Civil Action No. 7129
Court of Chancery of Delaware for New Castle County

CEDE CO. v. TECHNICOLOR, INC.

Decided Jan 29, 1999

MEMORANDUM OPINION

CHANDLER, Chancellor.

This litigation arose from the merger of Technicolor, Inc. and Macanfor Corp., a shell subsidiary wholly owned by MacAndrew and Forbes Group, Inc. ("MAF"). The merger completed MAF's acquisition of Technicolor and instigated two lawsuits by former Technicolor shareholder, Cinerama, Inc. The lengthy background of petitioner Cinerama's challenge to this transaction has been exhaustively recounted in earlier opinions.[1] Most recently, the Supreme Court reversed and remanded my predecessor's statutory appraisal of Technicolor, holding that he failed to include value in Technicolor created by its interim management.

[1] *See Cede Co. v. Technicolor, Inc.*, Del. Supr., 684 A.2d 289, 291 (1996).

MAF accomplished the second step of its acquisition by causing Technicolor to merge with Macanfor in a reverse triangular merger. Technicolor cashed out its minority shareholders, giving them $23 per share cash in exchange for their shares. This cash out, in turn, gave rise to Cinerama's appraisal rights under 8 Del. C. § 262. The Supreme Court held that Cinerama had the right to share in value injected into Technicolor during the period between October 29, 1982, the date of MAF's successful first step acquisition by friendly tender offer of 3,754,181 (or 82.19%) of Technicolor's shares (the "Tender Offer"), and January 24, 1983, the day Technicolor cashed out its minority shareholders (the "Cash Out"). In this Opinion, I appoint a neutral expert witness to reappraise Technicolor in accord with the Supreme Court's remand instructions.

I. BACKGROUND

This action began in 1983 when Cinerama filed a petition for appraisal of its Technicolor shares under 8 Del. C. § 262. During the course of discovery, Cinerama unearthed facts which it believed evidenced wrongdoing by Technicolor and MAF in structuring and approving the two-step merger. The Supreme Court allowed Cinerama to simultaneously pursue a fiduciary action against Technicolor and MAF while its appraisal action moved forward. To facilitate management of this extraordinarily protracted and voluminous litigation, however, Chancellor Allen stayed the appraisal and ruled first on the fiduciary claims. Ultimately, the Supreme Court affirmed Chancellor Allen's ruling in favor of Technicolor in the fiduciary action. Afterwards, Cinerama petitioned this Court for a judgment in its appraisal action. The former Chancellor issued a Restated Modified Order and Final Judgment on October 27, 1995, assessing the fair value of Cinerama's shares at $21.60 per share.

2 [2] Chancellor Allen awarded Cinerama a total of $4,345,920 with pre-judgment interest at 10.32%, compounded annually for the period from the cash-out merger (January 24, 1983) to the date of the original appraisal judgment (August 2, 1991). He added post-judgment simple interest of 10.5% accruing upon the original judgment of $4,345,920. *Cede Co. v. Technicolor*, Del. Ch., C.A. No. 7129, Restated Modified Order Final Judgment, Allen, C. (October 27, 1995).

Cinerama appealed the judgment, challenging the Chancellor's exclusion of any value injected into Technicolor by its new majority shareholder in the period between the Tender Offer and Cash Out. The Supreme Court reversed the former Chancellor's findings and remanded with instructions to reappraise Technicolor's value (The "Appraisal Remand").[3] The Appraisal Remand instructs me to recalculate Technicolor's fair value in line with the Court's rulings described below.

[3] *Cede Co. v. Technicolor, Inc.*, Del. Supr., 684 A.2d 289 (1996) [hereinafter "*Appraisal Remand*"].

A. Stipulated Uncontroverted Facts

Before its acquisition by MAF, Technicolor was a diversified film products company with five business divisions. Technicolor's core business was developing cinematic film, which it did at four labs (New York, Hollywood, Rome, and London) operated by the Professional Services Group.[4] The group also ran Magna Crafts, which added sound track to its customer's cinematic films, and Vidtronics, which operated a large-scale video copying plant engaged in recording of videotape copies of movies and other programs.

[4] Unlike the other labs, the London lab was not wholly owned, but a 70% subsidiary of Technicolor.

Technicolor's Consumer Services Group ran three businesses. Its Consumer Photo Processing Division ("CPPD") provided motion picture, slide, disc, and photographic film processing services to other photofinishers and to consumers through independent dealers. This group also ran Standard Manufacturing, which manufactured film splicers and related equipment at a plant in Chicopee, Massachusetts. Finally, the group operated Technicolor One Hour Photo, Inc. ("OHP"), a film processing company providing photofinishing services directly to consumers. Preceding MAF's offer, Technicolor planned to open 1000 OHP stores throughout the United States, locating them in high traffic areas. The Government Services Group provided a number of photographic and disparate non-photographic management services to agencies of the United States government.

