COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

June 4, 2008

Michael A. Weidinger, Esquire
Morris James LLP
500 Delaware Avenue, Suite 1500
P.O. Box 2306
Wilmington, DE 19899-2306

Jon E. Abramczyk, Esquire
Morris, Nichols, Arsht & Tunnell LLP
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347

Re: Crescent/Mach I Partnership, L.P., et al. v. Dr Pepper Bottling Co. of Texas
C.A. No. 17711-VCN
Date Submitted: December 19, 2007

Dear Counsel:

On May 2, 2007, I issued a memorandum opinion in this appraisal action.[1] I concluded that each share of Dr Pepper Bottling Holdings, Inc. (the "Company") had a fair value of $32.31 as of the date of the merger; the merger price was $25 per share.

[1] *Crescent/Mach I P'ship, L.P. v. Dr Pepper Bottling Co. of Texas*, 2007 WL 1342263 (Del. Ch. May 2, 2007) (the "Opinion"). The Opinion was supposed to have resolved two actions: this appraisal action (C.A. No. 17711-VCN) (the "Appraisal Action") and a related breach of fiduciary action, *Crescent/Mach I P'ship v. Turner*, C.A. No. 17455-VCN (the "Fiduciary Duty Action"). The pending motion does not involve, at least directly, the Fiduciary Duty Action.

My valuation efforts depended primarily upon a discounted cash flow ("DCF") analysis. Unfortunately, the DCF calculation contained two errors—one minor, but one substantial. A proper execution of the model would have yielded $30.04 per share as the fair value.

The Opinion, which included a spreadsheet as Schedule A depicting the Court's DCF model and its calculations, was issued without an implementing order. This process was followed to afford the parties a full opportunity to review the Court's calculations. The parties promptly agreed on a form of judgment that implemented my inaccurate fair value determination of $32.31 per share. Moreover, shortly after entry of the agreed upon form of final judgment on May 17, 2007, the parties executed an agreement (the "Agreement") on June 1, 2007, which purported "to fully and finally resolve" the matter.[2]

For reasons that are not clear, the Respondent, Dr Pepper Bottling Co. of Texas, which reports that it promptly forwarded the Opinion to its appraisal expert, did not identify the errors for approximately four months. After recognizing the

[2] The Agreement appears at Pet'rs' Opp'n, Affidavit of Michael Swartz, Ex. 1. In the Agreement, the parties agreed not only not to appeal from the Appraisal Action but also from the Fiduciary Duty Action. Also, the Agreement resolved the question of costs.

errors in the Court's analysis, the Respondent, on September 20, 2007, filed its Motion to Correct Two Clerical Mistakes in the May 2, 2007 Opinion.[3]

I. THE ERRORS

Both errors involve the Company's net operating loss carry forward. The larger of the errors resulted from the Court's inclusion of the full annual rate of the Company's net operating losses (the "NOLs") during the five-year projection period when it calculated terminal value. The historically accrued NOLs would have been "used up" shortly into the terminal period, but the Court's calculation projected them indefinitely. Indeed, the Court calculated the lump sum present value of the NOLs during the terminal period and added that amount back; by doing that, the Court's model had accommodated the residual post-five-year projection period value of the NOLs. Thus, for a short period, it double counted the NOLs, and then it continued to count them after they would have been consumed. This error amounted to $2.40 per share.

[3] Valuation literature also pointed out the errors. *See Gilbert E. Matthews, Errors and Omissions in DCF Calculations: A Critique of Delaware's Dr Pepper Appraisal,* BUS. VALUATION UPDATE, Oct. 2007, at 1, 8-11.

The smaller error amounted to $0.13 per share and was caused by the failure to add back the NOLs for the "stub" year of 1999 after subtracting that amount from the calculation of taxable income.

