not supposed to be a trick</p> <p>15 question.</p> <p>16 A. No, I just don't know, I mean, like</p> <p>17 because legally, perhaps, it's not the date that</p> <p>18 maybe you should . . .</p> <p>19 Q. Well, did you read the notices that</p> <p>20 were--</p> <p>21 A. Yeah yeah.</p> <p>22 Q. --sent out?</p> <p>23 A. Yeah.</p> <p>24 Q. Will you take my word for it that there</p> <p>25 was a notice that said that the effective date of</p>	<p style="text-align: right;">Page 163</p> <p>1 claim holders.</p> <p>2 BY-MR.SCHULTZ:</p> <p>3 Q. Okay. I'm not--my question is not</p> <p>4 asking you whether or not the sale should have</p> <p>5 taken place, okay? The sale did take place,</p> <p>6 didn't it?</p> <p>7 A. That is true.</p> <p>8 Q. All I'm asking you to--to agree with me</p> <p>9 on is that as of the date of the sale in this</p> <p>10 case, under the terms of the certificate of</p> <p>11 incorporation, which I'm sure you've been given to</p> <p>12 look at, the proceeds--the first \$82.9 million of</p> <p>13 the proceeds of the sale on that date went to the</p> <p>14 preferred shareholders, correct?</p> <p>15 MR. STANLEY: I have to object. Calls</p> <p>16 for a legal conclusion as to the validity of that</p> <p>17 particular document and its terms.</p> <p>18 MR. SCHULTZ: I'm not asking him for a</p> <p>19 legal opinion.</p> <p>20 BY-MR.SCHULTZ:</p> <p>21 Q. I'm just asking you, is that what the</p> <p>22 documentation says?</p> <p>23 MR. STANLEY: Well--</p> <p>24 THE WITNESS: That's what I--</p> <p>25 MR. STANLEY: Go ahead.</p>
<p style="text-align: right;">Page 162</p> <p>1 the acquisition was October 23, 2002?</p> <p>2 A. No problem.</p> <p>3 Q. Okay. That's not something we--</p> <p>4 A. No.</p> <p>5 Q. --dispute here?</p> <p>6 A. Yes.</p> <p>7 Q. I'm just using that date as a reference</p> <p>8 point now, okay? Do you agree that as of October</p> <p>9 23, 2002, the preferred shareholders owned stock</p> <p>10 that had a preference amount of \$82.9 million?</p> <p>11 A. Both Series A and B--together, yes.</p> <p>12 Q. Yes, uh-huh (Affirmative). And do you</p> <p>13 also agree that it is not disputed that a sale or</p> <p>14 an acquisition that was completed as of that date,</p> <p>15 October 23, 2002, that the first \$82.9 million of</p> <p>16 proceeds of a sale on that date had to be paid to</p> <p>17 the preferred shareholders?</p> <p>18 MR. STANLEY: I have to object.. That</p> <p>19 calls for a legal opinion, so that would be</p> <p>20 speculation on his part, I think.</p> <p>21 THE WITNESS: That's a legal--it is a</p> <p>22 legal issue. I mean, as an economist, I've said</p> <p>23 before that this sale would not have happened if</p> <p>24 it was--if the company was run according to</p> <p>25 economic theory to maximize the benefit of the</p>	<p style="text-align: right;">Page 164</p> <p>1 THE WITNESS: That's what I read in the</p> <p>2 documents. The documents said if something like</p> <p>3 this happened, then the first 82 point whatever</p> <p>4 goes to the preferred.</p> <p>5 BY-MR.SCHULTZ:</p> <p>6 Q. Okay. And so is it undisputed also</p> <p>7 that any sale that takes place or that took place</p> <p>8 as of that date, October 23, 2002, for less than</p> <p>9 the \$82.9 million would result in the common</p> <p>10 shareholders getting nothing? Is that correct?</p> <p>11 A. That is--that is correct, but that is</p> <p>12 precisely why the common stockholders would not</p> <p>13 agree to do something like that.</p> <p>14 Q. But as a matter of fact, that is true?</p> <p>15 A. As a legal--</p> <p>16 Q. It's what happened?</p> <p>17 A. --as a legal effect, as I read it in</p> <p>18 the documents. And what the documents say is</p> <p>19 consistent with what you described to me.</p> <p>20 Q. Okay. Now, do you agree--or correct me</p> <p>21 if I'm wrong, but I understand your opinion--or</p> <p>22 your analysis and your calculation that there were</p> <p>23 damages in this case is based on your opinion</p> <p>24 that there should not have been a sale as of</p> <p>25 October 23, 2002, correct?</p>

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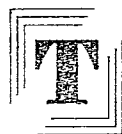
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<p style="text-align: right;">Page 165</p> <p>1 A. Yeah, there should not have been a 2 sale. 3 Q. Okay. Are you familiar at all, 4 Professor Kalay, with the provisions of the 5 appraisal statute under Delaware law? 6 A. Provision of the-- 7 Q. Appraisal statute under Delaware law. 8 Are you familiar with that at all? 9 A. I'm not sure that I am. I mean . . . 10 Q. Okay. You haven't-- 11 A. I haven't looked particularly on that. 12 Q. In this case, you have not been asked 13 to, nor have you taken it upon yourself to 14 perform an appraisal under Delaware statute? 15 A. Yeah. 16 Q. You have not, have you? 17 A. Yeah. 18 MR. STANLEY: Well--I have to object 19 that that's vague, but it's irrelevant. He's 20 answered the question. 21 BY-MR.SCHULTZ: 22 Q. Okay. And just to--your opinion--your 23 opinion is that this sale shouldn't have taken 24 place, right? 25 A. Yes.</p>	<p style="text-align: right;">Page 167</p> <p>1 something. 2 Q. Am I correct--based on your testimony 3 and based on your report, am I correct that you 4 did not see the need to perform your own 5 independent calculation of the fair market value 6 of Campus Pipeline as of the date of the merger? 7 MR. STANLEY: I have to object. Vague 8 as to quote fair market value, unquote. Go 9 ahead. 10 THE WITNESS: This is not accurate. 11 The--the--I have based my analysis, the--I needed 12 to do an analysis as the document--as my report 13 shows. But I based the analysis on what SCT 14 actually paid. So my estimate was what SCT 15 actually paid rather than just going and doing an 16 analysis independent of--that is correct. 17 BY-MR.SCHULTZ: 18 Q. Okay. Fair enough. In fact, you said 19 that several times in your report, didn't you? 20 A. I did. 21 Q. Let me just make sure I've got those 22 spots here. If I have understood that correctly. 23 Look at page .6 of your report, would you. 24 A. Yeah. 25 MR. STANLEY: Are we talking about</p>
<p style="text-align: right;">Page 166</p> <p>1 Q. Okay. And in your report, you refer 2 sometimes to what you referred to as a bad act? 3 A. Yes. 4 Q. Is that right? What is the bad act 5 that-- 6 A. It's just-- 7 Q. The sale? 8 A. --it's just a term, that the sale was 9 done to harm the--and harmed the common equity 10 owner. 11 Q. So is your opinion premised on the 12 assumption that the sale of Campus Pipeline to SCT 13 somehow involved a breach of a fiduciary duty or 14 fraud or some kind of breach? 15 MR. STANLEY: I have to object that it 16 calls for a legal opinion. 17 THE WITNESS: Yeah, I am--I just don't 18 know. It's not my expertise. I'm not going to 19 comment on that. 20 BY-MR.SCHULTZ: 21 Q. But you just think it was a bad act? 22 A. From an economic point of view. 23 Q. Okay. 24 A. And I've--I just use it for lack of 25 other words, just as a reference point to</p>	<p style="text-align: right;">Page 168</p> <p>1 Exhibit--what is this, one? His report, right? 2 THE WITNESS: My report, the 3 liquidation of Campus Pipeline, yeah. 4 BY-MR.SCHULTZ: 5 Q. Was that Exhibit 1? 6 A. That's--I don't know. It's not 7 numbered from here. But you're talking about my 8 report, right? 9 Q. Yeah, your report. I think-- 10 A. I think we're on the same page. 11 Liquidation of Campus Pipeline. 12 Q. Yeah. Yeah. Just up at the top of the 13 page, first line, you say, "This estimate of 14 damages is conservative in several respects. 15 First, it is based on the assumption that the 16 price (cash plus forgone common stocks) SCT paid 17 for Campus Pipeline, is the market value." Is 18 that one place where you said that that was your 19 assumption of market value? 20 A. That's--that's where I said that--that 21 I am basing my damages on the price that SCT 22 actually paid--actually paid. 23 Q. Yeah. 24 A. Yeah. 25 Q. And you said that that was--</p>

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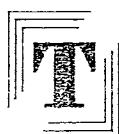
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<p style="text-align: right;">Page 169</p> <p>1 A. I assumed.</p> <p>2 Q. You called--you said you assumed that--</p> <p>3 A. Yes.</p> <p>4 Q. --is the market value--</p> <p>5 A. Assumed.</p> <p>6 Q. --correct?</p> <p>7 A. Yeah. Yeah. In order to do an</p> <p>8 analysis, yes. Do I do . . .</p> <p>9 Q. And then look over on page .8, if you</p> <p>10 would, please, near the bottom of the page--</p> <p>11 A. Yes.</p> <p>12 Q. --you say--this is the third line from</p> <p>13 the bottom, you say, "One thing to stress is--I</p> <p>14 am using the actual price paid by SCT as the base</p> <p>15 for the estimation of damages."</p> <p>16 A. That is correct.</p> <p>17 Q. In other words, I obtained a</p> <p>18 conservative estimate of damages by adopting the</p> <p>19 valuation of the defendants--</p> <p>20 A. Yeah.</p> <p>21 Q. --correct? Now, is that again--you're</p> <p>22 referring to the purchase price at--as of October</p> <p>23 2002, correct?</p> <p>24 A. The cash plus the forgone equity, yes.</p> <p>25 Q. So you just accepted that as the value</p>	<p style="text-align: right;">Page 171</p> <p>1 on my conservative estimate of damages, yes.</p> <p>2 Q. Right. Now, you--do you have Exhibit 2</p> <p>3 there in front of you?</p> <p>4 A. Yeah.</p> <p>5 Q. There's your panel. Table 1, panels--</p> <p>6 A. A to D.</p> <p>7 Q. --A, B, C, and D?</p> <p>8 A. Yes.</p> <p>9 Q. And I believe you testified earlier</p> <p>10 that this two-page document takes the place of</p> <p>11 Tables 7 and 8 in your original report--</p> <p>12 A. I did.</p> <p>13 Q. --is that correct?</p> <p>14 A. That's correct.</p> <p>15 Q. Okay. I just want to ask you a</p> <p>16 couple--three questions about the factual</p> <p>17 assumptions that underpin this table, okay?</p> <p>18 A. (Witness moves head up and down.)</p> <p>19 Q. Do these numbers in this table assume</p> <p>20 the preferred shares will, in fact, be convert--or</p> <p>21 purchased over either a 9-year or a 13-year</p> <p>22 period?</p> <p>23 MR. STANLEY: I have to object. Vague</p> <p>24 as to, quote, purchase, unquote, but go ahead.</p> <p>25 THE WITNESS: The--the analysis is done</p>
<p style="text-align: right;">Page 170</p> <p>1 as of that date for purposes of your calculation</p> <p>2 of damages?</p> <p>3 A. That is correct.</p> <p>4 Q. Okay. You didn't go out and do a whole</p> <p>5 separate independent valuation?</p> <p>6 A. I did valuation as you can see in the</p> <p>7 report, but it is based the starting point, yes.</p> <p>8 Q. Right, that's what I meant. You didn't</p> <p>9 do a separate base point evaluation?</p> <p>10 A. That's true.</p> <p>11 Q. Look over on page .15, if you would.</p> <p>12 A. Yes.</p> <p>13 Q. The second-to-the-last paragraph, about</p> <p>14 three lines up from the bottom of that paragraph.</p> <p>15 See where it says, "Nevertheless"?</p> <p>16 A. Yeah.</p> <p>17 Q. "Nevertheless, to minimize conflicts</p> <p>18 and arguments with the defendants, my estimate of</p> <p>19 damages uses the amount paid by SCT as the market</p> <p>20 value of Campus Pipeline at the time of the 'bad</p> <p>21 act.'" So there again, you've again stated that</p> <p>22 you've accepted as the market value of Campus</p> <p>23 Pipeline as of the date of sale as the amount of</p> <p>24 the sale, right?</p> <p>25 A. As--as my conservative estimate--based</p>	<p style="text-align: right;">Page 172</p> <p>1 under the assumption that the preferred--</p> <p>2 liquidation value of the preferred would be paid</p> <p>3 at the time that is mentioned, yes.</p> <p>4 BY-MR.SCHULTZ:</p> <p>5 Q. Okay. So when you say, for example, in</p> <p>6 Table 1, Panel A, when your value in the first</p> <p>7 column there at the end of nine years, the amount</p> <p>8 is \$63.6. Do you see that?</p> <p>9 A. Yes, I see.</p> <p>10 Q. Okay. That's--that calculation</p> <p>11 presumes that the preferred stocks, Series A and</p> <p>12 B, have all been paid for, correct?</p> <p>13 A. No.</p> <p>14 Q. During--over a nine-year period?</p> <p>15 A. They're not paid yet.</p> <p>16 Q. No, over a nine-year period, you're</p> <p>17 assuming--</p> <p>18 A. They will be paid using the current</p> <p>19 value under the assumption that in nine years they</p> <p>20 will be paid.</p> <p>21 Q. Right. Yes. And under that</p> <p>22 assumption, then you are able to follow your--</p> <p>23 A. Yeah.</p> <p>24 Q. --table through and find some amount of</p> <p>25 damage for Mr. Borghetti, correct?</p>

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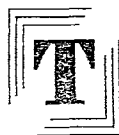
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<p style="text-align: right;">Page 173</p> <p>1 A. Correct.</p> <p>2 Q. Okay. But if you assumed that the</p> <p>3 preferred shareholders were not paid off, okay?</p> <p>4 A. Were not paid off?</p> <p>5 Q. Yeah, just--just for sake of--</p> <p>6 A. Okay.</p> <p>7 Q. --argument assume that the preferred</p> <p>8 shareholders were not paid off, okay?</p> <p>9 A. Uh-huh (Affirmative).</p> <p>10 Q. \$63.6 million in value, standing alone,</p> <p>11 would not be sufficient to have paid the preferred</p> <p>12 shareholders their ownership value as of October</p> <p>13 23, 2002, would it?</p> <p>14 A. Let me clarify. The answer is no, but</p> <p>15 let me clarify to you. The--</p> <p>16 Q. Let me make sure I got my question</p> <p>17 answered before you clarify.</p> <p>18 A. No, you--you didn't get it yet, because</p> <p>19 I'm answering it now.</p> <p>20 Q. Let me ask it again. Would you just</p> <p>21 agree with this--with this--I'll simplify it: As</p> <p>22 of October 23, 2002, \$63.6 million would not have</p> <p>23 been enough to pay the preferred shareholders off,</p> <p>24 correct?</p> <p>25 A. Nine years later?</p>	<p style="text-align: right;">Page 175</p> <p>1 THE WITNESS: I answered.</p> <p>2 MR. STANLEY: And if you want, he's</p> <p>3 going to explain.</p> <p>4 THE WITNESS: I disagree with you.</p> <p>5 BY-MR.SCHULTZ:</p> <p>6 Q. You disagree that as of October 23,</p> <p>7 2002, \$63.6 million was insufficient to pay the</p> <p>8 preferred shareholders?</p> <p>9 MR. STANLEY: No--he already--no, he</p> <p>10 agreed with that, but he disagreed with your</p> <p>11 further analysis.</p> <p>12 THE WITNESS: Your interpretation. I</p> <p>13 disagree with--I agree with your \$63.6.</p> <p>14 BY-MR.SCHULTZ:</p> <p>15 Q. I'm asking a different question.</p> <p>16 A. Okay. I agree that \$63.6 is a smaller</p> <p>17 number than \$82.93.</p> <p>18 Q. And therefore, as of October 23, 2002,</p> <p>19 it would not have been enough to pay the</p> <p>20 preferred shareholders in full, correct?</p> <p>21 A. It was not enough and it was not</p> <p>22 needed.</p> <p>23 Q. Okay. It was not--if it was?</p> <p>24 A. It was not needed.</p> <p>25 Q. Okay. If the company was sold for</p>
<p style="text-align: right;">Page 174</p> <p>1 Q. No, as of October 23, 2002, would \$63.6</p> <p>2 million have been enough to pay the preferred</p> <p>3 shareholders in full?</p> <p>4 A. The \$63.6 is not cash in the bank. The</p> <p>5 \$63.6 is the value--some of the value of all the</p> <p>6 claims on the firm.</p> <p>7 Q. Okay. I'm--my question is very simple.</p> <p>8 A. No, no, I'm--but I'm answering it. You</p> <p>9 have to give me--</p> <p>10 Q. Listen to my question.</p> <p>11 A. I have listened.</p> <p>12 Q. As of October 23, 2002--</p> <p>13 A. Yes.</p> <p>14 Q. --you agree, don't you, that \$63.6</p> <p>15 million would not have been enough to pay off the</p> <p>16 preferred shareholders?</p> <p>17 A. If you're asking whether or not \$63.6</p> <p>18 is a smaller number than \$82.93, it is a smaller</p> <p>19 number.</p> <p>20 Q. So it's not enough to pay them off?</p> <p>21 A. Now here is where we disagree. And if</p> <p>22 you want, I'll explain.</p> <p>23 Q. Well, just answer my question first.</p> <p>24 MR. STANLEY: He just said he</p> <p>25 disagrees.</p>	<p style="text-align: right;">Page 176</p> <p>1 \$63.6 million, it would not have been enough to</p> <p>2 pay the preferred shareholders?</p> <p>3 A. If the company was sold in a way</p> <p>4 through liquidation, then \$63.6 would be--since</p> <p>5 it's a smaller number, there wouldn't be enough to</p> <p>6 pay.</p> <p>7 Q. And the same would apply to \$72.9</p> <p>8 million under Table 1, Panel D?</p> <p>9 A. Yeah, I agree that \$72.9 is still lower</p> <p>10 than \$82.93.</p> <p>11 Q. Okay. And--you--you refer in your</p> <p>12 report in a few places, Professor, to the--what</p> <p>13 you call the "but for" world. Is the "but for"</p> <p>14 world a world without a sale on October 23, 2002?</p> <p>15 A. Yes.</p> <p>16 Q. Look at Exhibit 4 just for a second.</p> <p>17 MR. STANLEY: What page are we on here?</p> <p>18 I'm sorry.</p> <p>19 MR. SCHULTZ: What?</p> <p>20 MR. STANLEY: What page are we on? I</p> <p>21 apologize.</p> <p>22 MR. SCHULTZ: I didn't give you a page</p> <p>23 number.</p> <p>24 MR. STANLEY: Oh.</p> <p>25 BY-MR.SCHULTZ:</p>

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<p style="text-align: right;">Page 181</p> <p>1 A. And that's what I meant by that.</p> <p>2 Q. So would you--would it be correct to</p> <p>3 say that the income approach, market approach, and</p> <p>4 cost approach are generally accepted methodologies</p> <p>5 in the economic profession for valuing a business?</p> <p>6 A. Yeah. Yes.</p> <p>7 Q. Are you familiar with any literature--</p> <p>8 and I'm going to try to be as specific as I can</p> <p>9 with this--</p> <p>10 A. Okay.</p> <p>11 Q. --question.</p> <p>12 A. Okay.</p> <p>13 Q. Are you familiar with any literature</p> <p>14 that specifically addresses the point that you</p> <p>15 make in this paragraph 7, and that is, consistency</p> <p>16 of your option methodology with the accepted</p> <p>17 method of valuation,</p> <p>18 income approach, market approach, and cost</p> <p>19 approach?</p> <p>20 A. Okay. The--you have a lot of citations</p> <p>21 here that are consistent with--</p> <p>22 Q. I know, but--</p> <p>23 A. The point is--</p> <p>24 Q. Do you understand how specific I'm</p> <p>25 trying to be with my question, though?</p>	<p style="text-align: right;">Page 183</p> <p>1 methodology is consistent with the income</p> <p>2 approach?</p> <p>3 A. No.</p> <p>4 Q. None?</p> <p>5 A. No.</p> <p>6 Q. At all?</p> <p>7 A. Not that I know, no.</p> <p>8 Q. Do you yourself--do you still believe</p> <p>9 that the--what's referred to as the accepted</p> <p>10 method of valuation, income approach, market</p> <p>11 approach, and cost approach--do you agree that</p> <p>12 those are still generally accepted methodologies</p> <p>13 for valuing business?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. And when I say that, I mean</p> <p>16 not--I'm excluding from that your option</p> <p>17 methodology.</p> <p>18 A. Yeah, there are still other ways to do</p> <p>19 things.</p> <p>20 Q. And do you still use them yourself?</p> <p>21 A. Yes, I do.</p> <p>22 Q. You wouldn't have a problem with</p> <p>23 somebody using those methodologies, then, as a--as</p> <p>24 an accepted method?</p> <p>25 MR. STANLEY: I'll have to object that</p>
<p style="text-align: right;">Page 182</p> <p>1 A. I understand how specific, and I'll be</p> <p>2 specific with my answer.</p> <p>3 Q. Okay. Thank you.</p> <p>4 A. As I said before, the option valuation</p> <p>5 is discounted cash flows, valuation. Discounted</p> <p>6 cash flow valuation is similar, or significant</p> <p>7 part of the income approach. When you talk about</p> <p>8 the income approach, you're talking about</p> <p>9 discounted cash flow valuation.</p> <p>10 Q. Can I stop you?</p> <p>11 A. As mentioned--as mentioned by Mr.</p> <p>12 Garbowski--</p> <p>13 Q. Can I stop you just for a sec on that?</p> <p>14 A. Sure.</p> <p>15 Q. Is that where you believe the</p> <p>16 consistency--</p> <p>17 A. Yes.</p> <p>18 Q. --lies between the option methodology</p> <p>19 and--</p> <p>20 A. And this.</p> <p>21 Q. --the accepted method?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. Thank you. Are you familiar</p> <p>24 with any literature, Professor, that has taken</p> <p>25 issue or disagrees with the view that the option</p>	<p style="text-align: right;">Page 184</p> <p>1 it's an incomplete hypothetical and it would</p> <p>2 depend on the circumstances, but it's your opinion</p> <p>3 that he's asking for.</p> <p>4 THE WITNESS: These are generally</p> <p>5 accepted and it doesn't mean that anybody who's</p> <p>6 using these is doing the right things. Of</p> <p>7 course, these are just names. One has to</p> <p>8 evaluate the valuation.</p> <p>9 BY-MR.SCHULTZ:</p> <p>10 Q. Well, you have to use the method</p> <p>11 properly, correct?</p> <p>12 A. Exactly. If it's done properly, I have</p> <p>13 no problem.</p> <p>14 Q. You may have already covered this, but</p> <p>15 I apologize if you haven't, but just--can you tell</p> <p>16 me whether you are aware of the valuation</p> <p>17 methodologies recognized by the Delaware courts in</p> <p>18 an appraisal proceeding?</p> <p>19 MR. STANLEY: I object. Calls for a</p> <p>20 legal opinion, but if you know, go ahead.</p> <p>21 MR. SCHULTZ: I'm just asking him if</p> <p>22 he's aware of it.</p> <p>23 THE WITNESS: I--I'm not aware. I</p> <p>24 assume it's no different than others.</p> <p>25 BY-MR.SCHULTZ:</p>

