IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

GERHARD FRANK DOBLER, CHAP CELL, INC., GRACE M. KITTRELL, GTRW PARTNERSHIP, GARY MCKEE, JAMES E. BRYANT, LLOYD E. DAWSON, GAULD & HENSCHEN PARTNERSHIP, JOHN BROWN, HAROLD SWART, and ESSEX COUNTY CELLULAR G.P.,	)	
Petitioners,	)	
v.	)	C.A. No. 19211
MONTGOMERY CELLULAR HOLDING CO., INC., PALMER WIRELESS HOLDINGS, INC., and PRICE COMMUNICATIONS WIRELESS, INC.,	)	
Respondents.	)	

MEMORANDUM OPINION

Submitted: June 9, 2004
Decided: September 30, 2004
Revised: October 4, 2004

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LAMB, Vice Chancellor.

I.

This is an appraisal action, pursuant to 8 *Del. C.* § 262, filed as a result of a merger that cashed-out the petitioners' shares at a price of $8,102.23 per share. Trial was held January 26 through 29, 2004[1] followed by post-trial briefing, post-trial argument, and supplementation of the record. At trial, both parties presented expert testimony to determine the fair value of the shares as of the merger date. The testimony of the experts varied widely. The petitioners' expert presented a well-reasoned valuation framework, while the respondents' expert struggled to explain much of his analysis. Accordingly, the court uses the petitioners' valuation as a starting point and adjusts it for the reasons discussed in this post-trial opinion. The fair value of the shares as of the merger date is determined to be $19,621.74.

II.

A. The Parties

The petitioners are 11 minority shareholders of Montgomery Cellular Holding Co. ("MCHC"). They each owned 45.03603 shares of common stock of MCHC. As a group, they owned 495.36933 shares of common stock, which represents 4.95% of MCHC.

The respondents are MCHC and two corporate holding companies, Palmer Wireless Holdings, Inc. ("Palmer") and Price Communications Wireless, Inc.

[1] Citations to the transcript of the trial will be designated herein as "Tr. ___."

("Price Wireless"). Palmer owns a 94.6% majority interest in MCHC. Palmer in turn is a wholly-owned subsidiary of Price Wireless.

The parties stipulate that the petitioners have complied with the provisions of 8 *Del. C.* § 262 and are entitled to proceed with this action.

B. Background

Price Communications Corporation ("Price") is a holding company that is the ultimate parent of various telecommunications companies as well as other holding companies. MCHC was a holding company with no operating assets and was the sole shareholder of Montgomery Cellular Telephone Co., Inc. ("Montgomery"). Through its ownership of Palmer and Price Wireless, Price indirectly controlled MCHC.[2]

Palmer owned interests in 16 cellular systems in Georgia, Florida, and Alabama, including a 94.6% stake in MCHC. Eight of the systems were Metropolitan Statistical Areas ("MSAs") and eight were Rural Service Areas ("RSAs").[3] The main difference between an MSA and an RSA is population density. An MSA has "greater density," while an RSA is "much more . . . spread

[2] For the purposes of this opinion, the court will simplify the multi-layered holding company structure by using the following condensed organizational structure: Price is the ultimate parent company, Palmer is the regional systems holding company, MCHC is the holding company for Montgomery, and Montgomery is the cellular company at issue.

[3] MSAs and RSAs are separately licensed geographic regions determined by the Federal Communications Commission ("FCC").

out."[4] An MSA is generally more valuable for two reasons. First, an MSA will usually have a higher penetration rate due to its demographics, such as higher income people and people more receptive to wireless devices.[5] Second, an MSA will usually have a lower cost structure because it does not need to build as many cell towers for the same number of users. Montgomery, which encompassed the area around Alabama's state capital, was classified as an MSA.[6]

As a group, Palmer's holdings formed a contiguous cluster of cellular systems in the southeastern United States. Montgomery, on the western edge of Palmer's cluster, was in the center of cellular systems in Alabama. Its geographic location is important because: (1) as the center of Alabama, it is a crucial area for any company that wants to provide substantial regional coverage, and (2) it is located in the most populous area of Alabama. More populous areas commonly have higher penetration rates and users that spend more per month on their cellular phone bill. For these reasons, Montgomery, and therefore MCHC, was one of Palmer's most valuable holdings.

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[4] Tr. at 41.

[5] *Id*. at 42.

[6] Besides being valuable as an MSA, Montgomery had superior demographics relative to the other Palmer holdings. It ranked second in terms of POPs (the census population of a geographic area) and it was generally best or second best in the other demographic categories. Tr. at 43-44. POPs is a common industry metric for valuing cellular systems. *In re Mobile Communications Corp. of Am. Consol. Litig.*, 1991 WL 1392, at *4 (Del. Ch. Jan. 7, 1991) (describing the valuation of a cellular telecommunications company "based on population covered by licenses" as "industry standard").

In 1997, Price began discussions with various cellular telecommunications system operators regarding the possible sale of Palmer's cellular systems. These discussions continued into 2000, at which time Price hired the investment bank Donaldson, Lufkin & Jenrette ("DLJ") to solicit interest in Palmer. Due to DLJ's efforts, three potential acquirors, Verizon and two other unnamed parties, became interested in Palmer. One of the unnamed parties conducted limited due diligence and offered a preliminary indication of interest in acquiring Palmer for $1.7 billion. The board of directors of Price declined to pursue this transaction, however, due to the possibility of receiving a "significantly higher price" from Verizon.[7]

After two months of due diligence, Verizon negotiated a transaction agreement with Price that was executed on November 14, 2000. The overview of the transaction is that Price agreed to sell Palmer to Verizon for $2.06 billion. The consummation of this transaction, however, was conditioned on the prior completion of an initial public offering ("IPO") of Verizon Wireless.[8]

Since Palmer did not control 100% of the stock of MCHC, the agreement with Verizon required Palmer to use commercially reasonable efforts to acquire the

[7] Joint Pretrial Order ("JPO") at 6.

[8] Price agreed to this condition even though Verizon had already delayed the IPO. *See Verizon stalls other IPOs?* (Oct. 17, 2000), *at* http://money.cnn.com/2000/10/17/deals/wireless/ ("Verizon Communications[] deci[des] to delay the initial public offering of Verizon Wireless.").

minority shareholder interest. If Palmer failed to acquire that minority shareholder interest, the agreement allowed Verizon to reduce the purchase price by a corresponding amount, computed by multiplying the minority shareholders' *pro rata* share of FY 2000 EBITDA[9] by 13.5. This reduction provision also applied to the other Palmer subsidiaries, not just MCHC. Therefore, in order to receive the full $2.06 billion purchase price, Palmer needed to squeeze out all the minority shareholders in MCHC and in the other subsidiaries.

The relevant sections of the agreement are as follows:

> SECTION 2.02. Acquisition of Minority Interests. The Company and the Price Corporations will use commercially reasonable efforts to acquire on or before the Closing Date all of the outstanding shares of capital stock of, and other ownership interests in, each Majority Owned Company Subsidiary that are held by Persons other than the Price Corporations, the Company and their Affiliates, on terms and conditions, including receipt of any necessary consents or approvals of Government Entities, approved in writing by the Acquiror, which approval shall not be unreasonably withheld.
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> SECTION 5.02(b). If, and to the extent, any Majority Owned Company Subsidiary exists at Closing, the Aggregate Transaction Consideration shall be decreased, for each Company Cellular Telephone System Area in which any such Majority Owned Company Subsidiary owns, directly or indirectly, an interest, by the EBITDA of the relevant Company Cellular Telephone System Areas for the year ended December 31, 2000 as derived from the financial statements of such Company Cellular Telephone System Area as at, and for the year ended, December 31, 2000 multiplied by the percentage ownership interest (the "Third Party Interest") in the Majority Owned Company

[9] EBITDA is earnings before interest, taxes, depreciation, and amortization.

> Subsidiary held by Persons other than the Company and the Company Subsidiaries as of the Closing, which product shall then be further multiplied by 13.5.

Given the structure of the agreement, Price had a strong incentive to squeeze out every minority shareholder of Palmer's subsidiaries as long as it paid less than Verizon's corresponding price reduction. Any purchase of a minority position using an EBITDA multiple of less than 13.5 guaranteed more money for Price if the Verizon deal closed. With no credible reason to expect the Verizon deal not to close, Price went forward with the squeeze-out mergers.[10]

C. The Challenged Transaction

On June 30, 2001, Price caused Palmer, which owned more than 90% of the stock of MCHC, to eliminate the minority shareholder interest by short-form merger pursuant to 8 *Del. C.* § 253. In determining the price to be paid to MCHC's minority shareholders, Price made no effort to obtain an independent valuation. When questioned about Price's reasons, the CFO stated that Price's CEO did not want to hire a financial advisor because he viewed the valuations as "very costly."[11] Instead, Palmer purported to rely on Price's settlement of an

[10] In spite of the self-serving testimony of Price's CFO, the record shows that on June 30, 2001 Price expected the Verizon deal to close. *See* Tr. at 356 (describing the concern of Price's CEO and CFO that the IPO would not occur as speculation); *id.* at 299 ("[P]rior to June 30th, there [were] no press releases or notes to the market that said that [Price and Verizon] didn't expect the transaction to go through."); *id*. at 300 ("It wasn't until July 31st, 2001 that it was first announced that the Verizon transaction would not go through.").

[11] *Id*. at 296-298.

appraisal action with the dissenting minority shareholders of Cellular Dynamics ("CD").

CD, like MCHC, was "was the operator of a non-wireline cellular company in the Southeastern United States."[12] And, like MCHC, CD was majority-owned by Price.[13] In 1999, Price eliminated the minority shareholders of CD by short-form merger. Litigation ensued. After a lengthy negotiation using POPs as the valuation tool, the minority shareholders agreed to a settlement "based upon a value of [CD] derived by multiplying the estimated population . . . by $470."[14] Notwithstanding overwhelming evidence that the settlement was negotiated using POPs and not EBITDA,[15] Price claimed that it valued CD's stock using an EBITDA multiplier of 10.05.[16] Multiplying MCHC's FY 2000 EBITDA by 10.05, Palmer derived a figure of $8,102.23 per share, which it offered to the MCHC minority shareholders as fair value. In contrast, multiplying the $470 per POP metric by MCHC's POPs (323,675) yields a value of $15,212.73 per share.

