

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

IN RE: IREX CORPORATION,

Appellee

v.

MITCHELL PARTNERS, LTD., ET AL.,

Appellants

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 562 MDA 2013

Appeal from the Judgment Entered March 28, 2013
In the Court of Common Pleas of Lancaster County
Civil Division at No.: CI-07-01322

IREX CORPORATION,

v.

MITCHELL PARTNERS, LTD.; JAMES E. MITCHELL, AS GENERAL PARTNER OF J.E. MITCHELL & CO., L.P.; J.E. MITCHELL & CO., L.P., AS GENERAL PARTNER, TRADING AS MITCHELL PARTNERS, L.P.; GARY L. SAMPLE; JOYCE A. SAMPLE; JOSEPHINE A. FEAGLEY; GLS PARTNERS; AND LONG ORTHODONTIC ASSOCIATES, P.C. RETIREMENT PLAN

APPEAL OF: SAMPLE, GARY; SAMPLE, JOYCE; FEAGLEY, JOSEPHINE; GLS PARTNERS; LONG ORTHODONTICS, PC RETIREMENT PLAN

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 598 MDA 2013

Appeal from the Judgment Entered March 28, 2013
In the Court of Common Pleas of Lancaster County
Civil Division at No. CI-2007-01322

BEFORE: BENDER, P.J., WECHT, J. AND FITZGERALD, J.*

*Former Justice specially assigned to the Superior Court.

MEMORANDUM BY BENDER, P.J.

FILED DECEMBER 05, 2013

Irex Corporation (Irex) commenced this dissenters' rights action pursuant to the Pennsylvania Business Corporations Law (BCL), 15 Pa.C.S. §§ 1571-80. Following a non-jury trial, judgment was entered on March 28, 2013, in favor of Irex. Respondents-below appeal from the judgment in two groups: (1) Mitchell Partners, LTD; James E. Mitchell, as general partner of J.E. Mitchell & Co., L.P.; J.E. Mitchell & Co., L.P., as general partner trading as Mitchell Partners, L.P. (collectively, the Mitchell Partners); and (2) Gary L. Sample; Joyce A. Sample; Josephine A. Feagley; GLS Partners; and Long Orthodontic Associates, P.C., Retirement Plan (collectively, the Sample Parties). We affirm.

The Mitchell Partners raise the following issues on appeal:

[1.] Whether the trial court's stated bases (including its weighing of the trial evidence and its credibility decisions) for its determination that the fair value of Irex common stock on October 20, 2006[,] was \$66.00 per share are predicated upon erroneous conclusions of law and the manifestly unreasonable and capricious disregard of competent evidence.

[2.] Whether the trial court erred as a matter of law in applying an "asbestos discount" to its conclusion of value regarding the fair value of Irex stock on October 20, 2006, where the "asbestos discount" was calculated using *ipse dixit* formulations proffered by Irex's analysts that find no support in the financial community or in Pennsylvania law.

[3.] Whether the trial court erred as a matter of law in excluding evidence of Irex's actual financial performance following the October 20, 2006 Merger that was offered for the sole purpose of assessing the reasonableness of the cash flow projections prepared by the conflicted insiders comprising Irex's senior management and subsequently used in the discounted cash flow

analyses offered by Irex at trial as proof of fair value. In view of Irex's post-trial assertion highlighting the absence of any evidence of Irex's post-Merger financial performance, this Question includes the issue of whether Irex is now estopped from contesting the consideration of the evidence demonstrating Irex's post-Merger performance proffered by the Mitchell Partners Respondents at trial.

[4.] Whether the trial court erred as a matter of law and/or abused its discretion in its analysis and conclusions regarding the interest awarded to the Mitchell Partners Respondents in connection with the deferred payment received for their Irex common stock.

Mitchell Partners brief at 4. In addition, the Sample Parties raise the following issue:

Whether Joyce Sample retained her rights as a dissenting shareholder when a third party custodian inadvertently and without authorization tendered her shares to Irex approximately one year after the merger[.]

Sample Parties brief at 3.

In addressing these issues, our review is limited to

a determination of whether the findings of the trial court are supported by competent evidence and whether the trial court committed error in the application of law. Findings of the trial judge in a non-jury case must be given the same weight and effect on appeal as a verdict of a jury and will not be disturbed on appeal absent error of law or abuse of discretion. When this Court reviews the findings of the trial judge, the evidence is viewed in the light most favorable to the victorious party below and all evidence and proper inferences favorable to that party must be taken as true and unfavorable inferences rejected. The [trial] court's findings are especially binding on appeal, where they are based upon the credibility of the witnesses, unless it appears that the court abused its discretion or that the court's findings lack evidentiary support or that the court capriciously disbelieved the evidence. Conclusions of law, however, are not binding on an appellate court, whose duty it is to determine whether there was a proper application of law to fact by the

[trial] court. With regard to such matters, our scope of review is plenary as it is with any review of questions of law.

Piston v. Hughes, 62 A.3d 440, 443 (Pa. Super. 2013) (quoting ***Shaffer v. O'Toole***, 964 A.2d 420, 422-23 (Pa. Super. 2009) (internal quotation omitted); **see also *Appeal of O'Connor***, 283 A.2d 279, 280 (Pa. 1971) (rejecting an appellant's request to make an independent determination as to the fair value of her shares and stating, "This Court does not sit as a trier of issues of fact, expecting to be persuaded that one or the other side is more credible.") (quoting ***Reed v. Universal C.I.T. Credit Corp.***, 253 A.2d 101, 104 (Pa. 1969)).

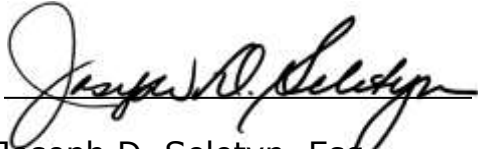
We have reviewed the certified record, the briefs of the parties, the applicable law, and the well-reasoned opinion authored by the Honorable Howard F. Knisely of the Court of Common Pleas of Lancaster County, dated October 9, 2012. We conclude that Judge Knisely's opinion is dispositive of the issues presented in this appeal. Accordingly, we adopt the opinion as our own for purposes of further appellate review.

In light of our conclusion, the Application to Strike filed by the Mitchell Partners and the Application to Amend (titled "Application of 'Sample Parties' to Revise 'Cross Appeals' Designation") filed by the Sample Parties are denied as moot.

Judgment affirmed. Application to Strike denied as moot. Application to Amend denied as moot.

J-A27011-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/5/2013

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IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL DIVISION

IN RE:

IREX CORPORATION,
Petitioner,

v.

MITCHELL PARTNERS, LTD., et al.,
Respondents.

No. CI-07-0132

ENTERED AND FILED
12 OCT -9 PM 1:46
PROthonotary's OFFICE
LANCASTER, PA.

OPINION

BY: KNISELY, J.

October 9, 2012

Before the Court is the dissenters rights action brought by Petitioner Irex Corporation pursuant to subsections 1571-80 of the Pennsylvania Business Corporations Law ("BCL"), 15 Pa.C.S. §§ 1571-80.

BACKGROUND

The following factual background is not in dispute by the parties. Petitioner Irex Corporation ("Irex") is a Pennsylvania Corporation with its principal place of business, at times relevant to this action, at 120 North Lime Street, Lancaster, Pennsylvania. Irex is a specialty contracting business which conducts business in the United States and Canada. Irex, structured as a C-Corporation, entered into a merger transaction with North Lime Holdings Corporation ("NL Holdings") and Irex Acquisition Corporation ("Irex Acquisitions") for the purpose of establishing an S-Corporation. A cash-out amount of sixty-six dollars (\$66.00) per share was offered for all the outstanding Irex common stock not held by NL Holdings. The total number of shares not held by NL Holdings was 124,376, of which 85% of the shareholders voted in favor of

the buyout at the \$66.00 per share offer. On October 20, 2006, the merger was completed and Irex became a wholly owned subsidiary of NL Holdings.

