LOST SYNERGIES AND M&A DAMAGES: CONSIDERING *CINEPLEX V CINEWORLD*

Jonathan Chan and Martin Petrin*

What is the appropriate remedy when an M&A transaction fails to close because of the acquirer's breach of contract? Even before the controversy surrounding Elon Musk's proposed acquisition of Twitter in the US, this question arose recently in Canada. In Cineplex v Cineworld, the Ontario Superior Court of Justice awarded $1.24 billion in damages based upon the target's loss of anticipated synergies. This article highlights the problems with this approach, including conceptual and reliability issues with calculating and apportioning synergies to one entity in a business combination and significant variation in the availability and size of damages depending on transaction structuring and the financial or strategic nature of the buyer or deal. To avoid many of these issues and provide more consistent outcomes, we argue that courts should award specific performance, where feasible, or alternatively loss of consideration to shareholders as the seller's or target's damages. This latter measure best approximates the target corporation's lost bargain and expectations and has the least reliability issues.

Quel est le recours approprié quand une transaction de fusion-acquisition ne peut se conclure en raison d'une rupture de contrat par l'acquéreur? Avant même la controverse entourant l'acquisition de Twitter projetée par Elon Musk aux États-Unis, cette question avait été soulevée récemment au Canada. Dans Cineplex v. Cineworld, la Cour supérieure de justice de l'Ontario a accordé 1,24 milliard de dollars en dommages-intérêts comme compensation de la perte de synergies prévues. Les auteurs de cet article mettent en évidence les problèmes de cette façon de procéder, notamment les problèmes conceptuels et de fiabilité associés au calcul et à la ventilation des synergies pour une entité dans un regroupement d'entreprises, ainsi que l'importante variation dans l'accessibilité et le montant des dommages-intérêts dépendamment de la structure de transaction et de la nature financière ou stratégique de l'acquéreur ou du marché à conclure. Pour éviter bon nombre de ces écueils et régulariser l'issue du processus, nous avançons que les tribunaux devraient accorder l'exécution en nature lorsque c'est possible, ou encore, une compensation de la perte de contrepartie auprès des actionnaires à titre de dommages-intérêts pour le vendeur ou l'acquéreur.

* Jonathan Chan is a Lecturer (Assistant Professor) at University College London (UCL) Faculty of Laws. Martin Petrin is the Dancap Private Equity Chair in Corporate Governance at Western University's Faculty of Law and DAN Department of Management and Organizational Studies. We are grateful for valuable feedback and comments from Paul S. Davies, Camden Hutchison, Philip King, and the journal's anonymous reviewers. Any errors remain our own.

Cette dernière mesure constitue la meilleure approximation de la perte du marché et des résultats attendus pour l'entreprise visée, en plus de présenter le moins de problèmes de fiabilité.

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1. Introduction

Expectation damages, in principle, are a straightforward remedy for breach of contract. However, as the recent case of *Cineplex v Cineworld*[1] demonstrates, how courts should identify and assess the expectation interest in breached mergers and acquisitions (M&A) agreements can be a more complicated inquiry involving the intersection of corporate law, business valuation, and contract law principles.[2] While *Cineplex* is already a remarkable case given that it is among the first to consider problems relating to material adverse change provisions in light of COVID-19, it is the decision's novel treatment of damages that is of interest for this article.

Cineplex arose when Toronto-based movie theatre and family entertainment centre chain Cineplex Inc. sued British cinema chain Cineworld Group plc for failing to complete an agreed acquisition of Cineplex via a plan of arrangement. Cineworld, its acquisition subsidiary, and Cineplex were the sole parties to the arrangement agreement and had the exclusive power to enforce most of its provisions, even though the transaction would have consisted of Cineplex shareholders transferring

1 2021 ONSC 8016 [*Cineplex*].

2 Although "merger" is not a formal term in Canadian corporate law, unlike in the US, we employ the term "M&A" in its conventional sense to refer to business combinations. See Christopher C Nicholls, *Mergers, Acquisitions and Other Changes of Corporate Control*, 3rd ed (Toronto: Irwin Law, 2020) at 4–5 [Nicholls].

their shares to Cineworld in return for a cash payment.[3] In an apparent case of first impression, the Ontario Superior Court of Justice (Commercial List), through the Honourable Justice Barbara Conway, decided in favour of Cineplex. The court considered different options for measuring damages but settled on an award of $1.24 billion for Cineplex's lost synergies and $5.5 million for transaction costs. Both parties have appealed the decision to the Court of Appeal for Ontario.

In this article, we ask whether courts should follow the approach in *Cineplex* of relying on expert estimates of lost synergies as the basis for awarding the selling or target entity expectation damages for M&A agreements that fail to close due to the buyer's breach of contract, but prevent shareholders from suing the buyer or letting the target sue on shareholders' behalf. While we find that synergies under general contract law principles may be subsumed under the heading of expectation damages, doing so in the M&A context will often be highly problematic for several reasons.

Apportioning synergies among the parties to an M&A deal, when by definition synergies can only be achieved by a combination of the acquirer and target, is fraught with conceptual difficulties and reliability concerns.[4] The quantum of damages would vary significantly based upon the identity of the party in breach, e.g., a financial buyer would be liable to pay less damages than a strategic buyer, due to fewer synergies generated, or no damages at all under a restrictive definition of what constitutes synergies. Breach would become more 'efficient', and hence more likely to occur, for certain types of transactions with low synergies. Acquisition structuring would also take precedence over a transaction's economic reality for the purpose of damages, such that awards would vary substantially depending on whether the target entity would survive or be re-structured post-closing, and whether a transaction is implemented as an asset deal, amalgamation, share transfer via plan of arrangement, or straightforward share deal.

We therefore outline, as our preferred option, an alternative approach for assessing damages, both in *Cineplex* and similarly situated M&A litigation, such as the evolving dispute surrounding Elon Musk's proposed acquisition of Twitter. As we will explain, specific performance will often be the most suitable remedy. However, if specific performance has been contractually excluded, is otherwise unfeasible, or—albeit as a

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3 A copy of the arrangement agreement is available at: "Arrangement Agreement" (15 December 2019), online (pdf): *Cineworld plc* <www.cineworldplc.com/sites/cineworld-plc/files/cineplex-inc-acquisition/arrangement-agreement.pdf> [perma.cc/9S69-K3VN] [*Arrangement Agreement*].

4 We use the term "combination" here in the functional economic sense of combining assets or business operations, not limited to mergers or amalgamations.

determinative factor—is not being sought by the aggrieved party (such as in *Cineplex*), the most appropriate remedy in the case of a buyer's unjustified failure to close an M&A deal are expectation damages as measured by the loss of consideration to the target's shareholders. Depending on the applicable contractual arrangements and the parties suffering direct harm, these damages may be paid to the target (which avoids some practical issues) or the shareholders.

This approach is not without its own flaws and doctrinal challenges, especially in complex transactions. However, it ultimately offers more certainty and fewer difficulties compared to measuring damages by reference to synergies that would have accrued to a target if the deal had closed. It can also be reconciled with existing doctrine and better accords with the economic reality of M&A transactions. While awarding lost synergies as damages to an aggrieved target corporation might appear to side-step doctrinal issues surrounding the separation between the target and its shareholders, we explain that this approach creates a host of separate, thornier issues, which should be avoided.

This article proceeds as follows; we begin with an overview of the *Cineplex* decision in Part II, emphasizing the different measures of damages considered. In Part III we briefly canvass the applicable contract law principles for determining remedies in breached M&A agreements, focusing on monetary damages and specific performance. Next, we focus the core of our analysis on the judicial treatment of synergies, and problems that arise when synergies are awarded as expectation damages to a target. We argue that the most appropriate measure for damages would be the loss of consideration to shareholders, measured by the purchase price minus the value of retained shares. The deal price negotiated by the directors is the quantum that most reliably and consistently represents the bargain that was contemplated as part of a transaction, even if the specific deal structure (in *Cineplex*, a plan of arrangement and contract that excluded shareholders' from enforcing the alleged breach against Cineworld) necessitates measuring and awarding a loss to the target. Finally, we conclude in Part IV.

2. Background

Cineplex is among a recent string of cases involving buyer's remorse for M&A agreements that were signed prior to the outbreak of the COVID-19 pandemic.[5] In 2019, Cineworld Group plc ("Cineworld"), a United

[5] See *Fairstone Financial Holdings Inc v Duo Bank of Canada*, 2020 ONSC 7397 [*Fairstone*]. For the US and UK, see *AB Stable VIII LLC v Maps Hotels and Resorts One LLC*, No CV No 2020-0310-JTL (Del Ch); *Travelport Ltd and Others v WEX Inc*, [2020] EWHC 2670 (Comm).

Kingdom based public company listed on the London Stock Exchange, sought to expand its international cinema business into Canada. Cineworld entered into discussions to acquire Cineplex Inc. ("Cineplex"), a large Canadian cinema and entertainment company that is publicly traded on the Toronto Stock Exchange. An arrangement agreement was signed in December 2019, pursuant to which an indirect wholly-owned subsidiary of Cineworld, 1232743 BC Ltd, would acquire all of Cineplex's issued and outstanding shares via a plan of arrangement under the *Ontario Business Corporations Act* ("Arrangement Agreement").[6] Cineworld's offer of $34 in cash per share, payable to Cineplex shareholders, represented a 42% premium over Cineplex's trading price at the time.[7] The offer was enthusiastically ratified by 99.9% of Cineplex's shareholders and 99.6% of Cineworld's shareholders in February 2020.[8] One week later, the deal appeared on track to close following the Ontario Superior Court's approval of the plan of arrangement, subject to Cineworld working with the relevant Canadian government agencies to obtain *Investment Canada Act* (*ICA*) approval.[9]

In early 2020, COVID-19 began to spread, and Cineplex's commercial prospects started to deteriorate. It shut down its theatres in March 2020, as the outbreak of the new virus was officially declared a pandemic and provinces across Canada began ordering businesses to close.[10] From the perspective of the buyer (Cineworld and its numbered company subsidiary), the commitment to acquire Cineplex for $2.8 billion no longer seemed like a good deal. However, the conditions under which Cineworld could avoid the transaction by paying a reverse termination fee did not apply, and the agreement's material adverse effect (MAE)

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6 *Business Corporations Act*, RSO 1990, c B16 [*Business Corporations Act*].