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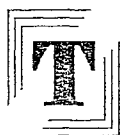
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<p style="text-align: right;">Page 189</p> <p>1 you will see that I have finance books with 2 chapters on real options. 3 Q. Correct. 4 A. And I actually detail here where 5 exactly they talk about this use of the option 6 methodology to value other assets. The term often 7 used for it is real options. 8 Q. Other-- 9 A. Then on page .8, you can see that I have 10 a lot of Web sites that shows the use of real 11 options and I describe what is in there in this 12 Web site. 13 Q. And are any of those--I'm assuming you 14 haven't read every one of these articles? 15 A. Of course not. 16 Q. Yeah. Okay. 17 MR. STANLEY: We'll leave it to you to 18 do that. 19 BY-MR.SCHULTZ: 20 Q. And obviously, notwithstanding Mr. 21 Stanley's delight and his statement-- 22 MR. STANLEY: Just teasing you, and you 23 laughed, too, Stuart. 24 BY-MR.SCHULTZ: 25 Q. --you don't know for a fact how many of</p>	<p style="text-align: right;">Page 191</p> <p>1 Q. Yeah. 2 A. When you say employee, what--I mean, 3 I'm a professor, so-- 4 Q. I guess what I'm asking you is 5 sometimes a university--I heard when I was in law 6 school, a university was described as 90 acres 7 surrounded by reality. 8 A. That's funny. 9 Q. Have you ever worked out for a company 10 in the real world, like Thomas Weisel, doing the 11 kind of evaluations that-- 12 A. Yeah. 13 Q. --they did in this case? 14 A. Okay. Let me--I guess the best way of 15 answering this question is just to go through-- 16 Q. Is it in your CV? 17 A. Go through my CV. Not all of it is 18 there, but I can tell you, I served on six 19 different board of directors. I served as the 20 chairman of the investment committee of a group of 21 mutual funds. I served as the chairman of the 22 investment committee for a large portfolio 23 manager. I'm currently on the board of directors 24 of a large portfolio manager. I am on the board 25 of directors right now of a mineral company--</p>
<p style="text-align: right;">Page 190</p> <p>1 these articles applied directly to the issue in 2 this case, do you? 3 A. Well, meaning--I don't know what you 4 mean by apply directly. A lot of them and most 5 of the textbook--and I've read quite a few and 6 I've brought you citation of quite a few--the most 7 important one is the citation to Black-Scholes, 8 the paper itself, and then textbook and so on. 9 So you have to--you have to understand that I am 10 dealing with this topic for 25 years. And I'm 11 writing on this topic. I'm teaching it. I am 12 lecturing it to executives. And so it's not 13 something that I have collected--it mention in 14 many, many places. 15 And obviously, out of this 5,000 16 articles, you find some that just make a very 17 small use of it, but they just mention it. 18 Perhaps some would just have it on the reference 19 list and I wouldn't know. That is definitely 20 possible. And you could find papers there that 21 they disagree with a lot of their content. 22 Q. Sure. Have you ever worked as an 23 employee and--for a company that did the type of 24 work that Thomas Weisel Partners did? 25 A. Valuation?</p>	<p style="text-align: right;">Page 192</p> <p>1 mineral water company that there--obviously, I'm 2 not an expert in water, so--but I am--I have 3 performed valuations of companies. I was 4 consultant to the Security and Exchange 5 Commission. 6 Q. How many times or how many different 7 issues or problems or cases have you consulted on 8 with the SEC? 9 A. Oh, with the SEC? 10 Q. Was it more than once? 11 A. I was in Washington in 2004. I had an 12 office at the headquarters in D.C., but I was an 13 independent consultant. I have worked with the 14 head of their investments branch. We still work 15 together--that came out from my association with 16 them in the four months that I was there. And I 17 still work on this particular issue and we still 18 work together--of course, less intensely. 19 Q. I just wondered if there was more than 20 one issue-- 21 A. That I did? 22 Q. --one problem. 23 A. There was more than one. There were 24 two problems that I worked on. 25 Q. Have you ever--you, yourself, ever</p>

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<p style="text-align: right;">Page 193</p> <p>1 prepared a fairness opinion like the Thomas Weisel 2 one in this case? 3 A. Well, the--I have done, for example, 4 the valuation of the Israeli telephone company 5 before the IPO and--before their IPO. 6 Q. Okay. 7 A. And my opinion was the base for the 8 negotiation with the underwriter. And I helped 9 them out through the process. 10 I have done evaluations of firms. I 11 have done evaluation of firms prior to an IPO. I 12 have done restructuring, that is firm in financial 13 distress and dealing with banks to restructure 14 their debt. 15 Q. In any of those evaluations that you've 16 just made reference to, have you--have you used a 17 methodology other than the Black-Scholes option 18 methodology that you used on this case? 19 A. I've used others as well, obviously. 20 Q. Okay. Have you ever used the Black- 21 Scholes option methodology in the--any of these 22 other evaluations that you've done? 23 A. Often I've--I've used the option 24 approach to valuation projects. 25 Q. Have you ever used it to value the</p>	<p style="text-align: right;">Page 195</p> <p>1 where you've used this? 2 A. For a valuation of-- 3 Q. Right. 4 A. That's correct. 5 Q. Okay. Give me about two minutes, okay? 6 A. No problem. 7 THE VIDEOGRAPHER: Time is 8 approximately 4:30 p.m. We're now off the record. 9 (Recess taken, 4:30-4:40 p.m.) 10 THE VIDEOGRAPHER: The time is 11 approximately 4:38 p.m. We are now back on the 12 record. 13 BY-MR.SCHULTZ: 14 Q. Just as a general concept, when the 15 preferred shareholders' interest is paid, do they 16 then become common shareholders? Or can they 17 become common shareholders? 18 A. If they pay the-- 19 MR. STANLEY: I'm going to object. 20 Calls for a legal opinion, but if you know. 21 BY-MR.SCHULTZ: 22 Q. Well, you've talked about this. 23 A. What you're saying is if they get the 24 liquidation value? 25 Q. Right, yeah. Is their--is their stock</p>
<p style="text-align: right;">Page 194</p> <p>1 entire--the value of an entire going concern as 2 opposed to just the option? 3 A. In the context of teaching and cases 4 and so on, I have done that. 5 Q. Not-- 6 A. In the context of evaluating a firm, 7 the case--this is kind of a natural case for it. 8 Others are--the data was different, calling for a 9 different type of evaluation, so-- 10 Q. Is this the case the only one where 11 you've done it outside of the university academic 12 scene? 13 A. I'm not sure. I mean--I mean . . . 14 Q. Can you think of one other one where 15 you've done it the way you did here, where you 16 were actually doing it for a business, for the 17 entire corporation valuation? 18 A. I'm thinking as--as you are talking-- 19 typically, the data was better for the market 20 approach and the other types of income approach, 21 sometime cost approach. And I've always went--you 22 know, used whatever data--this is an excellent 23 case for the application of this particular 24 method. 25 Q. So you can't give me one other case</p>	<p style="text-align: right;">Page 196</p> <p>1 converted or are they just out of the picture 2 completely, they're no longer owners? 3 MR. STANLEY: Object again. Calls for 4 legal opinion. Depends on legal documentation, 5 but if you know. 6 BY-MR.SCHULTZ: 7 Q. If you don't know, just--that's a good 8 answer, too. 9 A. Yeah, I probably should read and make 10 sure before I answer. 11 MR. SCHULTZ: Okay. That's all I have. 12 MR. STANLEY: So he's going to read and 13 sign. 14 MR. SCHULTZ: Sounds good. 15 MR. STANLEY: All right. 16 THE REPORTER: And did you want a copy 17 of this, Mr. Schultz? 18 MR. SCHULTZ: Yeah. 19 (A discussion was held off the record.) 20 MR. STANLEY: Get it on the disk, and 21 blah, blah, blah. 22 THE VIDEOGRAPHER: This concludes the 23 videotape deposition of Avner Kalay in the case of 24 Borghetti, et al., vs. System & Computer 25 Technology, Incorporated, et al., consisting of</p>

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Tab E

**CONDENSED
TRANSCRIPT**

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

WILLIAM BORGHETTI, MICHELLE)	
BORGHETTI, LA DOZZINA)	Deposition of:
SPORCA, LLC., LA FAMIGLIA)	JOHN PARSONS
BORGHETTI, LLC., CAMPUS)	
PIPELINE, INC.,)	
(DERIVATIVELY))	
)	
Plaintiffs,)	
)	
vs.)	Civil No. 040921012
)	
SYSTEM & COMPUTER)	
TECHNOLOGY, INC., a)	
corporation, et al.,)	
)	
Defendants.)	

May 19, 2006
9:47 a.m. to 11:42 a.m.

Location: Law Offices of Strong & Hanni
3 Triad Center, Suite 500
Salt Lake City, Utah

Reporter: Judy A. Holdeman, RPR
Notary Public in and for the State of Utah



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2181

1 MR. FISHLER: I am talking about 10/10/02. I
2 don't know, do you want the hour?
3 Q. (BY MR. FISHLER) When he came to you or you
4 got these documents on 10/10/02, did you speak with him
5 at or about that time?
6 A. **I think I spoke to Michelle.**
7 Q. Okay. And tell me what she said to you and
8 what you said to her.
9 A. **"I've got some documents I want to send you.**
10 **And William would like you," me, "to look at them."**
11 Q. And from -- did it appear to you that he sent
12 to you all of the documents relating to this acquisition
13 and merger?
14 A. **I don't know.**
15 Q. Okay.
16 A. **I know what he sent me is in Exhibit 1.**
17 Q. And in your billings -- and everybody does this
18 differently, but on 10/10/02, there is no indication how
19 much time you spent on the matter that I can see.
20 A. **That's correct.**
21 Q. Do you have a recollection as to how much time
22 you spent on them?
23 A. **I don't.**
24 Q. Okay. The next entry is 10/11/02. On
25 10/11/02, do you recall how much time you spent on that

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1 date reviewing select provisions of the Campus Pipeline
2 merger and related documents?
3 A. **I would have to rely on what it says there, an**
4 **hour and 20 minutes.**
5 Q. Okay.
6 A. **Oh, I'm sorry, the hour and 20 minutes was the**
7 **telephone call. So I don't know.**
8 Q. The next entry, and this may be nothing more
9 than my professional curiosity, I see on 10/14 there was
10 an entry for 39 minutes.
11 A. **Yes.**
12 Q. Do you have some type of a device on your phone
13 that actually times your calls?
14 A. **Yeah, I use a clock on my phone.**
15 Q. Not so much a clock, but it just tells you how
16 much time elapsed from the time the call starts until it
17 ends?
18 A. **That's correct.**
19 Q. So you -- on 10/11, you spoke to him for
20 1 hour, 20 minutes?
21 A. **Him?**
22 Q. Or her?
23 A. **Well, I would have spoken to William and**
24 **Jeffrey Jones.**
25 Q. Okay.

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1 A. **On 10/11.**
2 Q. On 10/11, you complete review of select
3 provisions of Campus Pipeline merger and related
4 documents.
5 Did those related documents contain portions of
6 the Delaware corporate code?
7 A. **It would have been what is in Exhibit 1.**
8 Q. Okay. Can you tell me if Exhibit 1 contains
9 Delaware corporate code? I think it's under Tab E.
10 A. **Tab E has Section 262 of the Delaware general**
11 **corporate law, which is the section pertaining to**
12 **appraisal rights.**
13 Q. All right. And you reviewed those documents?
14 A. **I would have reviewed them, yes.**
15 Q. All right. In your entry to 10/11, it said
16 that you reviewed documents for critical deadlines. Do
17 you see that?
18 A. **Yes, I do.**
19 Q. One of those critical deadlines for -- giving
20 notice of a demand for appraisal?
21 A. **That would have been a critical deadline.**
22 Q. And would another critical deadline have -- let
23 me just ask you this: What were those deadlines?
24 So you understand, at all times in this
25 deposition, this is an open-book test.

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1 So what were the critical deadlines? If you
2 want to look back through the documents, tell me. What
3 were the critical deadlines to you?
4 A. **Would have been the time in which a shareholder**
5 **would have had to file a notice of taking appraisal**
6 **rights.**
7 Q. All right. Would there be another deadline for
8 filing a lawsuit?
9 A. **I don't recall that I would have been involved**
10 **with that.**
11 Q. No, but was that a deadline set forth in the
12 code?
13 A. **I don't recall.**
14 Q. Look at the code, if would you, and see if you
15 can find that.
16 MR. FISHLER: Let's take a short break while we
17 give John a chance to look at that.
18 (Recess from 10:37 a.m. to 10:43 a.m.)
19 Q. (BY MR. FISHLER) Mr. Parsons, you have had a
20 chance to review a portion of the Delaware corporate
21 code; correct?
22 A. **I have.**
23 Q. And you would have reviewed that on or about
24 10/11/02?
25 A. **I believe I would have.**

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11 (Pages 32 to 35)

1 Q. Does it contain a deadline for filing an action
2 in a Court of Chancery?
3 A. It does.
4 Q. Let's go over your entry for 10/11. The total
5 entry would be for how many hours and minutes?
6 A. I don't know.
7 Q. What would be your hourly rate?
8 A. I don't know at that time.
9 Q. We could find out what your hourly rate is and
10 then we would divide that into 1114. And then that could
11 tell us the total number of hours that you spent for
12 these four entries, would that be a fair methodology?
13 A. That would be.
14 Q. Give me an estimate as to your hourly rate.
15 A. Estimated between 200 and \$220 an hour at that
16 time.
17 Q. Okay. And so using -- if that is the number
18 and we spent an hour and 20 minutes for that entry in
19 talking on the telephone with CPI officers and directors,
20 how much do you estimate you spent on the phone with
21 Mr. Borghetti?
22 A. I don't know that I was talking to officers of
23 CP on the phone. I was talking to William and Jeff. I
24 don't know if they were officers of Campus Pipeline at
25 that time.

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1 Q. I may have misunderstood what that entry says.
2 That 1 hour, 20 minutes, is that telephone time?
3 A. That's telephone time, yes.
4 Q. So does that include -- I presume what you are
5 saying here in this entry is that you talked to
6 Mr. Borghetti twice?
7 A. Yes. And Mr. Jones.
8 Q. And so the 1 hour and 20 minutes, would that be
9 for the two calls to Mr. Borghetti and Mr. Jones and also
10 calls to the officers and directors of CPI?
11 A. I didn't talk to any officers or directors of
12 CPI.
13 Q. So the 1 hour and 20 minutes would be a total
14 telephone time with Mr. Borghetti and Mr. Jones?
15 A. Yes.
16 Q. Okay. And can you tell me what you said to
17 them and what they said to you?
18 A. I really do not recall. The gist of it would
19 have been -- I don't recall specifics, but the gist of it
20 would have been my focus on the appraisal rights and what
21 these people had to do to preserve their appraisal
22 rights, the first step they had to do, not the filing in
23 court because that wasn't my focus. I am not the
24 litigation person, as I said earlier.
25 So I would have focused on what they had to do

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12 (Pages 36 to 39)

1 timely to preserve their appraisal rights.
2 Q. Okay. And to preserve appraisal rights, it's a
3 two-step process?
4 A. Whatever the statute says.
5 Q. The first would be to give notice. The second
6 would be to file your action?
7 A. If that's what the statute says, I would agree.
8 Q. Would you have told him that?
9 A. I don't know. I don't know whether I focused
10 at all on the filing of litigation. Again, that is not
11 sort of my mentality. I was more concerned about them
12 doing what they needed to do to get down the road.
13 Q. All right.
14 A. I mean, get down the road beyond the initial
15 preservation of rights.
16 Q. This hour and 20 minutes, these two phone
17 calls, what else did you discuss besides the deadlines?
18 A. We would have discussed any potential claims
19 that they may have against the officers and directors of
20 Campus Pipeline.
21 Q. Did you discuss the fact that they needed an
22 evaluation of their interest?
23 A. Who needed an evaluation?
24 Q. Jones and Borghetti.
25 A. I don't recall.

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1 Q. Did you follow up with a letter?
2 A. I don't think I would have followed this
3 conversation with a letter.
4 Q. So you didn't send any confirmation to tell
5 them what you -- or to confirm what you had told them in
6 these two calls?
7 A. Not that I recall.
8 Q. Let's just talk about what your role was. Is
9 there any question in your mind that you were
10 representing Mr. Borghetti and Mr. Jones?
11 A. There was a question in my mind in terms of the
12 extent of my representation.
13 Q. And this bill that you sent him, you sent that
14 on what date, October 31, '02?
15 A. No, it wouldn't have been sent on October 31.
16 It would have been sent sometime between the 5th and 15th
17 of November.
18 Q. Do you say that just because that is your
19 standard practice?
20 A. Yeah. It's the practice of getting bills --
21 prebills out for counsel review. And counsel then
22 reviews, makes corrections. They go back to the officer
23 manager for finals. And counsel looks at the finals.
24 And depending on schedules, it can be anywhere from a
25 week to ten days to get through that process.

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1 Q. The fact -- was this bill paid
2 A. **I don't know. I would have to assume it was.**
3 Q. All right. So in other words, he called you
4 for advice. You gave advice, submitted a bill, and
5 presumably he paid it?
6 A. Yes.
7 Q. It says here on 10/10/02, the runner service.
8 It says runner service to William Borghetti and return.
9 Looking at that in context with the first entry, would
10 that be an indication how you received the documents is
11 that you sent someone out to get them?
12 A. Yes.
13 Q. Is that your recollection?
14 A. **It's not my recollection, but I think that**
15 **speaks for itself. That is probably how they got to us.**
16 Q. And presumably there was a phone call or some
17 type of communication on or -- before you sent the runner
18 out or the runner wouldn't know to go out; right?
19 A. **That's correct.**
20 Q. You say here that you discussed facts, issues,
21 theorys, and strategies.
22 Do you recall what those were, the strategies
23 were?
24 A. **The strategies would have been to, of course,**
25 **preserve the appraisal rights. And then William and**

Page 40

1 **Jeffrey would have had to make a decision if there was no**
2 **negotiation process instigated as to whether they were**
3 **going to litigate at that point.**
4 Q. All right. You presumably saw in those
5 documents that there was a 120-day deadline for filing a
6 lawsuit in a Chancery Court in Delaware -- you saw that
7 most likely?
8 A. **I saw that. I just read that, yes.**
9 Q. And did you read the statute if they don't do
10 that, they would lose their appraisal rights; correct?
11 A. **Well, I didn't pay attention to the statutes,**
12 **but I assume that's what the statute says.**
13 Q. And did you feel that you had any duty to
14 advise them of that deadline?
15 A. **Well, I am sure I would have discussed with**
16 **them if they intended to litigate they had to get**
17 **litigation counsel.**
18 Q. And they had to do that within a certain period
19 of time?
20 A. Yes.
21 Q. Now, on 10/14, I do not understand that entry.
22 Is that -- was Mr. Borghetti and/or Mr. Jones -- were
23 they present or --
24 A. **With -- present with the meeting with**
25 **D. Scofield?**

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1 Q. Yes.
2 A. **They would not have been present.**
3 Q. And D. Scofield, that is David Scofield?
4 A. Yes.
5 Q. And forgive me, was he a lawyer in your office?
6 A. **Yes, he was a partner of mine at the time.**
7 Q. Okay. So, again, you look at appraisal rights,
8 statutory procedures, and you called Mr. Borghetti.
9 A. **Right.**
10 Q. And apparently that call lasted 39 minutes?
11 A. **That's correct.**
12 Q. And this meeting with Mr. Scofield, was that
13 before or after the phone call?
14 A. **I don't know.**
15 Q. At this time, I have noticed in some of your
16 documents that you have letters concerning your
17 representation of clients wherein you set forth what you
18 will do. And you set forth what your billing process is.
19 Do you do that customarily with clients?
20 A. **When the ethical standards require.**
21 Q. Okay. Did you ever send the letter to
22 Mr. Borghetti and/or Mr. Jones or Mrs. Borghetti
23 concerning that -- giving them your billing rates and
24 what you planned to do?
25 A. **Planned to do with respect to this matter?**

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1 Q. Yes.
2 A. **We were planning not to do anything for them.**
3 Q. Pardon?
4 A. **Our firm was not going to represent them**
5 **regarding the appraisal rights in the litigation.**
6 Q. How did you advise them of that, the client?
7 A. **I advised them that we don't do contingency fee**
8 **work and that they should seek counsel with other firms.**
9 Q. All right. When you talked on the 14th, was it
10 just with Mr. Borghetti?
11 A. Yes.
12 Q. And you advised him on 10/11 or 10/14 that you
13 would not do a contingency fee work?
14 A. **The best of my recollection, it would have been**
15 **on one of those dates.**
16 Q. But could an appraisal rights case be taken on
17 an hourly rate?
18 A. **I am sure it could be.**
19 Q. Okay. Were you interested in that?
20 A. **I don't recall.**
21 Q. What is Mr. Scofield's specialty?
22 A. **He is a litigator.**
23 Q. If he was a litigator, is there any specific
24 reason that you were talking to him on October 14?
25 A. **It had something to do with shareholder rights,**

Page 43

13 (Pages 40 to 43)

1 appraisal demand, but I don't know the specifics.
 2 Q. Okay. Do you know if Mr. Scofield made any
 3 time entries on this matter?
 4 A. They would have been on this statement had he.
 5 Q. Okay. What type of litigation does
 6 Mr. Scofield do?
 7 A. General litigator.
 8 Q. In your view, would he be competent to handle
 9 an appraisal rights litigation?
 10 A. No.
 11 Q. Why do you say that?
 12 A. Because I don't think he ever handled one.
 13 Q. Has he ever done a derivative shareholders
 14 action, plaintiff's counsel?
 15 A. I don't know.
 16 Q. Did Mr. Borghetti ever tell you that he was
 17 talking to other lawyers?
 18 A. Somewhat, sometime. After I referred him, in
 19 those October dates, to some counsel, somewhere after
 20 that, long after that, I am sure that he told me that he
 21 had engaged counsel.
 22 Q. Did you refer him to anyone?
 23 A. Well, I remember referring him over to
 24 Steve Crockett's firm only because I have referred work
 25 to Steve Crockett in past years. And I thought that that

Page 44

1 firm would be very good for William in terms of handling
 2 the appraisal rights.
 3 Q. And what part of the appraisal rights? Are you
 4 talking about the notice or the filing of the lawsuit?
 5 A. I don't -- at this point, I don't remember
 6 being involved in filing any notice for them. So it
 7 probably was the whole thing.
 8 Q. All right. And so when you said this firm does
 9 not do this type of thing, you need someone who can get
 10 involved in litigation because the appraisal process may
 11 include litigation; correct?
 12 A. I would only add to that that -- the
 13 contingency fee piece of it also.
 14 Q. Okay. But if -- even if he would be willing to
 15 pay your firm on an hourly basis, you did not want to get
 16 involved in that litigation?
 17 A. Well, I really don't recall. We had other
 18 litigators in the office. I never went further than
 19 David Scofield.
 20 Q. Who were the other people that do litigation?
 21 A. Well, at that time, Glen Davies probably would
 22 have been the one that I would have gone to if we handled
 23 the case.
 24 Q. And Glen Davies, was he with your firm then?
 25 A. Yes.

Page 45

14 (Pages 44 to 47)

1 Q. Even though his name is not in the title of the
 2 firm?
 3 A. Right.
 4 Q. When you talked about analyzing damage issues,
 5 can you recall what you said about that?
 6 A. I don't recall.
 7 Q. Okay. Did you discuss whether or not you could
 8 simultaneously have -- proceed with an appraisal action
 9 and fraud action against directors?
 10 A. That would have been beyond my capability.
 11 Q. Where were you meeting with Mr. Scofield if you
 12 didn't think he was capable of handling it?
 13 A. I can only speculate if you want me to
 14 speculate. And that would be that there was something in
 15 the statute that I wanted to check on. Some question
 16 must have come in my mind.
 17 Q. And because you were talking with Mr. Scofield,
 18 would it be a question that would involve litigation?
 19 A. Not necessarily.
 20 Q. Do you believe you advised Mr. Borghetti and
 21 Mr. Jones of all the deadlines that were pertinent?
 22 A. Certainly the ones that they wanted me to look
 23 at.
 24 Q. You say you analyzed damages. In what context,
 25 do you recall?

