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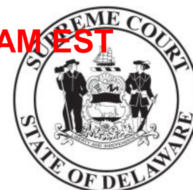

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIGADE LEVERAGED CAPITAL STRUCTURES FUND LTD. and BRIGADE DISTRESSED VALUE MASTER FUND LTD.,	: ORIGINAL FILED: 11/26/19 : CORRECTED FILED 12/16/19 : PUBLIC VERSION: 12/18/19
Petitioners-Below/Appellant,	: C.A. No. 427, 2019
v.	:
STILLWATER MINING COMPANY,	: **Appeal from the Court of Chancery of the State of Delaware** : **C.A. No. 2017-0385-JTL**
Respondent-Below/Appellee.	:

(CORRECTED) PETITIONERS-BELOW/ APPELLANTS' OPENING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

This is a rare appraisal case in which both Petitioners and Respondent *agreed* that the subject company was worth more at the time of the deal's closing than it was at signing. That is because Stillwater Mining Company ("Stillwater" or the "Company") mined palladium and platinum, and the long-term prices of those commodities increased materially between the signing of the merger agreement with Sibanye Gold Limited ("Sibanye") on December 9, 2016, and the closing of that transaction on May 4, 2017; indeed, the trial court found that "[b]etween signing and closing, the prices of palladium and platinum ***increased materially***, with a ***direct effect on Stillwater's value***." (Op. 39 (emphasis added) (citing A1541).) The Delaware appraisal statute plainly requires that "fair value" be determined at the transaction closing date, not on the date a merger agreement is signed.

Notwithstanding the plain language of the statute—and the undisputed evidence from both sides that Stillwater's fair value increased between signing and closing—the trial court refused to award that value based on Petitioners' alleged failure to argue that the merger price should be increased to account for that value. That decision should be reversed for at least two reasons. First, Petitioners *did argue* that the merger price must be increased to account for Stillwater's increase in value. Second, even assuming *arguendo* that Petitioners failed to make the argument—and they did make the argument—under Delaware law, the Chancery Court has an

independent duty to determine fair value. When both parties acknowledge an increase in value between deal signing and closing, the court has an unflagging duty to determine that value and award it. If it does not believe it can do so with the information presented, it should seek supplemental briefing on the issue rather than enter a fair value determination it knows is too low. Accordingly, this appeal seeks to reverse the trial court's error in failing to award Petitioners the increased value of their Stillwater common stock as of the merger date.

In addition, the trial court erred in deferring completely to merger price. The underlying sales process was not adequate to provide reliable third-party evidence of Stillwater's market value. Rather than actually analyze the process to determine whether it provided evidence of market value—which is the explicit rationale behind every case that has found "deal price" to be strong evidence of fair value—the trial court concluded that even *the complete absence of any market check* would be sufficient evidence to support deal price. In making such a ruling, the trial court simply ignored the teachings of this Court requiring an analysis of the sales process to determine whether it provides reliable evidence of fair value.

The Supreme Court should reverse the trial court's decision not to adjust its award for the increase in Stillwater's value between signing and closing. If this Court does not disturb the trial court's reliance on merger price, then its award of $18 per share should nevertheless be increased by $4.45 to reflect Stillwater's post-

signing rise in value, yielding a total of $22.45 per share. Alternatively, at a minimum, the award should be increased by $2.95 per share, which is the increased valuation amount proposed by Respondent's expert, yielding a total of no less than $20.95 per share. If the Supreme Court does not reverse the trial court's merger price ruling, it should enter a final order without further proceedings, reflecting the adjusted fair value award. No further proceedings are needed in that circumstance because the evidence of price accretion is in the record, and no further facts need be adduced to support it. If the Court finds that the court below erred in placing full reliance on deal price when there was an inadequate sales process, the case should be reversed and remanded for further proceedings.

SUMMARY OF ARGUMENT

1. The trial court erred in deciding, contrary to undisputed evidence advanced by both parties, that the fair value of Stillwater's shares should not include the admitted increase in long-term commodity prices that Stillwater experienced between signing and closing. Both sides' experts agreed that an increase in Stillwater's fair value during that period was appropriate. While the experts offered varying computations as to how to calculate that increase, the trial court should have increased the merger price by at least $2.95 per share, per Respondent's analysis, or $4.45 per share, per Petitioners' analysis.

2. The trial court clearly erred and abused its discretion by ignoring numerous instances in which Petitioners argued for a determination of fair value that would increase Stillwater's merger price to reflect the increase in commodity prices between signing and closing. Petitioners argued multiple times that while they did not believe that merger price was an appropriate measure of fair value, in the event that the trial court found otherwise, Stillwater's post-signing rise in value should nonetheless be added to the merger price. Petitioners repeatedly raised this point through extensive briefing and oral argument, at the pre-trial and post-trial stages of the underlying litigation, and their expert discussed it at trial as well. Accordingly, the trial court's (shocking) factual finding that Petitioners did not make this argument is clearly erroneous, false, and contradicted by the record.

3. The trial court erred in failing to satisfy its statutory duty of appraisal under Section 262(h). Even if Petitioners had not raised the argument that the merger price had to be increased to account for improved value after deal signing but before closing—which it did—the court has an independent duty to determine fair value, particularly when both it and the parties acknowledge the increase in value. In such circumstances, the appropriate course is to request supplemental submissions or retain an independent expert.

4. The court below erroneously concluded that the flawed sales process was sufficient to defer completely to merger price. The trial court never actually analyzed the process to determine whether it constituted a market check or provided market evidence. Instead, the trial court speculated whether this Court would defer to merger price in a hypothetical sales process involving a single bidder, and concluded that such a process would pass muster with this Court. Had the trial court grappled with the actual facts of the deal process at hand, it would have concluded that there was at best a compromised and feeble sales process, where Stillwater's CEO reached a handshake price agreement with the buyer before financial advisors were even retained and without forming a special committee. When it belatedly attempted to conduct a market check, it failed to provide sufficient time for other bidders to conduct due diligence or obtain financing. Such a flawed and disorganized process is simply not sufficient to warrant complete deference to

merger price as market evidence of fair value. The trial court's dictum—that even in a hypothetical case lacking *any market check whatsoever* a court should give complete deference to deal price—is not the law of this State, and never has been.

5. In sum, the trial court refused to increase merger price—despite uniform agreement that an increase in value occurred between signing and closing—and deferred completely to deal price despite a pre-signing sale process that it admitted was "disorganized and flawed." (Op. 53.) The inescapable inference is that the trial court did so because it was struggling to justify a "merger price" ruling despite the circumstances. We respectfully submit that this Court should take the opportunity to make clear that the appraisal statute does not require lower courts to award deal price and thereby shirk the independent statutory duty imposed by the Legislature. This Court should take this opportunity to breathe life back into statutory appraisal and hold that it is improper to (i) disregard undisputed evidence that Petitioners were entitled to an increase in fair value for Stillwater's shares based on Stillwater's commodity price increase between signing and closing; (ii) overlook Petitioners' repeated arguments that they should be awarded such increase even if the court deferred to merger price as fair value at signing; (iii) disregard its statutory duty, under Section 262(h), to perform an independent appraisal of Stillwater stock regardless of whether it believed the argument was clearly advanced; (iv) offer a speculative advisory opinion about whether this Court would defer to merger price

in a hypothetical single-bidder case; and (v) defer entirely to merger price when the transaction emerged from an admittedly, and seriously, flawed sales process.