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[12] JPO at 9.

[13] Price's ownership of CD, like its ownership of MCHC, was indirect and through holding companies.

[14] JPO at 9.

[15] From May 3, 2000 to February 27, 2001, minority shareholders' counsel and Price's counsel exchanged multiple letters negotiating the value of CD using the per POP metric. *See* Joint Exhibit ("JX__") 33, JX34, JX35, JX36, JX37.

[16] Mathematically, the two valuations of CD are the same regardless of which metric is used. For MCHC, however, the EBITDA metric generates a value substantially lower than the value generated by the POP metric.

Despite Price's elimination of the minority shareholders, the initial Verizon deal was never consummated. One month after the MCHC squeeze-out, Price and Verizon announced a further delay of Verizon Wireless's IPO, which precluded them from completing their transaction. Price and Verizon subsequently renegotiated the initial transaction, signing a new agreement in which Verizon reduced its price to $1.7 billion. This second transaction was agreed to on December 18, 2001 and consummated on August 15, 2002.

D. The Experts

The petitioners' trial expert, Marc B. Sherman, a C.P.A., has a B.S. in Business and Science from the University of Baltimore and a J.D. from the University of Maryland. Sherman spent the first seven years after college in accounting. He then entered real estate, working in the financing and acquisition of property. Sherman spent eight years in real estate, valuing properties by using similar methods that are used in valuing companies. He then returned to the accounting field, becoming a director of business advisory services for Coopers & Lybrand. Finally, he moved to KPMG as a partner, heading up their corporate transaction practice.[17]

[17] Immediately before trial, Sherman changed jobs to become a director of the Huron Consulting Group. Tr. at 6.

As head of KPMG's mid-Atlantic region valuation group, Sherman prepared approximately 25 company valuations. During this time, he also created over 100 discounted cash flow ("DCF") analyses, as well as more than 60 comparable company analyses. Sherman has testified as an expert in over 20 cases, either at trial or through deposition.

Sherman testified that the going concern value of MCHC was $21,346 per share as of June 30, 2001.[18] Since the management of MCHC had not made any financial projections, Sherman relied on MCHC's financial statements, data from an industry expert,[19] and a valuation performed for Verizon.[20]

The respondents' trial expert, Kenneth D. Gartrell, a C.P.A., has an M.S. in accounting and a Ph.D. in Business Administration from Kent State University. Additionally, Gartrell has an M.B.A. from the University of Rochester. Gartrell spent eight years as an accountant and auditor at Ernst & Ernst, the predecessor of

[18] On September 23, 2004, the petitioners' counsel supplemented the record via letter to the court, correcting a calculation error in Sherman's report. This error, which resulted only in a minor change to the final result, lowering the share value from $21,477 to $21,346, altered many of the intermediate computations. Where necessary, the court has changed the petitioners' figures to reflect the September 23, 2004 corrections.

[19] Sherman Revised Report Ex. A. The expert identified is Paul Kagan of Paul Kagan & Associates, "considered to be *the* industry analyst with regard to gathering data and predicting data relating to the cellular or the wireless telecommunications industry." Tr. at 30 (emphasis added). The respondents' expert witness agreed with Sherman that "the Kagan statistics are notable, credible, and valuable to those who look at [the telecommunications] industry." *Id*. at 509.

[20] Sherman Revised Report Ex. A. Verizon employed Robert Ott, a principal at Kane Reece & Associates, to perform a valuation of MCHC. Tr. at 31.

Ernst & Young. Gartrell has spent the last 20 years consulting with firms regarding fair market valuations. Gartrell has also taught business courses at the graduate and undergraduate level.

Gartrell has testified as an expert before the FCC and in federal court regarding the valuation of companies. Since 1997, he has been a consulting or testifying expert in a series of cases concerning the telecommunications industry. In total, Gartrell has testified as an expert in over 30 cases, either at trial or through deposition.

Gartrell testified that the stand-alone value of MCHC was $7,840 per share as of the merger date. He relied principally on his own extrapolations of MCHC's financial statements, as well as the financial statements of comparable companies.

E. The Valuation Methods

Both experts used similar methods to value MCHC, but there are two important exceptions: (1) Gartrell created his forecasts independently, whereas Sherman looked to third-party experts, and (2) only Sherman performed a comparable transactions analysis. These differences resulted in significantly divergent results.

1. The Respondents' Valuation Method

Gartrell relied on two analyses: a comparable company analysis and a DCF analysis. In his comparable company analysis, Gartrell focused on 14 rural and

regional cellular companies.[21] He began by calculating two standard valuation multiples: a revenue multiple and an EBITDA multiple. Relying on the median of the data set as the most reliable indicator, Gartrell computed the revenue multiples as 3.5 for rural companies and 3.3 for regional companies.[22] He also relied on the median value to compute the EBITDA multiples as 7.1 for rural companies and 15.2 for regional companies.

Stating that these multiples represent minority equity stakes, Gartrell then proceeded to adjust the value of MCHC to eliminate the minority discount. He chose a control premium of 35% because it is the mean of his range (30% to 40%) of control premia.[23] Applying this premium, Gartrell "increase[d] the median revenue multiples from 3.5 to 4.0 for the rural cellular carriers, and from 3.3 to 4.0

[21] Gartrell started with a list of 23 companies from the Bear Stearns Wireless Telecommunications Index. Gartrell Report Ex. 5. Six of those companies were excluded because they were removed from the index before the merger date. Additionally, the three national companies (AT&T Wireless, Nextel Communications, and Sprint PCS) were not considered comparable because of their extensive customer base. Finally, Gartrell's 14 companies are really only 13 because Centennial Communications has no revenue or EBITDA data and therefore Gartrell could not compute its multiples.

[22] *Id.* Ex. 6. Gartrell's median revenue multiple of 3.5 for rural companies is incorrect. Since the data set has an even number of data points, the median is derived by averaging the middle two numbers. But Gartrell averages 3.2 and 3.9 and gets 3.5. The correct answer is 3.55, or possibly 3.6 if rounded. By truncating the median at one decimal, Gartrell demonstrates a potential bias to round down when universal mathematical rules dictate the opposite result.

[23] *Id.* at 18. There is no serious dispute between the parties that either side used an unreasonable control premium. Both figures (31% for the petitioners and 35% for the respondents) were in a range of possible control premia for the opposing party.

for the regional carriers."[24] "The median EBITDA multiples increase[d] from 7.1 to 8.4 for the rural cellular companies, and from 15.2 to 18.9 for the regional carriers."[25]

Once he generated the revenue and EBITDA multiples, Gartrell proceeded to determine their "strategic weights."[26] He computed the strategic weights to "reflect[] the optimal mix of rural and regional business strategies" for MCHC.[27] Furthermore, he asserted that "only one strategic mix explains the entire difference between values calculated separately from each multiple."[28] His strategic weights are 79% rural and 21% regional,[29] which results in an initial valuation for MCHC of $122.7 million.

Yet Gartrell argued that this valuation is too high based on MCHC's combinatorial deficiency. He described MCHC as "stand-alone" and emphasized that cellular companies are "significantly more valuable in specific

[24] *Id.* at 21. Inexplicably, Gartrell applied a 35% control premium to two different multiples (3.3 and 3.5) and arrived at the same figure (4.0). Perhaps these figures represent additional rounding problems. *See supra* note 22.

[25] *Id.*

[26] *Id.* at 22-23.

[27] *Id.* at 22. Regardless of his determination of rural strategy, Gartrell considers Montgomery, Alabama "rural." Tr. at 782. He also considers all of Alabama "rural." *Id.*

[28] Gartrell Report at 23 n.23.

[29] *Id.* at 23. Despite his claims that the weights are not subjective, it is clear that Gartrell generated the outcome that he wanted. Even Gartrell admitted that he solved it iteratively, which is another way of saying he continued to plug in numbers until he got the solution he wanted. *Id.* at 23 n.23.

combinations."[30] To account for the absence of combinatorial value, Gartrell applied two discounts to MCHC. The first discount of 33% accounted for MCHC's low combinatorial value relative to other similar companies. The second discount of 15% accounted for MCHC's complete lack of combinatorial value due to its stand-alone basis. Gartrell derived both of these discounts from the C-Block auction by the FCC.[31]

The C-Block auction was a 1996 auction for part of the PCS spectrum, an unproven technology.[32] Unlike earlier FCC auctions, the C-Block auction was restricted to new companies.[33] To help encourage new bidders, the federal government provided financing "for up to 90 percent of the successful bid price."[34] Despite the C-Block auction's reputation for success, the FCC awarded licenses to many "successful" bidders who would later be forced into bankruptcy due to their unserviceable debt loads.[35]

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[30] *Id.* at 24. He advances this argument in the face of record evidence that MCHC was already in a specific combination, i.e., with the other Price cellular systems.

[31] *Id.* at 23-28.

[32] Tr. at 485-486. The potential failure of an unproven technology like PCS was highlighted by Price's CEO in his deposition. *See* Price Dep. Oct. 14, 2003 at 70 ("I would never buy a PCS license . . . . I wouldn't take one for free . . . . I think all PCS, including Sprint and T-Mobile, are going to go bankrupt.").

[33] The established national telecommunications companies were excluded from the auction. Tr. at 678.

[34] *Id*. at 680.

[35] *Id.* at 682 (listing NextWave, Pocket, and GWI as bankrupt).

