IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

VERITION PARTNERS MASTER FUND, LTD. and VERITION MULTI-STRATEGY MASTER FUND, LTD.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 1:19-cv-00377-CFC
COHERENT ECONOMICS, LLC, W. BRADFORD CORNELL, and SAN MARINO BUSINESS PARTNERS	)	Jury Demanded
Defendants.	)	

DEFENDANTS W. BRADFORD CORNELL AND SAN MARINO BUSINESS PARTNERS' RULE 12(b)(6) MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants W. Bradford Cornell and San Marino Business Partners, LLC move to dismiss all, or in the alternative, certain of the claims brought by Plaintiffs Verition Partners Master Fund, Ltd. and Verition Multi-Strategy Master Fund, Ltd. in the Complaint filed in this action for the reasons set forth in Defendants Cornell and San Marino Business Partners' memorandum of law accompanying this Motion.

CONNOLLY GALLAGHER LLP

/s/ Ryan P. Newell
Ryan P. Newell (Bar No. 4744)
Shaun Michael Kelly (Bar No. 5915)
1201 North Market Street, 20th Floor
Wilmington, DE 19801
(302) 757-7300
rnewell@connollygallagher.com
skelly@connollygallagher.com

Counsel for Bradford Cornell and San Marino Business Partners, LLC

OF COUNSEL:

Peter M. Spingola
Robert J. Shapiro
John M. Owen
Chapman Spingola, LLP
190 South LaSalle Street, Suite 3850
Chicago, Illinois 60603
(312) 630-9202
pspingola@chapmanspingola.com
rshapiro@chapmanspingola.com
jowen@chapmanspingola.com

Dated: March 25, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

VERITION PARTNERS MASTER FUND, LTD. and VERITION MULTI-STRATEGY MASTER FUND, LTD.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 1:19-cv-00377-CFC
COHERENT ECONOMICS, LLC, W. BRADFORD CORNELL, and SAN MARINO BUSINESS PARTNERS,	)	Jury Demanded
Defendants.	)	

DEFENDANTS W. BRADFORD CORNELL AND SAN MARINO BUSINESS PARTNERS' OPENING BRIEF IN SUPPORT OF THEIR <u>RULE 12(b)(6) MOTION TO DISMISS</u>

OF COUNSEL:

Peter M. Spingola
Robert J. Shapiro
John M. Owen
Chapman Spingola, LLP
190 South LaSalle Street, Suite 3850
Chicago, Illinois 60603
(312) 630-9202
pspingola@chapmanspingola.com
rshapiro@chapmanspingola.com
jowen@chapmanspingola.com

Dated: March 25, 2019

CONNOLLY GALLAGHER LLP
Ryan P. Newell (Bar No. 4744)
Shaun Michael Kelly (Bar No. 5915)
1201 North Market Street, 20th Floor
Wilmington, DE 19801
(302) 757-7300
rnewell@connollygallagher.com
skelly@connollygallagher.com

Counsel for Bradford Cornell and San Marino Business Partners, LLC

TABLE OF CONTENTS

NATURE AND STAGE OF THE PROCEEDINGS 1

SUMMARY OF ARGUMENT 2

STATEMENT OF FACTS 3

A. Verition Engages Defendants as an Expert Witness in the AOL Action 3

B. Verizon Argues that Cornell Should Be Discredited Because of His Alleged Bias 4

C. The Court of Chancery Determines a Share Price Based on a DCF Analysis in Between the Two Prices Advocated by the Opposing Parties' Experts 4

D. The Court of Chancery Explains Why It Utilized a DCF Model 4

E. The Court of Chancery Uses Fischel's DCF Model as a "Starting Point," But Carefully Weighs Each Party's Arguments and Each Expert's Opinions on the Appropriate Inputs and Assumptions to Utilize in the Model 5

1. The Court of Chancery Adopts the Cash Flow Projections Favored by Verizon/Fischel 6

2. The Court of Chancery Adopts Verition/Cornell's Arguments for Including a Pending Deal in AOL's Valuation 7

3. In Agreement with Verition's Position, the Court of Chancery Applies a Higher Growth Rate than the Rate Proposed by Verizon/Fischel 7

4. The Court of Chancery Agrees with Fischel's Position that $150 Million in AOL's Cash Reserves Should Not Be Included in the Valuation Since It Constituted Working Capital 8

F. Verition Threatens Suit against Defendants, and in Response, Defendants File a Declaratory Action Asserting that Verition's Claims Are Barred by a Settlement Agreement Between the Parties 8

G. Verition Files the Present Action in Delaware 8

ARGUMENT 9

I. Verition Fails to Allege Facts that Demonstrate that a Plausible Causal Link Exists Between the Alleged Wrongdoing and Verition's Purported Injury 9

A. A Plaintiff Must Plead All Necessary Elements Including Proximate Cause in a Manner that Meets the *Iqbal* and *Twombly* Standard 9

B. Verition Fails to State a Plausible Theory of Causation Connecting Its Allegations about Defendants' Credibility Issues with Its Purported Injuries 10

1. The Court of Chancery's Opinions Make Clear that Its Reasons for Its Ruling Had Nothing to Do with and Were Not Affected by Any Credibility Concerns Raised By Verizon at Trial 11

2. Verition's Counsel's Trial Decision to Accept the Fischel DCF Model as a Starting Point Likely Improved the Outcome in Verition's Favor and In Any Event that Strategy Did Not Harm Verition 13

II. Verition's Fraudulent Inducement (Count I), Fraudulent Concealment (Count II), and Professional Negligence (Count IV) Fail Because the Alleged Misconduct Underlying Those Claims Is Not Separate and Distinct from the Alleged Misconduct and Damages Sought in Its Breach of Contract Claim (Count III) 15

A. Verition's Fraudulent Concealment and Professional Negligence Claims are Barred by the Economic Loss Doctrine and Should Be Dismissed..................................... 15

B. Verition Fails to Allege the Existence of a Misrepresentation Independent of the Contract, So Its Fraud Claims Fail.. 16

C. The Complaint's Alleged Fraud Damages Rehash Verition's Breach of Contract Damages and Must Therefore Be Dismissed.. 17

III. Verition's Professional Negligence Claim (Count IV) Should Be Dismissed Because Delaware Has Not Recognized an Expert Witness Malpractice Cause of Action and Defendants' Actions Are Protected by the Absolute Litigation Privilege 18

IV. If the Court Does Not Grant Defendants' Pending Motions to Stay and to Transfer, Verition's Claims Should Be Dismissed under the Prior Pending Action Doctrine......... 20

CONCLUSION.. 20

TABLE OF AUTHORITIES

Cases

AFH Holding Advisory, LLC v. Emmaus Life Sciences, Inc., 2013 WL 2149993 (Del. Super. Ct. May 15, 2013) 18

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 9

Barker v. Huang, 610 A.2d 1341 (Del. 1992) 19

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 9

Brasby v. Morris, 2007 WL 949485 (Del. Super. Ct. Mar. 29, 2007) 15, 16

Connelly v. Lane Const. Corp., 809 F.3d 780 (3d Cir. 2016) 9

Cornell Glasgow, LLC v. La Grange Properties, LLC, 2012 WL 2106945 (Del. Super. Ct. June 6, 2012) 16, 17

Del. Open MRI Radiology Assocs., P.A. v. Kessler, 898 A.2d 290 (Del. Ch. 2006) 6

Delaware Art Museum v. Ann Beha Architects, Inc., 2007 WL 2601472 (D. Del. Sept. 11, 2007) 15

Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1 (Del. 2017) 5, 14

DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346 (Del. 2017) 14

Furnari v. Wallpang, Inc., 2014 WL 1678419 (Del. Super. Ct. Apr. 16, 2014) 16, 17

Glassman v. Unocal Exploration Corp., 777 A.2d 242 (Del. 2001) 7

Hoover v. Van Stone, 540 F. Supp. 1118 (D. Del., 1982) 19

In re Appraisal of AOL, Inc., No. 11204-VCG (Del. Ch. Feb. 23, 2018) ..... *passim*

Kirkland & Ellis v. CMI Corp., 1996 WL 559951 (N.D. Ill. Sept. 30, 1996) 11

Marro v. Adamski & Conti, 1998 WL 246397 (N.D. Ill. Apr. 30, 1998) 10, 11

McKenna v. Terminix Intern. Co., 2006 WL 1229674 (Sup. Ct. Del.) 15

Midland Red Oak Realty, Inc. v. Friedman, Billings & Ramsey & Co., 2005 WL 445710 (Del. Super. Ct. Feb. 23, 2005) 17

Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192 (3d Cir.1993) 2, 13

Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 2018 WL 922139 (Del. Ch. Feb. 15, 2018), *reargument denied*, 2018 WL 2315943 (Del. Ch. May 21, 2018) 1

W. Bend Mut. Ins. Co. v. Schumacher, 844 F.3d 670 (7th Cir. 2016) 10

Werwinski v. Ford Motor Co., 286 F.3d 661 (3d Cir. 2002) 15

Rules

Federal Rules of Civil Procedure 12(b)(6)……………………………………………...……..…1, 2

Defendants W. Bradford Cornell ("Cornell") and San Marino Business Partners, LLC ("SMBP"), submit this Opening Brief in Support of their Rule 12(b)(6) Motion to Dismiss the Complaint of Plaintiffs Verition Partners Master Fund, Ltd. and Verition Multi-Strategy Master Fund, Ltd. (collectively "Verition"):

NATURE AND STAGE OF THE PROCEEDINGS

In the case underlying this action, Verition, a Cayman Islands-based fund manager, made a calculated bet that it could realize a huge return by rejecting the deal price offered by Verizon in connection with its acquisition of AOL and then filing an appraisal action in the Delaware Court of Chancery. *See In re Appraisal of AOL, Inc.*, No. 11204-VCG (Del. Ch. Feb. 23, 2018) (the "AOL Action"). Verition had made (and lost) a similar bet in another appraisal action. *See Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 2018 WL 922139 (Del. Ch. Feb. 15, 2018), *reargument denied*, 2018 WL 2315943 (Del. Ch. May 21, 2018).[1]

Like many petitioners in recent appraisal actions, Verition ultimately did not recover in the AOL Action the amount that it hoped that it would—although it did net a small profit on its bet because of Delaware's statutory interest.[2] But rather than accept that outcome, Verition has sought to recover from its experts what it could not recover from the court in the AOL Action.

On January 28, 2019, Verition sued its experts Cornell, SMBP, and Coherent Economics, LLC (collectively, "Defendants") in Delaware state court based on the speculative theory that Verition's failure to achieve the desired victory at trial was caused by Cornell's alleged lack of

[1] In *Aruba*, like here, Verition argued the fair share price was far higher than the unaffected, pre-merger price or the deal price, but the court set a fair share price ($17.13) based on the unaffected share price, almost half the price for which Verition advocated using a DCF model ($32.57).

[2] The deal price was $50 per share and the *AOL* court initially determined a fair value of $48.70 per share. After statutory interest, that price left Verition in the black on its gamble. Thus, Verition's complaint is not that it lost money because of defendants' alleged wrongdoing but that it did not win as much as it might have.

credibility in the eyes of the court and a shift in litigation strategy as a result of that alleged lack of credibility. These theories, however, find no support in the Court of Chancery's 51-page opinion (the "*AOL* Opinion") that exhaustively laid out its reasoning. The *AOL* Opinion did not turn on the credibility of expert testimony and was not hurt by Verition's counsel's litigation strategy. *See* Complaint, D.I. 1-1; *AOL* Opinion, **Exhibit 1**.[3]

On February 25, 2019, Defendants removed the state court action, and now bring this motion to dismiss the complaint for failure to state a claim under Rule 12(b)(6). *See* D.I. 1.

SUMMARY OF ARGUMENT

1. This Court should dismiss the entire Complaint because Verition cannot state a plausible theory of how Defendants' alleged misconduct *caused* the purportedly negative outcome in the Court of Chancery. While causation questions can involve factual issues not resolvable on a motion to dismiss, *Iqbal* and *Twombly* require that mere speculation is insufficient as a matter of law to state a claim. Here, Verition's theory of causation rests on the unprovable and speculative position that the Court of Chancery's stated reasons for its ruling were not its actual reasons. Verition's theory requires this Court to disregard the Court of Chancery's explicitly reasoned opinion. The *AOL* Opinion makes clear that the court's fair value decision hinged solely on its selection of the appropriate inputs to use in the valuation model—decisions that had nothing to do with Defendants' wrongful acts or credibility. As a matter of law, no fact finder will be permitted to contradict (and effectively overturn) the Court of Chancery's ruling. As such, Verition does not and cannot state a plausible proximate cause theory.

2. Verition's claims for fraudulent inducement, fraudulent concealment, and

[3] The Court may consider the Court of Chancery's opinion in deciding this motion because Verition relied on that opinion as a basis for its claims in the Complaint. *See* Complaint at ¶ 37, D.I. 1-1; *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

professional negligence fail because those tort claims are barred by the economic loss doctrine.

3. Verition's professional negligence claim should be dismissed because Defendants' alleged acts and statements are protected by Delaware's absolute litigation privilege.

4. Verition's complaint must be dismissed under the prior pending action doctrine.

STATEMENT OF FACTS

Solely for the purposes of this motion to dismiss, the following facts set forth in the allegations of the complaint and the documents referenced therein alleged are deemed true.

A. Verition Engages Defendants as an Expert Witness in the AOL Action

In 2015, Verition held shares of AOL, Inc. ("AOL"). Complaint, D.I. 1-1 at ¶¶ 1-2, 6. Pursuant to a merger agreement, on May 11, 2015, AOL was purchased by Verizon Communications, Inc. ("Verizon"). *AOL* Opinion at p.16. After the merger, Verition filed the AOL Action in the Delaware Court of Chancery. *See id.* at p.18; 8 Del. C. § 262.

Grant & Eisenhofer ("G&E") served as Verition's attorneys in the AOL Action. *See* Complaint at ¶¶ 2, 13, 14, and 44-48, D.I. 1-1. On February 10, 2016, G&E retained Defendants to provide economic consulting services on behalf of Verition. *See id.*

Verition alleges that unbeknownst to Verition or G&E, Cornell had communicated with Verizon about potentially retaining him in the AOL Action and had told Verizon that, at that time, he believed Verizon had "the better side of the case." Complaint at ¶ 16, D.I. 1-1. Cornell allegedly told Verizon's in-house counsel he believed that appraisal cases "generally have little merit but are almost becoming a cost of doing an acquisition." *Id.* at ¶ 20. Verition further alleges that, upon learning that Verizon had selected Daniel Fischel as its expert, Cornell wrote to his colleague Fischel that "when Verizon/Wachtell chose you without even talking to me further that leads to a grudge against them." *Id.* ¶ 25. Verition asserts that in later exchanges with Fischel, Cornell made other comments about a "grudge" and disparaging remarks about the merits of Verition's case. *Id.*

at ¶ 26. Verition alleges that Cornell then solicited Verition to retain him and represented to G&E that he had no conflicts opposing Verizon, but that he did not disclose his "grudge," the fact that he had "disparaged" Verition's case, or his communications with Verizon or Fischel. *Id.* at ¶ 17, 27-28.

B. Verizon Argues that Cornell Should Be Discredited Because of His Alleged Bias

Fischel turned these emails over to Verizon. *Id.* at 29. Verizon then waited until after experts had been disclosed before "springing these communications on Plaintiffs' unsuspecting counsel" at which point it was allegedly "too late" for Plaintiffs to replace Cornell as their expert. *Id*. Verition claims these emails were so damaging to Cornell's credibility that it "forced Plaintiffs to essentially abandon him as their expert." *Id.* at ¶¶ 4, 36. Verition alleges it was forced to concede that the court could "use Fischel's model as a starting point and add to it." *Id.* at ¶ 35.

C. The Court of Chancery Determines a Share Price Based on a DCF Analysis in Between the Two Prices Advocated by the Opposing Parties' Experts

In the *AOL* Opinion, the Court of Chancery spent 51-pages setting forth its reasoning in support of its conclusions. Based on deciding that a DCF analysis provided the best measure of value per share, it concluded the fair share price for AOL was $48.70 per share, which was less than the $50 per share deal price and Cornell's original valuation of $68.98 per share, but more than Fischel's valuation of $44.85 per share and the unaffected share price of $42.59. *Id.* at ¶ 38; *AOL* Opinion at 24 fn. 118, 51. the Court of Chancery held that Verition was entitled to $48.70 per share plus compounding statutory interest rate. *AOL* Opinion at 51. The *AOL* Opinion broke down each step of the court's analysis.

D. The Court of Chancery Explains Why It Utilized a DCF Model

First, the court explained why it employed a DCF model, rather than using a deal price-minus--synergy model. It pointed out that "[t]he parties have not suggested a principled way to

use deal price under the circumstances here, . . . and none occurs to me." *Id.* at 24. The court noted that Verition and Verizon instead advocated for it to rely "on financial metrics rather than transaction price." *Id.* at 2. The court agreed with this position, noting that "[i]t is difficult . . . to ascribe to a non-*Dell*-Compliant sales price (on non-arbitrary grounds) . . . any particular weight" and "[t]herefore, I take the parties' suggestion to ascribe full weight to a discounted cash flow analysis." *Id.* at 4. The court did not, however, entirely disregard the deal price. Instead, it assigned the "transaction price to a role as a *check* on [its] DCF valuation" noting that "any such valuation significantly departing from even the problematic deal price here should cause me to closely revisit my assumptions." *Id.* (Emphasis added.)

E. The Court of Chancery Uses Fischel's DCF Model as a "Starting Point," But Carefully Weighs Each Party's Arguments and Each Expert's Opinions on the Appropriate Inputs and Assumptions to Utilize in the Model

The Court of Chancery noted that "[a]lthough widely considered the best tool for valuing companies when there is no credible market information and no market check, DCF valuations involve many inputs—all subject to disagreement by well-compensated and highly credentialed experts—and even slight differences in these inputs can produce large valuation gaps." *Id.* at 26, citing *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1, 38 (Del. 2017). The court recognized that, "[b]ecause each transaction is unique, appraisal is, by design, a flexible process. However, the clash of contrary, and often antagonistic, expert opinions with widely divergent views is a common feature of the genre." *Id.* at 19. (Internal citations and quotations omitted.) The Court of Chancery observed that Verition had hired "a well-qualified academic, Dr. Bradford Cornell, a visiting professor at the California Institute of Technology, as their expert witness." *Id.* at 27. It then noted Cornell had concluded that AOL's fair value was $68.98 per share, but "*[f]or reasons not necessary to detail,* however, the Respondent questioned Dr. Cornell's

impartiality in this matter, and the Petitioners seem content to use the DCF model presented by the Respondent's expert as a starting point for my analysis." *Id.* at 27. (Emphasis added.)

In its 51-page opinion, the Court of Chancery did not make a single other statement regarding Cornell's credibility as a witness.

After determining that the court would use Fischel's model as a "starting point," it weighed each side's arguments and evidence regarding what inputs and assumptions should be used in that model. It noted that Verition's "disagreements with the Fischel analysis [were] limited, although the effects of that disagreement on the calculation of fair value are vast." *Id.* at 27. The court noted the parties disputed only four items: "(1) the proper cash flow projections for the DCF; (2) the operative reality assumed in the DCF with regard to two deals with Microsoft and one deal with Millennial Media Inc.; (3) the proper projection period and terminal growth rate; and (4) how much of AOL's cash balance must be added back after the DCF." *Id.*

1. The Court of Chancery Adopts the Cash Flow Projections Favored by Verizon/Fischel

The court noted the "most important input necessary for performing a proper DCF is a projection of the subject company's cash flows." *Id.* at 27, *quoting Del. Open MRI Radiology Assocs., P.A. v. Kessler*, 898 A.2d 290, 332 (Del. Ch. 2006). The parties pointed the court to three potential sources for projections. Verizon advocated for using AOL's management's projections from mid-February 2015 ("Management Projections"), which Fischel had used in his model. Verition proposed using either a set of projections created by Deloitte, a consultant, for a tax impairment analysis ("Deloitte Projections") or a set of projections created by AOL in April 2015 ("Disputed Projections"), both of which Cornell used in his model. The court concluded,

> the Management Projections are in fact management's best estimate as of the Valuation Date. While a close call, the record indicates that the Disputed Projections were most likely created as a marketing tool in AOL's attempted sale

> of itself to Verizon. . . . The Deloitte Projections were made for the goodwill impairment analysis—a tax-driven assessment with a host of required assumptions that should not, in these circumstances, be used for a DCF analysis.

Id. at 33.

2. The Court of Chancery Adopts Verition/Cornell's Arguments for Including a Pending Deal in AOL's Valuation

The court recognized that the "determination of fair value must be based on all relevant factors, including . . . elements of future value, where appropriate." *Id.* at 34, *citing Glassman v. Unocal Exploration Corp*., 777 A.2d 242, 248 (Del. 2001). It noted that a corporation "must be valued as a going concern based upon the 'operative reality' of the company as of the time of the merger," but "speculative costs or revenues" must be excluded. *Id.* (Internal citations and quotations omitted). Verition and Cornell contended that "three potential deals were part of AOL's operative reality, and that any fair value analysis of AOL must include these transactions." *Id.* at 35. Fischel had excluded these deals in his analysis. *Id.* After careful analysis, the court concluded that two of the three potential deals (the "Display Deal" and the "Search Deal") should be included in AOL's valuation. *See id.* at 35-40. The court found, however, that the parties had only provided a sufficient basis to calculate the additional value created by the Display Deal, but not the Search Deal. *Id.* at 41-44. Thus, the court added $2.57 per share to Fischel's starting price. *Id.* at 43.

3. In Agreement with Verition/Cornell's Position, the Court of Chancery Applies a Higher Growth Rate than the Rate Proposed by Verizon/Fischel

Fischel had selected 3.25% as the perpetuity growth rate for AOL. *Id.* at 45. The *AOL* court, however, agreed with Verition and Cornell that Fischel's perpetuity growth rate of 3.25% did not accurately capture the trajectories of two divisions of AOL that were in hypergrowth at the end of the Management Projection period, and instead adopted a rate of 3.5%. *Id.* at 47. As a result, the court added a further $1.28 per share. *Id.*

4. The Court of Chancery Agrees with Fischel's Position that $150 Million in AOL's Cash Reserves Should Not Be Included in its Valuation Since It Constituted Working Capital

The court noted that Fischel and Cornell agreed that excess cash reserves should be added into a company's valuation. *Id.* at 48. AOL's cash reserves as of the valuation date were $554 million. *Id.* Fischel had opined that working capital necessary to fund ongoing operations, in contrast to excess cash, should be excluded. *Id.* Thus, Fischel had added $404 million at the end of the DCF, but excluded $150 million as working capital. *Id.* at 49. Cornell had added the full $554 million. *Id.* After weighing these respective positions, the court concluded that Fischel was correct in excluding $150 million as working capital. *Id.* at 49-50.

* * *

Based on its analysis of these four factors, the Court of Chancery concluded that the fair price of AOL stock was $48.70 per share. *Id.* at 51. It explicitly noted that this price "did not deviate grossly from the deal price of $50" which it had used as a "check" on its analysis. *Id.*

F. Verition Threatens Suit against Defendants, and in Response, Defendants File a Declaratory Action Asserting that Verition's Claims Are Barred by a Settlement Agreement Between the Parties

On December 11, 2018, Verition sent letters to Defendants threatening to sue them for the alleged misconduct later identified in Verition's complaint. *See* Complaint, D.I. 1-1 at ¶ 41. On December 20, 2018, Defendants responded by filing suit in the Northern District of Illinois seeking a declaration that Verition's claims are barred by a settlement agreement. *Id.* at ¶¶ 42-46.

G. Verition Files the Present Action in Delaware

On January 28, 2019, Verition filed its complaint in the Superior Court of Delaware against Defendants, initiating this action. *Id*. On February 25, 2019, Defendants filed their notice of removal. D.I. 1.

Cornell and SMBP now move to dismiss Verition's complaint.

ARGUMENT

I. Verition Fails to Allege Facts that Demonstrate that a Plausible Causal Link Exists Between the Alleged Wrongdoing and Verition's Purported Injury

A. A Plaintiff Must Plead All Necessary Elements Including Proximate Cause in a Manner that Meets the *Iqbal* and *Twombly* Standard

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Although the plausibility standard "does not impose a probability requirement," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007), it does require a pleading to show "more than a sheer possibility that a defendant has acted unlawfully," *Iqbal*, 556 U.S. at 678. A complaint that pleads facts "merely consistent with a defendant's liability … stops short of the line between possibility and plausibility of entitlement to relief." *Id*. (citation and internal quotation marks omitted). The plausibility determination is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*. at 679.

Under the pleading standards set by *Twombly* and *Iqbal*, a court reviewing a complaint must take three steps. First, it must "tak[e] note of the elements [the] plaintiff must plead to state a claim." *Iqbal*, 556 U.S. at 675. Second, it must identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Id*. at 679. "Some allegations, while not stating ultimate legal conclusions, are nevertheless so threadbare or speculative that they fail to cross the line between the conclusory and the factual." *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 790 (3d Cir. 2016) (internal citation omitted). Third, "[w]hen there are well-pleaded factual allegations, [the] court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

A court must dismiss a claim that fails to plausibly plead a causal link between the alleged wrongdoing and the purported injury. *See W. Bend Mut. Ins. Co. v. Schumacher*, 844 F.3d 670 (7th Cir. 2016) (affirming dismissal of malpractice claim, holding that plaintiff's conclusory assertions regarding the causal nexus between the identified misconduct and the alleged harm failed to show it would have prevailed but for the negligence of its counsel).

B. Verition Fails to State a Plausible Theory of Causation Connecting Its Allegations about Defendants' Credibility Issues with Its Purported Injuries

Verition's two theories of proximate cause that attempt to tie the Defendants' alleged misconduct to the purportedly negative ruling in the AOL Action fail to pass the plausibility test required to state a claim. *See*, *e.g*., *W. Bend Mut. Ins. Co.*, 844 F.3d 670; *Marro v. Adamski & Conti*, 1998 WL 246397, at *4 (N.D. Ill. Apr. 30, 1998) (dismissing malpractice claim because plaintiffs did not include "any factual allegations to support an inference that their underlying lawsuit was lost . . . as a result of defendants' actions").

First, Verition claims that the introduction of Cornell's emails at trial damaged his credibility and caused the Court of Chancery to reject Verition's arguments in favor of AOL's thereby resulting in a lower per share value than Verition would have been awarded if the court had not been influenced by these emails. However, it is an affront to the court's detailed, well-reasoned, and fact-based opinion to suggest that email statements made by Cornell played any role in the ultimate outcome of the case, let alone were sufficient to cause the Court of Chancery to reject out-of-hand all of Verition's arguments.

Second, Verition claims that Cornell's purported credibility issues allegedly forced it to concede that the court should use Fischel's model as a starting point for its DCF analysis instead of Cornell's model. However, a close inspection of the opinion shows that the choice of which model to

employ as a starting point in the court's analysis had no negative bearing on the final determination of value, which instead turned on the inputs and assumptions included in the model.

Therefore, Verition was not awarded the value it sought because the court did not agree with all of its evidence and arguments about the inputs to use in valuing the company, not because of any issue the court had with Cornell's credibility or the choice of which model to use as a starting point. *See Kirkland & Ellis v. CMI Corp.*, 1996 WL 559951, at *7 (N.D. Ill. Sept. 30, 1996) (dismissing all claims, including malpractice claim, where plaintiff "would not have been successful in the underlying litigation regardless of any alleged malpractice by [defendant]. In sum, [plaintiff] can neither allege nor prove that [defendant's] alleged misconduct proximately caused [plaintiff's] damages . . .".). Thus, Verition, like the malpractice plaintiffs in *Kirkland & Ellis* and *Marro,* fails to present a plausible theory by which a fact-finder could conclude that the allegedly unsuccessful outcome in the AOL Action turned on Cornell's alleged misconduct.

1. The Court of Chancery's Opinions Make Clear that Its Reasons for Its Ruling Had Nothing to Do with and Were Not Affected by Any Credibility Concerns Raised By Verizon at Trial

In alleging that "[t]he Court was charitable in declining to expose Cornell's bias and conflict in its opinion" (Complaint at ¶ 37), Verition's *own* pleading admits that the *AOL* court never stated that it ruled as it did because of a determination that Cornell was biased or not credible. Verition is forced to make the strained suggestion that the Court of Chancery did not state its actual reasons motivating its decision because nothing in the opinion suggests in any way that Verizon's questioning of Cornell's impartiality affected the court's conclusions. Indeed, the court found Cornell was "well-qualified" and concluded that Verizon's reasons for questioning his impartiality were "not necessary to detail." *AOL* Opinion at 27. Indeed, if the court's reasons for its decision

turned on Cornell's credibility, the court would have found it "necessary to detail" those reasons, given the painstaking efforts it made to explain its thought process on which its ruling rested.

Moreover, Verition's claim against Defendants requires this Court to believe that the Court of Chancery somehow would have adopted Cornell's opinion wholesale, if only Verizon had not questioned his partiality. But the court's painstaking opinion demonstrates its aptitude in understanding the issues in the case. It understood the parties' respective models—including the proposed inputs and assumptions and their effect on the overall price—but modified them and performed its own independent analysis of the record to arrive at its conclusions. That analysis credited some portions of each expert's opinions and each party's evidence and arguments, adopting piecemeal those portions with which it agreed only after meticulous analysis. Moreover, that analysis included independent findings not put forth by either expert. The takeaway is that the court arrived at its valuation only through its own careful reasoning, and that under no circumstances would it have blindly and completely accepted the opinions of Cornell (or Fischel).

Verition overreaches when it suggests that the Court of Chancery's allowing of Verizon to question Cornell regarding the emails at issue demonstrates that the court "credited Verizon's argument about his bias." Complaint at ¶ 31. This assertion conflates the court's rulings on the scope of permissible inquiry at trial with the conclusions it drew from that testimony; the best and only source for the reasons supporting the court's conclusion are found in its written opinion.

Verition's assertion that the Court of Chancery ruled as it did in *AOL*, not for the reasons actually stated in its opinion and not based on the facts and the law, but because it found Cornell biased or not credible does not hold up to scrutiny and no fact finder could find otherwise. For that reason, the Complaint fails to state a plausible claim.

2. Verition's Counsel's Trial Decision to Accept the Fischel DCF Model as a Starting Point Likely Improved the Outcome in Verition's Favor and In Any Event that Strategy Did Not Harm Verition

Verition claims it "essentially" abandoned Cornell and relied "primarily" on cross-examining Fischel. *Id.* at ¶ 2. But a thorough reading of the *AOL* opinion shows that Verition in fact continued to make arguments using Cornell's opinions regarding the appropriate inputs to employ in that model, and the Court of Chancery carefully weighed each of those opinions, crediting many of Cornell's opinions in its final analysis and not rejecting any of Cornell's opinions for credibility reasons.

Importantly, the court's decision turned on its choice of inputs and assumptions, not on the merits of the model to which it applied those inputs and assumptions. Verition acknowledged as much in its post-trial Opening Brief, arguing that the ruling on four critical inputs "swallow[s] all sub issues, including which valuation expert's model should be used." Post-Trial Opening Brief at 10, **Exhibit 2**.[4]

Furthermore, Verition cannot plausibly claim that it was hurt by allegedly being forced to concede to using Fischel's DCF model. As Verition observed in its Post-Trial Brief:

> [Applying the] "appropriate…DCF inputs…using Fischel's own model, his DCF valuation increases to $80.43 per share. Cornell's conservative DCF model yields a fair value of $68.98 per share. The chart below shows the economic effect, using AOL's expert's model, of the answer to each of the four questions.