STATEMENT OF FACTS

A. Overview of Stillwater

Stillwater is engaged in the development, extraction, processing, smelting, and refining of platinum-group metals ("PGMs"), which it mines from a geological formation in south-central Montana known as the J-M Reef. (Op. 3.) PGM metals are critical and irreplaceable components of a wide variety of manufactured products including, most notably, automotive catalytic converters. However, the J-M Reef is the *only* PGM mine in the United States, with the only other significant deposits located in South Africa and Russia. (Op. 3.) Stillwater is primarily engaged in mining palladium, which accounts for 75% of its mining and production; platinum accounts for 20%. (A1302.)

Stillwater has two producing mines at the J-M Reef, Stillwater Mine and East Boulder. (Op. 3.) The Company is developing two additional adjacent resources: Blitz, which is situated next to Stillwater Mine; and Lower East Boulder, which is next to East Boulder. (Op. 3.) In addition to PGM mining, Stillwater owns one of the largest PGM recycling operations in the world, which provides additional market supply of PGM. (A425; A1283.) In light of its operations, Stillwater's common stock trading price is heavily influenced by the spot and forward pricing of palladium. (Op. 3; A1125(16:6-10); A1131(166:2-167:5); A1119-A1123; A1539; A1541-1543; A1545; A1564; A1590.)

B. The Sale of Stillwater

In late January 2016, Stillwater's publicly-traded common stock hit its nadir in the face of an industry-wide decline. At that time, Sibanye opportunistically reached out to McMullen, Stillwater's CEO, about acquiring Stillwater. (Op. 9-10.) McMullen met with Sibanye's CEO, Froneman, and others on March 1, 2016. (Op. 10.) McMullen and Froneman agreed upon the terms for the eventual sale of Stillwater; Sibanye would pay in cash a 30% premium to the VWAP over a specified period prior to signing. (Op. 11 (citing A1128:19-39:10; A38).) McMullen and Froneman made their "handshake" deal without the advice of independent financial advisors or a disinterested special committee. McMullen then organized a confidential multi-day site visit for Sibanye in June (Op. 13-14), but McMullen failed to inform Stillwater's Board of Directors of Sibanye's interest in Stillwater. (Op. 13 n.7 (citing A1915-1916).)

In August 2016—without the benefit of any independent financial advisor or special committee—McMullen attempted to solicit third parties "in a haphazard and unstructured way." (Op. 16.) He relied largely on unauthorized agents lacking any contractual relationship to Stillwater, including Bank of America Merrill Lynch ("BAML"), to purport to solicit interest from potential buyers. (Op. 16.) McMullen also conducted what he called a "soft sell" strategy to attempt to gauge other potential buyers' interest in Stillwater, though this "soft sell" was not an effective

means of generating interest in Stillwater." (Op. 78.) No potential buyer was told that Stillwater was actually for sale or that it was already engaged in a sales process with Sibanye. Indeed, "[b]ecause BAML did not know that Stillwater was in discussions with Sibanye, [BAML] *reached out to Sibanye* as part of these efforts, ironically describing that a deal for Stillwater would be '[a] little pricey.'" (Op. 16-17 (citing A43) (emphasis added).)

In October 2016, Stillwater released its third-quarter earnings, which showed a continued increase in value based on its substantial production increases forecast for Blitz. (Op. 126 (citing A96; A415-418; A75-80).) Stillwater's stock price rose in response, closing at $13.79 on November 1. (A1635; A404-414.) Around that time, on October 3, the Board voted and decided not to form a special committee, despite disagreements among directors and concerns regarding conflicts of interest. (Op. 20-21.) The Board did not retain a financial advisor until formally engaging BAML on November 7, only one month before the sale. (Op. 22 (citing A111).) Though some potential buyers were interested in Stillwater (when they belatedly learned that it was for sale), they were provided only days to conduct operational and financial due diligence and submit a bid before the impending November 30 bidding deadline. (*See* Op. 22-28, 33.) No transaction could be properly investigated or financed on such a compressed time schedule and, not surprisingly, no buyer was able to do so. (Op. 33.)

Due to constraints on its ability to pay and increases in the value of Stillwater stock, Sibanye was unable to honor its agreement to pay a 30% premium, and on December 4, Sibanye made Stillwater a best and final offer of $18.00 per share, constituting a premium of 21%—well below the 30% premium previously agreed to. (Op. 32-33.) Nonetheless, on December 8, the Board agreed to sell Stillwater at that price, and on December 9, the transaction was announced. (Op. 33-34.)

After the closing, the price of palladium soared, increasing dramatically by the time of closing. (A1299.) On May 4, 2017, when the sale of Stillwater to Sibanye was completed, the spot price of palladium closed at $805.09 per ounce, an approximately 9% increase from the day of signing. (Op. 38; A663.) Since any commodity price increases "drop to the bottom line" without any increase in costs, the effect on expected free cash flow was dramatic. In November 2017, Sibanye issued a South African public filing, a Competent Person Report, effective July 31, 2017 (just 12 weeks after closing), which valued the Montana assets alone at $2.7 billion, or almost 23% above the merger price for *all* of Stillwater's assets. (Op. 38 (citing A970).)

C. The Trial and Post-Trial Rulings

At trial, Petitioners introduced opinions from several experts, including mining valuation expert Howard Rosen, who explained that Stillwater's fair value was $25.91 per share using the standard, widely-accepted DCF model. Petitioners

also argued for an adjustment in fair value based on the increase in commodity prices that Stillwater experienced between signing and closing, and Rosen described how such an adjustment should be calculated. Petitioners made clear that a valuation increase of $4.45 per share should be applied to account for the valuation increase between the deal date and the closing date.

Respondent contended at trial that Stillwater's fair value was $17.63 per share, relying on what the trial court characterized as "a combination of metrics, including the deal price, Stillwater's unaffected trading price ***with an adjustment for a valuation increase between the unaffected date and closing***, and an expert valuation based on a DCF model." (Op. 1 (emphasis added).) Respondent agreed that the fair value analysis should account for Stillwater's post-signing increase in value, and valued that increase at $2.95 per share. However, Respondent argued that this increase should be added to the unaffected stock price (prior to the announcement of the deal) rather than the merger price.[1] Although the parties disagreed over the amount of value increase that occurred between signing and closing, both agreed that some increase was warranted.