Page 46

1 A. It would have been general discussion of what
 2 may be involved in terms of recovery.
 3 Q. Okay. Did you talk about the fact that there
 4 were these preferred shareholders that would get the
 5 first moneys that were paid?
 6 A. I don't recall.
 7 Q. Did you keep any notes of these conversations?
 8 A. No.
 9 Q. Did you advise them that there was a 120-day
 10 deadline?
 11 A. I don't recall.
 12 Q. Do you believe that you had an obligation to
 13 advise them?
 14 A. I believe I had an obligation to advise them.
 15 Q. And if you had an obligation, you would have
 16 done that, wouldn't you?
 17 A. Uh-huh, yes.
 18 Q. Yes?
 19 A. Yes.
 20 Q. Do you recall whether or not William mentioned
 21 to you that he had any other attorneys working for him or
 22 Dirty Dozen at the same time you were working on his
 23 problem?
 24 A. I don't recall that.
 25 Q. Did he mention to you that he was interviewing

Page 47

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Tab F



PARSONS KINGHORN HARRIS

A PROFESSIONAL CORPORATION

Phone 801 363 4300
Fax 801 363 4378

ATTORNEYS AT LAW
www.pkhlawyers.com

111 East Broadway, 11th Floor
Salt Lake City, Utah 84111

William Borghetti
3522 E. Berghalde Lane
Salt Lake City UT 84121

Page: 1
October 31, 2002
Client No: 25027-01M
Statement No: 131557

General

10/10/2002

JP Receive and commence review/analysis of CPI/SCT merger documents and fairness opinion.

10/11/2002

JP Complete review of select provisions of Campus Pipeline merger and related documents; telecom to (2x) W. Borghetti and J. Jones discuss facts, issues, theories and strategies regarding shareholder appraisal rights and claims of action against SCT, CPI, officers and directors(1hr 20mins); review documents for critical deadlines.

10/14/2002

JP Final review of Delaware appraisal rights statutory procedures; telecom from and to W. Borghetti discuss/analyze/strategize appraisal rights procedures and analyze damages issues(39mins); meeting with D. Scofield analyze shareholder rights of recovery in appraisal demand.

10/29/2002

JP Receive, review and analyze email from W. Borghetti regarding strategies for CPI sale to SCT; telecom(vm) to WB regarding status and strategies in moving SCT/CPI issues forward.

For Current Services Rendered

1,114.00

10/10/2002 Runner Service - Runner service to William Borghetti and return.

28.50

2177

William Borghetti

Page: 2
October 31, 2002
Client No: 25027-01M
Statement No: 131557

General

Total Expenses	<u>28.50</u>
Total Current Work	1,142.50
Balance Due	<u>\$1,142.50</u>

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111 East Broadway, 11th Floor
Salt Lake City, Utah 84111

William Borghetti
3522 E. Berghalde Lane
Salt Lake City UT 84121

Page: 1
November 30, 2002
Client No: 25027-01M
Statement No: 132301

General

11/02/2002

JP Drafting non-disclosure/use agreement regarding confidentiality of information in connection to SCT/CPI valuation claims and review Rule of Procedure 504 regarding joint defense issues.

11/04/2002

JP Telecom from W. Borghetti discuss facts/issues regarding CPI claims(16mins); review, revise, augment and finalize NDA and transmit to client.

11/18/2002

JP Receive email from W.Borghetti regarding appraisal rights with respect to CPI merger; review Delaware appraisal rights statute and reply email to WB regarding assertion of appraisal rights.

For Current Services Rendered	450.00
Total Current Work	450.00
Previous Balance	\$1,142.50
Balance Due	<u>\$1,592.50</u>

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Tab G

Subject: Quick Question.

Date: Mon, 18 Nov 2002 08:45:57 -0700

From: William Borghetti <william@borghetti.com>

To: John Parsons <jp@pdkplaw.com>

Hi John,

Hope you had a great weekend and are doing well.

Quick question for you. To what address should we send our demand for appraisal consistent with Section 262 of the DGCL? To SCT? TO CP? I have the letter written and ready to go.

Thanks. -W-

Subject: Re: Quick Question.
Date: Mon, 18 Nov 2002 12:30:03 -0700
From: John Parsons <jp@pdkplaw.com>
Organization: Parsons, Davies, Kinghorn & Peters
To: William Borghetti <william@borghetti.com>

Dear William:

The Delaware appraisal rights statute states that the a constituent corporation before the effective date of the merger, or the resulting corporation within 10 days after the effective date of the merger, shall notify each shareholder entitled to appraisal rights that the merger was approved and that their appraisal rights may be exercised. Each such shareholder entitled to appraisal rights within 20 days after the date of mailing such notice shall demand in writing from the resulting corporation the appraisal of the shareholder's stock. This procedure is applicable only if, among other things, the merger was approved by shareholders' consent rather than at a shareholders' meeting. It is my understand(I have not verified this fact) that, if the merger was approved, such approval was via a shareholders' consent without a shareholders' meeting. The above statements are taken from Tab E, page 3, of the materials sent to you by CPI. I suggest you determine whether the merger was approved and if so when did it become effective. Darin or some other insided would have this information. Also, you could call corporate counsel who could provide this information regarding which, as a shareholder, you are entitled. Please let me know if I can be of further assistance.

Best regards,

John
William Borghetti wrote:

> Hi John,
>
> Hope you had a great weekend and are doing well.
>
> Quick question for you. To what address should we send our demand for
> appraisal consistent with Section 262 of the DGCL? To SCT? TO CP? I
> have the letter written and ready to go.
>
> Thanks. -W-

Tab H

From: Jeff Williams
To: William Borghetti
Date: 11/11/02 5:03PM
Subject: RE: Campus Pipeline

Tuesday works best for me. What time? My schedule is flexible all day. Jeff.

>>> "William Borghetti" <william@borghetti.com> 11/11/02 02:47PM >>>
Got your note. Next week is fine. I would suggest Monday or Tuesday for getting together as I might be out of town for the Thanksgiving break.

We have spent time, as I communicated to you in our meeting together, interviewing counselors and various firms. We have narrowed our list down considerably and will be prepared to make a decision soon. An in person meeting would be helpful for me and Jeff Jones as part of this process.

Thanks for your time and feel free to contact me should you have any questions.

Best regards, William

—Original Message—

From: Jeff Williams [mailto:jsw@bcpclaw.com]
Sent: Monday, November 11, 2002 2:21 PM
To: william@borghetti.com
Subject: Campus Pipeline

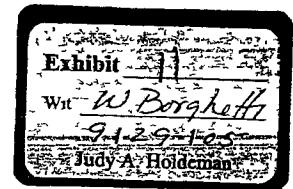
William, Thanks for the information. I will run a conflict check, and circulate the attachment to my partners for consideration. This week will be hard for me in terms of a meeting. How does next week look for Jeff and you? Let me know what you think. I understand that I have said this before, but I need to confirm in writing again that we do not yet represent you and have not accepted representation in this matter. Moreover, from your side, it is my understanding that you have not yet retained counsel, and are still considering other firms.

Sincerely, Jeff.

>>> "William Borghetti" <william@borghetti.com> 11/11/02 01:16PM >>>
Hi Jeff,

Hope you had a great weekend. Thank you again for spending time with me last week. I have talked with Jeff Jones and we would enjoy meeting you this week. Please let me know what time is convenient for you.

Best regards,



From: Jeff Williams
To: William Borghetti
Date: 12/4/02 9:23AM
Subject: RE: Re: Potential Contingency Matter

Hello William,

Has anything changed since we last met? I have received research results on one of the critical issues. It appears that if fraud exists, shareholders may not be limited to the appraisal remedy. This, however, forces the need to resolve the contours of a potential fraud claim against the protection provided by the business judgment rule. This research is not yet complete. I believe that I should be in a position to discuss this case again (including a conclusion regarding whether the firm is prepared to go forward on a contingency basis, or be involved in the case) by sometime next week. How is your schedule?

Jeff.

>>> "William Borghetti" <william@gardnertech.com> 11/12/02 02:54PM >>>
Hi Jeff,

We'll spend some time on our side thinking through this, but the valuation that Morgan Stanley and Goldman Sachs came up with (who were selected as co-lead underwriters for our IPO was equal to our greater than \$500M. With my stake and Jeff's (on an as-converted basis) representing ~14%, that equated to roughly in \$70M in shareholder value for the two of us.

You can understand the heartburn we have with recent events. The valuation has only gone down since then for a variety of reasons. Corporate mismanagement being the most significant.

I look forward to discussing this further when we meet.

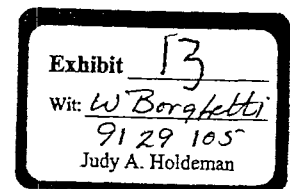
Best, -W-

-----Original Message-----

From: Jeff Williams [mailto:jsw@bcplaw.com]
Sent: Tuesday, November 12, 2002 11:34 AM
To: william@gardnertech.com
Subject: Fwd: Re: Potential Contingency Matter

Here are some thoughts from Gary. Maybe we could discuss these on Tuesday. Jeff.

>>> Gary Bendinger 11/12/02 11:16AM >>>
couple of other thoughts. there must have been valuations done in connection with going public. what did those reflect and what happened to value of company between then and transaction that closed? could also insist that valuation be done as of transaction date by consultant now to give us ballpark of what independent analyst would value it at. also interested in knowing more about other damage methodologies that are more lucrative.
Gary F. Bendinger
Attorney at Law
Bendinger, Crockett, Peterson & Casey, PC
gfb@bcplaw.com
(801) 533-8383



From: Jeff Williams
To: chb
Date: 12/30/02 8:57AM
Subject: Fwd: Re: Potential Contingency Matter

File Campus Pipeline.

>>> William Borghetti <william@borghetti.com> 12/29/02 04:46PM >>>
Hi Jeff,

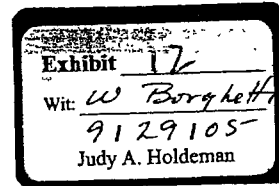
Thanks for your call on Friday. I did speak with Jeff and we're excited to learn more from your preliminary research on Delaware case law that might be relevant to our case.

Just so you know, we have narrowed down our list of potential firms considerably. I believe that we need a smart, aggressive and established SLC-based firm to lead us through this process. Although we haven't had a chance to see you in action yet, I am under the impression that you fit the above criteria well.

As I mentioned to you, we are eager to move forward. Let's try to chat sometime next week.

Best wishes this New Year!

William



Jeff Williams wrote:

>Call me when you have time. My cell number by the way is 801-243-9102.

>

>

>

>

>>>>William Borghetti <william@borghetti.com> 12/21/02 08:35AM >>>>

>>>>

>>>>

>Hi Jeff,

>

>Sorry I missed you yesterday. With the holidays approaching I have
>been

>crushed. I have you on my calendar for first thing Monday AM. I'll

>touch base with you then.

>

>Hope you have a great weekend.

>

>Best, -W-

>

>Jeff Williams wrote:

>

>

>

>>I should be around. J.

>>

BCPC 0088

Tab I

LEXSEE 1998 DEL. CH. LEXIS 9

RICHARD A. LE BEAU, DOROTHY N. LE BEAU, MICHELLE E. LE BEAU, BRETT JORDON, BROOKE JORDAN, KURT R. NEBEL, JOAN M. NEBEL, CHRISTINE STUCKER, DAVID STUCKER, MARGARET M. PAVLETIC, JOSEPH W. PAVLETIC, D.D.S., Individually and for THE JOSEPH W. PAVLETIC, D.D.S. IRA, ROBERT J. NOETZEL, D.D.S., M.S., As Trustee OF THE ROBERT J. NOETZEL, D.D.S., M.D. LTD. PROFIT SHARING AND SAVINGS PLAN & TRUST, JOHN M. CUNNINGHAM, III, M. SUSAN CUNNINGHAM, AND JOHN M. CUNNINGHAM, As Trustee of THE JOHN M. CUNNINGHAM TRUST, Dated December 19, 1991, Petitioners, v. M. G. BANCORPORATION, INC., a Delaware corporation, and SOUTHWEST BANCORP, INC., a Delaware corporation, Respondent.

Civil Action No. 13414

COURT OF CHANCERY OF DELAWARE, NEW CASTLE

1998 Del. Ch. LEXIS 9

August 26, 1997, Date Submitted

January 29, 1998, Date Decided

SUBSEQUENT HISTORY: [*1] Released for Publication February 2, 1998.

DISPOSITION: The Court rejects the Petitioners' request for fees and expenses.

COUNSEL: Bruce L. Silverstein and Martin S. Lessner, Esquires, of YOUNG, CONAWAY, STARGATT & TAYLOR, Wilmington, Delaware; and Thomas E. Chomicz of WILSON & McILVANE, Chicago, Illinois; Attorneys for Petitioners.

Wayne J. Carey and Ronald A. Brown, Jr., Esquires, of PRICKETT, JONES, ELLIOTT, KRISTOL & SCHNEE, Wilmington, Delaware; and Frederick V. Lochbihler and David S. Barritt, Esquires of CHAPMAN AND CUTLER, Chicago, Illinois; Attorneys for Respondents.

JUDGES: JACOBS, VICE CHANCELLOR.

OPINION BY: JACOBS

OPINION

MEMORANDUM OPINION

JACOBS, VICE CHANCELLOR

This appraisal action, brought under 8 Del. C. § 262, arises out of a "cash-out" merger (the "Merge") of M.G.

Bancorporation, Inc. ("MGB") into its corporate parent, Southwest Bancorp, Inc. ("Southwest") on November 17, 1993. The Merger consideration was \$ 41 per share, which the Petitioners claim was inadequate because MGB's fair value as of the Merger date was at least \$ 85 per share. The Petitioners also seek 10% compound interest on their appraisal [*2] award, plus their costs and expenses including reasonable expert witness and attorney's fees.

The Respondents contend that the fair value as of the Merger date was \$ 41.90 per share and that 8% simple interest is appropriate.

For the reasons discussed below, the Court concludes that (i) the fair value of MGB's shares at the time of the Merger was \$ 58,514,000, or \$ 85 per share, (ii) the Petitioners are entitled to 8% interest compounded monthly, and (iii) the Petitioners are not entitled to an award of legal fees or expenses.

I. FACTS

A. The Parties and the Merger

The Petitioners are shareholders who owned 18,151 shares of common stock of MGB before the Merger. The Respondents are Southwest Bancorp, Inc. ("Southwest") and its subsidiary, MGB. Before the Merger, MGB was a Delaware-chartered bank holding company headquartered in Worth, Illinois. MGB had two operating Illinois-chartered bank subsidiaries, Mount Greenwood Bank

("Greenwood") and Worth Bancorp, Inc ("WBC") Both banks served customers in the southwestern Chicago metropolitan area MGB owned 100% of Mount Greenwood and 75 5% of WBC

Before the Merger, Southwestern owned 91 68% of MGB's common shares On [*3] November 17, 1993, MGB was merged into Southwest in a "short form merger" under 8 Del C § 253 Because the Merger was accomplished unilaterally, neither MGB's board of directors nor its minority shareholders were legally required to, or did, vote on the transaction MGB's minority shareholders were offered \$ 41 in cash per share in the Merger The Petitioners rejected that offer, electing instead to pursue their statutory appraisal rights

To assist it in setting the Merger price, Southwest engaged Alex Sheshunoff & Co Investment Bankers ("Sheshunoff") to determine the "fair market value" of MGB's minority shares In a report submitted to Southwest on or about October 28, 1993, Sheshunoff determined that the fair market value of MGB's minority shares was \$ 41 per share as of June 30, 1993 ¹ Thereafter, a stockholders breach of fiduciary duty damage action was filed attacking the Merger, and this appraisal proceeding was also commenced On July 5, 1995, this Court issued an Opinion in the companion class action, holding that Sheshunoff had performed its appraisal in a legally improper manner The basis for the Court's conclusion was that Sheshunoff had determined only [*4] the "fair market value" of MGB's minority shares, as opposed to valuing MGB in its entirety as a going concern and determining the fair value of the minority shares as a pro-rata percentage of that value ²

1 Pet's Exhibit Number 5

2 *Nebel v Southwest Bancorp, Inc*, 1995 Del Ch LEXIS 80, *11, Del Ch, C A No 13618, Jacobs, V C (July 5, 1995)

B The Petitioners' Valuation

The Petitioners commenced this appraisal proceeding on March 15, 1994 The case was tried on December 2-5, 1996 At trial the Petitioners' expert witness, David Clarke ("Clarke"), testified that as of the Merger date the fair value of MGB common stock was at least \$ 85 per share In arriving at that conclusion, Clarke used three distinct methodologies to value MGB's two operating bank subsidiaries (i) the comparative publicly-traded company approach, (ii) the discounted cash flow ("DCF") method, and (iii) the comparative acquisition technique Clarke then added a control premium to the values of the two subsidiaries to [*5] reflect the value of the holding company's (MGB's) controlling interest in those subsidiaries ³ Lastly, Clarke then added the value

of MGB's remaining assets to the sum of his valuations of the two subsidiaries, to arrive at an overall fair value of \$ 85 per share for MGB

3 The Petitioners had instructed Clarke that Delaware law mandated such a premium at the subsidiary level, relying on *Rapid American v Harris* 603 A 2d 796, 804-05 (1992) In *Rapid-American* the Supreme Court of Delaware held that the trial court had erred by failing to include a 'control premium' in valuing the subsidiaries of a holding company that was the subject of an appraisal "We disagree with the trial court's characterization of that 'control premium' in this case as an impermissible shareholder level adjustment

The 'control premium' represented a valid adjustment to its valuation model which 'applied a [bonus] at the company-level against all assets

" (citing *Cavalier Oil Corp v Harnett Del Supr*, 564 A 2d 1137 (1989))

[*6] What follows is a more detailed description of how Clarke performed his valuation(s) of MGB

1 Comparative Company Approach

Clarke's comparative publicly-traded company approach involved five steps (1) identifying an appropriate set of comparable companies, (2) identifying the multiples of earnings and book value at which the comparable companies traded, (3) comparing certain of MGB's financial fundamentals (e g, return on assets and return on equity) to those of the comparable companies, (4) making certain adjustments to those financial fundamentals, and (5) adding an appropriate control premium After completing the first four steps, Clarke arrived at a value for WBC of \$ 33 059 million (\$ 48 02 per share), and for Greenwood of \$ 20 952 million (\$ 30 44 per share) Clarke next determined that during the period January 1989 to June 1993, acquirors of controlling interests in publicly-traded companies had paid an average premium of at least 35% On that basis, Clarke concluded that a 35% premium was appropriate, and applied that premium to the values he had determined for Greenwood and WBC, to arrive at fair values of \$ 43 3 million (\$ 62 90 per share) for [*7] WBC and \$ 27 1 million (\$ 39 37 per share) for Greenwood, respectively Clarke then valued MGB's 75 5% controlling interest in WBC at \$ 32 691 million (\$ 47 49 per share), and MGB's 100% interest in Greenwood at \$ 27 1 million (\$ 39 37 per share), under his comparative company approach

2 Discounted Cash Flow Approach

Clarke's DCF valuation analysis involved four steps (1) projecting the future net cash flows available to MGB's shareholders for ten years after the Merger date, (2) discounting those future cash flows to present value

as of the Merger date by using a discount rate based on the weighted average cost of capital ("WACC"), (3) adding a terminal value that represented the present value of all future cash flows generated after the ten year projection period, and (4) applying a control premium to the sum of (2) and (3).

Clarke did not create his own cash flow projections. He used the projections made by Sheshunoff at the time of the Merger, because Southwest's own management had accepted those projections when they fixed the Merger price. Clarke also accepted Sheshunoff's ten year projection period, because he independently had concluded that it would [*8] require ten years for MGB's cash flows to stabilize. Based on a 1996 Ibbotson Associates ("Ibbotson") study of the banking industry, Clarke concluded that the appropriate "small stock" premium to be used in the capital asset pricing model ("CAPM") to determine MGB's discount rate (WACC), was 1%, and that the appropriate discount rate (WACC) for MGB was 12%. Applying that 12% discount rate, Clarke calculated the present value of WBC's future cash flows to be \$ 17.251 million, and WBC's terminal value to be \$ 14.824 million. Applying that same 12% discount rate, Clarke arrived at a present value of \$ 10.937 million, and a terminal value of \$ 9.138 million, for Greenwood.

Applying the same 35% control premium to those values of the two subsidiaries, Clarke calculated MGB's 75.5% interest in WBC at \$ 33.824 million or \$ 49.14 per share; and MGB's 100% interest in Greenwood at \$ 28.3 million, or \$ 41.11 per share.

3. Comparative Acquisition Approach

Clarke's third valuation approach, the comparative acquisition method, focused upon multiples of MGB's last twelve months earnings and its tangible book value. Those multiples were determined by reference to the prices at [*9] which the stock of comparable companies had been sold in transactions involving the sale of control. Unlike the comparative company and DCF valuation approaches, this method did not require adding a control premium to the values of the subsidiaries because under that methodology, the parent holding company's controlling interest in the subsidiaries was already accounted for.

In valuing MGB under his third approach, Clarke identified three transactions involving community banks in the relevant geographic area that occurred within one year of the Merger. He also considered data published by The Chicago Corporation in its September 1993 issue of *Midwest Bank & Thrift Survey*.⁴ From these sources, Clarke determined that (i) control of WBC could be sold for a price between a multiple of 14 times WBC's last twelve months' earnings and 200% of WBC's tangible book value, and that (ii) control of Greenwood could be

sold for a price between a multiple of 12 times Greenwood's last twelve months' earnings and 175% of its tangible book value. Giving equal weight to these two sets of values, Clarke valued MGB's 75.5% interest in WBC at \$ 28.8 million (75.5% x \$ 38.1 million) or \$ 41.84 [*10] per share, and MGB's 100% interest in Greenwood, at \$ 22.9 million, or \$ 33.27 per share.

4 That data reflected an analysis of 137 bank acquisitions announced from January 1, 1989 to June 1, 1993.

4. MGB's Remaining Assets

Having valued MGB's two subsidiaries, Clarke then determined the fair value of MGB's remaining net assets, which included (i) a \$ 6.83 million note payable by Southwest, (ii) certain intangibles that Clarke did not include in his valuation, (iii) \$ 78,000 in cash, and (iv) other assets worth \$ 2000. These assets totaled \$ 6.91 million, from which Clarke subtracted liabilities of \$ 96,000 to arrive at a net asset value of \$ 6.814 million (\$ 9.90 per share) for MGB's remaining assets.

5. Fair Value Computation

Clarke then added the values he had determined under each of his valuation methodologies, for (i) MGB's 75.5% interest in WBC, (ii) MGB's 100% interest in Greenwood, and (iii) MGB's 100% interest in its remaining assets. Under his comparative publicly-traded [*11] method, Clarke concluded that MGB's value was \$ 76.59 per share with no control premium, and \$ 96.76 per share with a control premium. Under his DCF approach, Clarke determined that MGB's value was \$ 74.75 per share with no control premium, and \$ 100.15 per share with a control premium. And under his comparative acquisitions method, Clarke concluded that MGB's minimum fair value was \$ 85 per share, which represented the median of the values described above.

C. The Respondents' Valuation

At trial the Respondents did not call the Sheshunoff firm as a witness, even though its valuation had served as the basis for the \$ 41 per share Merger price. Instead, the Respondents relied upon the testimony of Mr. Robert Reilly ("Reilly"),⁵ who opined that as of the Merger date, the fair value of MGB common stock was \$ 41.90 per share -- only 90 cents per share more than Sheshunoff's \$ 41 valuation. Reilly arrived at that result by performing two separate valuations: a DCF analysis and a "capital market" analysis. Reilly did not include any control premium, having determined that a control premium was inappropriate in valuing a holding company such as MGB.

5 Reilly is an expert in performing business valuations. He was formerly the National Director of Valuation Services for Deloitte and Touche and is an accredited senior appraiser and a certified public accountant. The Petitioners claim that Reilly's entire valuation should be rejected because Reilly had no significant experience in valuing banks or bank holding companies, and was therefore not competent to value bank holding companies. Although the Court ultimately rejects Reilly's valuations, it is for reasons that concern the merits of his valuation approaches, not his expertise.

