

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

BLUEBLADE CAPITAL OPPORTUNITIES :  
LLC, a Delaware limited liability company, :  
and BLUEBLADE CAPITAL :  
OPPORTUNITIES CI LLC, a Delaware :  
limited liability company, :

Petitioners, :

v. :

NORCRAFT COMPANIES, INC., a :  
Delaware corporation, :

Respondent. :

**C.A. No. 11184-VCS**

**MEMORANDUM OPINION**

Date Submitted: April 25, 2018

Date Decided: July 27, 2018

David A. Jenkins, Esquire and Robert K. Beste, Esquire of Smith, Katzenstein & Jenkins LLP, Wilmington, Delaware and Michael E. Davidian, Esquire of Blueblade Capital Opportunities LLC and Blueblade Capital Opportunities CI LLC, New York, New York, Attorneys for Petitioners Blueblade Capital Opportunities LLC and Blueblade Capital Opportunities CI LLC.

Raymond J. DiCamillo, Esquire and Kevin M. Gallagher, Esquire of Richards, Layton & Finger, P.A., Wilmington, Delaware, Attorneys for Respondent Norcraft Companies, Inc.

**SLIGHTS, Vice Chancellor**

This statutory appraisal action arises out of a May 12, 2015, merger whereby Fortune Brands Home & Security, Inc. (“Fortune”) acquired Norcraft Companies, Inc. (“Norcraft” or the “Company”) (the “Merger”) for \$25.50 cash per share (the “Merger Price”). Petitioners, Blueblade Capital Opportunities LLC and Blueblade Capital Opportunities CI LLC (together, “Blueblade”), were Norcraft stockholders on the Merger’s effective date and seek a judicial determination of the fair value of their Norcraft shares as of that date.

In an appraisal action under the Delaware General Corporation Law, the trial court’s “fair value” determination must “take into account all relevant factors.”<sup>1</sup> The relevance (or not) of certain factors “can vary from case to case depending on the nature of the [acquired] company,” the nature of the process leading to the company’s sale and, perhaps most importantly, the evidence adduced by the parties at trial in support of their respective valuation positions.<sup>2</sup> “In some cases, it may be that a single valuation metric is the most reliable evidence of fair value and that giving weight to another factor will do nothing but distort that best estimate. In other cases, “it may be necessary to consider two or more factors.”<sup>3</sup> In all cases, however,

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<sup>1</sup> 8 *Del. C.* § 262(h).

<sup>2</sup> *Merion Capital L.P. v. Lender Processing Servs., Inc.*, 2016 WL 7324170, at \*16 (Del. Ch. Dec. 16, 2016).

<sup>3</sup> *DFC Global Corp. v. Muirfield Value P’rs, L.P.*, 172 A.3d 346, 388 (Del. 2017).

the trial court’s determination respecting the “relevant factors” must be grounded in the evidentiary record and “accepted financial principles.”<sup>4</sup>

I am cognizant of the Delaware Supreme Court’s embrace of “deal price” as a strong indicator of fair value in *Dell* and *DFC*. Those decisions teach that deal price often will be a relevant factor in the trial court’s fair value calculus—particularly where the respondent company was publicly traded and sold following a meaningful market check.<sup>5</sup> In both cases, however, despite having been urged to do so, the Supreme Court declined to adopt a rule that the deal price is presumptively reflective of fair value.<sup>6</sup> Mindful of *DFC* and *Dell*, I have considered carefully whether the Merger Price (less synergies) reflects the fair value of Norcraft as of the Merger date. For the reasons explained below, I am satisfied it does not.

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<sup>4</sup> *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd*, 177 A.3d 1, 22 (Del. 2017); *DFC*, 172 A.3d at 388 (“What is necessary in any particular [appraisal] case though is for the Court of Chancery to explain its [fair value calculus] in a manner that is grounded in the record before it.”).

<sup>5</sup> *See Dell*, 177 A.3d at 35; *DFC*, 172 A.3d at 349, 351, 372; *cf. DFC*, 172 A.3d at 369 n.118 (explaining that a discounted cash flow analysis is “often used in appraisal proceedings when the respondent company was not public or was not sold in an open market check”).

<sup>6</sup> *DFC*, 172 A.3d at 348 (rejecting the petitioner’s (and others’) argument that the Court should adopt a presumption in favor of the deal price, stating “[w]e decline to engage in that act of creation, which in our view has no basis in the statutory text”); *Dell*, 177 A.3d at 21–22 (noting “we doubt[] our ability to craft the precise preconditions for invoking such a presumption”).

In this case, the evidence reveals significant flaws in the process leading to the Merger that undermine the reliability of the Merger Price as an indicator of Norcraft's fair value. There was no pre-signing market check; Norcraft and its advisors fixated on Fortune and never broadened their view to other potential merger partners. As the parties worked to negotiate the Merger agreement, Norcraft's lead negotiator was at least as focused on securing benefits for himself as he was on securing the best price available for Norcraft. And, while the Merger agreement provided for a thirty-five-day post-signing go-shop, that process was rendered ineffective as a price discovery tool by a clutch of deal-protection measures.

*Dell* reminded us that Delaware courts have “long endorsed” the “efficient market hypothesis” and emphasized “that the price produced by an efficient market is generally a more reliable assessment of fair value than the view of a single analyst, especially an expert witness who caters her valuation to the litigation imperatives of a well-heeled client.”<sup>7</sup> I have heeded that guidance as well. Unfortunately, this case was tried before the Supreme Court decided *Dell*, and the record evidence regarding the efficiency of the market for Norcraft stock prior to the Merger is, in a word, thin. With that said, the evidence that can be drawn from the record reveals that, at the time of the Merger, Norcraft was fresh off an initial public offering of its stock, was

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<sup>7</sup> *Dell*, 177 A.3d at 24.

relatively thinly traded given the niche market in which it operated and was also thinly covered by analysts. Under these circumstances, I can discern no evidence-based rationale that would justify looking to the unaffected trading price of Norcraft's stock either as a standalone indicator of fair value or as a data point underwriting the use of a deal-price-less-synergies metric.

Having concluded that flaws in the sales process leading to the Merger undermine the reliability of the Merger Price as an indicator of fair value, and that the evidence *sub judice* does not allow for principled reliance upon the efficient capital markets hypothesis, I have turned to a "traditional valuation methodology," a discounted cash flow ("DCF") analysis, to calculate the fair value of Norcraft as of the Merger date.<sup>8</sup> In my view, given the evidence in this record, a DCF-based valuation provides the most reliable means by which to discharge the Court's statutorily mandated function to appraise Norcraft.

Not surprisingly, both parties proffered expert testimony regarding Norcraft's fair value on a DCF basis. And, as we have come to expect in appraisal litigation, the experts' DCF analyses yielded valuations that are miles apart. Neither expert walked the high road from start to finish during their respective DCF journeys. That is to say, both experts, at times, made choices in their analyses that were not

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<sup>8</sup> See *Highfield Capital, Ltd. v. AXA Fin., Inc.* 939 A.2d 34, 47 (Del. Ch. 2007) (describing DCF as a "traditional valuation methodology").

supported by the evidence or not supported by “accepted financial principles” in order to support a desired outcome. I have, therefore, borrowed the most credible components of each expert’s analysis to conduct my own DCF valuation, in my best effort to obey our appraisal statute’s “command that the Court of Chancery undertake an ‘*independent*’ assessment of fair value” when performing its mandated appraisal function.<sup>9</sup> As explained below, my DCF analysis reveals a valuation of \$26.16 per share.

Insofar as *Dell* and *DFC* require that the trial court carefully consider deal price before disregarding it altogether, I have returned to the Merger Price as a “reality check” before locking in my DCF valuation as the last word on fair value. Having done so, I am satisfied that the \$0.66 per share delta between the Merger Price and my DCF valuation of Norcraft is a product of the identified flaws in Norcraft’s deal process. Accordingly, I conclude that the fair value of Norcraft as of the Merger date was \$26.16 per share.

## I. FACTUAL BACKGROUND

I recite the facts as I find them based on the evidence presented during a four-day trial. That evidence comprises testimony from thirteen fact witnesses

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<sup>9</sup> *Dell*, 177 A.3d at 21 (quoting *Golden Telecom, Inc. v. Global GT LP*, 11 A.3d 214, 218 (Del. 2010) (emphasis in original)); see also *Gholl v. eMachines, Inc.*, 2004 WL 2847865, at \*5 (Del. Ch. Nov. 24, 2004) (noting that both parties bear a burden of proof in a statutory appraisal trial and holding that, “[i]f neither party satisfies its burden . . . the court must then use its own independent business judgment to determine fair value”).

(some presented live and some by deposition) and three live expert witnesses, along with over 500 exhibits. I accord the evidence the weight and credibility I find it deserves. As noted, both parties carried a burden to prove their respective valuation positions by a preponderance of the evidence. Thus, Petitioners were obliged to prove that their proffered valuation of Norcraft, a DCF-based valuation of \$34.78 per share, represented Norcraft's fair value as of the Merger; Respondent's burden was to prove that its proffered valuation of \$21.90 per share, the Merger Price less synergies, was Norcraft's fair value as of the Merger. With these competing burdens in mind, I find that the following facts were proven by a preponderance of the evidence.

#### **A. Parties and Relevant Non-Parties**

Respondent, Norcraft, is a Delaware corporation in the cabinetry manufacturing business.<sup>10</sup> Prior to the Merger, Norcraft's stock traded on the New York Stock Exchange.<sup>11</sup> On May 12, 2015, Fortune acquired Norcraft for \$25.50 cash per share in the Merger.<sup>12</sup> In connection with that transaction, Norcraft merged

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<sup>10</sup> JX 267 ("Norcraft FY2014 10-K") at 1, 6; JX 221 ("Merger Agreement"), pmb1. & § 1.3.

<sup>11</sup> JX 267 (Norcraft FY2014 10-K) at 1.

<sup>12</sup> Joint Pre-Trial Stipulation and Order ("PTO") ¶¶ 2y, 2ff. I commend the parties, and counsel in particular, for the substantial effort that was undertaken to prepare and submit comprehensive pre-trial factual stipulations.

with an indirect, wholly-owned subsidiary of Fortune, Tahiti Acquisition Corp. (“Tahiti”), with Norcraft surviving as a wholly-owned Fortune subsidiary.<sup>13</sup>

Petitioners were Norcraft stockholders as of the Merger date and collectively held 557,631 shares of Norcraft common stock.<sup>14</sup> It is undisputed that they properly perfected their statutory appraisal right.

Non-party, Fortune, is a home and security products company with four business segments: cabinets, plumbing, doors and security.<sup>15</sup> Fortune sells its products through several sales channels, “including kitchen and bath dealers, wholesalers oriented to builders or professional remodelers, industrial and locksmith distributors [and] ‘do-it-yourself’ remodeling-oriented home centers . . . .”<sup>16</sup>

Non-parties, Mark Buller, Christopher Reilly, Michael Maselli, Harvey Wagner, Ira Zecher and Edward Kennedy served on Norcraft’s board of directors (the “Board”) at all relevant times.<sup>17</sup> Buller also served as the Chief Executive Officer of Norcraft (and its predecessors) from 2003 to the Merger’s consummation

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<sup>13</sup> JX 221 (Merger Agreement), pmb1. & § 1.3; *see* PTO ¶ 2y.

<sup>14</sup> PTO ¶¶ 2h, 2i. Blueblade acquired all of its Norcraft stock after the Merger was announced. PTO ¶¶ 2h, 2i.

<sup>15</sup> PTO ¶ 2g; JX 270 (“Fortune FY2015 10-K”) at 6.

<sup>16</sup> JX 270 (Fortune FY2015 10-K) at 5.

<sup>17</sup> *See* PTO ¶ 2f.



in May 2015.<sup>18</sup> Non-party, Leigh Ginter, was the Chief Financial Officer of Norcraft (and its predecessors) from 2003 through the Merger's consummation.<sup>19</sup> And non-party, Eric Tanquist, was Norcraft's Vice President of Finance Administration from approximately 2007 through the Merger's consummation.<sup>20</sup>

Non-party, Christopher Klein, is Fortune's CEO and served in that capacity at all times relevant to this action.<sup>21</sup> Non-party, Robert Biggart, is Fortune's general counsel and served in that capacity at all relevant times.<sup>22</sup> And non-party, Jason Baab, served as Fortune's Vice President of Corporate Development and M&A at the time of the Merger.<sup>23</sup>

## **B. Pre-Merger Norcraft**

As of the Merger date, "Norcraft was a leading manufacturer of kitchen and bathroom cabinetry in the United States and Canada."<sup>24</sup> The Company sold its products primarily to kitchen and bathroom cabinet dealers in the home repair,

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<sup>18</sup> PTO ¶ 2f; JX 3 (Buller Dep.) at 19:9–21. Buller was also the Chairman of Norcraft's Board at all relevant times prior to the Merger. JX 3 (Buller Dep.) at 19:9–21.

<sup>19</sup> PTO ¶ 2f; JX 1 (Ginter Dep.) at 18–19.