The trial court held post-trial argument on May 1, 2019. On August 21, 2019, the trial court issued its Memorandum Opinion, deferring entirely to the merger price

[1] Respondent is no longer able to advance this argument, as the trial court convincingly eliminated unaffected stock price as a reliable metric (Op. 133-34.).

and holding that the fair value of Stillwater's common stock was the deal price of $18.00 per share. (Op. 139.) According to the court below, "[n]either side proved that its DCF valuation provided a persuasive indicator of fair value. The experts disagreed over too many inputs, and the resulting valuation swings were too great, for this decision to rely on a model when a market-tested indicator is available." (Op. 2.) The trial court thus accepted Respondent's position that "the sale process was sufficiently reliable to make the deal price a persuasive indicator of fair value." (Op. 1.) The trial court also refused to make an upward adjustment for Stillwater's increase in value after signing, finding that Petitioners did not argue for an adjustment to the deal price. (Op. 115.) Had the trial court assessed fair value based on the $18.00 per share merger price, but at least accounted for the valuation increase acknowledged by both parties, Petitioners would have been awarded a total of $22.45 per share, by their calculations, or, at a minimum, $20.95 per share, per Respondent's calculations.

ARGUMENT

I. THE TRIAL COURT'S FAILURE TO ACCOUNT FOR THE INCREASE IN VALUE BETWEEN SIGNING AND CLOSING, WHICH WAS RECOGNIZED BY BOTH PARTIES, CONSTITUTES REVERSIBLE ERROR.

A. Question Presented

Whether the trial court erred in failing to include in fair value the increase in Stillwater's value between the merger's signing and closing phases—when both parties to the action offered evidence of such increase—resulting from the undisputed increase in commodity prices during that period. (*See* A3425:23-A3426:9; A3015; A3270; A2053:9-A2058:7; A2810.)

B. Standard of Review

A statutory appraisal decision is reviewed for abuse of discretion. *In re Shell Oil Co.*, 607 A.2d 1213, 1221 (Del. 1992). The trial court's factual findings should be reversed where "they are clearly wrong and the doing of justice requires their overturn." *Montgomery Cellular Hldg. v. Dobler*, 880 A.2d 206, 219 (Del. 2005). The Supreme Court may also reject the trial court's factual findings where they are not "sufficiently supported by the record" or are not "the product of an orderly and logical deductive process . . . ." *Sternberg v. O'Neil*, 550 A.2d 1105, 1126 (Del. 1988). Legal errors are reversed as a matter of law.

C. Merits of the Argument

The appraisal statute requires fair value to be determined at the time of closing, not at the time a merger agreement is signed: "[i]f the value of the corporation changes between the signing of the merger agreement and the closing, then the fair value determination must be measured by the 'operative reality' of the corporation at the effective time of the merger." (Op. 43 (citing *Cede & Co. v. Technicolor*, 684 A.2d 289, 298 (Del. 1996)).) Failure to determine fair value at the time of closing is therefore an error of law. An award of merger price can only represent fair value if, at the time of closing, there has not been any increase in the value of the company during such period. Here, however, Petitioners were entitled to additional value for their shares based on the rise in commodity prices that undisputedly occurred between signing and closing. Respondent agreed that an increase in value occurred during this period, and that an adjustment to Stillwater's fair value was appropriate. Once presented with the undisputed fact of such increase in value, the trial court was required to make an award that captured that increase. The trial court's appraisal analysis thus should have included an increase in value that was, at a minimum, the amount proposed by Respondent's expert, if not more. Yet, the trial court—apparently predisposed to render a merger-price award—completely ignored the commodity price increase that occurred between signing and

closing, thereby valuing the company at the signing date, rather than the transaction date, and committed reversible error.

1. Both Parties Introduced Evidence Showing the Increase in Stillwater's Value Between Signing and Closing

The price of Stillwater's PGM commodities increased significantly in value as a result of increases in palladium prices between signing and closing. (A1299; A663-666.) That increase was unknown and unknowable at the time the deal was signed and accordingly could not have been included in the merger price. (*See* A1131(167:24)-1132(168:11); A113-116; A1609(361:21)-1610(362:11).) Nor did the Merger Agreement provide for any variable pricing mechanism to adjust the merger price to reflect that additional value, or to otherwise terminate the deal, since the merger price was based on a premium-to-trading price formula that did not depend on the value of Stillwater's underlying commodity. (A1158-1159.) Both experts agreed that the increase in Stillwater's fair value attributable solely to the increase in commodity prices (the spot price of palladium)[2] between signing and

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[2] Even today, palladium's value continues to break records, as a result of which Sibanye's CEO has described Stillwater as Sibanye's "crown jewel." *See* NASDAQ, Palladium (PA:NMX); https://www.nasdaq.com/market-activity/commodities/pa%3Anmx (last accessed Nov. 10, 2019). *See also* Felix Njini, "Sibanye Gold CEO Says New York Listing Possible in 2021," Bloomberg (Oct. 29, 2019 at 12:00 AM EDT), https://www.bloomberg.com/news/articles/2019-10-29/mining-deal-maker-eyes-new-york-from-2021-as-south-africa-palls. Under Delaware Rule of Evidence 201, this Court may take judicial notice of such facts related to palladium's commodity pricing, facts which are not debatable in that they "can be accurately and readily determined from sources whose accuracy cannot

closing may be measured by comparing, on the one hand, the results provided by a DCF model using the commodity price forecasts of BAML with, on the other hand, the results provided by that model using the commodity price forecasts of the experts in this case.

The price table below, which appeared in both of Petitioners' post-trial briefs and was referenced by both sides during post-trial argument, sets forth the respective analyses that the experts ran to determine the valuation impact that the commodity pricing increases had on Stillwater. (*See* A3425(107:23)-3426(108:9); A3015; A3270.)

MODEL	RESPONDENT'S PRICES & WACC	PETITIONERS' PRICES & WACC	MIDPOINT
BAML	\$3.17	\$3.87	\$3.52
ZMIJEWSKI	\$2.95	\$4.45	\$3.70
ROSEN-MATTHEWS	\$2.96	\$4.33	\$3.64

The numbers in the price table show the change in net asset value per share attributable solely to the change in commodity prices between signing and closing.

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reasonably be questioned." D.R.E. 201(b)(2); *Olenik v. Lodzinski*, 2018 WL 3493092 (Del. Ch. 2018) (judicially noticing company's stock price); *Weiss v. Samsonite Corp.*, 741 A.2d 366, 375 (Del. Ch. 1999) (judicially noticing table of closing prices of a company's stock on NASDAQ National Market System for certain dates). Further, "post-Merger values should and will be considered as a 'reality check' of any independently determined valuation . . . as of the Merger date." *Ryan v. Tad's Enters.,* 709 A.2d 682, 702 (Del. Ch. 1996), *aff'd*, 693 A.2d 1082 (Del. 1997) (appraisal decision considering evidence of target company's value *two years* after merger to assess fairness of merger price).