[4] The Court may consider Verition's Post-Trial Opening Brief in deciding this motion because Verition referred to that brief as a basis for its claims in the Complaint. *See* Complaint at ¶ 34, D.I. 1-1; *see Pension Benefit*, 998 F.2d at 1196 (3d Cir.1993).

	Selection of Three Key Inputs			**Equity Value per Share [D]**	
	Updated Projections [A]	Millennial Media & Microsoft Display [B]	Extended Explicit Projections [C]	Without Correcting Prof. Fischel's Cash Amount	Correcting Prof. Fischel's Cash Amount [E]
(a)	-	-	-	$44.85	$46.56
(b)	YES	-	-	$51.15	$52.87
(c)	-	YES	-	$51.56	$53.27
(d)	-	-	YES	$55.36	$57.07
(e)	YES	YES	-	$57.37	$59.09
(f)	-	YES	YES	$66.70	$68.41
(g)	YES	-	YES	$67.38	$69.10
(h)	YES	YES	YES	$78.72	$80.43

Post-Trial Opening Brief at 29. Therefore, as Verition acknowledged in its own pleading to the *AOL* Court, had the Court of Chancery agreed with all of Verition and Cornell's opinions about the proper inputs and assumptions to use in Fischel's DCF model, the resulting price would have been *higher* than the price advocated in Cornell's model. But the court disagreed with Verition about which inputs to utilize for reasons that had nothing to do with Cornell's credibility.

Finally, the court made it a point to note that any DCF "valuation significantly departing from even the problematic deal price here should cause me to closely revisit my assumptions." *AOL* Opinion at 10. In light of this statement, it is implausible to believe that the court ever would have used inputs that resulted in a price significantly higher than the deal price. Thus, Verition cannot plausibly claim that being forced to concede to Fischel's model proximately caused its alleged injuries.[5]

[5] While accepting the allegations pleaded in Verition's complaint as true, Cornell and SMBP note for the record that they dispute that Verition was "forced" to concede to Fischel's model. Rather, they posit that Verition's actual reason was strategic in light of contemporaneous developments in Delaware law. *See Dell, Inc.,* 177 A.3d at 35; *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 349 (Del. 2017).

II. Verition's Fraudulent Inducement (Count I), Fraudulent Concealment (Count II), and Professional Negligence (Count IV) Fail Because the Alleged Misconduct Underlying Those Claims Is Not Separate and Distinct from the Alleged Misconduct and Damages Sought in Its Breach of Contract Claim (Count III)

A. Verition's Fraudulent Concealment and Professional Negligence Claims are Barred by the Economic Loss Doctrine and Should Be Dismissed

Verition's tort counts seek only damages for economic loss and, therefore, cannot co-exist with the contract claim that is also pleaded. In Delaware, "[t]he economic loss doctrine is a judicially created doctrine that prohibits recovery in tort where a product ... has not caused personal injury or damage to other property," or where "the only losses suffered are economic in nature." *Delaware Art Museum v. Ann Beha Architects, Inc.,* 2007 WL 2601472, at *2 (D. Del. Sept. 11, 2007) (granting motion to dismiss claim for fraudulent representation because plaintiff's alleged injury was purely economic and did not fall within any recognized exception). As a general rule, "in order for contract and tort claims to co-exist in an action, the plaintiff must allege that the defendant breached a duty that is independent of the duties imposed by the contract." *See McKenna v. Terminix Intern. Co.*, 2006 WL 1229674, at *2(Sup. Ct. Del.); *Werwinski v. Ford Motor Co*., 286 F.3d 661 (3d Cir.2002) (recognizing a limited exception to the economic loss doctrine for fraud claims, but only where the claims arise independently of the underlying contract). The economic loss doctrine prohibits certain tort claims where an overlapping contract count adequately address the injury alleged. The theory is that contract law provides a better and more specific remedy than tort law. *Brasby v. Morris*, 2007 WL 949485, at *7 (Del. Super. Ct. Mar. 29, 2007) ("The economic loss rule is especially suited to situations where privity of contract exists. Plaintiff and Morris entered into such a contractual relationship. Consequently, the economic loss doctrine precludes Plaintiff from bringing a negligence claim since the damages alleged are only

economic losses.”). The doctrine aids the parties’ ability to allocate the risks of the business transaction. *Id.*

Here, Verition and Defendants entered into a contract for Defendants to provide expert services in the *AOL* Action. Any alleged concealment or negligence that damaged Verition after the formation of the contract occurred in performance of that contract, and not as a result of any separate tort duty. Accordingly, the economic loss doctrine bars Verition’s claim for fraudulent concealment (Count II) and professional negligence (Count III). *See Brasby*, 2007 WL 949485, at *7 (Del. Super. Ct. Mar. 29, 2007) (dismissing negligence and fraud claims because those claims did not arise independently of the underlying contract).

B. Verition Fails to Allege the Existence of a Misrepresentation Independent of the Contract, So Its Fraud Claims Fail

Verition’s fraudulent inducement and concealment claims are based entirely on Defendants’ obligations under the contractual agreement. To survive as separate claims in a complaint with a breach of contract claim, tort claims must involve violation of a duty arising apart from the contract. *See Cornell Glasgow, LLC v. La Grange Properties, LLC*, 2012 WL 2106945, at *8 (Del. Super. Ct. June 6, 2012). The surviving fraud claim must be collateral to the breach of contract claims. *Id.* “A plaintiff cannot ‘bootstrap’ a claim of breach of contract into a claim of fraud merely by alleging that a contracting party never intended to perform its obligations.” *Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *8 (Del. Super. Ct. Apr. 16, 2014) (dismissing fraud claims where alleged fraudulent misrepresentations were incorporated into contract). Fraud claims alleged contemporaneously with a breach of contract claim may only survive if “the claim is based on conduct that is separate and distinct from the conduct constituting breach.” *Id.*

Here, Verition alleges that Defendants fraudulently represented that they would perform an independent analysis and failed to disclose the existence of a conflict as a result of the

communications with Verizon and Fischel. Verition asserts that those alleged acts and omissions constitute fraudulent inducement and fraudulent concealment. *See* Complaint at ¶¶ 58, 65. But those exact same allegations form the basis of Verition's breach of contract claim:

> Defendants did not provide "independent, expert economic analysis and opinions" to Plaintiffs' counsel, as the engagement letter required. In fact, Defendants had an undisclosed bias and a disabling conflict that surfaced at the worst possible time in the litigation, with devasting [*sic*.] effects on the Plaintiffs' case.

Complaint at ¶ 74.

Verition's claims of fraudulent representations are not collateral issues in this case. Defendants have not violated any common law duty independent of the retainer agreement's obligations. Accusing Defendants of failing to disclose that they would not perform an independent analysis is another way of saying that Defendants never intended to perform the contract. *See Furnari,* 2007 WL 94948, at *7. Because Verition's fraud claims are not distinct from the breach of contract claim, they must be dismissed. *See Midland Red Oak Realty, Inc. v. Friedman, Billings & Ramsey & Co.*, 2005 WL 445710, at *3 (Del. Super. Ct. Feb. 23, 2005) (dismissing plaintiff's claims of fraud and negligence "based entirely on obligations owed by [defendant] under the contractual agreement. The alleged material misrepresentations made by [defendant] are not collateral issues in this case. [Defendant] has not violated any common law duty independent of the financing contract terms.")

C. The Complaint's Alleged Fraud Damages Rehash Verition's Breach of Contract Damages and Must Therefore Be Dismissed

The Complaint's counts for misrepresentation and concealment (Counts I and II) seek the same damages as Verition seeks in its breach of contract count (Count III) and cannot survive. "Delaware courts have consistently held that to successfully plead a fraud claim, the allegedly defrauded plaintiff must have sustained damages as a result of a defendant's action." *Cornell*

Glasgow, 2012 WL 2106945, at *8. (Internal citation omitted). "[T]he damages allegations may not simply 'rehash' the damages allegedly caused by the breach of contract." *Id.*, at *8–9 (dismissing a fraud claim because the plaintiffs' damages allegation was nothing more than a "rehash" of the allegations in its breach of contract claims); *see also AFH Holding Advisory, LLC v. Emmaus Life Sciences, Inc.,* 2013 WL 2149993, at *13 (Del. Super. Ct. May 15, 2013) (dismissing fraud claim because plaintiff's damages allegation for fraud was not separate and distinct from its damages allegation for breach of contract).

Here, Verition's fraudulent inducement claim and its fraudulent concealment plead virtually identical damages. *See id.* at ¶¶ 62, 70. Likewise, its breach of contract claim includes a near verbatim repetition of those same damages allegations. *See id. at* ¶ *75.*

Because Verition has pleaded materially identical damages in its fraud counts and its breach of contract count, it fails to plead damages caused by the allegedly fraudulent conduct separate from the damages caused by the alleged breach of contract. Thus, Counts I and II must be dismissed because the damages pleaded in them "rehash" the breach of contract damages.

III. Verition's Professional Negligence Claim (Count IV) Should Be Dismissed Because Delaware Has Not Recognized an Expert Witness Malpractice Cause of Action and Defendants' Actions Are Protected by the Absolute Litigation Privilege

Verition's professional negligence claim should be dismissed because Delaware does not appear to have recognized a cause of action that allows a party to sue its expert witness in an underlying lawsuit for professional malpractice on the basis of a failure to disclose an alleged conflict of interest. Cornell and SMBP have been unable to find any Delaware binding authority where a court considers whether an expert witness can be sued for professional negligence on the basis of an alleged failure to disclose bias or the existence of allegedly disparaging comments about case of the party to whom it provided services.

In addition, Delaware recognizes a broad absolute litigation privilege. The privilege is a long-standing rule that protects the statements of judges, parties, witnesses, and attorneys made in the course of judicial proceedings from defamation or similar tort actions, so long as the party claiming the privilege shows the statements issued as part of a judicial proceeding and were relevant to the issues in the case. *Barker v. Huang*, 610 A.2d 1341, 1345 (Del. 1992)

In *Hoover v. Van Stone,* a Delaware federal court granted summary judgment on defendants' counterclaim finding that all claims were barred by the absolute litigation privilege. 540 F. Supp. 1118, 1120 (D. Del., 1982). The counterclaim charged plaintiff with, *inter alia,* defamation and tortious interference, arising from plaintiff's disclosure to certain of defendants' customers of the existence of the suit and details underlying the complaint. The court held that the absolute privilege extended beyond defamation claims. *Id.* In *Barker,* the Delaware Supreme Court cited approvingly to *Hoover*, noting that the "absolute privilege would be meaningless if a simple recasting of the cause of action from 'defamation' to 'intentional infliction of emotional distress' or 'invasion of privacy' could void its effect." *Barker*, 610 A.2d at 1349.

Although Verition is suing Defendants for conduct that occurred, in part, prior to litigation, Verition's claims are entirely dependent upon Cornell's testimony in a judicial proceeding. As a result, Here, the absolute privilege operates to preclude Verition's claims for professional negligence against Defendants since they cannot survive without Cornell being held civilly liable for his participation as a witness in judicial proceedings.

IV. If the Court Does Not Grant Defendants' Pending Motions to Stay and to Transfer, Verition's Claims Should Be Dismissed under the Prior Pending Action Doctrine.

Defendants' Motion to Stay and Motion to Transfer are currently pending. D.I. 4 and 7. If the Court does not grant those motions, in the alternative, the Court should dismiss Verition's complaint under the prior pending action doctrine for the reasons set forth in those motions.

CONCLUSION

WHEREFORE, Defendants W. Bradford Cornell and San Marino Business Partners, LLC respectfully request that this Court dismiss all claims of Plaintiffs Verition Partners Master Fund, Ltd. and Verition Multi-Strategy Master Fund, Ltd. for the reasons set forth herein and award Defendants such other and further relief as this Court deems just and appropriate.

OF COUNSEL:

Peter M. Spingola
Robert J. Shapiro
John M. Owen
Chapman Spingola, LLP
190 South LaSalle Street, Suite 3850
Chicago, Illinois 60603
(312) 630-9202
pspingola@chapmanspingola.com
rshapiro@chapmanspingola.com
jowen@chapmanspingola.com

Dated: March 25, 2019

CONNOLLY GALLAGHER LLP

/s/ Ryan P. Newell
Ryan P. Newell (Bar No. 4744)
Shaun Michael Kelly (Bar No. 5915)
1201 North Market Street, 20th Floor
Wilmington, DE 19801
(302) 757-7300
rnewell@connollygallagher.com
skelly@connollygallagher.com

Counsel for Bradford Cornell and San Marino Business Partners, LLC

EXHIBIT 1

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE APPRAISAL OF AOL INC.) C.A. No. 11204-VCG

MEMORANDUM OPINION

Date Submitted: January 17, 2018
Date Decided: February 23, 2018

Stuart M. Grant, Mary S. Thomas, and Laina M. Herbert, of GRANT & EISENHOFER P.A., Wilmington, Delaware, *Attorneys for Petitioners*.

Kevin R. Shannon, Berton W. Ashman, Jr., and Christopher N. Kelly, of POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; OF COUNSEL: William Savitt, Ryan A. McLeod, Andrew J.H. Cheung, Nicholas Walter, and Courtney L. Shike, of WACHTELL, LIPTON, ROSEN & KATZ, New York, New York, *Attorneys for Respondent*.

GLASSCOCK, Vice Chancellor

Each block of marble, Michelangelo believed (or purported to believe) contained a sculpture; the sculptor's job was merely to pitch the overburden to reveal the beauty within. Early jurists believed (or purported to believe) something similar about common law; that it existed in perfect form, awaiting "finding" by the judge.[1] By contrast, even Blackstone would expect that statutory law would be an explicit, if blunt, tool of justice; manufactured, rather than revealed. Our appraisal statute, Section 262 of the DGCL,[2] is an exception. Broth of many cooks and opaque of intent, it provides every opportunity for judicial sculpting.[3]

The latest pitching of stone from the underlying statutory body occurred in our Supreme Court's recent decisions in *DFC* and *Dell.*[4] Those cases, in distilled form, provide that the statute requires that, where a petitioner is entitled to a determination of the fair value of her stock, the trial judge must consider "all relevant factors,"[5] and that no presumption in favor of transaction price obtains. Where, however, transaction price represents an unhindered, informed, and competitive market valuation, the trial judge must give particular and serious consideration to

---

[1] *E.g.*, 1 William Blackstone, *Commentaries*, *38–62.

[2] 8 *Del. C.* § 262.

[3] *See Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 2017 WL 6375829, at *13 (Del. Dec. 14, 2017) (noting that although the appraisal remedy is "entirely a creature of statute," statutory fair value has become a "jurisprudential, rather than purely economic, construct.").

[4] *DFC Global Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346 (Del. 2017); *Dell*, 2017 WL 6375829.

[5] 8 *Del. C.* § 262(h).

transaction price as evidence of fair value. Where information necessary for participants in the market to make a bid is widely disseminated, and where the terms of the transaction are not structurally prohibitive or unduly limiting to such market participation, the trial court in its determination of fair value must take into consideration the transaction price as set by the market. I will refer to transactions compliant with such conditions by the shorthand "*Dell* Compliant." In sum, while no presumption in favor of transaction price obtains, a transaction that demonstrates an unhindered, informed, and competitive market value is at least first among equals of valuation methodologies in deciding fair value. Where a transaction price is used to determine fair value, synergies transferred to the sellers must be deducted, to the extent they represent "element[s] of value arising from the . . . merger" itself.[6]

This matter is before me seeking a post-trial finding of the fair value of AOL Inc. ("Respondent," the "Company," or "AOL") under the appraisal statute. Because the seminal cases referenced above issued during the pendency of this matter, I asked the parties to supplement the briefing to reference the instruction that *DFC* and *Dell* supply. I note that, throughout that helpful briefing, both the Respondent and Petitioners continue to advocate for my reliance on financial metrics rather than transaction price.[7] Applying the *Dell* criteria of information distribution

---

[6] 8 *Del. C.* § 262(h).

[7] The Respondent, however, argues strenuously that the transaction was *Dell* Compliant, and that I should accept their expert's DCF valuation as consistent with the "ceiling" of deal price, from

and barriers to entry with respect to market participation in evaluating whether the transaction here is *Dell* Compliant, I find the matter a close question. AOL was widely known to be in play, the Company talked to numerous potential purchasers in relation to the sale of part (or all) of AOL, the no-shop period running post-agreement was not protected by a prohibitive break-up fee, and the actions of the AOL unaffiliated directors appear compliant with their fiduciary duties. No topping offer emerged. Nonetheless, the merger agreement was protected by a no-shop and matching right provisions. Moreover, the statements made by AOL's CEO, who negotiated the deal, in my view signaled to potential market participants that the deal was "done," and that they need not bother making an offer.

Market participants at this level are not shrinking violets, nor are they barnacles that are happy players during a favorable tide, but shut tight at its ebb. Nonetheless, I find the unusually preclusive statements by the CEO, in light of the other attributes of this transaction, such that I cannot be assured that a less restrictive environment was unlikely to have resulted in a higher price for AOL. Accordingly, I am unable to ascribe fair value solely to market price.

Having rejected transaction price as the sole determinant of value, I find myself further unable, in a principled way, to assign it *any* weight as a portion of my

---

which the DCF excludes synergy value. Resp't's Br. Addressing the Supreme Court's Decision in *Dell*. 1, 6.

fair value determination. It is difficult, in other words, to ascribe to a non-*Dell*-Compliant sales price (on non-arbitrary grounds) 25%, or 75%, or any particular weight in a fair value determination. Therefore, I take the parties' suggestion to ascribe full weight to a discounted cash flow analysis. I relegate transaction price to a role as a check on that DCF valuation: any such valuation significantly departing from even the problematic deal price here should cause me to closely revisit my assumptions.

After consideration of the experts' reports provided by the parties, and after addressing the differences between the parties in the proper construction of a DCF valuation, in light of the evidence at trial, I find that the fair value of AOL stock at the time of the merger was $48.70 per share. This is my post-trial decision on fair value; my reasoning follows.

I. BACKGROUND

A. The Company

AOL was a well-known[8] global media technology company with a range of digital brands, services, and products that it provided to advertisers, consumers, subscribers, and publishers.[9] AOL underwent significant changes in both perception and fortune after its apex in 2002, when it had more than twenty-six million

[8] Famous among users of a certain age as a provider of email access, as announced by the grammatically questionable "You've Got Mail."
[9] Stipulated Joint Pre-Trial Order ¶ 96.

subscribers in the United States and $9 billion in revenues.[10] AOL spun off as a public company from parent Time Warner in 2009, with Tim Armstrong named as Chairman and CEO.[11] After the spin-off, AOL shrank, ultimately to five million subscribers.[12] AOL faced substantial competition by 2014 and found itself in need of extensive consumer data to shift its desired focus to the online advertising industry.[13] In order to compete, AOL purchased a number of "content" and "ad-tech" companies, such as the Huffington Post, TechCrunch, Thing Labs, Inc., Adapt.tv, and Vidible.[14] These and other purchases allowed AOL to reposition itself as an ad tech company.[15]

---

[10] JX26 (AOL 10-K ending December 31, 2002) at F-13, F-16.

[11] JX66 (AOL 10-K ending December 31, 2010) at 2, 15.

[12] *Id*. at 46.

[13] JX750 at 4 (quoting Armstrong message in January 29, 2015 board agenda that "[w]hile I believe our overall strategic value as a company will continue to increase, the Wall Street view of the company will be neutral to negative unless one of our products becomes a catalyst for increased growth in 2015."); JX 1817 (quoting Armstrong in a March 26, 2015 email expressing concern about AOL's ability to obtain the required data and content to compete); JX 1079 (referring to a March 15, 2015 Armstrong email to the AOL Board about the lack of data and potential ways to address it, including a possible auction of the company); *but see* JX972 (quoting Armstrong email of February 28, 2015 to the AOL Board where Armstrong states that "[o]ur strategy and direction is dead on with the market and we have built a company that is strong and capable").

[14] JX2901 (describing AOL's acquisition of the Huffington Post on AOL's Form 8-K filed February 6, 2011); JX0066 at 85–86 (containing AOL's Form 10-K filed on December 31, 2010); JX0199 at 80–82 (containing AOL's Form 10-K filed on December 31, 2013); JX0968 at 2, 85–87, 90 (containing AOL's Form 10-K filed on December 31, 2014).

[15] JX2196 (Verizon CEO McAdam) at 105:22–24 ("Q. Was AOL discussed as one of the few players that had scale and advertising technology? A. Yes."), 106:11–15 ("One of those markets was mobile advertising. And to deliver—to participate in that market and to build capability, AOL was one of the opportunities we saw to enter the market quickly and to have a reasonable starting point."); Trial Tr. 333:13–19 (Marni Walden, head of Verizon's Product Innovation and New Businesses division, spoke with Armstrong about Verizon's interest in AOL's "ad tech capabilities").

AOL organized itself into three segments: Membership, Brands, and Platforms.[16] The Membership Group included the legacy dial-up internet and search services.[17] The Brands Group included the Huffington Post, TechCrunch, MapQuest, and other content providers.[18] The Platforms Group provided automated online advertising services for advertisers and publishers across multiple device and media formats.[19] As with other companies of similar size, AOL was closely followed by numerous analysts.[20]

B. Initial Discussions and Negotiation

Similar to other boards of directors, the AOL board of directions (the "AOL Board" or the "Board") "regularly review[ed] and assess[ed] the Company's business strategies and objectives," in order to "enhanc[e] stockholder value."[21] The AOL Board frequently considered many types of transactions and partnerships with other companies.[22] "In addition, the Company and its representatives [were] routinely approached by other companies and their representatives regarding possible transactions."[23] Several of those included inquiries from Silver Lake,[24]

---

[16] JX1180 at 3.
[17] JX0968 (AOL 10K filed on December 31, 2014) at 8.
[18] *Id.* at 8.
[19] JX1180 at 4.
[20] *See, e.g.*, JX1803 (examining JMP Securities, *Our Thoughts on Verizon's $50 per share Offer for AOL: Maintain Market Perform Rating*, May 12, 2015).
[21] JX1851 (the "Solicitation" or "AOL Schedule 14D-9") at 16.
[22] *Id.*
[23] *Id.*
[24] JX1180 at 4.

Tomorrow Focus,[25] Axel Springer,[26] Providence Equity,[27] and Hellman & Friedman.[28]

In June 2014, at the request of Verizon Communications Inc. ("Verizon"), AOL CEO Armstrong and Verizon CEO Lowell McAdam "discussed ongoing and emerging trends in their respective industries" at a media finance conference.[29] In October 2014, Verizon management contacted AOL to propose an initial meeting regarding "potential partnership opportunities" and the two CEOs met again that November.[30] A Verizon subsidiary and AOL entered into a confidentiality agreement in late November.[31]

In early December, representatives of AOL and Verizon met over three days to discuss "several potential collaborative opportunities," although McAdam informed Armstrong that "Verizon had no interest in the acquisition of the entire Company or of a majority interest in the Company."[32] In addition, AOL held a preliminary discussion with Comcast, a global telecommunications conglomerate, "regarding a potential transaction involving all or part of AOL's businesses" on

---

[25] JX140.
[26] JX0155.
[27] JX293.
[28] JX0155.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 16–17.

December 9, 2014.[33] McAdam and Armstrong spoke again by phone in mid-December 2014 and met in mid-January 2015 to "explore a joint venture."[34]

AOL management discussed a potential Verizon transaction with the AOL Board during their January 2015 meeting.[35] In January 2015, rumors about a potential transaction involving AOL leaked and caused AOL's stock price to rise.[36]

In February 2015, Verizon presented AOL with a high-level term sheet for a potential joint venture and the parties met several times to discuss it that February and March and continue with due diligence.[37] Verizon was not the only suitor for a deal with AOL. An AOL executive emailed Armstrong on February 20, 2015 that:

> Given the [Verizon] news in the press, the [AT&T] President of Advertising has express [sic] a very strong interest in having broader strategic conversation with us. They want a bite at the apple and don't want to be boxed out by [Verizon]. If we are going to move forward here we should engage at the CEO level is my view.[38]

Armstrong responded:

> I know . . . the [AT&T] CEO well - but we should discuss this . . . . We need to be ethical (not suggesting you were suggesting that – and know this is natural with press and BD - but me calling CEO of AT&T feels like a bridge too far).[39]

---

[33] AOL Schedule 14D-9 at 17.
[34] *Id*. at 17.
[35] *Id*.
[36] Stipulated Joint Pre-Trial Order, Ex. A; JX1974 (quoting AOL CEO Armstrong about rumors surrounding AOL).
[37] *Id*. at 18.
[38] JX0902 at 1.
[39] *Id*.

Armstrong described his rationale for this answer during trial:

> Q. And why did you say that calling the CEO of AT&T in these circumstances was a bridge too far?
>
> A. Well, I think that from where we were at the time period and knowing what we knew about AT&T and knowing what we knew about Verizon, the risk of having Verizon walk away at this point was much higher than the upside of trying to get AT&T involved when they were clearly outsourcing their core business in our core area to us, overall. So it just did not seem like a smart move.
>
> Q. Why were you concerned that a contact with AT&T might cause Verizon to walk away?
>
> A. I think one is Verizon was upset about the leak. And I think in the situation in a deal negotiation where, you know, we're in negotiations with Verizon, AT&T is not a real candidate, and we go to them, [Verizon CEO and Chairman McAdam], I think, is a very ethical person and somebody that, you know, he would take this the wrong way and we would risk losing the deal.[40]

Armstrong explained during his deposition that the AT&T overture was not "somebody senior at AT&T speaking for AT&T. This [was] somebody at the division that [AT&T was] looking to outsource to us, talking to one of our lower-level [business development] people."[41] In a later explanation to Verizon executive Marni Walden about these discussions with AT&T, Armstrong described these as "advanced discussions to launch a new strategic partnership. At the core of the

[40] Trial Tr. 490:1–20 (Armstrong).
[41] *Id.* at 543:16–19.

discussions was AT&T's content and service portal, which has been powered for Yahoo for many years."[42]

Fox, a multinational mass media corporation, also contacted AOL to express interest in AOL's platforms and brands businesses on February 26, 2015.[43] Private equity firm General Atlantic contacted AOL in March 2015 "to discuss an acquisition of certain of the Company's assets" and entered into a confidentiality agreement on March 7, 2015.[44] General Atlantic conducted limited preliminary diligence on these assets.[45] Fox entered into a confidentiality agreement with AOL and listened to a presentation by AOL on March 9, 2015.[46]

C. Sales Process

On March 25, 2015, Verizon proposed obtaining majority ownership of AOL for the first time.[47] The AOL Board began to meet weekly to "review the deal landscape, including the potential transaction with Verizon."[48]

AOL declined to conduct an auction. Fredric Reynolds, AOL's lead director, explained why AOL did not pursue an auction during his deposition:

> Q: Could you please explain why, in your view or in the view of the board as a whole, you thought it was not desirable for AOL to run an auction?

---

[42] JX1958 at 1 (June 22, 2015 email from Armstrong to Walden).
[43] AOL Schedule 14D-9 at 18.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* at 19.

> A: Again, I think, if I wasn't clear, I think in a business that has to do with technology and content, that it's a very fragile business, and letting the world know that you're for sale impacts your relationship with your -- with your competitors for sure, but also with your partners, be they publishers, being the search companies, being the talent that you want to attract.
>
> Those are all very difficult relationships that I think are almost impossible to be managed if a media company or a technology company is for sale.
>
> I -- I don't recall any large technology or large media company ever putting itself up for sale. I think, as evidenced last week, AT&T buys Time Warner. There was not an auction of that. It's just a very, very -- it's unusual, but technology and media companies don't have hard assets, they don't have long-term contracts that make airplanes or iPhones or anything like that. It's all ephemeral.[49]

Reynolds stated that "the company was not for sale and it was purposeful that it not be for sale"[50] and that the Board did "not auction[] the company. We had had no intention of auctioning the company."[51]

Discussions between AOL and Verizon continued in early April, and McAdam "raised the possibility of a 100% acquisition of the Company with Mr. Armstrong" on April 8, 2015.[52] Comcast entered into a confidentiality agreement with AOL that day, but declined to proceed any further with a transaction.[53]

---

[49] JX2210 (Reynolds Dep.) at 119:8–120:4.
[50] *Id.* at 84:17–18.
[51] *Id.* at 85:5–8.
[52] *Id.*
[53] AOL Schedule 14D-9 at 19.