<sup>20</sup> PTO ¶ 2f; JX 2 (Tanquist Dep.) at 21:2–16.

<sup>21</sup> PTO ¶ 2g.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> PTO ¶ 2a.

remodeling and new home construction markets through four business divisions: Mid Continent Cabinetry, StarMark Cabinetry, UltraCraft Cabinetry and Urban Effects (a.k.a. Norcraft Canada).<sup>25</sup> Prior to the Merger, Norcraft regarded Fortune, American Woodmark Corporation (“American Woodmark”) and Masco as its principal competitors.<sup>26</sup> It also faced competition from “a large number of smaller manufacturers.”<sup>27</sup>

### **1. Buller and Two Private Equity Firms Acquire Norcraft’s Operating Subsidiary in 2003**

In October 2003, Buller, certain Buller family members and funds affiliated with the private equity firms Saunders, Karp & Megrue (“SKM”) and

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<sup>25</sup> PTO ¶¶ 2b, 2c; JX 267 (Norcraft FY2014 10-K) at 6–10. For FY2014, “kitchen and bathroom cabinet dealers accounted for [86%] of Norcraft’s net sales, home builders accounted for [9%], and wholesale retailers, or home centers, accounted for [5%].” PTO ¶ 2b. “[A]pproximately 58% of [Norcraft’s FY2014] net sales were to the home repair and remodeling market and the remaining net sales were to the new residential construction market.” JX 267 (Norcraft FY2014 10-K) at 6. As of the Merger date, Norcraft, Fortune and Masco Corporation (“Masco”) were the only three “dealer channel” cabinet manufacturers in the United States with a market share of over 5%. *See* JX 112 (Gabelli & Co., *The Home Improvement Opportunity*, published Jan. 29, 2015 [“Gabelli Report”]) at CITI-00053582. In the cabinetry industry, the “dealer channel” comprises third parties who purchase cabinets from manufacturers (or wholesalers) and sell them to end users. *See id.*; JX 12 (Baab Dep.) at 36:8–20. In 2014, nearly half of U.S. cabinet sales (representing approximately \$6 billion) were made through the dealer channel, which is generally considered the most profitable sales channel in the cabinetry industry. *See* JX 112 (Gabelli Report) at CITI-00053582, CITI-00053595; JX 1 (Ginter Dep.) at 153:17–154:1; JX 5 (Klein Dep.) at 293:25–294:3.

<sup>26</sup> JX 267 (Norcraft FY2014 10-K) at 11.

<sup>27</sup> *Id.*

Trimaran Capital Partners (“Trimaran”) acquired Norcraft Companies, L.L.C. for approximately \$315 million (the “2003 Acquisition”).<sup>28</sup> At the same time, Norcraft Companies, L.L.C. converted to a Delaware limited partnership, Norcraft Companies, L.P. (“Norcraft LP”), and Buller became the CEO of that entity.<sup>29</sup> For the next ten years, Norcraft LP operated as a privately-held company.

## **2. Norcraft and the Cyclical Cabinetry Industry**

The undisputed evidence reveals that Norcraft operated in a cyclical industry.<sup>30</sup> As one naturally might expect, the cabinetry industry is directly affected by the home improvement industry, which, in turn, is affected by macro-economic conditions, including employment levels, demographic trends, availability of financing, interest rates and consumer confidence.<sup>31</sup> The cabinetry industry is also directly affected by housing starts, as a significant percentage of sales are connected

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<sup>28</sup> JX 3 (Buller Dep.) at 16:3–24. As of 2003, Norcraft Companies, L.L.C. was the operating entity in Norcraft’s organizational structure. JX 400 (Norcraft Amendment No. 5 to Form S-1, filed Oct. 30, 2013 [“Norcraft Amendment 5 to Form S-1”]) at 19. For purposes of this Memorandum Opinion, I have not distinguished SKM and Trimaran from the SKM and Trimaran funds that owned Norcraft common stock prior to the Merger.

<sup>29</sup> JX 27 (Mar. 29, 2004 Norcraft LP Press Release) at 2. Following the 2003 Acquisition, Norcraft LP became the operating entity in Norcraft’s organizational structure. JX 400 (Norcraft Amendment 5 to Form S-1) at 19. Buller and his family collectively owned approximately 11% of Norcraft LP’s equity. JX 3 (Buller Dep.) at 18:6–8.

<sup>30</sup> TT 21:6–11, 21:20–21 (Eldridge), 96:22–97:7 (Biggart), 607:23–608:1 (Clarke).

<sup>31</sup> JX 267 (Norcraft FY2014 10-K).

to new home construction.<sup>32</sup> When housing starts decrease, as they often do for various reasons,<sup>33</sup> cabinet sales decrease as well.<sup>34</sup>

Norcraft was no exception to this cyclicity. Norcraft LP enjoyed steady growth of its earnings before interest, taxes, depreciation and amortization (“EBITDA”) from 2003 through 2006—\$47 million (2003) to \$80 million (2006).<sup>35</sup> This growth was fueled, in large part, by a significant acquisition in March 2002 and a boom in the United States housing market.<sup>36</sup> Growth stalled, however, beginning in 2007, when Norcraft LP experienced the first of three consecutive years of declining sales and adjusted EBITDA.<sup>37</sup> As is typical in classically cyclical businesses, Norcraft LP saw improved sales beginning in 2010, although its adjusted EBITDA continued to decline until 2012 (with 2010 being the only exception). The attached chart illustrates the trends<sup>38</sup>:

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<sup>32</sup> *Id.*; see also TT 607:23–608:1 (Clarke); JX 14 (Clarke Dep.) at 60 (“I do believe that the home building industry is cyclical and at some point the housing starts would decrease.”).

<sup>33</sup> JX 23 (Austin Smith Rebuttal Report) at 6.

<sup>34</sup> JX 267 (Norcraft FY2014 10-K).

<sup>35</sup> JX 20 (Austin Smith Report) at 7.

<sup>36</sup> JX 400 (Norcraft Amendment 5 to Form S-1) at 19.

<sup>37</sup> JX 20 (Austin Smith Report) at 7.

<sup>38</sup> *Id.*

		Net Sales		Adjusted EBITDA	
		(\$ Millions)	YoY % change	(\$ Millions)	YoY % change
[1]	2003	256		47	
[2]	2004	330	29%	58	23%
[3]	2005	405	23%	70	21%
[4]	2006	441	9%	80	14%
[5]	2007	394	-11%	72	-10%
[6]	2008	332	-16%	51	-29%
[7]	2009	247	-26%	36	-29%
[8]	2010	263	6%	39	8%
[9]	2011	269	2%	37	-5%
[10]	2012	289	7%	34	-8%
[11]	2013	340	18%	43	26%
[12]	2014	376	11%	52	21%

As reflected in the chart, Norcraft LP’s adjusted EBITDA trended up in 2013, suggesting that its six-year period of decline had come to an end, at least for the time being.<sup>39</sup>

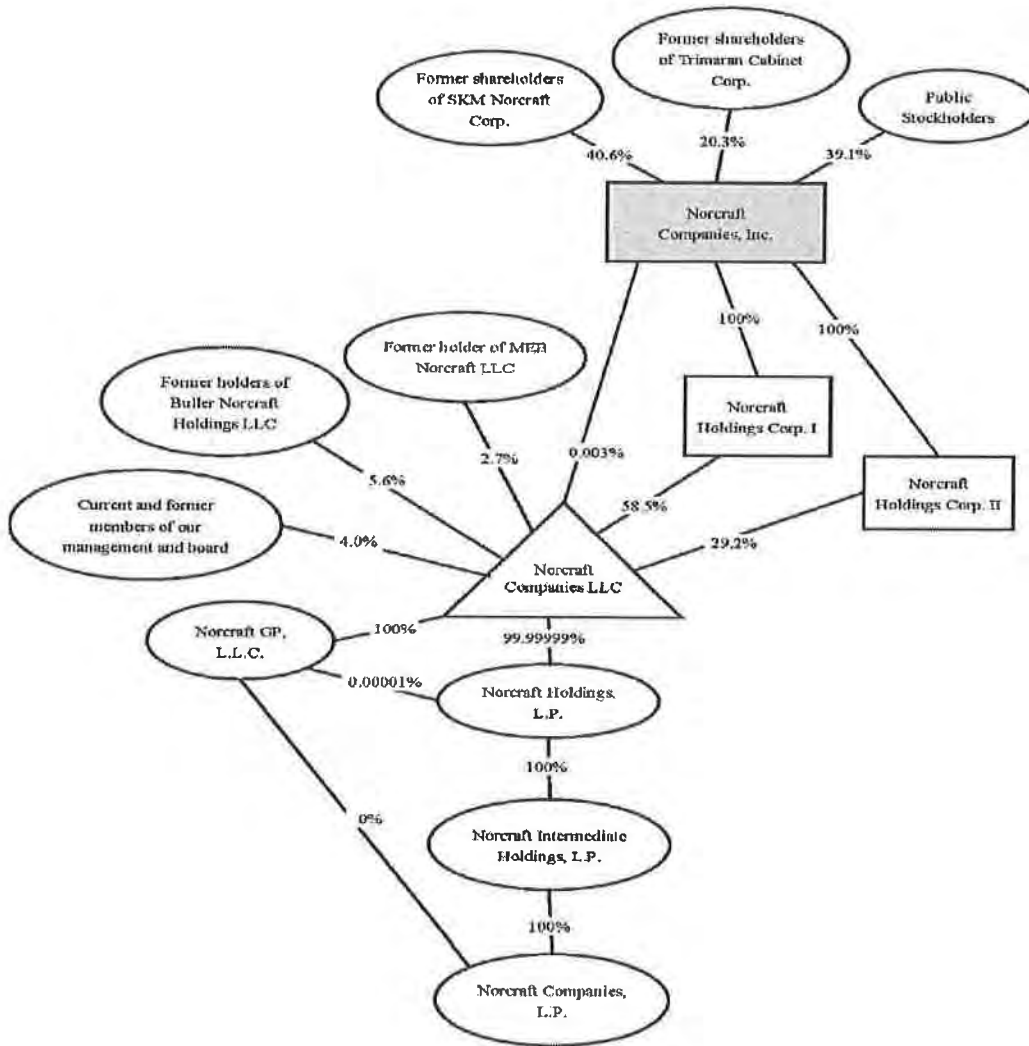
### 3. Norcraft’s IPO and Reorganization

On November 13, 2013, Norcraft completed an initial public offering (“IPO”)<sup>40</sup> whereby the Norcraft enterprise was reorganized into the following holding company structure<sup>41</sup>:

<sup>39</sup> *Id.* I note that between 2006 and 2013, Norcraft LP’s management struggled accurately to project the company’s future performance. JX 3 (Buller Dep.) at 183–84.

<sup>40</sup> JX 267 (Norcraft FY2014 10-K) at 12; PTO ¶ 2j.

<sup>41</sup> JX 267 (Norcraft FY2014 10-K) at 12, 15, 65; PTO ¶ 2d.



The newly-formed parent company, Norcraft—a publicly-traded company—was a holding company; Norcraft Companies LLC (“Norcraft LLC”)<sup>42</sup> and its subsidiaries

<sup>42</sup> Norcraft LLC is not to be confused with Norcraft Companies, L.L.C. As noted, Norcraft Companies, L.L.C. was converted into Norcraft LP in connection with the 2003 Acquisition, and it continues to exist as such in the Norcraft enterprise structure. JX 400 (Norcraft Amendment 5 to Form S-1) at 19; JX 267 (Norcraft FY2014 10-K) at 12; PTO ¶ 2d.

were the operating entities.<sup>43</sup> Following the reorganization, Norcraft was Norcraft LLC's sole managing member and owned (directly and indirectly) approximately 87.7% of Norcraft LLC, with Buller, his family members and certain members of Norcraft management holding the remainder.<sup>44</sup>

As part of the IPO, Norcraft sold 7,356,634 shares of Norcraft common stock, or 39.1% of Norcraft's equity, to the public at \$16.00 per share.<sup>45</sup> SKM and Trimaran together retained a 60.9% equity interest in Norcraft, while Buller, his family members and certain members of Norcraft management, through their convertible Norcraft LLC units, collectively held a prospective 12.3% equity interest.<sup>46</sup>

In conjunction with the IPO, Norcraft entered into Tax Receivable Agreements ("TRAs") with SKM, Trimaran and the Norcraft LLC unitholders (collectively, the "TRA Beneficiaries").<sup>47</sup> Under the TRAs, Norcraft was required

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<sup>43</sup> JX 267 (Norcraft FY2014 10-K) at 12.

<sup>44</sup> *Id.* PTO ¶ 2d. Buller et al.'s LLC units were convertible "at the option of the [unitholders]" into restricted shares of Norcraft common stock "on a one-for-one basis" or into cash (pursuant to a stated conversion formula), with the form of consideration to be determined at Norcraft's option. JX 267 (Norcraft FY2014 10-K) at 72; *see also* JX 35 (Norcraft Form 424B4, filed Nov. 6, 2013 ["Norcraft IPO Prospectus"]) at 101–02.