To arrive at these numbers, Petitioners took each of the models listed in the table and replaced BAML's WACC and commodity price forecasts with those of Respondent's experts, Zmijewski (as informed by Burrows), as well as Petitioners' valuation expert, Rosen (as informed by Petitioners' mining expert, Matthews), and compared the results.

Rosen testified to this methodology at trial, explaining the importance in the mining industry of capturing "a significant change in economic effects that affect your particular type of mine or the commodity price itself:"

> Q: Did you do anything to adjust for the change in price in commodity pricing between signing and closing?
>
> A: Yes. So that's an important thing, especially in the mining industry . . . if there is a period of time that lags between the announcement date of the transaction and the closing date. . . . And so I calculate what the change would be between [those two dates] and the effect of the basket of PGM materials, mostly palladium or platinum.

(A2053:9-22.) Rosen proceeded to explain in greater detail how he applied his calculation to show the increase in value between signing and closing to the unaffected stock price; importantly, he confirmed that it would be an identical exercise *if the starting point was merger price instead of unaffected stock price*.[3]

[3] Merger price has since become the valuation floor, as the trial court convincingly eliminated unaffected stock price as a reliable metric. (Op. 133-34.) The trial court found that Stillwater's stock did not trade in a sufficiently efficient market for the unaffected stock price to be a reliable starting point for any commodity-price adjustment. (Op. 128, 133-34.)

(A2053:9-A2058:7.) At trial, Rosen also testified that his calculation should be updated to account for the additional production volume provided by Blitz, which added "approximately 50 percent more volume" and required him to increase his numbers "by about 50 percent." (A2053:9-A2058:7.)

Zmijewski explained at trial that he used the same methodology as Rosen to conclude that the fair value increase between signing and closing was $2.95 per share. (A2810:6-A2812:4.) Zmijewski also confirmed Rosen's testimony that one difference between his calculation and that of Rosen's reflecting the commodity price increase was that Rosen's calculation needed to be adjusted to account for Blitz. Zmijewski testified:

> We know there is a timing effect here. ***We know that prices have changed***. So I took the model . . . , and I brought it back to December 9. . . . So I do that difference in the DCF, and it's $2.95. . . . So what happens if we do the same thing with Mr. Rosen? Mr. Rosen, we can take his $25.91. At the low end, he testified that it could be an adjustment for timing as low as $2, but then he said you need to make some adjustment for -- I think it's Blitz that wasn't in his calculations. . . . Of the two, though, to be fair with Mr. Rosen, I'd go with my $2.95. I'd go with the center column [of the pricing table]. I think that's a better representation of the difference than the two dates.

(A2810:6-A2812:4.)

Despite these different approaches, Zmijewski's analysis acknowledged a minimum value increase of $2.95.

2. The Trial Court Acknowledged that Both Parties Presented Evidence of Accretion in Value Between Signing and Closing

Tellingly, the trial court itself made explicit findings as to the increase in value Stillwater experienced as a result of commodity price increases between signing and closing. The Court below indicated that it fully understood that "Stillwater was a mining concern that primarily produced palladium and platinum" and that "Stillwater's cash flows depended on the prices of those metals, so when the prices of those metals increased or decreased materially, the value of the Company increased or decreased materially as well." (Op. 109 (citing A1541) (quoting Stillwater Annual Report (Form 10-K) (Feb. 16, 2017)) (stating that Stillwater's earnings and cash flows are so sensitive to PGM price changes that based on 2016 revenue and costs, a 1% change in the Company's average combined realized price for palladium and platinum would result in approximately a $7.1 million change to before-tax net income and about a $3.9 billion change to cash flows from operations.) The trial court further observed: "Between signing and closing, the spot price of palladium increased by 9.2%. The spot price of a weighted basket of Stillwater's products increased by 5.9%." (Op. 39.) The trial court thus acknowledged that "[b]etween signing and closing, the prices of palladium and platinum ***increased materially***, with a ***direct effect on Stillwater's value***." (Op. 39 (emphasis added) (citing A1541).)

Because Stillwater's increased value was undisputed by the parties and acknowledged by the trial court, the cases cited in the decision below on this issue are inapposite. Those rulings all involved factual questions as to whether a post-signing increase in value even occurred. *See Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.*, 847 A.2d 340, 358 (Del. Ch. 2004) ("[T]he record does not support the idea that [the company] was more valuable at [closing] than it was [at signing]"); *In re PetSmart, Inc.*, 2017 WL 2303599, at *31 (Del. Ch. May 26, 2017) (finding it "at best speculative" that merger price "was stale by the time of closing"); *Merion Capital L.P. v. Lender Processing Servs., Inc.*, 2016 WL 7324170, at *23 (Del. Ch. Dec. 16, 2016) ("***neither side*** presented analyses of the ***potential*** for valuation change between signing and closing") (emphasis added). Likewise, a recent case rejected a valuation increase based on underlying commodity prices where it was undisputed that the midstream energy company's value did ***not*** depend on commodities, since the company did not own, purchase, or sell the commodities it transported or stored. *In re Appraisal of Columbia Pipeline Grp., Inc.*, 2019 WL 3778370, at *45 (Del. Ch. Aug. 12, 2019). That case also found that the petitioners failed to provide any metric by which to adjust for increased value; while "[p]erhaps an expert could have constructed a metric, . . . the petitioners . . . did not provide one." *Id.*

Conversely, in the case at bar, not only the Petitioners, but the Respondent as well, each constructed a detailed metric by which to adjust for increased value. Unlike the cases identified in the preceding paragraph, *both* parties affirmatively advanced detailed analyses of the valuation increase due to commodity price improvements and how fair value should be adjusted accordingly to reflect that increase. The trial court's reliance on the above cases was thus misplaced. Indeed, Respondent's expert unequivocally testified that Stillwater's share price increased between signing and closing:

> Q. You agree that an increase in the price of palladium between signing and closing would have a positive impact on the value of Stillwater's share price. Correct?
>
> A. Depends on the amount, but -- and what else happened. But all else equal, you saw the calculation. I calculated it to be, based on the facts, $2.95."

(A2867:17-24.)

Regardless of whether the merger price resulting from the sale process was a reliable indicator of fair value, it was the trial court's statutory responsibility to couple its finding of fair value with the undisputed evidence of Stillwater's increase in value between signing and closing.

II. CONTRARY TO THE CHANCERY COURT'S FINDING, PETITIONERS REPEATEDLY ARGUED IN THE PROCEEDINGS BELOW THAT MERGER PRICE SHOULD BE ADJUSTED FOR STILLWATER'S UNDISPUTED INCREASE IN VALUE.

A. Question Presented

Whether the trial court erred in declining to adjust the merger price to reflect Stillwater's post-signing increase in value, based on a clearly erroneous finding that Petitioners had not argued for such an adjustment, when Petitioners had indeed advanced that argument in numerous instances before, during and after trial. (*See* A1546; A1649; A1658; A1661; A1718-1721; A2053-2058; A1514; A2810-2812; A2961-2962; A2992-2994; A3013-3016; A3282-3283; A3368-3379; A3424-3425.)