II. CONTENTIONS

In its motion, the Respondent urges the Court to correct these errors and to declare that the fair value of the Company's shares was $30.04 on the date of the merger. In support, the Respondent argues that courts have the ability and obligation to correct judgments containing clerical errors, and that explicit provision for correcting "[c]lerical mistakes" is found in Court of Chancery Rule 60(a). According to the Respondent, the two errors contained in the Court's DCF analysis were clerical in nature. The Petitioners counter that the errors were substantive and, regardless, the parties negotiated and executed the Agreement which constitutes an enforceable settlement agreement resolving all outstanding issues and ending the Appraisal Action. Accordingly, the Petitioners argue that the Respondent's motion is improper. The Respondent, however, contends that the Agreement is inapplicable to its present motion and that it is not legally effective.

III. ANALYSIS

A. *Characterizing the DCF Errors*

Turning first to the proper characterization of the two DCF errors, the parties strenuously debate whether they are appropriately described as clerical or substantive.[4] According to the Respondent, clerical errors under Rule 60(a) include "copying or computational" errors, and the two errors contained in the Court's DCF analysis were computational. The Respondent asserts that correcting these computational errors will not result in any substantive change to the judgment, but will merely implement the Court's holding in regard to the proper inputs for its DCF methodology, which the Respondent does not challenge.

The Petitioners argue that the two DCF errors were not merely mechanical scrivener's errors, but were instead substantive. In support, the Petitioners assert that to identify the errors, an understanding of the financial theory behind DCF analysis is required. Moreover, they argue that because determining fair value requires an informed judgment about what outcome would be appropriate after

[4] The Respondent principally relies upon Court of Chancery Rule 60(a) in seeking to have the errors rectified. In light of the Court's conclusion that the errors may be corrected under that Rule, it need not consider application of Rule 60(b). *See* 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.02[2], at 60-19 (3d ed. 2008) (clerical errors are more appropriately corrected under Court of Chancery 60(a)).

considering all the available data and calculations, simply modifying the DCF inputs and recalculating a value without again independently assessing the suitability of the value obtained would be improper.

Courts have always had the ability to correct ministerial errors in the record,[5] and Court of Chancery Rule 60(a) explicitly reaffirms that inherent power. Substantially similar to its federal counterpart, Federal Rule of Civil Procedure 60(a), Chancery Rule 60(a) provides as follows:

> (a) *Clerical mistakes*. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the Court at any time of its own initiative or on the motion of any party and after such notice, if any, as the Court orders.[6]

[5] *Am. Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 145 (1958).

[6] Federal Rule of Civil Procedure 60(a) reads,

> **(a) Corrections Based on Clerical Mistakes; Oversights and Omissions.** The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

Because Chancery Rule 60(a) is consistent with its counterpart Federal Rule, the Court looks to precedent established under the Federal Rule where helpful. *See Bolden-Wilson v. Hertrich's Corp.*, 2007 WL 2319783, at *2 (Del. Super. Aug. 2, 2007).

By its terms, Rule 60(a) applies only to "[c]lerical mistakes" and "errors . . . arising from oversight or omission."[7] Substantive errors must be corrected by motion under either Rule 59(e) or Rule 60(b).[8] Rule 60(a) is implicated only in a narrow set of circumstances,[9] a limitation that is "is directly related to the fact that the Rule contains no time bar."[10] When called upon to interpret Rule 60(a), courts must be careful to "preserve the delicate balance between the sanctity of final judgments . . . and the incessant command of the court's conscience that justice be done in light of all the facts."[11] This Court has held that Rule 60(a) may be invoked to "correct a clerical error or a copying or computational mistake, but not to make changes that affect the substantive rights of the parties."[12] Similarly, federal courts have cautioned against any reading of Federal Rule 60(a) that would allow for the