7 Cineplex Inc, News Release, "Cineplex Signs Definitive Agreement to be Acquired by Cineworld Group" (16 December 2019), online (pdf): <mediafiles.cineplex.com/press-releases/Cineplex%20and%20Cineworld%20Transaction%20Press%20Release%20Final%20ENG_20191216150825_0.pdf> [perma.cc/7MEF-ESSJ].

8 Cineplex Inc, News Release, "Cineplex Shareholders Approve Transaction with Cineworld" (11 February 2020), online (pdf): <mediafiles.cineplex.com/press-releases/Cineplex%20Shareholder%20Voting%20Press%20Release%20-%20FINAL_20200211221724_0.pdf> [perma.cc/Y36R-FT2M].

9 Cineplex Inc, News Release, "Cineplex Receives Court Approval for Arrangement with Cineworld" (18 February 2020), online (pdf): <mediafiles.cineplex.com/Cineplex%20Press%20Release%20-%20Final%20Court%20Order%20-%20FINAL_20200218213047_0.pdf> [perma.cc/7E5E-5CKD].

10 For a general timeline of events, see The Canadian Press, "A timeline of COVID-19 in Canada", *The Toronto Star* (24 January 2021), online: <www.thestar.com/politics/2021/01/24/a-timeline-of-covid-19-in-canada.html> [perma.cc/5HE9-2APQ].

clause excluded "outbreaks of illness",[11] leaving no easy way out for Cineworld. The Ontario Superior Court later determined that by April 2020, Cineworld no longer intended to take steps to close the transaction, including obtaining the necessary *ICA* approval.[12] Instead, Cineworld terminated the Arrangement Agreement in June 2020 based on alleged breaches of Cineplex's operating covenants, which Cineworld argued applied strictly despite the pandemic and entitled it to walk away from the deal.[13] Cineworld initially also alleged that an MAE occurred that provided it with the option to terminate the agreement, although this claim was not pursued at trial given the above-mentioned exclusion.[14]

Disagreeing with the buyer's reasoning for its withdrawal, Cineplex commenced an action for breach of contract with the Ontario Superior Court. In the court's subsequent decision, Justice Conway first ably considered the validity of Cineworld's allegations and whether Cineworld was within its rights to terminate the Arrangement Agreement. She found that Cineplex did not breach any covenants under the Arrangement Agreement, and therefore Cineworld was not entitled to terminate the transaction.[15] In particular, Justice Conway engaged with US judicial decisions and commentary on MAE clauses (also known as material adverse change or MAC clauses) given a dearth of Canadian precedent on the subject, which were relevant because the buyer argued, unsuccessfully, that the MAE clause and its "outbreaks of illness" exclusion were not relevant to interpreting the seller's covenant to conduct its business in the ordinary course.[16]

After determining that Cineworld unlawfully repudiated the agreement, Justice Conway turned to the second issue of remedies. First, it was necessary to determine whether expectation damages or specific performance was the appropriate remedy. Cineplex had not sought

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11 See the Arrangement Agreement's article 7 and section 8.3 (outlining grounds for termination and the reverse termination event), Schedule E (setting out the termination fee and applicable conditions), and section 1.1 (definition of Company Material Adverse Effect).

12 *Cineplex*, *supra* note 1 at para 117.

13 *Ibid* at para 73.

14 The alleged MAE concerned Cineplex having "fractured its relationships with its landlords." *Ibid* at para 117 (see footnote 11 of decision); See also Cineplex Inc, "Cineplex 2021 Annual Report" (14 February 2022) at 104, online (pdf): <mediafiles.cineplex.com/investor-relations/management-investment-circulars/Cineplex_AR2021_digital.pdf> [perma.cc/E82B-2YH2]. Both parties agreed that the COVID-19 pandemic fell within the "outbreaks of illness" exclusion in the MAE clause. *Cineplex*, *supra* note 1 at paras 45–46, 117 (see footnote 11 of decision).

15 *Cineplex*, *supra* note 1 at para 189.

16 *Ibid* at paras 116–118.

specific performance, but Cineworld argued that it could have done so, and that its failure to seek specific performance should preclude it from receiving expectation damages.[17] According to the court, however, specific performance was not available in the circumstances, unlike in similar cases such as *Fairstone Financial Holdings Inc v Duo Bank of Canada*.[18] Justice Conway found that once Cineworld had issued notice of termination and withdrawn its application for *ICA* approval, it "precluded Cineplex from seeking specific performance."[19] Specific performance was not considered at length in the judgment, which makes it difficult to observe which test the court applied, or analyze which factors had been decisive. Instead, in addition to the statements above, Justice Conway simply wrote that she disagreed with Cineworld's claim that an order for specific performance requiring Cineworld to use its best efforts to seek *ICA* approval after its withdrawal would have been an appropriate remedy.[20]

With monetary damages left as the sole remedy for Cineworld's breach of contract, the focus turned to their quantification. Cineplex relied on expert evidence to outline eight separate calculations of loss resulting from the breach. The first three calculations were presented by Cineplex's expert as being partially duplicative and therefore mutually exclusive measures of damages: the loss of consideration to Cineplex's shareholders (measure #1), the loss of Cineplex's future cash flow (measure #2), and the loss of synergies accruing to Cineplex (measure #3).[21] The loss of consideration to shareholders was calculated by Cineplex's expert as $1.32 billion, exclusive of pre-judgment interest. The next five calculations of loss were more ancillary, such as the costs of Cineplex's transaction expenses (measure #6), though these losses were by no means insignificant. For example, Cineworld not repaying Cineplex's bank debt after the deal closed was calculated as a $663 million loss (measure #5a). Cineplex's expert presented these five ancillary losses as overlapping and therefore mutually exclusive with measures #1 and #2.[22] In addition, three separate calculations of benefits gained by Cineworld from not closing the transaction (losses and costs avoided) were presented by Cineplex's expert, which would be relevant for a claim in restitution in the alternative of a contractual claim for compensatory damages.[23] Cineworld disputed all of the damage calculations other than transaction expenses, and

17 *Ibid* at para 158.

18 In *Fairstone*, the buyer and seller agreed that if Justice Koehnen found in favour of the claimant, "the appropriate award is specific performance rather than damages." See *Fairstone*, *supra* note 5 at para 376.

19 *Cineplex*, *supra* note 1 at para 158.

20 *Ibid*.

21 *Ibid* at paras 153–154.

22 *Ibid*. These five ancillary losses are numbered "4, 5a, 5b, 5c, 6".

23 *Ibid* at para 153. These three benefits are numbered "7a, 7b, 7c".

Cineworld's expert witness disagreed with "some of the methodologies and assumptions" of Cineplex's expert, although without providing alternative calculations.[24]

Justice Conway awarded measures #3 and #6: Cineplex's loss of expected synergies and its transaction costs. These damages were awarded in the amount calculated by Cineplex's expert: $1.24 billion for lost synergies and $5.5 million for transaction costs, excluding pre-judgment interest.[25] In order to quantify lost synergies, Cineplex's expert relied on annual estimated synergy projections in a report commissioned by Cineworld prior to signing the Arrangement Agreement. The synergies report, prepared by Ernst & Young identified three categories of synergies: cost synergies ($88 million annually), revenue synergies ($72 million annually), and efficiency synergies ($3.5 million annually).[26] Cineplex's expert opined that most of the total anticipated synergies ($163.5 million out of $176 million) were expected to accrue to Cineplex rather than Cineworld.[27] The expert then discounted these anticipated future cash flows to their present value, which resulted in $1.24 billion.

Cineworld has appealed the decision to the Court of Appeal for Ontario, and its management has stated that it "believes that Cineworld's chance of a successful appeal is more likely than not".[28] Cineplex, in turn, has filed a cross appeal, in which it asks for higher alternative damages. Should the lower court's decision be overturned, Cineplex argues that it should be awarded $2.8 billion in damages for diminished value and loss of performance.[29] As the latest development, Cineworld has recently filed

24 *Ibid* at paras 154–155.

25 *Ibid* at paras 159, 191.

26 *Ibid* at para 171.

27 *Ibid* at para 172.

28 Cineworld Group plc, "Annual Report and Accounts 2021" (2021) at 59, 86, online (pdf): <www.cineworldplc.com/sites/cineworld-plc/files/reports-presentation/2022/annual-report-2021.pdf> [perma.cc/UB4L-EFRJ]. This is also due to Cineworld's judgment that "[t]he Group does not expect damages to be payable whilst any appeal is ongoing, which is likely to take longer than the assessment out to 30 June 2023". *Ibid* at 100.