B. Standard of Review

See Part I-B, *supra*.

C. Merits of the Argument

The trial court, while recognizing the undisputed increase in Stillwater's value between signing and closing, refused to award such accretion, finding that neither party explained how the court could value that increased value in the context of a merger price ruling. However, that ruling was clearly erroneous because (i) Petitioners *did* argue for a merger price adjustment based on such accretion in value, and (ii) even if, *arguendo*, Petitioners had not shown the trial court how to adjust the merger price, the court below had an independent statutory duty to determine Stillwater's going concern value *as of the transaction date*; the trial court cannot

abdicate that duty simply because a party purportedly failed to demonstrate how to make such an adjustment. The trial court should have directed the parties to provide supplemental submissions or engaged its own independent valuation expert to make that determination. *See, e.g.*, *Shell Oil Co.*, 607 A.2d at 1222 (Del. 1992) ("the Court of Chancery has the inherent authority to appoint neutral expert witnesses"); *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 34 (Del. 2005) ("Court of Chancery … appoint[ed] a non-lawyer to serve concurrently as an independent expert witness on valuation matters and as a special appraisal master").

Petitioners argued repeatedly that fair value must be adjusted for the increase in Stillwater's value that occurred between signing and closing. Although Petitioners argued for use of a DCF valuation, Petitioners made clear that in the event that merger price was determined to be a proxy for fair value, the merger price must nevertheless be adjusted to reflect Stillwater's post-signing increase in value. Petitioners did so on at least six significant instances, as further shown below: (1) throughout their December 3, 2018 pre-trial brief; (2) in Rosen's direct testimony at trial; (3) in Rosen's June 29, 2018 expert rebuttal report; (4) in their February 13, 2019 post-trial opening brief; (5) in their April 24, 2019 post-trial reply brief; and (6) in their post-trial oral argument. (A1718-1719; A2055-2058; A1514; A2992-2994; A3282-3283; A3368-3379.)

By flatly ignoring these multiple occasions on which Petitioners had demanded an increase to merger price, the trial court committed reversible error.

1. Petitioners Insisted on Adding Post-Signing Accretion to Merger Price in Pre-Trial Briefing

Petitioners' pretrial brief argued for an upward adjustment to the merger price. Right up front, in the Introduction, Petitioners argued that "***regardless of whether the sales process was sufficient*** (and it was not), Petitioners are entitled to uplift; the only question is how much." (A1658 (emphasis added); *see also* A1661 ("Assuming, *arguendo,* that ***the sales process was sufficiently robust [to award merger price] this Court must still address the value added*** to Stillwater between signing and closing as a result of the substantial increase in commodities prices") (emphasis added).)

In fact, Petitioners dedicated an entire section in their pre-trial brief to emphasize this issue, with the following heading: "III. ASSUMING, *ARGUENDO*, THAT MERGER PRICE WAS FAIR VALUE AT SIGNING, THE FAIR VALUE OF STILLWATER AT CLOSING WAS $21.87 PER SHARE." (A1649; A1718.) Petitioners then explained: "***Even if this Court concludes that the sales process culminated in a fair price for Stillwater at signing*** on December 8, 2016, the fair value of Stillwater increased $3.87 by closing [on] May 4, 2017, as a result of continued commodity price increases." (A1718 (emphasis added).) After all, as Petitioners argued below, "Stillwater's fair value increased significantly in the

intervening six months" between signing and closing due to a rise in value attributable to rising commodity prices." (A1720.) Petitioners also argued that McMullen, Bateman, and Stewart all conceded that this increase was not reflected in the merger price. (A1720 (citing A1131(167:24-168:11); A1121(258:23-260:23)).)

Based on the models and calculations by both sides' experts, "the increase to Stillwater's value from signing to closing based on the BAML Model was ***$3.87***[4] ***per share, or 21.5%*** of the merger price." (A1721 (citing A1531-1531, A1533) (emphasis added).) Petitioners thus concluded in their pre-trial brief: "Accordingly, even if this Court concludes that the sales process resulted in [fair value] on December 8, 2016, the [fair value] of Stillwater at closing was $21.87 (and no less than $21.17) per share." (A1721.)

2. Petitioners Insisted on Adding Post-Signing Accretion to Merger Price in Trial Testimony and Petitioners' Expert Report

Rosen opined at trial that an upward adjustment to Stillwater's merger price was justified based on the increase in commodity prices—*i.e.*, the spot price of

[4] The value of $3.87 in this section of the pretrial brief refers to the accretion in pricing under the ***BAML model***, as stated in the text; as the case proceeded through trial, Petitioners alternatively requested that the trial court award the full benefit of the price accretion under Zmijewski's model, which is $4.45. *See* Part II(C)(4) below.

palladium—between signing and closing. (A2053:9-A2058:7; A2810:6-A2812:4.) After explaining in detail how the improvement in commodity pricing would increase the unaffected stock price by the time of closing, Rosen testified as follows, applying that same analysis to the merger price:

> Q: How, if at all, would that computation change if you were to start with the transaction price of $18?
>
> A: It would be exactly the same.

(A2056:16-19.)

Petitioners also provided to the trial court Rosen's expert rebuttal report, in which he opined as follows:

> My illustrative analysis, set out above with respect to why the [unaffected stock price of] $14.68 does not provide a reliable indication of value due to the changes in time and commodity prices between the Announcement Date and the Transaction Date ***also applies to the use of the $18.00 as a measure of the FV*** at the Transaction Date and ***the adjustments . . . for future value and commodity prices would be required if this measure was determined to provide a relevant starting point to determine FV at the Transaction Date***.

(A1546 (emphasis added).) Rosen's explanation thus reaffirms that Petitioners' arguments for an adjustment to reflect Stillwater's post-signing increased value were meant to apply even if the $18.00 merger price was deemed the proper measure of fair value.

3. Petitioners Insisted on Adding Post-Signing Accretion to Merger Price in Both of Petitioners' Post-Trial Briefs

Following trial, Petitioners consistently argued that the increase in value would apply to the merger price, even though Petitioners remained unconvinced that merger price should control as a proxy for fair value. They thus stated that "between signing and closing of the Merger, it is undisputed that the FV of Stillwater increased as a result of continued improvements in palladium prices. As a result, even if the process here had resulted in a merger price that [was] a reliable indicator of Stillwater's FV at signing (and it did not), it was not at closing." (A2961-2962.)

