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The Most Recent Appraisal Decisions (One Above, and One Below, the Deal Price) Should Further Discourage Appraisal Claims in Arm's-Length Merger Cases— Norcraft *and* Solera

Two new Delaware appraisal decisions—*Blueblade Capital Opportunities, L.P. v. Norcraft Inc.* (July 27, 2018) and *In re Appraisal of Solera, Inc.* (July 30, 2018)—should further discourage appraisal claims in the context of arm's-length mergers. In *Norcraft*, the Court of Chancery relied on a DCF analysis, while looking to the deal price as a "reality check," and found fair value to be *2.5% above* the deal price. In *Solera*, the Court of Chancery relied on the deal-price-less-synergies and found fair value to be *3.4% below* the deal price. Notably, while the court in neither case determined fair value to be *equal to* the deal price (the approach strongly embraced by the Delaware Supreme Court in its seminal *Dell* decision issued in late 2017), in both cases the result was *close to* the deal price (in our view, reflecting the impact of *Dell*).

Key Points

- **These decisions should further discourage appraisal claims in cases involving arm's-length mergers.** These decisions suggest that appraisal results in cases involving arm's-length mergers will be *at or below* the deal price if, in the court's view, the sale process was not "seriously flawed." Moreover, notably, in *Norcraft*, the appraisal result was *only modestly above* the deal price even though the court viewed the sale process as "seriously flawed." We note that, notwithstanding the result in *Norcraft*, it is highly unpredictable what the appraisal result is likely to be in a case in which the court views the sale process as seriously flawed. However, *Norcraft* may reflect that, post-*Dell*, appraisal results in arm's-length merger cases may be strongly grounded in the deal price even in those cases where the sale process is deficient. At the same time, it should be noted that a good sale process still will *minimize* the appraisal risk—and also will minimize the (albeit, in most cases, likely remote) risks of injunction of the deal or liability of directors, as well as reputational risk to the directors.

- **These decisions, together with other proceedings since *Dell*, indicate that the Court of Chancery is now likely to take the following approach in appraisal cases involving arm's-length mergers:** (a) When the court views the sale process as not "seriously flawed," the court likely will rely on the deal-price-less-synergies or the unaffected market price (both of which lead to appraisal results *below* the deal price); and (b) when the court views the sale process as "seriously flawed," the court likely will rely on the DCF methodology, and look to the deal price for

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a "reality check." Reliance on the deal-price-less-synergies will (if there are any synergies) lead to an appraisal result that is *below* the deal price (as was the case in *Solera*). Reliance on the unaffected market price will virtually always lead to a result that is *well below* the deal price (as was the case in *Aruba*, the first decision after *Dell*). Notably, in both post-*Dell* cases in which the court viewed the sale process as seriously flawed and therefore relied on a DCF analysis, the result was *close* to the deal price (in *Norcraft*, just above it and, in *AOL* (Feb. 2018), just below it). It is to be noted that DCF results are highly malleable, as even a small change in the myriad highly subjective inputs can lead to a significant change in the result.

- **These decisions strongly suggest that the Court of Chancery, when it relies on the deal price, will now *as a matter of course* adjust the deal price downward to exclude the value of synergies.** The Delaware appraisal statute mandates that "any value arising from the merger" be excluded from fair value. Nonetheless, in past years, the Court of Chancery, when relying on the deal price, almost never made an adjustment to exclude the value of synergies (citing uncertainty regarding which types of synergies the statute intends to exclude, how to measure their value, and how to determine to what extent such value was reflected in the deal price). Moreover, while the Delaware Supreme Court addressed the issue in *Dell*, the discussion was inconclusive as to whether the deduction should be made and, notably, the Supreme Court's emphasis was on the deal price itself being given "heavy, if not dispositive weight." While the Court of Chancery over the past couple of years *has* made adjustments to exclude the value of synergies in a few cases, the court's discussion in both *Norcraft* and *Solera* strongly suggests that the court now views deal-price-less-synergies (rather than deal price itself) as the standard approach it will use going forward.