The last two businesses were not denominated groups, but were apparently stand-alone divisions within Technicolor. The Gold Key Entertainment Division bought motion picture and program rights, which Gold Key licensed to foreign and domestic broadcasters. In 1982, Technicolor decided to sell Gold Key and was in the process of seeking a buyer when MAF appeared with its offer to buy the whole company.

Technicolor's last business segment, the Audio Visual division, historically sold 8mm cameras, but its market had collapsed as consumers switched to video cameras for their motion picture needs. Audio Visual responded by signing an agreement in 1981 with Funai Electric to sell Funai-made video cameras. The cameras lacked key features such as a tuner and recorded less than an hour per tape. By 1982, Technicolor's executives had slated ailing Audio Visual for sale.

When Kamerman first took Technicolor's helm in 1976, he presided over numerous managerial and technological innovations in Technicolor's photofinishing business. His efforts enabled the company to regain its competitive edge in technology and pricing at that time. Unfortunately, by the eighties, core business earnings had stagnated once again. In its Appraisal Remand, the Supreme Court succinctly described Technicolor's deteriorating business performance and Kamerman's unsuccessful attempts to once again rejuvenate the company:

Morton Kamerman ("Kamerman"), Technicolor's Chief Executive Officer and Board Chairman, concluded that Technicolor's principal business, theatrical film processing, did not offer sufficient long-term growth for Technicolor. Kamerman proposed that Technicolor enter the field of rapid processing of consumer film by establishing a network of stores across the country offering one-hour development of film. The business, named One Hour Photo ("OHP"), would require Technicolor to open approximately 1,000 stores over five years and to invest about $150 million.

In May 1981, Technicolor's Board of Directors approved Kamerman's plan. The following month, Technicolor announced its ambitious venture with considerable fanfare. On the date of its OHP announcement, Technicolor's stock had risen to a high of $22.13.

In the months that followed, Technicolor fell behind on its schedule for OHP store openings. The few stores that did open reported operating losses. At the same time, Technicolor's other major divisions were experiencing mixed, if not disappointing results.

As of August 1982, Technicolor had opened only twenty-one of a planned fifty OHP retail stores. Its Board was anticipating a $5.2 million operating loss for OHP for fiscal 1983. On August 25, 1982, the Technicolor Board "authorized the company's officers to seek a buyer for Gold Key." During 1982, Technicolor also decided to terminate the Audio Visual Division. Nevertheless, Kamerman remained committed to OHP. In Technicolor's Annual Report, issued September 7, 1982, Kamerman stated, "We remain optimistic that the One Hour Photo business represents a significant growth opportunity for the Company."

Technicolor's September 1982 financial statements, for the fiscal year ending June 1982, reported an eighty-percent decline of consolidated net income — from $17.073 million in fiscal 1981 to $3.445 million in 1982. Profits had declined in Technicolor's core business, film processing. Technicolor's management also attributed the decline in profits to write-offs for losses in its Gold Key and Audio Visual divisions, which had already been targeted for sale. By September 1982, Technicolor's stock had reached a new low of $8.37 after falling by the end of June to $10.37 a share.

In the late summer of 1982, Ronald O. Perelman ("Perelman"), MAF's controlling stockholder, concluded that Technicolor would be an attractive candidate for a takeover or acquisition by MAF. Kamerman and Perelman met for the first time on October 4, 1982 at Technicolor's offices in Los Angeles. Perelman informed Kamerman that MAF would be willing to pay $20 per share to acquire Technicolor. Kamerman replied that he would not consider submitting the matter to Technicolor's Board at a price below $25 a share.

Perelman met with Kamerman in Los Angeles for a second time on October 12, 1982. MAF's Chief Financial Officer also attended the meeting. The meeting's principal purposes were: (1) to allow MAF's Chief Financial Officer to review Technicolor's financial data; and (2) to give Perelman a tour of Technicolor's Los Angeles facilities.