Respondent Mitchell Partners, Ltd. ("Mitchell Partners") and James E. Mitchell were the owners of 11,730 shares of Irex common stock. Pursuant to the dissenters rights subsection of the BCL, Respondents appropriately filed written notice with Irex of their intent to dissent and obtain payment of the fair value of their shares. In response, Irex filed an action against the dissenting shareholders, pursuant to Section 1579 of the BCL, requesting this Court determine the fair value of the Irex shares as of the merger date.

The Court conducted a five-day appraisal hearing, which began on December 12, 2011. The Court received evidence in order to determine the fair value of Irex shares. The Court heard testimony for Petitioner from current Irex executives, members of the Special Committee assigned by the Irex Board of Directors with independently evaluating the offer price of \$60.00 per share (later negotiated to \$66.00 per share), investment bankers, and an expert in business valuation. The Irex executives included Kirk Liddell, President and CEO of Irex, Lori Pickell, CFO and Treasurer of Irex, and James Hipolit, Senior Vice President and General Counsel of Irex. The Special Committee was composed of Jane Pinkerton, the former Senior Vice President of Finance for Irex, Kenneth Stoudt, the Chairman of the Board of Stoudt Advisors, and Nathan Washburn, a former member of the Irex Board of Directors. Colby Snyder and Anthony Latini, investment bankers with Snyder & Company and Curtis Financial, respectively, and Professor Gregg Jarrell, accepted by the Court as an expert, testified in detail regarding valuation methodologies and the resulting range of prices for the fair market value of the stock at issue as of the merger date.

The Court heard testimony for Respondents from James Mitchell, the general partner of Respondent Mitchell Partners, L.P., and Steven Wolf, the Executive Director of Capstone Advisory Group, a dispute advisory firm specializing, in part, in business valuation. Mr. Wolf detailed the types of valuation methodologies and discounts applied in reaching his proposed range of values.

Based upon the evidence presented, the Court accounted for all the relevant valuation factors and events that occurred leading up to and on October 20, 2006, the merger date. Following the hearing, the Court ordered the parties to file briefs including proposed findings of fact and conclusions of law. The Court also ordered transcripts of the hearing, which have been filed and consist of five volumes, spanning 1,483 pages.

The parties timely filed their briefs. The Court has thoroughly reviewed the briefs, which contain 456 and 384 findings of fact by Petitioner and Respondent, respectively, as well as conclusions of law. Having thoroughly reviewed the briefs and having considered, weighed, and made credibility determinations of the evidence presented, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. William Kirk Liddell is the President and Chief Executive Officer of Irex Corporation ("Irex"). (N.T. Non-Jury Trial, 12/12-15/2002, at 51.)
2. James E. Hipolit is Irex's Senior Vice President and General Counsel. (*Id.* at 346.)
3. Irex began as a holding company, created to carry out a leveraged buyout of Armstrong Contracting Supply Company ("AC&S") in the late 1960s. (*Id.* at 54-55.)
4. In the 1980s, Irex was activated as the parent operating business and AC&S became a subsidiary to Irex. (*Id.* at 55, 57.)

5. Specialty Products Insulation Company ("SPI") was added as a subsidiary to Irex to focus exclusively on distribution of mechanical insulation products. (*Id.* at 56-57.)
6. AC&S was an insulation contracting business. (*Id.* at 56.)
7. AC&S used asbestos-containing products. (*Id.* at 67.)
8. AC&S hired Attorney James Hipolit in 1981 as Corporate Counsel to handle the company's growing asbestos litigation concerns. (*Id.* at 347.)
9. In 1983, when Irex was the parent company of AC&S, Attorney Hipolit became General Counsel of Irex. (*Id.* at 347-48.)
10. Attorney Hipolit became the president of AC&S in 2001. (*Id.* at 352.)
11. In 1993, Irex engaged Snyder & Company ("Snyder") to analyze a possible common-to-preferred stock exchange. (*Id.* at 714-15.)
12. Snyder is an investment banking firm with its principal business in assisting in the sale of privately held companies. (*Id.* at 714.)
13. In 1995, Irex again engaged Snyder to do a valuation of Irex stock in Irex's 401(k) retirement plan. (*Id.* at 716-17.)
14. Snyder continued to provide Irex with 401(k) stock valuations yearly through 2005. (*Id.* at 718.)
15. By the late 1990s, AC&S was the subject of substantial asbestos litigation. (*Id.* at 58.)
16. In 1998, SPI was spun off into a separate entity; a private equity business invested in and took control of SPI. (*Id.* at 61.)
17. Irex unsuccessfully attempted to sell the company in 2001. (*Id.* at 69, 353.)
18. In 2000 and 2001, Irex had increasing disputes with Travelers over the extent of coverage Travelers was obligated to pay under the insurance policies in issue. (*Id.* at 68, 353-54.)

AC&S and Travelers Insurance

19. AC&S had insurance policies from Travelers that AC&S called upon to cover asbestos litigation awards against it. (*Id.* at 352-53.)
20. The Travelers insurance policies that AC&S called upon were written from 1976 to 1979. (*Id.* at 354.)

21. Under the policies, Travelers provided two primary types of coverage: 1) products completed, operations coverage ("products completed coverage"), and 2) non-products, operations coverage ("ongoing operations coverage"). (*Id.* at 354-55.)

22. The products completed coverage had a one-million dollar aggregate limit. (*Id.* at 354.)

23. The ongoing operations coverage had a one-million dollar per event or occurrence limit. (*Id.* at 355.)

Attempts to Sell Irex

24. In 2001, Irex engaged Snyder to conduct a market check for potential buyers of Irex. (*Id.* at 69.)

25. The concept to sell the company in 2001 involved finding a buyer for the operating business with proceeds going to Irex shareholders and the company would retain the asbestos liabilities. (*Id.*)

26. Snyder's 2001 market check returned no serious, credible expressions of interest to buy Irex. (*Id.* at 69-70.)

27. At that time, trading of Irex stock on the market was very limited. (*Id.* at 71.)

28. In 2001, public trading of Irex stock was for \$8 to \$12 a share. (*Id.*)

29. Mr. Liddell then went to the Irex Board of Directors ("Irex Board") and suggested a stock repurchase of \$20 a share. (*Id.* at 72.)

30. The Irex Board rejected Mr. Liddell's repurchase proposal because, in part, of concern for potential liability should AC&S fail, leaving creditors to question Irex's decision to buy back shares with company money where the money should arguably have gone to creditors. (*Id.* at 72-73.)

AC&S Arbitration with Travelers

31. AC&S had a 1988 agreement with Travelers under which a percentage of asbestos claims classified as products completed coverage versus ongoing operations coverage was set. (*Id.* at 356.)

32. In early 2001, Irex initiated an arbitration proceeding, under its insurance policy, seeking to increase the percentage of claims identified as covered under the policy. (*Id.* at 355-56.)