On April 12, 2015, AOL management discussed the Verizon transaction with the Board, including "the emphasis that [Verizon] . . . put on their ability to retain the Company's management."[54] The Board "requested that Mr. Armstrong keep the Board apprised of these discussions as they progressed" but authorized further discussions with Verizon regarding both the transaction and management retention.[55] AOL opened a data room to Verizon on April 13, 2015.[56]

Verizon's counsel engaged AOL's counsel in a discussion on April 14, 2015 about "the importance to Verizon of retaining the Company's CEO and others on its management team and Verizon's desire to engage in a discussion with Mr. Armstrong regarding such future employment arrangements."[57] AOL's counsel informed Verizon that "Verizon's views had been discussed with the Board and that the Board had authorized Mr. Armstrong to engage in such discussions."[58] McAdam and Armstrong met again on April 17, 2015 to "discuss the potential integration of AOL and its personnel into Verizon's business."[59] During this period, Fox made several diligence calls to AOL, but did not contact AOL for further information.[60]

---

[54] JX1293 at 3.
[55] *Id.*
[56] AOL Schedule 14D-9 at 19.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*

Verizon sent a draft merger agreement to AOL on April 22, 2015.[61] The AOL Board met on April 26, 2015 to discuss the draft agreement, the deal landscape, "the possibility of seeking alternative offers," Verizon's "emphasi[s] . . . [on] the retention of the Company's management team," and AOL's continued retention of Allen & Company ("Allen & Co.") as its financial advisor.[62] AOL returned a revised draft merger agreement to Verizon on April 27, 2015 that proposed changes to a number of terms, including termination rights, the non-solicitation provision, antitrust approval, and others.[63] Verizon management spoke with Armstrong on April 30, 2015 about "the importance to Verizon that AOL's talent continue at the Company following the Merger and indicated that employment arrangements would be structured by Verizon to include compensation opportunities tied to the performance of the Company and in aggregate amounts at least comparable to current compensation opportunities."[64] However, "[n]o specific details of such compensation arrangements were discussed."[65]

AOL and Verizon exchanged draft agreements on May 1 and May 3, 2015.[66] The AOL Board discussed these drafts and "the importance that Verizon was placing

[61] *Id.* at 20.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* at 20–21.

on the retention of the Company's management team and Verizon's desire for employment and retention arrangements" on May 3, 2015.[67]

On May 4, 2015, a consortium including, among others, General Atlantic, Axel Spring SE, and Huffington Post CEO and founder Arianna Huffington, submitted a letter to AOL indicating its willingness to purchase a 51% stake in AOL's Huffington Post asset for approximately $500 million.[68]

On a May 7, 2015 phone call, Verizon informed AOL that Verizon "was planning to submit a formal offer to acquire the entire Company."[69] The AOL representative indicated that AOL expected a price per share "in the 50s" but the Verizon representative indicated that it would be "in the high 40s."[70] Verizon also indicated that it would present Armstrong with a specific employment proposal.[71] AOL reported financial results that beat analysts' expectations on May 8, 2015.[72]

On May 8, 2015, a Verizon representative made an oral offer of $47.00 per share for AOL.[73] An AOL representative countered and Verizon agreed to pay $50.00 per share in cash.[74] Verizon stated that "there was no further room for negotiation with respect to the offer price and that if this price was not of interest,

---

[67] *Id.* at 21.
[68] JX1582 at 6.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*

Verizon was prepared to withdraw its offer."[75] Verizon submitted a written offer at $50 later that day. The AOL Board discussed the offer, and counsel from the two companies negotiated certain terms.[76]

Armstrong phoned a Verizon representative on May 9, 2015 to request a higher price but was told "that there was no further room for negotiation with respect to the offer price," although Verizon agreed to lower the termination fee from 4.5% to 3.5%.[77] The AOL Board discussed the developments that same day.[78]

The parties exchanged additional draft agreements and Verizon delivered a draft employment letter offer to Armstrong on May 10, 2015.[79] "Mr. Armstrong had no conversations with Verizon regarding the draft letter prior to the conclusion of the Company's next Board meeting."[80]

On May 11, 2015, the AOL Board discussed the Verizon merger agreement with management and its legal and financial advisors.[81] The Board then "unanimously voted to approve the Merger Agreement."[82] Later that day, "Verizon

---

[75] *Id.*
[76] *Id.* at 21–22.
[77] *Id.* at 22; JX1755 at 3 (May 11, 2015 Verizon internal slideshow about the sales process stated that "Verizon did not communicate any flexibility on price, but signaled flexibility on break fee." Verizon submitted an offer of $47 per share but later submitted an offer for $50 per share "after significant verbal negotiations.").
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*

informed Mr. Armstrong that they were unwilling to proceed with a transaction without his agreement to terms" of employment and Armstrong and Verizon came to an agreement.[83]

The Verizon board of directors also approved the merger agreement, which was executed on May 11, 2015 (the "Merger Agreement" or "Agreement").[84] The deal was announced on May 12, 2015.[85] According to Armstrong, "a couple of days after [the] Verizon acquisition was announced, AT&T terminated contract negotiations and asked us to stop all development on product and content based on general sensitivities to competitor concerns, data separation, etc."[86]

In a CNBC television interview on the day the merger was announced, Armstrong gave this account of how the Verizon deal came together:

> Interviewer: Hey, Tim, couple of quick things. Help us with this first. Was there an auction? Give us back story here. Meaning, who went to whom? How did this happen?
>
> Armstrong: You know, basically, this happened in a very natural way and no auction. Basically over the course of time I sat down last summer at the Sun Valley conference and we talked about where the world was going and we have been big partners and we were kind of reviewing what the companies were doing together. That sort of kicked off sort of a natural progression to where we are today and I think facilitated by Nancy of Allen and Company and David Shapiro we were able to basically bring this deal together in a way that I think was

---

[83] *Id.*
[84] *Id.* at 23.
[85] *Id.*
[86] JX1958 at 1 (June 22, 2015 email from Armstrong to Walden).

> incredibly natural. If you look at the two visions on the companies and the platforms and both companies were doing the same thing.
>
> Interviewer: It's trading slightly above the premium right now. you didn't shop this to anybody else?
>
> Armstrong: No, I'm committed to doing the deal with Verizon and I think that as we chose each other because that's the path we're on. I gave the team at Verizon my word that, you know, [w]e're in a place where this deal is going to happen and we're excited about it.
>
> . . .
>
> Interviewer: Not to push you on it, but why not pursue an auction?
>
> Armstrong: You know, Andrew, I think the process of where we are as a company right now and the process we went through and knew you guys covered, lots of rumors about AOL in general. So, if somebody, we have always been a public company and been available. If somebody wanted to come do a deal with us, they would have done it. The Verizon deal was built around the strategy of where we're going.[87]

D. Merger and Subsequent Events

The Merger Agreement contained a no-shop provision, a 3.5% termination fee of $150 million, and unlimited three-day matching rights.[88] Stockholders were informed that the Merger Agreement allowed for the "ability to accept a superior proposal."[89] Verizon was "[p]repared for market action but expect[ed] limited interest from media/technology strategics and financial sponsors" due to its

[87] JX1794 at 6.

[88] AOL Schedule 14D-9 at 222, 24–25; Trial Tr. 796:13–20 (Reynolds) ("We were encouraged that there – the deal was drafted in a way that would allow an unfettered bid from a third party and it would enhance our shareholders' value.").

[89] AOL Schedule 14D-9 at 21.

assessment of a "limited interloper risk given [the] current sale status with [a] lack of full company buyers."[90] No topping bidder emerged.[91] More than 60% of AOL's outstanding common shares were tendered and the merger closed on June 23, 2015 (the "Valuation Date").[92]

The Petitioners filed for appraisal rights under Section 262 of the DGCL.[93] Six appraisal petitions were filed, which are consolidated in this action.[94] The parties and experts agree that a DCF analysis is the most appropriate valuation method in this matter.[95] My analysis follows.

II. WAS THE SALES PROCESS DELL COMPLIANT?

The appraisal remedy was created by statute to allow dissenting stockholders an "independent judicial determination of the fair value of their shares."[96] Because neither party bears the burden of proof, "in reality, the 'burden' falls on the judge to determine fair value, using 'all relevant factors.'"[97] The fair value of those shares is "exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation,"[98] and calculated based on the "operative reality of

---

[90] JX1755 at 14 (including a Verizon internal presentation from May 11, 2015).
[91] Trial Tr. 796:21–22 (Reynolds).
[92] Stipulated Joint Pre-Trial Order ¶¶ 8–9.
[93] 8 *Del. C.* § 262.
[94] Stipulated Joint Pre-Trial Order ¶ 2–3.
[95] Sept. 19, 2017 Oral Arg. Tr. 25:4–8.
[96] *Dell, Inc.*, 2017 WL 6375829, at *12 (citing *Ala. By-Products Corp. v. Cede & Co. ex rel. Shearson Lehman Bros., Inc.*, 657 A.2d 254, 258 (Del. 1995)).
[97] *In re Appraisal of Ancestry.com, Inc.*, 2015 WL 399726, at *1 (Del. Ch. Jan. 30, 2015) (citations omitted).
[98] 8 *Del. C.* § 262.

the company"[99] as of "the date of the merger."[100] The court should view the company as a standalone "going concern"[101] or an "on-going enterprise, occupying a particular market position in the light of future prospects."[102] Because the court values the "corporation itself," a minority discount[103] and "any synergies or other value expected from the merger giving rise to the appraisal proceeding itself must be disregarded."[104] Accordingly, petitioning stockholders are given their "proportionate interest" of the value of the corporation on the date of the merger, plus interest.[105]

Because each transaction is unique, "[a]ppraisal is, by design, a flexible process."[106] However, "the clash of contrary, and often antagonistic, expert opinions" with "widely divergent views" is a common feature of the genre.[107] As further described below, there is "no perfect methodology for arriving at fair value for a given set of facts."[108]

---

[99] *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 525 (Del. 1999).
[100] *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1142 (Del. 1989).
[101] *Id.* at 1145.
[102] *In re Appraisal of Shell Oil Co.*, 607 A.2d 1213, 1218 (Del. 1992).
[103] *Cavalier Oil Corp.*, 564 A.2d at 1144.
[104] *Global GT LP v. Golden Telecom, Inc.*, 993 A.2d 497, 507 (Del. Ch. 2010), *aff'd*, 11 A.3d 214 (Del. 2010).
[105] *Cavalier Oil Corp.*, 564 A.2d at 1144.
[106] *Golden Telecom, Inc.*, 11 A.3d at 218.
[107] *In re Appraisal of Shell Oil Co.*, 607 A.2d at 1222.
[108] *Dell, Inc.*, 2017 WL 6375829, at *15 (citing *DFC Global Corp.*, 172 A.3d at 348–49, 351).

The Supreme Court has "reject[ed] requests for the adoption of a presumption that the deal price reflects fair value if certain preconditions are met, such as when the merger is the product of arm's-length negotiation and a robust, non-conflicted market check, and where bidders had full information and few, if any, barriers to bid for the deal."[109] Indeed, the Supreme Court doubts its ability "to craft, on a general basis, the precise pre-conditions that would be necessary to invoke a presumption of that kind.[110] That said, the Supreme Court in *DFC* stated:

> Although there is no presumption in favor of the deal price, under the conditions found [in *DFC*] by the Court of Chancery, economic principles suggest that the best evidence of fair value was the deal price, as it resulted from an open process, informed by robust public information, and easy access to deeper, non-public information, in which many parties with an incentive to make a profit had a chance to bid.[111]

A. The Sales Process Was Not "Dell Compliant"

The question before me is whether the sales process here is *Dell* Compliant. A transaction is *Dell* Compliant where (i) information was sufficiently disseminated to potential bidders, so that (ii) an informed sale could take place, (iii) without undue impediments imposed by the deal structure itself. In other words, before I may consider the deal price as persuasive evidence of statutory fair value, I must find that the deal process developed fair *market* value. I conclude that, under the unique

---

[109] *Dell, Inc.*, 2017 WL 6375829, at *14 (citing *DFC Global Corp.*, 172 A.3d at 348).
[110] *DFC Global Corp.*, 172 A.3d at 366.
[111] *Id.* at 349.

circumstances of this case, the sales process was insufficient to this task, and the deal price is not the best evidence of fair value.

The AOL Board made a deliberate decision that stockholder value would not be maximized through an auction, and instead decided to pursue potential bidders individually by direct contact through bankers and other sources. Given the dynamics of AOL's particular industry, this decision appears reasonable. However, if front-end information sharing is truncated or limited, the post-agreement period should be correspondingly robust, so to ensure that information is sufficiently disseminated that an informed sale can take place and bids can be received without disabling impediments.

Despite statements by AOL's leadership that AOL was not for sale, the persistent market rumors seem to indicate that the market understood that the Company was likely in play. AOL was well-covered by analysts, traded frequently, and generally known in the market. AOL approached, and was approached by, a number of potential buyers of some (or all) of the Company, several of whom entered into confidentiality agreements and conducted due diligence.

AOL appears to have engaged with anyone that indicated a serious interest in doing a deal.[112] On the front end, the market canvas appears sufficient so long as interested parties could submit bids on the back end without disabling impediments.

However, here my concern arises. Immediately after announcement of the transaction, Armstrong gave a public interview and stated:

> I'm committed to doing the deal with Verizon and I think that as we chose each other because that's the path we're on. I gave the team at Verizon my word that, you know, [w]e're in a place where this deal is going to happen and we're excited about it.[113]

Armstrong's post-Agreement statements to the press about giving his "word" to Verizon could reasonably cause potential bidders to pause when combined with the deal protections here. In *Dell*, by comparison, the merger agreement included one-time matching rights until the stockholder vote; a forty-five day go-shop period; and termination fees of approximately 1% of the equity value during the go-shop or approximately 2% afterward.[114] Here, a termination fee of 3.5% and a forty-two day window between agreement and closing would probably not deter bids by themselves. But that period was constrained by a *no-shop* provision, combined with: (i) the declared intent of the acting CEO to consummate a deal with Verizon, (ii) the

---

[112] The Petitioners point to the fact that AT&T's potential approach was rebuffed. However, given the circumstances here, including the record evidence that there was a fear that engaging with AT&T would discourage or endanger the developing deal with Verizon, lack of engagement with AT&T, pre-Agreement, appears reasonable.
[113] JX1794 at 6.
[114] *Dell, Inc.*, 2017 WL 6375829, at *6–7.

CEO's prospect of post-merger employment with Verizon, (iii) unlimited three-day matching rights, and (iv) the fact that Verizon already had ninety days between expressing interest in acquiring the entire company and signing the Merger Agreement, including seventy-one days of data room access. Cumulatively, these factors make for a considerable risk of informational and structural disadvantages dissuading any prospective bidder.

In *Dell*, after the "bankers canvassed the interest of sixty-seven parties, including twenty possible strategic acquirers during the go-shop," the "more likely explanation for the lack of a higher bid [was] that the deal market was already robust and that a topping bid involved a serious risk of overpayment," which "suggest[ed] the price [was] already at a level that [was] fair."[115] Here, given Armstrong's statements and situation, together with significantly less canvassing and stronger post-agreement protections than in *Dell*, I am less confident that is true. I cannot say that, under these conditions, deal price is the "best evidence of fair value . . . as it resulted from an open process, informed by robust public information, and easy access to deeper, non-public information, in which many parties with an incentive to make a profit had a chance to bid."[116]

[115] *Dell, Inc.*, 2017 WL 6375829, at *21, 24.
[116] *DFC Global Corp.*, 172 A.3d at 349.

B. Deal Price as a Check

"The dependability of a transaction price is only as strong as the process by which it was negotiated."[117] I find the deal price is not sufficient evidence of fair value to warrant deference, but it is still useful to an extent. I will use it as a "check" in my determination of fair value, although I decline to give the deal price explicit weight in that determination. Given the process here, a determination of fair value via financial metrics that results in a valuation grossly deviant from deal price, under these circumstances, should give me reason to revisit my assumptions. In this way, the deal price operates as a check in my determination of fair value.[118]

The parties have not suggested a principled way to use deal price under the circumstances here, in a blended valuation of deal price and other valuation metrics, and none occurs to me. Instead, the parties agree, and I concur, that a discounted cash flow analysis is the best way to value the Company.[119] I turn to that now.

---

[117] *Merlin Partners LP v. AutoInfo, Inc.*, 2015 WL 2069417, at *11 (Del. Ch. Apr. 30, 2015).
[118] AOL stock publicly traded on the New York Stock Exchange. The unaffected stock price was $42.59, and the merger price was thus at a premium to the unaffected trading price. As with deal price, an efficiently derived stock trading price can serve as a check on a fair value analysis. Recently, this Court in *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 2018 WL 922139 (Del. Ch. Feb. 15, 2018), found an efficiently derived trading price to be fair value. I note that no party has advocated such here, and that no evidence concerning the efficiency of the market for AOL stock is before me. Moreover, the use of trading price to determine fair value requires a number of assumptions that, to my mind, are best made or rejected after being subject to a forensic and adversarial presentation by interested parties. Thus, I do not consider stock trading price further.
[119] *See supra* note 7. Because I do not explicitly give weight to the deal price, I need not address certain related issues, such as the calculation of synergies.

III. FAIR VALUE AND DISCOUNTED CASH FLOW ANALYSIS

A. Use of Discounted Cash Flow Analysis

Under 8 *Del. C.* § 262, to determine "fair value," a court must value a corporation as a "going concern" according to the corporation's "operative reality" as of the date of the merger.[120] Further, a court "must take into consideration all factors and elements which reasonably might enter into the fixing of value," and consider "facts which were known or which could be ascertained as of the date of merger."[121] The court retains discretion to use "different valuation methodologies" so long as the court justifies that exercise of discretion "in a manner supported by the record before it."[122] The court must derive the fair value of the shares "exclusive of any element arising from the accomplishment or expectation of the merger."[123] When using a DCF analysis, "this Court has recognized that management is, as a general proposition, in the best position to know the business and, therefore, prepare projections" in the "ordinary course of business."[124] With these general principles in mind, I turn to my valuation of AOL.

I rely primarily upon a DCF analysis, as "[b]oth experts agree that the DCF is the best and most reliable way to value AOL as a going concern as of the merger

---

[120] *M.G. Bancorporation, Inc.*, 737 A.2d at 525.
[121] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983) (quoting *Tri-Continental Corp. v. Battye*, 74 A.2d 71, 72 (Del. 1950)).
[122] *DFC Global Corp.*, 172 A.3d at 35 1.
[123] 8 *Del. C.* § 262(h).
[124] *In re Appraisal of Ancestry.com, Inc.*, 2015 WL 399726, at *18.

date."[125] A DCF analysis, "although complex in practice, is rooted around a simple principle: the value of the company at the time of the merger is simply the sum of its future cash flows discounted back to present value."[126] Further, a DCF analysis "is only as reliable as the inputs relied upon and the assumptions underlying those inputs."[127] However, "the use of math should not obscure the necessarily more subjective exercise in judgment that a valuation exercise requires."[128] I also acknowledge the *Dell* court's recent delineation of the weaknesses of the method:

> Although widely considered the best tool for valuing companies when there is no credible market information and no market check, DCF valuations involve many inputs—all subject to disagreement by well-compensated and highly credentialed experts—and even slight differences in these inputs can produce large valuation gaps.[129]

The Petitioners hired a well-qualified academic, Dr. Bradford Cornell, a visiting professor at the California Institute of Technology, as their expert witness. Cornell performed a financial analysis, and concluded that the fair value of AOL stock was $68.98 per share.[130] For reasons not necessary to detail, however, the Respondent questioned Dr. Cornell's impartiality in this matter, and the Petitioners seem content to use the DCF model presented by the Respondent's expert as a starting point for my analysis. Accordingly, I start with the DCF valuation provided

---

[125] Sept. 19, 2017 Oral Arg. Tr. 25:5–8.
[126] *In re of SWS Grp., Inc.*, 2017 WL 2334852, at *11 (Del. Ch. May 30, 2017).
[127] *Id.*
[128] *Agranoff* v. *Miller*, 791 A.2d 880, 896 (Del. Ch. 2001).
[129] *Dell, Inc.*, 2017 WL 6375829, at *28.
[130] Trial Tr. 108:17–21 (Cornell).

by that expert, Professor Daniel Fischel, and consider the Petitioners' limited arguments that certain assumption or inputs in that valuation must be changed.

Fischel opined that the fair value of AOL stock was $44.85 per share.[131] The Petitioners' disagreements with the Fischel analysis are limited, although the effects of that disagreement on the calculation of fair value are vast. The parties dispute only four items: (1) the proper cash flow projections for the DCF; (2) the operative reality assumed in the DCF with regard to two deals with Microsoft and one deal with Millennial Media Inc.; (3) the proper projection period and terminal growth rate; and (4) how much of AOL's cash balance must be added back after the DCF. I discuss each in turn.

B. Disputed Addition and Inputs

1. <u>Cash Flow Projections</u>

"The most important input necessary for performing a proper DCF is a projection of the subject company's cash flows. Without a reliable estimate of cash flows, a DCF analysis is simply a guess."[132] The parties point to three potential sets of cash flow projections. The projections relied on by Fischel in his analysis, which I use as a starting point, are management's long-term plan for 2015 (the "Management Projections" or the "LTP").[133] Fischel selected these projections

---

[131] Trial Tr. 1065:6–9 (Fischel).
[132] *Del. Open MRI Radiology Assocs., P.A. v. Kessler*, 898 A.2d 290, 332 (Del. Ch. 2006).
[133] JX0917; JX0921 at 46.

because they were "described as the 'best currently available estimates and judgements of [AOL]'s management as to the future operating and financial performance of [AOL],' and were used by AOL's financial advisor Allen in its May 11, 2015 fairness opinion."[134] The Petitioners encourage me to use either of two other projections relied on by Cornell. The first is based on ten-year projections that AOL submitted to Deloitte for a tax impairment analysis (the "Deloitte Projections").[135] The second, (the "Disputed Projections"), contained substantial differences, compared to the Management Projections, in working capital requirements and was sent by AOL to Verizon's advisors in April 2015. I find that the best estimate of cash flow projections is the Management Projections, made in the regular course of business, for the reasons that follow.

The Management Projections were completed in mid-February 2015 and presented to the AOL Board.[136] The AOL Board created four-year long-term plans as a part of its annual internal budgeting process.[137] AOL executives testified that the LTP did not include costs or risks from specific acquisitions or transactions;[138] however, the LTP assumed that AOL would fill strategic gaps in areas such as

[134] JX2255 (Fischel Report) ¶ 41; AOL Schedule 14D-9 at 24.
[135] Trial Tr. 649:19–650:3 (Dykstra).
[136] JX0917; JX0921 at 46.
[137] Trial Tr. 355:17–22 (AOL CFO of Platforms Bellomo), 641:17–642:10 (AOL CFO Dykstra).
[138] *Id.* at 363:10–13 (quoting AOL CFO of Platforms Bellomo's response that the LTP did not "account for the cost of acquiring Millennial Media or integrating it"); JX1248 (quoting an email from AOL CFO of Platforms Bellomo to another AOL employee: "[I]s our LTP a tough case to achieve on an organic basis?" "[T]he current LTP does not assume any acquisitions . . . .").

mobile supply, shifting demographics, and consumer data.[139] AOL financial advisor Allen & Co. sent the Management Projections to Verizon, albeit without AOL management's sign off.[140]

The Deloitte Projections were created after AOL hired Deloitte to perform a goodwill impairment valuation of the Company using a set of ten-year projections developed by AOL for this purpose.[141] AOL CFO Dykstra testified that she did not create the Deloitte Projections for non-tax purposes.[142] These projections were created through inputs provided by AOL Senior Vice President of Financial Planning and Analysis Michael Nolan,[143] after which "[Deloitte] . . . r[a]n it through their standard model."[144] According to Cornell, a DCF analysis based on the Deloitte Projections—instead of the Management Projections—values AOL stock at $55.36 per share.[145]

The Disputed Projections were created when Allen & Co. expressed concern, in April 2015, that AOL's projected working capital "appear[ed] to be materially

---

[139] Trial Tr. 361:19–364:16 (Bellomo); JX1712 at 3 ("Major Product/Solution Improvement Assumptions").
[140] Trial Tr. 889:13–22 (Roszkowski); JX1332; JX1457; JX2991; JX1286.
[141] Trial Tr. 649:19–650:3 (Dykstra).
[142] *Id.* at 653:22–654:10 (Dykstra) ("I wouldn't use them for formal valuation purposes for a different purpose. I mean, this goodwill impairment testing is a different purpose, to just judge whether you have a non-cash impairment charge for that period . . . It was a different process, different people involved.").
[143] Trial Tr. 650:12–13 (Dykstra).
[144] *Id.* at 650:21–23 (Dykstra).
[145] Pet'rs' Opening Br. Ex. A.

different from research estimates"[146] AOL prepared and sent another version of the working capital projections—the Disputed Projections—with different assumptions to Verizon's advisors.[147] AOL CFO of Platforms Nick Bellomo stated that he "reviewed the numbers that were shared [with Verizon] to "mak[e] them more optimistic" in order to "decrease[] the change in working capital, which would have had an increase in cash flow for the business, which would ultimately increase the valuation of the business under certain valuation methodologies."[148] Bellomo stated that it was his "understanding that the valuation that was initially floated to AOL for the purchase of AOL may [have] be[en] taken down unless these numbers were improved."[149] Allen & Co. director Isani explained to AOL Senior Vice President Mark Roszkowski on February 8, 2015 that:

> I think we should be presenting a robust opportunity case to [Verizon]—and as is typical for these processes, it will vary from budget. For internal purposes and record keeping, we should have the bridge btw that case and the board budget as well as document the rationale for the gap.

---

[146] JX1266 (quoting email from Allen & Co. that "[w]e have included [net working capital] from the LRP as well, which appears to be materially different from research estimates, are we sure the numbers we have for NWC are correct?"); *see also* JX2473 (quoting an internal AOL email from May 8, 2015 that the "increase in working capital seems crazy high").
[147] Trial Tr. 371:5–15 (Bellomo); *Id.* at 832:16–833:7, 835:22–836:2 (Allen & Co. director Isani) ("Q. And what do you understand the purpose of these [Disputed] cash flow projections to be? A. To make a case to Verizon on how the cash flow could be improved over time, should the company successfully deploy certain efforts."); *but see id.* at 827:7–828:2 (Isani) (agreeing that "it was typical in these processes to present a robust opportunity case to a potential buyer").
[148] *Id.* at 370:14–18 (Bellomo).
[149] *Id.* at 371:1–4.

> However, for the dialogue with [Verizon], we present only the robust case and completely own it as "the" plan. Typically we would not show board minutes as this is not a corporate deal (this case is tricky as the asset represents a large portion of total value). They will ask is this budget and we will have to rehearse the answer. But for a process like this it is not typical for the financials to be revised upward from the conservative board/budget ones
>
> (Should probably also connect w/ legal to get their input into the caveats for documenting the gap).[150]

AOL management sometimes referred to the Disputed Projections as "aspirational" in their internal correspondence.[151] There is also contemporaneous correspondence and trial testimony that the Disputed Projections were created with the assumption that AOL would become part of Verizon.[152]

---

[150] JX0819 at 1–2 (citing emails between AOL and Allen & Co. executives); *accord* Trial Tr. 311:7–312:3 (Doherty).

[151] Trial Tr. 656:19–21 (Dykstra) ("So we did that exercise and came up with a more aspirational set of working capital projections."); JX1691 (quoting a May 10, 2015 email from Dykstra to Roszkowski that "[w]e are going to note to the board at the meeting tomorrow that we provided a more aspirational cash flow to the [Verizon] team as part of the process and we'll need to note the differences at a very high level to the cash flow we provide to the board"); JX1748 (quoting an email from AOL Senior Vice President of Financial Planning & Analysis Michael Nolan to Dykstra on May 10, 2015 that "[b]elow [financial projections] compare[] base case vs aspiration as well as revised tax comment" and refer[] to an assumption that "improved work capital driven by DSO [days sales outstanding] and DPO [days payable outstanding] improvement initiatives planned in LRP," which allegedly could only be achieved by a Verizon acquisition of AOL).

[152] Trial Tr. 656:5–21, 658:23–659:8 (Dykstra) ("I believe they were talking about the exercise of taking a . . . stretch or aspirational approach to looking to see what numbers we could tweak in the model, and things that would be impacted by Verizon if they were there with us . . . .)", 662:4–663:12 ("[W]e went back and said what if we could stretch and Verizon could help us improve some of the dynamics in our cash flow, and collections in particular."); *Id.* at 896:20–897:20 (Roszkowski); JX1690 (quoting same email as JX1691); Trial Tr. 371:16–373:15 (Bellomo); *Id.* at 656:5–657:20, 662:4–663:16 ("Q. And when you wrote about the "more aspirational cash flow given to Verizon," to what are you referring? A. I'm referring to that exercise that we talked about, where we went back and said what if we could stretch and Verizon could help us improve some of the dynamics in our cash flow, and collections in particular."), 695:3–9 (Dykstra) ("Again, I've said that the additional assumptions were assuming we would get better leverage with Verizon.");

I note that other evidence challenges this narrative. The Disputed Projections were created after a rigorous internal process that involved input from a variety of departments within AOL.[153] Certain of AOL's employees signed off on the projections while they were unaware of a potential or likely sale to Verizon.[154] The Disputed Projections were submitted to Verizon and explained to AOL's Board, apparently as though they were current projections.[155] There are emails between AOL employees that refer to the LRP as being "incorrect" and outdated.[156] The

---

Trial Tr. 835:4–836:2 (Isani); *Id.* at 892:2–10, 893:11–23 (Roszkowski); JX1286 (working capital would improve if AOL had "more leverage on both payment terms and ability to collect . . . ."); JX1452 at 1 (quoting internal LionTree emails in April 2015 that "AOL is assuming . . . more scale" would lead to "a faster collection time"); JX1306 (April 14, 2015 email from Allen & Co. to AOL executives that an assumed change in working capital would be due to "[m]ore leverage over advertisers and publishers"); JX1419 (April 18, 2015 email from Allen & Co. to Verizon financial advisors including a "Net Working Capital Overview" with a "[c]hange in net working capital projections by segment").

[153] JX1280 (noting the Disputed Projections were prepared after "an internal review of the LRP"); JX1423 (quoting an internal AOL email chain discussing the change in projection assumptions in advance of a call); JX1414 (detailing the extensive internal input into the Disputed Projections from Corporate Development, Financial Planning & Analysis, and Allen & Co.); JX1398 at 1 (quoting an AOL finance team email of April 17, 2015 that the updated working capital projections resulted in "no change in AOIBDA [free cash flow] or end cash").

[154] JX1437 (quoting Allen & Co. director Isani in an April 20, 2015 email that: "FYI – [AOL] will also have their controller Lara sweet [sic] join the call at noon. PLEASE NOTE: Lara is not aware of the change in the structure to a 100% deal. As such, please continue to provide the context that the discussion is re: a deal with the last 80/20 public minority structure"); JX1434 at 1 (citing email to show that Lara Sweet, AOL's Controller was unaware of the potential Verizon transaction when she endorsed the Updated Projection); JX1411 at 1 (Armstrong e-mail to the Board, outside counsel, Allen & Co., and Dykstra, and Roszkowski, stating "[i]t is really important you know that the main people represented on this email are the limited set of people that have information on our deals").

[155] Trial Tr. 715:20–716:24 (Dykstra) (agreeing that Dykstra "t[old] the board the difference in cash flows at a very high level" after the Disputed Projections had been sent to Verizon).

[156] JX2451 at 2 (quoting an internal AOL email that "AJ can send you the LRP – caveat being that it is incorrect and does not reflect the updated numbers per all discussions since that time"); JX1406 (quoting internal email from Allen & Co. on April 18, 2015 that "[w]e have already told

Petitioners contend that AOL's goal for more leverage to decrease day sales outstanding (thus decreasing the required working capital and thereby improving cash flow) could have occurred outside of an anticipated deal with Verizon, although an exact method is left unspecified.[157]

I find that the Management Projections are in fact management's best estimate as of the Valuation Date. While a close call, the record indicates that the Disputed Projections were most likely created as a marketing tool in AOL's attempted sale of itself to Verizon. My purpose here is to determine the fair value of AOL, and not AOL's value as-advertised. I am not persuaded that the Disputed Projections represent the most recent and valid projections used by AOL management prior to the Valuation Date.

Finally, I find that the goodwill impairment projections are not pertinent to my DCF analysis here. The purpose behind any set of projections matters because it determines the appropriateness of various assumptions that must be made. The Deloitte Projections were made for the goodwill impairment analysis—a tax-driven assessment with a host of required assumptions that should not, in these circumstances, be used for a DCF analysis. While certain assumptions may be

---

[Verizon] all old numbers should be disregarded as they are not correct, however they would still like to have a call").

[157] Pet'rs Answering Post-Trial Br. 17 ("The documents cited by Respondent generally assert that working capital would improve if AOL had more scale or leverage (which AOL could obtain in ways other than an acquisition by Verizon) among several other strategies AOL had employed to improve working capital.").

appropriate for a tax analysis, those same assumptions may be nonsensical for valuation purposes. Consequently, I use the Management Projections in my DCF analysis.