29 Tara Deschamps, "Cineplex seeking alternative damages, if Appeal Court rules in Cineworld's favour", *CTV News* (28 January 2022), online: <www.ctvnews.ca/business/cineplex-seeking-alternative-damages-if-appeal-court-rules-in-cineworld-s-favour-1.5758625> [perma.cc/4EAN-Z3YR]. The hurdles for a successful appeal are relatively high as considerable deference is afforded to trial judges' damages awards. The Court of Appeal will likely only interfere with the lower court's decision upon a finding of grounds such as "error of principle or law, a misapprehension of evidence … a failure to consider relevant factors or consideration of irrelevant factors, or a palpably incorrect or wholly erroneous assessment of damages," among others: *SFC Litigation Trust v Chan*, 2019 ONCA 525 at para 112.

for Chapter 11 bankruptcy protection, the effects of which on the litigation were however not clear at the time of writing.

3. Contractual Remedies, *Cineplex*, and the Broader M&A Context

Breaches of M&A agreements are governed by general principles of contract law. It is therefore worth briefly reviewing these principles before reflecting on their application to *Cineplex* and the broader M&A context.

A) General Principles

Courts typically remedy breach of contract by awarding compensatory damages to the injured party. Compensatory damages in Canadian law, as well as English and American law, are intended to protect a claimant's expectation interest by placing her "in the same situation, with respect to damages, as if the contract had been performed."[30] To provide the expectation measure, the party in breach must pay the claimant "a monetary equivalent of performance", thereby preserving the bargain for the injured party.[31]

One important reason that contract law protects the expectation interest, rather than the reliance interest of the losses incurred by the injured party in relying on the promise, is because of the more acute evidentiary difficulties involved in proving one's losses, such as lost opportunities to profit.[32] As Professor McCamus explains, awarding the expectation rather than reliance measure for breach of contract is about preserving economic efficiency. It incentivizes claimants to mitigate losses, and it avoids the inefficient use of resources that would result from claimants being wastefully incentivized "to engage in the exercise of documenting [their] lost opportunities at the time of contracting."[33]

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30 *Robinson v Harman,* [1848] 1 Exch 850, cited in John D McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 973–974 [McCamus]; Ewan McKendrick, *Contract Law: Text, Cases and Materials*, 9th ed (Oxford: Oxford University Press, 2020) at 802-803; The American Law Institute, *Restatement (Second) of the Law of Contracts* (1981) at §344.

31 McCamus, *supra* note 30 at 973.

32 *Ibid* at 989.

33 *Ibid.* There is debate over whether expectation damages are an efficient default rule, or whether problems created by incentive effects (e.g., strategic behaviour) and incomplete contracting (e.g., changing or unforeseen circumstances) lead to sub-optimal outcomes. See Ariel Porat, "Economics of Remedies" in Francesco Parisi, ed, *The Oxford Handbook of Law and Economics: Volume 2* (Oxford: OUP, 2017) at ch 13; Eric Posner, "Economic Analysis of Contract Law After Three Decades: Success or Failure?" (2003) 112:42 Yale LJ 829 at 834-839.

When monetary damages are inadequate, courts may exercise their discretion to grant equitable remedies such as specific performance. These remedies are usually reserved for more exceptional circumstances "where the subject matter of a bargain is unique or irreplaceable".[34] Specific performance is said to be granted "on an exceptional basis" since equitable relief is by nature "potentially more oppressive" to the party in breach, and therefore only appropriate where damages fail to adequately remedy the breach of contract.[35] Damages are less likely to adequately cure the breach when the claimant has a "fair, real, and substantial justification" for specific performance because the goods contracted for are unique and therefore non-substitutable.[36]

Although synergies are rarely dealt with in the case law on contractual damages, one decision, *Canamed (Stamford) Ltd v Masterwood Doors Ltd*,[37] involved synergies as a factor in ordering specific performance where a seller wrongfully breached an agreement to sell a commercial medical centre. In *Canamed*, the court applied the *Semelhago* principles and held that specific performance was appropriate because of the uniqueness of the property, the lack of a substitute, and the inadequacy of damages as compensation.[38] The plaintiff, who already owned one medical building and had an agreement with the defendant to purchase another one, argued inter alia that damages were inadequate because he would be denied "the efficiency and synergy of operating both [two] buildings together".[39] Justice McMahon agreed and awarded specific performance. In assessing the adequacy of compensation, he noted that the value of the property to the plaintiff was higher than the standalone value of the property because the plaintiff owned one of the only two other commercial medical buildings in the area.[40] By completing the agreed sale,

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34 *UBS Securities Canada Inc v Sands Brothers Canada Ltd*, 2009 ONCA 328 at paras 96–100 [*UBS Securities*].

35 McCamus, *supra* note 30 at 1085–1086.

36 *Lailani v Wenn Estate*, 2011 BCCA 499 at para 17; *Asamera Oil Corporation Ltd v Sea Oil & General Corporation et al*, [1978] SCJ No 106, [1979] 1 SCR 633 at para 68 [*Asamera*]; *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51 (citing *Asamera*) at paras 38–41 [*Southcott Estates*]; McCamus, *supra* note 30 at 1087–1088. Some commentators have interpreted the emphasis on uniqueness as more fundamentally concerned with not under- or over-compensating the claimant. See Angela Swan et al, *Canadian Contract Law*, 4th ed (Toronto: LexisNexis Canada Inc, 2018) at §6.347 [Swan et al].

37 [2006] OJ No 802 [cited to], 41 RPR (4th) 90 (Ont Sup Ct) [*Canamed*].

38 *Ibid* at paras 137, 147-148. See generally *Semelhago v Paramadevan*, [1996] 2 SCR 415, [1996] SCJ No 71 [*Semelhago*].

39 *Canamed*, *supra* note 37 at para 138.

40 *Ibid* at para 147.

the plaintiff "would gain certain efficiencies and synergies that could not be obtained by owning another medical building" elsewhere.[41]

B) Specific Performance

Cineplex highlights the nature of specific performance as an exceptional remedy, while, in our view, simultaneously underscoring its advantages over damages for breached M&A agreements, given the lack of reliability surrounding valuation and the ability of parties in breach to pay potentially colossal M&A damages awards. In view of the *Cineplex* court's reluctance to order specific performance in connection with an M&A transaction, which will be outlined below, the importance of including contractual provisions for specific performance in M&A agreements comes to the forefront.

While courts in general rarely order specific performance, they are more inclined to do so in cases where the subject matter of a contract is unique or non-substitutable and damages cannot therefore provide an adequate remedy.[42] In the M&A context, the purchase or sale of a business can be regarded as inherently non-substitutable. This is especially true for a buyer that intends to acquire a business for strategic reasons.[43] However, a case for non-substitutability can also be made from the perspective of a seller, namely where a business is sold for non-cash consideration (e.g., shares in the buyer or a combined entity) or where there are no alternative buyers that a seller could turn to (which is reminiscent of the situation in the disputed sale of Twitter). For the seller, specific performance may be more attractive as it avoids having to continue the search for a buyer and the potentially challenging issues surrounding valuation that damages awards raise.

Another reason that speaks in favour of specific performance in M&A transactions is that they involve highly pronounced challenges in terms of valuation, which create difficulties surrounding the quantification of

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41 *Ibid* at para 149.

42 *UBS Securities*, *supra* note 34 at para 96.

43 Courts have declined to award specific performance for business acquisitions by financial buyers when there is evidence that the acquisition represents an investment opportunity with readily available substitutes. This situation can be contrasted with acquisitions by "strategic buyers" who are influenced by strategy considerations to acquire a particular business. See *Wallace v Allen*, 2009 ONCA 36 at para 40: "The argument can be made that every business is unique… While the company itself may be unique in what it does, the appellant's acquisition of the business was not — the appellant acquires businesses for a living." This suggests that courts may not only look at the character of the business, but also at the parties and broader circumstances surrounding a deal to determine whether specific performance is appropriate.

damages. Courts have thus chosen specific performance for contracts not only for the acquisition of shares that they regarded as not readily substitutable, but also in situations such as the sale of companies for which no public market exists and valuation difficulties arise that are not present to the same extent in the listed company context.[44] A similar rationale for awarding specific performance applies to contracts for the purchase and sale of controlling stakes (in both public or private companies). Since control over a company itself is non-substitutable and control premia are difficult to value, damages may not be an appropriate remedy.[45]

Finally, in the M&A context courts may also be more inclined to grant specific performance when damages would be inadequate because the party in breach is unlikely to be able to pay,[46] or there are challenges in calculating damages due to "valuation difficulties".[47] In the US, the seminal *IBP* case resulted in the Delaware Chancery Court (which applied New York law) awarding specific performance, ordering a purchaser that tried to back out of a merger to complete the acquisition.[48] In explaining its preference for specific performance over damages, the *IBP* court noted that the determination of a cash damages award would be very difficult and imprecise, and the cash award could turn out to be potentially staggeringly large.[49] Conversely, an award of specific performance would "entirely eliminate the need for a speculative determination of damages".[50]

The potential advantages of specific performance raise the question of how parties treat the issue of remedies in M&A agreements and litigation. Cineplex, for instance, decided not to seek specific performance, even though the Arrangement Agreement provided that it was entitled to do so.[51] In contrast, *Fairstone* provides an example of a case where both parties agreed that specific performance would be the adequate remedy.[52]

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44 See *UBS Securities, supra* note 34; *Newton v Graham*, 2011 SKQB 423; *IMP Group Ltd v Dobbin*, [2008] OJ No 3572, 171 ACWS (3d) 835 (Ont SC); *Hennig v Canadian Rocky Mountain Properties Inc*, 2005 ABCA 223; *Baird v Red Bluff Inn Ltd*, [1997] BCJ No 1152, 32 BLR (2d) 249 (BC SC); *Basra v Carhoun* (1993), 82 BCLR (2d) 71, [1993] BCJ No 1648 (BC CA); *Fleisher v Rosenbloom* (1988), 53 Man R (2d) 247, 8 ACWS (3d) 362 (QB); *Gilbert v Barron,* [1958] OJ No 32, 13 DLR (2d) 262 (Ont HCJ); *Dobell v Cowichan Copper Co* (1967), 61 WWR 594, 65 DLR (2d) 440 (BC SC); *WC Pitfield & Co v Jomac Gold Syndicate Ltd*, [1938] 3 DLR 158, [1938] OR 427 (Ont CA); McCamus, *supra* note 30 at 1102–1103.