<sup>45</sup> JX 35 (Norcraft IPO Prospectus) at 1; PTO ¶ 2d.

<sup>46</sup> JX 35 (Norcraft IPO Prospectus) at 102–03; JX 267 (Norcraft FY2014 10-K) at 73; PTO ¶ 2d.

<sup>47</sup> JX 36 (LLC Unitholder TRA), pmb1.; JX 267 (Norcraft FY2014 10-K) at 79.

to pay the TRA Beneficiaries 85% of the applicable annual tax savings, if any, that Norcraft realized as a result of certain tax benefits contributed to Norcraft by the TRA Beneficiaries, including net operating losses and asset basis step-ups.<sup>48</sup> The TRAs also provided that Norcraft’s payment obligations to the TRA Beneficiaries would be accelerated in the event of a “Change of Control.”<sup>49</sup> The TRAs later came to feature prominently in the Norcraft-Fortune negotiations leading up to the Merger.

### **C. Fortune Approaches Norcraft**

On October 20, 2014, representatives of Fortune’s financial advisor, RBC Capital Markets, LLC (“RBC”), contacted Buller to inform him of Fortune’s interest in a potential acquisition of Norcraft.<sup>50</sup> Three days later, Buller met with Fortune’s CEO, Christopher Klein, at Fortune’s headquarters in Deerfield, Illinois to discuss a potential Norcraft-Fortune transaction.<sup>51</sup> During that meeting, Buller informed Klein that Norcraft was not for sale, but also indicated that he (Buller) would convey

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<sup>48</sup> JX 36 (LLC Unitholder TRA) §§ 1.1, 3.1 (defining “Realized Tax Benefit” and “Cumulative Net Realized Tax Benefit”).

<sup>49</sup> *Id.* §§ 4.1–4.3. The TRAs defined “Change of Control” to include “the acquisition, directly or indirectly, by any [unaffiliated third-party acquiror] . . . of beneficial ownership . . . of more than 50.1% of the aggregate voting power” of Norcraft’s outstanding voting stock. *Id.* § 1.1.

<sup>50</sup> PTO ¶ 2k.

<sup>51</sup> PTO ¶ 2l.



any acquisition proposal to Norcraft's Board.<sup>52</sup> Perhaps sensing that his Board might be inclined to pursue a deal with Fortune, Buller advised Klein that he would like to have a role in the post-Merger company in the event the parties reached an agreement.<sup>53</sup> Klein was noncommittal but, internally, Fortune was disinclined to bring Buller on board post-Merger.<sup>54</sup> At the meeting's close, Klein provided Buller with a written, non-binding proposal under which Fortune would (1) acquire "100% of [Norcraft's] equity ownership interests" for \$22.00 cash per share via a tender offer (followed by a merger); and (2) satisfy Norcraft's obligations under the TRAs.<sup>55</sup>

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<sup>52</sup> JX 238 (Norcraft Schedule 14D-9, filed Apr. 14, 2015 ["Norcraft Schedule 14D-9"]) at 10.

<sup>53</sup> Transcript of Trial ("TT") at 205:1–10 (Biggart) ("Q. You suspect that Mr. Buller first raised the desire to be employed by Fortune following any merger during a meeting on October 23, 2014. Correct? A. I believe that's when he expressed an interest to [Klein].").

<sup>54</sup> JX 13 (Biggart Dep.) at 86:16–87:18 ("Q. Were there any internal discussions within Fortune about hiring [Buller] post-merger? A. Yes, I talked to [Klein] directly a number of times about it. Q. What did he say? A. [Klein] said I don't know that there is a place for him . . .").

<sup>55</sup> PTO ¶ 21; JX 69 (Fortune's Oct. 23, 2014 Proposal) at FB0049476. Fortune viewed the TRA payments as part of the Merger consideration. *See* JX 13 (Biggart Dep.) at 34:10–21, 166:10–167:8. Thus, for every dollar spent to satisfy the TRA Beneficiaries, that dollar would not be included in the consideration paid to Norcraft's public stockholders. *See* JX 249 (Funds Flow Memorandum), Ex. E.

Buller promptly informed Norcraft’s Board of Fortune’s proposal, and the Board convened on November 4, 2014 to discuss it.<sup>56</sup> Following that meeting, Norcraft engaged legal and financial advisors to assist the Board in its consideration of Fortune’s proposal.<sup>57</sup> The Company retained Ropes & Gray LLP (“Ropes & Gray”) as its legal advisor and Citigroup Global Markets Inc. (“Citi”) as its financial advisor.<sup>58</sup> The Board promptly tasked Citi with “review[ing] strategic alternatives of the [C]ompany, including a potential sale to Fortune.”<sup>59</sup> Norcraft also engaged Pricewaterhouse Coopers (“PwC”) to provide an assessment of the Company’s contractual obligations under the TRAs.<sup>60</sup>

#### **D. Norcraft’s Management Prepares Long-Term Projections**

Norcraft’s Board met again on November 8, 2014.<sup>61</sup> During this meeting, “[t]he [B]oard . . . discussed next steps in formulating a potential response to [Fortune], and after discussion, agreed that [Buller, Ginter and Reilly] would map out a proposed strategy and response with Citi[] and report their recommendations

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<sup>56</sup> JX 238 (Norcraft Schedule 14D-9) at 10.

<sup>57</sup> PTO ¶ 2m; JX 238 (Norcraft Schedule 14D-9) at 10.

<sup>58</sup> PTO ¶ 2m; JX 238 (Norcraft Schedule 14D-9) at 10.

<sup>59</sup> TT 12:1–3 (Eldridge). Nathan Eldridge was Citi’s lead banker in connection with the Norcraft engagement. *Id.* at 12:1–15.

<sup>60</sup> PTO ¶ 2m; JX 238 (Norcraft Schedule 14D-9) at 10.

<sup>61</sup> JX 71(Norcraft Board Minutes, Nov. 8, 2014) at NCFT0165019.

back to the [B]oard.”<sup>62</sup> The Board also instructed Buller and Ginter to prepare five-year financial projections to facilitate the Board’s evaluation of strategic alternatives (including a potential Norcraft-Fortune transaction).<sup>63</sup>

Buller and Ginter both had experience preparing long-term projections, having previously prepared five-year projections in connection with Norcraft’s IPO and four debt financing transactions between 2003 and 2010.<sup>64</sup> Norcraft, however, did not prepare long-term projections in the ordinary course of its business; it only did so in connection with “extraordinary event[s]” such as financing transactions and ultimately the Merger.<sup>65</sup> Ordinarily, Norcraft management prepared an annual one-year budget, which forecasted Norcraft’s quarterly (and monthly) performance for the upcoming year.<sup>66</sup> The Company’s annual budgeting process began each fall and involved several steps<sup>67</sup>:

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<sup>62</sup> *Id.* at NCFT0165020.

<sup>63</sup> JX 1 (Ginter Dep.) at 35–36; *see* JX 3 (Buller Dep.) at 112–16.

<sup>64</sup> JX 1 (Ginter Dep.) at 27–28; JX 3 (Buller Dep.) at 28:21–29:3, 102.

<sup>65</sup> JX 1 (Ginter Dep.) at 27:8–12.

<sup>66</sup> JX 1 (Ginter Dep.) at 22:4–24, 25:3–25; *see* JX 150 (Feb. 27, 2015 e-mail from Tanquist to RBC, attaching Norcraft’s FY2015 budget) at NCFT0138021–24.

<sup>67</sup> JX 2 (Tanquist Dep.) at 25–27; JX 3 (Buller Dep.) at 24:8–26:1.

- First, the corporate controller for each of Norcraft’s four business divisions would prepare a detailed “bottoms-up” budget for his or her division.<sup>68</sup> As part of that process, the division controllers “would work with [their respective] division presidents to come up with what they expected for sales growth in the [upcoming] year and . . . would build that into the budget[,] [along with] . . . other assumptions like labor efficiencies [and] material cost.”<sup>69</sup> In this way, the division controllers “would get a picture of what [profit and loss] would look like for [their respective divisions for] the [upcoming] year.”<sup>70</sup>
- Next, each division controller would present his or her division-level budget to Buller and Ginter “for review and approval.”<sup>71</sup>
- Finally, “[a]fter several rounds of . . . back-and-forth,” Ginter would compile the division-level budgets “into a consolidated format,” which was then presented to the Board for review and approval in January of the budgeted year.<sup>72</sup> After review, the Board typically would approve the consolidated annual budget that same month.<sup>73</sup>

Following the Board’s November 8, 2014 meeting, Buller and Ginter created two sets of five-year projections: a base-case projection (the “Base Case”) and an upside-case projection (the “Upside Case”), both of which are summarized below.<sup>74</sup>

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<sup>68</sup> JX 1 (Ginter Dep.) at 22:9–12; JX 2 (Tanquist Dep.) at 25:12–24.

<sup>69</sup> JX 2 (Tanquist Dep.) at 25:25–26:5.

<sup>70</sup> *Id.* at 26:5–7.

<sup>71</sup> JX 1 (Ginter Dep.) at 22:11–14; JX 3 (Buller Dep.) at 24:8–25:1.

<sup>72</sup> JX 1 (Ginter Dep.) at 22:15–18; JX 2 (Tanquist Dep.) at 26:8–10; JX 3 (Buller Dep.) at 24:12–18.

<sup>73</sup> JX 2 (Tanquist Dep.) at 26:8–10; JX 3 (Buller Dep.) at 24:15–18.

<sup>74</sup> JX 1 (Ginter Dep.) at 74–80; JX 99 (Jan. 9, 2015 e-mail from Reilly to other Norcraft Board members, attaching Norcraft management presentation [“Norcraft Jan. 2015 Management Presentation”]) at NCFT0146344–47. The record also contains a set of three-

<b>Base Case Projections (FY2014–2019)<sup>75</sup></b>						
(\$ in millions)	<b>2014E</b>	<b>2015E</b>	<b>2016E</b>	<b>2017E</b>	<b>2018E</b>	<b>2019E</b>
Net Sales	\$371	\$409	\$448	\$483	\$523	\$568
EBITDA	\$51	\$59	\$70	\$79	\$89	\$100
EBIT	\$36	\$42	\$51	\$58	\$68	\$81
CapEx	\$10	\$18	\$12	\$15	\$16	\$17

<b>Upside Case Projections (FY2014–2019)<sup>76</sup></b>						
(\$ in millions)	<b>2014E</b>	<b>2015E</b>	<b>2016E</b>	<b>2017E</b>	<b>2018E</b>	<b>2019E</b>
Net Sales	\$373	\$415	\$460	\$507	\$558	\$613
EBITDA	\$51	\$61	\$75	\$89	\$105	\$120
EBIT	\$36	\$45	\$56	\$67	\$82	\$100
CapEx	\$10	\$18	\$12	\$15	\$17	\$18

year projections for Norcraft, apparently created by Ginter prior to October 2014 (the “Ginter 2014 Projections”). Ginter, however, did not recall creating these projections or the purpose for which they were prepared. *See* JX 1 (Ginter Dep.) at 35:23–36:4, 53:22–54:18.

<sup>75</sup> JX 99 (“Norcraft Jan. 2015 Management Presentation”) at NCFT0146344–47.

<sup>76</sup> *Id.* The Base Case and Upside Case projections also included free cash flow forecasts. *Id.* at NCFT0146347. Those free cash flow forecasts, however, did not deduct for income taxes and, therefore, significantly overstated Norcraft’s future free cash flows. JX 1 (Ginter Dep.) at 44–45. Accordingly, the tables depicted here do not include the free cash flow component of the Base Case and Upside Case projections.

In preparing the Base Case and Upside Case projections, Buller and Ginter took a “top-down” approach—independently projecting Norcraft’s net sales, operating expenses and capital expenditures (for all business divisions) in the first instance, and then consulting with division-level management as and where needed—rather than the “bottoms-up” approach they used to prepare Norcraft’s annual budgets.<sup>77</sup> They created the Upside Case first.<sup>78</sup> After preparing the Upside Case, Buller and Ginter presented it to Reilly for his review.<sup>79</sup> “Upon review, [Reilly opined] that the [Upside Case] . . . was too aggressive . . . and asked [Buller and Ginter] to go back and . . . do a more conservative model, which became known as the [B]ase [C]ase.”<sup>80</sup> Buller and Ginter both believed that Norcraft could achieve the results forecasted in the Base Case and Upside Case projections, although “the [U]pside [C]ase was more of a stretch and everything would have had to go right.”<sup>81</sup>

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<sup>77</sup> JX 1 (Ginter Dep.) at 22–23, 75–76, 87–88; JX 3 (Buller Dep.) at 34–36.

<sup>78</sup> JX 1 (Ginter Dep.) at 75–76.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 75:23–76:8.

<sup>81</sup> *Id.* at 97:12–13; JX 3 (Buller Dep.) at 115:8–18 (“The [B]ase [C]ase is something that we felt very, very comfortable in doing, and then [in the Upside Case] we showed the upside that if everything, everything went our way, there was a possibility that we could hit the [U]pside [Case].”).