2. Pending Transactions as of the Merger

I start with the following assumptions. "The determination of fair value must be based on all relevant factors, including . . . elements of future value, where appropriate."[158] "[A]ny . . . facts which were known or which could be ascertained as of the date of the merger and which throw any light on [the] future prospects of the merged corporation" must be considered in fixing fair value.[159] A corporation "must be valued as a going concern based upon the 'operative reality' of the company as of the time of the merger."[160] I must exclude speculative costs or revenues, however.[161] Mere "actions in furtherance" of a potential transaction, without a manifest ability to proceed, should not be valued as part of a company's operative reality.[162]

[158] *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242, 248 (Del. 2001).
[159] *Montgomery Cellular Holding Co.*, 880 A.2d 206 at 222 (Del. 2005).
[160] *Ala. By-Prods. Corp.* v. *Neal*, 588 A.2d 255, 256–67 (Del. 1991); *M.G. Bancorporation, Inc*, 737 A.2d at 525; *LongPath Capital, LLC v. Ramtron Int'l Corp.*, 2015 WL 4540443, at *9 (Del. Ch. June 30, 2015).
[161] *Ramtron*, 2015 WL 4540443, at *13 & n.113; *see also M.G. Bancorporation, Inc.*, 737 A.2d at 525; *Ala. By-Prods. Corp.*, 588 A.2d at 256–67.
[162] *Gearreald v. Just Care, Inc.*, 2012 WL 1569818, at *6 (Del. Ch. Apr. 30, 2012).

The Petitioners argue that three potential deals were part of AOL's operative reality, and that any fair value analysis of AOL must include these transactions.[163] These include: (i) AOL's acquisition of Millennial, a programmatic mobile advertising platform;[164] (ii) a deal for Microsoft's Bing search engine to replace Google in powering search results on AOL properties (the "Search Deal"),[165] and (iii) a ten-year commercial partnership for AOL to run the sales of display, mobile, and video ads on Microsoft properties in the United States and eight international markets (the "Display Deal") (the Display Deal and Search Deal are together referred to as the "Microsoft Deals").[166] Fischel did not ascribe value to these transactions in his DCF analysis.[167] For each of these transactions I ask: (i) if the transaction was part of the "operative reality" of the Company as of the Valuation Date, and (ii) if so, was the transaction appropriately valued in the LTP. I will adjust my Fischel-based DCF analysis to include the financial impact of those transactions that were part of the Company's operative reality on the Valuation Date but which were not included in the LTP.

---

[163] Pet'rs' Answering Br. 47.

[164] JX2076 at 2–3 (citing August 25, 2015 internal Verizon proposal for merger agreement with Millennial); Trial Tr. 48:6–7 ("Millennial Media . . . is basically a programmatic mobile platform . . . .").

[165] JX2008 (including an "Advertising Sales and Services Agreement" executed on June 30, 2015).

[166] JX2441 (including a "Sales Partnership Agreement for AOL's Operation of [Microsoft's] Display and Video Advertising Monetization" executed on June 23, 2015).

[167] *See* JX2346 (LTP) at Tab I. A.2 Key assumptions (displaying unawareness of Search Deal in statement that "[n]ew search deal terms set in for 2016. This will negatively impact revenue and bottom line for Core").

a. Operative Reality

i. Description of the Deals

As mentioned, the Display Deal allowed AOL to run the sale of display, mobile, and video ads on Microsoft properties such as Xbox, Skype, Outlook, MSN, and others in the United States and eight other markets.[168] After months of negotiation,[169] Microsoft and AOL traded draft term sheets at least through May 2015.[170] Armstrong testified that the Display Deal "could have blown up at any time" because of, among other things, uncertainty surrounding the customers and the Microsoft employees AOL would need to onboard.[171] Armstrong confirmed in a May 14, 2015 email that AOL expected to close the Display Deal on May 27, 2015.[172] Nevertheless, AOL pushed back the Microsoft announcement until after the Verizon announcement.[173] AOL signed an agreement for the Display Deal with Microsoft on June 28, 2015 and announced the transaction on June 30, 2015.[174] The

---

[168] JX2441.
[169] JX2009 at 1 (quoting AOL executive that the MSFT deal "was 9 months of long drawn out internal and external negotiation").
[170] JX2412 (citing May 7, 2015 email from Bain to AOL: "Deal terms are still in flux; we anticipate having final terms on Friday 5/8, with some work still to be done on PMP terms."); JX2413 (quoting May 8, 2015 internal AOL email with "the latest term sheet" with updates about "[AOL's] latest reconciliation on terms with [Microsoft]").
[171] Trial Tr. 510:4–8, 12–13 (Armstrong).
[172] JX1816 at 1 (email from Armstrong to AOL executives on May 14, 2015).
[173] JX2425 (quoting email from AOL executive Roszkowski to another AOL employee on June 2, 2015 to hold off on announcing the Display Deal until after the Verizon announcement).
[174] JX2008 at 38–39 (Display); JX1997.

Petitioners imply that the Display Deal contributes $2.57 per share if included under Fischel's DCF Model.[175]

The Search Deal replaced a soon-to-expire contract with Google to allow Microsoft's Bing search engine to power advertising and results on AOL's properties.[176] Similar to the Display Deal, AOL planned to close the Search Deal on May 27, 2015 but delayed until after the Verizon announcement.[177] An AOL presentation from June 10, 2015 included the key terms, financial projections, and other business implications of the Search Deal.[178] The Search Deal closed on June 26, 2015.[179] Microsoft and AOL announced the Microsoft Deals on June 30, 2015.[180] The Petitioners do not quantify the impact of the Search Deal but instead urge me to "select a DCF value slightly above the median to account for the value added by the Microsoft Search Deal, which was accretive to free cash flow beginning in 2016."[181]

---

[175] Pet'rs' Answering Br. 46–47 (stating that the Millennial and Display Deals contribute $6.71 per share and that the Millennial Deal accounts for $4.14 per share of that contribution). I note that Cornell examines the Millennial and Display Deals as combined. Pet'rs' Post-Trial Answering Br., Ex. A.

[176] JX2008; Trial Tr. 512:12–20 (Armstrong); JX2146.

[177] JX1816 at 1 (email from Armstrong to AOL executives on May 14, 2015); JX2425 (quoting email from AOL executive Roszkowski to another AOL employee on June 2, 2015 to hold off on announcing the Display Deal until after the Verizon announcement).

[178] JX2433.

[179] JX2146 at 1–2 (including a copy of the Search Deal agreement); JX1997 (including an internal AOL email circulating the signature pages). The parties dispute whether the Search Deal closed on June 26 or 28, 2015; the distinction is not material to my decision here.

[180] JX2008; JX2146.

[181] Pet'rs' Answering Br. 47.

The path of Millennial Media, Inc. ("Millennial") to an acquisition by AOL (the "Millennial Deal") was more circuitous than the Microsoft Deals. After conducting initial diligence, AOL passed on buying Millennial in late 2014 but resumed preliminary diligence in February 2015.[182] AOL paused its diligence in April 2015 until Millennial announced its quarterly earnings.[183] In May 2015, Armstrong told the AOL Board that Millennial might "secure another offer in the near term, but we are willing to take that risk."[184] Armstrong made a non-binding offer to Millennial for $2.10 per share on June 5, 2015, "conditioned on exclusivity," and stated that "AOL was prepared to move expeditiously to negotiate and sign a definitive agreement to effect the transaction."[185] AOL sent a "written, non-binding proposal . . . reflecting the terms of the June 5 Proposal, and which also included an exclusivity period to negotiate a transaction between the parties until July 17, 2015."[186] On June 10, 2015, Millennial opened a data room to AOL and its advisors.[187] On June 15, 2015, Millennial and AOL signed an agreement to negotiate exclusively until July 17, 2015, and "which contained a standstill provision that would terminate if the Company entered into a definitive agreement with a third

[182] JX0663 at 1; JX2112 at 14.
[183] JX1476 at 1.
[184] JX1595 at 2.
[185] JX2112 (Millennial Schedule 14D-9) at 17.
[186] *Id.* at 18.
[187] *Id.*

party to effect a business combination."[188] Representatives of AOL and Millennial met on June 17–19, 2015 to discuss Millennial's "financials, business operations, product and technology, real estate and security infrastructure."[189] On June 23, 2015, Verizon closed the merger with AOL.[190]

On June 30, 2015, AOL's counsel "circulated a first draft of the Merger Agreement," followed by two weeks of meetings, discussions, and negotiations.[191] The parties discussed:

> [T]he scope of the representations and warranties, the benefits to be offered to the Company's employees following the transaction, the conduct of the Company's business between signing and closing of the transaction, the parties' respective conditions to closing, AOL's obligation to indemnify and maintain insurance for the Company's directors and officers, the rights of the parties to terminate the transaction, and the amount and conditions of payment by the Company of the termination fee and expense reimbursement described above.[192]

The SEC sent Millennial a letter "notifying [Millennial] that the SEC was conducting an information investigation" for fraud starting in July 2015.[193] After the expiration of the exclusivity agreement, Millennial attempted to auction itself to six other buyers, but AOL was the only party to submit a proposal.[194] AOL, by then under Verizon, agreed to pay $1.75 per share to acquire Millennial on September 2,

---

[188] *Id.* at 19.
[189] *Id.*
[190] Stipulated Joint Pre-Trial Order ¶ 9.
[191] *Id.*
[192] *Id.* ¶ 20.
[193] JX2112 (Millennial Schedule 14D-9) at 19–20.
[194] *Id.* at 20–24, 26 ("AOL was the only party to submit a proposal to acquire Millennial");

2015.[195] AOL signed the Millennial Deal on September 3, 2015.[196] The Millennial Deal closed on October 23, 2015.[197] The Petitioners argue that the Millennial Deal contributes $4.14 per share if included under Fischel's DCF model.[198]

ii. Conclusions

I find that the Display Deal was part of the operative reality of AOL as of the Valuation Date. I am persuaded by the level of certainty in that transaction, given AOL's internal correspondence and the concrete plans for an announcement date. I also find that the Search Deal was part of the operative reality of AOL as of the Valuation Date. I am persuaded by the apparent certainty of the transaction, based on internal correspondence and presentations, that this transaction was one that both sides fully expected to occur. However, I find that the Millennial Deal was not part of AOL's operative reality as of the Valuation Date. AOL had taken a number of steps toward a transaction, such as sending a non-binding offer subject to an exclusivity period, beginning the due diligence process, and meeting with executives. However, no merger agreement drafts had been exchanged and weeks of negotiations, a robust due diligence process, and an entire auction yet remained. The actions taken by AOL before the Valuation Date showed substantial interest in

---

[195] *Id.* at 23; JX2988.
[196] JX2112 at 25.
[197] JX2130 at 2.
[198] Pet'rs' Answering Br. 47.

a transaction but are not, to my mind, sufficiently certain as to be part of the operative reality of AOL on the Valuation Date.

b. LTP Assumptions

The second question is whether the operative reality of AOL as of the Valuation Date, including the relevant transactions mentioned above, was properly included in the LTP. Because I find that the Millennial Deal was not part of the operative reality of AOL on the Valuation Date, I need not answer the second question for that particular transaction. In essence, the question before me is this: what is the scope of the assumptions made in the LTP? The Petitioners urge me to view them narrowly—these specific deals were not assumed—making the Microsoft Deals additive to the Management Projections. The Respondent, by contrast, urges me to view them broadly—the LTP assumes that strategic gaps will be filled and these transactions merely fill that role—so that the LTP remains as management's best prediction of future cash flows and the Microsoft Deals should not be additive. My attempt to differentiate the new ingredients from those already baked in is below.

i. The Display Deal

The Display Deal and its relation to the LTP were specifically discussed internally after the AOL-Verizon merger. AOL executive Roszkowski explained to Verizon executive Walden in a September 3, 2015 email that the Microsoft and Millennial Deals were "*accretive* to [the LTP], but should *not* be a *straight addition*

to revenue and margin" and that "the [] LTP assumed deals like MSFT and that [AOL] would close [its] mobile technology/talent gap."[199] Roszkowski later testified that AOL's LTP was "optimistic . . . and . . . included assumptions that [AOL] [would] solve[] for key strategic capability gaps" so that the Microsoft Deals "actually made the long-term plan more certain" and could not be a "straight . . . addition" to the LTP.[200] The Display Deal included a number of risks, including adding approximately 1,270 Microsoft employees in nine countries.[201] The parties also dispute smaller, non-dispositive issues.[202]

The parties give me two choices with regard to the Display Deal: add the full value of the Display Deal as urged by the Petitioners, implicitly worth $2.57, or decline to add it to the LTP, as the Respondent recommends. I find that the Display

---

[199] JX2100 at 1 (emphases added); *see also* Trial Tr. 578:15–579:17, 582:7–18 (Doherty) ("Q. And in your view, Mr. Doherty, could you simply add the projections relating to the new Microsoft deal on top of the prior management projections? A. No. Not at all. I mean, two reasons. Number one, I felt it was already pretty much baked into their plan; and, number two, we didn't have a set of projections.").

[200] *Id.* at 901:3–14 (AOL head of corporate development Roszkowski); *see also id.* at 343:1–7 (Verizon EVP Walden); *Id.* at 314:1–19 (Verizon SVP Doherty).

[201] Tr. 374:15–375:12 (Bellomo); Tr. 512:2–513:8 (Armstrong); JX1993 at 6, 13–15 (quoting a June 25, 2015 internal Verizon slide deck explaining the deal and its risks and benefits to AOL and Verizon, including employee integration schedules); JX2008 at 9–16, 22–23 ("Advertising Sales and Services Agreement" between AOL and Microsoft dated June 30, 2015).

[202] The parties dispute the meaning of "delivered value" in an exhibit (JX2436) as either "revenue that is delivered to AOL and Microsoft on account of the deal" (Resp't's Answering Br. 57) or "by definition . . . additive" (Pet'rs' Opening Br. 59). The parties also dispute a slide (JX2441 at 8) that was either "apparently put together by a Bain consultant and never shared outside a small group of AOL's management, showing how AOL might be able to perform as part of Verizon, with illustrative numbers added on to AOL's long-term plan" (Resp't's Answering Br. 57) or as evidence that AOL viewed the Display and Millennial Deals as directly additive to the LTP (Pet'rs' Opening Br. 59–60).

Deal was, at least, partially accretive. I am convinced that AOL internally viewed it as at least partially additive to its LTP as evidenced by its internal presentations and communications, but I also suspect that it should not be *entirely* additive. Because I lack the information necessary to cut a finer slice in this instance, I add the full $2.57 per share to my DCF analysis. In other words, the record gives me no basis that another value for the display deal is less arbitrary than $2.57 per share.

ii. The Search Deal

Neither Fischel nor Cornell included the Search Deal in their DCF analyses,[203] purportedly because "AOL did not produce detailed forecasts for the Search Deal."[204] The LTP initially assumed that a new search deal with Google would be less favorable to AOL than the previous deal.[205] Armstrong testified that the Search Deal, together with the Display Deal, was "meant as a mitigation to the search money that we would lose when we switched from Google at the end of that year to Microsoft. But it was unlikely that the Microsoft deal would make up for the search loss that we were going to experience overall."[206] However, a June 10, 2015 AOL presentation included financial projections that explicitly portrayed the Search Deal

---

[203] Trial Tr. 232:18–19 (Cornell); JX2255 ¶ 41 n.90 (Fischel Report).
[204] Pet'rs' Opening Br. 56.
[205] JX2346 at Tab I. A.2 Key assumptions [for AOL's LTP] ("New search deal terms set in for 2016. This will negatively impact revenue and bottom line for Core.").
[206] Trial Tr. 512:12–20 (Armstrong).

as *additive* to AOL's OIBDA in comparison with the LTP.[207]

I find that the preponderance of the evidence shows that the Search Deal is, at least minimally, additive to the LTP. The record is lacking in a principled way to account for the Search Deal, however. The Petitioners do no more than urge me to "select a number slightly higher than the mid-point share price to account for the Search Deal's benefits."[208] I find fair value, therefore, is best expressed by omitting any speculation as to the value to AOL of the pending Search Deal. In other words, the record gives me no basis to find that another value for the Search Deal is less arbitrary than $0. I also note that I have included the full value of the Display Deal as accretive to value, potentially overstating fair value, and I find it prudent not to exaggerate that effect by adding speculative value here.

3. Projection Period

Any DCF analysis must include a post-projection period of valuation into perpetuity at a steady state. This case is a now-classic appraisal story of "the tale of two companies." AOL was divided into three segments: two parts small and rapidly growing; one senescent. The question before me is, in the context of four-year projections, ending with two segments enjoying high growth rates and a quiescent third segment, what is the best way to view the terminal period?

---

[207] JX1906_VZ-0056420 at 5–6 (comparing difference in Search Deal projections to "AOL May 2015 Outlook + 2016–18 Long Term Plan").
[208] Pet'rs' Opening Br. 56.

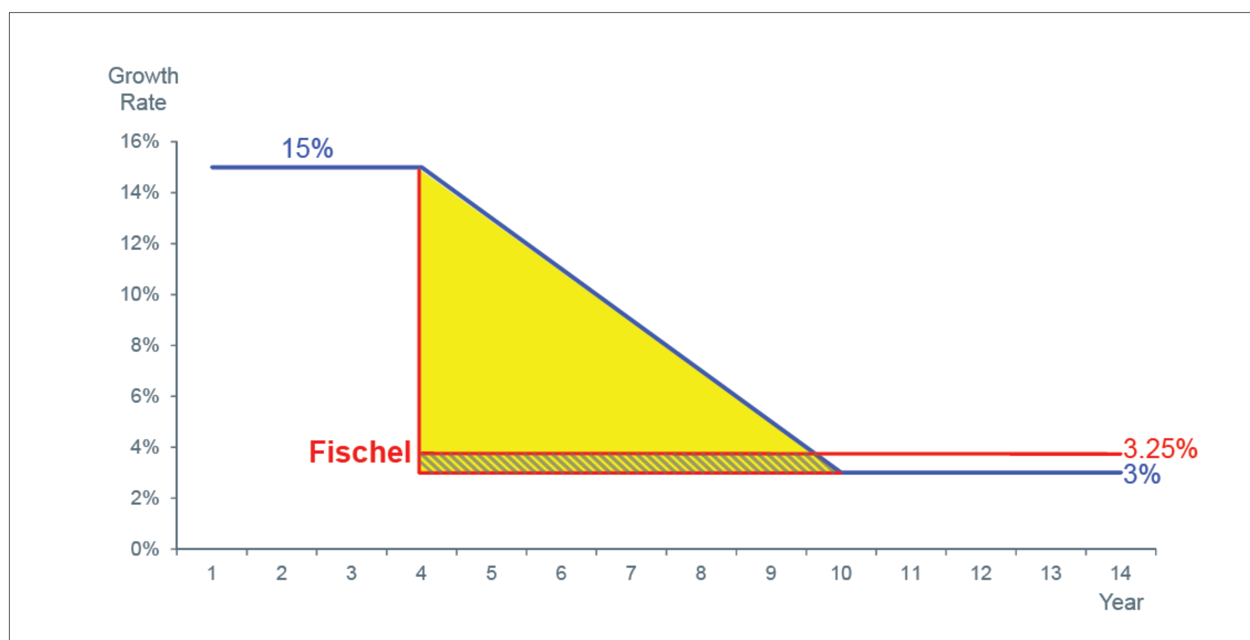
Fischel selected 3.25% as the perpetuity growth rate for AOL.[209] Fischel noted that the "perpetuity growth rates reported by analysts and advisors ranged from 1.0% to 6.6%, with a median of 2.5% and an average of 2.9%."[210] Fischel then averaged the 2.9% perpetuity growth rate given by analysts and advisors with the 4.6% long-term GDP growth estimate and 2.3% long-term inflation rate, resulting in an average rate of 3.28%.[211] Fischel reduced the perpetuity growth rate to 3.25% due to his concern that "AOL's Membership segment was the largest contributor to AOIBDA and was declining, so this may overstate the expected growth rate for the firm."[212] However, Fischel noted that because "AOL Projections do not provide estimates beyond 2018 . . . there is some possibility that AOL could experience growth in the short term at a rate higher than inflation due to higher growth in the Platforms and Brands segments or even potential acquisitions."[213] Lastly, Fischel tested the "sensitivity of the implied value of AOL's common shares to the perpetuity growth rate by using a range of 3.0% to 3.5%."[214]

Unsurprisingly, the Petitioners characterize Fischel's perpetuity growth rate of 3.25% as "flawed" because, they say, combined with his use of a two-stage model, Fischel insufficiently accounts for AOL's high growth rate prior to reaching steady

---

[209] JX2255 ¶ 54 (Fischel Report).
[210] *Id.* ¶ 52.
[211] *Id.* ¶ 54.
[212] *Id.* ¶ 54 n.104.
[213] *Id.* ¶ 53.
[214] *Id.* ¶ 54 n.104.

state.[215] The Petitioners argue that a three-stage DCF is more appropriate here because "academic literature [such as that by Professor Damodaran] counsels that if the growth in the final forecast year is well above the terminal growth rate, then a three-stage model is preferred."[216] The Petitioners point to Fischel's agreement, that two of the AOL businesses were experiencing "hypergrowth"[217] at the end of the two-stage projection period used by Fischel, as evidence that a two-stage model is inappropriate here.[218] The Petitioners illustrate this lost value using a chart:[219]



[215] Pet'rs' Post-Trial Opening Br. 64.
[216] *Id.* at 65.
[217] Trial Tr. 1105:20–1106:2 (Fischel) ("Q. Okay. Now, two of the AOL business segments experienced hypergrowth at the end of the projection period that you used. Correct? A. That's right. Q. And AOL did not reach a steady state at the end of the projection period. Correct? A. I think that's fair.").
[218] Pet'rs' Post-Trial Answering Br. 50.
[219] Pet'rs' Post-Trial Opening Br. 66.

As an alternative, the Petitioners advocate using the ten-year Deloitte projections used for the tax impairment analysis to account for the post-Management Projections growth gap described above.[220] I have already rejected this approach, for reasons set out above; I also note that AOL management did not believe it could reliably forecast beyond four years.[221]

In a fast-paced industry with significant fluctuations, where management is hesitant to project beyond four years, using a three-stage DCF model or a ten-year projection period seems particularly brazen. I find that a two-stage model is appropriate under these circumstances. However, I agree with the Petitioners that Fischel's two-stage model and perpetuity growth rate of 3.25% do not accurately capture the trajectories of the two divisions of AOL that were in hypergrowth at the end of the Management Projection period, despite the presence of the aforementioned senescent "You've Got Mail" laggard. I find a perpetuity growth rate of 3.5% more accurately captures AOL's prospects after the Management

---

[220] *Id.* at 66–67; JX2277 (Cornell Report) ¶¶ 89–92.

[221] Resp't's Opening Post-Trial Br. 74; Trial Tr. 642:11–23 (Dykstra) ("Q. Why did you only project out four years as part of the long-term planning process? A. It was very difficult to go beyond four years. You know, we were in businesses and markets where the world was changing pretty quickly. I mean, digital marketing really was just coming into play, so it was moving fast. We -- it's difficult to predict advertising trends to begin with."); JX2233 at 112:22–113:5 (Eoin Ryan Dep., former AOL head of investor relations and now AOL head of financial planning); Trial Tr. 642:11–23 (Dykstra); JX2233 at 112:22–113:5 (Ryan Dep.).

Projection period ends. When a 3.5% perpetuity growth rate is applied to Fischel's DCF model, the fair value of AOL stock increases by $1.28 per share.[222]

4. Cash Balance

The value of working capital that is required "to fund [a company's] ongoing operations . . . is already reflected in one sense in the discounted present value of those operations."; any balance of cash not so required is "'excess' and may be added to the discounted cash flow."[223] Fischel and Cornell agree that any such balance should be added back to the valuation for AOL after the DCF analysis. Fischel cites to Professor Aswath Damodaran for the financial valuation rule that "only cash in excess of the minimum cash balance needed for operations should be included in a DCF."[224]

The cash on hand of the Company on the Valuation Date was $554 million.[225] Fischel adds $404 million at the end of the DCF but reserves $150 million as working

[222] I use the Fischel model the parties provided to calculate my DCF. I note that Fischel's model includes a broken reference (#REF!) in Ex. N on the "AOL Dilutive Results (lexicon)" tab at cell BJ4. The reference impacts calculations made in the "DCF" tab regarding the shares outstanding at cell B16. I input "85.1" into cell B16 in accordance with Fischel's Report at JX2255 ¶ 57, which states that "AOL had approximately 85.1 million fully diluted shares outstanding as of the Valuation Date." The result was a $1.28 per share difference when applying a 3.5% perpetuity growth rate, or $46.13 per share. The parties may address any concerns with this approach before the Final Order.

[223] *Neal v. Ala. By-Products Corp.*, 1990 WL 109243, at *16 (Del. Ch. Aug. 1, 1990), *aff'd,* 588 A.2d 255 (Del. 1991).

[224] JX2255 at 36 (citing Aswath Damodaran, *Dealing with Cash, Cross Holdings and Other Non-Operating Assets: Approaches and Implications*, working paper, Sept. 2005, at 12) ("Damodaran").

[225] JX2255 (Fischel Report) ¶ 55 (including "cash and equivalents of $530 million plus assets held for sale of $24 million").

capital, an asset necessary to develop the return on investment that is represented in the DCF.[226] Cornell adds back AOL's entire cash balance of $554 million.[227] The Petitioners contend that the $150 million "minimum balance" is "litigation driven"[228] by pointing to (i) Verizon's and AOL's advisors purportedly opposite position in their valuations[229] and (ii) AOL's historic dips below $150 million cash on hand in 2014.[230] They contend that *none* of this cash should be excluded and that *no* working cash exclusion is appropriate.

I am not persuaded that, in evaluating the fair value of AOL under these circumstances, I should add back all of the cash of AOL, implicitly assuming that zero working capital would be required to achieve the returns that the DCF analysis projects. While I recognize that AOL dropped below $150 million in cash in the recent past, which the Petitioners point to as evidence that the minimum cash balance is a litigation façade, I also acknowledge that historical dips in cash reserves pertain to a different time period with different capital requirements. The preponderance of

---

[226] *Id.*
[227] JX2277 (Cornell Report) at 134.
[228] Pet'rs Post-Trial Opening Br. 69.
[229] *See* JX1546 at 12 (Guggenheim) (showing $477 million cash in an enterprise value analysis); JX2319 (Allen) at Tabs "WholeCo Multiple Val," "SOTP-Mult" (showing each as incorporating $493 million cash under a multiple-based valuation analysis), "WholeCo DCF (Old CF)," (including $493 million cash in calculating the weighted average cost of capital). I note that the Petitioners do not clearly point to an example of where Allen & Co. added back all of AOL's cash balance after a DCF analysis.
[230] *See, e.g.*, JX2267 (excerpt of AOL June 30, 2014 10-Q showing cash and equivalents of $136.2 million); JX2268 (excerpt of AOL March 31, 2014 10-Q showing cash and equivalents of $123.5 million); Trial Tr. (Dykstra) 764:1–2 ("I don't remember when we first came up with the [$150 million] minimum cash [goal].").

the evidence indicates that this not a litigation-driven argument.[231] I instead find that the withholding of $150 million as working capital is reasonable and decline to add it back into the DCF.

IV. CONCLUSION

In arriving at fair value, for the reasons discussed above, I give full weight to my DCF valuation. I begin with Fischel's DCF valuation of $44.85 and add $1.28 per share[232] for the adjustment to a 3.5% perpetuity growth rate and $2.57 per share to include the Display Deal as part of AOL's operative reality. My DCF analysis therefore results in a fair value of $48.70 per share. While the deal process was not *Dell* Compliant and thus not entitled to deference as a reliable indicator of fair value, it was sufficiently robust that I use the deal price as a "check" on my analysis, while granting it zero explicit weight. I note that value derived from my DCF does not deviate grossly from the deal price of $50.

I am cognizant, however, that I am saying two seemingly incongruent things; namely, that AOL's deal process was insufficient to warrant deal price deference at $50 per share—because, due to deal deficiencies, the sales price may not capture the full fair value of the Company—while also holding, based on my DCF analysis, that

[231] Trial Tr. 765:4–7 (AOL CFO Karen Dykstra) ("I said we had a goal of maintaining $150 million. We felt that that should be our minimum cash balance. We felt that that was prudent."); JX00921 at 31 (Feb. 27, 2015 AOL Board Agenda: "To balance our growth strategy with cash management objectives, our goals are to maintain . . . at least $150m of cash on hand, using the credit facility for strategic transactions (share repurchases and M&A transactions).").
[232] *See supra* note 222.

the value of AOL stock is even *lower*, at $48.70 per share. One explanation for this incongruity is that a deal price may contain synergies that have been shared with the seller in the deal but that are not properly included in fair value.

For the reasons described above, I hold that the fair value of AOL stock was $48.70 per share on the Valuation Date. The Petitioners are entitled to the fair value of their shares together with interest at the statutory rate. The parties should confer and provide a form of order consistent with this Memorandum Opinion.

EXHIBIT 2

2017 WL 2119723 (Del.Ch.) (Trial Motion, Memorandum and Affidavit)
Chancery Court of Delaware.

In re APPRAISAL OF AOL INC.

No. 11204-VCG.
May 10, 2017.

Petitioners' Post-trial Opening Brief

Stuart M. Grant (No. 2526), Mary S. Thomas (No. 5072), John C. Kairis (No. 2752), Laina M. Herbert (No. 4717), Grant & Eisenhofer P.A., 123 Justison Street, Wilmington, DE 19801, Tel: 302.622.7000, Fax: 302.622.7100, Counsel for Petitioners.

Dated: May 10, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

GLOSSARY vi

KEY PLAYERS viii

CITATION FORMAT ix

I. PRELIMINARY STATEMENT 1

II. STATEMENT OF FACTS 6

A. AOL HAD THREE DIVERSE BUSINESS UNITS 6

B. AOL HAD BECOME A HIGH GROWTH COMPANY IN A HIGH GROWTH INDUSTRY 7

C. AOL'S LONG-TERM PROJECTIONS 11

D. AOL UPDATES ITS LTP, FOCUSING ON CHANGES IN WORKING CAPITAL 12

E. AOL SELLS ITSELF EXCLUSIVELY TO VERIZON 18

1. History Of Verizon Deal 18

2. AOL Leaves Money On The Table 26

3. Verizon Valued AOL As A Stand-Alone Business And Looked At Synergies As An Add-On Value 27

F. ARMSTRONG IGNORES OTHER POTENTIAL PURCHASERS; CUTS A SIGNIFICANT DEAL FOR HIMSELF; AND LOCKS UP THE MERGER 29

1. Armstrong Ignores Other Potential Purchasers 29

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(a) Companies A, B, And C 31

(b) Arm strong Ignores AT& T 34

2. Armstrong Cuts A Significant Deal For Himself 36

G. THE MILLENNIAL DEAL 40

H. THE MICROSOFT SEARCH AND DISPLAY DEALS 44

1. The Microsoft Search Deal 44

2. The Microsoft Display Deal 46

I. THE MARKET WAS UNAWARE OF THE MILLENNIAL MEDIA, DISPLAY AND SEARCH DEALS PRIOR TO THE MERGER 48

III. ARGUMENT 49

A. THE FOUR CRITICAL QUESTIONS FOR THE COURT TO ANSWER 49

1. The Updated Projections Are The Appropriate Projections To Use In The DCF 50

2. The Millennial Deal And The Microsoft Search And Display Deals Were Part Of AOL's Operative Reality On The Valuation Date And Must Be Included In AOL's Fair Value 54

(a) The Microsoft Search Deal Was Better Than Projected 56

(b) The Millennial Media And Microsoft Deals Were Additive To AOL's Long-Term Plan Projections 57

(c) AOL Did Not Disclose The Millennial Media Or Microsoft Display Deals To Verizon Or The Market Prior To Entry Into The Merger Agreement 61

3. AOL's Fair Value Cannot Be Determined By Cutting Off Its Growth After Only Three-And-A-Half Years 63

4. All of AOL's Cash Must Be Included In Its Equity Value 67

B. THE "MARKET EVIDENCE" Is A RED HERRING AND HAS No IMPACT ON AOL'S VALUATION 71

1. Pre-Transaction Trading In AOL Shares Does Not Reflect Fair Value 72

2. Analysts' 12-Month Price Targets Do Not Reflect Fair Value 74

3. Pre-Transaction Competition 74

4. Arms-Length Transaction 75

5. Behavior Of AOL Managers, Directors, And Financial Advisors 77

6. The Premium Paid In The Merger Was Very Low 78

WESTLAW © 2019 Thomson Reuters. No claim to original U.S. Government Works.