Gartrell used the C-Block auction as a model for MCHC because, he claimed, MCHC should be valued as an isolated, single license entity, like the start-up PCS bidders. Applying the total 48% combinatorial discount to MCHC, Gartrell derived a stand-alone fair value of MCHC as $63.3 million. To this figure, he added the outstanding inter-company receivable to get a final valuation based on comparable companies of $80.5 million, a value which is lower even than Price's unilaterally set value.

Gartrell then computed a DCF valuation for MCHC.[36] He started with MCHC's financial performance for FY 2000 and its year-to-date performance as of June 30, 2001. From these figures, Gartrell independently created forecasts of MCHC's future financials for a five-year period. He adjusted the forecasts to remove the bad debt expense due to MCHC's installation of a new billing system.[37] For the growth rate, Gartrell used the long-term GNP rate, which is 3.3%. He reasoned that the GNP is the correct growth rate because MCHC had already saturated its market and therefore could not grow faster than the overall economy.

[36] In the first sentence of his DCF valuation, Gartrell acknowledged that "the market multiples strongly inform [his] opinion of MCHC's fair value." Gartrell Report at 28.

[37] Sherman and Gartrell agreed that this bad debt is non-recurring and should not affect a DCF analysis. On the other hand, Gartrell disagreed with Sherman with regard to the cell site lease and chose to leave it in his DCF analysis. *Id.* at 30.

Using these figures in his DCF analysis, Gartrell valued MCHC at $59.1 million. To this figure, Gartrell added the $17.2 million inter-company receivable. His final DCF valuation is $76.3 million.

In summary, Gartrell's comparable company analysis and DCF analysis resulted in a valuation of MCHC of between $76.3 and $80.5 million. With no reason to differentiate between the values, Gartrell simply averaged them to get a final valuation of $7,840 per share.[38]

2. The Petitioners' Valuation Method

Sherman performed three different financial analyses on MCHC: a comparable transactions analysis, a DCF analysis, and a comparable company analysis. In his comparable transactions analysis, Sherman split the comparable transactions into three categories: similar sized transactions, the initial Verizon transaction, and the CD settlement. For the similar sized transactions category, Sherman looked to five transactions between May 2000 and January 2001.[39] Each transaction involved a cellular company with approximately the same number of POPs. The other two categories (the initial Verizon transaction and the CD

[38] JPO at 24 ("Having no reason to favor one valuation or the other . . . Mr. Gartrell split the difference.").

[39] Other transactions were excluded because the companies had international operations, multiple lines of business, or prepaid customers. Transactions that involved PCS technology were also excluded. The resulting list was six RSA transactions. Sherman later removed the SACO River Company from the list after discovering that he could not break out its cellular figures from a related wire line company. Tr. at 22; Sherman Revised Report Ex. J.

settlement) involved single transactions that were included in the analysis only because they were related to the sale of MCHC.

Sherman then analyzed the categories using his four cellular system metrics (POPs, subscribers, EBITDA, and revenue).[40] These four metrics are considered standard (1) in the financial community,[41] (2) by Verizon in valuing the 16 Price entities,[42] and (3) by the respondents' expert.[43] For each metric, he computed a value of MCHC based on the category of comparable transactions. He then weighted these figures to derive his final overall valuation.

Sherman's method of weighting the valuations was a two-step process.[44] He began by weighting the metrics based on their importance in valuing cellular companies. He then weighted the category of comparable transactions within

[40] Sherman used only the POPs metric for his similar sized transactions analysis.

[41] In 2001 and 2002, Price retained four investment banks to provide fairness opinions regarding the consideration to be received from Verizon. One bank used all four metrics while the other three used at least two of the metrics in their opinions. JX98 (S-4 put out by Verizon and Price on May 31, 2002 at 54-85).

[42] For the second Price-Verizon transaction agreement, Verizon hired an independent third-party appraiser, Robert Ott, a principal at Kane Reece & Associates, who used the metrics of POPs and subscribers to determine that Montgomery should be valued at approximately 10% of the total acquisition price. JX7 at 01896-7.

[43] Gartrell agreed that "POPs and subscribers are [helpful] metrics to consider in determining the value of Montgomery." Tr. at 629. He later called POPs a "valuable indicator" of a company's value and admits that he has "used POPs in determining the value of a cellular company." *Id.* at 633. He also accepts the petitioners' assertion that "the ratio of subscribers is a standard valuation technique in valuing cellular companies." *Id.* at 633.

[44] For a complete description of his weighting rationale, see Sherman Revised Report at 40-41.

each metric. Below is an abbreviated table of Sherman's figures showing the categories, metrics, valuations, and weightings.[45]

Category	***Valuation***	***Metric Weighting***	***Category Weighting***
POPs		**45%**	
Verizon Transaction	$199,278,316		20%
CD Settlement	$199,286,698		10%
Similar Sized Transactions	$136,352,297		15%
Subscribers		**20%**	
Verizon Transaction	$226,758,135		15%
CD Settlement	$225,865,136		5%
Operating Cash Flows[46]		**25%**	
Verizon Transaction	$160,650,176		20%
CD Settlement	$226,738,142		5%
Revenue		**10%**	
Verizon Transaction	$236,517,971		7%
CD Settlement	$224,240,681		3%
Total		**100%**	**100%**

Multiplying the valuations by their respective weightings, Sherman computed a value of $192 million based on comparable transactions. To this value, he added $20 million of non-operating assets[47] to arrive at his final value of $212 million.[48]

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[45] *Id.* Ex G.

[46] Sherman uses EBITDA and operating cash flow interchangeably. *Id.* at 13.

[47] The $20 million of non-operating assets consist of the following: inter-company loan ($16.6 million), management fees ($3.2 million), and unallocated billing credits ($.13 million). *Id.* Ex. F. This $20 million figure is routinely added to the experts' valuations to determine MCHC's correct overall valuation.

[48] Sherman's two-step weighting process makes it difficult to determine easily the influence of any one particular factor. For example, to determine the influence of the Verizon transaction,

Sherman then performed a DCF analysis. Due to a lack of management projections, Sherman created forecasts of MCHC's cash flows based on predictions for the cellular industry and the economy. In making his forecasts, he relied primarily on Paul Kagan, an industry expert.[49] As an example of the industry figures Sherman relied on, Kagan projected wireless subscriber growth of 23% in 2001, declining to 7.7% in 2005.[50] Additionally, Kagan predicted an industry-wide market penetration rate of 78% by 2008.[51] Sherman also looked to industry growth reports that showed an annual growth rate of 16% for the wireless industry.[52]

The next step in his DCF analysis was to estimate the discount rate using a weighted average cost of capital ("WACC") approach. He determined the cost of equity to be 20.64% by adding a risk adjustment for MCHC to the expected return on capital from the Capital Asset Pricing Model. He then calculated the cost of debt to be 7.16% by assessing the creditworthiness of MCHC, as well as the general risk associated with the industry. Finally, he settled on a debt-to-equity

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one must add the individual weights and compute an overall percentage. In this example, the Verizon transaction represents 62% (20% + 15% + 20% + 7%) of Sherman's $212 million value.

[49] The petitioners point out that Verizon's valuation expert also relied on Kagan's growth rates in his DCF analysis. Pet'rs' Post Trial Br. at 33 n.47. This reliance demonstrates the authority that Kagan has with regard to the wireless industry.

[50] Sherman Revised Report at 7.

[51] *Id*.

[52] The Cellular Telecommunications & Internet Association's Year 2000 Wireless Industry Survey.

ratio of 1.2 after surveying other cellular companies. Multiplying these figures together, Sherman arrived at a final WACC figure of 13.25%.[53]

For his DCF projection period, Sherman used the ten-year period from June 1, 2001 to May 31, 2011. Before projecting the DCF, however, he removed two irregularities from the analysis. First, Sherman adjusted his DCF to remove an $861,000 bad debt expense incurred when Montgomery installed a new billing system.[54] He reasoned that the expense was non-recurring and would not affect operating cash flow.

The other irregularity that Sherman removed was Montgomery's sale of assets to Old North, a wholly owned subsidiary of Palmer. Montgomery sold all of its cell towers and cell sites to Old North for $1.[55] Old North subsequently leased back the same properties to Montgomery at an annual rent of $638,000. Sherman removed this rental expense because it was a lopsided transaction that showed clear evidence of corporate control on the part of Price.[56]

Using a capitalization rate of 9.25% from the Gordon Growth Model and a terminal growth rate of 4%, Sherman calculated a terminal value of $258 million.

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[53] Sherman Revised Report Ex H.

[54] The respondents' expert agrees that this bad debt expense should be removed from a DCF analysis. *See supra* note 39.

[55] Tr. at 317.

[56] Additionally, Sherman argues that if Montgomery had retained ownership of the assets, it could have charged rent to third parties. He does not quantify the opportunity cost of this revenue stream, but the court acknowledges the reasonableness of his argument.

From this value, Sherman arrives at a final business enterprise valuation of $150 million for Montgomery as a going concern, non-controlling operating asset of MCHC. Again, adding in the non-operating assets raised the valuation to $170 million. Finally, applying a control premium of 31%, Sherman increased his DCF valuation to $216 million.[57]

Sherman added a control premium to his DCF to account for suspected financial irregularities that he could not specifically identify. This general suspicion was in addition to other irregularities that he did try to correct.[58] Sherman was aware that Delaware courts generally do not apply control premia to DCF valuations.[59] However, he applied a control premium in the analysis here in an effort to compensate for what he suspected to be financial rents exacted from MCHC by Price.

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[57] After reviewing control transactions that occurred in the 12 months preceding June 30, 2001, Sherman settled on 31% as a conservative estimate of control premium. Sherman Revised Report at 17. This premium is in line with the respondents' estimate. Gartrell Report at 18 ("Empirical estimates of control premia usually are quoted between 30% to 40% above publicly-traded values.").

[58] *See infra* notes 140-143.

[59] *See, e.g., Taylor v. Am. Specialty Retailing Group, Inc.*, 2003 WL 21753752, at *2 (Del. Ch. July 25, 2003). *See also* S. Pratt, *The Lawyer's Business Valuation Handbook* 359 (2000) ("[DCF] value should represent the full value of the future cash flows of the business. Excluding synergies, a company cannot be worth a premium over the value of its future cash flows. Thus, it is improper and illogical to add a control premium to a DCF valuation.").