[7] Ct. Ch. R. 60(a).
[8] 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2854, at 240 (2d ed. 1995). Court of Chancery Rule 59(e) provides for a motion to alter or amend a judgment; it must be served within ten days of the judgment in question. Court of Chancery Rule 60(b) provides for a motion for relief from a judgment for, among other things, mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, or any other reason justifying relief.
[9] *See, e.g.*, *Baltimore Trust Co. v. McGee*, 2001 WL 985085, at *2 (Del. Super. Aug. 21, 2001).
[10] *Employers Mut. Cas. Co. v. Key Pharms.*, 886 F. Supp. 360, 363 (S.D.N.Y. 1995).
[11] *Bankers Mortgage Co. v. United Sates*, 423 F.2d 73, 77 (5th Cir. 1970).
[12] *Oldham v. Taylor*, 2005 WL 635052 (Del. Ch. Mar. 16, 2005).

correction of substantive errors, something that would jeopardize the finality of judgments.[13]

In aid of separating clerical mistakes from substantive errors, many courts focus on the erring court's original intent. Thus, it has been said that a Rule 60(a) motion "can only be used to make the judgment or record speak the truth and cannot be used to make it say something other than what originally was pronounced."[14] Accordingly, if the correction sought would modify the record to conform to the court's original intent, resort to Rule 60(a) is proper.[15] As the Seventh Circuit has said, "If the flaw lies in the translation of the original meaning to the judgment, then Rule 60(a) allows a correction . . . ." [16] If, instead, "the judgment captures the original meaning but is infected by error, then the parties must seek another source of authority to correct the mistake."[17] Similarly, the Tenth Circuit has declared that "Rule 60(a) may be used to correct what is erroneous because the thing spoken, written or recorded is not what the person intended to speak, write or record. . . .

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[13] *See Warner v. City of Bay St. Louis*, 526 F.2d 1211, 1212 (5th Cir. 1976).
[14] 11 WRIGHT, MILLER & KANE, *supra* note 8, § 2854, at 241.
[15] *See* 12 MOORE ET AL., *supra* note 4, ¶ 60.11[1][a], at 60-32; *see also Harman v. Harper*, 7 F.3d 1455, 1457 (9th Cir. 1993).
[16] *United States v. Griffin*, 782 F.2d 1393, 1396 (7th Cir. 1986).
[17] *Id.*

[But] Rule 60(a) is not available to correct something that was deliberately done but later discovered to be wrong."[18]

Some courts have predicated the test for whether correction pursuant to Rule 60(a) is proper on whether or not the correction would alter the parties' substantive rights. *In the Matter of West Texas Marketing Corporation*, the Fifth Circuit stated:

> [T]he relevant test for the applicability of Rule 60(a) is whether the change affects substantive rights of the parties and is therefore beyond the scope of Rule 60(a) or is instead a clerical error, a copying or computational mistake, which is correctable under the Rule. As long as . . . all the court need do is employ the judicial eraser to obliterate a mechanical or mathematical mistake, the modification will be allowed. If, on the other hand, cerebration or research into the law or [plenary] excursions into facts is required, Rule 60(a) will not be available to salvage the . . . blunders. Let it be clearly understood that Rule 60(a) is not a perpetual right to apply different legal rules or different factual analyses to a case. It is only mindless and mechanistic mistakes, minor shifting of facts, and no new additional legal perambulations which are reachable through Rule 60(a).[19]

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[18] *In re Craddock*, 149 F.3d 1249, 1254 n.4 (10th Cir. 1998) (citation omitted); *accord Blue Cross & Blue Shield Ass'n v. Am. Express Co.*, 467 F.3d 634, 637 (7th Cir. 2006) ("The past cannot be rewritten; Rule 60(a) allows a court to correct records to show what *was* done, rather than change them to reflect what *should have been* done."); *Burton v. Johnson*, 975 F.2d 690, 694 (10th Cir. 1992) ("A district court is not permitted . . . to clarify a judgment pursuant to Rule 60(a) to reflect a new and subsequent intent because it perceives its original judgment to be incorrect.").