- **These decisions are also notable for their discussion of the "unaffected market price" as a potential factor in determining appraised fair value.** In *Norcraft*, following Vice Chancellor Laster's lead in *Aruba*, Vice Chancellor Slights considered whether to use the unaffected market price as the sole method, or at least as a data point, for determining fair value. Vice Chancellor Slights determined not to rely at all on the unaffected market price; however, his reasoning suggests that, under more typical circumstances, he would in the future rely on it. In this case, he concluded, it was not a reliable indicator of fair value because, as the case was tried prior to the Supreme Court's issuance of its *Dell* decision, there was only a "thin" record regarding the efficiency of the pre-merger market for Norcraft stock. In addition, the Vice Chancellor found, there was some evidence that the market may not have been efficient, as Norcraft was "fresh off an [IPO]," the stock was "relatively thinly traded" given the company's niche market, and the company was "thinly covered" by analysts. In *Solera*, Chancellor Bouchard, after a lengthy discussion about the unaffected market price, concluded that the fact that the record suggested that "the sales process was conducted against the backdrop of an efficient and well-functioning market for Solera's stock" provided "corroborat[ion] that the best evidence of Solera's fair value was the merger price." We note that the court did not in either of these cases or in *Aruba* address the issue that the unaffected market price of a stock reflects an inherent minority discount, and that longstanding Delaware case law (including *Cavalier Oil v. Harnett*, issued by the Supreme Court in 1989) holds that appraised fair value should *not* reflect any minority discount.

NORCRAFT

Background. The petitioner brought this action for appraisal of the shares of Norcraft Companies, Inc. in connection with the arms-length acquisition of Norcraft (a public company) by Fortune Brands Home & Security, Inc. Fortune was the only bidder considered by Norcraft pre-signing. During the 35-day post-

signing go-shop period, 54 potential bidders were contacted, of which seven entered into confidentiality agreements, although only one met with management and it ultimately did not submit a bid. While most of the parties indicated that the price was too high or that they did not want to compete with Fortune, two parties stated that they could not move quickly enough to submit a bid within the 35-day period. Norcraft's CEO was the lead negotiator. Vice Chancellor Slights found that the sale process was "significantly flawed" and therefore relied on a DCF analysis, but, citing *Dell*, he looked to the deal price as a "reality check" on the DCF result.

The merger price was $25.50. The petitioner expert's DCF analysis result was $37.48 per share. The respondent company expert's DCF result was $23.74 (although he contended that fair value should be based on the deal price less the value of expected synergies, which yielded a result of $21.90 per share). The court's DCF result was $26.16, which was 2.5% above the deal price.

Although the court relied on a DCF analysis (because it viewed the sale process as "significantly flawed"), the appraisal result was only moderately above the deal price. Vice Chancellor Slights stated that he was "mindful" of the Delaware Supreme Court's "embrace" in *Dell* "of 'deal price' as a strong indicator of fair value" in cases involving arms-length mergers, but he rejected reliance on the deal price in this case because "significant flaws" in the sale process "undermined the reliability of the Merger Price as an indicator of fair value." The Vice Chancellor therefore relied on a DCF analysis. Citing the Supreme Court's admonitions in *Dell* that deal price must be "considered carefully," he "returned to the Merger Price as a 'reality check,' before locking in [his] DCF valuation as the last word on fair value." The Vice Chancellor stated that he was "satisfied that the $0.66 per share delta between the Merger price and [his] DCF valuation of Norcraft [was] a product of the identified flaws in Norcraft's deal process."

We note that a DCF result depends on the inputs utilized (most importantly, the target company's projections). However, the result is highly malleable, as even a small change in the myriad inputs (most of which are highly subjective) can lead to a significant change in the result. Since *Dell*, the Court of Chancery has relied on a DCF analysis in two arm's-length merger cases and has found in both that fair value was close to the deal price (2.5% above in *Norcraft* and 3% below in *AOL*). At the same time, it bears emphasis also that it is highly unpredictable what the result of a DCF analysis will be—and, certainly, it could be significantly above the deal price. Therefore, a good sale process will still reduce appraisal risk (and, as noted above, there are critical non-appraisal-related benefits as well).