In his comparable company analysis, Sherman was able to find only two comparable companies, neither of which was similar in size to Montgomery.[60] He excluded companies that had international operations, multiple lines of business, or prepaid customers. Additionally, he excluded companies that used PCS technology. Once he had settled on comparable companies, Sherman applied the same metrics he used in his comparable transactions analysis and gave them the same weight.[61] This approach resulted in a valuation of $206 million for MCHC. Again, adding in the non-operating assets raised the valuation to $226 million.

In summary, Sherman's analyses valued MCHC in a range from $212 to $226 million. Sherman derived his final share price by combining the results of the three analyses into a weighted average. He gave 80% weight to the comparable transactions analysis, 15% weight to the DCF analysis, and 5% weight to the comparable company analysis.[62] Sherman's heavy weighting of the comparable transactions analysis reflects his testimony that the transaction data, especially the Verizon agreement, was the best indication of value for MCHC. In contrast, he gave little weight to the DCF analysis because he had concerns about the reliability of MCHC's financial data and the lack of management projections. He gave even

[60] Montgomery had only 323,675 POPs, while the comparable companies had between 5.9 million POPs (Rural Cellular Co.) and 7.1 million POPs (Dobson Communications Co.). Sherman Revised Report at 28.

[61] The metrics are POPs, subscribers, EBITDA, and revenue. The respective weights are 45%, 20%, 25%, and 10%.

less weight to the comparable company data because of a dearth of publicly traded companies to which MCHC could reliably be compared. Calculating the mix of the three analyses yields a final valuation of MCHC of $213,455,619 and a final share price of $21,346.

III.

Pursuant to 8 *Del. C.* § 262, the petitioners are entitled to their *pro rata* share of the fair value of MCHC's common stock as of the merger date.[63] In determining the fair value, the court may exercise broad discretion, although it must value the company as a going concern.[64] In addition, Section 262(h) requires this court to calculate fair value "exclusive of any element of value arising from the accomplishment or expectation of the merger."[65] "In a statutory appraisal proceeding, both sides have the burden of proving their respective valuation positions by a preponderance of the evidence."[66] "If neither party satisfies its burden, however, the court must then use its own independent judgment to determine fair value."[67]

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[62] Sherman Revised Report at 42-43.

[63] *Gray v. Cytokine Pharmasciences, Inc.*, 2002 WL 853549, at *6 (Del. Ch. Apr. 25, 2002).

[64] *See, e.g., Cede & Co. v. Technicolor, Inc.*, 684 A.2d 289, 298 (Del. 1996) ("[T]he Court of Chancery's task in an appraisal proceeding is to value what has been taken from the shareholder, i.e., the proportionate interest in the going concern.").

[65] 8 *Del. C.* § 262(h).

[66] *M.G. Bancorporation, Inc. v. LeBeau*, 737 A.2d 513, 520 (Del. 1999).

[67] *Taylor*, 2003 WL 21753752, at *2.

In determining the fair value of MCHC's shares, the court may consider "proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court."[68] The following valuation approaches have been routinely utilized by this court in appraisal actions: (1) the DCF approach; (2) the comparable company approach; and (3) the comparable transactions approach.[69] The DCF approach "involves projecting operating cash flows for a determined period, setting a terminal value at the end of the projected period, and then discounting those values at a set rate to determine the net present value of a company's shares."[70] "The comparable compan[y] method of valuation determines the equity value of the company by: (1) identifying comparable publicly traded companies; (2) deriving appropriate valuation multiples from the comparable companies; (3) adjusting those multiples to account for the differences from the company being valued and the comparables; and (4) applying those multiples to the revenues, earnings, or other

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[68] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983).

[69] Recent representative appraisal actions include the following: *Doft & Co. v. Travelocity.com, Inc.*, 2004 WL 1152338 (Del. Ch. May 20, 2004) (accepting the comparable company approach); *Cede & Co. v. JRC Acquisition Corp.*, 2004 WL 286963 (Del. Ch. Feb. 10, 2004) (using the DCF approach); *Union Ill. 1995 Inv. L.P. v. Union Fin. Group, Ltd.*, 847 A.2d 340 (Del. Ch. Dec. 19, 2003) (appraising the company's stock by considering the value of the merger price, minus synergies, because this was the best evidence of fair value); *Taylor*, 2003 WL 21753752 (computing the value as the average of the DCF approach and the comparable company approach); *Gentile v. Singlepoint Fin.*, 2003 WL 1240504 (Del. Ch. Mar. 5, 2003) (adopting the comparable transactions approach).

[70] *Travelocity.com*, 2004 WL 1152338, at *5.

values for the company being valued."[71] The comparable transactions approach involves finding similar transactions, quantifying those transactions through financial metrics, and applying those metrics to the company at issue in order to arrive at a value.[72]

IV.[73]

Despite the prevalence of the DCF approach in appraisal actions,[74] the Delaware Supreme Court has clearly stated that "the ultimate selection of a valuation framework is within the Court of Chancery's discretion."[75] "As this court has recognized, methods of valuation, including a discounted cash flow analysis, are only as good as the inputs to the model."[76] Where neither party meets

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[71] *Agranoff v. Miller*, 791 A.2d 880, 892 (Del. Ch. 2001).

[72] *See Gentile*, 2003 WL 1240504, at *6 (noting, however, the limited usefulness of comparing "the purchase prices of two companies, of equal revenues, in different industries").

[73] As a threshold matter, the court must first address proper valuation of a holding company. "[A]ny holding company's ownership of a controlling interest in a subsidiary at the time of the merger is an 'operative reality' and an independent element of value that must be taken into account in determining a fair value for the parent company's stock." *M.G. Bancorporation*, 737 A.2d at 525. The parties are therefore correct in basing their valuations of MCHC, a single purpose holding company, on the value of its wholly owned subsidiary, Montgomery.

[74] *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 8-10[d] (2004 ed.) (discussing the overwhelming use of DCF analysis in appraisal actions since the Delaware Supreme Court "liberalized the appraisal valuation process" in *Weinberger*).

[75] *M.G. Bancorporation*, 737 A.2d at 524 ("[B]y recognizing the discounted cash flow model as one proper valuation technique, the Court of Chancery was not required to use that methodology to make its own independent valuation calculation by either adapting or blending the factual assumptions of the parties' experts.").

[76] *Travelocity.com*, 2004 WL 1152338, at *5.

its burden of proving fair value by a preponderance of the evidence, the court must make its own determination of fair value.[77]

In this case, for reasons next explained, the court completely rejects Gartrell's analysis. Instead, the court accepts the petitioners' basic framework and considers objections to that analysis raised by the respondents. The court first turns to Gartrell's valuation.

A. The Respondent's Expert Testimony

The first difficulty with Gartrell's expert report is his theoretical framework. Although Delaware law has accepted the term "stand-alone" when discussing going concern value in appraisal actions,[78] Gartrell's "stand-alone" terminology refers to a situation in which a company would not be valued as a going concern. In his report, Gartrell discounts MCHC due to its lack of "combinatorial value as part of a [pre-existing] network."[79] As a going concern, however, MCHC already had contractual relationships with other cellular providers making it more valuable than if its subscribers were confined to its licensed area. The minority shareholders are entitled to this value. Gartrell could properly limit any combinatorial value ascribed to the merger with Verizon. But instead, he

[77] *Taylor*, 2003 WL 21753752, at *2.

[78] *See, e.g.*, *Union Ill.*, 847 A.2d at 356 (using the term "stand-alone going concern"); *Gilbert v. MPM Enters.*, 709 A.2d 663, 673 (Del. Ch. 1997) (describing the valuation of "a company as a stand-alone entity under our appraisal statute").

[79] Gartrell Report at 24 ¶ 58.

incorrectly discounts MCHC's pre-existing value by removing "the combinatorial benefits of being part of a wider regional network" as of June 30, 2001.[80] The court gives no weight to Gartrell's repeated denials at trial of valuing MCHC as a stand-alone company because his responses contradict the responses given at deposition.[81] During deposition, the petitioners asked him directly if he had valued MCHC as a "stand-alone" company.[82] They also asked him if he had valued MCHC as if it did not have "any affiliations with Palmer."[83] To both questions, Gartrell answered in the affirmative, without inquiry or clarification. Additionally, his report states that he valued MCHC on a stand-alone basis.[84] Given Gartrell's use of the term "stand-alone," the court finds that he intended to deprive the minority shareholders of existing value as of June 30, 2001. Therefore, his valuations are invalid as a matter of law and must be disregarded.

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[80] *Id.* at 30 ¶ 72. As this court has previously observed in *Boyer v. Wilmington Materials, Inc.*, 754 A.2d 881, 901 (Del. Ch. 1999):

> The source of that value was not limited to the physical machinery and equipment with which it produced hot mix. Rather, WMI's value also derived importantly from the contractual obligations of the Stockholder Groups to purchase their hot mix requirements from WMI and from the 10-year remaining term of the License, among other things.

[81] Tr. at 620-2; Gartrell Dep. at 50. Additionally, it appears as if Gartrell backtracked during the trial and did admit to valuing MCHC as a stand-alone company. Tr. at 769, 793.

[82] *Id*. at 620.

[83] *Id.*

[84] *See, e.g.*, Gartrell Report at 8 ¶ 25; *id.* at 10 § B; *id.* at 23 § c; *id.* at 30 ¶ 72; *id.* at 32 ¶ 75. The examples are too many to list in their entirety. Suffice it to say that, notwithstanding his testimony in court, Gartrell was clearly valuing MCHC not as going concern.

Even if Gartrell's framework were legally permissible, his valuations fail to meet the burden required in an appraisal action. His DCF analysis is analytically unsound and his comparable company analysis relies on improper data from the C-Block auction. The flaws in both approaches are explored in more detail below.