7. Lack Of Topping Bids Is Not Evidence Of Fair Price 79

8. Post-Announcement Verizon Price Reaction Is Statistically Insignificant 80

9. Tender Offer Results Do Not Support Fischel's Fair Value Contention 82

10. AOL And Verizon Analyst Opinions Of The Transaction Are Not Evidence of Fair Value 83

C. FISCHEL'S CLAIM THAT AOL's FAIR VALUE EQUALS DEAL PRICE LESS SYNERGIES IS BASED ON THE UNSUPPORTED AXIOM THAT DEAL PRICE EQUALS FAIR VALUE 83

D. FISCHEL'S CLAIM THAT AOL'S FAIR VALUE EQUALS DEAL PRICE LESS SYNERGIES IS BELIED BY THE FACTS, INCLUDING THE ACTUAL WAY VERIZON APPROACHED THE ACQUISITION 87

IV. CONCLUSION 90

TABLE OF AUTHORITIES

Cases

In re Appraisal of Dell, Inc., 2016 WL 3186538 (Del. Ch. May 31, 2016) 73, 79, 84, 87

In re Appraisal of the Orchard Enters., Inc., 2012 WL 2923305 (Del. Ch. July 18, 2012) 84

Cede & Co. v. Technicolor, Inc., 684 A.2d 289 (Del. 1996) 49, 54

Del. Open MRI Radiology Assocs., P.A. v. Kessler, 898 A.2d 290 (Del. Ch. 2006) 54, 55

In re Diamond Foods, Inc., Sec. Litig., 295 F.R.D. 240 (N.D. Cal. 2013) 84

Gearreald v. Just Care, Inc., 2012 WL 1569818 (Del. Ch. Apr. 30, 2012) 49

Glassman v. Unocal Exploration Corp., 777 A.2d 242 (Del. 2001) 54

Golden Telecom, Inc. v. Global GTLP, 11 A.3d 214 (Del. 2010) 84

Highfields Capital, Ltd. v. AXA Fin., Inc., 939 A.2d 34 (Del. Ch. 2007) 49

M.G. Bancorporation, Inc. v. Le Beau, 737 A.2d 513 (Del. 1999) 49

Montgomery Cellular Holding Co., 880 A.2d 222 (Del. 2005) 54, 55

Other Authorities

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

ASWATH DAMODARAN, DAMODORAN ON VALUATION: SECURITY ANALYSIS FOR INVESTMENT AND CORPORATE FINANCE (2d ed. 2006) 63

Ben Reynolds, *Is Verizon's Acquisition of AOL an Example of 'Diworsification'?* THESTREET, May 12, 2015, *at https://www.thestreet.com/story/13147957/1/is-verizons-acquisition-of-aol-an-example-of-diworsification.htm* 81, 82

BRADFORD CORNELL, CORPORATE VALUATION: TOOLS FOR EFFECTIVE APPRAISAL AND DECISION MAKING (1993) . 63

Deborah A. DeMott, *Directors' Duties in Management Buyouts and Leveraged Recapitalizations,* 49 OHIO ST. L.J. 517 (1988) 73

Guhan Subramanian, Feb. 6, 2017 Draft at 25, *Using the Deal Price for Determining "Fair Value" in Appraisal Proceedings, in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? (forthcoming) (U. Chicago Press), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract id=2911880* 75, 84

Yahoo Finance, Dow Jones Industrial Average Historical Daily Stock Price, *at https://finance.yahoo. com/quote/;DJI/history?period1=1431316800&period2=1431403200&interval=1d&filter=history&frequency=1d* (last visited Mar. 31, 2017) 81

GLOSSARY

Ad Tech	Advertising technology
AOL	AOL Inc.
Board	Board of Directors for AOL Inc.
Company	AOL Inc.
DCF	Discounted Cash Flow

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

EBITDA	Earnings before interest, tax, depreciation and amortization
Guggenheim	Guggenheim Securities LLC
LionTree	LionTree Advisors LLC
Merger	Acquisition of AOL Inc. by Hanks Acquisition Sub, Inc., a wholly-owned direct subsidiary of Verizon Communications Inc.
Merger Agreement	Agreement and Plan of Merger between AOL Inc. and Hanks Acquisition Sub, Inc., dated May 11, 2015
Microsoft	Microsoft Corp.
Millennial Media	Millennial Media Inc.
OIBDA	Operating income before depreciation and amortization
Original Projections	AOL Inc.'s projections for capital expenditures, depreciation and amortization, change in net working capital, and stock-based compensation expense that were prepared in February 2015
Time Warner	Time Warner Inc.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

Updated Projections	AOL Inc.'s projections for capital expenditures, depreciation and amortization, change in net working capital, and stock-based compensation expense that were prepared in April 2015
Valuation Date	June 23, 2015
Verizon	Verizon Communications Inc.

KEY PLAYERS

(Role Described as of May 11, 2015)

Name	**Role**
Armstrong, Timothy	Chief Executive Officer and Chairman of AOL
Bellomo, Nicholas	Chief Financial Officer of AOL's Platforms Segment
Decker, Andrew	Senior Managing Director at Guggenheim
Doherty, John	Senior Vice President of Corporate Development at Verizon
Dykstra, Karen	Chief Financial Officer of AOL

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

Isani, Omar	Director at Allen & Co.
McAdam, Lowell	Chief Executive Officer and Chairman of Verizon
Nolan, Michael	Senior Vice President of Financial Planning & Analysis at AOL
Reynolds, Fredric	Member of AOL's Board of Directors
Roszkowski, Mark	Senior Vice President, Head of Corporate Development at AOL
Stenzler, Ehren	Managing Partner at LionTree
Walden, Marni	Product and New Business Organization at Verizon

CITATION FORMAT

Citations to Deposition Transcripts	"[Deponent's Last Name] [Page:Line]"
Citations to Exhibits Marked in Depositions	"[Deponent's Last Name] Ex. *"
Revised Expert Report of Bradford Cornell (JX2277)	"COR"
Expert Report of Daniel Fischel (JX2255)	"FOR"

Expert Report of Anindya Ghose (JX2252)	"GOR"
Expert Report of Catherine Tucker (JX2254)	"TOR"
Rebuttal Expert Report of Bradford Cornell (JX2263)	"CRR"
Rebuttal Expert Report of Daniel Fischel (JX2265)	"FRR"
Rebuttal Expert Report of Catherine Tucker (JX2264)	"TRR"
Joint Exhibit	"JX *"
Joint Pretrial Order	"PTO ¶*"
Trial Transcript	"TT [Witness' Last Name] [Page:Line]"

I. PRELIMINARY STATEMENT

On investor conference calls shortly before the Merger, Tim Armstrong explained that AOL's future was bright, that it was a leader in the Ad Tech space, and that there were "very few companies on planet earth that have the capabilities we do."[1] He told investors "by [] investing in undeniable trends ... we will set the Company up for future growth."[2] He stressed that AOL had a strategy of "shooting the gap between the large internet companies and the traditional media companies."[3] On an earnings call just four days before the Merger was announced, Armstrong hailed the Company's successful "platform shift towards mobile, social, video and programmatic advertising,"[4] touting The Huffington Post as "one of the largest and most important content, video and social brands in the world," AOL On as "one of the best platforms for the video business in the world," and ONE by AOL as "one of the best advertising platforms in the world."[5]

And then Petitioners filed their appraisal petitions. At trial, AOL put forth a lineup of impressive and well-prepared witnesses to tell a different story-a rehearsed story about AOL quietly, but desperately, seeking a merger partner so it could eke out an existence in a world dominated by Facebook and Google. But this after-the-fact litigation story has no support in the contemporaneous record. The contemporaneous record shows AOL never shopped itself and Armstrong even turned away potential suitors. The contemporaneous record also shows AOL was well-poised to take advantage of the rapidly growing Ad Tech business and was worth significantly more than the $50 per share for which Armstrong sold it.

Both valuation experts agree the appropriate way to determine the point estimate for the fair value of AOL's common stock is to use a discounted cash flow ("DCF) model.[6] Using their respective models, Petitioners' expert, Professor Bradford Cornell, opined that AOL's fair value was $68.98 per share[7] and AOL's expert, Professor Daniel Fischel, opined that the fair value was $44.85 per share.[8]

Although at trial Respondent tried to complicate this case with extraneous arguments,[9] there are still only four issues the Court must decide in order to determine AOL's fair value: (1) Which cash flow projections should be used to value AOL, the Original ("stale" and "messy") Projections or the Updated Projections (approved by senior members of AOL management)? (2) Should projections prepared in connection with the Microsoft deals (signed three days after the Merger) and the Millennial Media deal (effectively approved before the Merger) be used in determining the fair value of AOL's common stock? (3) Should a DCF to determine AOL's fair value use a three-stage model (or a longer projection period), or a two-stage model that cuts off AOL's growth after three-and-a-half years? (4) Should the valuation of AOL include all of its net cash or should it leave out $150 million? The answers to these questions come from the contemporaneous record and AOL's internal documents:

(1) The Updated Projections contain the most reliable free cash flow estimates and should be used in determining the fair value of AOL's common stock. The Updated Projections, generated months after the Original Projections, resulted from AOL's bottoms-up/top-down analysis of working capital estimates. The contemporaneous record shows: (a) several senior members of AOL management (including the CFO) signed off on the new working capital estimates contained in the Updated Projections; (b) the Updated Projections were provided to, and used by, Verizon and its bankers; and (c) internally, AOL never went back to the Original Projections, but used the Updated Projections instead. The Updated Projections should be used to value AOL.

(2) The Microsoft and Millennial Media deals were part of AOL's operative reality at the time of the Merger and should be used in determining the fair value of AOL's stock. On the Valuation Date, AOL was in advanced stages, or had effectively completed, the acquisition of Millennial Media and a commercial partnership with Microsoft. The Microsoft Deals were signed three days after the Merger. With regard to Millennial Media, AOL admitted "[i]f Verizon had not made the offer for AOL, AOL would have proceeded with obtaining formal board approval to acquire Millennial in June of 2015."[10] Given that these deals were part of AOL's operative reality on the Valuation Date, those projections should be included in the DCF analysis.

(3) A DCF to determine AOL's fair value should use a three-stage model or a longer projection period. A terminal value should not be applied until a company reaches a steady state. The Company's internal projections show two of AOL's three businesses (Platforms and Brands) would not have reached steady state by the end of the three-and-a-half-year projection period. In such a situation, one should either extend the projections or use a three stage DCF model and step down the growth rate from the end of the projection period, before valuing the terminal period. In performing a DCF analysis, Cornell used both a three-stage DCF that captured AOL's high growth during this middle period, and separately used a two-stage DCF, but with extended projections created by AOL (and used by Deloitte). Fischel, by contrast, dropped AOL's growth rate down to the terminal growth rate (an artificially low one) after just three-and-a-half years, despite AOL's "hyper growth." Growth does not just drop off of a cliff and a DCF should account for that by using either a three-stage model or a longer projection period.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(4) AOL's valuation should include all of its net cash. To get from enterprise value to equity value using a DCF, both experts agree one must add net cash. Both experts did just that. The difference is Fischel left out $150 million in cash because he assumed that it was "minimum cash" necessary to run the business and, therefore, should not be considered part of "net cash." But even the leading authority that Fischel himself cites, Professor Aswath Damodoran, explains that for companies who have their excess cash invested the way AOL does, it is not proper to deduct "minimum cash." There is also no basis to assume $150 million is an appropriate level of "minimum cash" for AOL. AOL's valuation should include all of its net cash.

These are still the overarching questions that swallow all sub-issues, including which valuation expert's model should be adopted. Using either expert's model and the appropriate inputs, the Court should award Petitioners at least $68.98 per share, plus statutory interest.

II. STATEMENT OF FACTS

Starting with the 2009 spin-off from Time Warner, AOL began a transformational shift to Ad Tech and content, propelled by a series of acquisitions.[11] By the Valuation Date, AOL was a leading global media and Ad Tech company.[12]

A. AOL HAD THREE DIVERSE BUSINESS UNITS

AOL was organized into three diverse business units: Platforms, Brands, and Membership.[13] The Platforms segment provided interconnected programmatic (automated) and premium advertising offerings and technologies enabling advertisers and publishers to reach consumers across various devices (*i.e.,* desktop, mobile, and television).[14] The Platforms business was growing rapidly.[15]

Also expanding rapidly was the Brands segment[16] - AOL's portfolio of unique content, primarily websites owned or operated by AOL, including AOL.com, The Huffington Post, TechCrunch, MapQuest, and co-branded websites owned or operated by third parties.[17] The Brands segment generated revenues through selling ads on these websites and through search advertising.[18]

The Membership group consisted of the legacy dial-up subscription service and related products and services (such as AOL Mail and AOL Search).[19] The Membership group generated revenues through membership fees and the sale of advertising on Membership group properties, as well as for marketing third party products and services. Although a cash cow at the time of the Merger, the Membership segment was expected to be a smaller portion of AOL's future.[20]

B. AOL HAD BECOME A HIGH GROWTH COMPANY IN A HIGH GROWTH INDUSTRY

Platforms' Ad Tech business had transformed AOL into a high growth company.[21] The industry experts (Professors Ghose and Tucker) "agree that 'online advertising has seen dramatic growth recently and is poised for continued growth.' "[22] Revenue from advertising on mobile devices (such as smartphones and tablets) has grown rapidly and that trend is expected to continue.[23] Consumers are also increasingly viewing videos online, leading to substantial growth in video advertising that is expected to continue.[24] Advertisers' spending on online ads bought and sold programmatically is estimated to increase substantially and surpass the share of online ads bought and sold traditionally.[25]

Through strategic acquisitions, AOL successfully transformed itself into a programmatic Ad Tech company well-positioned to capitalize on these trends.[26] As a leading Ad Tech company in a growing industry, AOL experienced significant growth leading up to the Merger.[27]

As Armstrong reported in a February 11, 2015 earnings conference call, AOL was "the fastest growing multi-platform user base in the top 5 internet companies for all of 2014."[28] Armstrong also reported:

[P]rogrammatic revenue grew by more than 100% in the quarter as it has for the entire year, and we increased our owned and operated programmatically sold impressions by 200% year-over-year.

Mobile ad revenue was up 50% year-over-year, and we saw 227% increase in mobile programmatic campaigns.[29]

Armstrong forecasted continued strong growth.[30] AOL's CFO Karen Dykstra echoed that promising future: "Looking at this business over the long term, we see a long runway of double-digit revenue growth."[31] In short, AOL's strategy was succeeding and the Company continued to grow right up to the Merger.

AOL's high growth was expected to continue past 2018 (the end of the Company's 31/2 years of projections). The Platforms and Brands segments were projected to see double-digit revenue and OIBDA growth at the end of the projection period.[32] The important Platforms segment would be in "hyper growth" and would not reach steady state until well after the end of 2018.[33]

C. AOL's LONG-TERM PROJECTIONS

In December 2014, the Company evaluated the "feasibility and/or attractiveness of separating the various aspects of AOL's businesses."[34] This exercise was referred to as "Project Netscape."[35] In connection with Project Netscape, AOL conducted a "deep dive" into its financial model, taking a bottoms-up approach to revenue and OIBDA.[36] The results were incorporated into AOL's 2015 long-term plan ("LTP"), which projected various financial metrics through fiscal year 2018, and which was presented to the Board in February 2015.[37] Both sides' valuation experts relied on AOL's LTP projections for base Revenue and adjusted EBITDA numbers.[38] Because the Microsoft and Millennial Media transactions were not yet part of AOL's operative reality at the time of Project Netscape, the projected impact of those deals was not included in the LTP.[39]

D. AOL UPDATES ITS LTP, FOCUSING ON CHANGES IN WORKING CAPITAL

AOL provided the LTP to Allen & Co. ("Allen"), its banker. The LTP included certain net working capital ("NWC") assumptions (the "Original Projections"). Allen provided the Original Projections to Verizon and its two bankers, Guggenheim and LionTree. It quickly became apparent that AOL's own assumptions for NWC were "materially different from research estimates."[40]

NWC Comparison

(Dollars in Millions)	2015	2016	2017	2018
Original NWC	$(76)	$(86)	$(96)	$(134)
NWC Wall Street Median	(22)	(24)	(15)	(20)

After reviewing the Original Projections, LionTree was "not comfortable" with them because "[t]here was no detail behind them."[41] As Ehren Stenzler of LionTree explained:

Candidly, it just seemed like the initial file that was provided was just wrong. There wasn't much to it.

It seemed like there was - seemed like they just didn't have the right information when - that was originally pulled.

[W]ithout having an explanation or sufficient detail behind it, we weren't comfortable using something until we have it.[42]

Guggenheim had a similar reaction to the NWC assumptions in the Original Projections:

> [T]hey had supplied some information about changes in working capital that, at least on the surface, we

didn't understand and had questions about.

[T]hey had sent over some very high level summary numbers through the projection period which, if I recall correctly, was 2018 that showed ever-increasing consumption of cash. In other words, the changes in net working capital meant cash was being consumed as part of the operations. That was something we didn't quite understand in the context of what the projections were - that were presented, so we needed to understand that.[43]

Hearing these criticisms, Omar Isani at Allen asked AOL management to take a "hard look to refine" the NWC assumptions.[44] AOL then performed a bottoms-up analysis of its Capex, SBC, change in NWC, and D&A projections, and revised its projections as to each component, resulting in the Updated Projections.[45] On April 17 and 18, several members of AOL's senior management, including CFO Dykstra, Michael Nolan, Tom Lee, Nicholas Bellomo, Lara Sweet (AOL Controller and Chief Accounting Officer),[46] and Mark Roszkowski, all signed off on the Updated Projections without caveat or exception.[47]

The contemporaneous documents are in stark contrast to the made-up trial testimony where AOL witnesses offered different excuses as to why the Updated Projections were unreliable.[48] For example, Bellomo - who signed off on the Updated Projections and provided "backup for the DSO ["days sales outstanding"] forecast"[49] that was a driving factor behind the improved numbers - testified at trial that he had simply "reviewed the numbers that were shared and [] took a pass at making them more optimistic"[50] to make sure it did not negatively impact Verizon's offer.[51] But Bellomo got his timeline wrong, as Verizon had made *no offer* as of the date the Updated Projections were approved and sent to Verizon.[52] Bellomo also conveniently forgot that many of his colleagues who created the Updated Projections were unaware of the prospect of an acquisition of AOL by Verizon. The reality is that in April 2015, knowing more about the Platforms business than he had when the Original Projections were created,[53] Bellomo - along with AOL Corporate Development, Financial Planning and Analysis, and even AOL's CFO - signed off on the Updated Projections because the Updated Projections were more accurate.[54]

Roszkowski and Dykstra tried to excuse the Updated Projections as having taken into account the potential impact of the Verizon transaction on cash flow. But this explanation defies logic. Every other number that AOL provided to Verizon and its bankers was for AOL as a standalone entity, not as part of Verizon. And, when AOL discussed the Updated Projections with Verizon's bankers, nobody suggested that the Updated Projections included benefits from the transaction with Verizon.[55] Moreover, AOL had in fact improved its working capital numbers pre-Merger.[56]

Allen simply instructed Verizon's bankers: "all old numbers *[i.e.,* the Original Projections] should be disregarded."[57] Allen circulated a chart "show[ing] the difference between the original numbers that were sent to LionTree and the updated numbers for net working capital and a few other items."[58] A chart reflecting the differences between the Original and Updated Projections follows:[59]

Original Projections					**Updated Projections**			
(Dollars in Millions)	**2015**	**2016**	**2017**	**2018**	**2015**	**2016**	**2017**	**201 8**
D&A Core	$48	$57	$68	$62	$48	$57	$68	$62
Brands	31	28	29	24	31	28	29	24
Platforms	84	121	131	106	111	121	131	106
Corporate	4	5	6	5	4	5	6	5
Total	$167	$212	$234	$197	$194	$213	$231	$19 7

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

Capex Core		($34)	($36)	($37)	($37)	($34)	($36)	($37)	($37)
Brands		(9)	(10)	(10)	(10)	(9)	(10)	(10)	(10)
Platforms		(56)	(54)	(50)	(48)	(56)	(54)	(50)	(48)
Corporate		(2)	(3)	(3)	(3)	(2)	(3)	(3)	(3)
	Total	($102)	($102)	($100)	($98)	($102)	($102)	($100)	($98)
Net Working Capital Core		($2)	($3)	($20)	($19)	$0	$0	$2	$1
Brands		(1)	(1)	(1)	(8)	(15)	(12)	(13)	(13)
Platforms		(76)	(82)	(74)	(104)	(13)	(26)	(24)	(18)
Corporate		3	(1)	(1)	(2)	0	1	2	2
	Total	($76)	($86)	($96)	($134)	($28)	($37)	($33)	($29)
Stock Based Comp Platforms		$27	$42	$45	$30	$33	$36	$39	$43
	Total	$66	$84	$91	$81	$72	$78	$85	$94

Verizon's financial advisors adopted the Updated Projections in their standalone analyses of AOL.[60]

When it suited his needs, even Fischel used portions of the Updated Projections in his analysis. Specifically, he used the D&A and SBC numbers from the Updated Projections to calculate certain of AOL's tax attributes for use in his DCF.[61] He did NOT use changes in NWC from the Updated Projections. Doing so would have resulted in a significantly higher valuation of AOL.

E. AOL SELLS ITSELF EXCLUSIVELY TO VERIZON

1. History Of Verizon Deal

In July 2014, Armstrong and McAdam met at Allen's annual Sun Valley Conference[62] and discussed "where the world was going" and "what the companies were doing together."[63] After various Autumn meetings between McAdam and Armstrong in the Fall, AOL and Verizon (code name "Thor") signed a Mutual Non-Disclosure Agreement allowing the companies "to explore potential opportunities ... to work together in the digital (online and mobile) media and entertainment and advertising spaces."[64] During December, Armstrong and McAdam met several times and continued discussing "what [was] possible" between the two companies.[65] These discussions focused solely on joint ventures and partnerships, not an outright acquisition of AOL.

By January 2015, Armstrong was so tight with McAdam he wanted to share with him "a big download on a major competitor's plans"[66] - specifically that AT&T was "going to be heavily investing in Linear TV"[67] - and to "detail where [Armstrong thought] investments [were] going."[68] Armstrong told McAdam he was "more convinced than ever [they] should aggressively see if [they could] do something big."[69] McAdam responded he "was also thinking about this and [had] come to the same conclusion."[70] Armstrong and McAdam continued these types of discussions about *a joint venture* into January.[71]

On February 5, the relationship Armstrong was forging with McAdam started to yield fruit. LionTree delivered to Verizon a term sheet prepared by Wachtell Lipton "set[ting] forth certain key high-level terms for a potential transaction between Hanks [AOL] and Thor [Verizon]."[72] From February through March 2015, the companies and their CEOs continued meeting to discuss a potential joint venture.[73]

While Armstrong was wooing McAdam, Armstrong apparently was not pursuing any other joint venture partners. On February 18, Roszkowski asked Armstrong if they should "start smiling and dialing to kick off conversations with Thor-like companies or [if Armstrong] want[ed] to continue to hold."[74] There is no contemporaneous evidence AOL ever started a "smile and dial" campaign to stoke interest from another company or to initiate price competition. Instead, AOL and Verizon "chose each other."[75]

Armstrong repeatedly stressed his preference for a deal with Verizon, to the exclusion of other deals. On March 30 he told management, "there may be other deals that come along - but we're going to solve Thor first - so don't worry about anything else."[76]

Although Armstrong had no interest in a deal with anyone else, he used unsolicited interest from Fox to push McAdam to a decision point. Armstrong told one of Verizon's bankers:

> [AOL] had other in bound from a large media company and they were serious. [Armstrong] told [Bourkoff] [he] hinted to it with Lowell but [AOL was not] shopping - this came directly in.[77]

On March 18, Armstrong communicated that "the other deal folks [were] moving quickly and Thor [would] lose a key timing if we don't get to a proposal shortly ...."[78]

On April 8, McAdam and Armstrong met, and McAdam for the first time proposed a 100% acquisition of AOL.[79] Armstrong waited until April 11 to inform the Board via email about a potential full acquisition of AOL by Thor.[80] At the April 12 Board meeting, Armstrong updated the Board on the status of discussions and the reasons he believed the transaction would be a strong strategic fit with the Company.[81] At this meeting, the Board authorized Company management to continue the overall discussions, including discussions regarding Armstrong's future employment with Verizon.[82]

Two weeks later, Verizon's counsel sent a draft merger agreement to Wachtell.[83] That draft merger agreement included a requirement that AOL reimburse Verizon's transaction expenses if the merger agreement was terminated under certain circumstances, a 4.5% termination fee, matching rights, and a "no shop."[84]

At the April 26 Board meeting, Armstrong presented the proposed merger agreement.[85] He also emphasized the importance to Verizon of retaining the Company's management post-Merger.[86] Armstrong explained he was having continued discussions with Verizon regarding his ongoing employment.[87] The Board authorized Company management, including Armstrong, to continue negotiating with Verizon, which included continuing discussions regarding Armstrong's retention post-closing.[88] By this point, the Board was fully informed that it had authorized a conflicted CEO to negotiate the sale of AOL.[89]

On May 8, AOL announced breakout earnings for the first quarter of 2015.[90] AOL's earnings significantly exceeded consensus Wall Street estimates for revenue, EBITDA, and earnings per share.[91] In response, AOL's stock price shot up $4.03 (or over 10%) to $43.42.[92] Armstrong described the results as "another strong quarter of consumer, customer, and product growth."[93] He stressed that AOL "delivered strong results while making significant and beneficial updates ... that further position AOL at the center of the dramatic platform shifts we are seeing in content, video and advertising."[94] Overall, his message was "AOL is now an extremely capable company."[95] Dykstra added that the "[f]irst-quarter results represent another strong quarter for AOL, made even more impressive by the accelerated overall revenue growth during a time of structural transition...."[96] Several analysts increased their price targets in response to the positive earnings news.[97]

Also on May 8, a mere month after Verizon first proposed a full acquisition, Verizon submitted a confidential written offer for a full acquisition of AOL at $50 per share.[98] The premium represented by Verizon's offer was only 15.2%.[99]

Armstrong twice explained to the Board (on May 8 and May 9) that Verizon had stated there was no further room for

negotiations with respect to the offer price.[100] And the Board twice directed the conflicted Armstrong to contact Verizon and request additional value for AOL's stockholders.[101] But Armstrong never countered with a number above $50 per share.

After the May 9 Board meeting, Armstrong told Marni Walden he "took the board through another round tonight and gave them [his] strong recommendation.... If we do get an approval, we were hoping to announce on Monday ...."[102] On Sunday morning, May 10, Armstrong told McAdam about how hard he was lobbying the Board, saying he "just sent Marni a note - we are very close based on the BOD call and individual calls I did last night."[103] Armstrong also confirmed with Walden and McAdam that AOL management would be meeting with the Board the next day and informed them AOL "seem[ed] to be making progress with the deal teams."[104] Armstrong also offered to update McAdam and Walden before noon on May 11th, "once [he had] a sense of the process."[105]

On May 11, the Board met to discuss Verizon's $50/share offer.[106] At this meeting, Armstrong described the strategic rationale for an acquisition of AOL by Verizon, and Allen presented its oral fairness opinion.[107] The Board then voted to approve the Merger.[108] On May 11, Verizon's board approved the Merger,[109] which was publicly announced the following day.[110] On June 23, 2015, the tender offer was completed and the Merger closed.[111]

2. AOL Leaves Money On The Table

After AOL announced its first-quarter 2015 earnings, Walden and John Doherty discussed a contingency plan assuming AOL rejected Verizon's $50/share offer.[112] As of May 10, Verizon's "[v]aluation analysis [was] supportive of increasing offer price to $52 per share,"[113] and Verizon management was prepared to "[r]ecommend approval of price up to $52 per share."[114] Walden "asked [Doherty] to be prepared in case [she] needed to justify that, because *[she] didn't want to lose a deal over a dollar or two."*[115]

While Doherty and Walden "were preparing ... to potentially go to 52," Doherty received an updated deck. Per Doherty's request, the "AOL Valuation" slide stated:

> Standalone projections exclude recent earnings momentum and replacement of Google search contract with more lucrative Microsoft deal.[116]

But neither Armstrong nor anyone at AOL countered Verizon's $50/share offer.[117] Instead, on May 11, Armstrong told Verizon the Board had approved at $50/share.[118] Thus, at least $160 million for stockholders was left on the table. But Armstrong got everything Verizon was willing to pay in executive compensation for himself. Nothing was left on the table there.

3. Verizon Valued AOL As A Stand-Alone Business And Looked At Synergies As An Add-On Value

Verizon valued AOL as a stand-alone business and viewed synergies as additional value to be gained from the acquisition.[119] On April 7, when Verizon was preparing to make a full-company acquisition proposal to AOL,[120] Verizon prepared a stand-alone DCF valuation of AOL, an analysis of AOL's stand-alone DCF valuation plus 50% synergies, and an analysis of AOL's stand-alone DCF valuation plus 100% synergies,[121] resulting in the following:

VERIZON'S APRIL 7, 2015 DISCOUNTED CASH FLOW ANALYSIS OF AOL[122]

AOL Stand-Alone DCF	$48.65/share - $64.29/share
AOL Stand-Alone DCF + 50% Synergies	$68.88/share - $84.52/share

AOL Stand-Alone DCF + 100% Synergies	$89.12/share - $104.75/share

On May 7, Doherty presented Verizon's board with a WholeCo DCF valuation analysis of AOL ranging from $45/share to $54/share.[123] Doherty also presented Verizon's board with synergy estimates.[124] Again, Verizon added the value of its synergies estimates *on top of* Verizon's WholeCo DCF valuation.[125]

These synergy estimates were never publicly disclosed.[126] Nor did any of AOL's experts test their legitimacy or accuracy.[127] In fact, most of the alleged synergies were revenue synergies which Respondent's own authority questions.[128]

F. ARMSTRONG IGNORES OTHER POTENTIAL PURCHASERS; CUTS A SIGNIFICANT DEAL FOR HIMSELF; AND LOCKS UP THE MERGER

1. Armstrong Ignores Other Potential Purchasers

Before the Merger and as part of its business model, AOL routinely entered into business deals, including commercial partnerships, with Verizon, AT&T, Comcast, and other entities. These deals were vital to AOL's success as a standalone company. But AOL presented a dishonest narrative at trial about these relationships and its discussions before and during the sales process, suggesting that AOL had a host of other suitors and had put out feelers in every direction. The truth is, other than Verizon, AOL entertained no other suitors for a full acquisition. At trial, AOL's lead director, Fredric Reynolds, acknowledged this, stating AOL "was not for sale in a public auction."[129] Reynolds was even more emphatic during his deposition, explaining "the company was not for sale and it was purposeful that it not be for sale" and "[w]e were not auctioning the company. We had had no intention of auctioning the company."[130] There are no contemporaneous documents that support the notion that AOL sought suitors for a purchase of all of AOL. In fact, in early 2015 AOL was actively telling investors "AOL is not out there shopping itself."[131]

Despite Armstrong's trial testimony regarding AOL's discussions with various potential financial[132] and strategic[133] partners about various commercial deals, where incidental references to a whole-company deal were allegedly made,[134] AOL did not have "any real discussion about ... a multi-bidder situation [because] that was not something we were contemplating at that point."[135] There was never a point when the Board considered it.[136] Armstrong confirmed this in an interview with a CNBC reporter the morning the Merger was announced:

Interviewer: ... Was there an auction? Give us back story here. Meaning, who went to whom? How did this happen?