45 McCamus, *supra* note 30 at 1102–1103.

46 *UBS Securities*, *supra* note 34 at para 103.

47 McCamus, *supra* note 30 at 1103.

48 *In re IBP Shareholders Litigation v Tyson Foods, 789 A 2d 14 (Del Ch 2001)* [*IBP*].

49 *Ibid* at 83.

50 *Ibid.*

51 *Arrangement Agreement, supra* note 3 at section 8.9.

52 *Fairstone*, *supra* note 5 at para 376.

In the US, there is empirical evidence supporting a strong preference by M&A contracting parties for specific performance,[53] a phenomenon that appears to occur also in Canada.[54]

A recent US example of a strong specific performance clause is contained in the agreement underlying Elon Musk's attempted takeover of Twitter. First, the agreement states that monetary damages would be an inadequate remedy if the parties fail to perform the provisions of the agreement,[55] whereas *Cineplex*'s Arrangement Agreement only mentions that "irreparable harm may occur for which money damages would not be an adequate remedy".[56] Second, the Twitter agreement also prevents the parties from disputing each other's right to specific performance.[57]

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53 In a study of 1000 public and private merger agreements from 2010–2019, Arnold et al find that between 85% and 95% of M&A contracts include specific performance provisions. Theresa Arnold et al, ""Lipstick on a Pig": Specific Performance Clauses in Action" (2021) 2021:1 Wis L Rev 359 at 363 [Arnold et al]. Specific performance clauses are similarly prevalent (in fact higher) for financial deals than strategic deals: *Ibid* at 371. In another study based on older data of 410 merger agreements and 299 asset purchase agreements filed with the US Securities and Exchange Commission (SEC) in 2002, 53.4% of merger agreements and 45.1% of asset purchase agreements included specific performance clauses: Theodore Eisenberg & Geoffrey P Miller, "Damages Versus Specific Performance: Lessons from Commercial Contracts" (2015) 12:1 J Empirical Leg Studies 29 at 52.

54 Arnold et al, *supra* note 53 at 381 n 64 (referring to Sara Josselyn, ABA 2015 Canadian Public Target M&A Deal Points Study – Key Takeaways (Part 2), Deal Law Wire (4 Feb 2016)). Although M&A agreements with specific performance clauses tend to give parties the right to seek specific performance without excluding other remedies, there is also the question to what extent parties may validly agree on specific performance (especially as the sole remedy) since equitable remedies are within the discretion of the courts. On this, see *Height of Excellence Financial Planning Group Inc v Bergen*, 1999 SKQB 142 (finding that the parties' agreement is relevant and persuasive, but not determinative) and Peter Castiel & Tania Djerrahian, "Specific performance in the context of Canadian M&A transactions: Possible but not always practical" (8 July 2013), online: *Stikeman* <www.stikeman.com/en-ca/kh/canadian-ma-law/specific-performance-in-the-context-of-canadian-m-a-transactions-possible-but-not-always-practical> [perma.cc/TN4B-VH7K] (including a discussion of the special situation in Québec).

55 See section 9.9 of the Agreement and Plan of Merger: United States Securities and Exchange Commission, "Form 8-K" (25 April 2022), online: <www.sec.gov/Archives/edgar/data/1418091/000119312522120474/d310843ddefa14a.htm> [perma.cc/6ZCN-5H95].

56 *Arrangement Agreement, supra* note 3 at section 8.9.

57 A majority of M&A contracts in Arnold et al's study also include "a promise not to challenge the granting of specific performance": Arnold et al, *supra* note 53 at 375. For a helpful analysis of the Musk/Twitter agreement, see also Stephen M Bainbridge, "Does Twitter's Lawsuit Against Elon Musk Really Look 'Like a Loser'?" (13 July 2022), online: *Professor Bainbridge* <www.professorbainbridge.com/professorbainbridgecom/2022/07/does-twitters-lawsuit-against-elon-musk-really-look-like-a-loser.html> [perma.cc/44RS-BWNV].

What explains this seemingly strong preference for specific performance? As two commentators have noted, the "most consistent explanation" given by US M&A practitioners for including specific performance provisions in the vast majority of M&A agreements is that "they did not think that judges would give them the appropriate amount of money damages their bargain demanded".[58] Indeed, each party may have their own reasons for agreeing to specific performance. In our view, courts should enforce contractual provisions regarding parties' preferred remedies insofar as they are feasible.

While the size and complexity of the *Cineplex* M&A transaction distinguishes it from other Canadian cases where specific performance was awarded for share sales,[59] the *Cineplex* court's reasons are difficult to analyze as it dismissed the specific performance argument without detailed justification. It suggested that the buyer's withdrawal from negotiations surrounding *ICA* approval made it clear that it would not be appropriate for the court to order Cineworld to re-launch this process.[60] Presumably, the court's reluctance was based on the concern that a recalcitrant buyer could simply not be forced to act in good faith, and even if told to obtain approval would be likely to act so as to torpedo the closing of the transaction.[61] It is also possible that the court was concerned that it could not properly monitor the buyer's conduct during a forced approval process.

Although these concerns are understandable, it is nevertheless surprising that the court dismissed specific performance without more detailed explanation. There are limitations that may prevent the award of specific performance, the most relevant in *Cineplex* likely including whether the court believed it could not supervise the defendant's performance,[62] and whether specific performance was still practical given the necessary third-party regulatory approval. In *Ruparell v JH Cochrane Investments Inc et al*, the court refused specific performance for the sale of an automobile dealership and its accompanying land, emphasizing that a

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58 Arnold et al, *supra* note 53 at 375, 381. Arnold et al notes that this rationale is distinct from the argument that courts are unable to conduct an accurate valuation of the damages.

59 *Canwest Pacific Television Inc v 147250 Canada Ltd*, [1988] BCWLD 2874, 30 BCLR (2d) 145 (BC CA) (upholding specific performance of the sale of shares of a television station); *Winlow v ACF Equity Atlantic Inc*, 2003 NSSC 182 (ordering specific performance of a sale of shares).

60 *Cineplex*, *supra* note 1 at para 158.

61 Justice Conway found, "on a balance of probabilities, that ICA Approval would have been forthcoming if Cineworld had not withdrawn its application on June 12": *Ibid* at para 181.

62 Swan et al, *supra* note 36 at §6.350.

required third-party consent from Volkswagen Canada was uncertain.[63] Yet, it would seem that context is crucial in determining the relative certainty of the third-party approvals that form a routine aspect of M&A agreements, particularly given the *Cineplex* court's finding that "there was a very high percentage likelihood that ICA Approval would have been obtained."[64]

The fact that the judges in a number of Delaware decisions have not hesitated to award specific performance of M&A agreements, even when completing the deal would require the "reasonable best efforts" of a party in breach, suggests that the mere prospect of non-cooperative behaviour should not inevitably preclude specific performance.[65] For instance, in the recent case of *Snow Phipps v KCAKE Acquisition*, then Vice Chancellor McCormick of the Delaware Chancery Court (currently in charge of the Musk/Twitter litigation) held that a remorseful buyer was obligated to close the deal, including using its "reasonable best efforts" to comply with a debt funding condition that it had wrongfully breached.[66] To accomplish this, the Court ordered the parties to provide supplemental submissions with deadlines for compliance with the decision, coupled with a jointly written letter addressing "any other matters that the court needs to address to bring this action to a conclusion at the trial level".[67] *Snow Phipps* thus demonstrates that M&A specific performance orders can be enforced even with a reluctant party obligated to exercise its "reasonable best efforts". While legitimate concerns about a party in breach acting in bad faith may be raised, this hypothetical possibility should be viewed in light of cases suggesting that courts are equipped to deal with these problems, and with appropriate deference to courts' supervisory acumen to distinguish between reasonable best efforts compliance and bad faith.[68]

Specific performance is particularly suitable in circumstances where the party seeking specific performance is the buyer, and the deal involves

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63 *Ruparell v JH Cochrane Investments Inc et al*, 2020 ONSC 7466 at paras 75–85.

64 *Cineplex*, *supra* note 1 at para 181.

65 See *Snow Phipps Group, LLC, et al v KCAKE Acquisition, Inc, et al*, CA No 2020-0282-KSJM (Del Ch 2021) [*Snow Phipps*]. See also *Hexion Specialty Chems, Inc v Huntsman Corp*, 965 A 2d 715, CA No 3841-VCL (Del Ch 2008) at 749–763, where the court ordered the buyer "to specifically perform their covenants and obligations under the merger agreement", which included using its "reasonable best efforts to consummate the financing". For other examples of specific performance of M&A agreements, see *Channel Medsystems, Inc v Boston Sci Corp*, 2019 WL 7293896 (Del Ch 2019); *IBP*, *supra* note 48.

66 *Snow Phipps*, *supra* note 65 at 123.

67 *Ibid* at 123–125.