The court viewed the sale process as "significantly flawed" due to the following combination of factors: (i) There was a single-bidder pre-signing process, *without* a record establishing that the board had adopted this approach for strategic reasons or that it had in fact created value for stockholders. Indeed, when the merger agreement was signed, several members of Norcraft's senior management believed that the deal price undervalued the company. (ii) The pre-signing process was "tainted" due to the lead negotiator's conflicts (discussed below), as to which there was evidence that he had been "at least as (if not more) focused on securing benefits for himself as he was on securing the best price available for Norcraft." Critically, the board "did nothing" to "manage" the conflicts. (iii) The board did not have "even a basic understanding" of critical aspects of the merger agreement terms. (iv) The post-signing go-shop was "ineffective" given the specific circumstances, the specific provisions (including an "unlimited matching right"), and, according to the court, the buyer and its banker had discouraged potential competing bids during the go-shop period.

The court reaffirmed that a single bidder pre-signing approach does not necessarily render a sale process unreliable. The court stated that, as a result of the single-bidder approach, Norcraft "missed the opportunity to test the market before committing to Fortune, [and] also missed the opportunity to leverage

the interest of another suitor to extract a higher price from Fortune." However, the Vice Chancellor acknowledged that focusing on a single potential buyer to the exclusion of other potentially interested bidders "can, in some instances, lead to the creation of significant value" and thus can support reliance on the deal price as a good indicator of fair value. In this case, however, according to the court, there was "no evidence" that the single bidder approach was employed "for the sake of achieving a strategic advantage or maximizing value." Further, and "more troubling" to the court, was that the focus on only one bidder was "tainted" by the fact that the lead negotiator was conflicted. In addition, the court emphasized that an effective go-shop could have "saved" the "shambolic" (as in "in shambles") pre-signing process. The court stated that, whether knowingly or not, the company had "put all eggs in the go-shop basket as a means to achieve fair value for Norcraft stockholders''—but then had been out-negotiated and agreed to an "ineffective" go-shop.

We note that, depending on the facts and circumstances, a single-bidder strategy *even without a go-shop* can satisfy a board's *Revlon* duties and, we believe, render a sale process reliable for appraisal purposes. The Delaware Supreme Court held in *C&J Energy* (2014) that R*evlon* duties may be satisfied without an "active" market check either pre- or post-signing, so long as there is an opportunity for other parties to make unsolicited competing bids. Thus, a go-shop is not required, even when there was a pre-signing single-bidder process without a market check, so long as the target company has a "fiduciary out" to accept superior bids and the deal protections (such as a termination fee) are modest. The court's emphasis in *Norcraft* on the importance of the go-shop to a reasonable sale process does not, in our view, suggest that the standard for the sale process is higher in the appraisal context than in the *Revlon* context (indeed, if anything, it should be lower given that appraisal relates to determining "fair value" while *Revlon* requires obtaining the "best price available"). Rather, in our view, the emphasis in *Norcraft* on the go-shop reflected that the court viewed the pre-signing process as so flawed (due to the board apparently not having even considered the benefits and detriments of the single-bidder strategy and the lead negotiator's conflicts) that the sale process could be viewed as reliable for appraisal purposes only if the post-signing process had included an effective market check.