Buller and Ginter presented the Base Case and Upside Case projections to Norcraft's Board at a meeting on November 25, 2014.<sup>82</sup> After discussion, the Board approved both sets of projections for use in connection with the Board's consideration of Fortune's proposal.<sup>83</sup>

#### **E. Norcraft Pushes Fortune to Increase its Offer**

Norcraft's Board next met on December 3, 2014.<sup>84</sup> During this meeting, Citi presented the Board with an analysis of Norcraft's standalone prospects and possible strategic alternatives.<sup>85</sup> Citi's presentation included an overview of preliminary valuation perspectives and selected strategic alternatives,<sup>86</sup> "including maintaining the status quo, a possible sale of the Company to [Fortune] or another buyer, as well as some other potential acquisition targets."<sup>87</sup> Following Citi's presentation, the Board determined that (1) "[Fortune's] proposed price of \$22.00 per share was inadequate"; and (2) "[Fortune's] offer would need to be significantly and

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<sup>82</sup> JX 71 (Norcraft Board Minutes, Nov. 25, 2014) at NCFT0165023.

<sup>83</sup> *Id.*; PTO ¶ 20.

<sup>84</sup> JX 71 (Norcraft Board Minutes, Dec. 3, 2014) at NCFT0165024.

<sup>85</sup> *Id.* at NCFT0165025; JX 95 (Dec. 2, 2014 email from Reilly to other Norcraft Board members attaching Citi presentation deck).

<sup>86</sup> JX 95 (Dec. 2, 2014 email from Reilly to other Norcraft Board members attaching Citi presentation deck).

<sup>87</sup> JX 71 (Norcraft Board Minutes, Dec. 3, 2014) at NCFT0165025.

substantially higher in order for the Board to consider a potential sale of the Company at this time.”<sup>88</sup> The Board, however, did not task Citi with pursuing alternative buyers or canvassing the market.

Two days later, Buller called Klein and conveyed to him the Board’s determination.<sup>89</sup> Buller also explained that “if [Fortune] were interested in significantly increasing [its proposed price] . . . , [Norcraft] would be prepared to share certain [non-public] information [with Fortune], under a confidentiality agreement with an appropriate standstill, in order to assist [Fortune] in understanding [Norcraft’s] prospects, upside potential and intrinsic value.”<sup>90</sup> Soon thereafter, on December 11, 2014, Norcraft and Fortune entered into a confidentiality agreement with a standstill.<sup>91</sup>

On January 7, 2015, Buller, Ginter and Citi representatives met with Fortune’s management at Buller’s home in Winnipeg, Canada to discuss the proposed Norcraft-Fortune transaction.<sup>92</sup> The discussion focused on the structure and timing of the proposed transaction, Norcraft’s business and financial projections and the

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<sup>88</sup> *Id.*

<sup>89</sup> JX 238 (Norcraft Schedule 14D-9) at 11.

<sup>90</sup> *Id.*

<sup>91</sup> PTO ¶ 2p; JX 97 (Confidentiality Agreement).

<sup>92</sup> PTO ¶ 2q.



integration of Norcraft into Fortune.<sup>93</sup> Norcraft provided Fortune with the Base Case and Upside Case projections as well as certain preliminary information regarding the TRAs.<sup>94</sup> During this meeting, Buller reiterated his interest in post-closing employment with Fortune and discussed the possibility with Klein.<sup>95</sup> Again, Klein “ke[pt] the door open” but stopped short of making a commitment.<sup>96</sup>

The following week, on January 14, Norcraft’s tax advisor, PwC, presented its analysis regarding the TRAs to Fortune’s management and RBC.<sup>97</sup> PwC explained that termination of the TRAs in connection with Fortune’s acquisition of Norcraft would require significant payments to the TRA Beneficiaries (including Buller).<sup>98</sup> PwC also identified certain tax benefits that Fortune could realize from the acquisition, including a stepped-up basis in Norcraft’s assets.<sup>99</sup> The next day, Klein advised Buller that Fortune’s tax advisor was performing its own analysis of

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> JX 238 (Norcraft Schedule 14D-9) at 12.

<sup>96</sup> JX 13 (Biggart Dep.) at 88:2–3.

<sup>97</sup> PTO ¶ 2r.

<sup>98</sup> *Id.*; JX 238 (Norcraft Schedule 14D-9) at 12. All parties agreed that Fortune’s acquisition, directly or indirectly, of 100% of Norcraft’s equity would constitute a “Change of Control” within the meaning of the TRAs. JX 36 (LLC Unitholder TRA) § 1.1 (defining “Change of Control”); *see* PTO ¶ 2z.

<sup>99</sup> PTO ¶ 2r.

Norcraft's obligations under the TRAs following the proposed transaction.<sup>100</sup> Klein also noted that Fortune would require more information about the TRAs to calculate Fortune's full payment obligations to the TRA Beneficiaries.<sup>101</sup>

On January 27, 2015, Klein delivered to Buller a revised written indication of interest with a proposed price of \$25.00 per share.<sup>102</sup> Buller promptly informed Norcraft's Board of Fortune's revised proposal, and the Board met on February 2 to discuss it.<sup>103</sup> During this meeting, Citi provided the Board with its revised valuation analysis, which incorporated Norcraft's net sales and EBITDA results for Q4 FY2014 (both of which were higher than expected) and Fortune's latest proposal of \$25.00 per share.<sup>104</sup> Reilly then reviewed with the Board the tax benefits that Fortune would realize in connection with its proposed acquisition of Norcraft, including a stepped-up basis in Norcraft's assets.<sup>105</sup> After receiving Reilly's report,

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<sup>100</sup> PTO ¶ 2s.

<sup>101</sup> *Id.*

<sup>102</sup> JX 238 (Norcraft Schedule 14D-9) at 12.

<sup>103</sup> *See* JX 238 (Norcraft Schedule 14D-9) at 12; JX 71 (Norcraft Board Minutes, Feb. 2, 2015) at NCFT0165026–27.

<sup>104</sup> JX 238 (Norcraft Schedule 14D-9) at 12; *see* JX 71 (Norcraft Board Minutes, Feb. 2, 2015) at NCFT0165026–27; PTO ¶ 2t. Citi's valuation employed several methodologies, including a DCF and comparable company analysis, and yielded values of \$16.75 to \$27 per share (based on the Base Case projections). JX 115 (Feb. 2, 2015 email from Citi, attaching Board Discussion Materials) at CITI-00063489.

<sup>105</sup> JX 71 (Norcraft Board Minutes, Feb. 2, 2015) at NCFT0165027.

“the Board concluded that [Fortune] would benefit from th[at] step-up in basis going forward and should therefore value th[at] benefit in its offer price.”<sup>106</sup>

With Citi’s and Reilly’s input in hand, the Board determined that Fortune’s proposed purchase price of \$25.00 per share was inadequate, in part because it did not value the tax benefits that Fortune would realize in connection with the proposed transaction.<sup>107</sup> The Board also believed, however, “that a transaction with [Fortune] could potentially create more value for [Norcraft] stockholders if at an appropriate valuation than if [Norcraft] continued independently to execute on its strategic plan. Accordingly, the Board authorized [Buller and Reilly] to continue to engage in discussions with [Fortune] to confirm if [Fortune] was willing to further increase its propos[ed] [price].”<sup>108</sup> Even at this stage, however, the Board did not reach out to other potentially interested parties in hopes of securing a better offer or, at least, a source of leverage in its discussions with Fortune.

The next day, Buller called Klein to convey Norcraft’s position regarding Fortune’s revised proposal.<sup>109</sup> During that call, Buller advised Klein that Fortune’s

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<sup>106</sup> *Id.*

<sup>107</sup> JX 238 (Norcraft Schedule 14D-9) at 12.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

proposed price remained inadequate and encouraged Fortune to increase its bid.<sup>110</sup> Unable to invoke the threat of an alternative transaction, Buller highlighted Norcraft's better than expected preliminary FY2014 results and FY2015 outlook as support for his pitch that Fortune pay a higher price.<sup>111</sup> Apparently not feeling the heat, Klein advised Buller that Fortune would consider increasing its bid but that it was unlikely that Fortune's proposed price would move significantly higher than \$25.00 per share.<sup>112</sup>

Following Buller and Klein's February 3 call, Fortune increased its offer to \$25.50 per share, indicating that this was its "best and final offer."<sup>113</sup> The Norcraft team was less than thrilled with Fortune's \$25.50 per share proposal; indeed, Reilly and Ginter both believed that Fortune's proposal significantly undervalued Norcraft.<sup>114</sup> Nevertheless, the Board remained focused exclusively on Fortune. In a last-ditch effort to get Fortune to increase its "best and final offer," the Board

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*; PTO ¶ 2u.

<sup>112</sup> JX 238 (Norcraft Schedule 14D-9) at 12.

<sup>113</sup> JX 412 (Feb. 10, 2015 email from Klein to Buller, attaching Fortune's re-revised proposal) at 2.

<sup>114</sup> JX 1 (Ginter Dep.) at 231:21–24 ("Q: [Y]ou testified that you thought that Norcraft was undervalued in the transaction [with Fortune], right? A: Yes."); JX 140 (Feb. 20, 2015 email from Reilly to Buller, Maselli and Citi representatives in which Reilly opines that "[Norcraft was] leaving \$ on the table" by moving forward with Fortune's \$25.50 per share proposal).

responded with a counterproposal of \$27.50 per share.<sup>115</sup> When Fortune rejected that counterproposal, the Board bid against itself with a second counterproposal of \$26.25 per share.<sup>116</sup> Once again, Fortune held firm and reiterated that \$25.50 per share was its best and final offer<sup>117</sup>—well aware that it was getting the Company for a “good price.”<sup>118</sup> With no alternative transaction on the horizon, Norcraft’s Board capitulated on February 21 at \$25.50 per share, hoping to extract further value during a post-sign go-shop.<sup>119</sup>

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<sup>115</sup> JX 412 (Feb. 10, 2015 email from Fortune to Buller attaching letter rejecting counterproposal).

<sup>116</sup> JX 413 (email chain Klein to RBC and Fortune deal team describing counterproposal, Feb. 13, 2015) at FB0089263.

<sup>117</sup> TT 100:4–17 (Biggart); JX 238 (Norcraft Schedule 14D-9) at 13.

<sup>118</sup> JX 185 (Mar. 20, 2015 email from Klein to Fortune director Mackay) (“You are spot on – its [sic] a good price, and there is a risk someone comes along and tries to top the offer.”). Indeed, prior to signing the Merger Agreement, Fortune had RBC render a fairness opinion. In that regard, RBC conducted a standalone DCF analysis of Norcraft that valued Norcraft at \$30.26 per share. JX 216 (Mar. 29, 2015 RBC presentation slides) at FB0047801. Fortune’s management valued Norcraft even higher. Its discounted cash flow and internal rate of return (“IRR”) analysis (the “DCF/IRR Analysis”) of Norcraft as a standalone entity valued Norcraft at approximately double the Merger Price and estimated a 16% annualized IRR before accounting for synergies. JX 191 (slides from Mar. 29, 2015 Fortune board meeting regarding Norcraft acquisition) at FB0076961; JX 301 (Apr. 28, 2015 email between Fortune deal team members, attaching Fortune valuation of Norcraft dated Mar. 19, 2015).

<sup>119</sup> JX 238 (Norcraft Schedule 14D-9) at 14; *see* TT 13–15 (Eldridge); JX 3 (Buller Dep.) at 86:13–20.

## F. The Parties Negotiate the Merger Agreement

In late February 2015, Citi informed Fortune that Norcraft was prepared to move forward with Fortune’s \$25.50 per share proposal, subject to the negotiation of a merger agreement that included a forty-five-day post-signing go-shop right for Norcraft.<sup>120</sup> Fortune responded with a counterproposal that provided for a twenty-five-day post-signing go-shop “that would be limited to certain identified potential purchasers.”<sup>121</sup> The counterproposal also called for a \$15 million termination fee if Norcraft accepted a superior proposal received during the go-shop period and a \$25 million termination fee otherwise.<sup>122</sup> By proposing this structure, Fortune sought to give Norcraft’s Board “the minimum amount [of time it] needed to satisfy [its] fiduciary responsibility . . . and no more,”<sup>123</sup> while also “discourag[ing] potential bidders.”<sup>124</sup>

On February 27, following negotiations, the parties eventually settled on a thirty-five day post-signing go-shop period (the “Go-Shop Period”) with no

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<sup>120</sup> JX 238 (Norcraft Schedule 14D-9) at 13–14. Norcraft also sought Fortune’s confirmation that (1) it would allow enhanced severance for Norcraft’s outgoing senior management; and (2) the TRA payment obligations would be satisfied in full at closing. *Id.* at 14.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> JX 5 (Klein Dep.) at 164:20–165:4.