68 An important distinction between *Snow Phipps* and *Cineplex* is that in the former the aggrieved seller voluntary sought specific performance, whereas in *Cineplex* the aggrieved seller did not.

at least some strategic component (which implies that synergies are greater than zero). The inherent uniqueness and non-substitutability of the acquisition presents perhaps the most straightforward and convincing case for awarding specific performance. Similarly, specific performance can be justified outside of all-cash deals when an aggrieved seller, acting as the claimant, was to receive shares in the post-acquisition buyer or combined entity, since these shares and the resulting entity "would not exist *but for* the merger".[69] The difficulties in accurately valuing these counterfactual shares raise strong concerns over the adequacy of damages in compensating the seller, whereas specific performance does not pose these problems.[70]

Specific performance may seem less suitable or relevant compared to a damages award in all-cash deals such as *Cineplex*, since as part of the deal and upon closing the seller would also receive cash consideration. Yet specific performance may still be desirable. First, a buyer in these circumstances may be able to obtain financing even for a forced acquisition (depending, among others, on the viability of a previously agreed deal considering deteriorating target value), but not a costly damages award. Second, as mentioned above, an aggrieved target in an all-cash deal might prefer specific performance because it is reluctant to re-launch the sales process as well as due to fears of under-compensation. Under-compensation, in this context, could occur due to: 1) judicial reticence to make large awards, 2) damage valuation difficulties, and 3) concerns that a damages award will not compensate for a failed acquisition's negative impacts on the target's future earnings. As a case in point on this final concern, consider how Twitter is seeking specific performance after Musk's aborted acquisition exposed its weaknesses and created a perception of damaged goods.[71]

C) Expected Synergies as Damages

With specific performance excluded, the *Cineplex* court next had to tackle the issue of damages. As mentioned, the court settled on the seller/target's loss of expected synergies—that is the expectation damages of Cineplex Inc. as a legal entity—as the basis of expectation damages, rather than loss of the purchase price payable to shareholders or Cineplex's loss of

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69 Jordan A Goldstein, "The Efficiency of Specific Performance in Stock-for-Stock Mergers" (2004) 29 Del J Corporate L 747 at 769.

70 *Ibid.*

71 Kate Conger & Mike Isaac, "How Elon Musk Damaged Twitter and Left It Worse Off", *The New York Times* (11 July 2022), online: <www.nytimes.com/2022/07/11/technology/elon-musk-twitter-damaged.html?searchResultPosition=1> [perma.cc/W6DL-5J9A].

future cash flows. The court also awarded a comparatively small amount for transaction costs, which we will not consider further in the following.

1) Synergies in M&A Transactions

In principle, lost synergies do not seem to raise unique doctrinal issues in contract law generally and appear to fit within the straightforward principle of granting expectation damages. Complexities arise however in the corporate and M&A context, with its involvement of multiple formally separated but economically linked parties (legal entities, shareholders, group companies), different types of acquisition structures, post-closing reorganisation and other measures, and the inherent problems of quantifying and allocating synergies given their nature as benefits resulting from combining different businesses. For these reasons, M&A agreements often differ, in various respects, from traditional commercial and business contracts, and thus deserve a tailored approach.

Synergies are excess free cash flows generated from combining target and acquirer firms' assets in a single post-merger entity—including separate legal entities combined under the umbrella of a corporate group—and by definition must exceed the sum of the free cash flows generated by the target and acquirer firms separately.[72] These additional free cash flows are typically categorized as either "operating" or "financial" synergies.[73] *Operating synergies* result from the combined entity generating higher revenues or lowering operating costs, with the former often referred to as "revenue synergies" and the latter as "cost efficiency synergies". Revenue synergies can arise, among others, from production and distribution complementarities or increased market power; cost efficiency synergies can stem from reducing headcount; and realizing economies of scale and scope can lead to both types of operating synergy.[74] *Financial synergies*,

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72 Robert W Holthausen & Mark E Zmijewski, *Corporate Valuation: Theory, Evidence & Practice*, 2nd ed (USA: Cambridge Business Publishers, 2020) at 810 [Holthausen & Zmijewski]; Luis E Pereiro, "The Estimation of M&A Synergies: A New Approach" (2018) 29:4 J Corporate Accounting & Finance 54 at 55 [Pereiro]; Emilie R Feldman & Exequiel Hernandez, "Synergy in Mergers and Acquisitions: Typology, Lifecycles, and Value" (2021) Academy Management Rev (forthcoming) at 1 [Feldman & Hernandez]; Kristin Ficery, Tom Herd & Bill Pursche, "Where has all the synergy gone? The M&A puzzle" (2007) 28:5 J Bus Strategy 29 at 35.

73 For a more recent typology of synergies, see generally Feldman & Hernandez, *supra* note 72.

74 Erik Devos, Palani-Rajan Kadapakkam & Srinivasan Krishnamurthy, "How Do Mergers Create Value? A Comparison of Taxes, Market Power, and Efficiency Improvements as Explanations for Synergies" (2009) 22:3 Rev Financial Studies 34 at 1180–1181 [Devos, Kadapakkam & Krishnamurthy]; Holthausen & Zmijewski, *supra* note 72 at 810–812.

on the other hand, typically result from tax savings generated by adjusting debt levels in the combined firm's capital structure, to better utilize the interest tax shield.[75]

When valuing a deal (or target), buyers will typically discount projected future free cash flows attributable to synergies from an acquisition to derive a present value (*PV*), and then subtract from this *PV* the restructuring costs (*RC*) of acquiring the target and implementing the required changes to realize the synergies.[76] Thus, *PV(Synergies) – RC = Net Synergies*. Net synergies represent value that would be created for the buyer through completing the acquisition, although this amount will also have to be adjusted for transaction costs. In public M&A, net synergies permit the buyer to pay significant premiums over the market price to target shareholders, effectively sharing a portion of net synergies to incentivize the target's shareholders to sell their shares.[77]

2) Problems with Awarding Synergies

Several issues arise in valuing synergies that are relevant for considering their appropriateness as expectation damages. They relate, essentially, to difficulties connected to the quantification and allocation of projected future synergies, uncertainties pertaining to the target entity's fate after the closing of a transaction, and the potential for damages to be influenced by the structure of the transaction and the nature of the buyer.

To begin, not all value creation in a "combined firm" (i.e., the resulting firm post-business combination) results from synergies. An underperforming target could also be improved without recourse to a business combination, such as by hiring more competent managers or increasing the amount of debt in the firm's capital structure. It is therefore open to debate whether value that "can be achieved independently of the acquisition" but has been included in an acquirer's synergy calculations should be excluded from synergies damages awards.[78]

While this issue was not discussed and does not seem to have been a significant factor in *Cineplex*, US courts have engaged with one aspect of it, although in the specific context of dissenting shareholders' appraisal

75 Devos, Kadapakkam & Krishnamurthy, *supra* note 74 at 1180–1181; Holthausen and Zmijewski, *supra* note 72 at 812.

76 Pereiro, *supra* note 72 at 55–57.

77 *Ibid* at 57.

78 Holthausen & Zmijewski, *supra* note 72 at 811–812. From the buyer's perspective, it is irrelevant whether the excess future cash flows in the combined firm result from reduced agency costs or gains from synergies.

rights claims concerning mergers under Delaware law. For instance, in *Verition Partners Master Fund Ltd v Aruba Networks, Inc*,[79] the Delaware Supreme Court reversed the Chancery Court, criticizing among others its efforts to separate reduced agency costs stemming from controlling ownership from other synergies that result from an acquisition.[80] This suggests that a strict definition of synergies (that excludes, for instance, the removal of agency costs that are not strictly tied to a transaction) for the purposes of quantifying damages would be a difficult approach.

Nevertheless, although *Verition* and other US appraisal cases may offer useful insights into calculating and allocating synergies, these cases and their aim to define a merging target's "fair value" are different from *Cineplex* and its focus on synergies as damages. As per the Delaware General Corporation Law's appraisal provisions, courts must determine fair value "exclusive of any element of value arising from the accomplishment or expectation of the merger,"[81] that is the value of the target as a going concern *without* synergistic effects. Indeed, the Delaware Supreme Court's preferred measure of fair value in appraisal cases is deal price minus synergies.[82] In contrast, there is no statutory or other requirement that would prevent courts, under Canadian contract law, from considering synergies when assessing damages.

Another difficult issue concerns the calculation and apportionment of synergies. The calculation of synergies can differ substantially dependent upon the valuation method employed and the assumptions in the model. Discounted cash flow (DCF) methods are predominant in the finance literature, along with real options methods. However a variety of other valuation methods such as "profit and loss (P&L) simulation tools", "industry multiples", and considering comparable precedent deals are also widely employed.[83] Calculating synergies always requires significant assumptions and a high degree of discretion, both in their quantification and estimating their duration.[84] Generally, however, calculating cost

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79 210 A3d 128 (Del Sup Ct 2019) [*Verition*].

80 *Ibid* at 9–11.

81 *Delaware General Corporation Law*, Del Ann Code Title 8, §262(h).

82 *DFC Glob Corp v Muirfield Value Partners, LP*, 172 A 3d 346 (Del Sup Ct 2016); *Dell Inc v Magnetar Glob Event Driven Master Fund Ltd*, 177 A 3d 1 (Del Sup Ct 2017); *Verition*, *supra* note 79.

83 Florian Bauer & Martin Friesl, "Synergy Evaluation in Mergers and Acquisitions: An Attention-Based View" (2022) J Management Studies at 4.