33. By the time of the 2001 arbitration proceeding, the products completed coverage was exhausted. (*Id.* at 355.)

34. Travelers disputed the extent of its liability for ongoing operations coverage claims. (*Id.* at 355.)
35. AC&S contended that its Travelers insurance coverage for ongoing operations coverage claims was unlimited. (*See* N.T. Non-Jury Trial at 355.)
36. Travelers argued that the entirety of the asbestos litigation constituted one event, wherein its liability for ongoing operations coverage would be limited to one-million dollars. (*Id.*)
37. Travelers also argued that the claims were converted to products completed claims because AC&S's operations of installing insulation containing asbestos ceased in 1973, before the years the insurance policies were written, between 1976 and 1979. (*Id.* at 354, 356.)
38. AC&S contended the claims were ongoing operations claims because they involved claimants exposed while installing asbestos-containing insulation. (*Id.* at 356.)
39. In July of 2003, the three-person arbitration panel made a two-to-one ruling in favor of Travelers and against AC&S. (*Id.* at 369.)
40. The majority of the arbitration panel reasoned that the claims AC&S wished to tender to Travelers were completed operations claims and were therefore barred by the aggregate limit under the policy. (*Id.*)
41. Later in 2003, AC&S filed a Federal Arbitration Act proceeding in the United States District Court for the Eastern District of Pennsylvania. (*Id.* at 370.)
42. In its Arbitration Act proceeding, AC&S reasserted arguments that the arbitration panel exceeded its authority and that its actions were barred by the automatic stay of AC&S's bankruptcy proceedings. (*Id.*)
43. In September of 2004, the Eastern District Court ruled against AC&S and found the arbitration decision to be valid. (*Id.* at 371.)
44. At the end of 2004, AC&S appealed from the District Court to the United States Court of Appeals for the Third Circuit. (*Id.*)
45. On January 19, 2006, the Third Circuit found that the arbitration decision violated the automatic stay of AC&S's bankruptcy proceedings and voided the arbitration decision. (*Id.* at 377.)
46. Travelers filed a writ of certiorari with the United States Supreme Court. (*Id.* at 380.)
47. In May of 2006, the United States Supreme Court denied certiorari. (*Id.*)

48. The underlying issues regarding the percentage of asbestos cases covered under the Travelers policies and the number of occurrence cases remained at the time of the merger in October of 2006. (*Id.* at 355-56, 388-89.)

49. Attempts to reach a settlement among AC&S, Travelers and the asbestos claimants were unsuccessful at the time of the merger in October of 2006. (*Id.* at 390-91, 393-94.)

AC&S Bankruptcy

50. In the early 2000s, AC&S had several hundred thousand lawsuits pending against it. (*Id.* at 68.)

51. In 2001, plaintiffs' lawyers began to file asbestos lawsuits against Irex as the parent company of AC&S. (*Id.* at 360.)

52. Irex did not have insurance independent of AC&S's insurance policies. (*Id.* at 361.)

53. On June 30, 2001, AC&S sold its operating assets to Irex subsidiaries to concentrate its efforts in defending asbestos lawsuits. (*Id.* at 58, 352.)

54. By late 2001, AC&S began to explore the possibility of a prepackaged bankruptcy under which a plan for reorganization would be agreed upon amongst AC&S, Irex and the plaintiffs' lawyers prior to AC&S filing for bankruptcy. (*Id.* at 357.)

55. AC&S filed for bankruptcy in September of 2002. (*Id.* at 77, 363.)

56. In claiming Chapter 11 bankruptcy for AC&S, Irex sought injunctions from the bankruptcy court to protect Irex and its subsidiaries from asbestos lawsuits. (*Id.* at 77.)

57. At the time of filing for bankruptcy, AC&S had negotiated for Irex to contribute ten-million dollars to the bankruptcy plan. (*Id.* at 362-64.)

58. Irex was willing to contribute the ten-million dollars so that it could be protected from asbestos lawsuits with an injunction granted by the bankruptcy court. (*Id.* at 359-60.)

59. The ten-million dollars from Irex would then be put in a trust to pay asbestos claimants. (*Id.* at 359, 362-63.)

60. At the time of filing for bankruptcy, AC&S had not successfully negotiated a full prepackaged bankruptcy. (*Id.* at 363-64.)

61. The bankruptcy court issued temporary injunctions, protecting Irex and their subsidiaries from derivative lawsuits from AC&S. (*Id.* at 77.)

62. Whether the bankruptcy court would issue a permanent injunction required that it confirm a reorganization plan for AC&S. (*Id.* at 77-78.)
63. After filing for bankruptcy, negotiations for a prepackaged bankruptcy plan continued. (*See* N.T. Non-Jury Trial at 364-65.)
64. The asbestos plaintiffs' attorneys were able to negotiate for liens on AC&S's insurance assets in order to settle all of its outstanding asbestos cases. (*Id.* at 365.)
65. The asbestos plaintiffs' attorneys were also able to negotiate for Irex to contribute twelve-and-one-half-million dollars to AC&S's bankruptcy rather than the originally agreed upon ten-million dollars. (*Id.* at 366.)
66. The negotiated reorganization plan was agreed upon among AC&S, the asbestos plaintiffs' lawyers, and Irex. (*Id.*)
67. On December 15, 2003, during a confirmation hearing, the negotiated reorganization plan was presented to the bankruptcy court. (*Id.* at 366.)
68. Travelers objected to the reorganization plan on a number of grounds. (*Id.* at 367.)
69. In January of 2004, the bankruptcy court recommended to the district court that the reorganization plan not be confirmed. (*Id.* at 367, 368.)
70. The bankruptcy court reasoned that the reorganization plan should not be confirmed because the negotiated liens for existing claimants made those claimants secured creditors. (*Id.* at 367.)
71. The bankruptcy court further reasoned that the claimants' status as secured creditors violated the general principles of equality required by the Bankruptcy Code. (*Id.* at 367.)
72. The United States Court of Appeals for the Third Circuit decided an asbestos-related bankruptcy case, *Combustion Engineering*, on December 2, 2004. (*Id.* at 259, 371.)
73. AC&S management, including James Hipolit, believed the *Combustion Engineering* decision was controlling precedent that indicated AC&S's outstanding bankruptcy plan was not confirmable. (*Id.* at 375.)
74. The *Combustion Engineering* decision indicated that AC&S's outstanding bankruptcy plan was not confirmable, in part, because of the pre-bankruptcy liens that AC&S agreed to give then existing asbestos claimants. (*Id.* at 372-73.)
75. The *Combustion Engineering* decision also indicated that AC&S's bankruptcy plan was not confirmable because AC&S did not have sufficient ongoing business operations to qualify as reorganization under the Bankruptcy Code. (*Id.* at 373-74.)

76. AC&S carried out discussions regarding AC&S's perceived lien problems with the asbestos plaintiffs' lawyers throughout 2005. (*Id.* at 376.)

77. The lien issue remained unresolved at the end of 2005. (*Id.*)

78. AC&S had not resolved the ongoing business operations issue prior to the merger in October of 2006. (*Id.* at 390.)

79. As of October 2006, discussions regarding a revised prepackaged bankruptcy plan continued, but resolution of the lien and business operations issues remained unresolved. (*Id.* at 387-90, 431.)

80. As of October 2006, AC&S management feared that AC&S would run out of the funds necessary to afford the bankruptcy proceedings if the proceedings continued for more than a couple years. (*Id.* at 420-23.)

81. If AC&S ran out of funds for bankruptcy proceedings, it would have to be liquidated. (*Id.* at 424.)

82. In October 2006, Irex management concluded that if AC&S could not obtain a confirmed plan of reorganization and accompanying injunctions for Irex and AC&S, Irex would become a target of asbestos claimants and would be forced to file for bankruptcy. (*Id.* at 424-25.)

Record Years for Irex and Reorganization Plan

83. From 2002 through 2005, Irex had successful, record operating years. (*Id.* at 73-74.)

84. From 2003 to 2006, Irex had a large construction project in Canada, Syncrude, that accounted for 33.8% of Irex's incremental revenue. (*Id.* at 155, 1054-55; Pet'r's Ex. 32.)

85. In the beginning of 2006, because of positive factors leading to a build-up of the equity value of Irex, Mr. Liddell believed the timing was right for restructuring. (N.T. Non-Jury Trial at 75-76.)

86. Mr. Liddell believed going into 2006 that there were positive factors to pitch to a bank in order to obtain loans to support the restructuring. (*Id.* at 75-76.)

87. The 2006 restructuring would have to be executed with bank loans rather than with company money because of potential legal liability related to uncertainty as a result of pending asbestos lawsuits, and uncertainty over insurance coverage and the status of AC&S. (*Id.*)

88. Mr. Liddell presented his ideas for restructuring to the Board of Directors of Irex ("Irex Board") on April 26, 2006. (*Id.* at 96-97; *see also* Pet'r's Ex. 36.)