Section G of Petitioners' post-trial opening brief, entitled "A FV Determination Based on the Merger Price Must Include Additional Consideration Because of the Substantial Increase in Commodity Prices Between Signing and Closing," covers this issue in greater detail. (A3013.) Petitioners again argued: "Even assuming, *arguendo*, that the process through which Stillwater was sold resulted in FV as of signing (and it did not), the merger price still necessarily understates Stillwater's FV at closing because of the continued increase in palladium prices after signing." (A3013.) Petitioners argued once again that McMullen and Bateman had both testified that the merger price did not reflect any valuation increase attributable to Stillwater between signing and closing due to rising commodity prices (A3014 (citing A1131(167:24-168:11); A1122(258:23-260:23))), and that the Merger Agreement contained no provision that would permit an increase

to the merger price if palladium continued to rise. (A3014 (citing A2496:9-17).) Referring to the "Midpoint" column of the above price table, Petitioners showed how the BAML, Zmijewski, and Rosen-Matthews models, when adjusted for commodity price changes, demonstrate that Stillwater's value increased between midpoint prices of $3.52, $3.70, and $3.64 per share, yielding an average of $3.62 per share based on those three midpoints. (A3015.) Thus, they argued, "even if the process through which Stillwater was sold resulted in FV at signing, its FV at closing was no less than $21.62 per share." (A3015-3016.) Petitioners' post-trial reply brief included a similarly-titled Section G: "Assuming the Sale Process Resulted in FV at Signing, the FV of Stillwater at Closing was $21.87 and No Lower than $21.62," arguing yet again for an adjustment to merger price based on Stillwater's increased value. (A3268.)

4. Petitioners Insisted on Adding Post-Signing Accretion to Merger Price at Post-Trial Argument

At oral argument after trial, Petitioners raised this issue again, arguing: "When it comes to the merger price, if Your Honor is convinced—and it's a big if . . . that there were all the sufficient predicates" for Stillwater's sale process to be deemed reliable and non-exclusive, and if "Your Honor then thinks merger price may be some kind of metric, ***at a bare minimum***, you have to . . . add on . . . the commodity price increase." (A3424:20-A3425:17.) Petitioners' counsel further explained:

> So the $4 and change number [$4.45, per the price table] suggests to me that if Your Honor really is convinced there is a process here that looks to be *Dell*-compliant, then the $18 may be some minimum floor, but you add on the percentage premium they intended to pay but did not . . . ***and the [$4.45] that the commodity price increase created.***").

(A3425:10-17 (emphasis added).) This argument thus demonstrates, once again, Petitioners' repeated assertions to the trial court that if the $18.00 merger price was determined to represent fair value,[5] it still needed to be adjusted upward to reflect Stillwater's post-signing valuation increase.

Given Petitioners' repeated arguments for the commodity price increase in value to be added to Stillwater's merger price, the trial court's refusal to apply the undisputed increase in value, on the asserted grounds that Petitioners did not mention it in the merger price context, is simply jaw-dropping and an abuse of discretion.

5. Respondent Expressly Addressed Petitioners' Multiple Demands for Accretion to Merger Price

Tellingly, Respondent specifically rebutted in its post-trial briefing and other submissions Petitioners' argument for an increase to merger price, proof positive that the parties addressed this issue. Respondent's post-trial reply brief included a

[5] During oral argument, Petitioners' counsel made clear that they did not believe a merger price ruling was appropriate, even as may be adjusted for the undisputed commodity price increase (A3370:2-20); they argued in the alternative that if the trial court were to use merger price as a proxy for fair value, then at a minimum merger price should be adjusted by such commodity price increase.

section: "***No Upward Adjustments To The Transaction Price Are Appropriate; Elements of Value Resulting from The Merger Must Be Deducted***." (A3192 (emphasis added).) In rebutting Petitioners' request for an upward adjustment to merger price, Respondent argued: "Petitioners do not dispute that no Delaware court has ever made an ***upward adjustment to deal price*** to reflect changes in the value of the target company between signing and closing," and that the stockholder vote "negates ***Petitioners' argument to adjust the Transaction price upward***." (A3192-3193 (emphasis added).)

Likewise, in its post-trial opening brief, Respondent included a section styled, "***The Value Resulting from the Merger Must be Deducted from the Deal Price; However, no Upward Adjustments are Appropriate***." (A3130 (emphasis added).) Once again, Respondent argued that "Stillwater is also aware of no Delaware authority – and Petitioners have cited none – supporting ***such an upward adjustment to Transaction price***. . ." (A3131 (emphasis added).)

Accordingly, the trial court's ruling that "the petitioners did not argue for an adjustment to the merger price, and so the parties did not have the opportunity to address these interesting issues" (Op. 115), constituted reversible error, as the parties did explicitly address this issue. Petitioners more than satisfied their burden of

proof[6] by providing the trial court with copious evidence that the fair value determination should account for the increase in value in commodity prices, as well as ample evidence on precisely how to calculate and apply the increase in value.

Moreover, even if Petitioners did *not* spell out in chapter and verse that their accretion metrics should be applied to the merger price (which they did), the trial court still had its own independent duty to couple the undisputed evidence of Stillwater's increased value with its own finding of fair value, whether or not merger price was deemed a proxy for fair value. It could have discharged that duty by seeking further guidance from the parties, or by engaging its own independent valuation expert, but the legislature requires that the courts do *something* to measure an undisputed valuation increase.

6. The Trial Court Should Not Have Deferred Completely to Merger Price Because There Was an Inadequate Market Check.

Merger price rulings cannot become a "safe harbor" for courts to avoid the legislative directive to perform a valuation analysis, especially where the parties and

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[6] In Delaware appraisal cases, the parties have the burden of proving their respective valuation conclusions by a preponderance of the evidence—proof that something is more likely than not. The parties' burden does *not*, however, relieve the Court of its statutory duty. A party is neither required to prove its valuation inputs and conclusions or underlying facts with certainty, nor by clear and convincing evidence. *M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 520 (Del. 1999). *See also Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *6 (Del. Ch. May 18, 2009), *aff'd*, 2010 WL 376924 (Del. Jan. 14, 2010); *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *13 (Del. Ch. Feb. 18, 2010).

the court agree that an increase in value must be accounted for. Under binding Supreme Court precedent, merger price should be given strong weight only when sales process provides evidence of what the market would pay, thus constituting a "market check" on fair value. *See Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1, 21, 35 (Del. 2017) ("*Dell*") ("[W]hen the evidence of market efficiency, *fair play, low barriers to entry, outreach to all logical buyers*, and the chance for any topping bidder to have the support of Mr. Dell's own votes is so compelling," merger price deserves "heavy weight") (emphasis added). In other words, one can have confidence that the price negotiated between a buyer and a seller is also the "fair price" when it is equal to or greater than the price that other potential purchasers are willing to pay for the same asset. This requires that the most logical buyers are provided with adequate information and opportunity to compete with bidders. *In re Appraisal of AOL*, 2018 WL 1037450, at *3 (Del. Ch. 2018) ("*AOL*"); *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.* ("*Aruba I*"), 2018 WL 922139, at *39 (Del. Ch. Feb. 15, 2018), *rev'd on other grounds and remanded*, 210 A.3d 128 (Del. 2019) ("*Aruba III*"). Specifically, an adequate sale process should be marked by "outreach to all logical buyers," information "sufficiently disseminated to potential bidders," and "without undue impediments imposed by the deal structure itself." *Dell* at 35; *AOL* at *8 (citing *Dell*). The Supreme Court has only authorized deference to deal price where there was a robust

and competitive sale process. *DFC Global Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 373 (Del. 2017) ("*DFC*").