1. The Respondent's DCF Analysis

Gartrell constructed his DCF analysis in a way that renders it meaningless as an analytic tool for a number of reasons: he used the long-term growth rate in gross national product ("GNP") as the growth rate for MCHC, he utilized a constant rate of growth beginning in year one, making the projection time period irrelevant, and he created forecasts without any research into MCHC's strategy. Gartrell's use of unsuitable inputs causes the court to ascribe no weight to his final DCF valuation.[85]

Gartrell's DCF analysis is flawed because he used the long-term growth rate of GNP as his growth rate for MCHC.[86] Without a valid explanation, the use of a generic growth rate is "inherently flawed and unreasonable."[87] Gartrell fails to provide any rational explanation for why he uses this generic growth rate instead of

[85] *See Cooper v. Pabst Brewing Co.*, 1993 WL 208763, at *3 (Del. Ch. June 8, 1993) ("When [a DFC] approach is used, however, as with any other method, the weight to be ascribed to expert valuations necessarily depends on the validity of the assumptions underlying them.") (citing *Alabama By-Products Corp. v. Neal*, 588 A.2d 255, 258 (Del. 1991).

[86] Tr. at 506.

[87] *Cede & Co. v. Technicolor, Inc.*, 2003 WL 23700218, at *15 (Del. Ch. Dec. 31, 2003).

a rate that would be helpful in valuing MCHC specifically.[88] The GNP rate could apply to any company. Gartrell attempts to rationalize his use of the GNP rate by claiming that "it is near the rate of growth that . . . the capital markets expected at the time [for the wireless industry]."[89] This statement undermines his credibility for two reasons. First, Gartrell is admitting that he had access to industry-specific growth rates, yet purposefully chose to ignore them, using instead a generic growth rate. Second, and more damaging, Gartrell rationalizes his choice by claiming the two rates are "near" each other. This explanation is ludicrous, especially given his testimony that the growth rate section of DCF analysis "[r]equires . . . precise analysis."[90] Without a proper growth rate, Gartrell's DCF is not credible.

Gartrell's DCF is also flawed because he used a constant rate of growth beginning in year one. As he admitted at trial, his DCF would produce the same valuation for MCHC regardless of the time frame, whether it was one, five, or ten years.[91] In essence, his DCF is literally nothing more than an extension of year

[88] The expert's argument in *Cede* was essentially the same argument that Gartrell made in this action. They both argued that "it is reasonable to expect that [the subject company's] real growth over the long-term should be in line with national real economic growth." *Cede & Co.*, 2003 WL 23700218, *15. This argument was rejected in *Cede* and is rejected here.

[89] Tr. at 507.

[90] *Id.*

[91] *Id.* at 713-4.

one's financial results. Despite Gartrell's expert qualifications, he arrived at this obvious conclusion only "at a late stage" in his valuation process.[92]

Finally, Gartrell's DCF input is flawed because he created the financial projections entirely on his own. "[T]his Court . . . holds a healthy skepticism for post-merger adjustments to management projections or the creation of new projections entirely."[93] Unlike Sherman, who sought out other sources of information, Gartrell created his data without reference to relevant sources of information. He never talked to any officers of MCHC, never analyzed MCHC's business operations, and had no idea what its business strategy was.[94]

For these reasons, the court is finds Gartrell's DCF analysis meaningless, and it will be disregarded.

2. The Respondents' Comparable Company Analysis

Gartrell's comparable company analysis is fatally flawed due to both his methodology and his data. With regard to his methodology, Gartrell switched between the mean and the median at a critical point in his analysis. When computing his EBITDA multiples, Gartrell used figures that are the median of their

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[92] *Id*. at 715.

[93] *JRC Acquisition Corp.*, 2004 WL 286963, at *2. *See also Gray*, 2002 WL 853549, at *8 (disregarding expert's DCF analysis because it used unreliable "litigation-driven projections"). *See also* Bradford Cornell, *Corporate Valuation* 142 (1993) (reasoning that the potential for abuse with regard to DCF analyses stems from the fact that "they are so difficult to contradict [that they] can be tailored to satisfy the needs of the client, rather than to produce the most accurate appraisal").

[94] Tr. at 616.

data set, instead of using the mean.[95] The record indicates that he used the mean for every other computation.[96] If Gartrell had used the mean numbers instead of the median numbers, "the value of [MCHC], based on the EBITDA, would be, before the non-operating assets, over $163 million."[97] Adding in the non-operating assets would result in a value of $183 million, a figure that is relatively close to the figure offered by the petitioners' expert. This selective change in methodology makes Gartrell's comparable company analysis suspect.

Additionally, when calculating the correct weighting for the EBITDA ratio between rural and regional, Gartrell abandoned his expert responsibilities.[98] As he testified, he "just . . . let the market guide [MCHC's] strategy."[99] He continued by saying that "mathematics itself solved for the simultaneous solution."[100] The conclusion would appear inescapable that Gartrell established a pre-determined

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[95] *Id*. at 785-789.

[96] *Id*. at 787 (admitting that he may have relied on the mean in all other computations and offering no specific computation where the median was used). For examples where Gartrell arbitrarily selects the mean, see the following: *id*. at 523 (referring to his control premium choice as "the midpoint between the high and low range"); JPO at 24 ("Having no reason to favor one valuation or the other . . . Mr. Gartrell split the difference.").

[97] Tr. at 788.

[98] At issue here is the fact that MCHC is an MSA that should be valued more highly. But Gartrell normalized the equation so that he applied a much higher weight (79%) to the rural companies than to the regional companies (21%). This was simply not reality. MCHC was an MSA and had the future potential of an MSA. Solving the equation to make the MSAs and RSAs equal is not performing any analysis, it is purely math. Not coincidentally, it lowers the value of MCHC.

[99] Tr. at 527.

[100] *Id*.

valuation figure to which he applied the EBITDA multiples. He then solved the equation algebraically to determine the rural and regional percentages needed to produce the pre-determined answer.[101]

Finally, even if his methodology were accepted, Gartrell chose inputs that are not relevant to the valuation of MCHC. Gartrell relied completely on the C-Block auction.[102] But the C-Block auction suffers from a number of serious flaws, including outdated data, different technology, an emerging market, and inexperienced bidders. Such flaws are obvious and glaring. The C-Block data cannot be termed comparable in any reasonable sense of the word. Even if it were, this court held in *Taylor* that "[i]n choosing a drastically reduced multiple, [an expert] demonstrate[s] that he believes the guideline companies are not truly comparable."[103] Here, Gartrell discounted MCHC by 48%, the exact discount that was found to undermine the entire analysis of an expert in *Taylor*. Similarly, the court finds here that Gartrell's comparable company analysis is not truly comparable.

Due to his flawed methodology and his complete reliance on non-comparable data, the court disregards Gartrell's comparable company analysis.

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[101] Moreover, if Gartrell had simply used the mean for his rural-regional weighting (i.e. a 50% split), the value of MCHC would have been $224 million. *Id*. at 788.

[102] His reliance even affected his DCF analysis. *See supra* note 36.

[103] *Taylor*, 2003 WL 21753752, at *9.

B. The Petitioners' Expert Testimony

In his attempt to properly value MCHC, Sherman was confronted with considerable difficulties. MCHC did not have contemporaneous management projections on which to base a DCF, there were no precisely comparable companies, and the comparable transactions were for RSAs, not MSAs. Despite these difficulties, the court is persuaded that Sherman created a workable valuation framework. Using his framework, the court adjusts Sherman's inputs as discussed below to arrive at a fair value for MCHC.

1. The Petitioners' Comparable Transactions Analysis

"[The] corporate level comparative acquisition approach to valuing a company, which include[s] a control premium for a majority interest in a subsidiary, [is] a relevant and reliable methodology to use in an appraisal proceeding to determine the fair market value of shares in a holding company."[104] "[Delaware] case law recognizes that when there is an open opportunity to buy a company, the resulting market price is reliable evidence of fair value."[105] However, "in an appraisal action, the merger price must be accompanied by evidence tending to show that it represents the going concern value of the company

[104] *Paskill Corp. v. Alcoma Corp.*, 747 A.2d 549, 556 (Del. 2000) (citing *M.G. Bancorporation*, 737 A.2d at 525). *See also Gentile*, 2003 WL 1240504 (adopting the comparable transactions approach).

[105] *Union Ill.*, 847 A.2d at 357 (citing *M.P.M Enters., Inc. v. Gilbert*, 731 A.2d. 790, 797 (Del. 1999)).

rather than just the value of the company to one specific buyer."[106] But "[a] merger price resulting from arm's-length negotiations where there are no claims of collusion is a very strong indication of fair value."[107] In fact, the court in *Union Illinois* gave 100% weight to "the price for [the subject company] that resulted from the auction preceding execution of the Merger Agreement."[108] More recently, this court has discussed approvingly the use of an offer to purchase a business unit of the subject company as indicative of value in an appraisal action.[109]

In his analysis, Sherman split the comparable transactions into three categories: similar sized transactions, the initial Verizon transaction, and the CD settlement. He then evaluated each category separately, valuing each by breaking out the relevant cellular and financial metrics.[110] He then recombined the data using a two-dimensional matrix of weighted percentages to derive his final valuation. Although Sherman presented a well-reasoned framework, for the reasons discussed below, his analysis ultimately fails to meet the burden required

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[106] *M.P.M. Enters.*, 731 A.2d at 797.

[107] *Id.*

[108] *Union Ill.*, 847 A.2d at 357.

[109] *See Prescott Group Small Cap, L.P. v. Coleman Co.*, 2004 WL 2059515, at *29 (Del. Ch. Sept. 8, 2004) ("[Such an offer] was not speculation but a known fact that may be considered for purposes of [an] appraisal."). *See also M.P.M. Enters.*, 731 A.2d at 797 ("[Merger prices and prior offers] derived in the open market through arm's-length negotiations offer better indicia of reliability than the interested party transactions that are often the subject of appraisals under § 262.").