89. One of the main objectives for restructuring was to create a holding company for Irex that would qualify as an S-corporation for tax purposes; Irex and its subsidiaries would also qualify as S-corporation subsidiaries. (N.T. Non-Jury Trial at 90; *see also* Pet'r's Ex. 33 at 14.)

90. Another main objective for restructuring was to provide liquidity at a fair price for non-participating shareholders. (N.T. Non-Jury Trial at 91; *see also* Pet'r's Ex. 33 at 14.)

91. In order to achieve these objectives, Mr. Liddell proposed a buyout merger transaction wherein a holding company would be created to: acquire all of the issued and outstanding shares of common stock of Irex and form a wholly-owned subsidiary to merge into Irex, with Irex being the surviving corporation. (N.T. Non-Jury Trial at 99-103; *see also* Pet'r's Exs. 28, 36.)

92. In the merger transaction, participating shareholders would contribute their shares of Irex common stock in exchange for common stock of the holding company. (N.T. Non-Jury Trial at 96-98; *see also* Pet'r's Ex. 36.)

93. In the merger transaction, non-participating shareholders would sell their shares of common stock in exchange for cash and would no longer be equity owners of Irex. (N.T. Non-Jury Trial at 100-101; *see also* Pet'r's Ex. 36.)

94. Synder's most recent Irex stock valuation for the annual 401(k) valuation was \$56 on December 31, 2005. (N.T. Non-Jury Trial at 110.)

95. Mr. Liddell presented the Irex Board with a written offer for NL Holdings to acquire Irex at \$60 per share. (N.T. Non-Jury Trial at 102-03, 113; *see also* Pet'r's Ex. 28.)

96. Mr. Liddell engaged Snyder to prepare a fairness opinion for the Board in connection with the \$60 per share offer. (*See* N.T. Non-Jury Trial at 113, 119.)

97. After Mr. Liddell presented the Irex Board with NL Holdings written expression of interest, he disassociated from the Irex Board on all deliberations and actions taken related to the offer. (N.T. Non-Jury Trial at 118.)

Protection Mechanisms for Non-Participating Shareholders

98. The Irex Board approved adding three members to its board to form a special, independent committee ("Special Committee") to evaluate the fairness of Holdings' \$60 per share offer to non-participating shareholders. (N.T. Non-Jury Trial at 121, 488, 570; *see also* Pet'r's Exs. 28, 151 at 5.)

99. Mr. Liddell had no involvement or influence over the Irex Board's decision to add three new directors. (N.T. Non-Jury Trial at 122.)

100. The new directors that would comprise the Special Committee were Jane Pinkerton, Tom Washburn, and Ken Stoudt. (*Id.*)
101. None of the new directors had a financial interest in NL Holdings. (N.T. Non-Jury Trial at 489, 570; *see also* Pet'r's Ex.151 at 5.)
102. Jane Pinkerton and Tom Washburn were minority shareholders of Irex stock at the time they joined the Special Committee. (N.T. Non-Jury Trial at 493-94; *see also* Pet'r's Ex. 151 at 5.)
103. The Special Committee hired its own legal counsel and financial advisor. (N.T. Non-Jury Trial at 138-39.)
104. The Special Committee engaged Curtis Financial Group ("Curtis") to prepare a fairness opinion on the proposed merger price of \$60.00 per share. (N.T. Non-Jury Trial at 872-73; *see also* Pet'r's Ex. 64 at 4.)
105. During the course of its engagement, Curtis presented the Special Committee with a draft of their analysis. (N.T. Non-Jury Trial at 596-97, 926-27; *see also* Pet'r's Ex. 42.)
106. Curtis's draft report indicated that the three methodologies used by Curtis each resulted in median ranges of value for Irex at \$65 to \$67 per share. (N.T. Non-Jury Trial at 602-03, 926-27; Pet'r's Ex. 42 at 2.)
107. Based upon Curtis's draft report, the Special Committee determined the acceptable range of value for Irex stock was \$65-70 per share. (N.T. Non-Jury Trial at 602-03.)
108. Ken Stoudt, on behalf of the Special Committee, negotiated with Kirk Liddell, on behalf of the buying group, to increase the offer price to \$66 per share. (N.T. Non-Jury Trial at 194-96, 604-06.)
109. The Special Committee engaged Curtis to prepare a fairness opinion with regard to the negotiated price of \$66 per share. (N.T. Non-Jury Trial at 607-08, 926-27.)
110. Curtis specialized in company valuations. (*Id.* at 873.)
111. Valuations are typically part of any investment banking engagement. (*Id.* at 874.)
112. Curtis was experienced in preparing fairness opinions in support of transactions including mergers, acquisitions, and raising capital. (*Id.* at 874.)
113. Anthony Latini, Jr. was managing director of Curtis in 2006. (*Id.* at 872.)
114. Anthony Latini, Jr. was Curtis's point person for the engagement by the Special Committee. (*Id.* at 880.)

115. Curtis was independent from Irex and had no previous connection to Irex. (*Id.* at 879.)

116. Curtis had experience valuing companies with asbestos-related litigation and bankruptcy exposure. (*Id.* at 875-76.)

117. Curtis had experience valuing companies in the construction, engineering, and building products industries. (*Id.* at 876-77; *see also* Pet'r's Ex. 64 at p. 27.)

118. The Special Committee hired Curtis because of its experience valuing companies with asbestos-related liability, its experience valuing contracting companies, and its lack of a conflict of interest. (N.T. Non-Jury Trial at 500-01, 587; *see also* Pet'r's Ex. 62.)

119. Dissenters rights as to the price paid per share to non-participating shareholders were granted. (N.T. Non-Jury Trial at 101-102.)

Methodologies of Irex Stock Valuation

120. Professor Greg A. Jarrell is an expert in business valuation. (*Id.* at 1012, 1014-15.)

121. Professor Jarrell conducted an independent valuation of Irex's stock price as of October 20, 2012, the merger date. (N.T. Non-Jury Trial at 1015; *see also* Pet'r's Exs. 149, 154.)

122. Snyder, Curtis and Professor Jarrell considered various valuation methodologies and evidence of Irex's stock value. (N.T. Non-Jury Trial at 731-36, 891-95, 1017-19, 1024-26, 1029-1034; *see also* Pet'r's Exs. 25 at 30, 89 at 1, 154 at 13-14, 21-22.)

123. Curtis attempted to use six valuation methodologies: guideline public company analysis, precedent merger and acquisition transactions analysis, discounted cash flow analysis, net book value analysis, recent trading analysis, and leveraged recapitalization analysis. (N.T. Non-Jury Trial at 889-92; *see also* Pet'r's Ex. 25 at p. 39.)

124. Curtis and Professor Jarrell attempted to use guideline public company analysis and precedent merger and acquisition analysis, but ultimately rejected these methods as unreliable indicators of value. (N.T. Non-Jury Trial at 891-92, 1123-24.)¹

125. Guideline public company analysis and precedent merger and acquisition analysis were not reliable indicators of value because no sample existed of underlying companies that were sufficiently comparable to Irex. (N.T. Non-Jury Trial at 891-92, 1118-23; *see also* Pet'r's Ex. 25 at 41-50).

¹ The Court notes that Professor Jarrell refers to guideline public company analysis as the "trading multiples approach" and precedent merger and acquisition analysis as the "transaction multiples approach." (*See* N.T. 1018-22; *see also* Pl. Ex. 154 at 10-11, 13.)