There is no inherent magic to merger price *per se*; this Court has simply found deal price to be a proxy for fair value in instances where the sale process results in meaningful price discovery and a market-created valuation metric, not merely the best price that a single bidder may have managed to obtain. Indeed, this Court has never directed or affirmed a merger price award where there had not been a meaningful pre-signing market check. *See Dell* (pre-signing outreach by special committee to all six logical potential buyers; post-signing outreach to sixty-seven parties; minimal post-signing barriers); *DFC* (pre-signing outreach to forty-three potential buyers over two years, with no hint of self-interest); *Aruba III* (pre-signing outreach to five potential buyers over five months).

Likewise, in every Chancery Court merger price ruling of recent vintage, the seller had authorized contact with potential bidders for a market check. *Columbia Pipeline*, 2019 WL 3778370, at *25 (company "contacted other potential buyers" pre-signing); *Aruba I* at *10 (Board "authorized [financial advisor] to contact other potential buyers"); *In re Appraisal of Solera Holdings, Inc.*, 2018 WL 3625644, at *1 (Del. Ch. July 30, 2018) ("two-month outreach to large private equity firms [and] six-week auction"); *In re PetSmart* at *28 ("27 potential bidders" contacted); *Merion Capital L.P. v. Lender Processing Servs., Inc.*, 2016 WL 7324170, at *18 (Del. Ch.

Dec. 16, 2016) (Board "decided to solicit bids"); *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 6164771, at *14 (Del. Ch. Oct. 21, 2015) ("Company conducted two auctions"); *LongPath Capital, LLC v. Ramtron Int'l Corp.*, 2015 WL 4540443, at *23 (Del. Ch. June 30, 2015) (company authorized advisor "to market. . .to other potential acquirers and . . . contacted twenty-four third parties"); *In re Appraisal of Ancestry.com, Inc.*, 2015 WL 399726, at *3 (Del. Ch. Jan. 30, 2015) ("auction process commenced" and advisor reached out to "group of potential strategic buyers and financial sponsors"); *Huff Fund Inv. P'ship v. CKx, Inc.*, 2013 WL 5878807, at *13 (Del. Ch. Nov. 1, 2013) ("successfully instigated a bidding war" and "canvassed the market for other potentially interested bidders"), *aff'd*, 2015 WL 631586 (Del. Feb. 12, 2015); *Union Illinois 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.*, 847 A.2d 340, 350 (Del. Ch. 2004) ("active auction" to "array of logical bidders"). When a sale process draws multiple bids, the courts may perceive what different bidders would pay as evidence that the deal price provides evidence of market information.

The court below failed to analyze the sales process for Stillwater to determine whether it provided reliable evidence of third-party market valuation. Instead, it analyzed a hypothetical "single-bidder" process. The trial court thus constructed a made-up deal process—involving only a single bidder—to speculate that if this Court would defer completely to merger price in that (more extreme) scenario, it

would likely uphold a merger-price determination here, despite the significant process deficiencies. However, the single-bidder hypothetical was simply a heuristic device positing facts not before the court, which by design failed to address the facts of this case.[7] This construct in effect freed the trial court from analyzing the sales process that was, at best, "disorganized and flawed." (Op. 53.) Rather than figuring out whether those process flaws meant that the deal price could not be relied upon as an independent "market check" on fair value, the trial court simply concluded that this Court would defer completely to merger price even in the complete *absence* of a market check. However, the trial court readily acknowledged that (i) the Supreme Court has never deferred to merger price in a "single-bidder process,"[8] (ii) *Stillwater* did not actually involve a single bidder, and (iii) the precedents discussed in *Stillwater*—predominantly, two fiduciary duty cases—were not "squarely on

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[7] In this non-binding dicta, the trial court *sua sponte* raised "[t]he *possibility* of a single-bidder strategy." (Op. 53 (emphasis added).) The trial court's hypothetical, if taken literally, would require deference to merger price in nearly every public M&A transaction, even for those lacking any pre-signing market check and featuring only the most coercive deal-protection features that deter any post-signing market check, as long as the agreed-upon transaction is publicly announced.

[8] "[I]n its appraisal jurisprudence, the Delaware Supreme Court has not yet been asked to rule on the reliability of a sale process involving a single-bidder strategy, no pre-signing outreach, and a passive post-signing market check." (Op. 60.) The trial court further stated: "I am not suggesting that the Delaware Supreme Court has ever endorsed a single-bidder process for purposes of appraisal . . . . Nor am I claiming to have any privileged insight into how the Delaware Supreme Court would or should evaluate the persuasiveness of a single-bidder strategy . . ." (Op. 67.)

point."[9] (Op. 67.) What would explain the resort to such an admittedly untested approach? The court below seems to have felt compelled to defer to merger price, and yet struggled with the best methodology toward achieving that outcome. Fearing another reversal by this Court for a non-merger price award, the trial court's single-bidder dicta provided a means to avoid examining Stillwater's actual sale process to determine whether it was truly revelatory of its intrinsic value or not. The ultimate issue is not whether a sale process is good enough to survive fiduciary duty analysis, but whether that process is strong enough to give the court confidence that deal price reflects market value; the hypothetical sidesteps an examination of that ultimate issue.

The trial court's analysis is not only inconsistent with the facts of this case, but it conflicts with Delaware's appraisal statute. The court below should have determined what, if any, market information Stillwater's sale process may have

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[9] Fiduciary duty cases do not control appraisal matters. *See Merion Capital L.P. v. Lender Processing Servs., Inc.*, 2016 WL 7324170, at *15 (Del. Ch. 16, 2016) ("Because the two inquiries are different, *a sale process might pass muster for purposes of a breach of fiduciary claim and yet still constitute a sub-optimal process of an appraisal*.") (emphasis added); *In re Appraisal of Ancestry.com*, 2015 WL 399726, at *16 (Del. Ch. 2015) (whether corporate directors satisfied fiduciary duties "is not dispositive of . . . whether that sale generated fair value" for appraisal); *In re Orchard Enter.*, 88 A.3d 1, 30 (Del. Ch. 2014) ("A price may fall within the range of fairness for purposes of the entire fairness test even though the point calculation demanded by the appraisal statute yields an award in excess of the merger price.").

yielded, or found that this process had no market value at all and was not deserving of deference as a valuation metric.[10]

7. Delaware Statutory Law Charges the Trial Court with an Independent Duty to Appraise.

Appraisal is "entirely a creature of statute," *Alabama By-Products v. Cede & Co.,* 657 A.2d 254, 258 (Del. 1995), and a legislative mandate. *Dell* at 20. The courts must undertake a valuation analysis as the legislature intended,[11] and the appraisal statute has been recently reaffirmed during a legislative review of its merits.[12]

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[10] If the trial court's hypothetical was meant to apply to an exclusive negotiation with the ultimate buyer, lacking any pre-signing market check, then the trial court's speculation about how this Court would rule was unnecessary, as this Court already addressed that exact situation in *Golden Telecom, Inc. v. Glob. GT LP*, 11 A.3d 214 (Del. 2010). In *Golden Telecom*, the target company's special committee shopped the deal to only one potential bidder. *Id.* at 216. The Chancery Court thus held that there was no market test, and as a result, it was improper to defer to merger price. *Id.* Based on these determinations, this Court held in *Golden Telecom* that the Chancery Court properly credited and relied on a DCF instead of merger price. *Id.* at 215, 219. The trial court's dicta here contradicts that ruling.