Tim Armstrong: You know, basically, this happened in a very natural way and no auction.

Interviewer: It's trading slightly above the premium right now. [Y]ou didn't shop this to anybody else?

Tim Armstrong: No, I'm committed to doing the deal with Verizon and I think that as we chose each other because that's the path we're on. I gave the team at Verizon my word that, you know, [w]e're in a place where this deal is going to happen and we're excited about it[.][137]

Similarly, the 14D-9 does not mention any other potential financial or strategic acquirers of the whole company because there were none.[138] There may be legitimate reasons not to auction a company. But there are consequences. One of which is that, coupled with a "no shop," the failure to have an auction eliminates any price discovery, thereby making deal price an unreliable source for fair value.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(a) Companies A, B, And C

The 14D-9 references only Company A (Comcast), Company B (Fox), and Company C (General Atlantic)[139] as companies with different levels of interest in investing in *certain parts of AOL.* But none of these companies had discussions about purchasing *all of AOL.*

Armstrong's trial testimony claiming AOL "had significant discussions" with Comcast "about doing a whole-company deal later in 2014"[140] is belied by his May 12 public statements and by the 14D-9. According to the 14D-9, on December 9, 2014, representatives of AOL and Allen "held a preliminary discussion with [Comcast] regarding a potential transaction involving all or a part of the Company's businesses,"[141] but AOL and Comcast did not even enter into a confidentiality agreement until April 8, 2015.[142] Two days later, representatives of AOL and Allen "had a brief follow-up discussion with representatives of [Comcast] with respect to a potential transaction. Representatives of [Comcast] informed the Company that [Comcast] was not prepared to proceed with a transaction with the Company at the present time."[143]

AOL gave short shrift to Fox's interest in *parts* of AOL's business. After Fox contacted AOL on February 26, 2015 "and expressed interest in receiving information with respect to [AOL's] platforms and brands businesses,"[144] AOL waited until March 9 to (1) execute a confidentiality agreement with Fox[145] and (2) make a presentation to Fox regarding "[AOL's] business with a focus on [AOL's] platform's business."[146] Between March 9 and mid-April 2015, AOL and Fox "held a series of calls" pursuant to which Fox "conducted preliminary financial diligence on the platforms assets and the other assets of [AOL]."[147] Following these diligence calls, however, Fox did not engage in further discussions with AOL regarding a potential transaction.[148]

General Atlantic was solely interested in The Huffington Post. In March 2015, General Atlantic contacted AOL to discuss acquiring "certain of [AOL's] assets."[149] General Atlantic conducted "limited preliminary diligence" on The Huffington Post.[150] On May 4, a consortium including Huffington Post CEO and founder, Arianna Huffington (the "Consortium") delivered to Armstrong a written expression of interest to purchase 51% of the Huffington Post for $500 million.[151] Armstrong described the offer as a "1B[illion] valuation and 51% buyout by Axel Springer of the Huffington Post."[152] Roszkowski considered the Consortium's offer attractive.[153]

A billion dollar valuation was lower than AOL internally believed the property was worth at that time. On December 7, 2014, Armstrong told Brand Central[154] he considered Huffington Post to be "a billion dollar plus brand."[155] At least two Board members and one member of management agreed.[156]

Rather than responding to the Consortium's $1 billion valuation and expression of interest directly, Armstrong replied that AOL would:

> take the letter under consideration and we will come back with a list of questions and comments. As we didn't know this letter was coming [] it will take us some time to organize our team to review the proposal.[157]

The Consortium responded: "Tim [we] tried several times to coordinate and announce a letter. No call back. That's why."[158] AOL did not provide the Consortium any "data to really diligence and support their view."[159] The Consortium's offer was left to die on the vine.

(b) Armstrong Ignores AT&T

On or around February 20, AT&T's President of Advertising contacted Roszkowski and "express[ed] a very strong interest in having a broader strategic conversation" with AOL.[160] Roszkowski advised Armstrong: "If we are going to move forward here we should engage at the CEO level."[161] In response to AT&T's "very strong interest" in a "broader strategic conversation" with AOL, Armstrong told Roszkowski:

I know Randall the CEO well - but we should discuss this Sunday night. We need to be ethical ... but me calling CEO of

AT&T feels like a bridge too far). We'll discuss Sunday night.[162]

When AT&T reached out to AOL, the two companies had already been discussing a potential commercial deal concerning ATT net.[163] Yet Armstrong refused to contact AT&T for a "broader strategic conversation."[164] At no time between February 20 and the Valuation Date, did Armstrong, AOL, or Allen contact AT&T's CEO concerning whether AT&T would be interested in acquiring all of AOL.[165] AT&T's interest was never communicated to the Board[166] or disclosed publicly.[167]

2. Armstrong Cuts A Significant Deal For Himself

While Armstrong was negotiating the Merger, he was also negotiating his own employment agreement with Verizon. Armstrong's employment agreement with AOL was set to expire on March 28, 2016.[168] After surviving both an intervention by the Board "to talk about ... the amount of talent [AOL] needed to be successful" and an adjustment to his target bonus to ensure AOL achieved its organizational and talent goals,[169] Armstrong was as attracted to Verizon as Verizon was to him.

Verizon was buying AOL, "a business that Verizon [didn't] necessarily know," and Verizon wanted to retain Armstrong to lead it.[170] At trial, the witnesses were well-prepared to stress that Verizon wanted AOL's "management team." At deposition, however, AOL's lead director admitted the Board knew that meant "specifically ... Tim Armstrong."[171] As Reynolds testified: "I don't think company management was accurate. It was Tim Armstrong," and any references to "company management" were actually references to Armstrong.[172] Similarly, Walden testified that Verizon "would not be doing a deal if [Armstrong] would not be coming on to be part of [Verizon's] management team."[173]

Armstrong was negotiating the Merger while simultaneously negotiating his future employment with Verizon. Beginning on April 12, when Armstrong first discussed Verizon's interest in acquiring 100% of AOL with the Board, Armstrong told the Board about the importance Verizon was placing on retaining AOL management, *i.e.* him.[174] Two days later, counsel for AOL and Verizon discussed the importance to Verizon of retaining Armstrong, and Verizon's interests in engaging Armstrong in a discussion about his employment agreement with the post-transaction company.[175] That same day, Wachtell advised Verizon's counsel that Armstrong was authorized to engage in conversations about his employment agreement with the post-transaction company.[176] Thus, as of April 14, AOL's counsel had signed off on Armstrong negotiating his own employment agreement as well as the Merger.

Armstrong did not waste any time. On April 17, he met with McAdam and members of Verizon's management to discuss how he and AOL would fit into Verizon's business.[177] When the Board convened again on April 26, Armstrong touted both Verizon's continued interest in entering into an employment agreement with him and the potential benefits of an acquisition by Verizon.[178] On April 30, after AOL gave Verizon its preliminary first quarter 2015 financial results, Armstrong again discussed his employment arrangement with Verizon.[179]

Verizon's May 8 written acquisition proposal noted it expected to extend employment offers to certain members of Company management, *i.e.,* Armstrong.[180] On May 9, when Armstrong asked a representative of Verizon to provide further value to AOL stockholders, he was told there was no further room to negotiate.[181] But that didn't stop Armstrong from negotiating up his own compensation, including his Founder's Incentive Award.

On May 10, Walden emailed Armstrong his employment agreement.[182] Although Walden indicated she "need[ed] final board approval," her cover email informed Armstrong: (1) the attached employment agreement addressed "your long term incentives and commitment" and (2) Verizon was going to "keep your annual incentives consistent to current state."[183] On May 11, after negotiating for a more favorable vesting period of his Founders' Incentive Award and a more favorable percentage of pay for the total value of his Founders' Incentive Award, Armstrong returned his executed employment agreement to Verizon.[184]

In the Merger, Armstrong received more than $10 million in golden parachute payments and vesting of his outstanding AOL stock options and performance stock units.[185] He locked in four years of guaranteed employment with Verizon.[186] He received the perks he requested from Verizon, maintained his AOL base pay,[187] and was paid a Founders' Incentive Award of restricted stock units with a value equal to 1.5% of AOL's market value as of the Valuation Date ("Founders' RSUs") - over $60 million.[188] Beginning in 2016, Armstrong also became eligible to receive annual equity awards from AOL with a target

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

value equal to $3 million per year.

In a process that took a mere 33 days from the time Verizon announced its interest in a full acquisition on April 8 until the Merger Agreement was signed on May 11 (three days from Verizon's first and only written offer), Armstrong agreed to a Merger Agreement containing a 3.5% termination fee, unlimited three-day matching rights, and a no-shop provision,[189] and secured tens of millions of dollars of additional compensation for himself. By contrast, Armstrong failed to secure any additional consideration for AOL's stockholders.[190]

G. THE MILLENNIAL DEAL

In 2014 and 2015, AOL evaluated several avenues to expand its growing mobile advertising business.[191] Toward that end, starting in 2014, AOL began due diligence on an acquisition of Millennial Media.[192] Millennial Media (codename "Mars") was a complete programmatic mobile advertising platform.[193] Combined with AOL's existing assets, Millennial would position AOL as a nearly comprehensive end-to-end advertising player in all advertising ecosystems; not just in display and video, but also in mobile.[194]

By early 2015, AOL's acquisition of Millennial was well underway. In January 2015, AOL signed a non-disclosure agreement with Millennial (the "Millennial NDA").[195] The Millennial NDA prohibited AOL from disclosing the existence of its discussions with Millennial Media, as well as any confidential information Millennial provided AOL in the course of due diligence to anyone else.[196] AOL enacted protections to ensure no one at AOL violated the Millennial NDA.[197]

AOL engaged in substantial due diligence, including four months of business diligence with product and sales teams, four months of technical diligence with engineering teams, and four months of financial diligence with AOL corporate development and Goldman Sachs.[198] AOL's due diligence revealed the acquisition of Millennial would provide it with access to "91 of Ad Age's 100 leading national advertising spenders" that utilized Millennial to reach their target audiences.[199] Additionally, Millennial had more than 750 million active user profiles, 60 million cross-device user profiles, nearly one billion global active unique views, and 65,000 applications enabled on its platform, combined which would provide AOL with instant "hard-to-replicate scale and entry into a high-195 growth market."[200] AOL believed that Millennial was integral to expanding its fast-growing mobile advertising business and "AOL's management and AOL's board were fully aligned in the belief that Millennial would significantly enhance the value of [AOL]."[201] AOL also believed the Millennial Deal would allow AOL to effectively compete with Facebook and Google for mobile advertising dollars.[202]

In May 2015, AOL modeled Millennial's financial performance as part of AOL.[203] AOL also created a detailed integration plan.[204] Part of those integration efforts involved shutting down certain components of Millennial and migrating those components to Platforms.[205]

In June 2015, AOL made an offer to acquire Millennial Media in a tender offer for $2.10 per share (the "Millennial Offer").[206] The Millennial Offer was subject to confirmatory diligence. On June 6, 2015, the Millennial board of directors accepted the Millennial Offer and made available additional documentation for confirmatory due diligence.[207] By the Valuation Date, AOL had made substantial inroads into confirmatory due diligence, including engaging KPMG to render a report on financial and tax diligence.[208] As of the Valuation Date, AOL planned to close the Millennial Deal by mid-July 2015.[209] The Board also approved the Millennial Deal, at least informally.[210]

AOL's deal approval memorandum to the Verizon board of directors makes clear that the Millennial acquisition was effectively a done deal pre-Merger:

> AOL was in the final phase of making an offer to buy Millennial when Verizon made the offer to buy AOL. AOL identified the need for Millennial in the middle of 2014 and spent over 9 months doing diligence on the asset, the talent, and the market. If Verizon had not made the offer for AOL, AOL would have proceeded with obtaining formal board approval to acquire Millennial in June of 2015.[211]

The Verizon Merger had no effect on the Millennial Deal or the way AOL looked at the deal.[212] The Millennial Deal was

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

announced on September 3, 2015-less than three months after the Merger.

H. THE MICROSOFT SEARCH AND DISPLAY DEALS

As of the Valuation Date, AOL was three days away from signing two deals with Microsoft. The first deal provided that Microsoft's Bing search engine would power search results and advertising on AOL's properties (the "Search Deal"), replacing AOL's then-current contract with Google.[213] The second deal was a 10-year commercial partnership pursuant to which AOL took over sales of display, mobile, and video ads on Microsoft properties (*i.e.,* Xbox, Skype, Outlook, MSN, and other products) in the United States and eight international markets (the "Display Deal").[214]

1. The Microsoft Search Deal

From 2010 through 2015, AOL powered its search advertising through Google. That deal expired in 2015.[215] AOL originally expected its new search deal would be less lucrative than the existing Google deal and included that assumption in its LTP.[216] Ultimately, after negotiating with both Google and Microsoft, AOL was able to strike a search deal with Microsoft that was far more lucrative than the expected new deal with Google.[217] The Microsoft Search Deal would positively impact the LTP's projected OIBDA beginning in 2017 (and was neutral to the plan in 2015 and 2016):[218,219]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Prior to making its Offer, Verizon was aware that AOL was negotiating the Search Deal and that the LTP did not take into account the more favorable terms of that agreement.[220] But Verizon was not aware of the degree to which the Search Deal impacted the LTP. On May 6, 2015, two days prior to making its Offer, Verizon asked Allen to provide an update on the status of the search deal renegotiation. AOL management refused to provide any such guidance.[221] The Search Deal closed on June 26, 2015-three days after the Merger.[222]

2. The Microsoft Display Deal

In addition to the Search Deal with Microsoft, AOL also negotiated the Display Deal-a commercial deal by which AOL would take control of Microsoft's entire video, display, and mobile inventory and advertising businesses over a 10-year period. AOL believed that the Display Deal would be "transformational for AOL" as it offered "a rare opportunity to rapidly scale *both* the premium audience/premium solutions business and the programmatic business on a global scale."[223] In connection with this transaction, AOL conducted financial, legal, technological, and human resources diligence and entered into a non-disclosure agreement with Microsoft (the "Microsoft NDA").[224] The Microsoft NDA prohibited AOL from sharing information with anyone not a party thereto.

As a result of its extensive diligence efforts, AOL determined that the partnership would contribute $2.8 billion of gross revenue and $240 million of AOIBDA during the agreement's first four years-from 2016 to 2020.[225] In 2016 alone, AOL expected the Display Deal would increase AOL's international presence from $316 million in international revenue to $500 million.[226] AOL projected the Display Deal would add between $500 and $600 million in top-line gross revenue to Platforms for each and every year of the ten-year agreement, driving significant cash flow generation from 2017 through 2024.[227]

AOL purposely delayed the signing and announcement of the Microsoft Search and Display deals to avoid disclosure requirements.[228] As of May 6, 2015, AOL employees were instructed that they were "not allowed to put anything in writing" about the Display Deal.[229] But both deals were effectively completed by May 2015. On May 8, 2015, Bain & Co., which advised AOL in connection with the Microsoft deals, circulated minutes from a May 7 leadership debrief.[230] Those minutes noted, "we anticipate having final terms on Friday 5/8"-the day the e-mail was sent.[231] Prior to receiving Verizon's offer, AOL expected the Display and Search deals would close on May 27, 2015.[232] By June 2, 2015, Microsoft and AOL were discussing the logistics of announcing the Search and Display Deals.[233] Roszkowski noted that Microsoft was "pushing for ...

announce post VZ close."[234]

By the Valuation Date, AOL had developed detailed 10-year financial projections, as well as an extensive integration plan, for the Display Deal.[235] On June 25, 2015, two days after the Verizon/AOL merger closed, AOL sought Verizon approval of the Display Deal.[236] Like the Search Deal, the Display Deal closed on June 26, 2015-three days after the Merger.[237]

I. THE MARKET WAS UNAWARE OF THE MILLENNIAL MEDIA, DISPLAY AND SEARCH DEALS PRIOR TO THE MERGER.

At no point prior to the Merger was the market aware of the Search, Display or Millennial Deals.[238] Even Verizon did not know about the Millennial and Display Deals when making its offer to purchase AOL.[239] As such, Verizon did not and could not account for the Millennial or Display Deals in its stand-alone valuation of AOL.[240]

III. ARGUMENT

The Court must determine AOL's fair value as a going concern as of the Valuation Date,[241] and then award Petitioners their proportionate share of that value.[242] This determination must be made based upon the "operative reality" of AOL as of the Valuation Date.[243] The parties each bear the burden of proving their respective valuations by a preponderance of the evidence.[244] Petitioners have satisfied their burden and judgment should be entered that the fair value of AOL as of the Valuation Date was at least $68.98 per share.

A. THE FOUR CRITICAL QUESTIONS FOR THE COURT TO ANSWER

Both experts used a Discounted Cash Flow analysis as the basis for their point estimate of fair value.[245] Both experts agree that the primary differences between their valuations rest on three inputs to the DCF and one post-DCF adjustment for cash.[246] There are only four key questions in this case: (1) Which cash flow projection should be used to value AOL, the Original Projections or the Updated Projections? (2) Should projections prepared in connection with the Microsoft deals and the Millennial Media deal be used in determining the fair value of AOL's common stock? (3) Should a DCF to determine AOL's fair value use a three-stage model (or a longer projection period), or a two-stage model that cuts off AOL's growth after three-and-a-half years? and (4) Should the valuation of AOL include all of its net cash or should it leave out $150 million of that cash? Each question presents this Court with a binary choice, the answers to which dictate the appropriate value per share.

1. The Updated Projections Are The Appropriate Projections To Use In The DCF

The first question is whether to use the outdated Original Projections or the Updated Projections. The Updated Projections are the appropriate projections to use in the DCF.

In an attempt to support Fischel's use of the outdated Original Projections, AOL's witnesses marched into trial and testified *ad nauseam* that the Updated Projections were "aspirational" and took into consideration the context of the Verizon acquisition. This is simply not true.

There is not a single piece of contemporaneous evidence suggesting that anyone thought the Updated Projections were aspirational[247] and/or took into consideration the context of the Verizon acquisition. The contemporaneous evidence shows a group of people - many of whom were wholly unaware of the potential Merger - making a good faith attempt at providing accurate working capital projections.

After receiving the Updated Projections, representatives of LionTree requested a telephone call with AOL to understand why

the Original Projections changed and the specific assumptions driving the Updated Projections. Tom Lee responded, "we're not going to reconcile the file *[i.e.,* the Original Projections] that never should have gone out."[248] In response to questions from Verizon's bankers, Lee stated:

- First, AOL doesn't forecast balance sheet or working capital by segment.

- Old file was created by accounting last year in a vacuum in connection with a preliminary analysis around a possible spin of Core.

- AOL's CFO, Controller, or corpdev was [not] privy to the analysis so the original file shared by AllenCo was something that was stale and not reviewed by corporate or the business unit.

- The updated numbers were created by our Controller, FP&A, and the CFOs of the segments to factor in our current payable and receivable cycles so is a better estimate of future working capital needs.[249]

Allen used the Updated Projections in its early draft of its fairness opinion.[250] But despite having serious concerns about the Original Projections, Isani testified that Allen was directed by AOL management to use the Original Projections in its final fairness opinion.[251] AOL offered no plausible explanation for AOL management directing Allen to use the Original Projections when all of AOL financial management had signed off on the Updated Projections. But whether it was because AOL's CFO did not want to be faced with presenting the Board with materially different projections than presented to it earlier in the year,[252] or because using the Original Projections made the deal price look better does not matter. The Original Projections were simply not AOL's operative reality at the time of the Merger.

Other than in Allen's fairness opinion, no one used the Original Projections *for any purpose* after the Updated Projections were created. In fact, a July 9, 2015 stand-alone valuation of AOL utilized the Updated Projections and noted that projections for the Company, including the Updated Projections, were provided by Company management.[253] Even Respondent's own expert used the SBC and D&A elements of the Updated Projections, rather than the Original Projections, for portions of his own DCF analysis.[254]

2. The Millennial Deal And The Microsoft Search And Display Deals Were Part Of AOL's Operative Reality On The Valuation Date And Must Be Included In AOL's Fair Value

The next question is whether the DCF should include the cash flow generated from the Microsoft and Millennial Deals. Because those deals were part of AOL's operative reality as of the Valuation Date, the cash flow from these deals must be included in the DCF.[255]

In an appraisal action, the fair value of a company must include the value of any business plans in existence at the time of the merger, including "elements of future value."[256] Elements of future value that must be accounted for can include expansion plans,[257] yet-to-be-proven business plans,[258] planned acquisitions, or other deals[259] in existence at the time of the merger. As our Supreme Court has held:

any facts which were known or which could be ascertained as of the date of the 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 stockholder's interest, but must be considered by the agency fixing the value.[260]

"In essence, when the court determines that the company's business plan as of the merger included specific expansion plans or changes in strategy, those are corporate opportunities that must be considered part of the firm's value."[261] Because the Millennial, Search, and Display Deals were all part of AOL's operative reality as of the Valuation Date - two having closed three days after the Merger and one that would have happened pre-Merger, but for the Merger - and the cash flows to AOL from those deals as of the Valuation Date were reasonably projected, the Court must consider the value of these three deals in its determination of the fair value of AOL.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(a) The Microsoft Search Deal Was Better Than Projected

AOL's LTP accounted for renewing a search deal with Google, but on less favorable terms than the existing deal.[262] The LTP did not account for the fact that, beginning in 2016, the Microsoft Search Deal was projected to be more favorable than the LTP. In a June 10, 2015 presentation to Verizon, AOL projected that in 2016, the Search Deal would contribute an additional $5million of OIBDA, in 2017, $17 million, and, in 2018, $23 million-all additive to the LTP.[263] These substantial benefits were not included in any valuation of AOL, including the one done by Cornell, as AOL did not produce detailed forecasts for the Search Deal. Should the Court determine that it is appropriate to use the more favorable Search Deal AOIBDA projections in its DCF analysis, the Court should select a number slightly higher than the mid-point share price to account for the Search Deal's benefits.

(b) The Millennial Media And Microsoft Deals Were Additive To AOL's Long-Term Plan Projections

The LTP that AOL shared with Verizon and that Allen used for its fairness opinion did not include the Microsoft Display or Millennial Deals. As of the Valuation Date, AOL had detailed financial projections for both deals. All contemporaneous evidence indicates that AOL intended that the Microsoft Display and Millennial projections "overlay" the AOL long-term plan. That is, the proper way to account for these deals is to add the deal-specific cash flow projections directly onto the LTP projections. As demonstrated in numerous contemporaneous documents, this methodology is how AOL internally calculated the deals' impact. There is no pre-litigation evidence that AOL accounted for these deals in any other way.

For example, as the deals neared completion in April 2015, Financial Planning and Analysis undertook a modeling exercise to demonstrate the effects of the Microsoft Display and Millennial Deals on the LTP projections.[264] To do so, Nolan, head of AOL Financial Planning and Analysis, Sweet, AOL Controller, and Tom Hartenstein, who developed the LTP, created an "overlay" to the LTP:[265]

	Projected	LongTerm Plan				YoY Growth		
	FY15	**FY16**	**FY17**	**FY18**	**FY15**	**FY16**	**FY17**	**FY18**
Revenue	2,538	2,844	3,250	3,721	0%	12%	14%	14%
Revenue net of TAC	1,770	1,830	1,978	2,175	-3%	3%	8%	10%
AOIBDA	500	569	638	716	-1%	14%	12%	12%
Operating Income	187				-9%	-100%	#DIV/0!	#DIV/0!
Net Income	90				-28%	-100%	#DIV/0!	#DIV/0!
Duliuted EPS	$1 16				-39%	-100%	#DIV/0!	#DIV/0!
AEPS	$2 74				22%	-100%	#DIV/0!	#DIV/0!

Diluted Shares Outstanding	81 9				-1%	-100%	#DIV/0!	#DIV/0!
FCF	200				-24%	-100%	#DIV/0!	#DIV/0!

Potential Acquisition/Deal Impacts

Mars-assume acquisition closes June 30, 2015 and financials reflect integrated case

Revenue	149	302	388	469	NA	102%	28%	21%
Revenue net TAC	68	126	150	170	NA	85%	19%	13%
AOIBDA	8	25	49	63	NA	230%	95%	28%
Operating Income	(11)	5	29	46	NA	-142%	512%	55%
Net Income	(11)	5	29	46	NA	-142%	512%	205%
Diluted EPS Accretion/(Dilution)					NA	#DIV/0!	#DIV/0!	#DIV/0!
AEPS Accretion/(Dilution)					NA	#DIV/0!	#DIV/0!	#DIV/0!
FCF	(4)	(43)	11	34	NA	1073%	-126%	205%

Maple-assume 6 months of 2015 activity based on deal model

Revenue	300	735	724	645	NA	145%	-1%	-11%
Revenue net TAC	94	239	243	222	NA	155%	2%	-9%
AOIBDA	(5)	59	76	73	NA	-1188%	29%	-4%
Operating Income	(5)	59	76	73	NA	-1188%	29%	-4%
Net Income	(7)	35	46	44	NA	-601%	33%	-5%
Diluted EPS Accretion/(Dilution)					NA	#DIV/0!	#DIV/0!	#DIV/0!
AEPS Accretion/(Dilution)					NA	#DIV/0!	#DIV/0!	#DIV/0!
FCF					NA	#DIV/0!	#DIV/0!	#DIV/0!
Anteleope-preliminary model								
Revenue	28	60	46	38	NA	116%	-23%	-18%
Revenue net TAC	25	55	43	35	NA	120%	-22%	-17%

AOIBDA					NA	#DIV/0!	#DIV/0!	#DIV/0!
Operating Income					NA	#DIV/0!	#DIV/0!	#DIV/0!
Net Income					NA	#DIV/0!	#DIV/0!	#DIV/0!
Diluted EPS Accretion/(Dilution)					NA	#DIV/0!	#DIV/0!	#DIV/0!
AEPS Accretion/(Dilution)					NA	#DIV/0!	#DIV/0!	#DIV/0!
FCF					NA	#DIV/0!	#DIV/0!	#DIV/0!

Scenario Planning with Acquisitions Included								
Revenue	3,015	3,941	4,408	4,873	19%	31%	12%	11%
Revenue net TAC	1,957	2,249	2,414	2,603	7%	15%	7%	8%
AOIBDA	502	652	763	851	-1%	30%	17%	12%
Operating Income	170	63	105	118	#DIV/0!	-63%	66%	12%
Net Income	72	39	75	89	-97%	-45%	91%	19%
EPS	1	-	-	-	-100%	-100 %	#DIV/0!	#DIV/0!
AEPS	3	-	-	-	-39%	-100 %	#DIV/0!	#DIV/0!
FCF	196	(43)	11	34	22%	-122 %	-126%	205%

The overlay shows AOL's Display and Millennial projections were additive to the long-term plan, as AOL calculated their value to AOL by simply adding each set of deal projections directly on top of AOL's long-term plan. For example, for FY17 AOIBDA, AOL started with the LTP number of $638 million, and then added the AOIBDA projections for Mars ($49 million) and Maple ($76 million) to the LTP number to project a total of $763 million AOIBDA for 2017, including both acquisitions.

Further demonstrating that the projections were additive to the long-term plan, on May 6, 2015, Bellomo, CFO of Platforms, instructed AOL's Budgets and Finance Director to add together the Microsoft profit and loss statement and the long-term plan profit and loss statement to create a combined statement.[266] On May 13, 2015, Tom Lee e-mailed Donald D'Anna, AOL's Chief Tax Officer & Treasurer regarding projections for Millennial Media and stated "Vijay will send a detailed cash flow forecast for Mars over the next three quarters so we can overlay that against AOL's status quo forecast."[267] For AOL's presentation to the Board regarding the Display Deal, AOL described the projections as "delivered value" projections, which by definition are additive.[268] Finally, on June 18, 2015-five days prior to the merger, AOL's deal team reviewed a presentation demonstrating once again that the projections for Display and Millennial Deals should be added directly on top of the long-term plan.[269]

	Strategic Priorities	**Current Priorities**	**~FTEs**	**~Revenue**			**~AOIBDA**		
			2015	**2**	**2**	**2017**	**2**	**2**	**2017**

				015	**016**		**015**	**016**	
AOL Base Business	• #1 Media	• Q2/3 Base business focus	4,300	$2,591	$2,845	$3,250	$508	$569	$638
	• Scale audience, revenue, creators	• Display, video ad revenue							
	• (Includes Search Renewal)	• Brand traffic growth							
+ Verizon	• Drive growth for Verizon	• Integrate DMS team	+880		+$1,030	+$1,875		$(187)	+$214
	• Drive OTT Video	• Drive strategic initiatives around							
	• Drive Ads with first party data	video, ads, content, revenue							
	• Preserve AOL's culture/autonomy	• Investment planning for 2015-6							
+ Maple	• Drive scale in advertising programmatic	• Definitive agreement and path to	+881		+$612	+$612		+$18	+$52
	• Drive cost synergies, OIBDA	approvals	(400)						
	• Establish growth platform for	• Lock up key talent	480						
	International	• Org design/Integration							
		• Day 1 Comms and onboarding							
+ Mars	• Become a leader in mobile app ads	• Deal negotiation	+650		+$338	+$423		$37	$61
	• Accelerate the Nexage platform	• Confirmatory diligence (including	(250)						
	• Acquire tech talent in mobile	product performance)	400						
		• Integration plan							
AOL VA1	• Ambitious topline	• Team	6,060		$	$6,160		$	$965

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

growth	integrations/Org design		4, 8 2 5	4 3 7
• #1 global cross-screen, media and	• Communications			
advertising platform	• Key talent retention			
• Preserve and build our culture	• Compelling investment plan and	~ 1 4X	~ 2 4X	~ 1 9X
• Create opportunities for talent	flywheel strategy	vs AOL 2015	vs AOL 2015	vs AOL 2015

The contemporaneous documents, including various modeling exercises conducted by AOL management and its financial planning team, make clear that to accurately calculate the value of the Millennial and Display Deals, the deal projections must be added directly on top of the LTP. This is exactly what Cornell did in calculating his DCF. Fischel failed to do so.

(c) AOL Did Not Disclose The Millennial Media Or Microsoft Display Deals To Verizon Or The Market Prior To Entry Into The Merger Agreement.