[*12] 1. *DCF Analysis*

Reilly's DCF analysis consisted of: (1) projecting MGB's future net cash flows available to shareholders for a period of five years after the Merger date, (2) determining an appropriate discount rate and discounting those future cash flows back to the Merger date, and (3) adding a terminal value that represented the present value of all future cash flows beyond the five year projection period. Reilly used a five year period, because in his opinion any longer interval would be too speculative. Relying on a 1992 Ibbotson study that was not specific to the banking industry, he also concluded that 5.2% was the appropriate small stock size premium to use in the CAPM for purposes of determining the WACC for MGB.

In determining an appropriate discount rate, Reilly concluded that MGB was subject to certain company-specific risks, namely, litigation involving its data processor (BYSIS) and MGB's dependence upon a single key supplier. Reilly quantified those risks at four percentage points, and on that basis concluded that the appropriate discount rate for MGB was 18%. Applying that 18% discount rate to MGB's future cash flows, Reilly valued

MGB at \$ 29.220 million, **[*13]** or \$ 42.45 per share, on the basis of his DCF approach.

2. *Capital Market Method*

Reilly's second method for valuing MGB was the "capital market" method, which involved: (1) identifying a portfolio of guideline publicly-traded companies, (2) identifying appropriate pricing multiples for those companies, (3) using the multiples for the guideline companies to calculate the appropriate pricing multiples for MGB ⁶ and (4) applying the multiples to the corresponding financial indicators for MGB. By this method, Reilly concluded that MGB was worth \$ 28.4 million, or \$ 41.26 per share, at the time of the Merger.

6 Reilly's pricing multiples were all related to the market value of invested capital ("MVIC"). Reilly computed the ratios of MVIC to: (1) earnings before interest and taxes ("EBIT"); (2) earnings before interest, depreciation and taxes ("EBIDT"); (3) debt free net income ("DFNI"); (4) debt free cash flow ("DFCF"); (5) interest incomes; and (6) total book value of invested capital ("TBVIC").

[*14] Reilly then averaged his DCF and capital market valuations, to arrive at an ultimate fair value for MGB of \$ 41.90 per share.

For ease of reference, the parties' respective valuation conclusions are summarized in the chart below. At the trial, Petitioners introduced evidence of what MGB's value would be if Sheshunoff's valuation were updated to the Merger date and if its minority discount were eliminated. Because of its importance to the analysis, that updated and revised valuation is also summarized below.

Valuation in \$ '000's:	WBC	75.5% of WBC	Greenwood	Other Assets	Total	Per Share	
Petitioners (Clarke)							
Comparative Publicly-Traded							
Method:	33,059	24,960	20,952	6,814	52,726	76.59	
With Control Premium:	43,300	32,692	27,100	6,814	66,606	96.76	
DCF Method:	32,075	24,217	20,079	6,814	51,110	74.25	
With Control Premium:	44,800	33,824	28,300	6,814	68,938	100.15	
Comparative Acquisitions							

Valuation in \$ '000's:	WBC	75.5% of WBC	Greenwood	Other Assets	Total	Per Share	
Method:	38,100	28,800	22,900	6,814	58,514	85.00 = fair	
							value
Respondents (Reilly)							
Capital Market							
Method:					28,400	41.26	
DCF Method:					29,220	42.45	
					Average: 41.90 = fair		
Sheshunoff (Updated)							value
(Without Control Premium)							
Adjusted Book Value:						64.13	
Adjusted Earnings Value:						76.80	

[*15] II. THE PARTIES' VALUATION CONTENTIONS

A. The Petitioners' Contentions

The Petitioners contend, for various reasons, that the \$ 41 Merger price did not represent MGB's fair value at the time of the Merger, and that the valuations offered by the Respondents' trial expert to support that price are fundamentally flawed. The Petitioners argue that Reilly's "capital market" approach and DCF analysis are legally deficient because Reilly failed to apply a control premium to the resulting values of the MGB subsidiaries, as Rapid-American requires.⁷ The Petitioners also claim that the Court should reject Reilly's "capital market" approach in its entirety because it is not recognized and accepted in the financial community. Alternatively, Petitioners argue that even if Reilly's capital market approach is accepted, the values he arrived at by that method must be rejected, because the MVIC-related ratios upon which Reilly relied are irrelevant and inappropriate measures to value bank holding companies. Finally, the Petitioners contend that Reilly's comparative publicly-traded company approach is flawed because Reilly's "comparable" companies were banks located outside the relevant [*16] geographic region (the Chicago suburbs) and (in certain cases) outside MGB's field of business.⁸

⁷ See n. 3, supra.

8 The Petitioners assert that MGB's fair value is even greater than what Clarke determined it to be, because Clarke's valuation omits the value of MGB's breach of fiduciary duty claims against the Respondents. The Petitioners claim that (1) Southwest engaged in self-dealing loans and usurped corporate opportunities that rightly belonged to MGB; (2) Southwest engaged in a self-dealing allocation of expenses that favored itself at the expense of MGB; and (3) Southwest wrongfully caused MGB's subsidiary banks to enter into contracts with BYSIS, its former data processing service provider, to their detriment. Because the Petitioners did not include these claims in their valuation, the Court does not address them.

The Petitioners also claim that Reilly's DCF analysis is deficient because it is a form of a minority stock valuation that is prohibited under Delaware appraisal law.⁹ Reilly's [*17] DCF analysis is also flawed, Petitioners assert, because Reilly and Southwest seized upon the "key supplier dependence" risk and the litigation risks involving MGB's former data process service provider ("BYSIS"), as a contrivance to support an unfairly low valuation of MGB. The Petitioners further contend that Reilly erroneously relied on the 1992 Ibbotson study to determine the WACC for MGB, because the financial data contained in the more recent 1996 Ibbotson study was specific to the banking industry and, thus, more reli-

able. Finally, the Petitioners claim that Reilly's use of five year projections, rather than the ten year projections Sheshunoff employed, was erroneous.

9 See n. 2; *supra*, *Cavalier Oil Corp. v. Harnett*, *Del. Supr.*, 564 A.2d 1137, 1144 (1989) ("In rejecting a minority or marketability discount, the Vice Chancellor concluded that the objective of a section 262 appraisal is 'to value the corporation itself; as distinguished from a specific fraction of its shares as they may exist in the hands of a particular shareholder' [emphasis in original].")

[*18] B. The Respondents' Contentions

Not surprisingly, the Respondents dispute these arguments and take the position that the Petitioners' valuation methodologies are improper and must be disregarded, on several grounds.

The Respondents first argue that it is improper to add a control premium of any kind to the value of MGB's subsidiaries, because that approach violates the requirement that the corporation be valued as a going concern. Respondents contend that Rapid-American -- the authority upon which Petitioners rely -- does not mandate the application of a control premium in this case, because in Rapid, the holding company subsidiaries at issue were involved in unrelated industries, whereas here MGB's two subsidiaries were both banks. The Respondents also argue that Clarke's inclusion of a control premium is proscribed by the command of 8 *Del. C.* § 262(h) that "fair value" be determined exclusive of post-merger events or other possible speculative post-merger business combinations. Respondents urge that increasing each subsidiary's value by adding a control premium; amounts to valuing MGB on the basis of the subsidiaries' acquisition value, rather than as a going [*19] concern. For these reasons, Respondents conclude that the control premia Clarke employed in performing his DCF and comparative company valuations are legally erroneous and must be rejected.

The Respondents next attack Clarke's DCF valuation on the basis that it employs a ten year projection period that, Respondents say, is inherently speculative and unreliable. Clarke's DCF valuation was also flawed (Respondents argue) because the "small stock" premium Clarke used to arrive at a 12% discount rate was derived not from the 1992 Ibbotson study that existed on the Merger date, but from a 1996 Ibbotson study that was compiled three years after the Merger had occurred. Therefore, the 12% discount rate, which is based on impermissible post-Merger data, must be rejected. Finally, the Respondents claim that in any event, Clarke's 12% discount rate was too low because it improperly failed to take into account the "key supplier dependence" risk and the risk of litigation

involving MGB's former data process server, BYSIS, confronting MGB at the time of the Merger.

The Respondents also attack Clarke's comparative publicly-traded company approach. They argue that Clarke considered only two multiples [*20] -- price-to-earnings and price-to-book value -- both of which involved distortions in the debt-to-equity ratios of Clarke's selected comparable companies and MGB. Respondents further criticize Clarke for (i) relying upon comparable company stock prices as of September 30, 1993 -- six weeks before the November 17, 1993 Merger date -- rather than as of the date immediately before the Merger was announced; and (ii) using historical financial averages for the five years preceding the Merger, rather than for the 2.75 year period before the Merger, as Reilly did.¹⁰ Finally, the Respondents contend that Clarke's valuation improperly failed to take into account the fact that MGB's subsidiaries (i) had poor prospects for growth or expansion, (ii) were located in geographic areas that did not have significant population growth, and (iii) faced significant competition.

10 Reilly concluded that the banking industry had changed too dramatically to justify a longer projection period.

These contentions are flow addressed.

[*21] III. ANALYSIS

To determine the fair value of MGB's shares as of the Merger date, this Court must decide three issues.

The first is whether Reilly's "capital market" valuation approach is legally permissible in this case. The specific question is whether that valuation method is generally accepted or recognized in the financial community for purposes of valuing a bank or bank holding company.

Neither side contests the validity per se of either the comparative publicly-traded company or the DCF valuation approaches. Both sides claim that the other improperly applied those methodologies to MGB. That frames the second set of issues regarding Clarke's publicly-traded company analysis, which are: (i) did Clarke use the proper financial indicators, (ii) did Clarke erroneously rely upon stock price quotes for the six weeks preceding the Merger, and (iii) was five years an appropriate historical period to compare the financial indicators and to make future growth projections? Respecting each side's DCF analysis, the issues concern (i) the appropriate discount rate and (ii) the appropriate projection period.

The third issue is whether Clarke's comparative acquisition approach [*22] -- in which a control premium is inherent -- is legally permissible in this case.¹¹

11 The specific control premium issue is whether Rapid American requires including a control premium as an element of the value of operating subsidiaries whenever the parent holding company is the corporation being appraised (as the Petitioners urge), or whether a control premium is appropriate only where the subsidiaries are in different businesses (as the Respondents urge).

For the reasons next discussed, the Court determines that (a) Reilly's "capital market" approach is legally impermissible, but even if valid, was improperly applied, thereby requiring the rejection of the values Reilly derived by that method; (b) both Clarke's and Reilly's DCF analyses were improperly applied, thereby requiring the rejection of the values both experts derived by that approach; (c) Clarke's comparative acquisition approach was a legally valid method to value MGB, and (d) the credible evidence of record supports Clarke's \$ 85 per [*23] share determination of MGB's fair value as of the Merger date.

A. MGB's Fair Value

It is a well-established principle of Delaware law that "the objective of a *section 262* appraisal is 'to value the corporation itself, as distinguished from a fraction of its shares as they may exist in the hands of a particular shareholder' [emphasis in original]."¹² Based on that principle, this Court determined in its earlier Opinion that Sheshunoff's \$ 41 valuation was impermissible under 8 Del. C. § 262, because it was an appraisal not of the entire corporation as a going concern but only of a minority block of its shares.¹³ Presumably that is why the Respondents chose not to rely upon the Sheshunoff valuation or to call Sheshunoff personnel as trial witnesses. Instead, Respondents elected to rely solely upon Reilly's valuation, which resulted in the same \$ 41 per share value that Sheshunoff had arrived at by a valuation approach found to be improper.

12 *Cavalier Oil Corp. v. Harnett*, Del. Supr., 564 A.2d 1137, 1144 (1989) quoting *Cavalier Oil Corp. v. Harnett*, 1988 Del. Ch. LEXIS 28, Del. Ch., C.A. No. 7959, Jacobs, V.C. (Feb. 22, 1988)).

[*24]

13 See *Nebel v. Southwest Bancorp, Inc.*, 1995 Del. Ch. LEXIS 80, *12, Del. Ch., C.A. No. 13618, Jacobs, V.C. (July 5, 1995).

The fact that Reilly's per share fair value determination serendipitously turned out to be only 90 cents per share more than Sheshunoff's legally flawed \$ 41 valuation, cannot help but render Respondent's valuation posi-

tion highly suspect and meriting the most careful judicial scrutiny. As a matter of plain common sense, it would appear evident that a proper fair value determination based upon a going concern valuation of the entire company, would significantly exceed a \$ 41 per share fair market valuation of only a minority block of its shares. If Respondents choose to contend otherwise, it is their burden to persuade the Court that \$ 41.90 per share represents MGB's fair value. The Court concludes that the Respondents have fallen far short of carrying their burden, and independently determines that the fair value of MGB at the time of the Merger was \$ 85 per share.

1. The Validity of Reilly's "Capital Market" Approach

The Court first addresses [*25] whether Reilly's capital market approach is legally permissible. That valuation approach (to repeat) involved deriving various pricing multiples from selected publicly-traded companies, and then applying those multiples to MGB,¹⁴ resulting in a valuation of \$ 41.26 per share.

14 See n. 6 supra.

The Petitioners argue that Reilly's capital market valuation method is impermissible because it includes a built-in minority discount. The valuation literature, including a treatise co-authored by Reilly himself, supports that position,¹⁵ and Respondents have introduced no evidence to the contrary. Nor did the Respondents establish that Reilly's capital market method is generally accepted by the financial community for purposes of valuing bank holding companies, as distinguished from other types of enterprises.¹⁶ Reilly determined the ratio of MVIC to other financial measures such as EBIT, EBIDT, DFNI, DFCF, Interest Income, and TBVIC -- ratios that the record indicates are not used to value banks.¹⁷

15 See S.P. Pratt, R.F. Reilly & R.P. Schweihs, *Valuing a Business* 194-95, 210 (3d ed. 1996) (explaining that comparative publicly traded companies produce a minority discounted valuation); C.Z. Mercer, *Valuing Financial Institutions* 198-200 and Chapter 13 (1992) (explaining that comparative publicly traded company valuation technique produces a minority valuation that requires adding a control premium to be accurate).

[*26]

16 See *Weinberger v. UOP, Inc.*, Del. Supr., 457 A.2d 701, 704 (1983).

17 Indeed, one of Sheshunoff's witnesses had to ask for the definitions of EBIT and EBIDT, and Southwest's chairman and CEO testified that those measures are not used to value banks. LPC Dep. at 154:4-8.

Because Reilly's capital market method results in a minority valuation, and the Respondents have failed to establish that that approach is generally accepted in the financial community to value banks or bank holding companies, the Court must conclude that in this specific case Reilly's capital market approach is improper, and must be rejected.¹⁸

18 This conclusion should not be read as a categorical, matter-of-law determination that Reilly's capital market approach is an inappropriate method to value banks. The opposite may be true, but in this specific case the Respondents failed to discharge their burden of proof on that issue.

[*27] 2. *The Parties' Respective Applications of the Comparative Publicly-Traded and DCF Valuation Methodologies*

The Court next considers (i) whether Clarke properly applied his comparative company analysis to MGB, and (ii) whether both sides' experts properly applied their respective DCF analyses to MGB. The validity per se of these two valuation methodologies is not in dispute.

a. Comparative Company Approach

A primary issue dividing the parties concerns the companies chosen as "comparable" to the corporation being appraised. A determination of that kind is necessarily fact intensive.

In performing his comparative company analysis, Clarke selected as comparables, banks having financial ratios, geographic locations, and demographic factors similar to those of MGB's two bank subsidiaries. Reilly, on the other hand, included companies that operated outside MGB's geographic location, in different economic environments, and in different lines of business.¹⁹ Where the valuation exercise rests upon data derived from companies comparable to the company being valued, it stands to reason that the more "comparable" the company, the more reliable will be the resulting valuation [*28] information. The Court concludes that in this case it was sounder practice to use as comparables suburban banks located in the same geographic area (as Clarke did), rather than banks located outside of WBC's and Greenwood's immediate areas (as Reilly did). Accordingly, I find Clarke's comparable companies to be superior to Reilly's.

19 Reilly also erred by including a Savings and Loan Institution as one of his comparable companies. MGB's two subsidiaries were commercial banks, not S&L's.

Another key difference between the parties' comparative publicly-traded company approaches is that

Clarke used the price-to-earnings and price-to-book value financial multiples, whereas Reilly used multiples based upon the market value of invested capital ("MVIC"). Relying upon various valuation authorities and publications, the Petitioners argue that where the enterprise being valued is a bank, the relevant ratios are price-to-earnings and price-to-book value.²⁰ Reilly disagreed. He opined that it is more appropriate to [*29] compare the different financial measures as a fraction of MVIC, because that approach eliminates the distortions inherent in Clarke's financial ratios. Reilly did not elaborate on what those distortions were, however, nor did he point to specific cases where MVIC was considered an appropriate financial measure of a bank or bank holding company. Given this record, the Respondents have not persuaded the Court that MVIC is widely accepted in the financial community as a measure of the value of a bank or bank holding company.²¹ Clarke's financial measures are generally accepted in the financial community for valuing banks, and the Court accepts them.

20 *Security State Bank v. Ziegeldorf, Iowa Supr.*, 554 N.W.2d 884 (1996); *BNE Mass. Corp. v. Sims*, 32 Mass. App. Ct. 190, 588 N.E.2d 14 (1992); *Estate of Howard Winston Cook v. United States*, 1986 U.S. Dist. LEXIS 24344, 86-2 U.S. Tax Cas. (CCH) P13,678 (June 11, 1986); *Valuing Financial Institutions*, C.Z. Mercer, 219-221 (1992); *The Journal of Bank Auditing and Accounting*, L.C. Pettit, M.D. Atchison & R.S. Kemp, "The Valuation of Small or Closely Held Banks," (Spring 1991), at 28-31.

[*30]

21 The use of MVIC as a tool to value other kinds of enterprises is, of course, widely accepted. See, *Rapid-American Corp. v. Harris*, 603 A.2d 796 (1992). Again, the Court's conclusion that MVIC has not been shown to be an appropriate measure of a bank's value is fact-specific to this case, and by virtue of the Respondent's failure of proof.

A third major difference between the parties' comparative company approaches is that Clarke used historical financial data going back five years before the Merger, whereas Reilly used historical financial data going back 2.75 years. In performing bank valuations, five year historical information is typically used. Reilly's position was that the banking industry had changed dramatically during the five years before the Merger, such that it was not appropriate to rely upon financial data going back that far.

At the heart of this dispute are the experts' differing assumptions about MGB's future growth prospects. The Respondents paint a bleak picture of MGB's future pros-

pects for increasing its revenues; the Petitioners argue that MGB's future prospects [*31] were far brighter. Petitioners agree that a company's more recent historical economic averages are a good indicator of its future growth rate, but emphasize that a firm's financial trends are often more reliably evidenced by its performance over the past five years. I concur. Petitioners have demonstrated that MGB's historical performance, whether over the past five years, three years, or twelve months before the Merger, indicated significant future growth.²² Although MGB's subsidiary banks did face certain difficulties (specifically, a limited marketplace without high-potential for growth or expansion and a primarily blue-collar residential population),²³ the Respondents have not persuaded me that this difficulty would likely prevent MGB's bank subsidiaries from maintaining their historical rates of growth.

22 See e.g., PX 1 at 10-26. The Petitioners also claim that the only reason MGB was not in a better position to expand was that Southwest had effectively drained MGB of its profits. (Pet'r's Reply Br. at 3.) ("Respondents do not dispute that their constant upstreaming of profits to Southwest left MGB and its subsidiaries with insufficient funds to carry on their operations, much less expand.")

[*32]

23 Trial Transcript at 942-43 (Meyer).

A fourth major difference between the parties' comparative company analyses is that Reilly relied upon comparable company stock prices on the day before the Merger, whereas Clarke used price quotations six weeks before the Merger. Because the merger date (more specifically, the date before the public announcement of a merger) is normally the time that is relevant, and because the Petitioners made no effort to justify Clarke's use of stock prices going back six weeks before the Merger, the Court cannot accept Clarke's comparative company valuation, despite the validity of the technique itself. Clarke's use of six week old pre-merger stock prices represents a departure from the norm without demonstrated justification.

To summarize, Reilly's capital market approach must be rejected because it was not shown to be generally accepted in the financial community for bank valuation purposes. Clarke's comparative company valuation must be rejected because it was improperly applied in this specific case. Accordingly, the only valuation methodologies remaining to [*33] be considered are (i) Reilly's and Clarke's DCF valuations and (ii) Clarke's comparative acquisition analysis.

b. The Parties' DCF Analyses

The parties' competing DCF analyses raise three questions. First, were the so-called "key supplier dependence" and "litigation risks" a proper basis for determining Reilly's 18% discount factor, or were those risks contrived solely for litigation purposes? Second, was it appropriate for Clarke to determine a 1% small stock size premium based on the 1996 Ibbotson study that was specific to the banking industry? Third, what cash flow projection period (five or ten years), and what growth rate after the fifth year, are appropriate assumptions for a DCF valuation of MGB?

Specifically, the parties' DCF valuations differ with respect to: (i) how many years into the future cash flows should be projected (ten years versus five years), (ii) what growth rate assumption after the fifth projection year is appropriate for MGB, (iii) should the Court credit the assumptions Sheshunoff made in valuing MGB in 1993, and (iv) what discount rate is appropriate for MGB. As more fully elaborated below, the Court finds it appropriate (a) to project future cash [*34] flows for a period of ten years into the future at a constant 4% growth rate, (b) to assign a high degree of reliability to Sheshunoff's remaining DCF assumptions (except for its minority discount), and (c) to accept neither Clarke's 12% discount rate nor Reilly's 18% discount rate.

The difference between Clarke's 12% discount rate and Reilly's 18% discount rate is attributable primarily to their different estimates of MGB's cost of equity capital, and their different assessments of the company specific risks confronting MGB at the time of the Merger. Reilly selected an equity risk premium based upon a 1992 Ibbotson study indicating that an appropriate small stock premium factor was 5.2%. Clarke relied on a 1996 Ibbotson study indicating that a premium of 1% was appropriate. The problem with the 1992 Ibbotson study was that it is not specific to the banking industry. The problem with the 1996 Ibbotson study is that although it was specific to the banking industry, the Petitioners have not shown that the data contained in that study (and relied upon by Clarke) was in existence as of the Merger date. The Court, therefore, is unable to accept the 1996 Ibbotson study, and the 12% discount [*35] rate derived therefrom.

Reilly's 18% discount rate is also flawed, however, because it rests on the unsupported assumption that at the time of the Merger, MGB was subject to certain material risks that required a steep discount of MGB's projected future cash flow. Reilly placed great emphasis upon MGB's dependence upon one key supplier and upon the pending litigation involving BYSIS, MGB's data process server as a basis to conclude that MGB involved abnormal business risk to a potential acquiror. The underlying evidence that these "risks" were material is unpersuasive. No document contemporaneous with the Merger shows

that Southwest's or MGB's management or boards viewed these developments as material risks. Importantly, nowhere in its valuation report did Sheshunoff allude to those risks. That fact significantly diminishes the credibility of a Southwest employee's litigation-driven trial testimony that management viewed these risks as significant. Of considerable importance also is that Sheshunoff concluded that a 10% discount factor (2% lower than Clarke's) was appropriate, and management accepted that discount assumption. Accordingly, the Court concludes that Reilly's 18% discount [*36] rate is inappropriately high and not supported by the record.

The final major difference between the parties' DCF analyses is that Clarke projected ten years of future cash flows at a constant growth rate of 4% using many of Sheshunoff's projections; whereas Reilly projected future cash flows for only five years, at a growth rate that decreased after the fifth year, using his (Reilly's) own projections. Sheshunoff used a ten year projection period for future cash flows, and assumed a constant rate of growth. Because Sheshunoff performed its valuation at the time of the Merger, without the benefit of hindsight and when no litigation was pending, and management accepted its assumptions, the Court accepts Sheshunoff's DCF assumptions (except for its minority discount) as more appropriate than Reilly's litigation-driven (and extremely conservative) assumptions.

Because neither side has supported certain key DCF valuation assumptions by a preponderance of persuasive evidence, the Court is unable to accept either Clarke's or Reilly's discounted cash flow valuations. That leaves Clarke's comparative acquisition approach, which the Court turns to next.