<sup>124</sup> JX 12 (Baab Dep.) at 99:23–100:4.

restrictions on the parties Norcraft or its advisors could contact, a \$10 million termination fee if Norcraft accepted a superior proposal during the Go-Shop Period and a \$20 million termination fee otherwise.<sup>125</sup> Importantly, however, Fortune also secured information rights with respect to competing proposals and unlimited matching rights with respect to superior proposals.<sup>126</sup> In a final stroke of masterful bargaining, Fortune also secured the right to launch Tahiti's tender offer for all of Norcraft's outstanding common stock (at \$25.50 per share) fifteen days after the start of the Go-Shop Period.<sup>127</sup>

In early March 2015, Fortune was given access to Norcraft's electronic data room, and on March 4, Fortune and Norcraft entered into a thirty-day exclusivity

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<sup>125</sup> JX 238 (Norcraft Schedule 14D-9) at 13–14; JX 221 (Merger Agreement) §§ 5.4, 7.3(a)(ii), 8.2. The Merger Agreement defined a “superior proposal” as “a bona fide written Competing Proposal (with all percentages in the definition of Competing Proposal increased to fifty percent (50%)) that did not arise out of a breach of Section 5.4 made by a Third Party on terms that the board of directors of the Company determines in good faith, after consultation with the Company's financial and legal advisors, and considering all factors as the board of directors of the Company (in consultation with its financial and legal advisors) considers to be appropriate (including financing risk, regulatory approval risk, the conditionality, timing and likelihood of consummation of such proposal and the experience and reputation of the proposed buyer) to be more favorable to the stockholders of the Company from a financial point of view than the Offer and the other Transactions (after giving effect to all adjustments to the terms thereof which may be offered by [Fortune] in writing, including pursuant to Section 5.4(g)).” JX 221 (Merger Agreement) § 8.2 (defining “Superior Proposal”).

<sup>126</sup> JX 221 (Merger Agreement) § 5.4(c), (g). Under the Merger Agreement, Fortune had four business days to match a superior proposal by a third-party bidder and two business days to match any subsequent proposal by the same bidder. *Id.* § 5.4(g).

<sup>127</sup> *Id.*, pmb1. & § 1.1

agreement.<sup>128</sup> Thereafter, on March 13, Buller, Ginter and Tanquist met with Fortune management to provide additional non-public information about Norcraft, and, on March 18, Fortune met with the senior management of each Norcraft business division.<sup>129</sup>

With the Merger Price set, and negotiations between Norcraft and Fortune proceeding apace, Buller again approached Klein about post-Merger employment with Fortune. At a Fortune-initiated meeting with Norcraft management on March 6, Buller advised Klein that he wanted to head Norcraft and Fortune's combined cabinetry business post-acquisition.<sup>130</sup> With the price locked in, and the inevitably uncomfortable confrontation now unavoidable, Klein finally informed Buller that Fortune would have no place for him after the Merger.<sup>131</sup> This came as a shock to Buller, who thereafter became increasingly "disruptive."<sup>132</sup>

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<sup>128</sup> JX 238 (Norcraft Schedule 14D-9) at 14; PTO ¶ 2w.

<sup>129</sup> JX 238 (Norcraft Schedule 14D-9) at 15.

<sup>130</sup> JX 163 (e-mail chain between Klein and RBC, Mar. 11, 2015) (Klein: "At one point [Buller] said in a hopeful way – 'Do you want to hire me to run your whole cabinet business?' I gently said no . . . ."); JX 13 (Biggart Dep.) at 86:16–87:11 (explaining that Buller "was hoping that [Fortune would] hire him").

<sup>131</sup> JX 163 (e-mail chain between Klein and RBC, Mar. 11, 2015); TT 205:7–14 (Biggart) (On March 6, 2015, Fortune "definitively told [Buller] he didn't have the job."); *see also id.* 83:1–3 (Biggart).

<sup>132</sup> TT 205:19 (Biggart); *see* JX 163 (e-mail chain between Klein and RBC, Mar. 11, 2015) (Klein: "From that point forward [Buller] was rather short with me . . . . So I need some help here - in a very careful way, so as not to turn this into WWII. [Buller] and his ego need to [be] managed."); TT 127:11–17 (Biggart) ("Buller, at this point, is not supporting



Unable to abandon the enterprise completely, Buller soon returned to Fortune with a new proposal: if he would not be a part of the combined company, then, upon Fortune's acquisition of Norcraft, Buller would acquire Urban Effects (Norcraft Canada) from Fortune.<sup>133</sup> After Buller announced his interest in acquiring Norcraft Canada, the Board determined, for the first time, that Buller was conflicted and, therefore, should be excluded from Board deliberations regarding the potential Norcraft-Fortune transaction.<sup>134</sup>

Buller, for his part, was determined to acquire Urban Effects and continued to press Fortune for a commitment to sell him the business, while also continuing to

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the transaction, and [Fortune was] getting the sense that he's not going to sign the merger agreement. And I'm concerned.”).

<sup>133</sup> JX 13 (Biggart Dep.) at 95:12–17 (“Q. Was it your understanding that Mr. Buller first raised his desire to purchase Norcraft Canada . . . after he was told there's no place for you post-closing? A. I believe so, that was the first I heard about it.”); JX 168 (e-mail chain between Klein and Fortune deal team, Mar. 14, 2015) (Klein: “So, I spoke to [Buller] this morning, and he would like to buy Urban Effects.”); JX 11 (Reilly Dep.) at 156:3–9.

<sup>134</sup> JX 71 (Norcraft Board Minutes Mar. 19, 2015) at NCFT0165034–35. According to Buller, since he never engaged in pre-close negotiations with Fortune to acquire Norcraft Canada, he did not recuse himself from Norcraft-Fortune negotiations. JX 3 (Buller Dep.) at 235:12–240:20. In contrast, Reilly testified that Buller did recuse himself from certain Norcraft Board meetings. JX 11 (Reilly Dep.) at 158:11–24. Remarkably, the Norcraft Canada conflict was the first Buller conflict that seemed to percolate up to the Board's attention. As discussed below, the Board apparently was content to have Buller negotiate TRA payments and Merger consideration at the same time (even though the TRA payments were to be made only to select TRA Beneficiaries who were competing with Norcraft stockholders for consideration), and also content to have Buller negotiate for his own post-Merger employment with Fortune while simultaneously taking the lead for Norcraft in Merger negotiations. *See* JX 13 (Biggart Dep.) at 89:7–11; JX 5 (Klein Dep.) at 139:3–140:14.

lead Norcraft’s negotiations with Fortune.<sup>135</sup> Fortune, however, was unwilling to give such a commitment while negotiations with Norcraft were ongoing—much to Buller’s frustration.<sup>136</sup> Yet it soon became clear to Fortune that Buller’s ire now risked derailing the deal.<sup>137</sup> To keep the peace, on March 25, Reilly emailed Buller to advise him that “[Klein] is going to offer to provide you some meaningful comfort on [C]anada. . . .”<sup>138</sup> Klein’s overture to Buller accomplished its intended purpose; Buller felt he had “[g]ot[ten] good comfort on UE.”<sup>139</sup> This “comfort” included:

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<sup>135</sup> See JX 13 (Biggart Dep.) at 97–100; *id.* at 121:4–10 (“[Q.] As of Thursday, March 19th, was [it] your understanding that Mr. Buller was insisting on some understanding pre-signing with respect to the sale to him of the Canada business? A. That’s my understanding. I believe [Buller] continued this up right until we signed the [Merger Agreement].”); TT 125:3–21 (Biggart) (explaining that Buller was upset because Fortune would not commit to sell him Norcraft Canada).

<sup>136</sup> See JX 168 (e-mail chain between Klein and Fortune deal team, Mar. 14, 2015) (Klein: “I told [Buller that his proposed acquisition of Urban Effects] would likely be a subsequent transaction - a week later or something like that, post close.”); JX 195 (e-mail chain between Klein and Fortune deal team, Mar. 25, 2015) (Klein: “[Eldridge] said I need to call [Buller] and calm him down and make him feel good”); TT 114–15 (Biggart) (explaining that Fortune did not feel comfortable negotiating a Norcraft Canada transaction with Buller pre-closing).

<sup>137</sup> JX 195 (e-mail chain between Klein and Fortune deal team, Mar. 25, 2015) (Klein: “[Eldridge] said I need to call [Buller] and calm him down and make him feel good.”).

<sup>138</sup> JX 197 (e-mail chain between Buller and Reilly, Mar. 26, 2015).

<sup>139</sup> JX 202 (e-mail from Buller to PwC, Mar. 27, 2015).

- Fortune’s waiver of a two-year, Canada-specific non-compete covenant otherwise applicable to Buller<sup>140</sup>; *and*
- Fortune’s agreement to modify Buller’s employment agreement with Norcraft’s operating subsidiary to provide that Buller would receive a severance payment if his employment was terminated without cause (including by Buller himself) within twelve months of Fortune’s acquisition of Norcraft.<sup>141</sup>

Thereafter, it appears that Buller was content to “live with a trust me I will sell Canada to you” status quo, and ostensibly was willing to support the Norcraft-Fortune transaction again—to Fortune’s great relief.<sup>142</sup>

With the Norcraft Canada fire contained, Fortune was soon on to the next Buller-related fire. In late March 2015, having finalized most of the merger agreement’s material terms, Norcraft and Fortune found themselves unable to reach agreement on the termination payments that would be due to the TRA Beneficiaries holding Norcraft LLC units (including Buller and his family members).<sup>143</sup>

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<sup>140</sup> JX 198 (e-mail chain between Norcraft and Fortune deal teams, Mar. 26, 2015) at NCFT0168392; TT 126:6–16 (Biggart) (“I got Chris Klein to agree . . . that [Fortune] would waive [Buller’s] noncompete in Canada, as a showing of good faith to . . . Buller that we were serious when we say we’re going to . . . have a negotiation after the closing . . .”).

<sup>141</sup> JX 219 (Amendment to Buller’s Employment Agreement).

<sup>142</sup> JX 204 (e-mail from Reilly to Maselli, Mar. 27, 2015).

<sup>143</sup> TT 123–26 (Biggart) (explaining the TRA-related difficulties); *id.* at 126:2–5 (Biggart) (“I called [Ropes & Gray] and said . . . [w]e better do something quick or this whole deal is going to fall apart.”).

Norcraft's and Fortune's tax advisors disagreed as to the value of certain tax attributes associated with the Norcraft LLC units, resulting in a \$3 million difference in their respective calculations of the termination payments.<sup>144</sup>

On March 26, Fortune tried to "cut a deal with Buller" on the TRA termination payments by offering to pay \$2 million of the \$3 million difference.<sup>145</sup> Buller insisted, however, that Fortune pay the entire \$3 million, much to Fortune's exasperation.<sup>146</sup> At this point, Fortune seemingly had reached its limit with Buller and advised Citi that "if there [was] no signed [merger] agreement by [the morning of March 30, Fortune was] done."<sup>147</sup> Negotiations followed. Ultimately, to appease Buller and keep the deal on track, SKM and Trimaran offered to transfer \$1 million of the TRA termination payments they stood to receive to the Norcraft LLC unitholders, such that the unitholders would receive the full \$3 million demanded by

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<sup>144</sup> TT 123–24 (Biggart).

<sup>145</sup> JX 13 (Biggart Dep.) at 168:2–3; JX 198 (e-mail chain between Norcraft and Fortune deal teams, Mar. 26, 2015); JX 207 (e-mail from Klein to Fortune deal team, Mar. 27, 2015); TT 126:8 (Biggart) ("[Fortune was] willing to pay 2 out of the \$3 million.").

<sup>146</sup> JX 207 (e-mail from Klein to Fortune deal team, Mar. 27, 2015) (Klein: "We[] heard through [Buller's] personal lawyer that he rejects our offer of 2 of 3 million [of the] disputed TRA amount, needs all 3. . . . I've been very reasonable here in all of this, but really cannot go any farther. I do not wish to call [Buller] and go through all of this again with him - it could do more harm than good.") (formatting altered); TT 128:12–23 (Biggart) ("Q. What was [Buller's] response to that proposal? A. He said no. And he said, I want . . . everything that my accountant says I'm entitled to. He said, [my accountant] has calculated my TRA payment at 19.7 [million], I want 19.7.").

<sup>147</sup> JX 207 (e-mail from Klein to Fortune deal team, Mar. 27, 2015).

Buller.<sup>148</sup> With that, the TRA fire was extinguished and Fortune had no more Buller-related fires to fight.

### **G. Norcraft's Board Approves the Merger and Norcraft Executes the Merger Agreement**

On March 29, 2015, Norcraft's Board received Citi's fairness opinion and approved the Merger Agreement.<sup>149</sup> The following day, Norcraft and Fortune executed the Merger Agreement and issued a press release announcing the Merger.<sup>150</sup> Immediately following the execution of the Merger Agreement, Norcraft entered into TRA termination agreements with the TRA Beneficiaries—SKM, Trimaran and the Norcraft LLC unitholders—providing that the TRAs would be terminated (if the Merger was consummated) in exchange for \$43.5 million in total payments to the TRA Beneficiaries.<sup>151</sup>

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<sup>148</sup> JX 212 (Mar. 27, 2015 e-mail from Buller to Maselli, Reilly et al., thanking Maselli and Reilly for agreeing that Trimaran and SKM, respectively, would transfer the \$1 million sum to the Norcraft LLC unitholders); TT 129:6–24 (Biggart).

