

The Court of Chancery Deviates from Some Recent Appraisal Decisions and Gives “100 Percent Weight” to the Deal Price

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In a recent decision out of the Delaware Court of Chancery—*Merion Capital L.P. v. Lender Processing Services, Inc.*, C.A. No. 9320-VCL (Del. Ch. Dec. 16, 2016) (“LPS”)—Vice Chancellor Laster strayed from several of the Court of Chancery’s recent appraisal opinions and assigned “100 percent weight” to the deal price in determining the fair value of the stock of Lender Processing Services, Inc. (“LPS”).

Prior to the acquisition, LPS provided integrated technology products, data, and services to the mortgage lending industry. Fidelity National Financial, Inc. (“Fidelity”), spun off LPS as a separate company in 2008, coinciding with the recession. While the recession devastated many businesses, LPS saw substantial revenue growth as loan defaults drove some of its business. However, the United States Department of Justice (the “DOJ”), the Federal Bureau of Investigation, and attorneys general from all 50 states began both criminal and civil investigations into LPS related to certain loan protocols, referred to as “robo-signing.”

In April 2010 and again in early 2011, Thomas H. Lee Partners, a private equity firm; Fidelity; and the Blackstone Group (collectively the “Consortium”) made an unsolicited offer to purchase LPS. LPS retained Goldman Sachs Group, Inc. (“Goldman”) as its financial advisor but the parties did not reach a deal at either time. In February 2012, the Consortium offered to purchase LPS for \$26.50 a share. In response, LPS’s Board of Directors (the “Board”) chose to explore other buyers. In April 2012, the Consortium increased their offer to \$28 per share, which the Board rejected. Although they increased their offer again in May 2012, the Board was committed to an offer of at least \$30 per share. In the meantime, LPS’s financial advisor contacted three financial sponsors and seven potential strategic buyers, but no offer was made.

In October 2012, the Board hired Boston Consulting Group (“BCG”) to evaluate LPS and, *inter alia*, test the reliability of LPS’s projections and evaluate strategic alternatives. BCG conducted a thorough review of the business that spanned a total of six months.

On January 31, 2013, LPS announced that, in connection with the “robo-signing” allegations, it had entered into a settlement

agreement with attorneys general from 46 states and the District of Columbia (for \$127 million), a settlement non-prosecution agreement with the DOJ (for \$35 million), and a settlement of related stockholder litigation (for \$14 million). Following these settlements, LPS's shares rose 7.5 percent on the same day. LPS then received approximately six offers to purchase its stock at and above \$30 per share, including from Fidelity. In response to the proposals, LPS hired a second financial advisor, Credit Suisse Securities (USA) LLC ("Credit Suisse").

The Board met on March 21, 2013, and BCG presented its results, which included three sets of five-year projections created with LPS management. Goldman and Credit Suisse also presented and prepared valuation models based on the three sets provided by BCG. Goldman and Credit Suisse advised that the Board should pursue a sale of LPS, and management agreed.

On May 27, 2013, LPS entered into a merger agreement (the "MA") with Fidelity, contemplating consideration of \$35.25 per share paid half in cash and half in Fidelity stock. The MA contemplated a 40-day go-shop period ending in July. Although 25 potential strategic buyers and 17 potential financial buyers were contacted during the go-shop period, none had any interest. Ultimately, nearly 99 percent of the almost 79 percent of voting stockholders voted in favor of the deal. The merger finally closed on January 2, 2014, at a final price of \$37.14 per share.

Subsequently, Merion Capital L.P. and Merion Capital II L.P. (together "Merion") demanded appraisal related to their nearly six million shares, and a four-day trial followed. Both experts used a discounted cash flow ("DCF") analysis. Merion's expert argued that the fair value of LPS at closing was \$50.46 per share while LPS's expert opined that the fair value was \$33.57 per share.

Vice Chancellor Laster held that the deal price of \$37.14 per share was the best indicator of fair value and ultimately gave "100 percent weight" to the deal price. In so holding, the court pointed to several factors that demonstrated a strong negotiation process, including, but not limited to: (1) meaningful competition in the pre-signing phase from different types of bidders that equally had access to reliable information about LPS; (2) the Board was well-positioned to solicit bids after it waited for BCG's detailed analysis and input from management and its two financial advisors; (3) there was no evidence of collusion among bidders or between LPS and any bidders; (4) the merger was not a management-led buyout ("MBO"); (5) the deal price appropriately contemplated synergies; and (6) the court's DCF analysis was within 3 percent of the final transaction price.

In the last pages of his opinion, Vice Chancellor Laster evaluated the Court of Chancery's most recent appraisal decisions, noting that in five recent decisions, the court declined to adopt the deal price as the most reliable indicator of value. As one example, Vice Chancellor Laster cited his May 2016 appraisal decision, *In re: Appraisal of Dell Inc.*, 2016 WL 3186538, at *1 (Del. Ch. May 31, 2016) ("*Dell*"), in which the court rejected the transaction price in valuing Dell Inc.'s stock at nearly a 30 percent premium. In citing *Dell*, the court noted the unique deal process, such as an MBO transaction with a leveraged buyout pricing model.

LPS should help assuage concerns that arose from recent appraisal decisions rejecting the transaction price. *LPS* establishes that those decisions are limited to their particular facts and circumstances (such as in *Dell*, where the Court weighed heavily the MBO-nature of the transaction), and do not preclude the Court from relying on the deal price as a valid measure of fair value. *LPS* confirms what has long been recognized in appraisal litigation: a robust sale process is key.