*2. The "Control Premium" Question [*37] and the Validity of Clarke's Comparative Acquisition Approach*

Having rejected Clarke's DCF and comparative company valuations, both of which involved directly adding a control premium to the values of MGB's two subsidiaries, the Court need not decide whether the direct addition of a premium is or is not mandated by Rapid-American. Nonetheless, the Court must address the control premium issue, but in a different context. That is, the Court must decide whether Clarke's comparative acquisition valuation, in which a control premium is implicit, is proscribed by § 262. I conclude that it is not.

In *Rapid-American Corp. v. Harris*,²⁴ the Delaware Supreme Court held that in valuing a holding company for § 262 appraisal purposes, it was appropriate to include a control premium as an element of the fair value of the majority-owned subsidiaries. The Court said:

Rapid was a parent company with a 100% ownership interest in three valuable subsidiaries. The trial court's decision to exclude the control premium at the corporate level practically discounted Rapid's entire inherent value. The exclusion of a "control premium" artificially and unrealistically treated Rapid [*38] as a minority shareholder. Contrary to Rapid's arguments, Delaware law compels the inclusion of a control premium under the unique facts of this case. Rapid's 100% ownership interest in its subsidiaries was clearly a "relevant" valuation factor and the trial court's rejection of the "control premium" implicitly placed a disproportionate emphasis on pure market value.²⁵

²⁴ *Del. Supr.*, 603 A.2d 796, 806-07 (1992).

²⁵ *Rapid-American*, 603 A.2d at 806-07 (emphasis in original).

The Respondents argue that Rapid-American turned on the "unique fact" that its subsidiaries were involved in three different industries. I do not read Rapid-American to hold that that "unique" fact was in any way critical to the result. The Respondents' construction of that case is too narrow. What the Supreme Court ruled is that a holding company's ownership of a controlling interest in its subsidiaries is an independent element of value that must be taken into account in determining a fair value for the [*39] parent company. Thus, the rationale of Rapid-American applies to MGB, and the Respondents have not shown otherwise.

The Respondents also challenge Clarke's comparative acquisition approach on a different basis. Pointing to the command in 8 *Del. C.* § 262(h) that fair value must be determined "exclusive of post-merger events or other possible business combinations," the Respondents urge that any valuation method that includes a control premium as an element of "fair value" necessarily represents post-merger synergies proscribed by § 262(h). I cannot agree. The (implicit) control premium at issue here is not the product of post-merger synergies. Rather, that control premium reflects an independent element of value existing at the time of the merger, flowing from the fact that the parent company owned a controlling interest in its subsidiaries at that point in time. Therefore, Clarke's comparative acquisition valuation cannot be invalidated on that basis either.

Because the Respondents have not challenged Clarke's comparative acquisition approach on any valid ground, and because the Court has rejected the parties' valuations based on their other methodologies, by process [*40] of elimination the only evidence of MGB's fair value is the \$ 85 per share Clarke arrived at by the comparative acquisition method. Having no other adjudicated basis to value MGB, the Court would be justified in accepting \$ 85 per share as the fair value of MGB, and does so -- but not by default or uncritically.

The Court is mindful that \$ 85 per share is more than double the Merger price. The Court is also aware of its role under § 262, which is to determine fair value *independently*.²⁶ In discharging that institutional function as an independent appraiser, the Court should, where possible, test the soundness of its valuation conclusion against whatever reliable corroborative evidence the record contains. On that score the record falls far short of perfection. Limited corroborative evidence is available, however, in the form of Sheshunoff's 1993 fair market valuation, (i) adjusted by Clarke to exclude Sheshunoff's minority discount and (ii) updated by Clarke to reflect value data as of November 17, 1993, the date of the Merger.²⁷ When Sheshunoff's 1993 valuation is adjusted in that manner, the resulting value of MGB is \$ 48,504,664 or \$ 70.46 per share with no control [*41] premium. If (for purposes of illustration) a 20% control premium were added, the resulting value would be \$ 56,842,796.80 or \$ 82.57 per share; and if the premium were 35%, the resulting value would be \$ 63,096,394.40, or \$ 91.66 per share.²⁸ The \$ 85 per share fair value based upon Clarke's comparative acquisition approach fits comfortably within that (hypothetical) range of values.

26 *Gonsalves v. Straight Arrow Publishers, Del. Supr.*, 701 A.2d 357 (1997).

27 The Sheshunoff valuation, as thus revised, is objective in the sense that Southwest's management accepted Sheshunoff's DCF projections, and Southwest's management accepted Sheshunoff's valuation as the basis for the Merger price.

28 PX 38 shows that the updated (to reflect information available as of the Merger date) and modified (to exclude a minority discount) valuation of MGB using Sheshunoff's methodology is \$ 70.66 per share, which when multiplied by MGB's 688,400 shares, yields \$ 48,504,664 as a total value for MGB. Subtracting the \$ 6,814,000 of other assets, multiplying the remaining value by 1.2 to include a 20% control premium, and then adding back the \$ 6,814,000 of other assets, yields a valuation of \$ 56,842,796.80, or \$ 82.57

per share. Using the same arithmetic, a 35% control premium would yield a value of \$ 63,096,394.40, or \$ 91.66 per share.

[*42] B. Interest

Next addressed are the appropriate rate of interest and compounding interval. Under § 262(h), this Court is empowered to award interest in an appraisal action at whatever rate (and compounding interval, where relevant) the Court deems equitable. Because MGB's cost of debt capital at that time was 8%, the Court finds that to be the appropriate interest rate. Because the legal rate of interest had risen to 10% as of the date of the trial, the Petitioners urge the Court to award them interest at that rate. The Court declines to do so.²⁹ A 10% interest rate might arguably be appropriate had the Court found undue delay on the Respondents' part, but there has been no undue delay here.

29 Although the Court does not rest its decision on that ground, it notes that the legal rate of interest as of the Merger date was also 8%.

Whether or not to award simple or compound interest is a matter within the Court's discretion. While it may be true, as the Respondents point out, that "an award of compound [*43] post-judgment interest is the exception rather than the rule,"³⁰ in today's financial markets a prudent investor expects to receive a compound rate of interest on his investment. Therefore, it is equitable and realistic for the Court to award compound interest in this case.³¹

30 *Cede & Co. v. Technicolor, Inc.*, 684 A.2d 289, 302; see also *Ryan v. Tad's Enterprises, Inc.*, Del. Ch., 709 A.2d 682, 1996 Del. Ch. LEXIS 54 (1996) *aff'd* by Order, Del. Supr., 693 A.2d 1082 (1997) (stating that compound interest is also the exception and not the rule with respect to pre-judgment interest).

31 See *Grimes v. Vitalink Communications Corp.*, 1997 Del. Ch. LEXIS 124, Del. Ch., C.A. 12334, Chandler, C. (Aug. 26, 1997) (holding that a monthly compounding interval is appropriate to force the Respondent to give up his gain and to fully reimburse Petitioner).

Turning to the compounding interval, the Petitioners argue that it should be monthly. The Respondents do not address the issue. Having been furnished no reason to do otherwise, [*44] the Court concludes that a monthly compounding interval is appropriate.

C. Fees and Expenses

Lastly, the Petitioners request an award of legal fees and expenses, but provide no meaningful support for that claim. In a single conclusory sentence in their opening brief, the Petitioners state: "in addition, and on account of Respondents' evidenced bad faith (before, in connection with, and following the merger), Petitioners urge the Court to assess all of their reasonable costs and expenses of the litigation, including attorneys' fees and expert fees, upon Respondents." In their Reply Brief, the Petitioners expand upon their bad faith claim by arguing that the Respondents sought to conceal MGB's fair value by "withdrawing Sheshunoff as their expert . . . keeping Mr.

Campbell away from Court . . . proffering Mr. . . . Reilly . . . and trumping up a story about litigation risks." ³²

32 Pet'rs Reply Br. at 33.

Without more evidence than these conclusory assertions, the Court is unable to conclude that the [*45] Respondents acted in bad faith. Accordingly, the Court rejects the Petitioners' request for fees and expenses.

IV. CONCLUSION

The parties shall confer and submit an appropriate form of order.

Tab J

LEXSEE 2007 DEL. CH. LEXIS 126

**HIGHFIELDS CAPITAL, LTD., HIGHFIELDS CAPITAL I, L.P., and
HIGHFIELDS CAPITAL II, L.P., Petitioners, v. AXA FINANCIAL, INC., Respon-
dent.**

C.A. No. 804-VCL

COURT OF CHANCERY OF DELAWARE, NEW CASTLE

2007 Del. Ch. LEXIS 126

June 27, 2007, Submitted
August 17, 2007, Decided

NOTICE:

THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

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JUDGES: LAMB, Vice Chancellor.

OPINION BY: LAMB

OPINION**MEMORANDUM OPINION**

An institutional investor petitions the court, pursuant to 8 *Del. C.* § 262, seeking judicial appraisal of its equity holdings in a large insurance conglomerate as a result of that company's July 2004 all-cash, all-shares merger. Based on the evidence presented at trial, the court believes that a combined sum-of-the-parts and shared synergies analysis is the most reliable valuation methodology in this litigation. The court exercises its independent business judgment to make several alterations to the cal-

culations utilized in those models by the respondent's [*2] expert, and determines that the fair value of the petitioner's stock on the date of the merger was \$ 24.97 per share.

I.**A. The Parties**

At issue in this litigation is the fair market value, as of July 8, 2004, of stock of The MONY Group, Inc., a company acquired on that date by the respondent, AXA Financial, Inc. ("AXA"). A diversified financial services organization, AXA is wholly owned by AXA Group, a French holding company for an international group of insurance and related financial services firms.

The petitioners, Highfields Capital Ltd., Highfields Capital I L.P., and Highfields Capital II L.P. (collectively, "Highfields"), are affiliated partnerships that have invested private funds on behalf of their limited partners since 1998. At the time of the AXA-MONY merger, Highfields owned 2,184,000 shares, or just over 4.3%, of MONY's outstanding common stock. In compliance with section 262 of the Delaware General Corporation Law, Highfields perfected its appraisal rights and promptly filed its petition following the transaction.¹

¹ On September 30, 2004, Cede & Co., as the recordholder of MONY shares beneficially owned by Don Siegal, filed an appraisal petition. The court, pursuant to [*3] an order dated February 24, 2005, consolidated the two actions and appointed Highfields's counsel as lead counsel for all petitioners.

B. The Facts**1. An Overview Of MONY's Business**

MONY's predecessor-in-interest, Mutual of New York, was formed in 1842 as a mutual life insurance company. It concentrated its product line on traditional life insurance policies sold through a career agency distribution system.²

2 In this type of distribution system, retail insurance agents sell the products of only one insurance company.

In the late 1980s, the insurance market became increasingly consolidated and competitive. Advances in both efficiency and scale were necessary for a life insurance company to maintain an edge as the industry evolved. These competitive pressures were a substantial causative factor in Mutual of New York's decision to demutualize in the fall of 1998. On the heels of this process and following the completion of the company's initial public offering at \$ 23.50 per share, MONY listed on the New York Stock Exchange.³

3 This price represented approximately 65% of MONY's then existing GAAP book value.

Following its demutualization, MONY sought to regain some of the competitive advantage [*4] it had lost during the late 1980s and throughout the 1990s. One strategy MONY employed was to diversify its product lines. Freed of the regulatory requirements which prevented its predecessor as a mutual company from branching into financial services areas outside of traditional life insurance, MONY quickly attempted to adapt through a flurry of smaller acquisitions. Between January 2000 and November 2001, MONY acquired Advest (a brokerage firm), Leberthal (a bond company), and Matrix (an investment bank). In December 2002, the company also discontinued its underperforming group pension business.

Despite its efforts to diversify its product offerings, MONY still faced substantial deficiencies in its business model that caused it to lag behind industry leaders. The company's career system distribution network was expensive to maintain, as more and more agents demanded the ability to sell third-party insurance products. Moreover, MONY lacked scale, a crucial element to success in a marketplace teeming with large, globally-based financial services companies. MONY's products, especially life insurance policies, were highly commoditized, meaning that the most significant factor in the company's [*5] continuing viability was its operating efficiency relative to other firms. Because competitors benefitted from greater economies of scale, MONY was forced to lower its prices on insurance products to maintain sales volume. This tactic led to lower operating margins and sagging earnings for the company.

MONY's inability to efficiently generate profitable new business was not the sole reason for its earnings problems. Shortcomings existed in the company's historical book of business as well. As a mutual company, Mutual of New York had not priced its policy premiums at maximum possible levels. After demutualization, MONY continued to hold a large, yet underpriced, book of business at a much higher percentage of assets or total revenues than its competitors. Thus, MONY's return on equity was materially below that of its peers due to the drag on earnings created by these inefficiently priced policies.

Unfortunately for MONY, in the insurance industry, low earnings beget still lower earnings. Because of capital, liquidity, and earnings concerns associated with the company, MONY suffered near continuous pressure from the ratings agencies in the post-demutualization period.⁴ In the insurance [*6] industry, ratings matter greatly, since agents, creditors, and customers all view a company's ratings trend and ratings outlook as strong indicators of an insurer's ability to satisfy its current and future financial obligations. Low debt ratings affected MONY's cost of borrowing and, in turn, its earnings levels.

4 In late 2002, two agencies lowered MONY's senior debt credit ratings and financial strength ratings.

More importantly, low ratings send a signal of a higher risk investment to prospective policy purchasers. Rational investors demand larger returns in exchange for such risk. This incontrovertible law of the free market presented MONY with a Hobson's choice: either acquiesce to investor demands by pricing policies to increase investor returns (thereby writing barely profitable or unprofitable business), or continue trying to sell overpriced, commoditized products in a competitive industry (thereby confronting decreased sales volume and unhappy sales agents fleeing to firms where they could enjoy greater commissions). Objectively speaking, a period of rating downgrades would spell disaster for MONY, and these downgrades were an ever present possibility for the company in the [*7] early 2000s.

In the face of these difficulties, MONY actively explored strategic alternatives to enhance stockholder value and to brighten the company's future. In addition to diversifying its business lines through the acquisitions mentioned above, MONY initiated cost-cutting measures that closed certain distribution facilities, realigned agency locations throughout the country, and laid off hundreds of employees. In late 2002, MONY's management devised a long-term cost-reduction and restructuring plan, the more substantive elements of which entailed further realignment of the company's distribution net-

work, a relocation of MONY's corporate headquarters, and adjustments to incentive-based executive compensation. Based on the evidence presented at trial, however, it was clear that MONY's management poured most of its creative efforts into a different strategic alternative that eventually bore fruit: a merger or sale of the company.⁵

5 Although MONY probably would have been able to implement structural changes that would have resulted in at least a portion of the \$ 47.2 million in savings the restructuring plan targeted between October 2002 and August 2003, there is no credible evidence [*8] that any of these changes were ever implemented, and estimating a firm figure for the savings achieved would be a highly speculative undertaking for the court. Indeed, Highfields's own expert testified at trial that he did not know how much cost saving was ultimately achieved, or whether any material difference existed between MONY's budgeted and actual expenses for 2003. Trial Tr. 337-38.

2. AXA And MONY Agree To Merge

In 2001, MONY's board of directors informed management of its general consensus that a business combination with a third party was likely to provide MONY with its best opportunity for long-term success. By late 2002, a general downturn in the capital markets, coupled with the industry-specific and ratings agency pressures MONY faced, finally led to an intensification of management's efforts to locate a potential acquiror. At that time, Credit Suisse First Boston ("CSFB"), one of MONY's strategic financial advisors, counseled management to obtain a third-party actuarial appraisal to identify cost savings that might be available to a merger partner. Instead of announcing a public auction of MONY, an option which the board believed might highlight dangerous weaknesses in [*9] the company to competitors, the board instructed Michael Roth, MONY's president and chief executive officer, to quietly explore combination opportunities.

Despite the low key approach the board took in finding a purchaser, the marketplace harbored little doubt about MONY's candidacy as a potential acquisition target. Investment bankers, industry analysts, and insurance company executives all understood that MONY's days as a stand-alone entity were likely numbered.⁶ Even the timing of a transaction was somewhat predictable, since the 5% ownership restriction imposed by New York state insurance regulations was set to expire in November 2003.⁷ Despite strong informational signals that MONY was on the selling block, but perhaps precisely because the market knew such a sale was an eventuality in the not-too-distant future, potential suitors, when approached

by MONY's management, balked at the suggestion of a transaction due to concern that MONY's existing stock price was too high.

6 Indeed, MONY was "on everybody's list and had been for a number of years," so much so that the company's probable acquisition "was a source of almost constant conversation among investment bankers, CFOs and CEOs [*10] of insurance companies." Trial Tr. 649, 770.

7 For the five-year period following MONY's demutualization, a potential acquirer would have had to obtain special approval from the New York Insurance Department to acquire more than 5% of MONY.

Unlike other possible buyers, AXA showed an interest in MONY. In the fall of 2002, Roth met with Kip Condon, the president and chief executive officer of AXA, to gauge AXA's general interest in a deal, without specifically discussing price. At a follow-up meeting in January 2003, Condon mentioned \$ 26 per share as an approximate acquisition price, marking the first time that any potential buyer talked of a specific price for MONY's stock. The two companies executed a confidentiality agreement in February 2003, and MONY thereafter formally retained CSFB as a financial advisor in connection with the potential transaction.

Following more than a month of due diligence, Condon told Roth that AXA would be willing to consider a transaction to acquire MONY at as much as \$ 28.50 per share in cash. AXA pulled that proposal in April 2003, however, when it determined that change in control agreements benefitting MONY's management were worth nearly \$ 163 million. [*11] Instead, AXA proposed a stock-for-stock merger using AXA's American Depositary Receipts at a fixed exchange ratio valued at \$ 26.50 per share at the time. The MONY board rejected the proposal due to the stock component of the deal, as well as the fact that the fixed exchange ratio effectively required MONY stockholders to make a currency bet on the U.S. dollar versus the euro during the time between deal announcement and closing.

In the months following the termination of negotiations between MONY and AXA, MONY continued to face a market devoid of willing buyers. Eager to increase the company's sale prospects, MONY's board negotiated new change in control payments for management, greatly reducing the payout provisions.

In the fall of 2003, negotiations resumed between AXA and MONY, which ultimately led to AXA's offer to acquire MONY for \$ 31 per share in cash. Following consultation with financial and legal advisors, as well as

senior management, the MONY board concluded that the \$31 per share price was fair and was the best way to maximize stockholder value. Absent a transaction, the board believed the company would continue to deteriorate due to its lack of scale, its reliance on a [*12] fundamentally flawed, high-cost field agency system, and its inability to adapt to competitive pressures in the financial services industry.⁸

8 Without a buyer, the directors and officers of MONY were convinced that the company's prospects were dire. *See* Theobald Dep. 51-53 (noting that MONY would likely be sold at scrap value absent a synergistic sale); Foti Dep. 288-89 (noting that there was a "significant risk that [MONY] would face a meltdown scenario" if the AXA transaction did not happen).

3. Uncertainty Follows The Merger Announcement

The merger was announced on September 17, 2003, and represented a 7.3% premium over MONY's then current trading price. During a conference call with MONY management the following day, a number of institutional investors criticized the \$ 31 price—approximately 76% of MONY's GAAP book value at the time—as being too low.⁹ Despite having no written documentation or analyses with which to justify a conclusion that AXA's offer substantially undervalued MONY, Highfields became a vocal opponent of the deal and publicly advocated for stockholders to reject it.¹⁰ Two proxy advisory firms, Institutional Shareholder Services ("ISS") and Glass-Lewis & Co., [*13] also reacted negatively, relying on what they believed to be a relatively small premium offered by AXA and a low price-to-book value for the acquisition. Numerous insurance industry analysts, however, believed that the merger would deliver solid value to MONY stockholders.¹¹

9 Southeastern Asset Management, MONY's largest stockholder at the time, called the offer "ridiculously low" and labeled the board's actions "egregious." Third Avenue Funds described MONY stockholders as being "cashed out at a disgraceful number." JX 977 at 11.

10 On January 29, 2004, Highfields sent a letter to MONY stockholders urging them to vote against the merger. JX 141 at 1. Based on the merger price, Highfields's equity stake in MONY was worth almost \$ 68 million, yet, apparently "consistent with [Highfields's] policy" to store "work . . . [in employees'] heads" on valuation matters, it prepared no analytical documentation to quantify how much more than \$ 31 per share MONY was worth at the time. Trial Tr. 109-10.

11 Citigroup analysts commented that "[a]lthough this valuation appears low at first, we believe that it is actually fair given that MONY is a 2.0% [return on equity] in a sector that currently returns [*14] approximately 12.0%." JX 1119. Fox-Pitt, Kelton believed that "AXA's bid to acquire MONY is fairly valued at this time" and did not expect a higher bidder to emerge. JX 1129. Lehman Brothers wrote that "[t]he price appears to be reasonable at 75% of reported book value." JX 1136. Deutsche Bank claimed that "[i]n light of the price multiples offered for . . . other recent transactions, we continue to believe that AXA's offer of \$ 31, or 0.76x non-FAS 115 book value, for the MONY franchise is a fair price." JX 1135.

Public opinion surrounding the deal was further complicated by AXA's proposed method of financing. To raise capital to pay for the acquisition, AXA issued in France corporate debt instruments called ORANs.¹² A number of institutional investors with sizeable holdings in MONY stock, including Highfields, purchased substantial positions in these securities following the merger announcement. It was well understood at the time that investors with long positions in the ORANs had incentives to acquire MONY shares in support of the merger, while investors with short positions in the ORANs had motivation to impede the transaction.

12 The ORANs, or Obligations Remboursables en Action [*15] ou en Numeraire, were debt securities issued by AXA Group and were structured to automatically convert into AXA stock upon the closing of the MONY merger.

On February 3, 2004, Highfields made a \$ 15.4 million short sale in ORANs, and, following a later trade on February 11, Highfields's short position in the ORANs grew to \$ 40.6 million. Two weeks later, in a publicly filed letter to this court, but without revealing its own short position, Highfields urged that the vote of stockholders with long positions in the ORANs be abridged, claiming that such stockholders had financial interests contrary to those of other investors in MONY stock. During this time, Highfields never disclosed to the market that, if the merger was voted down, its short position in the ORANs would allow it to make an \$ 11 million profit on an investment it had held for only a few months.

Not surprisingly, the merger quickly became the subject of expedited stockholder litigation in this court. Stockholder plaintiffs claimed that, among other things, the MONY directors breached their fiduciary duty to obtain the highest value reasonably available for stock-

holders in the sale of the company.¹³ This court ultimately [*16] concluded on a thoroughly presented preliminary injunction record that the MONY board acted in accordance with its fiduciary obligations under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*¹⁴ and its progeny by accepting AXA's \$ 31 per share proposal, and that "there was ample room for the [MONY] board to make a good faith and honest determination that approval of the merger . . . was in the best interests of the corporation."¹⁵

13 See generally *In re MONY Group Inc. S'holder Litig.*, 852 A.2d 9 (Del. Ch. 2004) ("MONY I"); *In re MONY Group Inc. S'holder Litig.*, 853 A.2d 661 (Del. Ch. 2004) ("MONY II").

14 506 A.2d 173 (Del. 1986).

15 *MONY II*, 853 A.2d at 667-68 (citing *MONY I*).

As the prospects for the transaction darkened due to discontent among institutional investors in early 2004, MONY management's gloomy predictions of a ratings downgrade looked set to materialize if the merger fell through.¹⁶ During February 2004, all of the ratings agencies lowered at least MONY's ratings outlook, largely as a result of uncertainty surrounding the outcome of the AXA deal.¹⁷ Analysts familiar with the business echoed management's concerns that the merger was essential to ensure that MONY did [*17] not suffer the financial fallout likely to result from a further credit rating slip.¹⁸

16 Management's concerns are expressed in a file memorandum written by MONY's chief financial officer, Richard Daddario, on February 12, 2004:

We believe that the most likely scenario is that upon announcement that the transaction has not been approved MONY's rating will be downgraded by one notch In addition, unless results improve dramatically, we believe that the negative outlook could result in another one notch downgrade in late 2004 or perhaps in 2005. A combination of the downgrade and the added uncertainty created by the unsuccessful transaction adds significant risk to the MONY organization.