[19] 12 F.3d 497, 504-505 (5th 1994).

The Second Circuit, also endorsing the substantive rights test as controlling, has similarly stated that "[t]he heart of the distinction between an error that is correctable under Rule 60(a) and one that is not is that a correction under Rule 60(a) cannot alter the substantive rights of the parties, but rather may only correct the record to reflect the adjudication that was actually made."[20] Thus, the substantive rights test also may be seen as turning on the court's original intent, the adjudication that was already made.

Mindful of these principles, the Court now considers the two errors contained in the Opinion. This Court has stated that Rule 60(a) may be used to correct a "computational" mistake. The errors contained in the Court's DCF calculation were clearly "computational" as that term is commonly defined.[21] That is unsurprising, given that a DCF calculation, by definition, involves computation. Asking if the errors were "computational" according to the dictionary definition of that term is not dispositive in this context, however, because the Petitioners have argued that the

[20] *Dudley ex rel. Estate of Patton v. Penn-America Ins. Co.*, 313 F.3d 662, 675 (2d Cir. 2002).
[21] "Computational" refers to something "having to do with computation." WEBSTER'S THIRD NEW INT'L DICTIONARY 468 (3d. ed. 1993). "Computation," in turn, is defined as "the act or action of computing," "calculation, reckoning." *Id.*

Court's DCF calculation involved substantive analysis.[22] Consequently, the Court must focus its inquiry on its intent as expressed in the record to determine whether the errors were "computational" as that term is used in Rule 60(a).

Looking to the Opinion, the Court found that at the time of the merger, Holdings had accumulated $49.3 million in NOLs that could be used to offset future taxes.[23] The Court also determined that these NOLs would not be impaired by the Company's acquisition of DLJ's interest and that the NOLs would offset taxes at an annualized rate of $6.25 million a year. As the Court explained, "The NOLs, as carried forward during the projection period, are used to reduce tax liability (and, thus, increase cash flow). *After the projection period, the NOLs until they are fully consumed, reduce the tax liability*. That tax savings must be reduced to a lump sum present value."[24] As the Respondent correctly posits, the Court did not, pursuant to its chosen methodology, intend the inclusion of the NOLs' benefit into perpetuity. Instead, the Opinion explicitly stated that the Court intended to include the NOLs'

[22] Reframed, the Respondent has suggested that instead of merely inserting mistaken inputs into an analytically sound DCF model, the substantive DCF model used by the Court called for those inputs.
[23] *Crescent/Mach I P'ship, L.P.*, 2007 WL 1342263, at *13.
[24] *Id.*, at *13 n.80 (emphasis added).

benefit to reduce tax liability only until they were fully consumed. Thus, the record manifests that the Court intended to include the benefit to reduce tax liability from the NOLs for the year 1999, but did not intend to include that annual amount as a perpetual benefit in calculating the Company's terminal value.[25] Therefore, the Court's intent, as ascertained from the record, reveals that the errors were inconsistent with its pronounced adjudication.

Notwithstanding, the Petitioners have suggested, tenably, that the DCF errors are simply too complex to be viewed as clerical. Specifically, the Petitioners argue that identifying these errors requires an understanding of the financial theory behind DCF analyses in general and net operating losses in particular, and that the errors are not narrow computational mistakes, "the equivalent of . . . typographical error[s] on a calculator where the right formula was used, but the wrong input[s] [were] hit on the keypad."[26] The Court concludes that although DCF analyses may be among the more difficult calculations made by courts and are by no means simple, they are not beyond the righting ken of Rule 60(a).

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[25] In regard to the latter error, this conclusion is also supported by the Court's inclusion of the "NPV of Unused NOLs" in the calculation of fair value in Schedule A that represented the Court's reduction of the tax savings to a lump sum net present value, indicating the Court's recognition that this benefit would not continue in perpetuity.

[26] Pet'rs' Opp'n, at 8.