The court found that the go-shop was ineffective based on the specific facts and circumstances. The Vice Chancellor emphasized that, given the flawed pre-signing process, the post-signing go-shop was "the only meaningful opportunity to check the market" and it was therefore "especially important that the Company run an effective go-shop with a meaningful market check." The court observed that the Norcraft board did not appear to appreciate this factor, or to have "even a basic understanding of the terms and function of the go-shop"—and thus it fell prey to Fortune's attempts to weaken the go-shop through various provisions. The court noted that the lead banker for Norcraft's financial advisor "had never run a sell-side go-shop," yet Norcroft "relied completely on [the financial advisor] to oversee the process." By contrast, the buyer "knew full well what was at stake" with respect to the go-shop and "pushed hard" for provisions that would make it less likely that a topping bidder would emerge. The court found that the go-shop was "ineffective" for the following reasons:

- *The buyer's "informational advantage" as the first mover.* Prior to the merger agreement being signed, it was not widely known that Norcraft was up for sale, thus other potentially interested bidders were "several steps behind Fortune in pursuing an acquisition of Norcraft." This factor was exacerbated in this case, according to the court, because there was a particularly complex tax situation, which the buyer had taken months to "navigate," and which any competing bidder would have had to evaluate and resolve before the go-shop period expired.

- *The buyer's "unlimited matching right.*" The buyer had the right for four days after receiving notice of a "superior proposal" to match it, and had two business days to match any subsequent

proposal by the same bidder. We note that, while matching rights are common, an "unlimited" matching right has frequently been characterized by the Court of Chancery as a factor that deters competing bids.

- *The interrelationship of various provisions, which effectively "tightened and shortened" the 35-day go-shop period.* The "tightening" resulted from merger agreement provisions that permitted Norcraft to terminate the agreement only if a third party made a "full-blown superior proposal" (as opposed to "just get[ting] to excluded party status") by the end of the go-shop. The "shortening" related to the fact that a bidder would have to make a competing proposal by no later than 30 days into the go-shop in order to ensure that (i) the Norcraft board had the two business days it was allowed under the merger agreement to assess the proposal and declare it superior, (ii) Fortune's four business day match period expired, and (iii) the merger agreement could be terminated before Fortune could close on the shares tendered under the TSAs (which shares had to be tendered promptly after launching of the offer and Fortune was permitted to launch it 15 days into the go-shop period). The shortened go-shop period was of concern to the court because of the complexities of the due diligence process (relating primarily to the complicated tax situation noted above); and, we note, a number of potentially interested parties stated that they could not bid within the timeframe of the go-shop.

- *The discouragement of bids.* According to the court, the buyer's financial advisor ("in a fit of bad judgment") and the buyer's CEO "devised a strategy to dissuade potentially interested parties" from submitting topping bids during the go-shop. The court cited an email from the banker to the CEO in which the banker stated that he would emphasize to one of the potential bidders with whom a call had been scheduled that the buyer had been targeting Norcraft for a long time and viewed a merger as highly strategic. The CEO advised him to make Norcraft sound "not very interesting" and to "shut the door" on the potential bidder.

The court found that the lead negotiator had significant actual conflicts of interest and that the board "did nothing" to "manage" the conflicts. Norcraft's CEO, "B," was the lead negotiator for the transaction. According to the court, the buyer "strung [B] along" during the merger negotiations, "leading him to believe he might continue his employment with Fortune post-close." After settling on the merger price, Fortune finally told B that his employment would not be continued post-close; however, Fortune then "secured [B]'s continued commitment to the merger by stringing him along again, this time by dangling the possibility" that Fortune would be willing to sell the Norcraft Canada business to him after the closing. In addition, according to the court, there was evidence that "[B] had pushed hard for post-closing employment with Fortune" and, in addition, "had been spurring with Fortune in an attempt to extract every dollar he demanded for the [Tax Receivable Agreements that he and others had entered into with Norcraft in connection with the company's IPO, and that would have to be bought out by Fortune as part of the merger] (diverting consideration from stockholders)."According to the court, the Norcraft board did nothing to address B's conflicted status until B announced that he would be exploring the acquisition of Norcraft Canada from Fortune. Prior to that time, the court stated, the board did not form a special committee to negotiate with Fortune or "take any other steps to neutralize [B]'s influence"; and even the board's "half-hearted attempt to recuse B from further board deliberations regarding the Merger following his expressed interest in Norfolk Canada proved ineffective."