> On October 27, Kamerman and Perelman reached an agreement by telephone. Perelman initially offered $22.50 per share for Technicolor's stock. Kamerman countered with a figure of $23 per share. He also stated that he would recommend its acceptance to the Technicolor Board. Perelman agreed to the $23 per share price.
>
> * * *
>
> On October 29, 1982, the Technicolor Board agreed to the acquisition proposal by MAF. The Technicolor Board: approved the Agreement and Plan of Merger with MAF; recommended to the stockholders of Technicolor the acceptance of the offer of $23 per share; and recommended the repeal of the supermajority provision in Technicolor's Certificate of Incorporation.
>
> * * *
>
> In November 1982, MAF commenced an all-cash tender offer of $23 per share to the shareholders of Technicolor. When the tender offer closed on November 30, 1982, MAF had gained control of Technicolor. By December 3, 1982, MAF had acquired 3,754,181 shares, or 82.19%, of Technicolor's shares. Thereafter, MAF and Technicolor were consolidated for tax and financial reporting purposes.
>
> The Court of Chancery made a factual finding that, "upon acquiring control" of Technicolor, Perelman and his associates "began to dismember what they saw as a badly conceived melange of businesses." Perelman testified: "Presumably we made the evaluation of the business of Technicolor before we made the purchase, not after." That evaluation assumed the retention of the Professional and Government Services Groups and the disposition of OHP, CPPD, Gold Key and Audio Visual.
>
> Consequently, immediately after becoming Technicolor's controlling shareholder, MAF "started looking for buyers for several of the [Technicolor] divisions." Bear Stearns Co. was also retained by MAF in December 1982 to assist it in disposing of Technicolor assets. As of December 31, 1982, MAF was projecting that $54 million would be realized from asset sales.
>
> In December 1982, the Board of Technicolor notified its stockholders of a special shareholders meeting on January 24, 1983. At the meeting, the Technicolor shareholders voted to repeal the supermajority amendment and in favor of the proposed merger. MAF and Technicolor completed the Merger [effective January 24, 1983.]
>
> 5 [5]*Appraisal Remand*, 684 A.2d 289, 292-93.

B. Remand Instructions

The overarching mandate of the Appraisal Remand is to recalculate Technicolor's fair value at the date of the Cash Out using data and a methodology that accounts for the value of Technicolor under the operative realities of MAF's management, the so-called "Perelman plan." This would rectify Chancellor Allen's mistake of calculating Technicolor's fair value assuming the "Kamerman plan." He denied Cinerama any share in the value injected into Technicolor between the Tender Offer and the Cash Out by assuming that the management running Technicolor on the day of the Tender Offer continued unchanged until the day of the Cash Out. In reversing that interpretation of 8 Del. C. § 262(h), the Supreme Court discussed a number of sub-issues that define the scope of this proceeding and that have engendered much legal debate between petitioner and respondent.

Let me briefly describe those sub-issues and the parties' main contentions:

1. The Supreme Court held that the value of Technicolor under the Perelman and Kamerman Plans differed because MAF intended to liquidate certain Technicolor divisions.

The Supreme Court noted Chancellor Allen's factual finding that "`upon acquiring control' of Technicolor, Perelman and his associates `began to dismember what they saw as a badly conceived melange of businesses'" and interpreted his findings to signify MAF's intention to retain "the Professional and Government Services Groups and the disposition of OHP, CPPD [including Standard Manufacturing], Gold Key and Audio Visual." The parties agree that this is now the law of the case.

2. Weinberger v. UOP, Inc. *restricts 8 Del. C. § 262(h)'s ban on appraising "an element of value arising from the accomplishment or expectation of the merger" by allowing appraisal of "elements of future value, including the nature of the enterprise, which are known and susceptible of proof as of the date of the merger and not the product of speculation."*

The parties are in agreement that the Court's interpretation of § 262(h) brings value injected into Technicolor by its MAF management between the time of the Tender Offer and Cash Out (the "Interim Management") within the scope of my appraisal of Technicolor's statutory fair value, but they quarrel over the Appraisal Remand's exact meaning. The Supreme Court's elucidation of *Weinberger* is an important gloss on the statute's language for the reason that the shift from the Delaware block method to discount cash flow ("DCF") analysis as the principal means of valuing companies has introduced a methodology that complicates application of § 262.

DCF values a company as the present value of future income cash flows. The first step of DCF is to project the company's future income stream. This step is usually broken into two components: (1) a period (often five or seven years) of explicitly projected yearly cash flows and (2) a terminal value, a lump-sum figure representing the aggregate value of cash flows after the explicit forecast period into the relevant future.[6] Next, the yearly sums for the second year forward are discounted to derive their present value. The rate (r) used to discount the values is usually derived from the enterprise's cost of capital, adjusted to reflect the risk inherent in the cash flows (often derived from the entity's stock's beta, which measures the stock's price volatility relative to a relevant stock market index). Thirdly, by adding the current year's cash flows to the discounted values of each future year's income (including the last year's lump-sum terminal value), one arrives at the net present value ("NPV") of the enterprise.

6 [7] The lump sum's value does not reflect an infinite cash stream because the present value of cash flows far off into the future is effectively zero.