[110] Sherman lists the possible metrics by which to measure cellular systems as POPs, subscribers, EBITDA, and revenue.

in appraisal actions. After adjusting Sherman's inputs, the court finds that the fair value of MCHC based on comparable transactions is $196,217,373.73.

a. The Verizon Transaction

The Verizon transaction is problematic for several reasons: (1) the transaction was never consummated; (2) the transaction was contingent on the IPO of Verizon Wireless; (3) the transaction consisted of a cluster of companies, not just MCHC; and (4) Verizon agreed to a value that implicitly incorporated whatever synergies it expected to realize from creating a national network. Despite these issues, Sherman testified that the initial Verizon transaction is the best indicator of value for MCHC because it involved the very company that he is trying to value,[111] and, indeed, it would even be appropriate to value MCHC based exclusively on this transaction.[112]

The petitioners cite *Union Illinois* to support their reliance on information about a legitimate offer known at the time of the squeeze-out merger. They argue that the initial Verizon agreement can be used as an indication of value regardless of whether the transaction was consummated. In *Union Illinois*, the merger "resulted from a competitive and fair auction."[113] In MCHC's case, there was no

[111] Tr. at 63-65.

[112] *Id*. at 66. Sherman's valuation is already heavily dependent on the Verizon transaction. Verizon is 62% of the comparable transactions figure and approximately 50% of Sherman's final valuation.

[113] 847 A.2d at 358.

auction per se, but, from 1997 through 2000, Price "from time to time held discussions with various cellular telecommunications system operators with respect to the possible acquisition of [Palmer's] cellular telecommunications operations."[114] These discussions yielded a competitive third-party bid for a group of companies that included MCHC. Price indirectly controlled each of the companies in the group, either through complete ownership or an overwhelming majority of the stock. There is no evidence that Price did not attempt to get the best price possible for the group. Logically, Price would want a high price given its large holdings. The resulting offer by Verizon is functionally equivalent to the merger price in *Union Illinois* in terms of being a competitive, arm's-length negotiated price.[115]

The petitioners also argue that the initial Verizon agreement can be an indication of value despite the IPO condition. In contrast, the respondents argue that the conditional aspect of the initial Verizon agreement makes it inapplicable to MCHC. Fundamentally, they say, Price was at the mercy of Verizon and its IPO of Verizon Wireless. Price had no right to enforce the agreement as of June 30,

[114] JPO at 5.

[115] *Van De Walle v. Unimation, Inc.*, 1991 WL 29303, at *18 (Del. Ch. Mar. 7, 1991) ("It is [] recognized that where a unique asset such as corporate control (or the corporation itself) is being sold, an auction market (or its equivalent, in the form of an effective market canvass) can provide important, highly reliable, evidence of the best available transaction for such a sale.") (citations omitted).

2001. For these reasons, the respondents argue, the $2.06 billion price cannot be used by this court in valuing MCHC.

Upon close inspection of the facts surrounding the Verizon Wireless IPO, the court finds that Price was aware of potential problems before it signed the agreement with Verizon. The IPO had been delayed in October 2000, *before* the agreement with Price was executed. In the face of the wireless industry's general uncertainty and an already delayed Verizon Wireless IPO, Price signed an agreement that was contingent on the IPO. Price cannot now claim that the IPO's delay created an uncertainty that altered the value of MCHC. Prior to June 30, 2001, Price acted as if the IPO would proceed on time. Indeed, the securities industry continued to report that Verizon would complete the IPO on time.[116] Clearly, Price's actions were based on the belief that the Verizon deal would close. Any other conclusion is illogical because there would be no other reason (and there is no reason offered by the respondents) for Palmer to squeeze out MCHC's minority shareholders.[117]

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[116] *See, e.g.*, JX193 Tucker Anthony Sutro Capital Markets Feb. 7, 2001 ("Verizon Planning IPO of Wireless Division No Later Than This Summer"); JX50 CFSB Equity Research Apr. 3, 2001 at 6339 ("Price continues to be confident in its closing of its acquisition with Verizon Wireless."). *See also* JX192 CNN Feb. 6, 2001 ("Verizon IPO still on tap").

[117] The respondents' rationale that they lowered the EBITDA multiple to account for the uncertainty does not address the issue of why they did anything. If they were truly unsure the deal would not close, the rational response would have been not to buy out the minority shareholders.

Of course, the Verizon deal differs from the transaction discussed in *Union Illinois* because the Verizon agreement was conditional and it was never consummated. Although Price had a valid agreement, Verizon could walk away if the IPO collapsed for any reason. In the end, the transaction was delayed one year, during which time the acquisition price dropped by 17.5%, or $306 million.

Despite these issues, the court is persuaded that the initial Verizon agreement is a valid comparable transaction because: Price canvassed the market to find potential acquirers, hired investment bankers to solicit prospective buyers, negotiated with Verizon the agreement at arm's-length, and the agreement included the sale of MCHC. For these reasons, the Verizon transaction will continue to be the driving factor for the comparable transactions analysis.

The court now considers how to determine what part of the Verizon transaction's value is attributable to MCHC as a going concern. In an appraisal action, minority shareholders are not entitled to the value of the potential synergies offered by the merger.[118] On the other hand, they are entitled to their *pro rata* share of the subject company as a going concern.[119]

The respondents argue that the Verizon agreement should be disregarded completely because it was the sale of a cluster of companies, not the sale of an

[118] *Union Ill.*, 847 A.2d at 356 (discussing "the need to exclude synergies in order to value the entity as a going concern").
[119] *Gray*, 2002 WL 853549, at *6.

individual company. They assert that the value in the Verizon deal is the combinatorial value that cannot be allocated to the individual companies in the cluster. The respondents, while partly correct, miss the point with regard to the value that is attributable to Palmer.

The combinatorial value, if any, that was attributable to Palmer is deal-making value reflected in the Verizon transaction. By bringing a cluster of companies to the bargaining table, Price added value to the transaction by cutting Verizon's costs. Due to Price's efforts, Verizon need not be concerned about a holdout problem. Eliminating this problem was especially beneficial to Verizon with regard to MCHC given its advantageous location between the Verizon companies and the Palmer companies. Additionally, Price decreased Verizon's transaction costs by combining 16 negotiations into one.

The court recognizes the value that Price generated by combining 16 smaller companies into one regional company, but that value is not the combinatorial value that Gartrell made the case for at trial. Instead, Gartrell's combinatorial value argument addressed the business aspects, not the deal-making aspects, of Palmer. He argued that MCHC should be valued as if it did not have "any affiliations with Palmer."[120] This argument implicitly attributes a value to Palmer based on its business affiliation with its subsidiaries. At trial, however, it was clear that Palmer

[120] Tr. at 620-2.

did not provide any business value to the subsidiaries. Indeed, the officers of Price were unable even to explain what services Palmer provided to justify their management fees.[121] The court finds that any possible business-related combinatorial value did not exist in the Palmer organization. The only combinatorial value attributable to Palmer was the value generated by its facilitation of the negotiation of the Verizon agreement.

One other important aspect of the Verizon transaction is MCHC's favorable standing with regard to the other subsidiaries. The record indicates that MCHC was one of the most valuable subsidiaries for the following reasons. First, MCHC was an MSA. In general, MSAs are more valuable than RSAs. There were eight MSAs and eight RSAs in the cluster. Therefore, MCHC, at a minimum, would be considered above average. Second, MCHC had favorable characteristics. It was located in the center of Alabama. Its territory covered the capital of Alabama. It had the highest number of POPs. Based on these characteristics, MCHC was arguably the most valuable company in the cluster. Third, the court discounts the respondents' reliance on EBITDA to claim that MCHC lacked value. Clearly, Price exerted corporate control over MCHC to decrease its EBITDA. The management fees, the sale of assets to Old North, and the inexplicable corporate

[121] *See infra* note 140.

allocation are several examples of how Price drove down MCHC's EBITDA.[122] The court finds that MCHC was possibly the most valuable company in the cluster. At a minimum, it was certainly well above average.

In the respondents' favor, the transaction was not consummated, it was conditional, and it did consist of a cluster of companies. Yet these arguments are balanced on the petitioners' side by two significant factors. First, although MCHC was definitely an above-average subsidiary, Sherman valued it as average. By using the metrics from the Verizon transaction, Sherman imputed to MCHC the characteristics of all the subsidiaries. This allotment necessarily created a cautious valuation, regardless of the different weights applied to the metrics.

Second, the Verizon transaction was a legitimate offer to purchase a group of companies that included MCHC. In *M.P.M,* although the Court of Chancery refused to give any weight to arm's-length negotiated prior offers, the Delaware Supreme Court held that such offers are "better indicia of reliability than the interested party transactions that are often the subject of appraisals under § 262."[123] More recently, this court has reinforced that position by stating that offers "may be considered for purposes of [an] appraisal."[124] Here, Price had something stronger

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[122] *See infra* notes 140-143.

[123] *M.P.M. Enters.*, 731 A.2d at 796.

[124] *Prescott,* 2004 WL 2059515, at *29 (declining to use an agreed-to in principle offer in determining fair value).

than an offer—it had a validly executed transaction agreement. Regardless of the conditional aspect of the agreement, Verizon was still bound by "the implied covenant of good faith and fair dealing that inheres in every contract."[125] Even more important, the agreement included MCHC. Given the discussions in *M.P.M.* and *Prescott*, the petitioners should be allowed to use the Verizon transaction.