Transpositional and computational errors have been described as "typical" or "classic" Rule 60(a) mistakes,[27] and the cases involving them are usually straightforward. For example, courts have invoked Rule 60(a) to remedy mistakes in reciting the record,[28] in tallying a plaintiff's period of unemployment,[29] in transposition,[30] in the amount of rent paid for purposes of calculating an alimony award,[31] in metes and bounds descriptions,[32] in completing judgment forms,[33] and in timely entering a party's opposition in the docket.[34] Courts have also relied on Rule 60(a) to correct the omission of a filing date,[35] a misnomer,[36] a person's age,[37] a date,[38] and the inadvertent omission of a document from the record.[39] Indeed, the Fifth Circuit has likened errors remediable under Rule 60(a) to mistakes "merely of

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[27] 12 JAMES WM. MOORE ET AL., *supra* note 4, ¶ 60.11[1][b], at 60-32 (3d ed. 2008).
[28] *Dura-Wood Treating Co. v. Century Forest Indus.*, 694 F.2d 112, 114 (5th Cir. 1982).
[29] *Trujillo v. Longhorn Mfg. Co.*, 694 F.2d 221, 225-26 (10th Cir. 1982).
[30] *Esquire Radio & Elecs. v. Montgomery Ward*, 804 F.2d 787, 795-96 (2d Cir. 1986).
[31] *W.T. v. PT.*, 2000 WL 33201265 (Del. Fam. Oct. 18, 2000).
[32] *In re Village by the Sea*, 98 B.R. 93, 95 (Bankr. S.D. Fla. 1989).
[33] *Griffin*, 782 F.2d at 1396-1387.
[34] *In re Am. Precision Vibrator Co.*, 863 F.2d 428, 431 (5th Cir. 1989).
[35] *Schwartz v. Pattiz*, 41 F.R.D. 456, 459 (E.D. Mo. 1967), *aff'd*, 386 F.2d 300 (8th Cir. 1968).
[36] *Anderson v. Brady*, 6 F.R.D. 587, 587-88 (E.D. Ky. 1947).
[37] *In re Application of Levis*, 46 F. Supp. 527, 529-31 (D. Md. 1942).
[38] *United States v. Roth*, 164 F.2d 575, 576-77 (2d Cir. 1948).
[39] *United States v. Stuart*, 392 F.2d 60, 62-63 (3d Cir. 1968).

recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature."[40]

Although ascertaining fair value is, of course, a more complex undertaking,[41] that alone does not defeat Rule 60(a)'s application. As a general rule, computational errors may be corrected under Rule 60(a), and as discussed afore, ultimately, whether the Rule's invocation is appropriate depends on the court's original intent, which in this case militates in favor of the Rule's application. Moreover, it is well-settled that Rule 60(a)'s operation is not so narrow as to apply only to errors committed by clerks.[42] Thus, the Fifth Circuit stated that Rule 60(a) errors are "*of the sort*" that a clerk or amanuensis might make. The Court is satisfied that its mistakes in the Opinion were of that variety. The most complicated, substantive facets of any DCF analysis are determining the appropriate model and the proper inputs for use in that model. In this instance, the Court selected a model and

[40] *In re Transtexas Gas Corp*., 303 F.3d 571, 581 (5th Cir. 2002) (citation and quotation omitted) (emphasis added).
[41] *See, e.g, In re Shell Oil Co.*, 607 A.2d 1213, 1222-23 (Del. 1992) (encouraging the use of neutral experts in appropriate appraisal cases); *Rapid American Corp. v. Harris*, 603 A.2d 796, 802 (Del. 1992) (describing an appraisal proceeding as a "battle of experts"); *Gonsalves v. Straight Arrow Publishers, Inc.*, 2002 WL 31057465, at *1 (Del. Ch. Sept. 10, 2002) (utilizing a court-appointed neutral expert to aid in the appraisal process).
[42] *See, e.g., In re West Tex. Mktg. Corp.*, 12 F.3d at 503-504; *In re Jee*, 799 F.2d 532, 535 (9th Cir. 1986); *Pattiz v. Schwartz*, 386 F.2d 300, 303 (8th Cir. 1968).