126. Snyder, Curtis and Professor Jarrell all used discounted cash flow as a reliable valuation methodology to determine an implied value range for Irex stock. (N.T. Non-Jury Trial at 736-39, 902, 1015-16; *see also* Pet'r's Exs. 51 at 51-53, 89 at 1, 154 at 10.)
127. Discounted cash flow is the appropriate primary methodology for determining the fair value of Irex stock on October 20, 2006. (N.T. Non-Jury Trial at 1015-16, 1019-20.)
128. Under the discounted cash flow approach, a company's value is equal to the present value of expected future free cash flows discounted at an appropriate risk adjusted rate. (*Id.* at 902, 1033-34; *see also* Pet'r's Exs. 25 at 51, 149 at 17.)
129. Valuation analysts do not develop the projections used in discounted cash flow analysis. (N.T. Non-Jury Trial at 1046-47.)
130. Standard procedure of discounted cash flow and valuation analysts is to rely on projections provided by the subject company's operating managers. (*Id.* at 1047.)
131. The Syncrude project was a significant contributor to Irex's growth. (*Id.* at 1054-1055.)
132. The Syncrude project was winding down and coming to an end in 2006. (*Id.* at 155-57.)
133. Irex management projected an 8.3% decline in revenue from 2006 to 2007. (*Id.* at 289-91, 299, 1055-56.)
134. Professor Jarrell tested Irex management's projection of an 8.3% decline in revenue from 2006 to 2007 and found it to be reasonable in light of the Syncrude project ending. (*Id.* at 1054-56; *see also* Pet'r's Ex. 154 at 32, 33.)
135. Irex's cumulative average growth rate over the period of 1987 to 2005 was 2.6%. (N.T. Non-Jury Trial at 1056-57.)
136. Irex management's revenue growth rate of 3% was consistent with Snyder's application of a 3% annual growth rate in its yearly 401(k) valuations dating back to 2001. (N.T. Non-Jury Trial 767, 1059; *see also* Pet'r's Ex. 89 at P03211.)
137. Irex's historical revenue growth rate over the period 1987 to annualized 2006 is 3.0%. (N.T. Non-Jury Trial at 1059-60.)
138. Revenue growth is one of the seven value drivers that impact discounted cash flow analysis. (*Id.* at 1060-61.)
139. Irex is a business that has low profit margins. (*Id.* at 1060.)
140. Profit margin is one of the seven value drivers that impact discounted cash flow. (*Id.* at 1037, 1069.)

141. Professor Jarrell tested Irex management's profit margin (EBITDA) projections. (*Id.* at 1061-65; *see also* Pet'r's Ex. 154 at 39.)
142. Valuation professionals regularly refer to Ibbotson data for valuation variables such as EBITDA margins. (N.T. Non-Jury Trial at 1066.)
143. Irex's Standard Industrial Classification (SIC) code is 17. (*Id.*)
144. Irex's projected profit margins were higher than Ibbotson's EBITDA margins for SIC code 17 for 2005 and the five-year averages. (*Id.*)
145. The projected profit margins of 4.4% was higher than Irex's historical profit margins of 3.9%. (*Id.* at 1061-62; Pet'r's Ex. 154 at 39.)
146. Irex was experiencing decreasing profit margins in 2006 despite an increase in revenue. (N.T. Non-Jury Trial at 1062-63.)
147. The higher the profit margin, the higher the discounted cash flow value to investors, all other factors being equal. (*Id.* at 1037, 1064.)
148. Professor Jarrell was satisfied that Irex management's profit margin projections were reasonable, good faith projections. (*Id.* at 1069.)
149. Professor Jarrell determined that Irex management's projection of a steady 3% growth rate after 2007 was reasonable in light of its consistency with Irex's long-term historical growth rate and with Snyder's annual projections for 401(k) valuations since 2000. (*See id.* at 1056-59; *see also* Pet'r's Ex. 154 at 34-38.)
150. Discount rate is one of the seven value drivers that impact discounted cash flow analysis. (N.T. Non-Jury Trial at 1037, 1069.)
151. Valuation analysts use the weighted average cost of capital (WACC) as part of standard procedure to determine the discount rate applied in discounted cash flow analysis. (1071.)
152. WACC is a weighted average of two types of capital, equity capital and debt capital. (*Id.* at 1071-72; *see also* Pl. Ex. 154 at 43.)
153. As part of WACC, the cost of equity capital is computed by using the capital asset pricing model or the build-up method. (N.T. Non-Jury Trial at 1072-73.)
154. Professor Jarrell used the capital asset pricing model in his Irex valuation. (*Id.* at 1073.)
155. Under the capital asset pricing model, the cost of equity is equal to the risk free rate plus beta times market risk premium. (*Id.* at 1079.)

156. Curtis used the build-up method in its calculations. (*Id.* at 1073, 1077.)
157. Beta is an index of risk. (*Id.* at 1073.)
158. Beta is included in the capital asset pricing model equation. (*Id.*; *see also* Pl. Ex. 154 at 44.)
159. Under the build-up method, an industry premium that implies beta is used to compute the cost of equity capital. (N.T. Non-Jury Trial at 1077.)
160. The build-up method is consistent with the capital asset pricing model in that one approach implies the other. (*Id.*)
161. A beta of one means that the subject stock has the same risk as the S&P 500. (*Id.* at 1073.)
162. A beta greater than one means that the subject stock is riskier or more volatile than the S&P 500. (*Id.*)
163. Companies in the construction industry typically have betas greater than one. (*Id.* at 1074.)
164. All else being equal, a higher beta results in a higher WACC. (*Id.* at 1075.)
165. All else being equal, a higher WACC results in a lower value. (*Id.*)
166. Ibbotson SIC code 17 provides four types of sample unlevered betas for this industry: median, SIC composite, large composite, and small composite. (*Id.* at 1074-75; *see also* Pet'r's Ex. 154 at 45.)
167. To strengthen his position, Professor Jarrell wanted to pick the lowest possible unlevered beta. (N.T. Non-Jury Trial at 1075.)
168. Of the four betas, the median unlevered beta was the lowest at 1.06. (N.T. Non-Jury Trial at 1075; *see also* Pet'r's Ex. 154 at 45.)
169. Professor Jarrell chose 1.06 as his unlevered beta. (N.T. Non-Jury Trial at 1075.)
170. The SIC code 17 SIC composite unlevered beta was 1.47. (*Id.* at 1077; *see also* Pet'r's Ex. 154 at 45.)
171. An Ibbotson industry premium of 3.5% implies a beta of 1.47. (N.T. Non-Jury Trial at 1077.)
172. The WACC calculation also requires the weight of debt and the weight of equity. (N.T. Non-Jury Trial at 1075-76; *see also* Pet'r's Ex. 154 at 43.)

173. The weight of debt is the ratio of the market value of debt to total capitalization. (N.T. Non-Jury Trial at 1072, 1076; *see also* Pet'r's Ex. 154 at 43.)
174. Professor Jarrell used Ibbotson's SIC code 17 data to compute the weights. (N.T. Non-Jury Trial at 1076.)
175. Based on the SIC code 17 information, Professor Jarrell chose a range of debt to total capital ratio (leverage ratio) of 15% to 25%. (*Id.*)
176. Professor Jarrell then used his leverage ratio to determine a levered beta. (*Id.*)
177. A leverage ratio of 20% results in a beta of 1.23. (*Id.*; *see also* Pet'r's Ex. 154 at 45.)
178. Ibbotson provides the market risk premium. (N.T. Non-Jury Trial at 1077-78.)
179. The market risk premium, as provided by Ibbotson, is 7.08%. (*Id.*)
180. The capital asset pricing model typically understates actual returns for small companies unless a size premium is added to the model. (*Id.* at 1079-80.)
181. It is common practice for valuation analysts to add a size premium to the capital asset pricing model. (*Id.* at 1080.)
182. Ibbotson generates size premiums. (*Id.*)
183. Ibbotson's size premiums are divided into ten deciles. (*Id.* at 1080-83; *see also* Pet'r's Ex. 154 at 47.)
184. Each decile has market capitalization limits. (N.T. Non-Jury Trial at 1080; *see also* Pet'r's Ex. 154 at 47.)
185. A company's Ibbotson size premium is determined by examining within which market capitalization limits the company fits. (N.T. Non-Jury Trial at 1080; *see also* Pet'r's Ex. 154 at 47.)
186. The smallest size premium decile, the 10b decile, is comprised of companies with a market capitalization of \$1 million to \$169 million. (N.T. Non-Jury Trial at 1081; *see also* Pet'r's Ex. 154 at 47.)
187. The size premium for the 10b decile is 9.83%. (N.T. Non-Jury Trial at 1081; *see also* Pet'r's Ex. 154 at 47.)
188. The implied fair value of Irex per share as determined by Professor Jarrell and Mr. Wolf each place Irex in the 10b decile. (N.T. Non-Jury Trial at 1081-82; *see also* Pet'r's Ex. 154 at 48.)