84 To illustrate this, consider one example from Professors Holthausen and Zmijewski's text. In a hypothetical merger generating $1.05 billion in synergies, roughly half of the projected synergies ($526 million) arise due to the assumption that cost efficiency synergies continue in perpetuity rather than having a 10-year duration like the revenue synergies: Holthausen & Zmijewski, *supra* note 72 at 813–817.

efficiency and financial synergies tends to be more certain than calculating revenue synergies.[85] Still, despite the clear fact that calculating synergies "involves imprecision" at least one way of looking at it is to say that the imprecision is "no more than other valuation methods, like a DCF analysis", as former Chief Justice Strine of the Delaware Supreme Court wrote in the *Verition* appraisal decision.[86]

Should synergies remain a court's preferred method of assessing damages, a more nuanced approach to synergies could involve distinguishing between different types of synergies, allowing only certain categories to be recoverable as damages, namely the more reliably quantifiable cost savings type. For example, in *In Re Appraisal of Panera Bread Company*,[87] the Delaware Chancery Court had to determine the value of synergies to be excluded from a fair value appraisal. The shareholders who exercised their appraisal rights identified three categories of synergies: "incremental cost savings, incremental leverage tax benefits, and revenue synergies."[88] While the buyer had modelled the first two categories of synergies when conducting its valuation of the target, it "did not quantify any revenue synergies attributable to [its] growth opportunities", acknowledging that quantifying growth is more complicated.[89] As such, the court only recognized and excluded from the fair value appraisal the first two categories of synergies.[90]

A significant drawback of recognizing only readily quantifiable synergies as damages might be to unjustifiably "soften the blow" for a buyer that breaches an acquisition agreement. Furthermore, as Professor McCamus notes, the point of expectation damages is to not prejudice injured parties with difficult evidentiary burdens of proving how much they lost (reliance damages).[91] On the other hand, allowing claimants to recover any type of synergy, so long as it is quantified in the valuation model used to arrive at a purchase price, may create perverse incentives for parties that expect a breach by the other side. Buyers could be tempted to include all types of speculative synergies in their valuations because artificially inflating their models may lead to higher damages should the seller refuse to close the deal. Vice versa, inflated synergies could benefit the selling party if the buyer unjustifiably fails to complete the transaction. An instance of inflated synergies can be observed in *In re Appraisal of*

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85 *Ibid* at 813.
86 *Verition*, *supra* note 79 at 24.
87 2020 WL 506684 (Del Ch) [*In Re Appraisal of Panera Bread Company*].
88 *Ibid* at 103.
89 *Ibid* at 112.
90 *Ibid* at 115, 130.
91 McCamus, *supra* note 30 at 989.

Regal Entertainment Group,[92] an appraisal action that shareholders brought in connection with a previous Cineworld acquisition. Here, there was evidence that Cineworld may have overstated the potential synergies of the transaction, although the reason was apparently not connected to valuation or damages but rather due to a desire to satisfy lenders' expectations.[93]

More difficult than calculating synergies, arguably, is deciding how to allocate them. Since synergies by definition accrue to the combined entity and cannot be achieved by an acquirer or target separately, apportioning them between acquirer and target has serious conceptual and practical difficulties. In *Cineplex*, the court accepted the claimant's expert's determination that of the total of $176 million projected annualized synergies, $163.5 million was expected to be realized by Cineplex following the closing of the transaction.[94] The court acknowledged that "the ultimate benefit of the synergies would have accrued to Cineworld as the shareholder of Cineplex" but it still found that this did "not change the fact that these synergies would have been realized by the corporate entity, Cineplex".[95]

The *Cineplex* court's approach to awarding synergies as damages raises several concerns that echo the general problems with this approach. As an initial observation, even if we assume that despite uncertainties the figure representing the transaction's total projected annual synergies was correct, it should be noted that this amount was based on a study that Cineworld had commissioned prior to entering the agreement with Cineplex.[96] Thus, the synergies were calculated before COVID-19 and its impact could be assessed. It is likely that the financial outlook for the entertainment business has now changed. This raises the question of whether the synergies should have been recalculated to incorporate these economic circumstances, since the date for assessing damages for "rare" or "unique" assets is flexible and may be calculated as of the date of trial, as opposed to the date of the agreement, breach, or planned closing.[97]

Another challenge with the *Cineplex* award is its allocation of almost 93% of the synergies to Cineplex. As mentioned, synergies are generated as a consequence of combining business assets. While it is technically possible to determine which entity in a corporate group would benefit directly from the synergies, as was attempted in *Cineplex*, this will often

92 Cons CA No 2018-0266-JTL (Del Ch May 13, 2021).

93 *Ibid* at 88–89.

94 *Cineplex*, *supra* note 1 at para 172.

95 *Ibid* at para 176.

96 *Ibid* at para 171.

97 See *Semelhago*, *supra* note 38 at paras 13–14 and section 3d below.

be both a highly uncertain and formalistic exercise. The economic reality is that within corporate groups, any benefits in the form of cash flows or otherwise can be shifted or allocated as the group (or its management) sees fit. The ultimate benefit, especially in case of wholly owned subsidiaries, accrues to the parent company, as the *Cineplex* court noted. This does not mean that separate legal personalities of group entities should be disregarded, but it does signify that there is a high level of artificiality and uncertainty in assumptions that synergies accrue, and will continue to accrue in the future, to a certain entity within a group. This is evident in US cases such as *Verition*, where the target company's expert admitted that the portion of synergies accruing to the target "cannot accurately be measured", and both "parties agree[d] that it is not possible to determine with precision what portion of the final deal price reflects synergy value".[98]

Furthermore, especially from the perspective of a target and its shareholders, the use of synergies as damages can lead to wildly varying and acutely problematic results. It would mean that if a court can be convinced that projected transactional synergies would have accrued only or in large part to entities other than the target, the target's damages would have to be small or zero. Consequently, in these situations, even though an agreed purchase price may have included a premium to the target shareholders, that premium would not be recoverable in case of a buyer's breach and refusal to close.

Assessing damages based on future synergies of a specific target entity may become outright futile when said target would not survive post-closing, be it because the acquisition itself is structured as a merger or amalgamation, or the target would be merged with another entity as part of a buyer's post-closing reorganization activities.[99] Either way, a legal entity that ceases to exist can hardly be said to have benefited from future excess cash flows, unless we assume that there is a short time window, a "logical split second" between the closing of a transaction and the target's disappearance, during which future benefits accrue that can later be claimed on the entity's behalf.

If the plan had been to acquire Cineplex through an amalgamation, would the court have changed its approach to damages? Or, if there would have been a proposed asset deal, could the selling entity have claimed that synergies would have accrued to it, despite the cash flows going to

98 *Verition Partners Master Fund Ltd and Verition Multi-Strategy Master Fund Ltd v Aruba Networks, Inc*, 2018 WL 922139 (Del Ch 2018) at 102.

99 *Business Corporations Act*, *supra* note 6 at s 179(a.1): "Upon the articles of amalgamation becoming effective … (a.1) the amalgamating corporations cease to exist as entities separate from the amalgamated corporation."

another entity? In other words, the broader question here is whether the availability of damages in M&A transactions should depend on the structure of an acquisition. Awarding synergies as damages would create significant divergences in the availability and size of awards based upon transaction structuring.

The arrangement that was chosen as the structure for acquiring Cineplex is also worth exploring further. Under the Arrangement Agreement, Cineplex's shares would have been transferred to a Cineworld subsidiary, while Cineplex shareholders would have received cash payments. This represents at its core a share deal effectuated by way of an arrangement, with one of the features including that the contract was between the buyer (parent and subsidiary) and Cineplex, not between the buyer and Cineplex shareholders. If a transaction is structured not as an arrangement with a share transfer but as a straightforward share purchase agreement (or a public takeover), the "synergies accruing to the target" analysis would likely not be applied. Instead, since the contract would be between the buyer and the target shareholders, the focus would be on the target shareholders and their loss. Given the problems with relying on the target's lost synergies, would this approach—using shareholders' loss as expectation damages—not have been a viable and appropriate remedy? The next section will further explore this question.

D) Loss of Consideration to Shareholders

The *Cineplex* court was clear in rejecting loss of consideration to shareholders as the correct measure of damages. Justice Conway pointed out that Cineplex was the contracting party under the Arrangement Agreement, not the shareholders.[100] Indeed, apart from specific exceptions, the shareholders were contractually excluded from enforcing the agreement and suing Cineworld for the type of breach that had occurred.[101]

Justice Conway also refused to apply an approach based on the "transferred loss" doctrine developed by English courts. This doctrine, invoked by Cineplex in support of an award measured by the loss of consideration to its shareholders, is an exception to the general rule that a claimant cannot recover a third party's losses. It allows a claimant (*A*) to recover against a defendant (*B*) for losses suffered by a third party (*C*), if when contracting *B* contemplated that *A* would pass on the benefit of the

100 *Cineplex*, *supra* note 1 at para 161.

101 *Ibid* at paras 162–164.

contract to *C*.[102] Legal commentators have noted a lack of judicial clarity surrounding transferred loss, since under a "broader ground" construction of the doctrine, *A* is actually recovering for her own loss (i.e., *B*'s breach of contract itself and the loss of performance), and is therefore not required to transfer any damages award to *C*.[103]

The *Cineplex* court did not need to engage with these concerns as it stated that the doctrine was not applicable. As Justice Conway noted, the doctrine "has been narrowly construed and recognized only in cases where the third party suffers loss as the transferee of the property affected by the breach," which "is not the case here".[104] Additionally, the court also found that "there is no basis to apply that principle when the parties expressly defined the rights of third parties" in the Arrangement Agreement.[105]

The court's dismissal of the doctrine notwithstanding, the clearest way to understand the issue is not that a corporation is claiming for its shareholders' loss. Rather, in the context of a breached M&A agreement, the corporation's loss is best assessed by its shareholders' loss, since the consideration payable most accurately represents the value and substance of the corporation's bargain. Furthermore, there is no reliable means of assessing the loss (or gain) to other constituencies such as employees, consumers, etc. Recognizing that price most accurately represents the corporation's loss does not hinder the target's directors from distributing the damages in whatever manner and to whichever constituents they deem to be in the corporation's best interests. This is also in line with Canadian directors' fiduciary duties that allow for consideration of the interests of non-shareholder constituencies.[106]

In fact, Canadian law already recognizes that harm to the corporation can be represented conceptually by the shareholders' loss. The rule in *Foss v Harbottle* denies shareholders a cause of action for diminution in share value when harm is done to the corporation directly (since the shareholders

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102 Paul S Davies, *JC Smith's The Law of Contract*, 3rd ed (Oxford: Oxford University Press, 2021) at 135–136.