identified the inputs for that model in the Opinion, but failed to execute the model correctly using those selected inputs. In short, although the substantive financial theory behind a DCF analysis is different from, for instance, that underpinning an alimony calculation, the mistaken entry of an input into either yields the same result: a clerical error.[43]

As the Petitioners have observed, however, fair value cannot be determined by resort to a single calculation; instead, when confronted with a range of reasonable values, a court must look to all the relevant evidence and considerations of fairness before reducing fair value to a specific sum.[44] In the Opinion, the Court expressed some uneasiness with the $32.31 determination, indicating that it might have represented a value that was too high.[45] Additionally, in the course of its opinion, the Court performed other checks, which indicated that a value of $30.04 would not

[43] *Cf. W.T.*, 2000 WL 33201265, at *1. A similar analysis leads to the same conclusion with respect to the smaller error as well.

[44] *See, e.g., Cede v. Technicolor, Inc.*, 2003 WL 23700218, at *2 (Del. Ch. July 9, 2004) ("The value of a corporation is not a point on a line, but a range of reasonable values, and the judge's task is to assign one particular value within this range as the most reasonable value in light of all the relevant evidence and based on considerations of fairness."), *aff'd in part and rev'd in part*, 884 A.2d 26 (Del. 2005).

[45] *See Crescent/Mach I P'ship, L.P.*, 2007 WL 1342263, at *15 n.101 ("The conclusion here—that the merger consideration of $25 per share was slightly more than $7 per share less than fair value—may appear to be at odds with [the Court's holding of] Turner's faithful performance as a fiduciary and his acknowledged competence and expertise in the soft drink bottling industry.").

be inappropriate.[46] Based on these previously conducted independent evaluations, the Court sees no impediment to changing the fair value per share to that sum.

For the preceding reasons, the Court holds that the two challenged DCF errors in the Opinion were clerical mistakes capable of correction under Rule 60(a).

B. *Rule 60(a) and the Agreement*

The parties have presented extensive argument concerning the Agreement in their briefings. Having found that, as an initial matter, the two DCF errors are amenable to correction under Rule 60(a), the Court must turn to the Petitioners' contention that the Agreement constitutes a settlement that resolved the two pending civil actions and prevents the Court from considering the Respondent's current motion concerning the Appraisal Action. In turn, the Respondent argues that private parties cannot circumscribe the Court's ability to correct clerical errors under Rule 60(a); that the agreement does not limit the parties' rights to seek recovery of any amount overpaid as a result of computational errors; that legally effective

[46] The Petitioners correctly note that a fair value determination, even if principally driven by the results of a DCF analysis, should be informed by other applicable valuation methodologies. In the Opinion, at note 101, the Court touched upon this aspect of its valuation effort and concluded, largely because of the Company's unique market position addressed at some length in the Opinion, that other methodologies would not be particularly helpful. That conclusion holds true for this reconsideration as well. To the extent that other indicators may be of some minimal value, the revised fair value is not inconsistent.

settlement of an appraisal action requires court approval under 8 *Del. C.* § 262(k), which was not obtained in this case; and that the Agreement was the product of unilateral mistake and should be rescinded with restitution of any amount overpaid. Despite the parties' considerable ruminations on the Agreement, the Court need not consider these arguments beyond the narrow issue that is brought before it by the Respondent's Rule 60(a) motion: whether the Court may correct the two clerical errors embedded in its DCF analysis.