The court appeared to suggest that, when it relies on the deal price, it will deduct synergies as a matter of course. In *Norcraft*, Vice Chancellor Slights, without further comment, stated that he had considered (and rejected) reliance on "the Merger price (less synergies)." He never mentioned even the possibility of reliance just on the merger price (without a deduction for synergies). Combined with

Chancellor Bouchard's statement on this topic in *Solera* (discussed below), these decisions strongly suggest that, going forward, when the court relies on the deal price, there will be a deduction for synergies as a matter of course (at least where the record establishes the value of synergies).

SOLERA

Background. The petitioners brought this action for appraisal of the shares of Solera Holdings, Inc. in connection with the $3.85 billion arms-length acquisition of Solera (a public company) by Vista Equity Partners. There had been a two-month "outreach" to large private equity firms, followed by a six-week auction during which eleven financial and seven strategic potential buyers were contacted. Public disclosures made clear that the company was for sale. The board rejected two bids that it found to be unsatisfactory even though at the time it had not received other bids. The merger agreement provided for a 28-day post-signing go-shop, which included terms that specifically facilitated a key strategic competitor of Solera to continue to bid for the company. No competing bid was received during the go-shop. Solera's CEO was the lead negotiator. Chancellor Bouchard found that the sale process, although "not perfect," was sufficient to support reliance on "the deal price (less synergies)" to determine fair value. The result, after the deduction of the value of expected synergies from the deal price, was 3.4% below the deal price.

The court found that the sale process, "although not perfect," supported reliance on the deal price. The court found that the sale process was an "open process" that, "although not perfect," was "characterized by many objective indicia of reliability." First, there had been substantial outreach to financial buyers and the "whole universe of buyers" was put on notice, with increasing specificity over time, that the company was considering strategic alternatives. The court noted that although only one strategic buyer expressed interest, its "presence" in the sale process incentivized the financial sponsors to put forth more competitive bids. Thus, the court concluded, "many heterogeneous potential buyers had a meaningful opportunity to bid." The go-shop had no structural defects, according to the court, and indeed was crafted to facilitate the ability of Solera's main competitor to continue bidding for the company after the merger agreement was signed (among other things, by providing for a 1%, instead of a 3%, termination fee if the merger agreement was terminated for a superior offer by the competitor). Second, an "independent and fully authorized" special committee oversaw the process. The committee "actively engaged with the bidders, did not favor any one in particular, and expressed a willingness to walk away from bids it did not find satisfactory" (which, the court noted, it in fact did twice—"without the safety net of another bid"). Finally, the court noted, the sale process occurred against a backdrop of Solera having "a deep base of public stockholders, its shares were actively traded…and were covered by numerous analysts, and its debt was closely monitored by rating agencies." These facts establishing an efficient market for Solera's shares "corroborate[d] that the best evidence of Solera's fair value was the merger price," the court wrote.

The court found that the CEO's potential conflicts did not undermine the sale process—although the board should have better monitored them. "A," the CEO of Solera, met with private equity firms before and after the special committee was formed. The committee "could have done a better job of monitoring [A] and his interactions," particularly after the committee was formed, the court stated, but the interactions "did not compromise the integrity or effectiveness of the sale process…." The court noted "the reality that [A]'s participation in a transaction was a prerequisite for a financial sponsor to do a deal." (As the petitioners put it, "[A] *is* Solera.") All of the PE firms that submitted bids made clear that the bids depended on A continuing to lead the company. As no go-private transaction ever would have been a possibility without "buyers becoming personally acquainted and comfortable with [A]," his engaging in one-on-one conversations with PE firms before the committee was formed "had the utility of gauging interest in the Company to see if undertaking a formal sales process made sense." Once the committee