103 *Ibid*. See also *Lowick Rose LLP (in liquidation) v Swynson Ltd and another*, [2017] UKSC 32 at paras 15–16, 52–53, 105–106 [*Lowick Rose*].

104 *Cineplex*, *supra* note 1 at para 168; While the "narrow ground" of the doctrine depends on loss stemming from property transfer, unlike the "broader ground" which compensates the loss of performance interest to the third party, "Lord Sumption (for the majority) noted there was 'much to be said for the broader principle' but acknowledged that only the narrower principle had 'hitherto been recognised'." *Lowick Rose*, *supra* note 103; See Andrew Trotter, "Reconsidering Transferred Loss" (2020) 82:4 Modern L Rev 727 at 734–735.

105 *Cineplex*, *supra* note 1 at paras 167–168.

106 *Canada Business Corporations Act*, RSC 1985, c C-44, s 122(1.1) [*CBCA*].

are only harmed indirectly), and its justification is premised upon the fact that "loss in share value is simply reflective of the loss incurred by the corporation *as a result of the wrong done to it*".[107] Acknowledging that damages for direct harm to a target corporation are best assessed by the shareholders' loss is consistent with the underlying premise of the *Foss v Harbottle* rule.

Furthermore, in circumstances where shareholders are contractually excluded from enforcing M&A agreements or cannot claim against a buyer in breach because they have not suffered an "independent loss" from the direct harm done to the corporation, assessing the corporation's loss with regard to the shareholders' loss still accords with the two rationales for the *Foss v Harbottle* rule. First, it respects that the corporation is a distinct legal entity from its shareholders, since the corporation is recovering for harm done directly to it, and second, it "avoids a multiplicity of actions".[108] It is not inconsistent to acknowledge that a corporation's loss is relationally "independent" from the shareholders' loss,[109] and yet is still best approximated by it, because the loss of consideration payable to shareholders is the most reliable objective measure of the economic value of the corporation's lost bargain.

Justice Conway further declined to engage with the parties' submissions concerning the US case of *Consolidated Edison Inc v Northeast Utilities*,[110] noting that it was not for the court to get involved in the debate that arose in another jurisdiction.[111] Even if the court had engaged with this decision, it likely would have provided little assistance and would not have offered a suitable model for the court to follow.

In *Consolidated Edison*, the Second Circuit held that, under New York law, a target could not recover damages from a buyer based on the consideration that target shareholders would have received if the merger had closed. The decision differs from *Cineplex* in that it concerned shareholders' own right to sue a prospective buyer for their damages (which the court denied), whereas it did not address the target entity's own damages.[112] It also relied heavily on the specific language in the merger

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107 *Tran v Bloorston Farms Ltd*, 2020 ONCA 440 at para 32 [*Tran*]. Emphasis original.

108 *Ibid* at paras 31, 65.

109 *Ibid* at paras 39, 58–59.

110 426 F 3d 524 (2nd Cir 2005) [*Consolidated Edison*].

111 *Cineplex*, *supra* note 1 at para 166.

112 The target, Northeast Utilities, had countersued Consolidated Edison for breach of the merger agreement and demanded over $1 billion in damages. The parties subsequently settled the action. See Robert L Haig et al, *Commercial Litigation in New York State Courts*, 4th ed (New York, NY: Thomas Reuters, 2020) at § 110:33.

agreement, which the court found "afford[ed] each party a critical power to abandon the merger if it is willing to suffer the stipulated consequences" and included "specified and limited remedies available to each party in event of breach and termination of agreement".[113]

Consolidated Edison has also been severely criticized by commentators,[114] and it has to date not been adopted in the leading corporate law jurisdiction of Delaware, where *In re IBP* (although decided under New York law) seems to remain one of the leading cases on merger contract remedies. Notably, former Delaware Chief Justice Leo Strine once informally commented that he disagreed with *Consolidated Edison*'s general thrust. He observed that restrictive third-party beneficiary provisions in merger agreements were "designed to deal with the cacophony that could arise with individual shareholders trying to enforce a contractual right" rather than "to deprive the corporation of remedies pursued in good faith by the directors on behalf of the stockholders".[115] Strine also noted that he was open to conceptualizing that a merger contract was negotiated by the directors for the benefit of the stockholders and, in order to honor the parties' expectations, allowing the board to collect monetary damages suffered by the stockholders on their behalf.[116]

Strine's view is in line with what many practitioners believe to be the case, or at least believed pre-*Consolidated Edison*, and what two commentators with a view to the US dubbed the "Traditional Paradigm" in merger agreements.[117] Namely, that:

> while not expressly carving out any rights with respect to the target company's shareholders, the parties proceed with the underlying assumptions that (1) the target corporation is acting for the benefit of its shareholders in the merger context, and (2) in the event of a buyer's breach or wrongful termination, the shareholders'

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113 *Consolidated Edison*, *supra* note 110 at 531.

114 For a particularly thorough analysis and critique, see Ryan D Thomas & Russell E Stair, "Revisiting "Consolidated Edison"—A Second Look at the Case that Has Many Questioning Traditional Assumptions Regarding the Availability of Shareholder Damages in Public Company Mergers" (2009) 64:2 Business Lawyer 329 [Thomas & Stair].

115 *Ibid* at note 70 (quoting then-Vice Chancellor Strine's response at a legal conference in 2008).

116 *Ibid*. Although not directly on point, there is Delaware case law that recognizes that a shareholder may have standing to enforce certain rights as an intended third party beneficiary under a merger agreement. *Amirsaleh v Bd of Trade of NY,* 2008 WL 4182998 (Del Ch 2008).

117 Thomas & Stair, *supra* note 114 at 330–331.

> damages are effectively merged with damages suffered by the company and may be pursued and collected by the target corporation on the shareholders' behalf.[118]

While we do not suggest that provisions excluding shareholders' right to enforce an M&A agreement should be disregarded, we nevertheless believe that loss of consideration to shareholders is an appropriate measure of a corporation's damages in M&A contractual breaches. It is possible to uphold exclusionary provisions that limit shareholders' rights and, at the same time, still use loss of consideration damages as a remedy given that the quantification of damages is separate from the questions of standing to bring an action and to whom damages will be paid. An award in the amount that corresponds to the shareholders' loss of consideration can be paid to a target corporation that brings an action against a buyer in breach.[119] This would still respect any exclusions limiting shareholders' rights since recognizing that a corporation's loss is best approximated by the shareholders' loss is altogether different from allowing a corporation to recover for the shareholders' loss itself. Indeed, if we accept that the shareholders' loss of consideration is the best indicator for a target's loss as well, "it is then possible to reconcile the fact that shareholders are not actual third-party beneficiaries to a merger agreement with basic principles of contract damages".[120] Moreover, it is consistent with contract damages principles to allow recovery of the shareholders' expectancy damages as the company's own expectation damages.[121]

In *Cineplex*, the court could have found that the seller/target, Cineplex, should be awarded damages in an amount corresponding to its shareholders' loss of consideration, without treating Cineplex as claiming or collecting on the shareholders' behalf and without an obligation on Cineplex to distribute the award or parts of it to its shareholders. Cineplex

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118 As Thomas and Stair also note: "[T]he assumption that shareholder damages may be available in the event of a breach reflects a logical and practical understanding by the parties to merger agreements and provides for an orderly dispute resolution procedure. Given its limited purpose in the context of the corporate law and practicalities relating to public company mergers, typical 'no third-party beneficiaries' language in this context should not be read to restrict damages absent a clear expression of intent to the contrary in the contract": *Ibid* at 330, 342–343.

119 On this, see also *ibid* at 330, note 5: "While … paying the shareholders' damages to the company would not put the shareholders in the same position economically as if the deal were consummated (due to obvious tax inefficiencies should the board determine to distribute the proceeds of any settlement and the unlikely event that the share price increase would correspond dollar-for-dollar should such proceeds be retained by the company), this is no different than the settlement of most other derivative claims enforced by a company."

120 *Ibid* at 343.

121 *Ibid*.

had an expectation that its shareholders would receive the purchase price if the transaction had closed, in line with the contractual principles for damages.

An award for shareholders' loss of consideration can be conceptually explained at least as convincingly, if not more so, than the seller's lost synergies. In view of the many problems that arise when synergies or loss of cash flows to a target are used to ascertain damages, awarding damages based on the value of the consideration that would have been payable to shareholders had the transaction been completed minus the value of the shares is therefore appealing. The two measures (lost synergies and loss of consideration) may, of course, result in identical or similar amounts, although that is not necessarily always the case.[122] Lost synergies and lost cash flows however create more attenuated quantification and apportionment pitfalls, whereas purchase price provides the most accurate representation of the value that the buyer assigned to the target, and which was at the heart of the bargain that it agreed to and expected to be upheld. Purchase price negotiated at arms-length represents the parties' allocation of the value created by the deal, whereas synergies by themselves represent an *ad hoc*, non-market, assumption driven estimation of value. That does not mean, however, that synergies are irrelevant; they are, however, already reflected in the purchase price premium, which may include a portion of the synergies that the buyer is willing to share with the sellers. A further appeal to use shareholders' loss of consideration is that it works whether or not synergies are present. It is available also in non-synergistic deals since it can operate regardless of whether the buyer is a strategic or financial buyer.[123]

In ascertaining loss of consideration, one difficulty is setting the date for assessing the value of the residual value of the target shares. The general rule is that damages crystallize at the date of breach.[124] However, exceptions are permitted in "special circumstances," and one such circumstance courts have recognized is for "classes of property, including shares, whose value is subject to sudden and constant fluctuations of unpredictable

122 In *Cineplex*, for example, loss of synergies was projected at $1.24 billion, whereas loss of consideration to shareholders was calculated at $1.32 billion: *See Cineplex*, *supra* note 1 at para 153.