189. Professor Jarrell applied the 9.83 size premium in his capital asset pricing model equation. (N.T. Non-Jury Trial at 1084.)
190. Professor Jarrell determined the cost of equity is 23.53%. (N.T. Non-Jury Trial at 1084.)
191. The cost of debt based on Irex's actual cost of debt is 7.30%. (*Id.* at 1085.)
192. The after tax cost of debt is 4.67%. (*Id.* at 1086; *see also* Pet'r's Ex. 154 at 51.)
193. Professor Jarrell calculated the range for WACC to be 19.13 % to 20.4% with a midpoint of 19.76%. (N.T. Non-Jury Trial at 1086-87; *see also* Pet'r's Ex. 154 at 52.)
194. Ibbotson's discount rate for SIC code 17 is 19.22%. (N.T. Non-Jury Trial at 1087)
195. Ibbotson's discount rate for SIC code 17 of 19.22% indicates the reasonableness of Professor Jarrell's discount rate. (*Id.*)
196. In calculating Irex's net debt, Professor Jarrell looked at the operating cash requirements of a sample of firms in Irex's industry, selected the lowest amount of operating cash requirement from the sample, and applied that as his estimate of the amount of cash Irex needed for operating requirements. (*Id.* at 1092; *see also* Pet'r's Ex. 154 at 58.)
197. The operating cash requirement is deducted in the net debt calculation to avoid double counting. (N.T. Non-Jury Trial at 1092.)
198. Irex had \$6.9 million on its books, accounting for AC&S's cash and marketable securities. (*Id.*; *see also* Pl. Ex. 154 at 58 n.2.)
199. In calculating net debt, Professor Jarrell deducted the \$6.9 million because the it was part of the pending bankruptcy settlement wherein Irex agreed to relinquish 100% ownership in AC&S. (N.T. Non-Jury Trial at 1092; *see also* Pet'r's Ex. 154 at 58 n.3.)
200. As a final step in his discounted cash flow analysis, Professor Jarrell calculated the asbestos discount range. (N.T. Non-Jury Trial at 1093-94.)
201. Professor Jarrell calculated the present value of \$12.5 million because that was the amount Irex had committed itself to as part of its unapproved bankruptcy plan. (*Id.* at 1099.)
202. Professor Jarrell used the present value of \$12.5 million and accounted for tax benefits of making installment payments to determine the minimum reasonable estimate of the asbestos liability of \$3.8 million. (*Id.* at 1099.)

203. Professor Jarrell computed the maximum asbestos liability to be \$3.5 billion in the event Irex would not obtain injunction protection and be wiped out. (*Id.* at 1100; *see also* Pet'r's Ex. 64.)

204. Professor Jarrell calculated the percentage increase in Irex's stock price from 2004, when confirmation of the bankruptcy plan was denied, to the date the board first discussed a possible buyout merger in February of 2006, when the stock price was unaffected by the potential merger. (N.T. Non-Jury Trial at 1103-04; *see also* Pet'r's Ex. 154 at 68.)

205. Irex's stock price increased 133% from 2004 to February of 2006. (N.T. Non-Jury Trial at 1103-04; Pet'r's Ex. 154 at 68.)

206. Professor Jarrell determined a 133% increase in liability from present value of the actual settlement deal, \$3.8 million, was \$11.7 million, representing the maximum contingent asbestos liability. (N.T. Non-Jury Trial at 1103-04; Pet'r's Ex. 154 at 69.)

207. Professor Jarrell then determined the midpoint of the maximum and minimum contingent asbestos liabilities, \$7.7 million, based on the theory that either outcome was equally likely. (N.T. Non-Jury Trial at 1104; Pet'r's Ex. 154 at 69-70.)

208. Professor Jarrell's discounted cash flow analysis yielded an implied value per share of Irex in the range of \$51.71 to \$75.70. (N.T. Non-Jury Trial at 1107-08; Pet'r's Ex. 25 at 72.)

209. Curtis's discounted cash flow analysis yielded an implied value per share of Irex in the range of \$53.85 to \$75.99. (N.T. Non-Jury Trial at 926; *see also* Pet'r's Ex. 25 at 53.)

210. Snyder's discounted cash flow valuation of Irex yielded an implied value per share of Irex in the range of \$70.76 to \$90.52 before applying an asbestos discount. (N.T. Non-Jury Trial at 775.)

211. Snyder's discounted cash flow valuation of Irex yield an implied value per share of Irex in the range of \$49.53 and \$63.50 after applying an asbestos discount. (Pet'r's Ex. 89 at I, p. 1.)

212. Curtis also looked to book value as an indicator of value and found that Irex's implied value per share based on book value was in the range of \$61.26 to \$74.41. (N.T. Non-Jury Trial at 893-94; Pet'r's Ex. 25 at 54.)

213. Curtis's leverage recapitalization analysis, book value analysis, and shares traded analysis resulted in ranges of values grouped near and overlapping the range of values resulting from Curtis's discounted cash flow analysis. (N.T. Non-Jury Trial at 899-901; Pet'r's Ex. 25 at 40.)

214. Curtis did not conduct a market check. (N.T. Non-Jury Trial at 516, 588-89.)

215. The Special Committee was not authorized to conduct a market check as part of its due diligence. (N.T. Non-Jury Trial at 114-16, 589.)

216. The Special Committee believed the asbestos-related litigation exposure would contribute to an undervaluation of the stock if a market check was conducted. (N.T. Non-Jury Trial at 589.)

Merger Transaction

217. As a result of its valuation and analysis, Curtis found that \$66 per share was a fair value of Irex stock. (N.T. Non-Jury Trial at 608, 609, 927-29; Pet'r's Exs. 25, 115.)

218. The Special Committee voted to approve the \$66 per share offer as the fair value of Irex stock. (N.T. Non-Jury Trial at 514, 609; Pet'r's Ex. 50.)

219. By resolution dated August 28, 2006, the Special Committee recommended the Board approve the \$66 per share offer. (N.T. Non-Jury Trial at 515-16; Pet'r's Ex. 50.)

220. The Board approved the offer and the Agreement and Plan of Merger was approved and adopted on August 31, 2006. (N.T. Non-Jury Trial at 88-89; Pet'r's Ex. 33 at P00009, P00109.)

221. A proxy statement was sent to Irex shareholders informing them of the special meeting to be held on October 10, 2006 to vote on the transaction. (N.T. Non-Jury Trial at 88-89; Pet'r's Ex. 33.)

222. The proxy statement also contained information regarding dissenters rights. (Pet'r's Ex. 33 at 7.)

223. On November 8, 2006, James Mitchell sent a letter to Irex giving notice that he was exercising dissenters rights. (N.T. Non-Jury Trial at 1232; Pet'r's Ex. 4.)

224. The total number of shares involved in the vote was 405,681. (N.T. Non-Jury Trial at 1401.)

225. Eighty-six percent of the shares voted in favor of the \$66 per share offer. (*Id.* at 1402.)

226. The total number of shares dissented was 17,030. (*Id.* at 294.)

227. By stipulation, the remaining dissenters are Gary L. Sample, Joyce A. Sample, Josephine A. Feagley, GLS Partners and Long Orthodontic Associates, P.C. Retirement Plan Trust. ("Sample Parties").

228. On October 20, 2006, the Merger was completed.

Dissenters Rights and Valuation

229. James Mitchell is the general partner and manager of Mitchell Partners. (*Id.* at 1226.)

230. Mitchell Partners is a hedge fund that is primarily invested in microcap stocks and particularly thinly traded microcap stocks. (*Id.* at 1226-27.)