Despite several too-convenient, litigation-driven statements by AOL's trial witnesses,[270] the contemporaneous record demonstrates Verizon was unaware of the Millennial and Microsoft Display Deals before the parties entered into the Merger Agreement. AOL was bound by non-disclosure agreements with both Microsoft and Millennial Media from disclosing any confidential information to Verizon. In fact, the Millennial NDA prohibited AOL from sharing even the existence of the Millennial discussions with Verizon.[271] There is no contemporaneous evidence indicating AOL breached the Millennial NDA or the Microsoft Display NDA or that Verizon was aware AOL was in talks with Millennial or Microsoft (regarding Display).

On May 12, 2015, the day after AOL accepted Verizon's $50 per share offer, AOL disclosed the Millennial Deal to Verizon.[272] Following that disclosure, Doherty e-mailed Roszkowski in an e-mail titled "Millenial [sic]" and asked, "[d]o you have a summary deck on this potential transaction? I want to *start working* this internally."[273] Roszkowski responded: "TA and I reached out to Millennial this morning (we are calling it Mars) and signaled we are still interested in moving forward and will circle back on next steps.... It would be great to move quickly."[274] On May 18, 2015, Verizon signed the Joinder to the Millennial NDA.[275] *After* signing the Joinder to the Millennial NDA, AOL provided Verizon with detailed diligence regarding the Millennial Deal, including financial projections and AOL's integration plan.[276] Verizon did not have any of this information when negotiating price or valuing the Company. Fischel's suggestion (without any evidence) that if AOL believed the Millennial and Microsoft Display Deals had value, AOL would have shared information regarding the deals with Verizon as part of the negotiation process is meritless. AOL was prohibited from sharing any information regarding the Millennial and Microsoft Display deals with Verizon pursuant to the respective NDAs.

3. AOL's Fair Value Cannot Be Determined By Cutting Off Its Growth After Only Three-And-A-Half Years

The next question is whether the DCF should use a three-stage model (or a longer projection period) or a two-stage model that cuts off AOL's growth after three-and-a-half years.

A two-stage DCF - where growth goes from double digits (15.6 percent for Platforms and 11.6 Percent for Brands) immediately down to 3% - like falling off of a cliff, is unrealistic for a high growth firm. Growth rates do not precipitously decline after some artificial projection period.[277]

So the question is how to account for AOL's high growth after the projection period but before it reaches steady state. There

are three possibilities.[278]

A variation on the two-stage "cliff" method is to use a higher perpetuity growth rate in an attempt to account for the high level of growth in the earlier part of the terminal period. This is the technique Fischel claims to have used, applying a slightly higher perpetuity growth rate (3.25%) than the one used by Cornell (3.0%).[279] But Fischel's two-stage model is flawed because it applies an artificially low perpetuity growth rate. A perpetuity growth rate would need to be considerably higher than 3.25% in order to approximate the high levels of growth AOL expected. Fischel claims he landed on 3.25% by using an average of: (1) the inflation rate; (2) the expected increase in nominal GDP; and (3) the average perpetual growth rate used by six analysts. But Fischel rigged the analyst numbers by ignoring the fact that of the six analysts he looked to, only one - Allen - used a perpetual growth rate after only three-and-a-half years of projections. After such a short period of projections, Allen used a 6.6% perpetuity growth rate to attempt to account for the high growth rate prior to steady state. All five of the other analysts used projections that were substantially beyond three-and-a-half years, resulting in the lower perpetuity growth rates - Cantor Fitzerald (6 years); Credit Suisse (6 years); LionTree (10 years); Jefferies (10 years); and Needham (10 years). Fischel's higher perpetuity growth rate should have been closer to Allen's 6.6%, rather than 3.25%, in order to serve as anything close to a proxy for six or more years of unaccounted-for growth.[280]

The other possibilities are to use a three-stage DCF or to use a substantially longer projection period, if available.

A three-stage DCF uses projected growth rates to model a more gradual transition between high growth and steady state. Instead of having growth drop off a cliff, it uses a linear model to go from the higher growth levels at the end of the explicit projection period down to the level of the perpetuity growth rate. This is an appropriate method here, as academic literature counsels that if the growth in the final forecast year is well above the terminal growth rate, then a three-stage model is preferred. Professor Damodaran, for example, advises the use of a three-stage growth model if a company is growing at a high rate - defined as "more than 8% higher than the stable growth rate."[281] Given the double-digit growth rates for Platforms and Brands at the end of the explicit projection period, a three stage model is appropriate.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

The third approach to account for high growth is to use a longer projection period in order to use management's best estimate of the high growth period. Cornell also modeled this method.[282] AOL had reliable non-Merger related projections that its advisor (Deloitte) used in its annual goodwill impairment analysis.[283] These numbers were used by Deloitte and approved by AOL management.[284] Using those growth numbers,[285] Cornell arrived at an enterprise value for AOL of $5.927 billion, which translates to a point price of $68.98 per share.[286]

4. All Of AOL's Cash Must Be Included In Its Equity Value

The final question is a post-DCF issue - namely, whether all of AOL's cash should be included in its equity value. After calculating an estimated enterprise value for the Company, both experts agree that one needs to add back net cash.[287] Cornell adds back $554 million in cash and equivalents and tax attributes based on AOL's March 31, 2015 Form 10-Q.[288] Fischel only adds back $404 million.[289]

In his report, Fischel relies on a single document to determine that AOL must withhold a "minimum cash" amount of $150 million from the equity value. That document is a hypothetical cash buyback analysis indicating the "projected cash on hand," on December 31, 2016, would be $150 million.[290] He relies on nothing else[291] and the document proves nothing. Fischel admits the document sets forth a hypothetical scenario. At trial, Fischel admitted the document does not say $150 million is *required* minimum cash, that AOL would be violating some covenant by going below $150 million, or that any harm whatsoever would befall AOL should its cash balance drop below $150 million.[292] By that time, however, Fischel had to find new "proof" for his $150 million reduction, so he purported to rely on an unidentified analysis by Dykstra where she allegedly said "the target minimum cash going forward is 150 million."[293] Fischel never identified nor produced such a document and apparently never spoke with Dykstra concerning the issue.[294] Fischel wants the Court to rely upon a document setting forth a hypothetical scenario or upon a document he says exists, but no one else has seen.

Moreover, AOL's SEC filings reveal AOL's cash and equivalents historically have fallen below $150 million - specifically in the first and second quarters of 2014 - further contradicting Fischel's assumptions. Finally, while Fischel's litigation-driven assumptions subtract out this "minimum cash," neither Verizon's nor AOL's advisors did so in their valuations.[295]

Not only is Fischel's $150 million figure flawed, but his entire theory is wrong. As authority for his position that the minimum cash necessary for operating the business should be subtracted from the equity value of a company, Fischel relies on Damodaran, who instructs that "only cash in excess of the minimum cash balance needed for operations should be included in a DCF."[296]

But Damodaran's position with respect to treatment of excess cash, is precisely the *opposite* of what Fischel claims it to be. On the very next page of the same paper that Fischel replies upon, Damodaran teaches that:

> In our view, the debate about how much cash is needed for operations and how much is excess cash misses the point when it comes to valuation. Note that even cash needed for operations can be invested in near-cash investments such as treasury bills or commercial paper. These investments may make a low rate of return but they do make a fair rate of return. Put another way, an investment in treasury bills is a zero net present value investment, earning exactly what it needs to earn, and thus has no effect on value. We should not consider that cash to be part of working capital when computing cash flows.[297]

According to AOL's 2014 10-K, AOL's cash and equivalents "primarily consist of highly liquid short-term investments ... which include money market accounts, U.S. treasury bills and time deposits that are readily convertible into cash."[298] Dykstra confirmed this at trial.[299] Thus, as Damodaran's article explains, "[g]iven the investment opportunities that firms ... have today, it would require an incompetent corporate treasurer for a big chunk of the cash balance to be wasting cash."[300]

After making the appropriate adjustments for the three DCF inputs, and correcting Fischel's cash adjustment error, using Fischel's own model, his DCF valuation increases to $80.43 per share. Cornell's conservative DCF model yields a fair value of $68.98 per share. The chart below shows the economic effect, using AOL's expert's model, of the answer to each of the four questions.[301]

Chart of Prof. Fischel's Modified Discounted Cash Flow Analysis Depending Upon Which Combination of the Three Key Inputs are Adopted

	Selection of Three Key Inputs			**Equity Value per Share [D]**	
	Updated Projections [A]	Millennial Media & Microsoft Display [B]	Extended Explicit Projections [C]	Without Correcting Prof. Fischel's Cash Amount	Correcting Prof. Fischel's Cash Amount [E]
(a)	-	-	-	$44.85	$46.56
(b)	YES	-	-	$51.15	$52.87
(c)	-	YES	-	$51.56	$53.27
(d)	-	-	YES	$55.36	$57.07

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(e)	YES	YES	-	$57.37	$59.09
(f)	-	YES	YES	$66.70	$68.41
(g)	YES	-	YES	$67.38	$69.10
(h)	YES	YES	YES	$78.72	$80.43

B. THE "MARKET EVIDENCE" IS A RED HERRING AND HAS NO IMPACT ON AOL'S VALUATION

Although both experts used a discounted cash flow analysis to determine fair value,[302] at trial, Fischel attempted to wrap himself in the flag of "market factors" to support his conclusion.[303] Notably, even Fischel himself does not actually rely on any of the market factors he identified in reaching his conclusion as to the fair value of AOL. These "market factors" prove nothing and were added solely to pander to the Court.

1. Pre-Transaction Trading In AOL Shares Does Not Reflect Fair Value

AOL's stock price is not its fair value.[304] Fischel admitted not only that the market is frequently wrong,[305] but here that the market did not have full information.[306] Thus, pre-transaction trading in AOL shares should be rejected as an indicia of fair value because Respondent's expert admits it is unreliable.[307]

AOL Management and the Board believed that the market did not understand AOL's business and that AOL investors suffered from investor myopia.[308] Contemporaneous evidence shows that AOL believed that AOL's fundamental value was much higher than AOL's stock price. For example, in February 2015, while AOL stock was trading at approximately $41 per share, the Board evaluated a DCF analysis in connection with a stock repurchase that modeled AOL's value in a range of $52 to $62 per share-25% to 50% higher than the then-current stock price.[309]

In an analogous case, *In re Appraisal of Dell, Inc.,* this Court considered and rejected the use of market price as indicia of fair value.[310] In *Dell,* as in the present action, the company was in the process of engaging in a series of expensive acquisitions.[311] Like AOL, those acquisitions were instrumental to the long-term growth strategy of the company.[312] Like AOL, management believed that stockholders were only interested in short-term results and not long-term strategy and that, as a result of the acquisitions, the company's stock price was undervalued.[313] Like AOL, internal projections valued the company significantly higher than the then-current stock price.[314] In substantially similar circumstances to those in this case, this Court held that stock price is unreliable as an indicator of fair value.[315]

2. Analysts' 12-Month Price Targets Do Not Reflect Fair Value

Even Fischel admits that analysts' 12-month price targets are not fair value.[316] A 12-month price target is merely the price at which an analyst expects a company to trade 12 months in the future. Fischel did absolutely *nothing* to determine whether the analysts covering AOL were accurate in their previous projections of future AOL stock prices[317] and in fact acknowledges that analysts are frequently wrong.[318] Given that Respondent's own expert admits that analyst reports are unreliable indicators

of value and that he has failed to do anything to determine the accuracy of analysts covering AOL, analyst price targets must be rejected as an indicia of fair value.

3. Pre-Transaction Competition

The sales process here was anything but pristine. Armstrong shut out all other potential acquirers from the negotiation table. There was no meaningful pre-transaction competition for all of AOL because AOL admittedly did not shop the Company. Fischel had no knowledge of *any* other entity interested in a whole company acquisition of AOL.[319] There is simply no basis for Fischel to argue that there was meaningful "pre-transaction competition" for AOL while admitting that he was unaware of a single other company with which AOL engaged regarding a whole company acquisition and while Armstrong admitted that he "didn't shop this to anyone else."[320] Giving any weight to a deal process where AOL refused to reach out to any other potential buyers is completely inappropriate, because it is "impossible to know what would have happened in the event of a meaningful market canvass."[321]

4. Arms-Length Transaction

Fischel characterizes the Merger as an arms-length transaction. This ignores reality. Armstrong was taken to the woodshed in 2015 for his unfocused performance and poor leadership.[322] The Board threatened to change his compensation structure.[323] His employment contract was set to expire in March 2016.[324] On the other hand, Verizon was enamored with Armstrong and made the Merger contingent on his retention.[325] Armstrong was promised over $60 million in new stock awards from the Merger.[326] The Board knew that Armstrong was self-interested,[327] yet put no protections in place to ensure the process was fair to AOL's stockholders-allowing him to negotiate his employment agreement with Verizon at the same time he was negotiating the Merger on behalf of AOL.[328] Given the chief negotiator's significant self-interest in doing a deal with Verizon, and his admission that he did not shop the Company, the Merger was not an arms-length transaction, and the deal price is not an indicia of fair value.[329]

5. Behavior Of AOL Managers, Directors, And Financial Advisors

Fischel cites to the fact that AOL managers, directors, and financial advisors supported the Merger.[330] The fact that directors approved the Merger is not evidence of fair value.[331] In order for a company to enter a merger, its board of directors must approve it.[332] In completed transactions, financial advisors always issue fairness opinions supporting the transaction price.[333] Fischel also cites AOL management's support for the transaction; however, he admitted that no management vote took place.[334] Further, he admitted that a significant amount of the shares held by management were actually held by Armstrong,[335] who had significant financial incentives (more than an additional $60 million) other than the consideration he would receive as payment for his AOL stock. Other members of management and the Board also had transaction-based financial incentives, yet Fischel made no attempt to quantify them.[336] Given the significant individual incentives in addition to deal price that each of the directors, managers, and advisors had to close a deal with Verizon, the behavior of AOL's managers, directors, and advisors is no an indicia of fair value.

6. The Premium Paid In The Merger Was Very Low

The premium paid in the Merger over the unaffected stock price was very low - only 15.2%.[337] Fischel's effort to justify this low premium is fatally flawed. In his Premium Paid Analysis, Fischel failed to identify the unaffected stock price for the transactions he used to compare against AOL,[338] so many of his "comparables" show premiums measured against prices that had already risen because of leaks about the impending merger. He also included transactions that were not comparable such as mergers of equals and mergers in highly-regulated industries. Even given all of these errors that artificially deflated the premiums paid in his chosen transactions,[339] the premium paid to AOL's stockholders is pathetically low. Of all of the "comparable" transactions identified by Fischel, less than 7 percent had lower 90-day premiums than the Merger. If anything,

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

the premium paid to AOL's stockholders indicates that merger price is not fair value.

7. Lack Of Topping Bids Is Not Evidence Of Fair Price

Fischel cites a lack of topping bids as a factor supporting his fair value determination. This argument ignores the substantial barriers another potential bidder would face. The Merger Agreement was signed and announced on May 12, 2015. The tender offer commenced on May 26, 2015, two weeks later, and ended on June 22, 2015-a mere six weeks after announcement. In addition, the Merger Agreement included several deal protections that made a topping bid less likely-it contained a no shop,[340] a 3.5% termination fee,[341] and unlimited three-day matching rights.[342] Armstrong, who was leading the deal process, was also eager to get a deal done specifically with Verizon, which promised him tens of millions of dollars and job security he would not otherwise have. He publicly professed his preference for Verizon, stating on May 12 that "I'm committed to doing the deal with Verizon and ... I gave the team at Verizon my word."[343] Looking at the deal holistically-including the short time period between the announcement and the closing, the deal's size, the amount of time necessary for due diligence, the deal protections, and Armstrong's stated preference for a deal with Verizon-there were way too many barriers to entry for another potential bidder. As such, the lack of a topping bid is not an indicia of fair value.

8. Post-Announcement Verizon Price Reaction Is Statistically Insignificant

Fischel cites the eighteen cent Verizon stock price decrease (about a 0.36 percent drop) between the closing price on May 11, 2015 of $49.80 and the closing price on May 12, 2015 of $49.62 as support for his conclusion that the market thought Verizon paid too much for AOL. Verizon's stock movement proves no such thing. The AOL/Verizon merger was announced at 7:00 am ET on May 12, 2015.[344] Shortly before the 7:00 am announcement, Verizon's stock was trading at $49.33 per share.[345] So, the closing price on May 12 of $49.62 actually reflects an increase from the price at which Verizon stock traded immediately prior to the Merger Announcement:[346]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
Additionally, Verizon's market capitalization on the date of the merger announcement was approximately $200 billion. Verizon spent only 2.2 percent of its market capitalization to acquire AOL.[347] Given that, it is not surprising that the Merger did not have any significant effect on Verizon's stock price.

Committing further error in his analysis, Fischel did not isolate other market factors that could have contributed to the movement in Verizon's stock price. For example, on the announcement date, the Dow Jones Industrial Average dropped by approximately 0.2%,[348] a similar percentage move on the day to that of Verizon. Fischel also did not consider whether the acquisition of AOL was perceived as Verizon not having confidence in its core business,[349] or that in entering a new market-content and advertising technology-Verizon would be distracted from its core business.[350] In short, the statistically insignificant move in Verizon's stock price is not an indicia of fair value.

9. Tender Offer Results Do Not Support Fischel's Fair Value Contention

The fact that 63.9 percent of AOL stockholders tendered their shares in the Merger does not support Fischel's fair value determination. Excluding Armstrong's shares, less than 60% of outstanding shares were tendered. This level of stockholder support for the Merger is in the lowest five percent of all transactions identified by Fischel in his premia paid analysis (and is in fact in the bottom five transactions period).[351] The very low stockholder support for the Merger, even without information on the Millennial, Search or Display Deals or the updated free cash flow projections, supports that the merger price was significantly *below* fair value.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

10. AOL And Verizon Analyst Opinions Of The Transaction Are Not Evidence Of Fair Value

Like the rest of the market, Wall Street analysts did not have complete information as to the operative reality of AOL as of the Valuation Date. They did not know about the Millennial, Search, or Display Deals, and they did not know that AOL updated its free cash flow projections resulting in higher projected value.[352] Additionally, Fischel acknowledges that analysts are frequently wrong and that he did *nothing* to determine whether the analysts covering AOL were ever accurate.[353] For these reasons, the views of analysts as to the merits of the Merger are not an indicia of fair value.

For all of the foregoing reasons, including that Fischel admits much of the market evidence he cites is statistically insignificant or is otherwise unreliable and the market did not have material, non-public information as to AOL's operative reality as of the Valuation Date, the alleged "market evidence" is really no evidence at all.

C. FISCHEL'S CLAIM THAT AOL'S FAIR VALUE EQUALS DEAL PRICE LESS SYNERGIES IS BASED ON THE UNSUPPORTED AXIOM THAT DEAL PRICE EQUALS FAIR VALUE

Fischel's assertion that $50 per share is "maximum fair value" rests on the false assumption that deal price is fair value, although Fischel admitted during cross-examination that deal price is not fair value.[354] The Delaware Supreme Court has made clear that "[r]equiring the Court of Chancery to defer-conclusively or presumptively-to the merger price, even in the face of a pristine, unchallenged transactional process, would contravene the unambiguous language of the statute and the reasoned holdings of our precedent."[355] It is well established that the "market for an entire company has different and less confidence-promoting attributes than the public markets."[356] A Court should give "no weight" to deal price when the process by which that deal was reached "does not include a meaningful market canvass and an arms-length process."[357] Furthermore, a conclusion that a market for a particular stock is efficient is markedly different than a conclusion that market price reflects fundamental value, particularly where, as here, there is a significant information asymmetry.[358] In keeping with the teachings of our Supreme Court, there are four main reasons why the deal price in this case does not reflect the fair value of AOL.

First, the market did not know that AOL was in the process of acquiring Millennial Media, which completed AOL's ad tech stack and allowed it to compete at a grander scale for high margin, rapidly expanding mobile advertising dollars.[359] At the time of the Offer, neither Verizon nor any other potential acquirer of AOL knew about the Millennial Media Deal either.[360]

Second, the market did not know about the Display Deal, a deal that AOL projected would *add $2.8 billion* in revenue in just the first four years of the 10-year agreement.[361] At the time of the Offer, Verizon (or any other potential acquirer) did not know about it either.[362]

Third, the market did not know that AOL conducted a "deep dive" into its free cash flow projections resulting in a bottoms-up model that more accurately forecast AOL's future cash flow-and was significantly more favorable than prior projections. Other potential acquirers of AOL did not know that either. In fact, even stockholders deciding whether to tender their shares did not know about AOL's free cash flow projections, because AOL did not disclose them in the Proxy.[363]

Fourth, at the time of the Merger, AOL's management believed that its stockholders suffered from investor myopia-they were only interested in short-term gains and not AOL's long-term plan.[364] AOL's Board and Management recognized that stockholders reacted negatively to acquisitions and investment, but repeatedly insisted both publicly and internally that the short-term bumps would create a long runway of high growth for AOL.[365] In 2015, AOL was at the end of a three-year substantial acquisition strategy that was set to culminate with the acquisition of Millennial Media, and AOL's investors had a long history of negative reaction to AOL investment.[366] As this Court has held, the optimal time to buy a company "is after it has made significant long-term investments, but before those investments have started to pay off and market participants have begun to incorporate those benefits into the price of the Company's stock."[367] That is exactly what happened here. Verizon took advantage of the negative investor reaction to AOL's announcement that 2015 would be an investment year[368] and bought AOL at a discount.

D. FISCHEL'S CLAIM THAT AOL'S FAIR VALUE EQUALS DEAL PRICE LESS SYNERGIES IS BELIED BY

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

THE FACTS, INCLUDING THE ACTUAL WAY VERIZON APPROACHED THE ACQUISITION

Fischel claims to support his "best estimate of the fair value of the AOL shares" with his "calculation of the Merger Consideration net of estimated synergies."[369] He "concluded that the deal price is a maximum fair value but not fair value itself because it doesn't take into account synergies,"[370] and "reduced the [deal price by his] estimated value of synergies of $4.07 ... to get ... an implied fair value of the AOL shares of 45.93."[371] This simplistic approach is flawed in several fundamental respects.

First, Fischel's analysis contravenes the manner in which Verizon valued AOL and crafted its offers. In its valuation analysis, Verizon calculated AOL's stand-alone value without synergies as well as values assuming Verizon would keep 50% or 100% of the synergies.[372] The value attributable to synergies was layered on top of the AOL stand-alone value.[373] As Fischel conceded, under Verizon's valuation analysis, Verizon could retain 100% of the synergies and still pay more than $50 a share for the fair value of AOL.[374] Moreover, Verizon was prepared to offer up to $52 a share if AOL rejected the $50 a share offer.[375]

Second, Fischel assumed that the "$50 [a share] price includes some portion that was paid to the AOL shareholders because of the expected synergies resulting from the transaction."[376] But Fischel confirmed at trial that he did not specifically analyze the Verizon bid nor conduct any other Verizon-specific analysis to calculate the amount of synergies Verizon purportedly ceded to AOL's shareholders.[377]

Third, Fischel did nothing to verify the reasonableness of Verizon's synergy projections.[378] Neither did Professor Tucker.[379] Fischel did not even read, let alone rely on anything in Tucker's reports,[380] so her opinions on synergies are irrelevant to Fischel's valuation.

Finally, Verizon never disclosed its synergy projections.[381] Accordingly, that information could not have affected AOL's stock price.

IV. CONCLUSION

For the reasons set forth herein, Petitioners are entitled to an award of at least $68.98 per share for their AOL stock, plus interest at the statutory rate.

Dated: May 10, 2017

Respectfully submitted,

/s/ Stuart M. Grant

Stuart M. Grant (No. 2526)

Mary S. Thomas (No. 5072)

John C. Kairis (No. 2752)

Laina M. Herbert (No. 4717)

GRANT & EISENHOFER P.A.

123 Justison Street

Wilmington, DE 19801

Tel: 302.622.7000

Fax: 302.622.7100

Counsel for Petitioners

Footnotes

1 JX0836 at AOL00240248.

2 *Id.*

3 *Id.*

4 JX1624 at AOL00143917; TT(Armstrong) 535:5-23.

5 JX1624 at AOL00143917.

6 TT(Fischel) 1065:6-12. Deal price is an inappropriate measure of AOL's fair value here, where, among other things, there was no price discovery, there was an interested CEO controlling the negotiations, and there was significant information asymmetry.

7 TT(Cornell) 108:17-21.

8 TT(Fischel) 1065:6-9

9 For example, Respondent attempted to impugn the integrity of Petitioners' expert, but Respondent's own expert testified that he respected Cornell as a scholar, as a valuation expert, and in particular as an expert in valuation of technology companies. TT(Fischel) 1167:15-22.

10 JX2076 at VZ-0059181.

11 JX0968 at 2; TOR at ¶11(discussing AOL's "shift[] [in] its strategy towards trying to generate revenues from digital advertising").

12 JX0968 at 2; TT(Ghose) 30:7-13.

13 JX0968 at 3, FOR at ¶¶6, 7; TOR at ¶11.

14 FOR at ¶7; JX0968 at 3; JX1180 at 4.

15 JX0836 at AOL00240233, AOL00240235.

16 JX0836 at AOL00240235.

17 FOR at ¶7; TOR at ¶16; JX0968 at 3.

18 JX0968 at 3.

19 FOR ¶7; TOR ¶17; JX0968 at 2; JX1180 at 3.

20 TOR ¶17; JX 0968 at 2.

21 In contrast to Armstrong's pessimistic testimony at trial, in contemporaneous documents AOL boasted of its continued "successful[] transition to the programmatic future of advertising," "reach[ing] profitability in Q4 and for the full year," programmatic revenue growing at "250% in 2014" and "80% year-over year." JX0836 at AOL00230232, AOL00230236; JX1647 at 3, 5.

WESTLAW © 2019 Thomson Reuters. No claim to original U.S. Government Works.

22 TRR at *¶5; see also* GOR at ¶11; TT(Ghose) 14:19-21("[O]nline advertising has seen dramatic growth in the past few years and [is] well poised for dramatic growth in the coming years.").

23 GOR at ¶¶23-25; TT(Ghose) 20:22-24; TT(Tucker) 936:17-18("So Dr. Ghose is exactly right when he says that mobile is growing. It's really growing."); TRR at ¶65.

24 GOR at ¶¶24-25; TT(Ghose) 28:4-7("So programmatic advertising has basically seen rapid growth in the last few years. And that trend is also expected to continue for many, many years from now.").

25 GOR at ¶72; TRR at ¶5("We also agree about the shift in the trajectory of online advertising towards mobile, OTT video, and programmatic (automated) advertising.").

26 JX0836 at AOL00240232(Armstrong reporting "AOL continues to successfully transition to the programmatic future of advertising"), at AOL00240239(Dykstra reporting that AOL had "done an extraordinary job ... transforming the organization, along with the business into more of a programmatic Company.").

27 In stark contrast to Armstrong's self-serving trial testimony, where he claimed AOL was facing a multitude of insurmountable challenges, TT(Armstrong) 496:21-498:8, 515:10-18, Armstrong told investors that AOL "saw some very macro trends that point to the success we've had in our strategy," including "a growing user base," "end[ing] the year with over 50% of our traffic being mobile," "moving from essentially zero programmatic revenue in 2012 to approximately 40% of our non-search advertising in Q4 2014" and "growing our pricing of advertising by double digits, both in Q4 and for 2014." JX0836 at AOL00240232. He also touted AOL's "plan for 2015 as a whole, which [AOL] started deeply executing against in Q4," which included "meaningfully shift[ing] [AOL's] resources and [its] organization to the largest opportunities...." JX0836 at AOL00240234. On March 10, at a company conference, Armstrong described "bring[ing] [AOL's] high-growth business to profitability" in 2014 and taking the first half of 2015 to properly position AOL to "be in a really good position in the second half of '15 and '16 and '17 and '18 to take advantage of ... fairly epic platform shifts happening in media overall." JX1050 at 5; TT(Armstrong) 527:17-530:10. AOL's first quarter 2015 breakout earnings announcement on May 8, also reflected its significant growth. JX1646. On May 8, Armstrong highlighted AOL's "80% year-over-year" programmatic revenue growth, which represented "45% of global brand ad revenue." JX1647 at 3.

28 JX0836 at AOL00240232; TT(Armstrong) 522:21-524:9.

29 JX0836 at AOL00240233; TT(Armstrong) 524:24-525:13; *see also* JX0836 at AOL00240234("Fourth quarter results represent another solid quarter for AOL, a great end to 2014 and our eighth consecutive quarter of year-over-year revenue and adjusted OIBDA growth.").

30 JX0836 at AOL00240233("When we look forward over the next five years, we see a similar set of principles emerging."); TT(Armstrong) 525:14-24; JX0587 at AOL00272929("The valuation of the company in 2016 will be dramatically higher, even if our profits are lower, because people will be able to see the path to massive value creation.... I can calculate - today - a much higher valuation for AOL and if we do a great job next year our valuation and strategic valuation will be big - very big.") Yet at trial Armstrong portrayed AOL as if it were in dire straits. TT (Armstrong) 410:1-412: 13.

31 JX0836 at AOL00240236.

32 JX0921 at AOL00002474; JX1546 at VZ-0007863, VZ-0007887, VZ-007893; JX1734 at ALLEN 00013544; JX2359 at Tabs "Hanks Projections Per Management" and "AOL Earnings Summary"; JX2277, COR at Ex. 8. The revenue and EBITDA projections are the same in projections used by Fischel and Cornell. *See* FRR ¶17 n.23.

33 TT(Isani) 852:2-11.

34 Roszkowski(JX2235) 125:16-21; TT(Isani) 829:2-830:1.

35 Roszkowski(JX2235) 125:16-21.

36 JX1573.

37 JX2466 at AOL-QP 00317984.

38 FOR ¶41; COR ¶¶76-77; COR Ex. 9 nn. A-B.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

[39] TT(Dykstra) 725:17-727:3, 728:2-15; Ryan(JX2233) 135:14-18.

[40] JX1262 at ALLEN QP0017163; JX1266 at AOL00322156; JX1329.

[41] Stenzler(JX2215) 55:5-12, 56:25-57:2.

[42] Stenzler(JX2215) 59:6-8, 60:10-61:7.

[43] Decker(JX 2213) 71:22-73:8, 77:17-21; JX1305.

[44] JX1310 ("Do you really think [working capital] will be that negative? If not, can your guys take a hard look to refine?").

[45] JX1423 at ALLEN QP0021856.

[46] When the Updated Projections were developed, Sweet was not aware Verizon was interested in a full acquisition. JX1434 at ALLEN QP0021667; JX1437("Lara is not aware of the change in the structure to a 100% deal.").

[47] JX1365; JX1374; JX1377; JX1393; JX1414; JX1415.

[48] Throughout trial, Respondent's counsel and expert referred to the Updated Projections as the "Alternative Projections." *See, e.g.,* TT(Fischel) 1045:9, 11; 1048:8, 1049:20; TT(Comell cross) 230:3; TT(Dykstra direct) 661:24; TT(Isani direct) 836:20. The term "Alternative Projections" is a litigation-generated term that cannot be found in the contemporaneous documents or even in any of the fact witnesses' own words. *See* TT(Isani) 854:5-14. Rather, the term is just part of a well-rehearsed litigation strategy.

[49] JX1440 at AOL00221201; *see also* JX1374 at ALLEN QP0021088 ("Movements are driven based on revenue and expense trends as well as movements in DSO and DPO.").