Assuming that the Agreement is a legally enforceable settlement agreement resolving the Appraisal Action, the Court finds it no bar to correcting the Opinion's two clerical errors.[47] "It is axiomatic that courts have the power and the duty to

[47] This conclusion resolves the Respondent's Rule 60(a) motion; therefore, the Court need not pass on the parties' further contentions concerning the Agreement. The Court, however, makes the following observations:

First, based on the opening sentence of the Agreement, which evidences the parties' intent to "fully and finally resolve" the two civil actions, and the absence of any subsequent clause limiting the breadth of that language, the Agreement appears to read generally as settlement agreement. *See* Pet'rs' Opp'n, Affidavit of Michael Swartz, Ex. 1 ("This letter memorializes the terms of the parties' agreement to fully and finally resolve . . . the 'fiduciary duty action' . . . [and] the 'appraisal action.'") The Petitioners' surrender of their right to appeal in both the Fiduciary Duty Action and the Appraisal Action is a material factor counseling against reopening the judgment and revisiting the ultimate outcome, whether by action under Court of Chancery Rule 60(a) or by avoiding the terms of the Agreement. Before the Agreement was entered, it appears that both sides had, on their own, decided not to take any appeal. The decision whether to appeal, especially from the Petitioners' perspective, likely was guided in large part by the final per share value established by the Court. If that final consideration were sufficient, there would have been no reason to appeal either from the Fiduciary Duty Action or from the various decisions in the

Appraisal Action with which the Petitioners may have disagreed. It suffices to note that the Petitioners had non-frivolous grounds for appeal with respect to both actions.

Second, Subsection 262(k) of the Delaware General Corporation Law is likely not implicated by the Agreement. Subsection 262(k) provides, in relevant portion, "[N]o appraisal proceeding in the Court of Chancery shall be dismissed as to any stockholder without the approval of the Court, and such approval may be conditioned upon such terms as the Court deems just . . . ." As the Petitioners argue, when the Agreement was executed, there was no pending "appraisal proceeding in the Court of Chancery" because that action had been fully prosecuted to judgment, and therefore, there was no "proceeding" to be "dismissed." The approval requirement in Section 262(k) is designed to prevent a shareholder from settling "out of the class suit at a premium, thereby abandoning the prosecution of the action to the detriment of other class members." *Ala. By-Products Corp. v. Cede & Co.*, 657 A.2d 254, 260 (Del. 1995). That concern is not present in this case: the Agreement was executed on behalf of all parties to the Fiduciary Duty and Appraisal Actions after final judgments were entered in those cases. Therefore, the primary purpose of Section 262(k), to ensure that a representative plaintiff does not settle to the detriment of his peers, is not implicated. The cases proceeded to judgment before any party settled, and when settlement occurred under the Agreement, all parties settled. Simply put, there was no plaintiff to be left behind.

Finally, the Court doubts that these facts would support unilateral mistake. As a general matter, courts refuse to inquire into the adequacy or fairness of the consideration that supports a bargain. *See, e.g.*, *Ryan v. Weiner*, 610 A.2d 1377, 1381 (Del. Ch. 1992). It is only with "extreme reluctance" that Delaware courts depart from this principle. *Id.* To avoid a settlement agreement on the basis of unilateral mistake, a party must demonstrate that "(1) the enforcement of the agreement would be unconscionable; (2) the mistake relates to the substance of the consideration; (3) the mistake occurred regardless of the exercise of ordinary care; and (4) it is possible to place the other party in the status quo." *In re Appraisal of Enstar Corp.*, 604 A.2d 404, 411 (Del. 1992); *see* RESTATEMENT (SECOND) OF CONTRACTS § 153 (providing a similar formulation). Although the parties' reliance on the Court's DCF determination in the Agreement goes to the substance of the consideration, it is less clear that the Respondent can satisfy the other elements of unilateral mistake. Enforcing the Agreement would likely not be unconscionable because the decision to enter into a settlement is a calculated choice that carries with it the risk that if the matter were allowed to proceeded to final resolution, whether at the trial court level or on appeal, the outcome may have differed. The Respondent, having elected to "fully and finally" resolve the Appraisal Action for $47,480,676.28, voluntarily assumed the risk that the Court's adjudication may have been flawed and cannot now seek to undo that decision based on unilateral mistake. *See id.* (bearing the risk of mistake is fatal to a claim of unilateral mistake). Additionally, the Court has reservations that the Respondent can show that it exercised reasonable care in regard to the DCF analysis. In issuing the Opinion, the Court did not simply declare a value, conducting its analysis *sub rosa*. Instead, the Court appended Schedule A to the Opinion, which revealed its DCF calculation with all possible transparency. Before executing the Agreement, the parties had ample