<sup>149</sup> JX 238 (Norcraft Schedule 14D-9) at 16–17.

<sup>150</sup> PTO ¶ 2y; JX 238 (Norcraft Schedule 14D-9) at 17.

<sup>151</sup> PTO ¶ 2z. Under the TRA termination agreements, the Norcraft LLC unitholders would receive approximately \$19.7 million, SKM would receive approximately \$15.9 million and Trimaran would receive approximately \$7.9 million. *Id.*

SKM, Trimaran and the Norcraft LLC unitholders also entered into Tender and Support Agreements (“TSAs”) with Fortune and Tahiti,<sup>152</sup> whereby SKM, Trimaran and the Norcraft LLC unitholders agreed that:

- they would “promptly” tender their Norcraft shares into Tahiti’s tender offer and, in any event, would do so at least two days before the offer’s initial expiration date<sup>153</sup>; *and*
- the shares so tendered could not be withdrawn unless and until the tender offer expired or was “terminated in accordance with the terms of Merger Agreement.”<sup>154</sup>

## **H. The Go-Shop**

The Go-Shop Period commenced with the Merger’s announcement on March 30, 2015.<sup>155</sup> Given that Norcraft and Citi had focused exclusively on Fortune during the pre-sign “process,” it was especially important that the Company run an effective go-shop to provide a meaningful market check. Yet Citi’s lead banker, Eldridge, had never run a sell-side go-shop.<sup>156</sup> Because Norcraft’s Board was unsure

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<sup>152</sup> PTO ¶ 2bb.

<sup>153</sup> JX 229 (Buller Tender and Support Agreement [“Buller TSA”]) § 3; JX 230 (SKM Tender and Support Agreement [“SKM TSA”]) § 3; JX 231 (Trimaran Tender and Support Agreement [“Trimaran TSA”]) § 3. Fortune initiated Tahiti’s tender offer on April 14, 2015, PTO ¶ 2ee, and the offer’s initial expiration date was May 11, 2015. JX 239 (Norcraft Schedule TO, filed Apr. 14, 2015, attaching Tahiti’s tender offer) at 9.

<sup>154</sup> JX 229 (Buller TSA) § 3(b); JX 230 (SKM TSA) § 3(b); JX 231 (Trimaran TSA) § 3(b).

<sup>155</sup> PTO ¶ 2cc.

<sup>156</sup> TT 45:14–46:8 (Eldridge); JX 8 (Eldridge Dep.) at 49:8–12, 89:17–90:22.

of the go-shop's core components, it relied completely on Citi to oversee the process.<sup>157</sup> Fortune, on the other hand, knew full well what was at stake. Its Vice President of M&A, Robert Baab, pushed hard for an unlimited match right and for Fortune's right to launch Tahiti's tender offer during the Go-Shop Period, understanding that both measures would make it less likely that a topping bidder would emerge.<sup>158</sup>

During the Go-Shop Period, Citi contacted fifty-four potential bidders: twelve potential "strategic" bidders and forty-two private equity firms.<sup>159</sup> Of the fifty-four parties contacted, seven entered into nondisclosure agreements—six private equity firms and American Woodmark, one of Norcraft's industry peers.<sup>160</sup> Only one of

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<sup>157</sup> JX 3 (Buller Dep.) at 199–200; JX 9 (Maselli Dep.) at 76:5–16; JX 11 (Reilly Dep.) at 122–29.

<sup>158</sup> JX 12 (Baab Dep.) at 100–02; *see also* JX 149 (Feb. 27, 2015 email from Klein to Fortune deal team outlining Fortune's conditions for the go-shop, explaining their intended effect of avoiding an auction); JX 232 (e-mail chain between RBC, Klein and other members of Fortune's deal team, Apr. 7, 2015, explaining RBC should emphasize to other potential buyers that Fortune has matching rights).

<sup>159</sup> TT 26:22–27:1 (Eldridge). Citi's contact list was developed with input from Buller and Reilly, who "suggested [certain] companies to put on the list, including companies that had reached out to [Norcraft] historically." TT 27:7–12 (Eldridge).

<sup>160</sup> TT 27 (Eldridge); JX 243 ("Buyers Log" dated May 4, 2015, prepared by Citi ["Citi Go-Shop Log"]). The six private equity firms were The Carlyle Group ("Carlyle"), TPG Capital, Wind Point Partners, Olympus Partners, American Industrial Partners and another unidentified private equity firm. TT 27 (Eldridge); JX 243 (Citi Go-Shop Log).

those seven parties, Carlyle, went on to meet with Norcraft management.<sup>161</sup> Carlyle ultimately did not submit a bid.<sup>162</sup>

Most of the parties Citi contacted indicated either that they were “not interested in competing with Fortune”<sup>163</sup> or that “[t]he price [was] too high.”<sup>164</sup> At least two non-bidding parties, however, advised Citi that they could not “move fast enough [to submit a bid] in 35 days.”<sup>165</sup>

In an effort to ensure that Fortune would reap the benefits of its hard-fought bargain, RBC and Klein devised a strategy to dissuade potentially interested parties from engaging with Norcraft. In that connection, early in the go-shop process, RBC emailed Klein advising that RBC had “a call scheduled for [April 9, 2015] with

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<sup>161</sup> JX 240 (“Go-Shop Process Update” dated Apr. 20, 2015, prepared by Citi); TT 157 (Biggart).

<sup>162</sup> PTO ¶ 2cc.

<sup>163</sup> JX 243 (Citi Go-Shop Log) at 5 (“no interest in going head-to-head with Fortune on this”), 7 (“Fortune is a logical buyer here, so hard for us to compete”), 8 (“[n]ot that interested in competing against Fortune”), 10 (“[c]an’t compete with Fortune”), 11 (“[c]an’t compete with Fortune”).

<sup>164</sup> *Id.* at 6, 14 (“[v]alue too high”).

<sup>165</sup> *Id.* at 15; *see id.* at 2 (“investment is too big [] to consider in a short period”); TT 46:9–19 (Eldridge) (“Q. And, sir, you testified at your deposition that there were go-shop participants in this process who indicated that they would like to have more time. Correct? A. Yes. Q. And what parties were those? A. I don’t recall specifically. I recall it being a general comment from a couple of people that we spoke with. They may not have been people that signed NDAs. It was just a general comment from various people that we contacted.”).



Masco”—one of the go-shop participants—“to discuss the [Merger].”<sup>166</sup> In this email, RBC explained that it would “emphasize [to Masco] that [Norcraft] is an asset that [Fortune has] been monitoring/targeting for a long time . . . and [that Fortune] view[ed] the [Merger] as highly strategic.”<sup>167</sup> RBC also indicated that it hoped to “get some sense from Masco as to whether or not [Masco was] likely to engage [with Norcraft].”<sup>168</sup> Eager to close the deal, Klein advised RBC that “[t]he trick [with Masco] . . . is not to make Norcraft sound very interesting for them.”<sup>169</sup> Klein also emphasized that he was “more interested in [RBC] shutting the door on [Masco] and [its] willingness to look at [acquiring Norcraft], versus learning a lot from [Masco] . . . .”<sup>170</sup>

When Fortune’s general counsel, Biggart, learned of this correspondence, he nearly had “a heart attack in [his] office.”<sup>171</sup> He immediately “went over to see [Klein]”—before RBC’s call with Masco—and “explained to him that [Fortune and

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<sup>166</sup> JX 233 (e-mail chain between Klein, RBC and other members of Fortune’s deal team, Apr. 7, 2015) at FB0089016.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> TT 144:3–4 (Biggart).

its deal team] can't be doing this.”<sup>172</sup> Biggart then warned RBC that Klein's proposed approach was “the wrong way to deal with a go-shop” and that “[RBC] can't be interfering like this.”<sup>173</sup> Klein apparently heeded Biggart's admonition, as did RBC.<sup>174</sup>

As permitted by the Merger Agreement, Fortune launched Tahiti's tender offer for Norcraft's stock fifteen days into the Go-Shop Period, on April 14, 2015, securing the support of a majority of Norcraft's outstanding common stock (per the TSAs).<sup>175</sup> The Go-Shop Period expired as scheduled on May 4, with Norcraft having received no competing acquisition proposals.<sup>176</sup> Tahiti successfully completed its tender offer on May 11, and the Merger closed the following day.<sup>177</sup>

### **I. The Parties' Experts**

Both parties presented valuation experts at trial to opine on Norcraft's fair value as of the Merger date.<sup>178</sup> Petitioners' valuation expert was David A. Clarke;

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<sup>172</sup> TT 144:5–6 (Biggart).

<sup>173</sup> TT 144:16–18 (Biggart).

<sup>174</sup> JX 5 (Klein Dep.) at 275:6–276:14.

<sup>175</sup> JX 221 (Merger Agreement), pmb. & § 1.1; PTO ¶¶ 2cc, 2ee.

<sup>176</sup> PTO ¶ 2cc.

<sup>177</sup> JX 250 (May 12, 2015 Fortune press release); PTO ¶ 2ff.

<sup>178</sup> TT 455–56 (Clarke); TT 698 (Austin Smith).

Respondent presented Yvette R. Austin Smith.<sup>179</sup> Petitioners also presented a deal process expert, Guhan Subramanian (“Subramanian”), to opine on the soundness (or not) of Norcraft’s deal process.<sup>180</sup> I summarize each expert’s opinion below.

### **1. Clarke’s Opinion Regarding Norcraft’s Fair Value**

Clarke opined that the Merger Price of \$25.50 per share “does not reflect Norcraft’s fair value [as of the Merger date] . . . [b]ecause there was no competitive process to acquire Norcraft prior to the signing of the Merger Agreement and the

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<sup>179</sup> TT 455–56 (Clarke); TT 698 (Austin Smith). By any measure, both experts are well qualified. *See* JX 18 (Report of David G. Clarke, ASA [“Clarke Report”]) at 8 (describing qualifications); JX 20 (Austin Smith Report) at 3 (describing qualifications). And both did what they were engaged to do here – advocate their side’s position on fair value – quite effectively. It is accepted in Delaware appraisal litigation that paid valuation experts have assumed more of an advocacy role, and less of a traditional expert witness role (as illustrated by the wide deltas we regularly see in their valuation conclusions). *See Dell*, 177 A.3d at 24 (“the price produced by an efficient market is generally a more reliable assessment of fair value than the view of a single analyst, especially an expert witness who caters her valuation to the litigation imperatives of a well-heeled client”); *Global GT LP v. Golden Telecom*, 993 A.2d 497, 498–99 (Del. Ch. 2010) (“Both these men of valuation science *purported* to apply the same primary method of valuation—the discounted cash flow (‘DCF’) method—but the expert for the petitioners came up with a value of \$139 per share and the expert for Golden came up with a value of only \$88 per share—a modest \$51 per share value gap.” (emphasis supplied)). Despite the repeated expressions of frustration by our courts, the practice continues. When a rushing river flows against a resisting rock, eventually the river wins out. Perhaps that is the hope among appraisal advocates and the valuation experts they engage to sponsor their positions.

<sup>180</sup> TT 243–44 (Subramanian). Subramanian is “the H. Douglas Weaver Professor of Business Law at the Harvard Business School (HBS) and the Joseph Flom Professor of Law and Business at the Harvard Law School (HLS).” JX 19 (Expert Report of Guhan Subramanian [“Subramanian Report”]) at 2; *see id.* (describing qualifications).

post-signing go-shop process was not an effective tool for price discovery . . . .”<sup>181</sup>

According to Clarke, a DCF analysis premised on the Base Case projections provides the most reliable evidence of Norcraft’s fair value as of the Merger date.<sup>182</sup>

Based on his DCF analysis, Clarke concluded that Norcraft’s fair value as of the Merger was \$34.78 per share.<sup>183</sup>

For his DCF analysis, Clarke chose to extend the Base Case projections for an additional five years (through 2024), before applying a perpetuity growth rate (“PGR”) of 3.5% at the end of the projection period.<sup>184</sup> He also adjusted the Base Case projections to deduct for income tax expense in each projected year, which the Base Case projections presented in Norcraft’s Schedule 14D-9 failed to do.<sup>185</sup>

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<sup>181</sup> JX 18 (Clarke Report) at 17 (quoting JX 19 (Subramanian Report) at 25) (internal quotation marks omitted). Clarke did not offer any independent analysis as to why the Merger Price is not a reliable indicator of Norcraft’s fair value as of the Merger date; instead, he adopted in full Subramanian’s conclusion on that point. *See* JX 18 (Clarke Report) at 6, 17.

<sup>182</sup> *See id.* at 2.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 2–3. The extension of the projections, according to Clarke, was required to reduce Norcraft’s growth rates gradually to a “steady state.” In this regard, Clarke notes that “if [he] had to use 2019 as the final year of [his] projections, [he] would then need to use a higher [PGR of 4.4%] to account for the tapering of [Norcraft’s] growth to a steady state.” JX 21 (Rebuttal Report of David G. Clarke, ASA [“Clarke Rebuttal Report”]) at 27 n.62.