7 The mathematical expression for NPV is:

In this example, the cash flows for years CO, the current year, to C5 would be explicitly forecast and the lump sum figure for C6 would reflect all annual cash flows into the relevant future.

Chancellor Allen rejected Cinerama's valuation of Technicolor because it relied on a forecast of Technicolor's future cash flows that calculated the liquidation value of divisions which MAF intended to sell. His interpretation of § 262 comported with pre- *Weinberger* precedent that valued corporations according to the Delaware block method. Even if the law did not require it, the Delaware block method itself precluded valuation of an entity assuming future cash flows derived from the acquiror's business plan because it used a weighted average of historical market value, asset value, and earnings value to compute statutory fair value.[8] Moreover, a liquidation value was traditionally excluded in favor of a going-concern methodology.[9] Although my predecessor seemed to construe *Weinberger* as permitting a liquidation value for a division slated for sale under the Kamerman plan,[10] he did not believe that *Weinberger* ended the historic policy of appraising a corporation as a going concern, which

the Chancellor concluded would prohibit including the liquidation value of assets to be sold by interim management under MAF's Perelman plan.

8 [11]*See Levin v. Midland-Ross Corp.*, Del. Supr., 194 A.2d 50, 53 (1963).

9 *Id.* at 54 (holding liquidation or sales value was contrary to the main purpose of a § 262 proceeding, which was to determine the going concern value for the corporation).

10 *Cede Co. v. Technicolor*, Del. Ch., C.A. No. 7129, mem. op. at 79-83, Allen, C. (October 19, 1990) (favoring Torkelsen's factual assumption that Gold Key was for sale, but rejecting Torkelsen's liquidation value appraisal in favor of Rappaport's on-going concern appraisal because Torkelsen assumed too high a selling price for the division) [hereinafter " *Appraisal Opinion*"].

11 *Id.* at 52 ("When value is created by substituting new management or by redeploying assets "in connection with the accomplishment or expectation of a merger," that value is not, in my opinion, a part of the "going concern" in which a dissenting shareholder has a legal (or equitable) right to participate.").

With hindsight, it is clear that the liquidation value of an asset slated for sale under the Perelman plan is as much a part of the going-concern value of Technicolor under § 262 as the liquidation value of assets slated for sale by Kamerman. The inflexible nature of the Delaware block method would tend to subsume the impact of recent business plan changes within its weighted historical averages, but statutory appraisals can now utilize a DCF methodology that gives central importance to the most recent business plan's utilization of an asset. The import of this is that the intuitive and simple delineation between new and old management's deployment of assets becomes blurred when a court values a two-step merger target under a DCF analysis.

In a two-step merger, the acquiror first buys a controlling stake in the target through a tender offer (either friendly or hostile). After the tender offer closes, the acquiror owns a controlling block of shares and can replace the board with friendly directors, or as in this case, assert control of the target's old board of friendly directors. The fundamental effect of the tender offer's closing is to place the acquiror in control of the company and in a position to guide its management, even though some shareholders continue to own shares in the target. Often, as its first step, the acquiror orders management to approve a friendly merger with the acquiror's wholly-owned subsidiary. Next, the shareholders, with the acquiror voting its controlling block, vote on the proposed friendly merger. If approved, the company forces the remaining public shareholders, those who did not sell their shares at the tender offer, to relinquish their shares in the target in return for cash. Meanwhile, the acquiror's wholly-owned subsidiary is merged into the target, leaving the target as the surviving entity, a company now 100% owned by the acquiror. The cash out of the other shareholders, however, triggers their right to a statutory appraisal of the fair value of their shares. Such was the case in this instance.

The complicating factor in two-step mergers is that the day of the change in control and the day of the cash out is not the same. The cash out follows the change in control, giving the acquiror an opportunity to change the management of the target, altering its value in the interim period between the change of control and the cash out. As a result, this question arose during Chancellor Allen's appraisal of Technicolor:

Does Cinerama have the right to share in the value injected into Technicolor by its interim management under the Perelman plan?

Chancellor Allen answered no. He concluded that § 262(h)'s prohibition on value created by *the accomplishment or expectation of the merger* included the acquiror's interim management changes. The logic of his ruling flows from the fact that the interim changes made by the acquiror

are made as a consequence of the change in control accomplished by the Tender Offer and in expectation of the Cash Out. He deemed that this value, therefore, fell within the exclusionary language of § 262(h). He also seemed persuaded, at least in part, that the value created by those interim changes would arise down the road, as MAF's changes took effect. This effectively means that the present value of those changes would be the future income streams created after the merger. He did not believe that Cinerama had the right to share in the value of those future income streams.