123 *Cf In Re Appraisal of Panera Bread Company*, *supra* note 87 at 103–104. The Delaware Chancery Court states that the characterisation of strategic v. financial buyers does not matter as long as the acquisition of the financial buyer "includes speculative elements of value which arise only from the merger."

124 *Rougemount Capital Inc v Computer Associates International Inc*, 2016 ONCA 847 at paras 50–51 [*Rougemount Capital*].

amplitude".[125] Possible options for breached M&A agreements therefore include the date of: the agreement; the breach on the part of the buyer or seller; the intended closing; the trial; or the judgment. Ultimately, judges are best positioned to select the date of assessing damages based on the specific evidence before them.[126] One option that we believe accords well with the contract law principle of expectation damages—putting the injured party in the position they would have been absent the breach—is using the (approximate) date of the intended closing of a transaction.[127]

Finally, the loss to shareholders measure is particularly well aligned with the goals of a cash out transaction (as in *Cineplex*). Leo Strine has observed that it is difficult to imagine what the purpose of a board's negotiations in a cash out deal would be if not to achieve the best possible deal for the shareholders.[128] Indeed, when a company is being sold, and shareholders are cashed out, the target or selling entity will have little interest in the financial future of the combined entity. A reading of Cineplex management's information that it provided to its shareholders about the transaction is also instructive in this regard. The board therein states its general commitment to "maximizing shareholder value" and describes how it initiated the transaction with the aim to arrange for a sale of Cineplex "for cash at a significant premium to the trading price" of its common shares.[129] As benefits of the transaction, it emphasized the premium to shareholders, certainty of value and liquidity for selling shareholders, its conviction that the transaction provided the most value compared to other alternatives, and a number of contractual safeguards, including Cineplex's ability to respond to a financially more attractive "superior proposal" should another interested buyer emerge.[130]

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125 *Asamera*, *supra* note 36 at para 61; *Rougemount Capital*, *supra* note 124 at para 52.

126 See *Semelhago*, *supra* note 38 at para 18 (damages assessed at date of trial after consideration "[f]or practical purposes" of the evidence adduced).

127 In a similar manner, M&A agreements typically allocate exogenous risks affecting share price to the buyer until closing. *Cf Kinbauri Gold Corp v IAMGOLD International African Mining Gold Corp*, [2004] OJ No 4568, 192 OAC 24 (ON CA) at para 69, where assessing damages when the "loss became clear" was preferred over crystallizing damages at intended closing. The Court of Appeal for Ontario in *Kinbauri* also upheld a 10% contingency allowance discount to the damages award, given the trial judge's finding that the likelihood of obtaining certain regulatory approvals was 90%. *Ibid* at paras 91–100.

128 Thomas & Stair, *supra* note 114 at 343.

129 Cineplex, "Notice of Special Meeting of Shareholders to be held on February 11, 2020 and Management Information Circular" (3 January 2020) at 20–21, online: *Cineplex* <mediafiles.cineplex.com/investor-relations/management-investment-circulars/Cineplex_Management%20Information%20Circular_Jan%203%202020.pdf> [perma.cc/PAU5-PKZY] [Cineplex, "Notice of Special Meeting of Shareholders to be held on February 11, 2020 and Management Information Circular"].

130 *Ibid* at 24–27.

The goals underlying the sale of a company are of course also influenced by the law on corporate purpose and directors' fiduciary duties. In this regard, Canadian boards are not subject to *Revlon* duties,[131] which oblige boards of a Delaware corporation to obtain the best possible deal for shareholders in certain scenarios.[132] In contrast, Canadian boards may consider the interests of a wide range of constituencies (e.g., shareholders, employees, creditors, etc.) to determine the best interests of the corporation, without heeding to a *Revlon*-like priority rule.[133] Accordingly, a sale of a Canadian target could be intended to benefit parties other than just shareholders, such as when a board would seek to trade better employee protections for a lower sale price. Still, the evidence to date suggests that this rarely materializes in practice. For example, an empirical study of "fiduciary out" clauses in Canadian public M&A agreements concluded that "in the M&A context, directors are primarily concerned with protecting shareholder interests", given evidence that only one fiduciary out clause in two samples containing more than 1,000 Canadian M&A transactions from 2001–2021 referenced stakeholder interests.[134] And M&A transactions expressly designed to benefit non-shareholder constituencies are even less likely to occur in closely held companies or those with a controlling shareholder. In *Cineplex*, there was no indication that the directors negotiating the deal were acting to prioritize the interests of non-shareholder constituencies in a way that materially influenced the sale price.

4. Conclusion

Cineplex is a useful case study for analyzing the broader issues that arise when courts use a target or seller's lost synergies as the appropriate measure of expectation damages. There are a number of conceptual and practical difficulties with awarding these types of damages, which ultimately should not be followed. Synergies must be apportioned under this approach to either the buyer or seller, which is not only highly

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131 For discussion of how the court in *Pente Investment Management Ltd v Schneider Corp*, [1998] OJ No 4142, 42 OR (3d) 177 (ON CA) simultaneously "rejected *Revlon* duties, while implying that directors owe their fiduciary duties to shareholders", see Camden Hutchison, "To Whom Are Directors Duties Owed? Evidence from Canadian M&A Transactions" (2022) McGill LJ (forthcoming) 1 at 5–6 [Hutchison].

132 *Revlon, Inc v MacAndrews & Forbes Holdings, Inc*, 506 A 2d 173 (Del Sup Ct 1986) [*Revlon*]. *Revlon* duties, as further refined by subsequent case law, apply, e.g., when a target is subject to a transaction that will transfer control from widely dispersed shareholders to a controlling shareholder.

133 *CBCA, supra* note 106, s 122(1.1); *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at paras 40, 85–87; Nicholls, *supra* note 2 at 276–278.

134 Hutchison, *supra* note 131 at 4. These findings demonstrate that, in practice, directors mostly consider themselves obliged to maximize shareholder value.

uncertain, but requires an artificially formalistic characterization of cash flows within corporate groups that strays considerably from economic realities. Such an approach inevitably means that the quantum of damages will vary significantly depending on valuation assumptions, the nature of the buyer, and the structuring of a transaction, with significantly smaller (including potentially zero) damages for financial buyers or where the synergies accrue to entities other than the target.[135] Although there are different methods for calculating expectation damages, it is important that methods are applied consistently, which heightens the importance of the *Cineplex* decision for future M&A litigation in Canada.

While individual cases will depend on the specific M&A structures and language in applicable contracts, loss of consideration to shareholders—both in *Cineplex* as well as in similarly situated M&A transactions—will often be the most appropriate damages award because it more accurately represents the injured party's lost bargain and expectations.[136] Indeed, especially in cash out transactions, it is difficult not to view the seller's board as acting for its shareholders with a view to negotiating the best possible deal for them. And regardless of how wide directors' fiduciary duties are in a given jurisdiction, shareholders' loss still provides the most reliable economic valuation of the target's direct loss in the case of an unjustified failure to close by the buyer.

Moreover, in considering appropriate remedies for breach of contract in M&A agreements, courts should more readily award specific performance damages. Even in cash out deals for an aggrieved target (like *Cineplex*) damages may fail to provide an adequate remedy. Specific performance becomes even more compelling for an aggrieved target standing to receive share consideration in the buyer or post-combination firm, as well as for aggrieved strategic buyers when a seller is in breach. Given the inherent inadequacy of damages for the purchase or sale of businesses involving any strategic component, much less the quantification challenges and reliability concerns surrounding any measure of damages, we suggest that specific performance remains a more viable alternative. US courts' willingness to award specific performance has already contributed

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135 One example of courts seeking to avoid variation in damages awards depending on the legal form of the claimant is *Southcott Estates*, *supra* note 36 at para 29, where Justice Karakatsanis wrote that "not requiring single-purpose corporations to mitigate would expose defendants contracting with such corporations to higher damage awards than those reasonably claimed by other plaintiffs, based solely upon their limited assets."

136 This conclusion remains the case even if target shareholders would receive shares in the surviving entity, although the valuation methods for calculating loss of consideration in this scenario would raise the same reliability issues as calculating loss of synergies.

to the now ubiquitous use of specific performance clauses in US M&A contracts.[137]

Cineplex and its treatment of specific performance and damages will no doubt focus the attention of both academics and practitioners to the thorny issue of M&A remedies. It may even stimulate new approaches to contracting practices, with renewed attention paid to details concerning termination, breach, and remedies.[138] Importantly, the Court of Appeal for Ontario may soon have a chance to consider *Cineplex* and its broader issues. Given the surprising dearth of cases on the remedies challenges that may arise in M&A transactions, and considering their importance, the Court's decision promises to provide much needed guidance and certainty for parties involved in M&A transactions.

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137 Arnold et al, *supra* note 53 at 383.

138 In brief, one approach consists of including clauses that a company has the right to sue for damages on behalf of its shareholders, while another approach would be to define the target's damages as those of its shareholders' loss. See, however, also an alternative, more nuanced approach described in Thomas & Stair, *supra* note 114 at 350–356.