[50] TT(Bellomo) 370:3-7.

[51] TT(Bellomo) 388:17-22.

[52] TT(Bellomo) 388:17-391:2; JX1849 at AOL00230522.

[53] TT(Bellomo) 379:2-5.

[54] JX1374; JX1414. In Q1 2015, FCF grew $24 million year over year "reflecting the timing of working capital." JX1624 at AOL00143921. Nolan also stressed, in a contemporaneous email, that the main difference between the working capital numbers in the Original and Updated Projections was "the improved dso and dpo assumptions based on our initiatives to improve both." JX1690.

[55] JX1429.

[56] JX1624 at AOL00143921.

[57] JX1424 at ALLEN-QP0022213.

[58] Isani(JX2230) 142:24-145:16; JX1435 at ALLEN QP0021729.

[59] *See* JX1435 at ALLEN QP0021729; JX1869.

[60] Decker(JX2213) 70:10-79:4; Stenzler(JX2215) 41:1-43:17, 45:2-54:5, 56:6-61:7.

[61] TT(Fischel) 1093:4-10.

[62] JX0357 at AOL00360049.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

63 JX1794 at 6.

64 JX2216 at 1.

65 JX0597.

66 JX0660 at AOL00272872.

67 Armstrong(JX2218) 208:15-209:15.

68 JX0660 at AOL00272872.

69 *Id.*

70 *Id.*

71 *See, e.g.,* JX0698; JX0701; JX0703; JX0705; JX0708 (noting AOL would contribute Platforms and Brands); JX0709 at AOL00306217, AOL00306219-24.

72 JX0811 at VZ-0017346, VZ-0017350-51.

73 JX1849 at AOL00230519.

74 JX0881 at AOL00157221.

75 JX1794 at 6.

76 JX1157 at ALLEN 00049492.

77 JX1022 at AOL00305853.

78 JX1084.

79 JX1849 at AOL00230520.

80 JX1289 at AOL00359590.

81 JX1293 at AOL00002684.

82 *Id.*

83 JX1849 at AOL00230521.

84 *Id.;* JX1469 at AOL00297351-54, AOL00297362-65

85 JX1491 at AOL00002686; JX1484 at AOL00473957.

86 JX1849 at AOL00230521.

87 JX1491 at AOL00002687; JX1849 at AOL00230521.

88 JX1491 at AOL00002687.

89 Reynolds(JX2210) 89:4-90:23, 92:7-24.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

[90] JX1624.

[91] JX1715 at LIONTREE-AOL0034728.

[92] *Id.;* JX2365.

[93] JX1624 at AOL00143917.

[94] *Id.*

[95] *Id.*

[96] JX1624 at AOL00143919.

[97] *E.g.* JX1653 (CRT); JX1660 (UBS).

[98] JX1582 at AOL00473980-82; Roszkowski(JX2235) 156:4-7.

[99] JX1715 at LIONTREE-AOL0034729.

[100] JX1622 at AOL00002706; JX1666 at AOL00002714.

[101] *Id.*

[102] JX1675.

[103] JX1731 at VZ-0062024.

[104] JX1702.

[105] *Id.*

[106] JX1735 at AOL00002716.

[107] *Id.* at AOL00002719

[108] JX1735 at AOL00002719; JX1849 at AOL00230523.

[109] JX1849 at AOL00230524.

[110] JX1791 at 94-96.

[111] JX1965 at 5.

[112] TT(Walden) 345:24-346:4.

[113] JX1715 at LIONTREE-AOL0034730; Doherty(JX2208) 191:25-192:5.

[114] JX1715 at LIONTREE-AOL0034731.

[115] TT(Walden) 346:18-20(emphasis added).

[116] JX1717 at LIONTREE-AOL0069907; JX1752 at VZ-0028098.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

117 TT(Doherty) 600:14-22.

118 JX1754 at VZ-0033755; TT(Doherty) 621:12-18.

119 *See, e.g.,* JX1256 at VZ-0051888 (4/7/15); JX1489 (4/25/15); JX1612 at VZ-0048471 (5/7/15); JX1717 at LIONTREE-AOL0069907 (5/10/15); JX1754 at VZ-0033765 (5/11/15); JX1752 at VZ-0028098 (5/11/15); JX1758 at VZ-0050105 *(5/11/15).*

120 TT(Doherty) 621:23-622:7.

121 JX1256 at VZ-0051888; TT(Doherty) 622:16-19, 623:5-8, 624:5-8.

122 JX1256 at VZ-0051888; TT(Doherty) 622:29-624:20.

123 JX1612 at VZ-0048471.

124 JX1489 at VZ-0048800.

125 JX1612 at VZ-0048471; TT(Doherty) 627:12-629:8.

126 TT(Fischel) 1153:1-11.

127 TT(Tucker) 965:16-970:18; TT(Fischel) 1153:12-21.

128 JX0097 at 5-7.

129 TT(Reynolds) 802:5-6.

130 Reynolds(JX2210) 84:17-18; 85:5-8.

131 JX687 at 4 of 10.

132 TT(Armstrong) 430:14-435:2.

133 TT(Armstrong) 424:6-430:13.

134 There is no evidence of these alleged “whole company” discussions anywhere, nor was Armstrong authorized by the Board to have any such discussions. *See, e.g.,* JX2235(Roszkowski) 184:11:24(characterizing discussions with Comcast and Fox).

135 Reynolds(JX2210) 45:8-12.

136 Reynolds(JX2210) 45:13-16.

137 JX1794 at 6(emphasis added).

138 TT(Armstrong) 519:4-522:2; JX1849 at AOL00230517-23; Reynolds(JX2210) 45:13-16.

139 TT(Armstrong) 519:15-20.

140 TT(Armstrong) 428:9-19, 459:11-464:5.

141 JX1849 at AOL00230518.

142 JX1264; JX1849 at AOL00230520.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

143 JX1849 at AOL00230520.

144 JX1849 at AOL00230519.

145 JX1038; JX1849 at AOL00230519.

146 JX1849 at AOL00230519. Prior to adopting AOL's litigation story, Reynolds testified at deposition that Fox was interested only in a partnership or asset sale and *not* interested in a spinoff of all or part of AOL's businesses. Reynolds(JX2210) 83:11-84:2. *See also* JX1027(Armstrong noting that Fox was only potentially interested in content and ads).

147 *Id.*

148 *Id.*

149 *Id.*

150 JX1849 at AOL00230519.

151 JX1582 at AOL00473983-84.

152 JX1548 at AOL00211151.

153 Roszkowski(JX2235) 236:6-237:9.

154 Armstrong(JX2217) 84:5-15(Brand Central included "probably the top 15 people at the company.").

155 JX0587 at AOL00272929; Armstrong(JX2218) 201:25-202:13.

156 In May 2015, one Board member stated Huffington Post was worth $1.5 billion, and Reynolds "said that $1.0 [billion] would be an OK outcome" (JX1662) in response to "the prospects of someone coming and making a bid for [Huffington Post]." Isani(JX2230) 39:2-17; 184:17-20.

157 JX1550 at AOL00305548.

158 *Id.*

159 Isani(JX2230) 184:17-20.

160 JX0898 at AOL00129410.

161 *Id.*

162 *Id.*

163 Armstrong(JX2218) 205:7-206:6; JX0902 at AOL00306013; JX0960 at slides 4,7.

164 Armstrong(JX2218) 206:15-207:6; JX0902.

165 Armstrong(JX2218) 207:7-21; Isani(JX2230) 34:13-23. Allen was not aware AT&T reached out to anyone within AOL concerning a potential strategic transaction. Isani(JX2230) 35:10-14.

166 *Compare* JX0960 at slide 7 (2/27/15 Deal Landscape describing for the Board the commercial deal AOL was negotiating with AT&T, but not disclosing the inbound interest) *with* JX1066 at AOL00272464 (March 13 Deal Landscape provided to AOL *management,* which disclosed AOL had received "[i]nbound interest from [AT&T's] President of Advertising)" *with* JX1097 at AOL00211713 (March 20 Deal Landscape provided to AOL management, disclosing "Inbound interest from President of

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

Advertising”).

[167] TT(Armstrong) 519:4-522:2; *see* JX1849 at AOL00230517-23.

[168] JX0311 at 68; Armstrong(JX2217) 145:11-146:14.

[169] Reynolds(JX2210) 59:11-17.

[170] Walden(JX2206) 85:20-25.

[171] Reynolds(JX2210) 92:12-15.

[172] Reynolds(JX2210) 92:16-24.

[173] TT(Walden) 335:11-16.

[174] JX1849 at AOL00230520; JX1293 at AOL00002684.

[175] JX1849 at AOL00230520.

[176] *Id.*

[177] *Id.*

[178] JX1849 at AOL00230521.

[179] *Id.*

[180] JX1849 at AOL00230522.

[181] JX1849 at AOL00230523.

[182] JX1688.

[183] JX1688 at AOL00211038.

[184] JX1737; JX1759.

[185] JX1849 at AOL00230507-515.

[186] JX1743.

[187] Walden(JX2206) 182:20-183:7.

[188] JX1737.

[189] JX1797 at 47-49, 61.

[190] JX1849 at AOL230523.

[191] JX2076 at VZ-0059180-81.

[192] JX2076 at VZ-0059181.

[193] TT(Ghose) 48:6-7.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

194 TT(Ghose) 49:7-14.

195 JX2405.

196 *Id.*

197 TT(Armstrong) 546:6-9.

198 JX1841 at VZ-0033559.

199 JX1841 at VZ-0033567.

200 JX1841 at VZ-0033564 & VZ-0033605.

201 JX2076 at VZ-0059181.

202 JX2076 at VZ-0059188-89.

203 JX1841.

204 JX1841 at VZ-0033602-607.

205 JX1841 at VZ-0033604 (MYDAS, DSP, and DMP); TT(Dykstra) 731:21-732:6.

206 JX2430.

207 *Id.*

208 JX2440.

209 JX2434 at AOL00218358.

210 JX2098(Email re: “Mars - AOL BOD” from Armstrong to the Board: “Thanks to all your hard work - we were able to dust off the deal you approved and work with Verizon on getting it done.”).

211 JX2079 at AOL00394863(emphasis added).

212 JX2076 at VZ-0059181(“Does being owned by Verizon change the Millennial deal or the way AOL looks at it? No.”). Nor is there any doubt that AOL had the financial capacity to acquire Millennial Media pre-merger. JX1875 at AOL00189105(“The good news is we have plenty of cash to run the business, even allowing for a $310mm cash acquisition of [Millennial Media] in June.”).

213 JX2008.

214 JX2441.

215 JX1906 at VZ-0056420.

216 JX2279 at 6.

217 JX1843 at 76.

218 JX1906 at 29; *see also* JX1843 at 76.

219 Partner A is Google. Partner B is Microsoft. *Compare* JX1906 at 31 *and* JX1843 at 76.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

[220] JX1717 at LIONTREE-AOL0069907.

[221] JX2406 at ALLEN QP0025517; TT(Doherty) 582:11-18.

[222] JX2146 at 1-2.

[223] JX2441 at AOL-QP 01033139.

[224] JX2412; JX2441.

[225] JX2441 at AOL-QP 01033139.

[226] JX2441 at AOL-QP 010331341-42.

[227] JX2441 at AOL-QP 01033144.

[228] JX2407.

[229] JX2408.

[230] JX2412.

[231] *Id.*

[232] JX1816.

[233] JX2425.

[234] *Id.* at AOL-QP 200010089.

[235] JX2441 at AOL-QP 01033153-58.

[236] JX1993.

[237] JX2008 at AOL0043190.

[238] Fischel(JX2274) 356:4-7; TT(Fischel) 1136:2-14.

[239] Verizon knew about the Search Deal, but not the positive effect that it would have on AOL's bottom line. JX2406 at ALLEN QP0025517; *see also* TT(Walden) 344:4-8; TT(Doherty) 582:11-18, 596:12-17, 598:24-599:8.

[240] TT(Doherty) 582:11-18.

[241] *Cede & Co. v. Technicolor, Inc.,* 684 A.2d 289, 296 (Del. 1996).

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

[243] *M.G. Bancorporation, Inc. v. Le Beau,* 737 A.2d 513, 525 (Del. 1999).

[244] *Gearreald v. Just Care, Inc.,* 2012 WL 1569818, at *4 (Del. Ch. Apr. 30, 2012).

[245] FOR ¶59("[T]he best estimate of the standalone fair value of the AOL shares is the DCF value."); FRR ¶1("This opinion was based on my DCF analysis[.]"); COR ¶21("I determined that it is appropriate to place a higher weight on implied values using the DCF approach.").

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

246 FRR ¶17; CRR ¶7; TT(Fischel) 1065:6-24.

247 Dykstra described the Updated Projections as aspirational when presenting to the Board in May, but she did not use that term when instructing her team to create the Updated Projections.

248 JX1423 at ALLEN QP0021850.

249 JX2450 at AOL00277029.

250 JX1490 at ALLEN QP0023465 (April 26, 2015 Draft); JX2468 at ALLEN_00053330 (May 6, 2015 Draft).

251 TT(Isani) 838:10-13.

252 Armstrong testified that Dykstra and her team frequently "misforecasted," causing AOL to have to "redo budgets, redo forecasts, change operations, [and] change the cost structure." TT(Armstrong) 453:1-8. As a result, on February 25, 2016, Armstrong expressed his frustration with the financing department to Dykstra and told her everything that needed to be fixed. JX0939. Three days later, Armstrong emailed AOL's lead independent director, informing him that Dykstra was "killing the operators because the process/numbers are out of hand and always changing." JX0954. Thus, by March 2016, Dykstra knew that her position at AOL was in jeopardy unless she fixed the issues raised by Armstrong.

Although Dykstra signed off on sending the Updated Projections to Verizon, she quickly realized that she could not sign off on them being used in Allen's final fairness presentation because the Board had never seen them. AOL only instructed Allen to use the Original Projections after Dykstra had her team scour board materials for every bit of information the Board had seen about FCF. JX2457 ("I want someone to go through with Julie Hines [attorney in AOL's legal department] every financial presentation, including Allen Co presentations that have been put in front of the board in the last 90 days, and confirm with legal that we got everything even if not in 'boardbooks.' "). That search revealed the Board had seen cash flow numbers consistent with the Original Projections. Knowing that, Dykstra realized if she authorized use of the Updated Projections in the presentation to the Board, she would have to acknowledge to the Board the Original Projections were inaccurate, JX2450, further fueling a case for her termination.

253 JX2027.

254 Fischel(JX2274) 313:11-15("And in fact, you based your ... present value of the tax attributes on the [Updated Projections]; correct? A. Yes, I would agree with that."); TT(Fischel) 1093:4-10.

255 *Montgomery Cellular Holding Co.,* 880 A.2d 206, 222 (Del. 2005) ("[E]lements of future value that are known or susceptible of proof as of the date of the merger may be considered.").

256 *Id.; Glassman v. Unocal Exploration Corp.,* 777 A.2d 242, 247 (Del. 2001).

257 *Del. Open MRI Radiology Assocs., P.A. v. Kessler,* 898 A.2d 290, 314-15 (Del. Ch. 2006).

258 *Cede,* 684 A.2d, at 298-99.

259 *Montgomery Cellular Holding Co.,* 880 A.2d at 222.

260 *Id.* (internal quotations omitted) (holding that a deal that the appraised entity expected to close as of the date of the transaction was properly considered in calculating fair value, even though after the merger closed, the parties announced the expected transaction was not moving forward).

261 *Kessler,* 898 A.2d at 315 n.51.

262 JX2346 at Tab I. A.2 Key assumptions("New search deal terms set in for 2016. This will negatively impact revenue and bottom line for Core.").

263 JX1906 at VZ-0056420 at slide 6.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

264 JX1482.

265 *Id.* Mars is Millennial Media. Maple is Microsoft Display.

266 JX2408.

267 JX2416 at AOL00167250-51.

268 JX2441 at AOL-QP 01033144.

269 JX2436 at 9.

270 When asked at trial when they learned about the Millennial Deal, several Verizon witnesses' statements contradicted not only the contemporaneous record, but also their deposition testimony in this action. *Compare* Doherty(JX2208) 91:4-6("I don't recall"); *id.* 91:18:21(noting it was "right around that time" that the Merger Agreement was signed that Doherty learned of the Millennial Deal) *with* TT(Doherty) 313:18-21("I don't recollect a specific date but it was in the mid-April time frame.").

271 *See* JX2405.

272 JX2415.

273 Id.(emphasis added).

274 *Id.*

275 JX2418.

276 JX1841.

277 TT(Cornell) 109:5-110:24; ASWATH DAMODARAN, DAMODORAN ON VALUATION: SECURITY ANALYSIS FOR INVESTMENT AND CORPORATE FINANCE at 153 (2d ed. 2006)("For firms with very high growth rates in operating income, a transition phase ... allows for a gradual adjustment not just of growth rates but also of risk characteristics, returns on capital, and reinvestment rates toward stable growth levels."); BRADFORD CORNELL, CORPORATE VALUATION: TOOLS FOR EFFECTIVE APPRAISAL AND DECISION MAKING at 149 (1993)("For the constant growth model to be applicable, explicit cash flow forecasts are required up to the point where the real growth in cash flow converges to a constant rate .... Unfortunately for many firms, particularly recent start-ups and high-technology enterprises, it may take 20 years or more for growth rates to fall to a constant level.")

278 TT(Fischel) 1054:11-23.

279 FRR at n. 35; TT(Fischel) 1111:21-1112:9.

280 By averaging analysts who used longer projection periods, Fischel did not account for the fact that different perpetuity growth rates should be used depending on the years in the projection period (*i.e.,* a longer projection period could justify lower perpetuity growth rates than a shorter projection period). TT(Fischel) 1115:1-1118:9.

281 COR ¶129; http://pages.stern nyu.edu/~adamodar/New Home Page/lectures/basics html, accessed September 8, 2016.

282 COR ¶¶ 89-92.

283 TT(Cornell) 112:9-20. Outside of litigation, AOL admitted that longer projections were better. For example, in January 2015, Deloitte had asked AOL for projections through 2025. Mike Nolan asked, "[h]ow critical is it for us to provide Deloitte with projections through 2025?" Ben Wanjara responded, "not an absolute requirement, but a preferred way to determine a DCF." JX787 at AOL-QP 00414922. Cornell, but not Fischel, modeled AOL in the "preferred way."

284 TT(Cornell) 116:19-117:18.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

285 Other financial advisors valuing AOL modeled projections beyond 2018. Guggenheim extended its projections through 2030 and Goldman Sachs modeled cash flow projections through 2022. JX1546 at VZ-0007888(Guggenheim); JX1913 at AOL00160436 at Tab "Apollo SA"(Goldman).

286 Cornell also conducted an Alternative DCF Analysis which used only management's explicit forecasts, but then used a terminal multiple based upon projected 2018 EBITDA for AOL's peers. The result of this analysis, including Millennial Media and Microsoft Display in the management cash flow forecast, is a range of values per share of $74.55 to $84.55.

287 TT(Fischel) 1123:4-7; TT(Cornell) 123:15-21.

288 COR at Ex. 9(citing JX2014 at AOL00258561).

289 FOR ¶55.

290 *Id.*

291 Fischel (JX2276) 457:12-23.

292 TT(Fischel) 1128:6-1129:4

293 TT(Fischel) 1126:20-1127:4.

294 TT(Fischel) 1124:20-1126:4.

295 *See* JX1546 at VZ-0007858 (Guggenheim); JX2319 (Allen) at Tabs "WholeCo Multiple Val," "WholeCo DCF (Old CF)," and SOTP-Mult.

296 FOR *¶55* & n.105 (citing Aswath Damodaran, *Dealing with Cash, Cross Holdings and Other Non-Operating Assets: Approaches and Implications,* working paper, Sept. 2005 at 12) ("Damodaran").

297 CRR ¶24.

298 CRR ¶25(citing JX0968 at 78).

299 TT(Dykstra) 761:21-762:18.

300 CRR ¶25(citing Damodaran at 13).

301 Because Petitioners' expert's model already has affirmative answers to each of these questions, it was easier to show the individual effect using AOL's expert's model.

302 FOR ¶59("[T]he best estimate of the standalone fair value of the AOL shares is the DCF value."); FRR ¶1("This opinion was based on my DCF analysis[.]"); COR ¶21 ("I determined that it is appropriate to place a higher weight on implied values using the DCF approach.").

303 Fischel Demonstrative at 3.

304 TT(Fischel) 1137:2-4.

305 TT(Fischel) 1138:23-24.

306 TT(Fischel) 1092:16-22 (Updated Projections); 1095:7-11 (Microsoft and Millennial Media Deals).

307 TT(Fischel) 1138:23-24.

308 *See, e.g.,* JX0839("Today is going to be a very big message to the world that we are investing in AOL .... We also just made big changes to the company for the future. There is a very strong chance Wall Street will not like our guidance - basically we are

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

spending future earnings on important areas of the business. The stock may get hit .... Don't worry about the stock if it goes down, we will perform and we will bring it back up because we win in the real marketplace."); JX0281 at AOL-QP 00136961 ("Earnings reaction yesterday was dislocated from reality"); at AOL-QP 00136962 ("The company is not going to be managed on a day to day stock price - the value of the company is what we build and execute against the strategy.") and *infra* note 368.

309 JX0921 at AOL00002470; *see also* JX684 at AOL00313936 (a January 2015 document valuing AOL in a range of $71-$108 per share and noting that "assets rarely trade at their full SOTP valuations.").

310 2016 WL 3186538, at *24 (Del. Ch. May 31, 2016), *reargument denied* (Del. Ch. June 16, 2016).

311 *Id.* at 32.

312 *Id.* at 33.

313 *Id.; see also* Deborah A. DeMott, *Directors' Duties in Management Buyouts and Leveraged Recapitalizations,* 49 OHIO ST. L.J. 517, 536 (1988) (explaining that overhang from past acquisitions may artificially depress a company's stock market price and make a buyout price appear generous).

314 *Dell,* 2016 WL 3186538, at *34 (finding that an internal valuation that valued the company at $20 to $27 per share while the stock was trading between $9 and $10 a share was supportive of a conclusion that the standalone value of the company was higher than the stock price).

315 *Id.*

316 TT(Fischel) 1140:15-18.

317 TT(Fischel) 1140:9-14.

318 TT(Fischel) 1139:1-2.

319 TT(Fischel) 1163:14-18.

320 JX 1794 at 6.

321 Guhan Subramanian, Feb. 6, 2017 Draft at 25, *Using the Deal Price for Determining "Fair Value" in Appraisal Proceedings, in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? (forthcoming) (U. Chicago Press), *available at https://papers.ssrn.com/sol3/papers.cfm* ?abstract id=2911880.

322 *See, e.g.,* Reynolds(JX2210) 59:7-17.

Tim was struggling at this point. His organization was not following his direction, and he was not being clear as to what the direction should be. So this was sort of an intervention on my part, with the board's support, to talk about having the right talent, and we were--_and the right - and the amount of talent we needed to be successful. And, therefore, we were adjusting his target bonus to make sure that we achieved certain organizational and talent goals.

323 *Id.*

324 JX0084.

325 TT(Reynolds) 804:24-805:2.

326 JX1790(granting an award of 1.5% of the Company's market value on the Merger Date).

327 Reynolds(JX2210) 89:25-90:23.

328 TT(Reynolds) 805:18-806:3.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

329 Subramanian, *supra* note 321 at 23.

330 Despite Reynolds' trial testimony that the entire Board was supportive of Verizon's $50/share offer, TT(Reynolds) 792:23-793:22, the contemporaneous documents demonstrate Armstrong persuaded a reluctant Board to approve the Merger. JX1633; JX1702; JX1721; JX1728; JX1731.

331 TT(Fischel) 1145:4-10 ("Q. Now, the board of directors have approved every deal that's ever ultimately been completed; right? A. I assume so, correct. Q. Yeah. So that doesn't tell us anything, does it? A. No.").

332 *Id.*

333 AOL's financial advisor received approximately $40 million it would not have received if the Merger did not close. TT(Isani) 853:12-22. Tellingly, one of Verizon's financial advisors valued AOL at up to $82.81 per share, much higher than Fischel's "maximum fair value." JX1546 at VZ-0007847.

334 Fischel (JX2274) 268:14-18.

335 FRR Ex. A (demonstrating that Armstrong held more than 87 percent of total shares held by management and almost 95 percent of total shares held by directors).

336 FRR n.9.

337 JX1715 at LIONTREE-AOL0034728.

338 TT(Fischel) 1141:21-1142:4.

339 TT(Fischel) 1142:10-14.

340 TT(Fischel) 1150:18-19; TT(Fischel) 1150:24-1151:2("[I]t certainly places certain constraints on the target, on the acquired firm in their ability to go out and solicit other bids.").

341 TT(Fischel) 1151:3-8(describing it as "on the high side").

342 TT(Fischel) 1151:9-12; *Dell,* 2016 WL 3186538, at *41(noting that an unlimited match right "is a powerful disincentive" to another potential purchaser).

343 JX1794 at 6.

344 Press Release, Verizon, Verizon to Acquire AOL, May 12, 2015, 7:00 am ET, *at http://www.prnewswire.com/news-releases/verizon-to-acquire-aol-300081541* .html.

345 Bloomberg, VZ US Equity data, May 12, 2015.

346 *Id.*

347 Ben Reynolds, *Is Verizon's Acquisition of AOL an Example of 'Diworsification'?,* THESTREET, May 12, 2015, *at https://www.thestreet.com/story*/13147957/1/is-verizons-acquisition-of-aol-an-example-of-diworsification html.

348 Yahoo Finance, Dow Jones Industrial Average Historical Daily Stock Price, *at https://finance.yahoo.com/quote/ˆJI/histo?period1=1431316800&period2=* 1431403200&interval= *d&filter=history&frequency=1d* (last visited Mar. 31, 2017).

349 Cornell (JX2272) 56:12-17.

350 Ben Reynolds, *Is Verizon's Acquisition of AOL an Example of 'Diworsification'?,* THESTREET, May 12, 2015, *at https://www.thestreet.com/story/13147957/1/is-verizons-acquisition-of-aol-an-example-of-diworsification.html.*

351 JX2361; TT(Fischel) 1147: 23-1148:14.

352 TT(Fischel) 1136:5-17.

353 TT(Fischel) 1139:23-1140:14.

354 TT(Fischel) 1138:18-22.

355 *Golden Telecom, Inc. v. Global GTLP,* 11 A.3d 214, 217-18 (Del. 2010); *see also In re Appraisal of the Orchard Enters., Inc.,* 2012 WL 2923305, at *5 (Del. Ch. July 18, 2012).

356 *Dell,* 2016 WL 3186538, at *24.

357 Subramanian, *supra* note 321 at 23; *see generally Dell,* 2016 WL 3186538 (giving no weight to deal price).

358 *In re Diamond Foods, Inc., Sec. Litig.,* 295 F.R.D. 240, 247 (N.D. Cal. 2013) ("The requirement that an efficient market digest 'all relevant information' is not equivalent, however, to a requirement that such information is insinuated in the stock price in an objectively accurate way, such that the price reflects the 'fundamental value' of the stock").

359 Reynolds acknowledged that AOL expected its acquisition of Millennial Media to add value to its Platforms business. TT(Reynolds) 815:12-816:5.

360 Doherty admitted that AOL was not permitted to share or discuss Millennial Media's confidential information with Verizon until Verizon signed the joinder to the nondisclosure agreement between AOL and Millennial Media. TT(Doherty) 588:17-591:23; JX2405 (NDA between AOL and Verizon); JX2418 (Joinder Agreement to Confidential NDA); *see also* JX1879; JX1906; JX2076; JX1841; TT (Walden) 341:18-344:8.

361 JX2002 (6/29/15 press release announcing Display Deal).

362 Notwithstanding Doherty's self-serving direct testimony that the Display Deal was "already in [AOL's] plan," (TT(Doherty) 578:10-579:17), as of May 8, Verizon did not have any information regarding the Display Deal. TT(Doherty) 598:18-599:8. When Verizon thought it was going to have to raise its bid, Doherty was going to "try to use [Display] to pull a dollar or two more" into the deal." TT(Doherty) 578:10-14.

363 *See generally* JX1851 (AOL 14D-9).

364 TT(Armstrong) 413:13-414:14; JX0839; JX0279; JX0281.

365 JX0836 at AOL00240234 ("[W]e see 2015 as an investment year, and a very important year for AOL to fully transition into a growth business" and "[a] successful 2015 means a successful 2016 and 2017, with more growth and better businesses"), AOL00240236 (repeatedly told investors AOL had a long runway of double-digit growth ahead).

366 *See, e.g.,* TT(Reynolds) 800:12-17("acquisitions ... were not well received by our investors ... [t]he stock usually went down."); JX0839 (prior to AOL's Q4 2014 earnings call, Armstrong told Brand Central: "Today is going to be a very big message to the world that we are investing in AOL.... There is a very strong chance Wall Street will not like our guidance - basically we are spending future earnings on important areas of the business. The stock may get hit...."); JX0587 (Armstrong noting the "valuation of the company in 2016 will be dramatically higher, even if [its] profits are lower, because people will be able to see the path to massive value creation").

367 *Dell,* 2016 WL 3186538, at *32.

368 TT(Armstrong) 531:23-533:1("Q: You understood that in the short term, the market would not react positively to the news that AOL was investing in itself, didn't you? A: Yes").

369 FOR at ¶16.

370 TT(Fischel) 1016:22-24.

371 TT(Fischel) 1018:23-1019:1; FOR at ¶35.

372 JX1256 at 14; JX1754 at VZ-0033781; TT(Fischel) 1157:9-1158:20.

373 TT(Fischel) 1158:11-20, 1160:17-20.

374 TT(Fischel) 1158:21-1159:9, 1160:21-24; JX1256 at 14; JX1754 at VZ-0033781.

375 TT(Walden) 345:24-348:11.

376 TT(Fischel) 985:15-17; FOR at ¶15, ¶35.

377 TT(Fischel) 1156:22-1157:8.

378 TT(Fischel) 1153:12-15. Fischel simply accepted Verizon's synergy projections and applied a percentage obtained from an article noting that in certain other transactions a median of 31% of synergies was shared with the target. FOR at ¶35; TT(Fischel) 1017:19-1018:20.

379 TT(Tucker) 967:17-970:18.

380 TT(Fischel) 1156:7-9.

381 TT(Walden) 341:1-17; TT(Fischel) 1153:6-11.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

VERITION PARTNERS MASTER FUND, LTD. and VERITION MULTI-STRATEGY MASTER FUND, LTD.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 1:19-cv-00377-CFC
COHERENT ECONOMICS, LLC, W. BRADFORD CORNELL, and SAN MARINO BUSINESS PARTNERS	)	Jury Demanded
Defendants.	)	

[PROPOSED] ORDER GRANTING DEFENDANTS W. BRADFORD CORNELL AND SAN MARINO BUSINESS PARTNERS' RULE 12(B)(6) MOTION TO DISMISS

AND NOW, upon consideration of Defendants Bradford Cornell and San Marino Business Partners' Motion to Dismiss pursuant to Rule 12(b)(6) (the "Motion"), and any response thereto, it is hereby ORDERED, that the Motion is Granted.

DATED: ________________

____
The Honorable Colm F. Connolly