As logical as his reasoning seems, the former Chancellor's ruling effectively collapses two legally distinct transactions into one. Despite the economic advantages of the two-step merger, there is no legal link between a first-step tender offer and a second-step cash out. When the two are joined in a two-step merger, nothing in the language of § 262 indicates that special rules apply. Instead, the shareholders cashed out at the second step obtain the right under 8 Del. C. § 262(h) to have the fair value of those shares calculated in light of any substantive change in the target's value brought about by the interim management decisions of the acquiror.

The Supreme Court's prohibition on speculative calculations of value created by the merger does not prohibit forecasting future income streams generated by projects implemented by interim management.[12] Of course, there are a number of elements of speculation in any DCF analysis — for example, the forecast of future income flows, the estimation of the cost of capital, the entity's market beta, and the selection of a discount rate. But, these estimates, when used to derive the present value of a project already implemented, are fundamentally concerned with the valuation of an *existing* asset, not some hypothetical synergy or business plan that may, or may not, be realized. Of course, the degree to which management has moved forward on a project will dramatically affect the risk involved, which in turn can play a role in determining the project's present value, but forecasting cash flows from an existing asset, whether risky or not, is not the same as the "use of *pro forma* data and projections of a speculative variety relating to the completion of a merger."[13] The former process appraises an asset to which the cashed-out shareholders' ownership rights attached before cancellation of their shares, making it an asset whose value is appraised under the Supreme Court's interpretation of § 262(h). [14]*3. "The Court of Chancery's determination not to value Technicolor as a going concern on the date of the merger under the Perelman Plan, resulted in an understatement of Technicolor's fair value in the appraisal action."*

12 [15]*Weinberger v. UOP, Inc.*, Del. Supr., 457 A.2d 701, 713 (1983) (allowing appraisal of "elements of future value, including the nature of the enterprise, which are known or susceptible of proof as of the date of the merger and not the product of speculation, may be considered.").

13 *Appraisal Remand*, 684 A.2d at 297.

14 *See id.* at 298-300.

15 *Id.* at 299.

Cinerama interprets that sentence in the Appraisal Remand to mean that I am bound to calculate a value for Technicolor more than the value arrived at by the former Chancellor.

4. "This Court will not make an independent determination of value on appeal. This appraisal action will be remanded to the Court of Chancery for a recalculation of Technicolor's fair value on the date of the merger.

* * *

> *Upon remand, it is within the Court of Chancery's discretion to select one of the parties' valuation models as its general framework, or fashion its own, to determine fair value in the appraisal proceeding."*

16 [16]*Appraisal Remand*, 684 A.2d at 299 (citations omitted).

Technicolor insists that this paragraph grants the trial court discretion to recalculate Technicolor's fair value in line with the Court's legal rulings, but unbound by any valuation floor, except the $21.60 arrived at by Chancellor Allen. Moreover, Technicolor argues that I can revisit my predecessor's factual findings. If I independently find them to be untainted by his legal error, to be logical, and to be substantiated by the record, I can — and, Technicolor urges, should — adopt them as my factual findings.

5. "The undervaluation in this appraisal proceeding resulted from negative assumptions that originated from an erroneous legal theory, not from either the valuation framework selected or adaptions to it by the Court of Chancery. In that regard, however, we have concluded that the Court of Chancery's erroneous majority acquiror principle and proximate cause exception permeated its factual assumptions so pervasively, that the Court of Chancery's attribution of only a $4.43 per share value difference between the Perelman Plan and the Kamerman Plan should not be considered the law of this case upon remand."

17 [17]*Appraisal Remand*, 684 A.2d at 299-300.

Cinerama seizes upon this passage (in conjunction with the passage quoted below) as mandating a valuation more than my predecessor's finding of $21.60 plus the value, $4.43, he attributed to the difference between the Kamerman and Perelman plans (a total of $26.03 per share). Cinerama also believes (in a sometimes selective manner) that the factual basis for then-Chancellor Allen's findings were reversed by the Supreme Court, and that to the extent that I could refind the same facts, I could not do so without triggering Cinerama's right, under Rule 63, to crossexamine every fact and expert witness upon whose testimony I based my findings.

* * *

The parties' voluminous briefs — the word "brief" itself a misnomer — defy meaningful summarization, so I will not attempt the task. Instead, I have raised only the parties' relevant arguments as I attempt to reconcile the language favored by Cinerama with the passages stressed by Technicolor. Because the passages seem to contradict each other on some level, divining the exact scope of my task is, it is fair to say, somewhat difficult.