[11] Where, as here, a statute's language and meaning is clear and definite, "[i]t is for the Legislature, not for the court, to declare the public policy of the state; and it is not, therefore, the function of the court to graft an exception on the plain and positive terms of the statute." *Fed. United Corp. v. Havender*, 11 A.2d 331, 337 (Del. 1940). *See In re Adoption of Swanson*, 623 A.2d 1095, 1097 (Del. 1993) ("Regardless of one's views as to the wisdom of the [adoption] statute, our role as judges is limited to applying the statute objectively and not revising it").

[12] In 2015, the Delaware State Bar Association's Corporation Law Section Council analyzed the desirability of limiting or eliminating the practice of appraisal arbitrage, finding that "fiduciary duties and litigation may not be sufficient to ensure that the merger price reflects the fair value of the acquired shares," and so "[t]o the extent that the appraisal remedy is necessary to protect stockholders, its effectiveness

would be curtailed if the statute were amended to limit the ability to transfer the right." DGCL 262 Explanatory White Paper, *available at* https://www.appraisalrightslitigation.com/files/2015/03/DGCL-262-Proposal-3-6-15-Explanatory-Paper-1.pdf (Mar. 6, 2015).

III. BY THE CHANCERY COURT'S OWN REASONING, THE MORE REASONABLE OUTCOME WOULD ACCOUNT FOR THE INCREASE IN VALUE BETWEEN SIGNING AND CLOSING.

A. Question Presented

Whether the trial court's decision directly contradicted the trial court's own extensive discussion as to why an adjustment for increased value was indeed warranted. (Op. 109-115).

B. Standard of Review

See Part I-B, *supra*.

C. Merits of the Argument

The trial court appeared unconvinced by its own ruling. As an initial matter, the court below acknowledged that "the nature of Stillwater's business makes this case a plausible one for an upward adjustment that goes beyond inflation" (Op. 109), discussing not just the *plausibility* of such an upward adjustment, but the *persuasiveness* of doing so under this set of facts. (Op. 109-115.) Indeed, the trial court discussed the merits of a series of "counterarguments" to its own holding, including an extensive analysis of the barriers at play in this case that likely discouraged otherwise willing buyers from pursing competing bids based on the post-signing increase in value.

First, the trial court acknowledged that the effectiveness of a post-signing market check depends in large part on competing bidders having enough time to act; *i.e.*, having a "full timeline between the signing and the [stockholder] vote in which

to intervene." (Op. 112.) That time period does not necessarily commence with the announcement of the deal, but rather, when the bidder learns of the valuation change—which "shortens the amount of time for the bidder to intervene." (Op. 112.) The trial court observed that the truncated time frame afforded to potential bidders other than Sibanye constituted a major market deterrent here. (Op. 112.)

Second, the court analyzed the deterrent effect of the termination fee. In this case, the costs of the break fee to Stillwater "would reduce Stillwater's value to the acquirer, making the acquirer neutral as to any increase in Stillwater's value that did not clear" the $26.5 million mark, if not higher, "because a competing bidder would incur expenses of its own to make the competing bid." (Op. 111.) Accordingly, "Stillwater's value could increase by up to $26.4 million ***without a rational acquirer having any reason to bid***," and "***[t]he absence of a topping bid could not rule out a valuation change*** of this magnitude." (Op. 111. (emphasis added).)

Third, the trial court acknowledged the possibility of a valuation change to the target company *after* the stockholder vote. According to the Court, particularly if there is some delay in between the vote and closing, the competing bidder lacks a meaningful opportunity to intervene once stockholders have already approved the transaction with a particular buyer. (Op. 112.)

Fourth, the trial court recognized the coercive effect of matching rights:

> Perhaps the most significant problem with relying on a post-signing market check to rule out an increase in the

> target's standalone value is that the resulting valuation improvement would be available to any bidder. . . . In a competition for that incremental value, the incumbent bidder's matching right would loom large.

(Op. 113 (citing Peter Cramton & Alan Schwartz, *Using Auction Theory to Inform Takeover Regulation*, 75 L. Econ. & Org. 27, 28–29 (1991)).)

Indeed, the trial court acknowledged the nearly insurmountable hurdles deterring a deal-jumper:

> To make it worthwhile to bid, a potential deal jumper would not only have to perceive that the value of the target had increased above the level set by the deal price plus the termination fee and fee reimbursement plus the deal jumper's likely transaction costs, but also perceive a pathway to success that was sufficiently realistic to warrant becoming involved, taking into account the potential reputational damage that could result from being unsuccessful.

(Op. 113.) Candidly understanding this dynamic, the trial court concluded that the potential deal jumper "should expect the incumbent to match any incremental bid," and because the improved commodity prices were available to all bidders, "a strong argument can be made that a competitor would not think that it had the ability to outbid the incumbent and would not try." (Op. 113-14.) In other words, a so-called passive market check is not really a market check at all. The trial court buttressed this analysis with copious industry and academic sources demonstrating matching rights' highly deterrent effect. (Op. 113 n.21.)

Finally, the Court observed that stockholders' failure to vote down an otherwise guaranteed deal did not at all suggest that they perceived the merger price to equal fair value; thus, the "stockholders might well have preferred the surer option of the deal price, even if they believed that the Company's value had increased between signing and closing such that the deal price no longer reflected fair value." (Op. 114.)

The trial court ultimately resorted to merger price, despite the highly compelling case it made against doing so.

CONCLUSION

The trial court's failure to adjust Stillwater's fair value for the undisputed increase in commodity prices between signing and closing constituted reversible error. Petitioners respectfully request that the Supreme Court reverse the trial court's valuation determination; if the Court does so without disturbing the trial court's merger price award, it need not remand for further proceedings but enter a final order based on the record evidence that the increase in value between signing and closing due to the commodity price increase warrants an adjustment of $4.45 per share above merger price (totaling $22.45 per share), or at the very least an adjustment of no less than Respondent's acknowledged price increase of $2.95 per share above merger price (totaling $20.95 per share). If the Court finds that the trial court erred in fully relying on deal price despite an inadequate sales process, the case should be reversed and remanded for further proceedings.

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