took charge, there was no indication that A's contacts had "predetermined or undermined the process." The court stated, however, that once the company had received an indication of interest and the special committee was in place, the committee "should have monitored [A]'s contacts with potential bidders more carefully." The petitioners "justifiably" criticized A's two-hour meeting with the buyer after the special committee had been formed. Shortly after the meeting, the buyer began to model a larger option pool for post-merger Solera executives. Both A and the buyer testified that compensation was not discussed at the meeting (or any time before the deal was signed). Although there was no evidence to the contrary, the court called the timing "suspicious" and stated that best practices would have dictated that a representative of the special committee should have accompanied A to the meeting "as a precaution." However, according to the court, even if compensation *had* been discussed, "nothing in the record indicates that any of [A]'s…actions before or during the sales process compromised or undermined the Special Committee's ability to negotiate a deal." For example, the court stated, there was no evidence that A participated in price discussions with any bidders or influenced the outcome of the sales process.

The court adjusted the merger price downward to exclude the value of synergies—and reaffirmed that synergies may be expected not only in strategic deals but also where a financial sponsor is the buyer. First, interestingly, in *Solera*, the Chancellor stated that he "adjust[ed] for synergies in accordance with *longstanding precedent*" (emphasis added) (although, as discussed above, the Court of Chancery has only recently begun to actually make such adjustments). This statement, together with Vice Chancellor Slight's statement in *Norcraft* on this topic (discussed above), appear to suggest that deal-price-less-synergies will now be the standard approach when the court relies on the deal price (at least when there is a record establishing the value of the synergies). Second, with respect to the calculation of the synergies deduction, the respondent company's expert calculated total expected synergies of $6.12 per share and then made a "conservative estimate" that 31% of the value of the synergies ($1.90 per share) "remained with the seller" (by using the lowest percentage identified in one of three empirical studies). Observing that the petitioners "made no effort to rebut" this evidence, the court concluded that it was "convincing." Third, the court reaffirmed that synergies can arise in financial buyer deals. The court noted that, in this case, the financial buyer owned 40 software businesses, three of which it believed had "significant 'touch points' with Solera from which synergies could be realized." The court cited the buyer's modeling of four different categories of synergies in its financial analysis of the company during the bidding process and the evidence presented at trial with respect to three of them (portfolio company revenue, private company cost savings, and the tax benefits of incremental leverage).

The court viewed the petitioners' DCF result as "facially unbelievable" because it so significantly exceeded the deal price. The court considered, but did not rely on, the parties "dueling DCF analyses." The court noted that the respondent company's DCF result was "in the same ballpark" as the court's deal-price-less-synergies result. Given the quality of the sale process, he found the petitioners' DCF result, which was $84.65 per share (almost 52% above the merger price), "facially unbelievable." That result, the court wrote, suggests that, "in a transaction with an equity value of approximately $3.85 billion at the deal price, potential buyers left almost $2 billion on the table by not outbidding [the buyer]."

The court also considered (but did not rely on) the unaffected market price. The respondent company argued, based on *Aruba*, that the court should rely on the unaffected market price, leading to a fair value determination about 35% below the deal price. The court rejected this argument. First, the court reasoned, this argument was advanced by the company only after *Aruba* was issued (and petitioners therefore were afforded no opportunity to respond). Second, there was "little in the record to give the court any comfort about Solera's true unaffected market price" (and, the court noted, the figure advocated by the respondent represented the closing price "on a *single* day"). Finally, the Chancellor noted that the

Supreme Court has "unmistakably emphasize[d] the probative value of deal price" and has *not* suggested that a reduction in "agency costs" (that is, as we read the opinion, the portion of the control premium paid that is attributable to the value of obtaining control) should be excluded from fair value. "Had that been the Supreme Court's intention, I believe it would have said so explicitly," the Chancellor wrote.

Practice Points

- **Determining the sale process strategy for an arm's-length merger.** It bears emphasis that the appraisal result in *Norcraft* was only modestly (2.5%) above the deal price in the context of a sale process that the court found to be "significantly flawed." At the same time, the appraisal result in *Solera* was only slightly (3.4%) below the deal price in the context of a seemingly robust sale process even where the synergies expected were significant. These outcomes should be considered when a buyer weighs the rewards of a sale process strategy that maximizes deal certainty as against the appraisal risks. At the same time, the important *non*-appraisal-related benefits of a robust sale process should also be considered—including minimizing the (albeit, in most cases, likely remote) risks of injunction of the deal or liability of directors, as well as reputational risk.