<sup>185</sup> JX 18 (Clarke Report) at 24; JX 1 (Ginter Dep.) at 44–45.

After determining Norcraft's projected unlevered free cash flows through Norcraft's FY2024, Clarke then discounted each year's projected free cash flow amount to present value using a 9.6% discount rate based on an estimate of Norcraft's weighted average cost of capital ("WACC").<sup>186</sup> With these inputs, Clarke concluded that the present value of Norcraft's projected unlevered free cash flows through FY2024 was \$297.3 million.<sup>187</sup>

Clarke then calculated Norcraft's terminal value by (1) dividing Norcraft's terminal year unlevered free cash flow by a capitalization rate of 6.1% and (2) discounting the quotient of that calculation to present value using Norcraft's

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<sup>186</sup> JX 18 (Clarke Report) at 3, 42. To derive Norcraft's WACC, Clarke first "calculated [1] Norcraft's cost of equity based on the capital asset pricing model ('CAPM') and [2] Norcraft's long-term[,] [after-tax] cost of debt." *Id.* at 3, 33. Clarke next multiplied (1) Norcraft's estimated cost of equity (11.4%) by the proportion of equity in Norcraft's capital structure (approximately 75%), as measured by Norcraft's (undiluted) market capitalization immediately before the Merger's announcement (\$396 million); and (2) Norcraft's estimated after-tax cost of debt (4.31%) by the proportion of debt in Norcraft's capital structure (approximately 25%), as measured by the book value of Norcraft's long-term debt on March 29, 2015 (\$147.5 million). *Id.* at 33, 42 & sched. 5-B. Finally, Clarke summed the product of each calculation to obtain a WACC of 9.6%. *Id.* at 33.

<sup>187</sup> *Id.*, sched. 2-A (DCF analysis).

estimated 9.6% WACC.<sup>188</sup> This yielded a terminal value of \$509.5 million.<sup>189</sup> Clarke then added Norcraft's terminal value to the present value of Norcraft's projected unlevered free cash flows through FY2024 to obtain an \$806.8 million operating value.<sup>190</sup>

Clarke next made the following adjustments to Norcraft's operating value to derive Norcraft's total equity value: (1) adding Norcraft's excess cash, estimated at \$44.3 million; (2) adding the value (to Norcraft) of TRA-related tax benefits, estimated at \$4.4 million; (3) adding cash received by Norcraft from the (presumed) exercise of all outstanding options on Norcraft stock, estimated at \$18.3 million; and (4) deducting the book value of Norcraft's long-term debt—\$147.5 million, per Norcraft's Form 10-Q for Q1 FY2015.<sup>191</sup> After making these adjustments, Clarke

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<sup>188</sup> *Id.*, sched. 2-A (DCF analysis). Terminal year free cash flow is the future value implied by (1) the subject company's projected revenue and expense items in the final year of the discrete projection period; and (2) the subject company's estimated PGR. *See id.* Clarke calculated Norcraft's capitalization rate as the positive difference of Norcraft's estimated WACC (9.6%) and estimated PGR (3.5%). *Id.* at 43.

<sup>189</sup> *Id.*, sched. 2-A (DCF analysis).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* Operating value, as stated here, represents the present value of Norcraft's future unlevered free cash flows. *Id.* A DCF analysis, however, attempts to derive the value of the subject company's equity. *Id.* at 45. Thus, adjustments to the operating value are generally necessary to add in equity in the form of excess cash (or cash equivalents) and to remove debt. *Id.* at 45–47. Clarke based his excess cash and “cash from option exercise” estimates on the information disclosed in the Base Case projections and Norcraft's Form 10-Q for Q1 FY2015. *Id.* at 45. He based his estimation of the TRA-related tax

concluded that Norcraft's total equity value was \$726.3 million.<sup>192</sup> Finally, Clarke divided this aggregate value by Norcraft's "fully diluted" shares outstanding (20,880,123) to obtain an aliquot value of \$34.78 per share.<sup>193</sup>

Clarke also performed a comparable company analysis to confirm the results of his DCF analysis.<sup>194</sup> For this analysis, he selected four companies for his peer group: (1) American Woodmark, (2) Masonite International Corp. ("Masonite"), (3) PGT Innovations, Inc. ("PGT") and (4) Ply Gem Holdings, Inc. ("Ply Gem").<sup>195</sup> The analysis yielded a \$33.92 per share valuation.<sup>196</sup> Clarke "determined not to weight this analysis in determining a specific per share value [for Norcraft], however, due to the difficulties in finding any companies that were fully comparable to Norcraft."<sup>197</sup>

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benefits on the "[I.R.C. §] 743(b) and [net operating loss] utilization" projections included in Citi's March 28, 2015 presentation to the Norcraft Board. *Id.* at 46.

<sup>192</sup> *Id.* at 48.

<sup>193</sup> *Id.* Clarke calculated Norcraft's "fully diluted shares outstanding" as the sum of (1) the total number of Norcraft shares and stock options outstanding as of the Merger date; and (2) the total number of convertible Norcraft LLC units (convertible into Norcraft stock) outstanding on that date. *Id.*

<sup>194</sup> *Id.* at 2-4.

<sup>195</sup> *Id.* at 51.

<sup>196</sup> *Id.* at 4.

<sup>197</sup> *Id.* at 2.

## 2. Austin Smith's Opinion Regarding Norcraft's Fair Value

Austin Smith determined that the most reliable indicator of Norcraft's fair value as of the Merger date was the Merger Price, "*less . . . contemporaneously estimated synergies [of \$3.60 per share]*"<sup>198</sup>—a metric that yields a valuation of \$21.60 per share. Austin Smith also conducted an independent valuation using three different valuation methodologies: DCF, comparable company and precedent transaction analyses.<sup>199</sup> Based on those approaches, Austin Smith determined that Norcraft's fair value as of the Merger date "ranged from \$17.48 to no more than \$23.74."<sup>200</sup>

Austin Smith's primary DCF analysis, like Clarke's, relied on the Base Case projections (adjusted to deduct for income tax expense in each of the projected years) and applied a 3.5% PGR at the end of the projection period.<sup>201</sup> Unlike Clarke, however, Austin Smith did not extend the Base Case projections.<sup>202</sup>

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<sup>198</sup> JX 20 (Austin Smith Report) at 29 (emphasis in original). Austin Smith based her \$3.60 per share "synergies" figure on "the presentations of Citi and the work done by RBC." TT 704:24–705:1 (Austin Smith).

<sup>199</sup> JX 20 (Austin Smith Report) at 1.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 20–21, 23 & Ex. 6 (DCF Analysis). Austin Smith performed two additional DCF analyses, one relying on the Ginter 2014 Projections, which valued Norcraft at \$15.59 per share, and another relying on a Capitalization of Cash Flow methodology, which valued Norcraft at \$12.65 per share. *Id.* at 23–24.

<sup>202</sup> *Id.* at 23 & Ex. 6 (DCF Analysis).



After determining Norcraft's projected unlevered free cash flows through Norcraft's FY2019, Austin Smith discounted each year's projected free cash flow amount to present value using a 11.2% discount rate based on her estimate of Norcraft's WACC.<sup>203</sup> From this, Austin Smith concluded that the present value of Norcraft's projected unlevered free cash flows through FY2019 was \$151 million.<sup>204</sup>

Austin Smith then calculated Norcraft's terminal value by (1) dividing Norcraft's terminal year unlevered free cash flow by a capitalization rate of 7.69% and (2) discounting the quotient of that calculation to present value using Norcraft's estimated 11.2% WACC.<sup>205</sup> Austin Smith concluded that Norcraft's terminal value was \$435 million.<sup>206</sup> She then added Norcraft's terminal value to the present value

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<sup>203</sup> *Id.* at 20.

<sup>204</sup> *Id.*, Ex. 6 (DCF Analysis). To derive Norcraft's WACC, Austin Smith first calculated (1) Norcraft's cost of equity based on CAPM and (2) Norcraft's after-tax cost of debt (using a 37.69% tax rate). *Id.*, Ex. 5 (Calculation of WACC). She next multiplied (1) Norcraft's estimated cost of equity (12.4%) by a target proportion of equity in Norcraft's capital structure (86%), based on the capital structure of selected comparable companies; and (2) Norcraft's estimated after-tax cost of debt (3.6%) by a target proportion of debt in Norcraft's capital structure (14%), again based on a "comparable capital structure" approach. *Id.*, Exs. 4 (Calculation of Beta) and 5 (Calculation of WACC). Finally, Austin Smith summed the product of each calculation to obtain a WACC of 11.2%. *Id.*, Ex. 5 (Calculation of WACC).

<sup>205</sup> *See id.*, Ex. 5 (Calculation of WACC). This is the same approach Clarke followed to determine terminal value (with different inputs). JX 18 (Clarke Report), sched. 2-A (DCF analysis).

<sup>206</sup> JX 20 (Austin Smith Report), Ex. 6 (DCF Analysis).

of Norcraft's projected unlevered free cash flows through FY2019 to obtain a \$586 million operating value.<sup>207</sup>

Austin Smith made two adjustments to Norcraft's operating value to determine Norcraft's total equity value: (1) adding Norcraft's excess cash, estimated at \$52.7 million<sup>208</sup>; and (2) deducting the book value of Norcraft's long-term debt—\$147.5 million, per Norcraft's Form 10-Q for Q1 FY2015.<sup>209</sup> Having made these adjustments, Austin Smith concluded that Norcraft's total equity value was \$491 million.<sup>210</sup> She then divided this total equity value by Norcraft's "fully diluted" shares outstanding (20,880,123) to obtain an aliquot value of \$23.54 per share.<sup>211</sup>

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<sup>207</sup> *Id.*

<sup>208</sup> JX 537 (native Excel version of Austin Smith's DCF model). Austin Smith calculated Norcraft's excess cash on the Merger date based on the "Cash from Norcraft" figure in the "Funds Flow Memorandum" prepared in connection with the Merger (\$54,396,335.01), JX 249 at 2, less a \$20 million cash balance (cash for operations, per the Base Case projections) plus the product of (1) Norcraft's total options outstanding as of the Merger date (1,142,383) and (2) the weighted average exercise price of those options (\$16.01). JX 20 (Austin Smith Report), Ex. 6 (DCF Analysis) (drawing option-related information from Norcraft's Q1 FY 2015 10-Q, JX 248 at 14).

<sup>209</sup> JX 20 (Austin Smith Report), Ex. 6 (DCF Analysis).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* Austin Smith calculated Norcraft's fully diluted shares outstanding as 20,869,976. JX20 (Austin Smith Report) at 13 & n.25. It is unclear how Austin Smith derived this figure, and the figure conflicts with the information set forth in Norcraft's Form 10-a for Q1 FY2015 and the "Funds Flow Memorandum" prepared in connection with the Merger. See JX 248 (Norcraft's Q1 FY2015 Form 10-Q) at 4, 11 (17,311,573 shares of Norcraft common stock outstanding, 2,426,167 convertible Norcraft LLC units outstanding and 1,142,383 options on Norcraft stock outstanding as of March 31, 2015); JX 249 (Funds Flow Memorandum) at 3, 11 (18,947,886 shares of Norcraft common stock outstanding,

Finally, upon “summing th[is] . . . component[] of [Norcraft’s] value” with the value of the TRA-related tax benefits that Norcraft would realize in each projected year (estimated at \$0.20 per share), Austin Smith determined that “the per share value of Norcraft was \$23.74” as of the Merger date.<sup>212</sup>

As noted, Austin Smith also undertook to value Norcraft using two “market-based” valuation methodologies. Her comparable company analysis yielded a valuation of \$23.46 per share and her precedent transaction analysis yielded a valuation of \$17.48 per share.<sup>213</sup>

According to Austin Smith, “[t]he high level of consistency between [her] three separately determined estimates of fair value and the [Merger Price] (less synergies) provides strong analytical support that \$21.90 accurately represents the per share fair value of Norcraft.”<sup>214</sup> In addition, Austin Smith submits, “the fact that the [Merger Price] derived from a robust deal process” lends “additional support” to her fair value determination.<sup>215</sup>

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789,854 convertible Norcraft LLC units outstanding and 1,142,383 options on Norcraft stock outstanding as of May 11, 2015). Both documents indicate a figure of 20,880,123 fully diluted shares outstanding as of the Merger date.

<sup>212</sup> JX 20 (Austin Smith Report) at 23.

<sup>213</sup> *Id.* at 25–28.

<sup>214</sup> *Id.* at 29.