I start off with noting that the Supreme Court's language criticizing Chancellor Allen's methodology interprets his legal error, the failure to value Technicolor under the Perelman plan, as causing an undervaluation of Cinerama's shares. Indeed, the focus of the Appraisal Remand is the potential impact of my predecessor's interpretation of § 262(h) on his calculation of fair value. But, the language stressed by Technicolor expressly states the Supreme Court's *refusal* to appraise Cinerama shares itself and its instruction upon remand that the trial court has "discretion to select one of the parties' valuation models as its general framework, or fashion its own."[18] At the same time, the Supreme Court cautioned me:

18 *Appraisal Remand*, 684 A.2d at 299.

> We are unable to determine from the record how much of the "input" accepted by the Court of Chancery was predicated upon its erroneous legal theory and how much was properly attributable to its assessment of credibility or a weighing of evidence. Therefore, upon remand, Cinerama should be afforded an opportunity to renew all of its formulaic and factual arguments regarding valuation before the recalculation of fair value is made by the Court of Chancery.

19 [19]*Id.* at 301 (citations omitted).

The Supreme Court explicitly instructed me to reappraise Technicolor assuming the Perelman plan's utilization of its assets and to give Cinerama the opportunity to not only challenge the former Chancellor's findings of fact and law where tainted by his "erroneous legal theory," but to reargue every underlying fact and legal issue upon which he ruled. In light of the Supreme Court's specific

legal ruling about how to reappraise Technicolor and its instruction to give Cinerama wide latitude in rearguing its case, I conclude that so long as I heed those instructions, I am not bound to a valuation floor of $21.60, the price determined by my predecessor.

To conclude otherwise would be to impose a constraint upon the Supreme Court's mandate that I use my discretion in reviewing, perhaps retrying, findings tainted by my predecessor's majority acquiror principle or findings which, in light of Cinerama's arguments, I find unpersuasive. To set a valuation floor to this reappraisal would effectively preclude me from questioning and reassessing every aspect of then-Chancellor Allen's appraisal. This would violate what others might refer to euphemistically as "the spirit" of this remand, the mandate that I comprehensively review the record and formulate an appraisal methodology that is substantiated by the evidence, financially sound, and in compliance with the legal rulings made in the Appraisal Remand.

Let me reiterate. The Supreme Court used the terms "understatement" and "undervaluation" to describe the impact of former Chancellor Allen's legal error on his appraisal of Technicolor, plainly indicating that the Supreme Court *perceived* that rectification of his legal error will result in an award *larger* than $21.60. The Court also disparaged Chancellor Allen's attribution of "only" a difference of $4.43 per share between the Kamerman and Perelman plans. I cannot conclude that these statements were meant to bind me, however, for two reasons. First of all, the Supreme Court expressly stated that it could not discern how much of then-Chancellor Allen's appraisal was tainted by his erroneous interpretation of 8 Del. C. § 262(h). Therefore, any valuation made by the Supreme Court, even a floor, must suffer from this same infirmity. I cannot believe that after I have undertaken an in-depth reexamination of the trial record mandated by the Appraisal Remand, any predictions expressed in the Appraisal Remand about the potential valuation after remand must be treated as the law of the case. I note, too, that Chancellor Allen himself described the $4.43 difference as "very roughly estimated."[20] In so doing, he questioned the accuracy of this estimate, a figure computed for purely comparative purposes. If the estimate itself is of questionable accuracy, relying on it to predict whether the Perelman plan's comparative worth is more or less than $4.43 cannot be done without being susceptible to the same inaccuracies. Again, I conclude that predictions of Technicolor's fair value, bereft of the exhaustive reexamination and recalculation mandated by the Supreme Court, cannot prevail over the amount at which I arrive after reappraising Technicolor using commonly-accepted financial techniques implemented in accord with the Appraisal Remand. I cannot commit myself (or my expert) to a number more than $21.60 (or $26.03) and then back my financial analysis into it. Such an approach would make a mockery of the judicial process and would not be condoned by the Supreme Court. Instead, at this point, I direct my expert witness to create the final report described below without any preconceived numerical constraints. After I review the final report, I shall revisit this issue later. The parties may raise it with me at my final hearing, but may not argue it before the expert — who shall concentrate on the financial aspects of properly appraising Technicolor.

[20] *Appraisal Opinion* at 43.

II. APPOINTMENT OF NEUTRAL EXPERT WITNESS

The following begins, but does not finish, my task of reappraising Technicolor. Part A defines the nature of my inquiry. Part B describes how I will delegate part of my work to a neutral expert witness.

A. Task Defined

Normally, upon remand, the trial judge examines the remand opinion to discover what aspects of the trial judge's rulings are overturned, either expressly or impliedly. In this case, I perceive two prongs to this analysis. I must first review Chancellor Allen's findings to determine what parts are tainted by his erroneous majority

acquiror principle. Those parts that I conclude are tainted, along with the appraisal of divisions expressly reversed by the Supreme Court, must be reappraised. The second analysis stems from a review of Cinerama's reargument in opposition to my predecessor's factual and legal findings. Those findings that I question in light of Cinerama's arguments must also be reexamined, if not retried.