- **Pre-signing process and go-shop.** If a target company intends to utilize a pre-signing single-bidder process, the board should *consider and document* the strategic rationale for doing so. If it is not clear that the process resulted in a merger price that created value for the stockholders, then, the court emphasized in *Norcraft*, reliance on the deal price for appraisal purposes will depend on there having been an "effective" post-signing go-shop.

- **Conflicts of interest.** If a director, negotiator, or banker has a conflict of interest with respect to a proposed merger, the board should take appropriate action to "manage" the conflict. Such action could include forming a special committee, removing the party from involvement in the process, assigning a lesser role to the person, setting parameters for the person's involvement (such as having another person functioning with him or her), or other actions.

- Valuation arguments in an appraisal cases:

  - ***Unaffected market price.*** Both parties should be prepared to address the issue of unaffected market price given the court's seeming endorsement of this factor as a potentially relevant factor in determining fair value. If fair value is determined based in whole or in part on the unaffected market price, the respondent company should be prepared to address a petitioner's argument that there should be an upward adjustment to reverse the inherent minority discount. We note that the appropriate measuring period for the unaffected market price is inherently uncertain and subjective and will depend on the facts and circumstances. (In *Aruba*, the court, without explanation, used a 30-day average; in *Solera*, the court rejected the concept of using a single day's trading price but offered no further guidance).

  - ***Deduction of synergies.*** Both parties should be prepared to address the issue of synergies given the court's now apparent embrace of deducting the value of synergies when relying on the deal price. A respondent should maintain a record with respect to the buyer's expected synergies and negotiations with respect to the sharing of the value of the synergies with the target stockholders. A respondent should also be prepared to address the issue of "negative synergies" (*i.e.*, "costs" of the merger, including loss of opportunities) that the petitioner might argue should mitigate any downward adjustment of the deal price to exclude synergies value.

- ***Synergies for financial sponsors.*** The court has indicated in several cases (most recently, *Solera*) that there may be synergies where a financial sponsor is the buyer. Financial buyers should identify synergies that may be expected based on its other portfolio companies and/or with respect to portfolio company revenue, private company cost savings, and the tax benefits of incremental leverage.

- ***DCF.*** A party should consider whether its DCF result will be viewed by the court as credible, given the court's now often-expressed skepticism of DCF results that vary extremely from the deal price in the context of an arm's-length merger. Notably, *Norcraft* suggests that the court's evaluation of whether a DCF result above the deal price is credible may depend on whether there is, in the court's view, a reasonable correlation between (a) the delta between the DCF result and the deal price and (b) the extent to which, in the court's view, the sale process was flawed.

- **Determining the prepayment amount in appraisal cases.** In deciding whether and how much to pre-pay in an appraisal case to toll interest, the respondent company should take into consideration the recent significantly increased possibility of a below-the-deal-price appraisal result and the potential for difficulty in getting back pre-paid funds that ultimately turn out to have exceeded the appraisal award.

- **Projections utilized in a DCF analysis.** Interestingly, in *Norcraft*, the parties' respective experts did not challenge the overall reliability of Norcraft's projections and the court was "satisfied" that they were reliable, notwithstanding that Norcraft did not prepare long-term projections in the ordinary course of business. The key dispute relating to the parties' respective DCF analyses was whether the projections should have been extended out an additional five years. On this point, the court agreed with the respondent company's expert, who testified that a lengthier period would be inappropriate given that Norcraft's industry (cabinet manufacturing) is cyclical (and follows the residential construction market) and that the industry was projected to reach a "steady state" at or before the last year of the period covered by the existing projections. Further, the court commented, "Insofar as Norcraft's own management was not inclined to project Norcraft's financial results beyond FY 2019, I see no basis to do so *post hoc* for the sake of reaching a litigation result.

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