After weighing the factors discussed above, the court concludes the initial Verizon transaction can be used as an indication of value for MCHC. From the record presented, the positives and negatives of the transaction are fairly seen to cancel each other out. Thus, Sherman's use of financial and cellular metrics derived from the initial Verizon transaction as proxies to assist in the valuation of MCHC is reasonable and the court finds no evidence in the record to contradict him. The court will therefore accept Sherman's use of the $2.06 billion purchase price as an indication of value for MCHC.

b. The CD Settlement

Sherman's use of the CD transaction is problematic for two reasons. First, the CD transaction is a settlement of an appraisal action resulting from a squeeze-out merger, not an arm's-length acquisition. Shareholders who settle appraisal actions factor in other concerns, such as the cost of litigation. In addition, although the dissenting shareholders have no burden of liability and therefore no liability

[125] *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 168 n.17 (Del. 2002).

risk, the outcome of the appraisal action is uncertain. Consequently, the CD settlement must be adjusted upward to eliminate this distortion.

Second, Sherman incorrectly adjusted the CD settlement to eliminate a perceived minority discount. During the negotiation of the CD settlement, the applicable law in its state of incorporation (Georgia) changed, holding minority discounts invalid.[126] Therefore, the final negotiated settlement value of $470 per POP cannot be reasonably understood as including a minority discount, especially given that the minority shareholders had legal representation and their lawyer knew about the recent change in the law. The court will therefore remove the control premium added by Sherman.

Removing Sherman's 31% control premium returns the per POP metric to its original negotiated value of $470. The court then adjusts this metric upward by 15% to account for the settlement "haircut." Although there is an insufficiency of evidence in the record concerning the computation of the CD settlement, the court is satisfied that the $470 per POP figure represented a minimum value paid by Price. The 15% upward adjustment accounts for the litigation costs and the possibility of a lower outcome in an appraisal action. Presumably, the range for these combined factors is 10-15%. To be cautious, the court chooses 15% as the appropriate adjustment given the lack of evidence. Multiplying the settlement

[126] *Blitch v. Peoples Bank,* 540 S.E.2d 667, 670 (Ga. Ct. App. 2000).

figure of $470 by 15% yields a result of $540.50 per POP. Comparing this figure to the one demanded by CD's minority shareholders, the court finds this adjustment reasonable.[127]

c. Similarly Sized Transactions

The problem with Sherman's similarly sized transactions is that all of the comparable companies were RSAs. MCHC is an MSA and there were no MSAs in the comparison. Arguably, Sherman did the best he could because there was no data available for MSAs. But the economic reality is that MSAs are more valuable given their demographics and locations. In order to account for the inherent valuation differences between RSAs and MSAs, Sherman assigned this valuation a low weight, just 15% of the comparable transaction analysis. The court is satisfied that this low weight offsets the valuation difference. Therefore, despite Sherman's difficulty in finding transactions that could be described as similar, the court will accept his valuation.

2. The Petitioners' Comparative Company Analysis

"The comparable company approach involves reviewing publicly traded competitors or participants in the same market or industry, generating relevant

[127] The minority shareholders offered to settle for $500 on December 19, 2000. JX35 Letter from Woodrow W. Vaughan, Jr., Kidd & Vaughan LLP, to K. Patrick Meehan, Holland & Knight LLP 2 (Dec. 19, 2000) ("We believe that [$500 per POP] frankly is less than the fair value of their shares at the time of the taking but this demand is made in an attempt to wrap up this matter now.").

multiples from public pricing data of the comparable companies and applying those multiples to [the subject company] in order to arrive at a value."[128]

In his comparable company analysis, Sherman was able to find only two comparable companies, neither of which is close to MCHC's size.[129] Sherman valued the companies using the same metrics as used in the comparable transaction approach.[130] His final valuation for MCHC is $157 million, which increases to $226 million when a control premium and non-operating assets are added.

The respondents do not question Sherman's list of comparable companies.[131] They do, however, argue that any valuation based on these companies should have a substantial discount (37-53%) based on the C-Block auction results. The court rejects this argument. The C-Block auction produces results that are greatly at variance with the other data. A discount of 48% is simply not credible.[132] Further, the C-Block auction concerned a different technology in a nascent market with new market entrants.[133] Moreover, the 1996 data was outdated—a difference of five years is substantial in a market such as cellular telecommunications. In addition to these data problems, there was no evidence that "any expert, any

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[128] *Taylor*, 2003 WL 21753752, at *7.
[129] Sherman Revised Report at 28-29.
[130] *Id.* at 29 Table 5.
[131] JPO at 11.
[132] *See infra* note 103.
[133] *See supra* note 32 (detailing CEO Price's opinion about PCS technology and its likely failure).

analyst, or anyone [had] ever determined the value of a cellular company using the C-Block methodology."[134] For these reasons, the C-Block cannot be used to justify a discount in valuing MCHC.

Given the experts' mutual agreement about the comparable companies, the court finds that Sherman's analysis is strongly indicative of MCHC's fair value. The court therefore accepts his valuation of MCHC based on comparable companies.

3. The Petitioners' DCF Analysis

DCF is an acceptable methodology of valuing companies in an appraisal action.[135] However, a DCF analysis is "only as good as the inputs to the model."[136] Although "necessarily speculative in nature[, DCF inputs are] central to the reliability of the underlying methodology."[137] "Delaware law clearly prefers valuations based on contemporaneously prepared management projections because management ordinarily has the best first-hand knowledge of a company's

[134] Tr. at 668.

[135] *M.G. Bancorporation*, 737 A.2d at 524 (acknowledging "the propriety of using a discounted cash flow model in [a] statutory appraisal proceeding" in the Court of Chancery).

[136] *Travelocity.com*, 2004 WL 1152338, at *5-*7 (rejecting a DCF valuation because the inputs were not reasonably reliable).

[137] *Harris v. Rapid Am. Corp.*, 1990 WL 146488, at *6 (Del. Ch. Oct. 2, 1990), *aff'd in relevant part, and rev'd on other grounds*, 603 A.2d 796 (Del. 1992).

operations."[138] Despite the inherent unreliability of post-merger, litigation-driven forecasts, this court has acknowledged the propriety of using DCF analysis based on such forecasts in the absence of viable alternatives.[139]

Having no management projections on which to rely, Sherman looked to three sources on which to base his forecasts: MCHC's financial statements, an industry expert, and Verizon's internal consultant. Upon reviewing MCHC's financial statements, he found them to have extensive irregularities. He testified that these irregularities are the result of Price's corporate control over MCHC. In order to arrive at more reliable forecasts, Sherman adjusted MCHC's historical financial statements to correct for the following irregularities: excessive management fees,[140] an unexplained inter-company loan,[141] an unexplained

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[138] *Travelocity.com*, 2004 WL 1152338, at *6. *See also Cede & Co., Inc. v. Medpointe Healthcare, Inc.*, 2004 WL 1949298, *16 (Del. Ch. Aug. 16, 2004) (discussing the court's skepticism about litigation driven forecasts).

[139] *Travelocity.com*, 2004 WL 1152338, at *7 (explaining that in such instances the court would "subject the outcome to an appropriately high level of skepticism").

[140] In the first five months of 2001, Palmer charged Montgomery a management fee of $603,000, which represents an annualized figure of nearly $1.5 million. Palmer could not explain the reason for this fee, how this fee was computed, or what management it actually provided to Montgomery. Price Dep. Oct. 13, 2003 at 256 (saying that he had "no idea" what the management fees were); at 259 (saying that the management fees were "accounting bulls**t"). More troubling than Palmer's ignorance is its disparate treatment of its subsidiaries. Subsidiaries that had minority shareholders paid management fees. JX135 at 02339; JX41 at 0295. Subsidiaries that did not have minority shareholders paid no management fees. *Id*. Even more telling is Palmer's termination of the management fee to Montgomery once the minority shareholders were eliminated. Tr. at 330-3. The management fee charged by Palmer can be reasonably interpreted to be a corporate charade by which the parent removed money from its subsidiary.

[141] Palmer was unable to explain the specifics of the $16.6 million inter-company loan from Montgomery to Palmer. The officers of Palmer did not know the interest being charged, the

corporate allocation,[142] and an overcharge by a vendor.[143] Despite those adjustments, Sherman testified that he remained unconvinced that the financial statements provided him with reliable enough data to make valid forecasts. He admitted candidly that he would be just as comfortable removing the DCF valuation from his report.[144]

Even after correcting MCHC's financial statements for the irregularities discussed above, Sherman still had to make two additional adjustments to his DCF. First, Sherman adjusted his DCF to remove Montgomery's $861,000 bad debt expense incurred for Palmer's new computer expense. This adjustment was also made by the respondents' expert and is uncontested. Second, Sherman adjusted his DCF to account for the sale and leaseback of Montgomery's cell sites and towers. This transaction was clearly an inappropriate exaction by Price due to its corporate control.

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basis for determining interest, or whether any interest was owed to Montgomery at all. Additionally, the only documentation for the interest was assertedly on a personal computer no longer in Palmer's possession.

[142] Palmer routinely allocated costs for interconnection charges, switch charges, monthly service charges, and billing service charges among the 16 subsidiaries. Yet, in what has become a pattern of ignorance, Palmer was unable to explain on what basis these charges were made. Again, the only documentation was assertedly on a personal computer no longer in Palmer's possession.

[143] In 2000, after the billing services contract was given to an entity affiliated with Price (the son of Price's CEO was a principal in the new billing vendor), Montgomery was overcharged approximately $2 million. This overcharge was supposedly refunded to Montgomery, although Price is unable to produce documentation to that effect.

[144] Tr. at 239 ("If you want to take my discounted cash flow out totally, you won't get an argument from me.").

In addition to MCHC's financial statements, Sherman also relied on Paul Kagan, a wireless industry expert, and Robert Ott, who created a valuation of MCHC for Verizon in 2002, because they were neutral authorities with respect to the initial Verizon agreement and to this appraisal action.

In summary, Sherman was confronted with considerable difficulties in deriving a reliable DCF valuation. He realized that MCHC had financial irregularities and he adjusted his valuation to correct them. He also relied on third-party experts to guide his valuation. Although the court is uneasy about accepting a DCF valuation that originated from such imperfect financial data, Sherman has presented a well-reasoned approach to tackling a difficult problem. The court, therefore, will use his DCF as an indication of MCHC's fair value.