correct judgments which contain clerical errors or judgments which have issued due to inadvertence or mistake. . . . Rule 60(a) . . . recognizes this power . . . ."[48] The Court's prerogative to correct the record is inherent and does not depend upon the parties' actions. Rule 60(a) provides that that the Court may correct errors of its

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opportunity to examine the Court's computations. In fact, as the Petitioners have noted, a writer for a valuation trade publication was able to identify the errors. *See Matthews*, *supra* note 3, at 8. ("The Court helpfully appended a summary of its calculations to the published decision. A close reading discovered two calculation errors . . . ."). That the Respondent's experts failed to identify these errors before it entered into the Agreement suggests that it failed to exercise reasonable care. Finally, because the time for appeal in the Appraisal Action may have passed and the time for appeal in the Fiduciary duty Action likely has passed, *see* Supr. Ct. R. 6(a)(i) (providing a 30-day time limit for appeals in civil actions); *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 149-51 (2d Cir. 1999) ("The long established rule states that '[o]nly when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken . . . begin to run anew. The test is a practical one.'" (alternations in original)); *Bolden-Wilson*, 2007 WL 2319783, at *3 (discussing that an order correcting an error pursuant to Rule 60(a) is appealable but the underlying judgment is not); 12 MOORE ET AL., *supra* note 4, ¶ 60.11[1][a], at 60-42 ("[A]n amended judgment to correct a clerical error under Rule 60(a) does not restart the running of the time for appeal . . . ."); *but see Storey v. Castner*, 306 A.2d 732 (Del. 1973) (reaching a different result under unusual factual circumstances), and because some of the funds transferred to the Petitioners have been disbursed, returning the Petitioners to the *status quo ante* may be difficult.

[48] *Am. Trucking Ass'ns*, 358 U.S. at 145 (citation omitted); *accord Howard Sober, Inc. v. Interstate Commerce Comm'n*, 628 F.2d 36, 41 (D.C. Cir. 1980) ("In [*American Trucking*] the Supreme Court recognized the Commission's inherent power to rectify ministerial mistakes."); *Allied Materials Corp. v. Superior Prods. Co.*, 620 F.2d 224, 226 (10th Cir. 1980) ([T]he power to amend its records to correct inadvertent mistakes is an inherent power of the court."); *Blankenship v. Royalty Holding Co.*, 202 F.2d 77, 79 (10th Cir. 1953) ("Courts possess the inherent power to correct errors in the records evidencing the judgment pronounced by the court so as to make then [sic] speak the truth by actually reflecting that which was in fact done.").

own accord and at any time; judgments are, after all, public documents.[49] Therefore, the Court will grant the Respondent's motion and correct the errors in the record associated with the DCF analysis, the Agreement notwithstanding.[50]

IV. CONCLUSION

For the foregoing reasons, the Respondent's motion is granted. An implementing order will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Elizabeth M. McGeever, Esquire
Register in Chancery-K

[49] *In re IBP, Inc.*, 793 A.2d 396, 409 (Del. Ch. 2002) ("A judicial decision is a public document.").
[50] The Court underscores the narrow scope of its holding. Although it grants the Respondent's motion and will correct the record to reflect the intended DCF analysis and outcome, it does not provide for recoupment of any overpayment.