231. Mr. Mitchell first purchased 1,400 shares of Irex stock at \$24 per share on March 26, 1997. (*Id.* at 1254; Pet'r's Ex. 5.)

232. Mr. Mitchell then sold 1,000 shares of Irex stock at \$25 per share on March 26, 1997. (*Id.*)

233. Mr. Mitchell bought Irex stock on dates between December 18, 2001 and April 18, 2006 at prices ranging from \$10.25 to \$65.00 per share. (*Id.*)

234. Mr. Mitchell received a letter from Lori Pickell dated May 15, 2006 informing him of the proposed buyout merger wherein minority shareholders would be paid \$60.00 per share in exchange for their shares. (N.T. Non-Jury Trial at 1238; Pet'r's Ex. 6.)

235. Mr. Mitchell testified that he thought the offer price of \$60 per share was outrageous and below what the value of the company was. (N.T. Non-Jury Trial at 1239.)

236. On May 30, 2006, Mr. Mitchell bought 598 shares of Irex stock at a price of \$65.50 per share. (*Id.* at 1258; Pet'r's Ex. 5.)

237. On June 2, 2006, Mr. Mitchell bought 1,363 shares of Irex stock at a price of \$63.75. (N.T. Non-Jury Trial at 1259; Pet'r's Ex. 5.)

238. On June 5, 2006, Mr. Mitchell bought 1,431 shares of Irex stock at a price of \$63.75. (N.T. Non-Jury Trial at 1259; Pet'r's Ex. 5.)

239. On June 9, 2006, Mr. Mitchell bought 800 shares of Irex stock at a price of \$64.50. (N.T. Non-Jury Trial at 1259; Pet'r's Ex. 5.)

240. In total, Mr. Mitchell purchased 4,192 shares of Irex stock after he received notice that management was going to cash out shareholders at a price of \$60 per share. (N.T. Non-Jury Trial at 1259.)

241. Mr. Mitchell bought nearly a third of his total Irex holdings after he received notice of the proposed buyout merger. (N.T. Non-Jury Trial at 1260.)

242. Mr. Mitchell did not do a detailed analysis similar to the valuations done by Snyder, Curtis, and Professor Jarrell. (*See id.* at 1240, 1243.)

243. Mr. Mitchell looked to other stocks and concluded that the Irex offer price was too low. (*Id.* at 1240.)

244. Mr. Mitchell testified that he believed Irex ought to be worth \$144 to \$180 per share. (*Id.* at 1249.)

245. Mr. Mitchell sent a demand for payment of fair value to Irex dated December 20, 2006 wherein Mr. Mitchell estimated fair value of Irex shares to be \$125 per share. (*Id.* at 1248-49; Pet'r's Ex. 20.)

246. Steven A. Wolf is the executive director of Capstone Advisory Group ("Capstone"). (N.T. Non-Jury Trial at 1271.)

247. Capstone is a dispute advisory firm in the areas of business valuation, forensic litigation, and bankruptcy reorganization. (*Id.* at 1270.)

248. Mr. Wolf used the discounted cash flow analysis and guideline public company analysis in deriving the value of Irex. (*Id.* at 1342.)

249. In his discounted cash flow analysis, Mr. Wolf did not use management's projections regarding growth rate. (*Id.* at 1287-90, 1430-31.)

250. In his discounted cash flow analysis, Mr. Wolf used Irex management's profit margin projection where it exceeded the historical profit margin. (*Id.* at 1356, 1442-43, 1448.)

251. In his guideline public company analysis, Mr. Wolf used the companies that Snyder, Curtis and Jarrell determined were too different from Irex to be a reliable indicator of value. (*Id.* at 891-92, 1118-23, 1424-25.)

CONCLUSIONS OF LAW

1. A market check would not have provided a reliable indication of the fair value of Irex stock.
2. The buying group reasonably added a no-shop provision, preventing a market check, to its offer where a market check carried the potential of revealing little or no interest in Irex following the failed 2001 auction and subsequent and recurring unsettled bankruptcy and asbestos litigation issues.
3. Dissenters rights were granted in accordance with Pennsylvania law.
4. Irex management's projections were reasonable, good faith projections.
5. Snyder, Curtis, and Professor Jarrell reasonably and as standard practice, relied upon Irex management's projections.

6. The Special Committee exercised due diligence in (1) obtaining independent legal counsel and financial advisor to assess the fair value of Irex stock and (2) negotiating for the best fair price within the reliable ranges of values, particularly the discounted cash flow range, as provided by Curtis.
7. Mr. Wolf unreasonably and arbitrarily adjusted value drivers, altering Irex's management's growth rate projections and accepting management's optimistic profit margins despite a lower historical profit margin where all adjustments served to increase fair value.
8. Mr. Wolf's unreasonable and selective use of Irex's projections and other discounted cash flow value drivers rendered his analysis unreliable.
9. Guideline public company analysis and precedent merger and acquisition analysis were not reliable indicators of value.
10. Discounted cash flow is the appropriate methodology for valuing Irex stock as of the merger date.
11. Market based information such as Irex stock's trading price prior to the announcement of merger and the 2001 auction serve as evidence of value.
12. The fair value of Irex stock on the date of its merger, October 20, 2006, when Irex was acquired by North Lime Holdings Corporation, was sixty-six dollars (\$66.00) per share.
13. Gary L. Sample, Joyce A. Sample, Josephine A. Feagley, GLS Partners and Long Orthodontic Associates, P.C. Retirement Plan Trust's issues are moot as the Court has found the value paid for her shares was the fair value of Irex stock.

DISCUSSION

The Court initially notes that its jurisdiction in a dissenters rights proceeding is plenary and exclusive. 15 Pa.C.S. § 1579(c).

Irex management testimony came from Kirk Liddell, President and CEO, Lori Pickell, CFO, Secretary, and Treasurer, and Jim Hipolit, Senior Vice President and General Counsel. Management outlined the historical structure of AC&S and Irex from its birth as well as the pre-merger structure and geographic scope of the subcontracting construction industry. Restructuring became necessary as AC&S became a large target for asbestos suits (several

hundred thousand) and Irex also became a target (suits exceeding 15,000). Efforts to sell in 2001 came up with no legitimate buyers. AC&S filed for bankruptcy in 2002 in an effort to protect Irex with hopes of a reasonably quick AC&S reorganization. However, between 2002 and 2003, the bankruptcy reorganization efforts fell apart with the Bankruptcy Court recommending rejection of the plan to the District Court.

Around the same timeframe as the bankruptcy setbacks, AC&S's extensive insurance coverage by Travelers was in dispute. AC&S and Travelers proceeded to arbitration where the panel ruled against AC&S. AC&S appealed from the arbitration panel. Not until 2006 had AC&S received any positive developments in the bankruptcy proceedings or asbestos litigation.

In 2006, there were some positive developments for AC&S. The United States Court of Appeals for the Third Circuit found the arbitration panel violated the automatic stay provision of the bankruptcy proceedings and voided the arbitration ruling. Additionally, the new *Combustion Engineering* decision in the Third Circuit outlined appropriate reorganization policies for many asbestos stricken companies. A new judge had been assigned to the bankruptcy proceedings and the possibility of an approved plan with accompanying injunctions for Irex improved.

With the positive bankruptcy developments and improved sales numbers from 2002 through 2005, Irex management considered the possibility of changing from a C-corporation to an S-corporation with at least 50% of the current shareholders remaining and proposing the buyout to the non-participating shareholders. By the spring of 2006, the buying group began preparing its proposal and presented a written offer on June 2, 2006. Mr. Liddell presented a concrete proposal to the Irex Board for the buying group to purchase outstanding Irex shares from the non-participating shareholders. Mr. Liddell used what he determined to be the net asset value, earnings, equity, and fair market value, to arrive at an offer price of \$60 per share.