Before using Sherman's DCF in the final computation, however, the court will remove the control premium. A DCF is a final valuation that does not need any additional correction, such as a control premium. Sherman had already corrected for Price's control of MCHC by modifying his inputs. Accordingly, the court will not include Sherman's additional control premium in its final valuation.

C. MCHC's Fair Value

In determining MCHC's fair value, the court begins with Sherman's framework. Although the respondents object in general to parts of his methodology, their objections do not specifically address the weights assigned to

any one variable beyond asking the court to eliminate certain inputs. If the court were to eliminate one of those inputs (i.e. the comparable transactions valuation), the final formula would necessarily be altered.

As discussed above, the court disregards the respondents' objections and finds that all three of Sherman's approaches are valid indications of value for MCHC. However, the court disagrees with his weighting. He assigns an 80% weight to the comparable transaction analysis, which gives the Verizon transaction an overall weight of 50%. Even though the Verizon transaction is valid for this appraisal, the court determines that 50% is too significant a weight to assign it. Indeed, the 80% weight assigned to all comparable transactions is disproportionately large given the issues discussed above. In contrast, the court concludes that the DCF valuation should be weighted more heavily. Despite problems with MCHC's financial statements, Sherman corrected the figures in a reasonable manner and looked to third-party authorities for guidance on other inputs. For these reasons, the court finds the proper weighting for MCHC is 65% for the comparable transactions, 30% for the DCF, and 5% for the comparable companies. Using these weights, the court computes the final fair value of MCHC to be $196,217,373.37.

As a reality check on this valuation, the court looks to two metrics: Verizon's per POP price and Verizon's EBITDA penalty. POPs is an industry-

standard metric that is widely used in valuing cellular companies. Using Verizon's adjusted POP figure of $616, MCHC would be valued at $199,383,800. Adding in the non-operating assets yields a total of $219,237,652.

For the EBITDA reality check, the court will use the 13.5 multiple that was effectively a penalty to Price. If Price did not squeeze out the minority shareholders, Verizon would decrease the purchase price by MCHC's EBITDA multiplied by 13.5 for their *pro rata* share. Using this figure yields an MCHC value of $160,650,175.50. Adding in the non-operating assets yields a total of $180,504,027.50.

Although these reality checks vary significantly, they both approximate the court's fair value, as they are within approximately 10% of the computed value and fall on either side of it. Therefore, the court views them as validating the court's conclusion. MCHC's fair value is $196,217,373.37 and its share price is $19,621.74.

D. Interest

"In determining the fair rate of interest, the Court may consider all relevant factors, including the rate of interest which the surviving or resulting corporation would have had to pay to borrow money during the pendency of the proceeding."[145] Furthermore, an interest award, by statute, may be either "simple

[145] 8 *Del. C.* § 262(h).

or compound."[146] Reading these two sections together "demonstrate[s] that an interest award necessarily has two components—a rate of interest and a form of interest."[147] "The Court must determine both parts in fashioning an interest award that is fair to the dissenting stockholder as well as to the surviving corporation."[148]

Despite the petitioners' attempt to develop a complete record with regard to the rate of interest, their efforts fall short of what is required. It is well established that "[e]ach party bears the burden of proving an appropriate rate under the circumstances."[149] In this action, the petitioners rely solely on Montgomery's cost of borrowing as of the merger date. They take the midpoint of the range and seek an award of 13% interest.

The petitioners' analysis is frozen in time. Unlike the determination of fair value in an appraisal action, which must be determined as of one specific date, the determination of a proper interest rate must be based on the cost of borrowing during the relevant time period.[150] By relying completely on the rates as of the

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[146] 8 *Del C.* § 262(i).

[147] *Gonsalves v. Straight Arrow Publishers, Inc.*, 2002 WL 31057465, at *9 (Del. Ch. Sept. 10, 2002).

[148] *Id.*

[149] *Grimes v. Vitalink Communications Corp.*, 1997 WL 538676, at *9 (Del. Ch. Aug. 26, 1997).

[150] *JRC Acquisition Corp.*, 2004 WL 286963, at *13 ("In order to determine the cost of borrowing for the relevant period, one must ascertain Respondent's borrowing costs from the date of the merger and at regular intervals, i.e., monthly, until an appropriate ending point near the judgment date.").

merger date, the petitioners have failed in meeting their burden of establishing the appropriate rate of interest for the entire time period.

In the circumstances, the court must look to the legal rate of interest which, by statute, is 5% over the Federal Reserve discount rate.[151] After reviewing the record, the only evidence of a Federal Reserve discount rate is 3.25%.[152] Therefore, the appropriate interest rate for this appraisal action is 8.25%.

The petitioners request that interest on their appraisal award be compounded. This court, in its discretion, may award simple or compound interest.[153] The award, however, must be based on sound and articulated reasoning.[154] Despite the Supreme Court's concern about the "developing standard practice" of awarding compound interest in appraisal cases,[155] the reality is that compound interest best reflects the purposes of Delaware's appraisal statute.[156] By awarding compound

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[151] 6 *Del. C.* § 2301(a).

[152] The petitioners derived this number as of June 30, 2001 and the respondents agreed to it. *See* Pet'rs' Post Trial Br. at 63 and Resp'ts' Post Trial Br. at 54. The court realizes the apparent paradox of accepting one rate from June 30, 2001 in an effort to determine the rate over the entire time period, especially after having rejected the petitioners' argument. The simple explanation is that the respondents agreed to the rate as the default legal rate and offered no evidence of possible lower rates between 2001 and 2004.

[153] *Gonsalves*, 2002 WL 31057465, at *9.

[154] *Taylor*, 2003 WL 21753752, at *12.

[155] *See Gonsalves v. Straight Arrow Publishers, Inc.*, 725 A.2d 442 (Table), 1999 WL 87280, at *4 (Del. Feb. 25, 1999) ("[T]he [appraisal] statute provides discretion to choose [simple or compound interest] on a case-by-case basis, but requires explanation for the choice.").

[156] *Taylor*, 2003 WL 21753752, at *12.

interest, this court is able to both compensate the petitioners for their loss and force the respondents to disgorge any benefits they received since the merger date.[157]

In this case, the parties have agreed that the interest should be compounded[158] and have focused their argument on the compounding interval. In appraisal actions, the appropriate compounding interval for the legal rate of interest is quarterly.[159] The petitioners request a monthly compounding, but fail to cite case law to support their argument.[160] The court therefore agrees with the respondents that, when the award is the legal interest rate, the appropriate compounding interval is quarterly.

E. Legal Fees and Expenses

In general, Delaware law does not permit fee shifting in an appraisal proceeding.[161] However, this court may use its equitable powers to award expert and attorney fees.[162] Such powers will be invoked only under rare circumstances that rise to the "glaring egregiousness" necessary to award fees and costs.[163]

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[157] *See Gilbert*, 709 A.2d at 674.

[158] The respondents concede that the interest should be compounded. Resp'ts' Post Trial Br. at 55.

[159] *Travelocity.com*, 2004 WL 1152338, at *12 (citing *Taylor*, 2003 WL 21753752, at *13).

[160] The petitioners cite two cases, *Gray* and *ONTI*, neither of which awarded the legal rate of interest. *See Gray*, 2002 WL 853549; *Onti, Inc. v. Integra Bank*, 751 A.2d 904 (Del. Ch. 1999).

[161] *See In re Radiology Assocs., Inc. Litig.*, 611 A.2d 485, 501 (Del. Ch. 1991) (citations omitted) ("[A]s with any appraisal proceeding, petitioner should bear the costs of his own expert.").

[162] *Cede & Co.*, 684 A.2d at 301.

[163] *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 13-3[b] (2004 ed.) (discussing the Court of Chancery's

The petitioners make several pertinent arguments regarding the award of fees and costs. They claim that the respondents breached their fiduciary duties to the minority shareholders, that Price set the merger consideration in bad faith, that Price's CEO lied under oath, and that the respondents improperly disposed of personal computers in an effort to disrupt discovery. While the petitioners do have valid concerns regarding the behavior of the respondents, their arguments are not forceful enough to compel this court to award fees and costs.

The respondents did refuse to hire a financial advisor or obtain an independent valuation of MCHC; there is credible evidence that Price's CEO determined MCHC's share price himself, with little or no regard for fair value, in spite of his testimony to the contrary; and the disposal of the personal computers is troubling to this court given the clear discovery request from the petitioners. Despite all of this, the behavior of the respondents does not rise to the level necessary for this court to invoke its equitable powers and award fees and costs. As Chancellor Allen said in *Barrows v. Bowen*, fee shifting is a narrow exception, seldom invoked by the Court of Chancery:

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infrequent use of the bad faith exception to the American rule). *See also Kaung v. Cole Nat'l Corp.*, 2004 WL 1921249, at *6 (Del. Ch. Aug. 27, 2004) (awarding fees and costs based on the behavior of the petitioner's representatives, which was "frivolous, oppressive, and vexatious").

> While this court can imagine situations which may be so egregious as to warrant an award of attorney's fees on the basis of fraud, the American Rule would be eviscerated if every decision holding respondents liable for fraud or the like also awarded attorney's fees. Even more harmful would be to extend this narrow exception to situations involving less than unusually deplorable behavior.[164]

The petitioners have highlighted disturbing behavior on the part of the respondents, but they have failed to demonstrate the glaring egregiousness that would compel this court to award fees and costs. Therefore, their request is denied.

V.

In conclusion, the parties have both failed to meet their burden of proof regarding the valuation of MCHC. For all the foregoing reasons, the court determines that the fair value for each share of MCHC's common stock, as of the date of the merger, was $19,621.74 and will enter an order awarding the petitioners a total of $9,720,008.20 plus interest at the legal rate, compounded quarterly. The respondents are directed to reimburse the petitioners for all taxable court costs. The parties are directed to present an order of final judgment in conformity with this opinion within 10 days.

[164] *Barrows v. Bowen*, 1994 WL 514868, at *2 (Del. Ch. Sept. 7, 1994).