<sup>215</sup> *Id.* In her reports and trial testimony, Austin Smith provided only a cursory—and mostly conclusory—discussion of Norcraft’s deal process. *See id.* at 19–20; TT 701–703

### 3. Subramanian's Opinion Regarding Norcraft's Deal Process

Professor Subramanian served as Petitioner's deal process expert.<sup>216</sup> According to Subramanian, Norcraft's deal process was flawed in several respects that rendered the process "unlikely to have yielded fair value for the Norcraft shareholders."<sup>217</sup> The principal flaws Subramanian identifies are (1) the lack of any "competitive process to acquire Norcraft prior to the signing of the Merger Agreement"<sup>218</sup>; (2) information asymmetries between Fortune and potential third-party bidders<sup>219</sup>; and (3) the presence of certain deal protection mechanisms that curbed the efficacy of the go-shop and effectively truncated the Go-Shop Period by at least five days.<sup>220</sup>

#### a. Absence of Pre-Signing Competition

Subramanian posits that Norcraft's "decision to negotiate exclusively with Fortune" prior to signing the Merger Agreement "eliminated a standard source of bargaining leverage for Norcraft"—namely, "invok[ing] the threat of an alternative

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(Austin Smith). She also acknowledged that she had never before been called upon to offer expert testimony on the efficacy of a sales process. TT 791:20–24 (Austin Smith).

<sup>216</sup> JX 19 (Subramanian Report) at 24–25.

<sup>217</sup> *Id.* at 26.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 25, 33–36.

<sup>220</sup> *Id.* at 25, 45–52.

deal” to extract a higher price.<sup>221</sup> Consequently, Norcraft was unable to move Fortune above its proposed purchase price of \$25.50.<sup>222</sup> Moreover, Subramanian submits, it does not appear “that Norcraft extracted something else [from Fortune] in exchange for exclusivity.”<sup>223</sup>

As a practical matter, the absence of pre-signing competition “meant that the Norcraft Board was relying on [the] go-shop process to ensure that Norcraft shareholders received fair value.”<sup>224</sup> According to Subramanian, this reliance was misplaced because Norcraft’s go-shop process was so poorly structured that it was rendered entirely ineffective as a price discovery tool.<sup>225</sup>

#### **b. Information Asymmetries**

Subramanian next posits that certain information asymmetries between Fortune and prospective acquirors vitiated the effectiveness of Norcraft’s go-shop process.<sup>226</sup> As noted, Fortune first approached Norcraft regarding a potential acquisition on October 20, 2014, and the parties signed a confidentiality agreement

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<sup>221</sup> *Id.* at 30 (internal quotation and footnote omitted).

<sup>222</sup> *Id.* at 31; *see* TT 100:4–17 (Biggart); JX 238 (Norcraft Schedule 14D-9) at 13.

<sup>223</sup> JX 19 (Subramanian Report) at 31.

<sup>224</sup> *Id.* at 32.

<sup>225</sup> *Id.* at 32–33.

<sup>226</sup> *Id.* at 25, 33–36.

on December 11, 2014.<sup>227</sup> Exclusivity soon followed.<sup>228</sup> This dynamic gave Fortune a substantial head start relative to other potential suitors in evaluating the benefits and challenges of a Norcraft transaction, including the complex issues relating to the TRAs.<sup>229</sup> And, per Subramanian, “[t]his discrepancy . . . created a severe information asymmetry problem, because it would be virtually impossible for prospective third-party bidders to [learn] as much about Norcraft as Fortune [already knew]” in the thirty-five days allotted for Norcraft’s go-shop process.<sup>230</sup>

Moreover, Subramanian submits, regardless of whether Fortune’s “first mover” status provided it with an actual benefit, potential competing bidders would have perceived Fortune to enjoy an informational advantage.<sup>231</sup> That perceived advantage, in turn, discouraged others from bidding for Norcraft to avoid the “winner’s curse”—a phenomenon that occurs in common value auction settings

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<sup>227</sup> PTO ¶¶ 2k, 2p.

<sup>228</sup> PTO ¶ 2w.

<sup>229</sup> JX 19 (Subramanian Report) at 29–30, 34 (“Fortune . . . signed a confidentiality agreement on December 11th, 2014, and then had 110 days of exclusive access to confidential information and management time at Norcraft before the deal was announced on March 30th, 2015.”). During the course of those 110 days, both Norcraft and Fortune had to deal not only with valuation issues relating to the Norcraft business, but also complex tax and valuation issues (with the help of separate independent experts) relating to the TRAs. JX 5 (Klein Dep.) at 137–38.

<sup>230</sup> JX 19 (Subramanian Report) at 34.

<sup>231</sup> *See id.* at 35.

where the winning bidder has “buyer’s remorse” because it has overpaid for the asset in question.<sup>232</sup> That remorse is a product, in part, of the winner’s perception that it lacked an adequate understanding of the asset before it made its bid.<sup>233</sup> Here, Subramanian submits, because potential competing bidders for Norcraft perceived that Fortune knew more about the Company than they could hope to learn in thirty-five days, they may well have feared that they would end up overpaying to acquire Norcraft if they outbid Fortune.<sup>234</sup>

### **c. Deal Structure Minimizes Efficacy of the Go-Shop**

According to Subramanian, the interaction between certain deal protection provisions in the Merger Agreement and the TSAs effectively truncated the Go-Shop Period “from 35 days to 30 days or even shorter.”<sup>235</sup> As noted, the Merger Agreement entitled Fortune to launch Tahiti’s tender offer for Norcraft’s stock fifteen days into the Go-Shop Period.<sup>236</sup> In addition, under the TSAs, Buller, SKM and Trimaran were obligated to tender 53.6% of Norcraft’s outstanding voting stock

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<sup>232</sup> *Id.* at 35–36 (citing Guhan Subramanian, *Deal Making: The New Strategy of Negotiauctions* 87–88 (2011)).

<sup>233</sup> *Id.* at 40–41.

<sup>234</sup> *Id.* Per Subramanian, Fortune’s unlimited match right compounded the “winner’s curse” problem, and so operated as a “‘powerful disincentive’ to prospective third-party bidders.” *Id.* at 43 (footnote and citation omitted).

<sup>235</sup> *Id.* at 52.

<sup>236</sup> JX 221 (Merger Agreement), pmb1. & § 1.1.

into Tahiti’s tender offer “promptly following” the initiation of the offer and, in any event, no later than two days before the offer’s initial expiration date.<sup>237</sup> And that tender could not be rescinded absent a “full-blown superior proposal.”<sup>238</sup>

Thus, if Fortune launched Tahiti’s tender offer halfway through Norcraft’s go-shop process (as it did),<sup>239</sup> 53.6% of Norcraft’s voting shares would “promptly” be tendered to Tahiti—and that tender would be irrevocable absent a superior proposal. Moreover, even if Norcraft received a superior proposal during the Go-Shop Period, Fortune would still have at least four days to match that proposal.<sup>240</sup>

According to Subramanian, the confluence of the deal protections, the limited duration of the Go-Shop Period, Fortune’s unlimited match right, the definition of “superior proposal” and Fortune’s ability to launch Tahiti’s tender offer during the go-shop, resulted in a systematic “tightening and shortening” of the go-shop process. The “tightening” occurred because “a third party would have to make a full-blown superior proposal, not just get to excluded party status, by the end of the 35 days.”<sup>241</sup> The full-blown superior proposal was required for Norcraft to terminate the Merger

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<sup>237</sup> JX 229 (Buller TSA) § 3; JX 230 (SKM TSA) § 3; JX 231 (Trimaran TSA) § 3.

<sup>238</sup> TT 254:21–255:7 (Subramanian); JX 221 (Merger Agreement) § 1.1.

<sup>239</sup> PTO ¶ 2ee.

<sup>240</sup> JX 221 (Merger Agreement) § 5.4(g).

<sup>241</sup> TT 255:4–7 (Subramanian).



Agreement and prevent Tahiti from accepting the shares tendered pursuant to the TSAs (a majority of the shares outstanding). Subramanian explained:

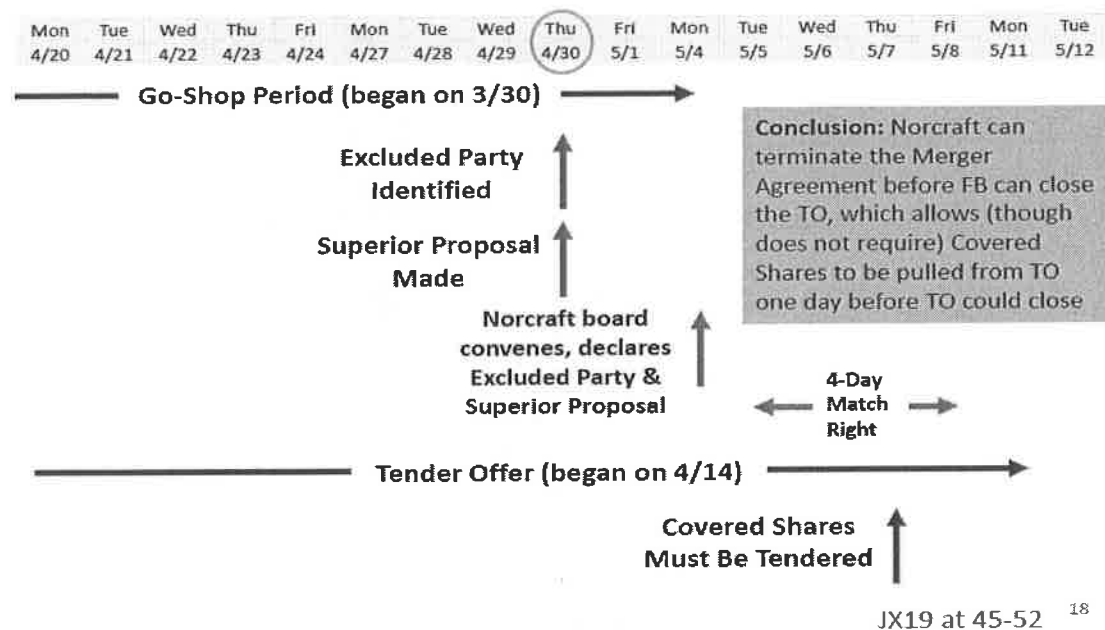
Ordinarily, if this was a normal go-shop, you'd have excluded party status by the end of the go-shop period. But . . . [here] you've got to get to a superior proposal. Got to get the whole shebang done, as Chancellor Strine said it in *Lear*, by the end of the go-shop period. And in my observation and in my experience looking at these go-shops, that is a big deal. Having to get to an entire superior proposal by the end of the go-shop period is a very different task than getting to simply excluded party status.<sup>242</sup>

The "shortening" occurred because any potential bidder contemplating whether to participate in the go-shop could wait no longer than April 30—what Subramanian terms the "last clear chance" date—to make its superior proposal if it wanted to ensure that (i) the Norcraft Board had the two business days it was allowed under the Merger Agreement to assess the proposal and declare it superior; (ii) Fortune's four-business-day period to match expired; and (iii) Norcraft terminated the Merger Agreement before Fortune (via Tahiti) could close on the tendered Covered Shares. The following graphic from Subramanian's report illustrates the "tightening and shortening" phenomenon:

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<sup>242</sup> TT 299:18–300:4 (Subramanian).

**“Last Clear Chance” For a Third-Party Was On April 30<sup>th</sup>**



Subramanian also observes that, even without the “tightening and shortening” of the go-shop, Fortune’s unlimited match right stands alone as a disabling feature of this go-shop.<sup>243</sup> According to Subramanian, from the perspective of a potential bidder, unlimited match rights are typically perceived as limiting any “pathway to success.”<sup>244</sup> Indeed, Subramanian submits, “[e]verybody agrees that match rights deter bids. It [is] not even a debated question.”<sup>245</sup>

<sup>243</sup> JX 19 (Subramanian Report) at 41–44; JX 221 (Merger Agreement) at § 5.4(g).

<sup>244</sup> JX 19 (Subramanian Report) at 50.

<sup>245</sup> TT 254:4–7 (Subramanian).

Here again, Fortune was acutely aware of the advantage it secured, while Norcraft’s Board apparently did not understand what an unlimited match right was much less how that deal protection might work to hinder the go-shop.<sup>246</sup> In describing the disparity in the sophistication of the two parties negotiating this Merger, Subramanian observed: “it seems like . . . the Fortune side was playing chess and the Norcraft side was playing checkers.”<sup>247</sup>

## **J. Procedural Posture**

Petitioners filed a petition with this Court on June 22, 2015, seeking appraisal of their 557,631 shares of Norcraft common stock.<sup>248</sup> The Court held a four-day trial in June 2017, and the parties thereafter submitted post-trial briefing. On December 20, 2017, the Court requested supplemental submissions from the parties to address certain questions following the Delaware Supreme Court’s December 14, 2017, decision in *Dell*.<sup>249</sup> The Court heard post-trial argument on April 25, 2018.

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<sup>246</sup> Compare JX 232 (e-mail chain between RBC, Klein and other members of Fortune’s deal team, Apr. 7, 2015) with JX 11 (Reilly Dep.) at 125:3–22 and JX 3 (Buller Dep.) at 206:16–207:24.

<sup>247</sup> TT 269:8–11 (Subramanian).

<sup>248</sup> JX 260 (Petition for Appraisal).

<sup>249</sup> 177 A.3d 1; D.I. 91.