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[Delaware Supreme Court Holds That Chancery Court Is Not Bound By Merger Price Or Fairness Opinion In Appraisal Proceedings Under Delaware General Corporate Law Section 262\(h\)](#)

In [Golden Telecom, Inc. v. Global GT LP](#), 2010 WL 5387589 (Del. Dec. 29, 2010), the [Delaware Supreme Court](#) affirmed a judgment of the [Delaware Chancery Court](#) in an appraisal proceeding under [Section 262\(h\) of the Delaware General Corporation Law](#) (“DGCL”). Section 262(h) provides that in the event of a merger, a stockholder of a Delaware corporation is entitled to an independent appraisal proceeding regarding the “fair value” of its outstanding shares. In affirming the Chancery Court, the Supreme Court declined to adopt two bright line rules for appraisal proceedings under Section 262(h). First, it rejected the notion that the Chancery Court must consider the merger price agreed to by the parties following arm’s-length negotiations and fair process as necessarily reflecting the “fair value” of the corporation’s shares. Second, it rejected the assertion that a corporation is bound by company-specific data included in its fairness opinion in arriving at a “fair value” under Section 262(h). This decision confirms that the Chancery Court has great flexibility, and is entitled to great deference, in conducting its independent appraisal of the value of a merger target under Section 262(h).

In early 2007, petitioner Golden Telecom, Inc. (“Golden”) received an offer from VimpelCom to acquire Golden. VimpelCom’s two largest stockholders -- Altimo and Telenor – also were the largest stockholders in Golden. Shortly thereafter, Golden formed a special committee of independent directors, unaffiliated with Altimo or Telenor, to assess potential strategic transactions. In September 2007, VimpelCom proposed a tender offer to Golden at \$80 per share.

After a series of revised proposals and rejections by the special committee over the course of two months, VimpelCom’s tender offer steadily increased, with VimpelCom ultimately offering \$105 per share. Golden’s special committee ultimately recommended this merger price and Golden’s board of directors agreed, unanimously approving the merger.

In support of the proposed merger, Credit Suisse delivered a fairness opinion stating that \$105 determination was fair, and this opinion was distributed to shareholders. The companies signed a merger agreement on December 21, 2007 which called for a cash tender offer for all outstanding shares of Golden’s common stock.

The vast majority of outstanding stockholders -- 96.6% in total -- accepted the VimpelCom’s offer of \$105 per share. Respondent Global GT LP (“Global”), however, did not. It rejected VimpelCom’s offer and opted for an appraisal under DGCL Section 262(h).

Under Section 262(h), the Chancery Court was required to “determine the fair value” of Golden’s shares “together with interest, if any, to be paid upon the amount determined to be the fair value.” In doing so, Section 262(h) mandates that the Chancery Court “take into account all relevant factors.” Applying Section 262(h), the Delaware Chancery Court issued an opinion appraising the value of Golden at the time of the merger at \$125.49 per share and awarded damages accordingly. Both parties appealed.

Golden argued that the Chancery Court abused its discretion by “failing to defer to the merger price.” The merger price, Golden contended, “indicated Golden’s fair value for the purposes of appraisal.” Golden requested that the Delaware Supreme Court reverse the Chancery Court and “adopt a standard requiring conclusive or, in the alternative, presumptive deference to the merger price in an appraisal proceeding.”

The Supreme Court rejected these arguments and affirmed the Chancery Court’s appraisal. The Court started with the statutory language of Section 262(h). It noted that Section 262(h) “neither dictates nor even contemplates that the Court of Chancery should consider the transactional market price of the underlying company.” Instead, the Supreme Court noted, “in determining ‘fair value,’ the statute instructs the court” to “take into account all relevant factors.” In doing so, under Delaware law, the Supreme Court further noted, the Chancery Court was to assess Golden’s fair value “as a going concern, as opposed to the firm’s value in the context of an acquisition or other transaction.” Section 262(h) required the Chancery Court to conduct an “*independent* evaluation of the ‘fair value’ at the time of the transaction,” and this independent evaluation vested the “Chancellor and Vice Chancellors with significant discretion to consider ‘all relevant factors.’”

The Court rejected Golden’s argument that the Chancery Court was required to defer “conclusively or presumptively” to the merger price, even where, as here, the merger price was arrived at by a “pristine, unchallenged, transactional process.” The Court held that such a position would “contravene the unambiguous language of the statute” and would “inappropriately shift the responsibility to determine ‘fair value’ from the court to private parties.” The “fair value” determination was for the courts, and “inflexible rules governing appraisal” – such as the rule suggested by Golden – would provide “little additional benefit.”

Under Section 262(h), appraisal was intended to be “by design[] a flexible process.” As a result, the Delaware Supreme Court rejected Golden’s contention that the Chancery Court was required to defer to the merger price in any appraisal proceeding.

Global also appealed the Chancery Court’s appraisal price of \$125.49. It contended that Golden “should not have been allowed to disavow the tax rate” set forth in the Credit Suisse fairness opinion distributed to shareholders. Global argued that the opinion was “procured by Golden and prepared by Golden’s financial advisor using Golden’s input, assistance, and approval.” Because the primary purpose of the fairness opinion was to “convince stockholders to whom the tender offer was made that the price offered was fair,” Global argued that Golden should be prohibited to from “walking away from [its] own company specific data specifically provided to stockholders” under Delaware’s duty of candor.

The Supreme Court also rejected this argument, again turning to the plain language of Section 262(h). “[N]owhere,” the Court found, does Section 262(h) require “the appraising authority to require the parties to adhere to previously prepared data.” Instead Section 262(h) “vests the court with significant discretion to consider ‘all relevant factors.’”

Further, Global’s contention that company’s should always be bound by what they say in a fairness opinion, was simply bad public policy. Adopting bright line rules would, the Court found, “likely increase the price of an already expensive process. . . . Requiring public companies to stick to transactional data in an appraisal proceeding would pay short shrift to the difference between valuation at the tender offer stage – seeking ‘fair price’ under the circumstances of the transaction – and valuation at the appraisal stage – seeking ‘fair value’ as a going concern.” The Chancery Court could – and, in fact, did – properly weigh the significance of Golden backing away from its own fairness opinion.

As such, the Supreme Court affirmed the Chancery Court’s decision in all respects. The record, the Court found, supported the Vice Chancellor’s decision, which was, in all events, entitled to great deference. Consequently, Global was entitled to a redemption price of \$125.49 for all of its outstanding shares.

This decision confirms that under Section 262(h), the Chancery Court is invested with extensive discretion in determining the “fair value” of a public company, and, and should look to “all relevant factors” in making that decision. So long as the Chancery court appraises the company as a “going concern” rather than as part of an acquisition, that determination will not be disturbed absent an abuse of discretion.

For further information, please contact [John Stigi](#) at (310) 228-3717 or [Martin White](#) at (415) 774-3233.