JX 66.

17 On February 5, 2004, Fitch changed MONY's financial strength rating from "rating watch positive" to "rating watch evolving." On February 19, 2004, S&P downgraded MONY's financial strength rating to "A" and placed this rating on "credit watch developing." The same day, A.M. Best changed its rating of MONY from "under review--positive" to "under review--developing." On February 23, 2004, Moody's altered MONY's rating from "review for possible upgrade" to "direction uncertain." JX [*18] 60 at 33-37.

18 Goldman Sachs observed that "[t]he rating agencies have downgraded MONY due to the uncertainty surrounding the completion of the deal and have indicated that ratings could slip further if the deal is not done. If downgraded again, MONY's insurance company could struggle with increased lapses, questions about liquidity, and lack of sales." JX 1134. Morgan Stanley stated that "[i]f . . . MONY is left to make a go of it alone, the situation could be rather unpleasant. Once an insurance company's financial strength comes under question, the sale of new product, retention of its sales force and maintaining persistency of its in-force block will become challenging. At this point, ratings will drop further and the company will essentially go into run-off." JX 1133.

In the end, AXA's \$ 31 per share offer remained outstanding for eight months. Despite AXA's public statements that it would not increase its offer, no prospective buyer submitted a higher bid. The stockholder vote went forward on May 18, 2004, and was approved by 51% of the stockholders. The transaction closed on July 8, 2004. At the time, holders of 16.7% of MONY's shares indicated they would exercise appraisal rights. [*19] Ultimately, however, Highfields was the only substantial stockholder to prefect an appraisal demand.¹⁹

19 The ten largest institutional investors in MONY held roughly 24% of the company's outstanding common stock at the time of the merger. Several of these large stockholders who ended up accepting the \$ 31 merger consideration (Southern Asset Management and Third Avenue Funds) were the same ones who originally attacked the deal for undervaluing MONY.

4. The Procedural Posture Of This Litigation

Highfields filed its appraisal petition on November 4, 2004. Following extensive fact and expert discovery, a trial was held from April 30, 2007 to May 3, 2007. Post-trial briefing was submitted, and the court heard post-trial oral argument on June 27, 2007. That same day, the parties stipulated to, and the court entered, an order setting the pre-judgment interest rate in this action at 6.2%, compounded semi-annually, running from July 8, 2004.

II.

In a *section 262* appraisal proceeding, the court must "determine the fair value of 100% of the corporation [and award] the dissenting stockholder his proportionate share of that value."²⁰ This evaluation requires an examination of "all factors and elements [*20] which reasonably might enter into the fixing of value," including market value, asset value, earning prospects, and the nature of the enterprise, which are "known or susceptible of proof as of the date of the merger."²¹ The corporation subject to valuation is viewed as a going concern "based upon the 'operative reality' of the company at the time of the merger."²² This value must be reached regardless of the synergies obtained from the consummation of the merger,²³ and cannot include speculative elements of value arising from the merger's "accomplishment or expectation."²⁴ However, the value of a petitioner's shares may not reflect discounts for lack of marketability or illiquidity.²⁵

²⁰ *Cavalier Oil Corp. v. Harnett*, 1988 Del. Ch. LEXIS 28, 1988 WL 15816, at *9 (Del. Ch. Feb. 22, 1988), *aff'd*, 564 A.2d 1137 (Del. 1989).

²¹ *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983); *Tri-Cont'l Corp. v. Battye*, 74 A.2d 71, 72 (Del. 1950).

²² *M.G. Bancorp, Inc. v. LeBeau*, 737 A.2d 513, 524 (Del. 1999).

²³ *M.P.M. Enters., Inc. v. Gilbert*, 731 A.2d 790, 797 (Del. 1999).

²⁴ 8 Del. C. § 262(h). *Ng v. Heng Sang Realty Corp.*, 2004 Del. Ch. LEXIS 69, 2004 WL 885590, at *6 (Del. Ch. Apr. 22, 2004).

²⁵ *Bell v. Kirby Lumber Corp.*, 413 A.2d 137, 147 (Del. 1980).

It [*21] is well established that "fair value" for purposes of appraisal is equated with the corporation's stand-alone value, "rather than its value to a third party as an acquisition."²⁶ If, however, the transaction giving rise to the appraisal resulted from an arm's-length proc-

ess between two independent parties, and if no structural impediments existed that might materially distort "the crucible of objective market reality," a reviewing court should give substantial evidentiary weight to the merger price as an indicator of fair value.²⁷

²⁶ *M.P.M. Enters.*, 731 A.2d at 795.

²⁷ See *Van de Watte v. Unimation, Inc.*, 1991 WL 29303, at *17 (Del. Ch. Mar. 7, 1991) ("The fact that a transaction price was forged in the crucible of objective market reality (as distinguished from the unavoidably subjective thought process of a valuation expert) is viewed as strong evidence that the price is fair."). See also *Dobler v. Montgomery Cellular Holding Co.*, 2004 Del. Ch. LEXIS 139, 2004 WL 2271592, at *11 (Del. Ch. Sept. 30, 2004), *aff'd in relevant part*, 880 A.2d 206 (Del. 2005) (citing *M.P.M. Enters.*, 731 A.2d at 797, for the proposition that "a merger price resulting from an arm's-length negotiations where there are no claims of [*22] collusion is a very strong indication of fair value").

Fundamentally, a Delaware court must employ a liberalized approach to valuation embracing "proof of value by any techniques or methods which are generally considered acceptable in the financial community."²⁸ Both parties "have the burden of proving their respective valuation positions by a preponderance of the evidence."²⁹ However, if neither party adduces evidence sufficient to satisfy this burden, "the court must then use its own independent judgment to determine fair value."³⁰

²⁸ *Weinberger*, 457 A.2d at 713.

²⁹ *M.G. Bancorp*, 737 A.2d at 520.

³⁰ *Taylor v. Am. Specialty Retailing Group, Inc.*, 2003 WL 21753752, at *2 (Del. Ch. July 25, 2003).

III.

A. The Parties' General Contentions

Based on its experts' testimony, Highfields posits that MONY's fair value on July 8, 2004 was between \$ 37 and \$ 47 per share. Highfields argues that the \$ 31 per share merger price is an unreliable indicator, and only reflects the company's value to AXA as a buyer rather than its value as a going concern. According to Highfields, in the absence of the merger, MONY was poised for success because of management's dedication to growing revenues and cutting expenses [*23] in the future.

Moreover, Highfields contends that AXA's valuation methodologies are flawed because: (1) they rely on an improper elimination of \$ 600 million from MONY's DAC and goodwill; (2) they do not account for the strong performance of the equity markets from September 2003 to July 2004, which allegedly would have increased MONY's going-concern value were it not for an effective \$ 31 per share cap on the stock price; and, (3) they wrongly attribute a great deal of the appreciation in the company's stock price in the months before the deal's announcement to merger speculation. In the end, Highfields contends that the opposing expert's reliance on actuarial models and assumptions created by AXA, an interested party on the buy side of a transaction, was unreasonable, and that AXA has failed to show by a preponderance of the evidence that its expert properly applied any relevant valuation metric.

In response, AXA argues that the going-concern value of MONY as of July 8, 2004 was no more than \$ 21 per share. AXA says that the merger price, less synergies, is the best indicator of value in this case because of the arm's-length negotiation process employed and the lack of material impediments [*24] to a topping bid. According to AXA, the standardized valuation methodologies applied by its expert also support a value which approximates this market-based approach. AXA argues that Highfields's valuation work uses improper assumptions and inputs, and that AXA's own conclusions--particularly with respect to MONY's market appreciation post-announcement, the \$ 600 million DAC write-down, and investors' understanding that MONY would likely be acquired--are borne out by the evidence. Ultimately, AXA contends that MONY was a troubled business facing a dire and unprofitable future due to inherent, irreparable deficiencies in its system of operation, unyielding pressure from competitors, and constant monitoring from ratings agencies.

B. The Experts And Their Testimony

Four experts testified at trial, three on behalf of Highfields and one on behalf of AXA. However, only one of Highfields's experts actually opined as to MONY's fair value. The court now turns to the evidence those individuals presented.

1. The Non-Valuation Experts

a. Edward W. Buttner

Edward W. Buttner is a certified public accountant licensed in Florida.³¹ Buttner has given expert witness testimony in state and federal courts [*25] on numerous occasions with respect to accounting and auditing issues in the insurance industry.

31 After graduation from Jacksonville University in 1976, Buttner spent 16 years with the accounting firm of Ernst & Young, where he specialized in accounting, auditing, and consulting for insurance companies. As a partner at Ernst, he directed valuation engagements on insurance companies, and supervised statutory and GAAP financial statement examinations on more than 25 insurance concerns. When Buttner left Ernst in April 1992, he was the partner-in-charge of the firm's Florida insurance practice. Since May 1992, Buttner has continued to provide accounting and consulting services to insurance companies as a partner in Buttner Hammock & Co., P.A.

At trial, Buttner testified on behalf of Highfields regarding the propriety of certain pro forma accounting adjustments made by MONY management and used by CSFB in its February 2004 valuation of the company. Specifically, Buttner opined that a pro forma \$ 600 million reduction in MONY's book value, which resulted from a hypothetical 50% write-down of the company's deferred acquisition cost asset ("DAC") and 100% of its goodwill, was inappropriate under [*26] financial reporting standards used in the insurance industry.³² Buttner also testified that the pro forma replacement of these assets with a hypothetical value of business acquired asset ("VOBA"), a purchase accounting concept normally used by the purchaser of an insurance company, was an unreasonable decision by MONY's management.

32 DAC reflects an accounting treatment given to up-front, variable costs related to an insurance company's generation of new business, including commissions paid and underwriting expenses. DAC is capitalized, and then amortized to correspond with the amount of time the policy that generated those costs is outstanding.

Buttner noted that, according to GAAP reporting standards, the amount of DAC an insurance company may capitalize on its books should not exceed the present value of future profits generated by in-force business.³³ If MONY's DAC or goodwill were ever impaired before the merger, the company would have written those assets down in accordance with GAAP financial reporting standards.

33 MONY's DAC was tested for impairment quarterly. PricewaterhouseCoopers, in making its 2003 fiscal year report to MONY's audit committee, noted that the company's DAC [*27] was recoverable, and its goodwill was not impaired. Indeed, the auditor thought the treatment of these

assets was appropriate and more conservative than industry practice.

However, instead of using GAAP book value in preparing its fairness opinion, each of the valuation metrics CSFB used relied upon the hypothetical \$ 600 million DAC-VOBA substitution. MONY management arrived at this figure by calculating the rate of return a potential acquiror would look for in considering whether to purchase MONY, and then backing out the amount by which the potential acquiror's VOBA would exceed MONY's then-existing DAC and goodwill. Buttner testified that this effective revaluation of assets would not have been available to MONY if the company continued as a stand-alone entity, and that CSFB's fairness opinion improperly understated MONY's fair value because of the DAC-VOBA substitution.

On cross-examination, Buttner admitted that, if MONY was considering a sale, the DAC-VOBA adjustment would be a relevant criterion in determining what an acquiror might pay. An acquiror would be interested in this adjustment because an elimination of the DAC asset and the establishment of a smaller VOBA asset would [*28] offer the potential for a meaningful GAAP earnings improvement for MONY. Moreover, since purchase accounting standards would require a buyer to eliminate goodwill and DAC, while replacing those assets with the acquirer's own calculations as to the value of MONY's in-force business, a hypothetical DAC-VOBA substitution would be of great importance to MONY's board in reviewing the range of values at which an acquiror might proceed with a sale.

b. Michael P. Borom

Highfields also relies upon the expert testimony of Michael P. Borom, one of the founding partners of Impala Partners, LLC, a financial advisory boutique. For the last 10 years, Borom has provided restructuring advice to financial services and insurance-related companies such as Conseco and Leucadia National Corporation.³⁴

³⁴ His engagements with these companies have included issues regarding valuation, debt restructuring, cost-reduction plan implementation, and rating agency presentations. Borom is a graduate of Colgate University, and began his career at General Electric in the company's financial planning and analysis department. He served as chief financial officer of GE Capital's mortgage insurance arm from 1991 to 1995. [*29] Borom was also chief financial officer of Aetna's property casualty insurance subsidiary from 1995 to 1996, and worked intensively on valuation issues during Aetna's sale of that portion of its business.

In preparing his expert report, Borom analyzed MONY's revenues and net income from 2001 to 2003. Borom testified that trial that MONY was a healthy company, one which experienced overall revenue growth of 11% in both 2002 and 2003. The growth in MONY's insurance business during the pre-merger period, according to Borom, was substantially attributable to a sizable increase in the company's sale of corporate-owned life insurance policies ("COLI"), an item which MONY's management had focused on improving. The success of MONY's asset management wing, however, correlated to trends in the capital markets during this time frame, showing lulls in performance during 2001 and 2002, but a general trend upward in 2003. The brokerage and investment banking line of the company showed steady revenue growth from 2001 to 2003. Borom opined that these positive trends in MONY's business would likely have continued in the first half of 2004.

In analyzing the company's pre-tax net income from 2001 to 2003, [*30] Borom made certain adjustments for "unusual and timing items" specific to the insurance industry. He also normalized MONY's capital gains by removing all capital gains and losses from the period, and then substituting for those figures the company's five-year average for capital gains. This analysis produced a steady increase in MONY's pre-tax net income for the period, which rose from \$ 17.8 million in 2001, to \$ 31.1 million in 2002, to \$ 55 million in 2003. Borom believed that this upward trend in net income would likely have continued in 2004 before the AXA merger closed.

Furthermore, Borom testified as to the viability of management's proposed cost reduction plan. Borom testified that \$ 45 million of the projected \$ 47 million in expense savings would have been both attainable and sustainable for MONY over the long term if the merger with AXA never occurred. In his opinion, several factors, including management's support for the cost-saving initiatives, outside pressure from stockholders and ratings agencies, and the fact that MONY was near the bottom of the industry in terms of operating efficiency, all made it more likely than not that the company would have succeeded in realizing [*31] these expense savings.

Finally, Borom took issue with the February 2004 management projections which CSFB relied on in preparing its fairness opinion. Based on numerous meetings and consultations with ratings agencies during his career, Borom claimed it was unreasonable to assume that, barring consummation of the AXA merger, MONY would have suffered another ratings downgrade in late 2004 or early 2005. Finally, Borom commented that the \$ 31 price AXA's expert used to calculate the shared synergies generated by the merger was too low. In Borom's view, monetary incentives on the part of management to get a

deal done, the lack of an open auction at the beginning of the sale process, and the significant due diligence costs a topping bidder would incur to intelligently make a bid were all structural impediments that distorted the sale process in AXA's favor.

On cross-examination, Borom admitted that, despite MONY's growth in net income under his analysis, the company's return on equity was still between 1% and 2%, and at the bottom of the insurance industry. Furthermore, Borom agreed that a ratings downgrade would have had a significant negative impact on the company's COLI sales, the area [*32] where MONY was achieving its highest rate of growth. Borom also admitted that the only major differences between management's August 2003 projections (which he relied on) and its February 2004 projections (which CSFB relied on) were attributable to the downgrades MONY received from the ratings agencies in mid-February 2004. He agreed that the February 2004 projections assumed the implementation of the expense reduction initiatives he discussed during his direct testimony, and also assumed that MONY could avoid further ratings downgrades through remedial action if the merger failed to close. Finally, Borom noted that he was never provided with, and never analyzed, any of the industry analyst reports supporting the \$ 31 price as fair; instead, he relied only on fairness assessments prepared by ISS and Glass-Lewis.

2. The Valuation Experts

Both Highfields and AXA presented valuation experts. Highfields's valuation expert is Dr. Israel Shaked, a professor of finance and economics at Boston University's School of Management. For nearly 30 years, Shaked has taught courses at the graduate and undergraduate levels on various topics, including business valuation and corporate finance.³⁵

35 Shaked [*33] graduated from the Hebrew University of Jerusalem and later earned a doctorate in business administration from Harvard Business School. Shaked also acts as managing director of the Michel-Shaked Group, a financial consulting firm which he co-founded. In the past, Shaked has been retained as an expert or consultant concerning valuation and financial condition issues in a number of cases involving insurance and financial services companies, but never in the context of valuing a life insurance company.

AXA's valuation expert is Peter C. Jachym, a managing director of Keefe, Bruyette & Woods ("KBW"), an investment banking firm that focuses exclusively on the financial services industry.³⁶ Within the past few years, Jachym has worked on SunLife's acquisition of Keyport

Life and the sale of Forethought Insurance to a private investment firm called The Devlin Group.³⁷

36 On a year-to-year basis, KBW does a greater number of merger and acquisition transactions for the financial services industry (banks, insurance companies, broker-dealers, and asset managers) than any other investment bank in the United States.

37 Before joining KBW in 2001, Jachym worked for a number of other investment banking [*34] firms, including Merrill Lynch and Bane of America Securities, where he specialized in valuation, capital raising, and sale transactions in the insurance industry. Jachym attended Yale University for his undergraduate studies, and received a masters degree in business administration from the Amos Tuck School of Business at Dartmouth College.

a. Shaked's Testimony And Jachym's Rebuttal

Shaked testified that the fair value of MONY as of July 8, 2004 was \$ 43.03 per share. He reached this conclusion using three traditional valuation methodologies. First, Shaked employed a discounted cash flow ("DCF") analysis based on assumptions taken from management's August 2003 projections. Shaked considered these projections more authoritative than the February 2004 projections on which CSFB relied because, according to him, the August 2003 projections were made when management was still valuing MONY as a stand-alone entity. He used a 5.0% terminal growth rate in his analysis, which was derived from IBES, an authoritative source that compiles growth rates for certain companies based on estimates of different institutional investors. Shaked's 8.9% discount rate came from the Capital Asset Pricing Model [*35] formula, and was consistent with the discount rates AXA applied to value MONY from May to September 2003. Shaked arrived at a price of \$ 39.18 per share for MONY's stock under the DCF formula, which he weighed at 50% in his overall analysis.³⁸

38 The range of values under Shaked's DCF is \$ 34.85 to \$ 50.69 per share.

To compile a list for his comparable company valuation, Shaked combined the businesses included in the S&P 500 Life and Health Insurance Index (the "L&H Index") with the companies CSFB identified in its February 2004 presentation to MONY's board. He then eliminated companies whose market capitalization was more than ten times greater than MONY's. This process yielded 13 comparable companies.

Shaked used a price-to-book value multiple for this analysis, rather than a price-to-earnings multiple. He testified that price-to-earnings multiples are not typically used to value life insurance companies, and that, if one were applied using MONY's 2003 earnings, the result would have been a multiple of 97.33. Given that MONY's stock was trading at \$28.20 at the time the merger was announced, a price-to-earnings multiple would not have been a reasonable metric. AXA agrees with Shaked [*36] on this point.

Because of MONY's low earnings and due to its below-average financial strength rating, Shaked derived a multiple for MONY of .89 from the lower quartile of companies he examined. To remove the minority discount, Shaked compiled a list of 55 transactions involving financial acquirors from July 8, 1999 to July 8, 2004 in which more than \$ 200 million was paid and in which at least 51% of the company was purchased. This yielded a median minority discount of 30.1%. Shaked multiplied MONY's book value per share of \$ 40.24 (which omitted the \$ 600 million write-down of DAC and goodwill) by .89, and then added in the 30.1% minority discount. By doing so, he arrived at a price for MONY of \$ 46.69 per share under his comparable company analysis, which he weighed at 30% in his overall valuation.³⁹

39 Shaked's comparable company analysis returned a range of \$ 41.45 to \$ 51.92 per share.

Shaked also employed a comparable transactions analysis. He examined life insurance acquisitions between July 8, 1999 and July 8, 2004 involving entire enterprises (as opposed to transactions where a line or division of a conglomerate was sold) where at least 51% of the target was acquired at a cost [*37] of at least \$ 200 million. After excluding deals which were ten times greater than the AXA-MONY merger, Shaked ended up with a list of seven transactions.

Based on price-to-book value, the MONY merger was assigned a multiple of 1.37, in the lower quartile of the comparable transactions. After removing a 14.5% synergy premium from the MONY transaction, he arrived at a value of \$ 47.15 for each share of MONY stock using his comparable transactions analysis, which he weighed at 20% overall.⁴⁰

40 The range of values for Shaked's comparable transactions metric is \$ 43.71 to \$ 50.59 per share.

Shaked also undertook a market price analysis to gauge how MONY's stock price would have reacted to appreciation in the capital markets from September 17, 2003 to July 8, 2004 without what he contends was an effective cap of \$ 31 per share resulting from the pend-

ency of AXA's offer. Shaked took MONY's stock price a month prior to the merger announcement (\$ 28.20), adjusted for a minority discount, and multiplied this figure by MONY's expected percentage return based on the appreciation of the L&H Index during the relevant period.⁴¹ Doing so, Shaked arrived at \$ 42.22 as an expected unaffected price [*38] for MONY's stock (on a control basis) as of July 8, 2004.⁴²

41 To perform this calculation, Shaked found that the value of the L&H Index increased by 21.7% during the relevant period. MONY's beta to that index was .69. Thus, MONY's expected return for the period, according to Shaked, was 15.1%.

42 This figure reflects the elimination of a 30.1% minority discount. If the AXA expert's minority discount of 16.7% is used, one arrives at an unaffected price of \$ 37.68.

To rebut the evidence Shaked presented, Jachym testified at length regarding what he believed were fundamental flaws in Shaked's analyses. First, Jachym noted several thematic shortcomings in Shaked's presentation. Shaked never used financial data derived from an actuarial appraisal, despite the fact that actuarial appraisals are the industry norm for valuation of a life insurance company. Also, Shaked paid no attention to the actual \$ 31 per share price AXA paid, even though MONY was acquired through an arm's-length bargaining process. Moreover, Shaked used dated managerial projections from August 2003 throughout his report, projections prepared before MONY suffered a ratings downgrade in February 2004.

Jachym testified that [*39] Shaked's valuation methodologies are unreliable. In Shaked's DCF analysis, GAAP earnings estimates are used, which do not equate with cash flows in the life insurance business due to capital retention and dividend maintenance requirements. Also, Jachym stated that Shaked improperly arrived at MONY's terminal value by growing projected earnings at a constant rate. According to Jachym, Shaked erred in his comparable company analysis by assigning MONY multiples based on the median of the bottom quartile of each model, even though MONY was outperformed by companies at the very bottom of the list. Finally, Jachym stated that Shaked's comparable transactions model is flawed because it completely ignores the Safeco transaction,⁴³ which was the most similar in size, timing, and financial performance to the MONY deal. Jachym adamantly disagreed with Shaked's contention that Safeco was a distressed sale, noting that Safeco's parent company had capital raising alternatives and that the avail-

ability of Safeco's statutory financial statements would have precluded any material marketability discount.

43 This deal involved the March 15, 2004 purchase of Safeco Life & Investments by a group of investors [*40] (including Highfields).