In response, the Board elected to appoint three new members to the Board who would serve as the Special Committee to independently carry out its due diligence in protecting the minority shareholders and determining if \$60 per share was a fair price. The Special Committee consisted of a former board member, Nathan Washburn, a former CFO of Irex, Jane Pinkerton, and a local, well-respected, independent business man, Ken Stoudt. Ken Stoudt served as chair of the Special Committee. Both Washburn and Pinkerton had a significant stake in the value as they owned a large number of shares that would be bought out.

Snyder had been the financial advisor to Irex and AC&S and had prepared the annual 401(k) valuations for the companies with the latest relevant valuation in December of 2005 at \$56 per share. All company materials regarding financials as well as Snyder's information was given as an open door policy to the Special Committee's financial analyst, Curtis. Curtis provided a report as of August 28, 2006, of the fairness opinion of \$60 per share. As a result of the reports of Mr. Liddell, Snyder, and Curtis, the Special Committee negotiated a price of \$66 per share as fair market value of Irex with the buying group.

With this background to the buyout merger, effective October 20, 2006, the Court's obligation is consider and weigh the testimony and evidence presented from the parties to this matter, make credibility findings of the parties and experts, and determine the fair value of the dissenters' shares on a going concern basis. *See Appeal of O'Conner*, 452 Pa. 287, 291, 304 A.2d 694, 697-98 (1973.) Our Supreme Court provided guidance on determining fair value:

In determining what figure represents this true or intrinsic value, consideration must be given to all factors and elements which reasonably might enter into the fixing of value. . . .

Some of the factors that must be considered in rendering an intelligent decision are: Asset value; market value; market prices of comparable companies; market price and earnings ratio; management and its policies; earnings; dividends;

valuation of assets; reserves for various contingencies; tax liabilities; future earnings; predictions of future business events and etc. The list seems interminable and yet all factors must be considered and given their proper weight in order that a just result might be attained.

In an attempt to render the unwieldy, wieldable, courts have distilled all of these factors into three principal methods of valuation which have been variably used, commonly in combination, in the actual judicial determination of intrinsic value: (1) net asset value; (2) actual market value; and (3) investment value.

Appeal of O'Conner, supra at 698 (citation omitted) (footnote omitted).

The Court first notes that in shares at issue in this evaluation, approximately 281,00 were to be held by NL Holdings, 107,000 were to be redeemed, 1,700 dissented, and 6,820 were held by Mr. Washburn and Mrs. Pinkerton. Approximately, 86% were redeemed at the \$66 per share offering. Additionally, valuations of the four expert financial analysts were:

Snyder.....	\$60
Curtis.....	\$66
Professor Jarrell.....	\$63
Capstone/Mr. Wolf.....	\$180

Tony Latini of Curtis, having no connection with Irex, AC&S or NL Holdings, provided the Court with his valuation work. His financial background and extensive history of valuations including contracting companies and companies with asbestos issues was a significant contributor to his credibility and the credibility of his fairness opinion. He reviewed and analyzed all historical data, publicly available information, all requested information from Irex and AC&S as well as the historical information and Snyder's fairness opinion. He thoroughly reviewed and analyzed Irex management's projections and future estimates and discussed them with management. He completed an industry review as well as a discount analysis of the asbestos issues facing AC&S and Irex. With the use of all the data he compiled, Mr. Latini

looked at 6 various valuation methodologies in determining implied ranges of the per share value price of Irex stock.

Curtis's valuation methodologies included: guideline public company analysis, mergers and acquisition transactions analysis, discounted cash flow, net book value, stock trading analysis, and leveraged recapitalization analysis. Curtis eliminated the first two methodologies because there was either not enough data available on the comparable companies or the companies were not sufficiently similar to Irex in terms of operating and financial characteristics for comparables analysis to provide informative values for Irex.

Curtis's net book value approach with an applied asbestos discount resulted in an implied range of values per share of \$61.26 to \$74.41. (*See* Pet'r's Ex. 25 at 40.) The stock trade analysis over a one year period resulted in an implied range of values of \$61.26 to \$74.41 per share. (*See id.*) Trading analysis over a ten year period prior to merger resulted in a significantly lower implied range of values of \$47.50 to \$73.00 per share. During the ten-year period, only 1,600 shares sold-above \$65. Also, prior to the merger announcement, stock was trading at or below \$50 per share.

Curtis also conducted a leveraged recapitalization analysis in an attempt to determine what a group attempting to do a transaction for control of the company would actually be willing to pay. This analysis resulted in an implied range of values of \$34.66 to \$70.40 per share. (Pet'r's Ex. 25 at 40.) Further, Curtis's leveraged buyout analysis yielded a range of values between \$53.85 and \$75.99 per share. (Pet'r's Ex. 25 at 40.) Finally, Curtis determined from its

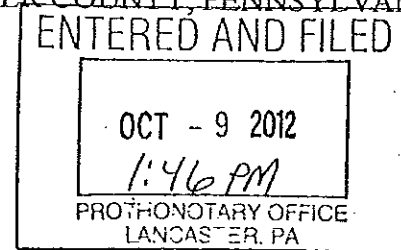
discounted cash flow the implied range of values of Irex stock was \$53.85 to \$75.99 per share with a midpoint of \$64.09.²

The Court finds the methodologies and calculations presented by Curtis to be the most credible. The Court accepts its findings as the appropriate measure of the fair, best per share value of Irex stock at the time of the merger. The testimony of Professor Jarrell, which the Court finds to be credible, served to successfully discredit the methodologies employed by Mr. Wolf and to bolster the conclusion of Curtis. The Court finds Mr. Mitchell's testimony to be of no value to the Court's findings. Mr. Mitchell paid a range of prices from \$10.25 to \$65 prior to notice of the proposed merger and continued to purchase stocks after notice of the proposed merger at a range of prices from \$63.75 to \$65.50 despite claiming that the original \$60 offer was outrageously low. Additionally, the testimony of Mr. Wolf and his reconfiguration of Irex's forecasts and limitation of the asbestos discount is not credible in the Court's determination of fair value.

Therefore, this Court finds the fair value of Irex stock as of October 20, 2006 is \$66 per share, as negotiated by the independent Special Committee and within the range established by Curtis. Accordingly, the Court enters the following:

² The ranges of implied values for Irex stock generated by the various methodologies employed by Curtis is demonstrated in Pet'r's Ex. 25 at 40.

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL DIVISION



IN RE:

IREX CORPORATION,
Petitioner,

v.

MITCHELL PARTNERS, LTD., et al.,
Respondents.

No. CI-07-01322

VERDICT

AND NOW, this 9th day of October, 2012, having conducted a five-day stock valuation trial in the above matter, received evidence accordingly, and thoroughly reviewed the closing statements and proposed findings of fact and conclusions of law submitted by the respective parties, the Court hereby finds that:

- (1) the fair value of Irex Corporation ("Irex") stock on the date of its merger, October 20, 2006, when Irex was acquired by North Lime Holdings Corporation, was sixty-six dollars (\$66.00) per share;³ and
- (2) Gary L. Sample, Joyce A. Sample, Josephine A. Feagley, GLS Partners and Long Orthodontic Associates, P.C. Retirement Plan Trust's issues are moot as the Court has found the value paid for their shares was the fair value of Irex stock. Thus, their claim is dismissed.

BY THE COURT:


HOWARD F. KNISELY
JUDGE

Attest:

Copies to: Melvin Newcomer, Esq.
George W. Croner, Esq.
George C. Werner, Esq.

³ The Court submits its Opinion of this date, including Findings of Fact and Conclusions of Law, to support its verdict on the ultimate issue of the fair stock value of Irex.

NOTICE OF ENTRY OF ORDER OR DECREE
PURSUANT TO PA. R.C.P. NO: 236
NOTIFICATION - THE ATTACHED DOCUMENT
HAS BEEN FILED IN THIS CASE
PROTHONOTARY OF LANCASTER CO., PA
DATE: 10-9-12