The question remains, however, as to what the scope of my reappraisal should be. Do I reopen the record and retry selected issues? Or, do I substitute evidence introduced by Cinerama, but rejected by my predecessor where I find his findings either tainted or unpersuasive? I prefer, to the extent possible, not to reopen this matter. My reasons are twofold.

First, I question whether the fact witnesses and experts who testified will be available to testify again fifteen years later. If they are, it is likely that their memories have faded. Consequently, I am loathe to engage in the discovery necessary if issues are retried. The mere passage of time will prejudice a fair disposition of this matter because new evidence will likely be unreliable.

Secondly, I perceive in appraisal actions a need to act swiftly. The interests at stake in appraisal cases are largely, if not entirely, economic. Delay in adjudicating an appraisal case ties up assets, preventing them from being efficiently deployed. The economic drag is a harm to the public. But, more importantly, it prevents the prevailing party from enjoying use of the disputed assets. A year or so delay is perhaps inevitable, but fifteen years of delay constitutes an injustice in and of itself. To compensate the victorious litigant with legal interest is an approximation that may not totally compensate loss of an asset and that, in some cases, may penalize the losing side for delay that it may not have caused. I am not saying that justice should be sacrificed for the purpose of speed. I am saying that swiftness itself is an essential element to the just resolution of an appraisal action. To that extent, further delay in this matter would be no more than further injustice. I see no greater harm that would be caused by relying on the 47-day trial record already amassed in this case. I will wait, however, to make a final determination as to this issue until after I have read the expert's report (or petition), as described below:

B. The Court-Appointed Neutral Expert Witness

In order to establish a discrete set of issues to retry in this matter and to formulate a financially sound methodology for appraising Technicolor in accord with the Appraisal Remand, I hereby appoint a special expert witness who shall submit a final report to this Court.[21] In creating that final report, I direct the expert to consider the following:

21 *In re Shell Oil Co.*, Del. Supr., 607 A.2d 1213, 1222 (1992) (holding "we believe that the Court of Chancery has the inherent authority to appoint neutral expert witnesses").

1. The Torkelsen valuation of Technicolor employs the correct legal theory, assuming the use of Technicolor's assets under the Perelman plan. In that one respect, it is superior to the Rappaport valuation. Because the Appraisal Remand mandates that I reappraise Technicolor using the Perelman plan assumptions, I direct the expert to begin his or her inquiry with an examination of the Torkelsen valuation.[22] He or she, however, may also borrow from the Alcar Report's valuations under the Perelman Plan and the Hamada Report's modifications to the Torkelsen valuations.

22 [23] Princeton Venture Research Report (PX 445).

23 *See* Alcar Report at 7.1 (DX 344); Hamada Report, tab 24 (DX 355).

2. Chancellor Allen carefully compared the Rappaport and Torkelsen valuations, finding a number of shortcomings in the latter. Some of those shortcomings represent the use of unreliable data and methodologies unrelated to the former Chancellor's misinterpretation of § 262. Those include the following:

A. Chancellor Allen criticized three assumption made by Torkelsen: (1) Technicolor would retain its 1982-83 market share throughout the forecast period; (2) there were (in 1982-83) no foreseeable external threats to the vitality of the film processing business; and (3) all Technicolor's material economic relationships would remain stable during the forecast period.[24] The expert should address those criticisms.

B. I note that my predecessor criticized Torkelsen for calculating a lump sum terminal value for Technicolor's film processing group that assumed 5% growth, which was the stipulated inflation rate. The expert should examine this assumption. Is it meaningful to include inflation in the growth rate of a business without increasing the cost of capital by the rate of inflation for the same period? It appears to me that Torkelsen has factored inflation into his report in a self-serving way. Is his methodology acceptable within the financial community? How does the 5% growth rate comport with the economic principle that abnormal earnings will attract new competitors who drive profits down to the costs of capital? The expert should consider the advantages and feasibility of substituting a lump sum that ignores inflation and eliminates the 5% growth assumption.

C. If the expert adopts the Torkelsen valuation, the expert may wish to carve out the portion (as a percentage of the ultimate value) representing the videocassette business and undertake a separate valuation of Vidtronics, perhaps using Rappaport's model as a starting point. Otherwise, the expert should explain why Torkelsen's statistical analysis is reasonable and accurate.

[24] *Appraisal Opinion* at 23-24.