As to Shaked's calculation of a control premium for the transaction, Jachym noted that Shaked used transactions involving both financial and non-financial institutions to calculate his figure, an improper technique considering regulatory constraints on dividends and cash flows to stockholders typically result in lower control premiums being paid to acquire a financial institution. As to Shaked's synergy premium calculation, Jachym testified that the transactions Shaked relied on were not comparable to the AXA-MONY merger, and that they occurred in the bull market of the late 1990s when the typical merger premium was inflated in comparison to 2004 standards. Finally, Jachym claimed that MONY's stock price was artificially inflated by merger speculation at the time of the transaction. He stated that Shaked's trading volume analysis and event study were poor indicators of an inflated price in this case, since those models examine the effect of a single event or a single piece of information on a stock's price, rather than testing for the presence of a long-term price condition. Indeed, Jachym noted that MONY was operationally underperforming firms in its peer group [*41] from March 13, 2003 to September 17, 2003, yet the company's stock outperformed that same group by approximately 25% during the same time period.⁴⁴

44 On cross-examination, AXA's counsel questioned Shaked about his use of capitalized earnings estimates derived from management's August 2003 projections in his DCF analysis. Shaked noted that earnings for insurance companies are normally higher than free cash flows to stockholders, due to, among other things, the effect of DAC amortization. Indeed, AXA's counsel questioned Shaked at length about the professional acceptability of using capitalized earnings as an input in a DCF analysis for an insurance company. Shaked also observed that the earnings estimates he used for 2004 were approximately six times MONY's 2003 actual earnings, while those for 2005 were around 12 times the 2003 numbers. Shaked testified that if MONY management's February 2004 projections were substituted into his model, the DCF value of MONY would have been less than \$ 20 per share. Moreover, Shaked noted that his DCF calculation results in the same value no matter which year is used as the terminal year, and that nearly 100%

of MONY's value from his DCF analysis [*42] derives from terminal value.

AXA's counsel also attacked Shaked's comparable company and comparable transactions metrics. Shaked admitted that MONY's return on equity for 2004 was projected to be the worst, and was the second worst historically, of any of the comparable companies he analyzed. Furthermore, the returns on equity reported by the target companies in Shaked's comparable transactions analysis were all substantially higher than that of MONY. Despite all of this, Shaked placed MONY in the lower quartile in both his comparable company and comparable transactions analyses, rather than at the very bottom.

b. Jachym's Testimony And Shaked's Rebuttal

Jachym testified that the fair value of MONY as of July 8, 2004 was \$ 20.80 per share. He used five different metrics in forming this conclusion. The first method involved a shared synergies analysis, wherein Jachym assumed that the price AXA paid (\$ 31 per share), less synergies derived from the transaction that AXA was willing to share with MONY stockholders (\$ 7.75 per share), was the best indicator of the company's value as a going concern because no material impediments existed to a competing bid. Jachym derived the synergy value [*43] of the transaction from AXA's September 2003 board presentation, and from valuation materials created by CSFB in February 2004 for MONY's directors. Jachym arrived at a value for MONY of \$ 23.75 per share using a shared synergies approach, and weighed this price at 50% in his overall valuation opinion.

Second, Jachym created a sum-of-the-parts analysis, which he claimed to be the best method by which to value MONY absent an arm's-length transaction. According to Jachym, a sum-of-the-parts analysis was appropriate due to a lack of comparable companies and comparable transactions for MONY, as well as the fact that MONY was comprised of three distinct segments (its insurance, brokerage, and asset management businesses).

For the insurance segment, Jachym broke the business down into three components: the adjusted net asset value, the value of in-force business, and the value of future business. Jachym used financial data prepared by MONY as of June 30, 2004, which the company prepared to meet statutory accounting requirements, to arrive at a net asset value figure. To value the in-force and future business, Jachym relied on actuarial projections developed by AXA in September 2003 when it [*44] was deciding how much to bid for MONY. Because KBW is not an actuarial firm, Jachym and his team conducted interviews with several of the AXA actuaries re-

sponsible for compiling the actuarial model to determine the reasonableness of the assumptions used therein.

Jachym calculated MONY's adjusted net asset value to be \$ 1.02 billion, and assigned values of \$ 74.7 million and \$ 97.9 million to the in-force business and the future business, respectively. He testified that the discount rates used to calculate the latter two figures were consistent with those employed by the actuarial appraisal firm MONY retained in early 2003, and that his valuation of MONY's future business was quite aggressive, considering that AXA ascribed no value at all to this segment when it examined MONY in September 2003.

In valuing MONY's brokerage business, Jachym used a weighted average of comparable company and comparable transactions metrics to arrive at a value of \$ 273.1 million. He testified that a DCF methodology was not used because KBW did not have reliable, contemporaneous projections for the brokerage segment for the necessary time periods.

For MONY's asset management business, Jachym used a weighted [*45] average of comparable companies and DCF analyses to arrive at a value of \$ 93.5 million. Jachym testified that, after subtracting the company's long-term debt and adding back holdings of cash and cash equivalents, the total value of MONY using a sum-of-the-parts analysis was \$ 893 million, or \$ 17.68 per share. Jachym weighed his sum-of-the-parts approach at 35% in his overall analysis.

Jachym also applied a comparable company methodology. He selected publicly traded life insurance companies with a market capitalization between \$ 500 million and \$ 5 billion, and then analyzed each firm's price-to-book, price-to-2004 estimated earnings, and price-to-2005 estimated earnings ratios. Jachym testified that, statistically speaking, MONY was the worst performing and most troubled company of any in its peer group. After eliminating an implied minority discount of 16.1%, Jachym arrived at a value of \$ 19.98 per share under the comparable company approach, which he weighed at 7.5% in his overall valuation opinion.

In Jachym's comparable transactions analysis, he selected six relevant acquisitions of life insurance companies that occurred between 2001 and mid-2004. While Jachym assigned a 10% weighting [*46] to five of these transactions, he testified that one transaction in particular was highly comparable to AXA's purchase of MONY--the Safeco transaction. Safeco was operationally similar to MONY, and struggled with low returns on equity. At \$ 1.35 billion, the Safeco acquisition was slightly less than the price paid for MONY, and the transaction closed three months prior to the AXA-MONY merger. Thus, Jachym chose to apply a 50% weight to the Safeco transaction, and ultimately derived an \$ 18.83 per share price

under the comparable transactions method after making a 16.1% discount to eliminate synergies. Jachym weighed his comparable transactions metric at 5% in his overall valuation of MONY.

Jachym testified that, in applying a DCF methodology, he looked for financial data that would equate well with MONY's free cash flows available to stockholders. According to Jachym, Shaked's metric of GAAP earnings bears no resemblance to the actual cash flows of an insurance company, but statutory earnings, which he used, do. Jachym characterized his discount rate of 10% as aggressive, and examined discount rates discussed in proxy statements from financial transactions occurring between 1999 and [*47] February 2004 to validate the reasonableness of this assumption. Applying these inputs, Jachym arrived at a per share price for MONY of \$ 21.83 as of July 8, 2004, which he weighed at 2.5% in his overall analysis.

To rebut Jachym's opinion, Shaked highlighted certain portions of the KBW analysis which he found to be flawed. He testified that the 10%-12% discount rate used in Jachym's DCF analysis was unduly high, and that the \$ 600 million write-down of MONY's DAC and goodwill fundamentally skewed Jachym's comparable company and comparable transactions metrics downward. Shaked also stated that Jachym's inclusion of the Safeco transaction in his comparable transactions analysis was inappropriate because it was a distressed sale of a larger company's line of business, rather than the sale of an entire enterprise.

In order to test the validity of AXA's contention that the share price of MONY was artificially inflated at the time of the merger announcement due to market speculation, Shaked conducted an event study and a volume analysis on MONY stock. In the event study, he found that statistically significant abnormal activity in the price fluctuation of MONY's stock rarely occurred from [*48] March 13, 2003 to September 17, 2003, "In the trading volume analysis, Shaked found that differences in the average trading volumes for MONY stock from January 5, 2001 to March 12, 2003 and from March 13, 2003 to September 17, 2003 were not statistically significant. "46 Shaked concluded that MONY's share price was not materially driven up by market speculation in the time preceding the announcement of the merger. "47

45 Shaked ran a regression analysis on MONY's stock price versus a "peer index" established by AXA's expert, as well as the L&H Index, between February 19, 2002 and February 13, 2003. Once he derived a "normalized" relationship between the movement of MONY's stock and these indexes, Shaked looked for abnormal activity in the seven months prior to the merger announce-

ment. He found statistically significant variations on only nine trading days for the "peer index," and only two trading days for the L&H [*49] Index comparison. On none of these days was there news in the marketplace discussing a possible acquisition of MONY. Shaked testified that if there were rampant merger speculation surrounding MONY in this period, many more statistically significant variations would have occurred.

46 Shaked said that a statistically significant variation between the two periods would have been likely if MONY's stock was trading in anticipation of a merger during the March to September 2003 time frame.

47 On cross-examination, Jachym admitted that he had no statistical analysis to assign a specific dollar amount of merger speculation imbedded in the price of a MONY share, and admitted that some of the price increase in the six months prior to the merger announcement could have been due to upward trends in the equity markets. Highfields's counsel repeatedly questioned Jachym regarding his assumptions as to MONY's potential difficulty in generating profitable new business. Moreover, Jachym admitted that the price-to-book value ratio assigned to Safeco in KBW's comparable transactions analysis did not adjust for Safeco's unrecognized capital gains and losses, which resulted in a substantial understatement of [*50] MONY's value under that particular metric.

IV.

As an initial matter, the court finds that neither party fully satisfied its burden of persuasion regarding a valuation of MONY.⁴⁸ Generally speaking, however, several of Jachym's models--namely, his shared synergies approach and his sum-of-the-parts/actuarial appraisal analysis--are more credible, and therefore form the underlying basis for the court's determination of fair value in this case. Strikingly, despite the industry standard of using a sum-of-the-parts/actuarial appraisal methodology to value an insurance conglomerate as a going concern, and despite the reliance this court typically places on the merger price in an appraisal proceeding that arises from an arm's-length transaction, Shaked provided no testimony about MONY's value pursuant to these important models.

48 Indeed, the parties' briefs are like two ships passing in the night, with each litigant showing an equal amount of tedium in attacking (often with good cause) every assumption used or con-

clusion reached by the other party's expert, no matter how minor. In using KBW's shared synergies and sum-of-the-parts analyses as a framework for a fair value determination (while [*51] making adjustments based on its own independent business judgment), the court feels compelled to observe that, like democracy was to Winston Churchill, Jachym's work was basically the least worst valuation scheme presented in this case.

Shaked's valuation not only suffers because of these analytical gaps, it is also markedly disparate from market price data for MONY's stock and other independent indicia of value.⁴⁹ Because Shaked's conclusions substantially deviate from these objective barometers, it is appropriate to use Jachym's opinion as a baseline for the court to formulate its own independent judgment as to a fair value for MONY.

49 See, e.g., *Cede & Co. v. Technicolor, Inc.*, 2003 WL 23700218, at *4 (Del. Ch. Dec. 31, 2003) (noting that a valuation supported by several independent indicia of value is more reliable than an expert who "does not even attempt to perform reasonableness checks upon his valuation"); *Cede & Co. v. Technicolor, Inc.*, 1990 WL 161084, at *31 (Del. Ch. Oct. 19, 1990) (employing market price data not as an independent valuation source, but "as corroboration of the judgment that [an expert's] valuation is a reasonable estimation of intrinsic value of [the appraised [*52] company], exclusive of elements of value arising from expectation or accomplishment of the merger"), *rev'd on other grounds*, 634 A.2d 345 (Del. 1993). For example, Shaked's comparable transactions analysis indicated that MONY should have sold for \$ 55.12 before backing out synergies, a figure 77% higher than the actual merger consideration of \$ 31 per share, and a price at which a bidder topping AXA's bid by \$ 4 per share would have made \$ 1 billion on a \$ 1.75 billion investment. Likewise, Shaked's comparable company analysis ascribes a value to MONY of \$ 46.69, even though on the last day of trading before the announcement of the merger, and given the market knowledge of a likely transaction, MONY stock traded at only \$ 29.33. See also JX 1135 (March 22, 2004 Deutsche Bank report stating that "if the AXA-MNY deal were to fall apart, we expect the MNY stock to trade in the \$ 25-27 range"); JX 1132 (February 11, 2004 Fox-Pitt report stating that "we expect the stock will drop below \$ 30 if the merger is voted down"); JX 125 at 13 (ISS Proxy Report stating that "[c]ommentary from Wall Street analysts

suggest MONY may fall into the mid twenties if the merger is not consummated").

A. The [*53] Experts' DCF Analyses

Typically, Delaware courts tend to favor a DCF model over other available methodologies in an appraisal proceeding.⁵⁰ However, that metric has much less utility in cases where the transaction giving rise to appraisal was an arm's-length merger,⁵¹ where the data inputs used in the model are not reliable,⁵² or where a DCF is not customarily used to value a company in a particular industry. While all of these factors influence the court's decision when ascribing weight to an expert's DCF model, only the latter two factors require substantial discussion here.

⁵⁰ *Crescent/Mach I P'ship v. Turner*, 2007 Del. Ch. LEXIS 63, 2007 WL 1342263, at *9 (Del. Ch. May 2, 2007).

⁵¹ See, e.g., *Union Ill. 1995 Inv. L.P. v. Union Fin. Group, Ltd.*, 847 A.2d 340 at 359-61 (discounting the utility of a DCF analysis in this type of circumstance).

⁵² See, e.g., *Doft & Co. v. Travelocity.com, Inc.*, 2004 Del. Ch. LEXIS 75, 2004 WL 1152338, at *5-7 (Del. Ch. May 20, 2004) (rejecting a DCF valuation because the inputs were not reasonably reliable).

1. Shaked's DCF Analysis

A DCF assigns a value to an enterprise by adding (1) an estimation of net cash flows that the company will generate over a period of time to (2) a terminal value equal to the future value, as of the end of the projection [*54] period, of the company's cash flows beyond the projection period.⁵³ Fundamentally, Shaked's DCF is flawed because it does not estimate cash flows over a time period, but simply capitalizes an earnings estimate for MONY's 2005 fiscal year devised by management in August 2003.

⁵³ *ONTI, Inc. v. Integra Bank*, 751 A.2d 904, 917 (Del. Ch. 1999).

Shaked relies on GAAP earnings to hypothesize a cash flow stream for MONY. However, GAAP earnings are not useful because state regulation materially reduces the free cash flows an insurance company has available for distribution to stockholders by imposing capital retention and dividend set-aside requirements on those earnings. Shaked also improperly uses a constant rate of growth beginning in 2005 to extrapolate his earnings estimates (without presenting any evidence that MONY's

earnings would stabilize after 2005). The unreliability of Shaked's "DCF" analysis is further demonstrated by the observation that it yields substantially the same valuation for MONY regardless of whether a five-year, ten-year, or even one-year projection was used, thus rendering the projection time period irrelevant.⁵⁴ Indeed, Shaked's DCF becomes nothing more than an extension [*55] of 2005 financial projections in which MONY's calculated terminal value represents almost 100% of Shaked's total estimated value of the company.⁵⁵

⁵⁴ See *Dobler*, 2004 Del. Ch. LEXIS 139, 2004 WL 2271592, at *10 (noting that a DCF is meaningless where a projection time period becomes irrelevant because it is essentially nothing more than an extension of one year's financial results).

⁵⁵ Although his wrongful extrapolation of one year's estimated earnings is by itself sufficient to render Shaked's DCF useless, his use of dated management projections further undermines his DCF calculations. Shaked used August 2003 projections, rather than February 2004 projections. The latter accounted for MONY's then-recent ratings downgrade, and its most recent financial performance (including all of 2003). Truly, it was hopelessly optimistic for Shaked to assume that MONY, as a stand-alone company facing further ratings downgrades and trying to implement cost saving measures which would affect its revenues, would be able to increase its 2005 earnings to 12 times its actual 2003 figures. His utilization of these figures completely ignores the fundamental nature of the enterprise subject to this appraisal proceeding. *Rapid-American Corp. v. Harris*, 603 A.2d 796, 805 (Del. 1992) [*56] (citing 8 Del. C. § 262(h)).

2. Jachym's DCF Analysis

In several ways, Jachym conducted his DCF analysis in a more credible fashion than did Shaked. Jachym did not rely on outdated management projections which were, by any reasonable measure, not indicative of MONY's future prospects. Jachym also used estimated statutory earnings, which correlate more strongly with cash available for distribution to stockholders, as a proxy for cash flow. But these indications that Jachym's DCF is more structurally sound do not mean the court should blindly rely on Jachym's application of this metric.

As the evidence at trial showed, industry experts and executives do not consider a DCF a particularly important framework for valuing a company whose primary business is selling life insurance. A successful insurer can have massive (and misleading) outflows of cash in

times of high sales volume, whereas a troubled, yet established, company can show sizeable positive cash flows because its in-force policy premiums overshadow small commission payments and other variable expenses resulting from low current sales. Jachym, an analyst with more than 20 years of experience in the insurance sector and who works [*57] for an investment bank that is a juggernaut in the financial services and insurance industries, chose to assign only a 2.5% weighting, no more than a token figure, to a DCF in his overall valuation of MONY. Therefore, while a properly conducted DCF analysis is typically granted substantial evidentiary weight by a court in an appraisal proceeding,⁵⁶ court will not utilize a pure DCF methodology in determining MONY's fair value.

⁵⁶ *Crescent*, 2007 Del. Ch. LEXIS 63, 2007 WL 1342263, at *9.

B. The Experts' Comparable Transactions Analyses

A comparable transactions analysis is an accepted valuation tool in Delaware appraisal cases. The analysis involves identifying similar transactions, quantifying those transactions through financial metrics, and then applying the metrics to the company at issue to ascertain a value.⁵⁷ The utility of the comparable transactions methodology is directly linked to the "similarity between the company the court is valuing and the companies used for comparison."⁵⁸ Because a testifying expert necessarily exercises a degree of subjective judgment in selecting the transactions he actually compares to the one at issue, a reviewing court must closely evaluate whether a party who relies on [*58] a comparable transactions analysis has met its burden of persuasion.

⁵⁷ *In re United States Cellular Operating Co.*, 2005 Del. Ch. LEXIS 1, 2005 WL 43994, at *17 (Del. Ch. Jan. 6, 2005) (citing *Dobler*, 2004 Del. Ch. LEXIS 139, 2004 WL 2271592, at *8).

⁵⁸ *Id.* (citing *Lane v. Cancer Treatment Centers of America, Inc.*, 2004 Del. Ch. LEXIS 108, 2004 WL 1752847, at *34 (Del. Ch. July 30, 2004)).

1. Shaked's Comparable Transactions Analysis

In his comparable transactions analysis, Shaked used dated transactions that occurred during a strong bull market in the late 1990s and early 2000s, the majority of which were five years removed from the closing of the AXA-MONY merger.⁵⁹ More detrimentally, however, Shaked relied on companies that were not directly comparable to MONY, while omitting from his analysis one highly probative transaction--the purchase of Safeco.⁶⁰ These discretionary judgments resulted in a substantial overvaluation of MONY.

⁵⁹ Of the seven transactions Shaked classified as comparable, four were from 1999.

⁶⁰ In Highfields's post-trial briefing, Shaked belatedly attempts to include the Safeco transaction in his comparable transactions analysis. This effort is procedurally inappropriate, and casts great doubt on Shaked's objective judgment considering he [*59] originally believed it was appropriate to ignore the Safeco transaction altogether. In any event, the court gives this dilatory tactic no weight, since Shaked still relies on other non-comparable transactions.

The Safeco transaction is temporally relevant to the AXA-MONY merger. It was announced in late September 2003 and closed in March 2004. Moreover, the consideration paid in the two transactions was similar. Perhaps most strikingly, the life insurance businesses of both companies suffered from low returns on equity, an influential factor in both companies being sold at substantial discounts to GAAP book value.⁶¹

⁶¹ The Safeco transaction occurred at approximately 78% of book value, while the MONY transaction went through at roughly 72% of book value.

Highfields's argument that the Safeco transaction is irrelevant because it involved a distressed sale at a significant marketability discount is simply makeweight. Goldman Sachs, a respected financial advisor, conducted an auction for Safeco.⁶² Contemporaneous buy-side and sell-side actuarial appraisals conducted by prominent actuarial firms confirm that the discount from book value in the Safeco transaction was justified, and erodes [*60] Highfields's contention that Safeco was sold at a marketability discount.⁶³ Indeed, one would expect this to be the case, considering that Safeco's life insurance segment filed statutorily-required financial statements that were readily available to members of the investment community. For these reasons, the court finds Shaked's comparable transactions methodology unreliable and unpersuasive.

⁶² Trial Tr. 356-57.

⁶³ JX 1222; JX 1251.

2. Jachym's Comparable Transactions Analysis

In his rebuttal report, Jachym criticizes as improper the use of a price-to-book value multiple in Shaked's comparable transactions model. However, it is Jachym's reliance on an implied price-to-earnings multiple of 12.5x to value MONY that fails the test of reasonable-

ness. This calculation resulted in an implied value for MONY of only \$ 4.50 per share. Despite the fact that, in the court's view, no conceivable basis exists to assign any weight to such an outlying value of MONY, Jachym insisted it was sound judgment to weigh this figure at 30%. The powerful influence the \$ 4.50 per share number imparted on his comparable transactions model unreasonably reduced the going-concern value Jachym derived for MONY.

Although [*61] the court could adjust the weight Jachym placed on the price-to-earnings multiple to reach an acceptable valuation for MONY, there remains an irreparable structural malady in Jachym's comparable transactions methodology--a failure to adjust the price-to-book value metric for each selected company's unrealized capital gains and losses. Under Financial Accounting Standard 115 ("FAS 115"), insurance companies are permitted to report losses in their investment portfolio without adjusting their book value to reflect those losses. If an adjustment is made for FAS 115, unrealized losses not yet booked will increase the reported book value of the firm. The effect of this adjustment, for present purposes, is a decrease in the insurer's price-to-book value multiple.

Despite the analyst and industry preference of evaluating a firm after making an FAS 115 adjustment, Jachym did not do so for his comparable transactions. In his presentation to the court at trial, Jachym assigned a ratio of .53x for the Safeco transaction, despite admitting on cross-examination that the multiple would increase to .78x when adjusted for FAS 115. Although the court requested that Jachym reconfigure his model to compensate [*62] for this shortcoming, he was unable to do so because book value excluding FAS 115 is not publicly available for three of the six transactions he used. Therefore, the court finds that Jachym's comparable transactions analysis is irretrievably defective, and cannot form a legitimate basis from which to derive MONY's fair value.

C. The Experts' Comparable Company Analyses

The comparable company valuation model involves "(1) identifying comparable publicly traded companies; (2) deriving appropriate valuation multiples from the comparable companies; (3) adjusting those multiples to account for the differences from the company being valued and the comparables; and (4) applying those multiples to the revenues, earnings, or other values for the company being valued." ⁶⁴ When evaluating the utility of this methodology in a particular case, a court must consider the degree of similarity between the company valued and the companies compared, for "at some point, the differences become so large that the use of the compara-

ble company method becomes meaningless for valuation purposes." ⁶⁵

64 *Dobler*, 2004 Del. Ch. LEXIS 139, 2004 WL 2271592, at *8 (quoting *Agranoff v. Miller*, 791 A.2d 880, 892 (Del. Ch. 2001)).

65 *Lane*, 2004 Del. Ch. LEXIS 108, 2004 WL 1752847, at *34 [*63] (quoting *In re Radiology Assocs., Inc. Litig.*, 611 A.2d 485, 490 (Del. Ch. 1991)).

1. Shaked's Comparable Company Analysis

Shaked's comparable company methodology suffers from the same problem the court found with his comparable transactions analysis--namely, the companies Shaked examined were not sufficiently comparable to MONY to render his work reliable for purposes of a Delaware appraisal proceeding. Using a price-to-book value metric, ⁶⁶ Shaked placed MONY at the median of the bottom quartile in his model, assigning the company a multiple of .89x. This multiple is a 27% discount from Shaked's own comparable company median, and represents a 33% discount from the mean. Thus, Shaked's conclusion implicitly supports AXA's critique that his comparable company analysis is overly biased and subjective. In the past, other Delaware courts have found a comparable company metric to be unreliable where such a discrepancy is present. ⁶⁷

66 In deriving these ratios, Shaked used data from second quarter Form 10-Qs, an improper approach as this information was not publicly available as of July 8, 2004, and thus was not reflected in the market price of the companies as of that date.

67 *Dobler*, 2004 Del. Ch. LEXIS 139, 2004 WL 2271592, at *11 [*64] (quoting *Taylor*, 2003 WL 21753752, at *9, for the proposition that by choosing a drastically reduced multiple, "[an expert] demonstrate[s] that he believes the guideline companies are not truly comparable," and rejecting a deviation of 48% as unreasonable); *Gotham Partners, L.P. v. Hallwood Realty Partners*, 855 A.2d 1059, 1076 & n.31 (Del. Ch. 2003) (discussing the dangers of significantly deviating from the mean or median of guideline companies' multiples because the analysis becomes too biased and subjective).

Shaked's calculation of a 30.1% control premium in his comparable company analysis, which he achieved by removing the implicit minority discount from the calculated stock price of MONY, was also conducted in a

questionable fashion. None of the more than 50 transactions he examined, all of which involved a financial buyer taking the acquired company private, involved an insurance company. Indeed, only one transaction even involved a financial institution. The use of a pool of such dissimilar transactions, leaves the court with no confidence that Shaked's calculation of a 30.1% control premium was proper, particularly since he ignored the fact that financial buyers may also enjoy [*65] synergistic benefits from their acquisitions.⁶⁸ For these reasons, the court finds Shaked's comparable company methodology unreliable and gives it no weight.

68 See, e.g., *Kleinwort Benson Ltd. v. Silgan Corp.*, 1995 WL 376911, at *5 (Del. Ch. June 16, 1995) (observing that the premium necessary to remove the inherent minority discount in a publicly traded stock is somewhere between zero and the full value of the control premium, and discounting available premium data which ranged from 34%-48% to 12.5% to account for synergies). As Jachym testified, even financial buyers have some synergies when making an acquisition, such as the ability to reduce the acquired company's cost of capital and to attract best-in-breed management and board members.

2. Jachym's Comparable Company Analysis

As was the case with his DCF analysis, Jachym both explicitly (in his trial testimony) and implicitly (by weighing the metric at only 7.5% in his overall valuation) admits to the lack of real comparability between MONY and the other publicly traded life insurance companies examined in his comparable company model. The price-to-book value metric for Jachym's comparable firms, which he weighted at 60%, ranged [*66] from .54x to 1.36x. Jachym placed MONY at the bottom of this range. This .54x multiple is a 40% discount from Jachym's own price-to-book value median, and represents a 41.4% discount from the mean. Jachym's comparable company analysis, then, bears the same hallmarks of unreliability Shaked's.⁶⁹

69 *Id.*

Jachym's methodology is further undermined by contradictions in his trial testimony and his report. Jachym stated that the market did not value MONY on the basis of its earnings, and that it was not acceptable practice to derive stock values for an insurance company solely from earnings. Thus, Jachym's decision to rely heavily on price-to-estimated earnings multiples was unreasonable, particularly in light of market estimations of MONY's value.⁷⁰ By weighting an implied value of \$ 10.70 per share at 40% in his comparable company

analysis, Jachym unduly skewed downward the result obtained from this model.⁷¹ Viewed with the shortcomings associated with his price-to-book value metric, the court rejects Jachym's comparable company analysis.⁷²

70 Market analysts suggested a stand-alone price for MONY in the mid-\$ 20 range several months before the transaction closed. See note 49 *supra*.

71 Jachym [*67] ascribed 20% weight to an implied value per share of \$ 8.26 based on price-to-2004 estimated earnings, and 20% weight to an implied value of \$ 13.14 based on price-to-2005 estimated earnings.

72 Despite the court's pointed questioning at trial, both Shaked and Jachym stood by their decisions to remove an implicit minority discount in MONY's stock when conducting their comparable company analyses. Although Delaware courts now seem to accept that the application of this valuation metric requires such an adjustment, the debate in the legal and financial community continues. Compare Lawrence A. Hamermesh & Michael L. Wachter, *The Short and Puzzling Life of the "Implicit Minority Discount" in Delaware Appraisal Law* (Univ. of Penn. Inst. For Law & Economics, Research Paper No. 07-01), available at http://w4.stern.nyu.edu/clb/docs/Events/IMD_Draft_1-18-07.pdf (arguing that the implicit minority discount has not gained general acceptance in the financial community) and Richard A. Booth, *Minority Discounts and Control Premiums in Appraisal Proceedings*, 57 BUS. LAW. 127, 148-51 (2001)(same) with John C. Coates IV, *"Fair Value" As An Avoidable Rule of Corporate Law; Minority Discounts in Conflict* [*68] *Transactions*, 147 U. PA. L. REV. 1251 (1999) (arguing that the elimination of an implied minority discount is, in some instances, appropriate).

D. Shaked's Market Price Analysis

Although Shaked technically gave it no weight in his ultimate determination of MONY's fair value, he conducted a market price analysis as a purported test of reasonableness, and concluded that MONY's expected unaffected share price as of July 8, 2004 was \$ 42.22. To arrive at this price, Shaked took what he believed was MONY's unaffected share price a month before the announcement of the merger (\$ 28.20), eliminated a minority discount (30.1%), and then applied a beta multiple against the return of the L&H Index from the date of the merger announcement to the merger closing.⁷³

73 The return on the L&H Index during this period was 21.7%. Shaked calculated a beta of 0.69, and thereby derived an expected return for MONY of 15.1% during the same time frame.

As an initial matter, the court is convinced that MONY's stock price included an element of value reflecting merger speculation leading up to the September 17, 2003 announcement. MONY was well covered by analysts, and the evidence at trial overwhelmingly showed [*69] the market was aware that a transaction involving MONY would probably occur soon after the volume ownership restrictions on the company's stock expired in November 2003. Due to the extended period of time that this information was available, the court finds plausible Jachym's contention that a merger speculation premium was an imbedded condition in MONY's pre-September 17 stock price.⁷⁴

74 Additionally, the imbedded nature of this merger speculation condition would arguably render Shaked's addition of a minority discount to MONY's stock price an improper double-counting.

The event study and the volume study conducted by Shaked, which form his basis for opining that MONY's stock price was unaffected, are not meaningful where such an imbedded condition exists.⁷⁵ Moreover, Shaked's assumption that MONY's stock price would move in direct proportion to an index is highly speculative. Significantly, Shaked admitted at trial that three of the seven companies on the L&H Index were not comparable to MONY, and that MONY historically underperformed those component companies.

75 The predictive value of such analyses are granted great deference only in those situations where the market suddenly becomes [*70] aware of novel and previously unknown information about a particular security. *See, e.g., Schwab v. Philip Morris USA, Inc.*, 449 F.Supp.2d 992, 1181 (E.D.N.Y. 2006) ("According to the Efficient Capital Markets Hypothesis, securities prices in efficient market incorporate all available public information. One way to determine whether price incorporates *new* and relevant publicly available information is to conduct an event study . . .") (emphasis added).

Jachym testified that such an indexing technique was not commonly relied upon in the financial community. Indeed, Jachym said that, at least in his experience, indexing is unprecedented. This court has previously considered, and rejected, the explanatory power of a similar model.⁷⁶

76 In *Emerald Partners v. Berlin*, 2003 Del. Ch. LEXIS 42, 2003 WL 21003437 (Del. Ch. Apr. 28, 2003), the defendants' expert applied a discount based on decreases in the market capitalization of purportedly comparable companies to opine that the going-concern value of an appraised entity decreased in the time period between the November 30, 1987 merger announcement and the August 1988 merger closing. The court rejected that approach, noting that:

From a methodological standpoint, [*71] [the expert's] discount approach to valuing [the company] is highly problematic, because what it discounts is a going concern value based upon a decline in *market capitalization* of selected companies in the same industry. That method of valuation is counterintuitive, because (among other things) it assumes that each firm's going concern value has a constant relationship to the average market capitalization of all comparable firms within the same industry . . . [This valuation approach] has not been shown to be generally accepted as valid in the business/financial valuation community.

Id. at *35-36 (emphasis in original). That instruction applies with equal force to Shaked's model here.

Finally, Shaked's market price analysis assumes, and wrongly so, that AXA's \$ 31 offer acted as a market ceiling on MONY's stock price, rather than a floor. In reality, the latter is more likely. If the going-concern value of MONY was somehow depressed by AXA's bid during a time of highly favorable market conditions, the emergence of a topping bid would be all the more probable. For these reasons, the court finds Shaked's market price analysis flawed and will not consider it reliable in determining MONY's [*72] fair value.

E. The AXA-MONY Transaction Provides A Reliable Basis On Which To Value MONY

As mentioned above, a court may derive fair value in a Delaware appraisal action if the sale of the company in question resulted from an arm's-length bargaining process where no structural impediments existed that might prevent a topping bid.⁷⁷ The court must, however,

exclude synergistic elements from the sale price to arrive at a fair value.⁷⁸

77 *Union Ill.*, 847 A.2d at 357.

78 *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 220 (Del. 2005).

Jachym's decision to weigh the \$ 31 per share merger price, less synergies, at 50% in his valuation analysis is both justified and not surprising. Clearly, the merger between AXA and MONY was an arm's-length transaction. No MONY officer or director participated in the buy-side of the deal, and none of these individuals continued employment with AXA following the merger. The directors "consistently acted in an independent manner" throughout the merger process, and the three inside directors on MONY's board who stood to receive change-in-control payments recused themselves from the vote of the MONY board that approved the transaction.⁷⁹

79 *MONY II*, 853 A.2d at 667.

Of [*73] equal importance, no material impediments existed to prevent another bidder from entering the sale process for MONY during the eight-month period between the merger announcement and the MONY stockholder vote.⁸⁰ With a market check of this length, the court must conclude that any seriously interested bidder would have come forward, given that (1) AXA publicly stated that it would not increase its bid beyond \$ 31 per share,⁸¹ (2) industry analysts and executives understood that MONY was "in play,"⁸² and (3) CSFB was unaware of any other entity that had an interest in acquiring MONY at a higher price.⁸³

80 Trial Tr. 647-48; 774-75.

81 Trial. Tr. 646-47; JX 1405.

82 Durham Dep. 38-40; Foti Dep. 82-84, 233, 235.

83 *MONY I*, 852 A.2d at 22.

Highfields's contention that impediments to a topping bid existed does not bear scrutiny. Highfields says that substantial due diligence costs deterred a bidder from entering the process. However, a prospective buyer could have defrayed those costs through a hedging strategy, buying up to a 5% stake in MONY before surfacing an interest in making a competing bid. Indeed, if Highfields was actually convinced, despite offering no contemporaneous analysis prepared [*74] by its own employees as evidence in this case, that AXA's bid undervalued MONY by nearly \$ 12 per share, it could have either made a topping bid by itself or as part of a group

or encouraged a third party to do so.⁸⁴ If MONY was truly worth \$ 43 per share, certainly some savvy investor likely would have competed with AXA, as each dollar per share below that level, according to Highfields's theory, would have resulted in the purchaser realizing approximately \$ 50 million in value.⁸⁵

84 Highfields was intimately familiar with investors who might have been willing to purchase an undervalued insurance company, since it participated in the Safeco transaction in the same time frame as the AXA-MONY merger. Furthermore, Highfields had significant financial resources available with which to acquire a highly undervalued firm. Just seven months following the merger, Highfields made a \$ 3.25 billion cash offer for 100% of Circuit City, Inc.

85 It seems that much of this discrepancy between the merger price and Shaked's valuation results from Highfields's view that MONY's DAC and goodwill were improperly discounted by \$ 600 million. The evidence shows that this financial accounting-purchase accounting [*75] substitution, however, was little more than an accounting game which, when implemented, has the effect of driving up valuation metrics based on earnings, while driving down metrics based on book value. In any event, the valuation techniques the court ultimately uses to determine the fair value of MONY's shares (sum-of-the-parts and shared synergies) are not directly dependent on the DAC write-down. For instance, with respect to the shared synergies approach, investors and the marketplace were aware of the \$ 600 million adjustment because it was included in the proxy statement issued in connection with the merger. If this adjustment vastly understated MONY's fair value, then a topping bidder would have had all the more reason to enter the fray and compete with AXA to purchase the company.

The more logical explanation for why no bidder ever emerged is self-evident: MONY was not worth more than \$ 31 per share because no prospective purchaser, either strategic or financial, stood to gain the synergies AXA anticipated in the merger, synergies which it was willing to share with MONY's stockholders.⁸⁶ On these facts, the transaction giving rise to this appraisal action is a solid indicator [*76] of MONY's fair value, and the court finds reasonable and appropriate Jachym's decision to grant the merger price great deference in his valuation analysis.

86 See *MONY I*, 852 A.2d at 22 ("Using these resources and the considerable body of informa-

tion available to it, the board determined that because MONY and AXA share a similar business model, the career agency distribution system, and have complementary products, AXA was a 'perfect fit' for MONY, and thus presented an offer that was the best price reasonably available to stockholders.").

The court's determination on this point, however, is not entirely dispositive. The court must still account for the amount of shared synergies imbedded in the \$ 31 per share merger price. The parties' positions on this issue differ. Highfields levels several meritorious attacks on Jachym's analysis, but fails to offer any alternative position on how synergies ought to be determined. Therefore, the court, exercising its independent business judgment, finds it appropriate to rely on Jachym's shared synergy calculations after certain adjustments.

Based on conclusions reached by industry analysts, CSFB, and AXA's management, Jachym opined that shared synergies [*77] represented at least 25% of the merger price, or \$ 7.75 per share. Despite Jachym's view that a DCF methodology generally yields an unreliable valuation result in the insurance company context, and despite the fact that, in conducting his own broader valuation analysis, Jachym never relied on CSFB's February 2004 board presentation, he did rely on those materials in calculating shared synergies. The court finds this reliance improper.

AXA's view of the synergistic elements of the transaction are likely more reliable in Jachym's sum-of-the-parts analysis. Jachym relied heavily on the actuarial assumptions in AXA's September 2003 valuation of MONY, which lends credence to the synergy estimations contained in AXA's valuation. Trial testimony also showed that the September 2003 valuation was not of the typically skewed, buy-side variety: rather, it was an objective study created by a team of actuaries whose professional standards require neutrality.⁸⁷ It is therefore reasonable to assume that, based on its September 2003 valuation of MONY, AXA viewed the lower end of shared synergies in the transaction at \$ 9.54.⁸⁸

⁸⁷ Actuarial work in the insurance context, of course, stands in contrast [*78] to the often biased valuation work presented to opposing boards by investment bankers representing a particular company.

⁸⁸ JX 167 at 55.

The synergy figures, however, must take into account certain discrepancies between AXA's September 2003 valuation and Jachym's sum-of-the-parts valuation (the only other legitimately conducted valuation metric

presented in this litigation) as of the transaction closing date. Essentially, AXA's good faith estimations in September 2003, according to a corrected version of Jachym's later analysis, undervalued MONY by approximately \$ 5.42 per share.⁸⁹ Therefore, AXA's calculation of shared synergies as \$ 9.54 per share must be adjusted downward to \$ 4.12 per share, with the result being a merger price, less shared synergies, of \$ 26.88 per share. For the above reasons, the court will weigh this figure at 75% in determining MONY's going concern value as of July 8, 2004.⁹⁰

⁸⁹ AXA did not place a value on MONY's term life business as part of its September 2003 analysis, and Jachym testified that this value should have been approximately \$ 97,887,259. Additionally, Jachym's report shows that AXA undervalued MONY's broker-dealer subsidiary by \$ 145,940,000 [*79] and its fund management group by \$ 57,996,785. However, Jachym calculated MONY's corporate debt at a higher figure than AXA by \$ 27,972,935. Together, these figures represent approximately \$ 5.42 for each of the 50,521,772 shares outstanding at the time of the merger. These modifications are discussed in greater detail later in this opinion.

⁹⁰ Highfields's argument that the shared synergies approach is improper because the synergy calculation only represents synergies to AXA as a particular buyer is unpersuasive. Synergies resulting from a transaction are always buyer-specific, and will fluctuate depending on efficiencies and expense savings a purchaser can achieve. Yet this fact has no real bearing on a company's going-concern value, since the synergies are always subtracted out from the merger price. Indeed, acceptance of this argument would cast great doubt on the entire line of Delaware cases that assume an arm's-length transaction price, less synergies, is strong evidence of fair value.

F. Jachym's Sum-Of-The-Parts Analysis Provides A Reliable Valuation

Jachym's sum-of-the-parts analysis consisted of four distinct calculations: (1) an actuarial appraisal to value MONY's life insurance [*80] and annuity business; (2) a blended comparable company and comparable transactions approach to value MONY's broker-dealer subsidiary; (3) a weighted discounted cash flow and comparable company metric to value MONY's asset management business; and (4) a standard accounting approach to value MONY's corporate assets and liabilities. For the reasons that follow, the court finds this methodology, with slight modifications, a reliable means of deriving

MONY's fair value since such a metric is standard procedure in the financial community when valuing an insurance conglomerate consisting of diverse lines of business where no directly comparable companies or transactions exist.

1. The Life Insurance And Annuity Business

Jachym's valuation of MONY's life insurance and annuity business consisted of an actuarial appraisal. He determined that, as of July 8, 2004, MONY's statutory net asset value was \$ 1,020,390,155, while the value of its in-force business was \$ 74,673,875. Jachym also opined that the present value of MONY's new business was \$ 97,887,359. Thus, this component of his sum-of-the-parts analysis is worth \$ 1,192,951,290.

As Jachym testified, an actuarial appraisal is the preferred valuation [*81] methodology in the insurance industry. Highfields's witnesses did not contradict this assertion. Strangely, Highfields offered no alternative actuarial appraisal in this litigation, despite relying on actuarial analyses when it invested in the Safeco transaction. Instead, it labels Jachym's testimony incompetent because AXA, not Jachym, created the assumptions underlying the actuarial model. Moreover, Highfields contends that Jachym's analysis improperly relied on stale projections created by MONY management. Under scrutiny, however, both of these points are unpersuasive.

The evidence at trial overwhelmingly showed that Jachym's reliance on the actuarial assumptions used in AXA's model was reasonable. His team conducted extensive interviews with AXA's actuarial staff to vet those assumptions. Not only was the Jachym's work with AXA more extensive than the work done on one of his typical valuation engagements, but the questions his team posed to AXA's actuaries were materially similar to those AXA asked of MONY's actuarial staff during its due diligence inquiry. Additionally, the court does not find it troublesome, given the particular type of business being valued in this case, that [*82] a prospective buyer created the actuarial assumptions used by Jachym. In the insurance business, actuaries act as neutral evaluators whose professional obligations and reputations depend upon the objectivity of their work product.

Moreover, the court finds that Jachym reasonably updated MONY's management projections as of July 8, 2004. Jachym determined the company's net asset value component based on statutory filings MONY submitted to state regulators on June 30, 2004. For MONY's in-force business, Jachym testified that he adjusted MONY's post-tax earnings and expenses to bring those figures in line with the closing date of the merger, and also eliminated certain downward adjustments made by AXA. Finally, the court agrees with Jachym's assessment

that the company would not be able to write profitable business in the future (other than its specialty products line).⁹¹ Therefore, the court finds that the valuation conclusions Jachym reached with respect to MONY's life insurance and annuities business are reasonable and are supported by competent evidence.

91 Highfields argues that Jachym essentially adopted AXA's assumptions on this point, and that those assumptions were wrong because [*83] they assigned a zero value to MONY's future business only because AXA planned to discontinue selling MONY products after completion of the merger. This argument is unpersuasive for two reasons. First, Jachym did estimate a positive value \$ 97,887,359 for MONY's new business, although that amount solely derives from the company's specialty products line. Second, as to other insurance and annuity products, MONY's prospects of ratings downgrades and its lack of a competitive position in the marketplace meant that its future run-of-the-mill insurance underwriting would not generate a positive return. As Jachym testified, although writing unprofitable business seems foolish from an economic standpoint, MONY would have continued to do so to keep its moderately profitable in-force business from fleeing and to maintain its distribution system. Trial Tr. 841-45, 853-60. *See also id.* at 642, 679-80 (Stanley Tulin commenting that although MONY was selling products, it was not making money off of what it was selling); Daddario Dep. 241-42 (explaining that, in the event of a ratings downgrade, MONY might need to sell business at a loss to maintain its distribution network); Stoddard Dep. 196-97 [*84] (noting that CSFB believed MONY would not be able to write profitable future business over the long term).

2. The Broker-Dealer Business

Jachym's decision to employ a weighted average of comparable transactions (66.7%) and comparable company (33.3%) analyses to value MONY's broker-dealer business was justified methodologically, particularly since reliable, contemporaneous projections for this business segment were not available. Indeed, Highfields did not specifically argue with Jachym's decision to employ these two models, nor did it note any impropriety in his choice of comparable companies and transactions.

The court does find, however, that Jachym erred in placing weight on backwards-looking earnings metrics in both of these models. In Jachym's comparable company analysis, this particular multiple, which was assigned a

20% weight, valued the broker-dealer business at \$ 113.8 million.⁹² In his comparable transactions analysis, this specific metric, weighted at 22.2%, implied values of \$ 99.1 million and \$ 100.4 million.⁹³ As Jachym readily admitted at deposition and at trial, these figures are outliers in each model, and there is no likelihood that they accurately estimate the fair [*85] value of the broker-dealer subsidiary. Exercising its business judgment, the court must remove these values from Jachym's analysis, and finds that the fair value of the broker-dealer business as of July 8, 2004 was \$ 345.94 million.⁹⁴

92 The other metrics returned values of \$ 389 million, \$ 307.5 million, \$ 271.6 million, and \$ 349.5 million. Without the backward-looking earnings metric, the comparable company analysis implies a value of \$ 382.4 million.

93 The other metrics returned values of \$ 286.3 million, \$ 381.9 million, \$ 314.0 million, and \$ 640 million. Without the backward-looking earnings metric, the comparable transactions analysis implies a value of \$ 327.7 million.

94 This figure is achieved by the following formula: $(\$ 327.7 \text{ million} \times (2/3)) + (\$ 382.4 \text{ million} \times (1/3)) = \$ 345.94 \text{ million}$.

3. The Asset Management Business

To value the asset management segment of MONY, Jachym conducted a DCF analysis and a comparable company analysis, which he then weighted at 60% and 40%, respectively. At trial, the Highfields expert witnesses offered no material criticism of Jachym's valuation of the asset management business, and gave no alternative valuation. Instead, Highfields argues that [*86] Jachym improperly relied upon AXA projections in his DCF analysis. This assertion is incorrect because the projections Jachym used were based on historical and projected figures obtained from MONY's management.

As Jachym admitted at trial, however, the projections used for both the DCF and the comparable company models were denominated in euros rather than dollars. Recalculating this figure results in a \$ 24,538,425

increase in the going-concern value of the asset management business.⁹⁵ Thus, the court finds that the proper value of that operation is \$ 117,996,785 as of July 8, 2004.

95 Jachym testified that changing the denomination would result in a \$ 0.17 increase in his overall estimated value of MONY (i.e. from \$ 20.80 to \$ 20.97). The court must back this figure out of Jachym's overall analysis to determine the error's effect on his sum-of-the-parts model. Because Jachym weighted the sum-of-the-parts at 35% overall, the true distortion in the model is \$ 0.4857 per share (solving for "X" in the equation: $X = \$ 0.17 / .35$). Thus, the overall adjustment is \$ 0.4857 multiplied by the number of outstanding shares (50,521,772) to arrive at \$ 24,538,425.

In sum, an adjusted sum-of-the-parts [*87] valuation for MONY results in a total value for the company of \$ 970,915,140 as of July 8, 2004, or \$ 19.22 per share.⁹⁶ Using its independent business judgment, the court weights this figure at 25% in its determination of MONY's going-concern value.

96 This figure is calculated by adding the life insurance and annuity value (\$ 1,192,951,290) with the broker-dealer value (\$ 345,940,000) and the asset management value (\$ 117,996,785). Corporate assets and liabilities are then subtracted (\$ 685,972,935). There is no dispute regarding Jachym's calculation of the corporate assets and liabilities of MONY.

V.

By weighting the modified shared synergies analysis at 75% and the modified sum-of-the-parts analysis at 25%, the court finds that Highfields is entitled to \$ 24.97 for each share of MONY stock it held on July 8, 2004.⁹⁷ Counsel for AXA is instructed to submit, on notice, a final form of order in accordance with this opinion (including a provision for the parties' agreed upon rate of interest) within 10 days.

97 $(\$ 26.88 \times .75) + (\$ 19.22 \times .25) = \$ 24.97$.