3. I want the expert to revisit the discount rate, cost of capital, and cost of debt in light of the Supreme Court's determination that the Perelman plan was the management plan in effect. I perceive the possibility that these figures are no longer valid in light of that ruling. First, the expert must consider whether the cost of debt was possibly affected by MAF's collateralization of Technicolor's assets to obtain bank financing for the acquisition. Even if Technicolor was not directly encumbered by that debt, I assume that lenders would down grade the value of that collateral in securing future loans to Technicolor. The expert should consider whether this has a measurable impact on the cost of debt used in this proceeding. Would any change affect the cost of capital used to derive the discount rate? If so, the expert should account for that effect. More importantly, would the changed characteristics of Technicolor under the Perelman plan undermine any of the assumptions (*i.e.*, selection of comparable companies) used to derive its cost of capital? Finally, if the underlying methodologies used to calculate the discount rate must be changed to reflect the Appraisal Remand's mandate, the expert should evaluate what changes should — and can — be made to the discount rate. If these figures are not tainted by the former Chancellor's legal error, the expert should consider using the figures selected by Chancellor Allen.

4. The Supreme Court ordered me to reappraise OHP, CPPD, Standard Manufacturing, and Gold Key assuming that Technicolor would proceed with MAF's plans to liquidate these divisions. The expert should determine the most professionally acceptable method and the most reliable data by which to redo the appraisal of these divisions as ongoing concerns. The expert may want to consider the use of weighted scenarios by which to account for the possibility that Technicolor might not sell a particular division in the first year or for the immediate asking price. For example, for the Gold Key division, the asking price of $25 million and the ongoing concern value of $17 million

could be weighted to derive a single value representing the present value of the future possibility of liquidating that division.

5. The expert may also review the record, including the parties' briefs, and correct any other insufficiencies contained in the valuations that the expert incorporates into the report. The expert should choose the most reliable techniques and data available within the record, modifying unreliable portions of otherwise logical and reasonable valuations by substituting other data contained in the record or by utilizing a more reliable and commonly-accepted financial technique. That process will be assisted by reference to Cinerama's reargument of its factual and legal arguments in its remand briefs and Technicolor's responses.

25 [25] I expect the expert to be of greater assistance in examining Cinerama's factual arguments. I will also review Cinerama's briefs before issuing a final opinion to evaluate the merits of Cinerama's legal and factual reargruments.

6. Although the expert must comply with the spirit of the Appraisal Remand, the expert may reject all my suggestions above. I only ask that he or she explain to me why the suggestions are not relevant or are incorrect.

7. During the formulation of this report, the expert shall have the authority to hold hearings or demand briefing at his or her discretion. Considering the ample briefing and the voluminous record in this matter, the expert may wish to concentrate on already available materials, may decide to bring the parties in to summarize their positions, may hold a hearing to question them on discrete issues or may demand briefs to address the expert's concerns.

8. If the expert requires data outside the record to complete his or her report, the expert may petition the Court to open the record. I will decide not only the petition, but whether or not to hear the parties on the issue upon receiving the petition.

9. The expert's final report shall set forth an appraisal of Technicolor's statutory fair value and shall be created according to the following procedures: After the expert's draft report is completed and before it is submitted to me, the parties shall have the opportunity to take exception to it and the expert shall have the opportunity to reject or incorporate those exceptions into a final report. Then, the parties shall submit their exceptions to the final report directly to me. I shall hold a final hearing at which the parties may raise their exceptions and all other final arguments (such as Cinerama's invocation of Rule 63). I shall call the expert to testify regarding his or her final report and the parties may cross-examine him or her. I grant the parties numerous opportunities to formally oppose the contents of the expert's final report. Consequently, I expect them to cooperate in all other aspects of this endeavor.

III. CONCLUSION

In closing, I note that the Supreme Court granted me the flexibility to fashion my own valuation methodology to appraise Technicolor. It is difficult for a judge with a legal, not finance, background to undertake a complete appraisal. Therefore, I am delegating the creation of an appraisal report to my expert, in line with the Supreme Court's instructions to fashion my own methodology. After the parties have argued their exceptions and other issues before me, I shall issue my own legal and factual findings in this matter.

I am heeding the spirit of the Appraisal Remand by empowering the expert to construct a new model for valuing Technicolor that factors out Chancellor Allen's tainted findings and that sifts through Cinerama's wide-ranging reargument of its legal and factual positions. At the same time, I expect the expert's final report to provide a coherent, comprehensible body of issues upon which to focus the parties' arguments and my rulings. The parties will have the opportunity to cross-examine my expert, providing me with their critique of his final report. This will enable me to examine the data and methodology employed by

the expert and to assemble a final ruling that is factually accurate, financially sound and in accord with the law of the Appraisal Remand.

An order appointing the special court-appointed expert witness shall issue after I confer with counsel.

IT IS SO ORDERED.