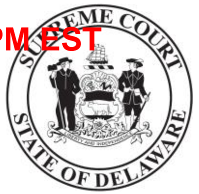
EFiled: Jan 09 2020 03:45PM EST
Filing ID 64601166
Case Number 427,2019



IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIGADE LEVERAGED CAPITAL STRUCTURES FUND LTD. and BRIGADE DISTRESSED VALUE MASTER FUND LTD.,	:	
Petitioners-Below/Appellants,	:	
	:	C.A. No. 427, 2019
v.	:	
	:	**Appeal from the Court of**
STILLWATER MINING COMPANY,	:	**Chancery of the State of Delaware**
	:	**C.A. No. 2017-0385-JTL**
Respondent-Below/Appellee.	:	

PETITIONERS-BELOW/APPELLANTS' REPLY BRIEF ON APPEAL

HEYMAN ENERIO
GATTUSO & HIRZEL LLP
Samuel T. Hirzel (# 4415)
Elizabeth A. DeFelice (# 5474)
300 Delaware Avenue, Suite 200
Wilmington, DE 19801
302-472-7300

Attorneys for Petitioners-Below/Appellants Brigade Leveraged Capital Structures Fund Ltd. and Brigade Distressed Value Master Fund Ltd.

OF COUNSEL:

LOWENSTEIN SANDLER LLP
Lawrence M. Rolnick
Steven M. Hecht
1251 Avenue of the Americas
New York, New York 10020
212-262-6700

DATED: January 9, 2020

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 6

I. THE TRIAL COURT'S RULING THAT PETITIONERS FAILED TO PROVE DEAL PRICE SHOULD BE ADJUSTED UPWARD RESULTED ONLY FROM ITS (ERRONEOUS) FINDING THAT PETITIONERS DID NOT ARGUE FOR IT. 6

II. RESPONDENT'S NEWLY MINTED THEORY THAT THE SAME ADJUSTMENT CANNOT BE MADE TO DEAL PRICE AND UNAFFECTED STOCK PRICE IS CONTRADICTED BY THE TRIAL COURT'S RULING AND TRIAL RECORD. 10

III. RESPONDENT DISREGARDS THE TRIAL COURT'S NOVEL (AND ERRONEOUS) CONCLUSION THAT A SALES PROCESS CAN BE MEASURED AGAINST A SINGLE-BIDDER PROCESS. 12

IV. PETITIONERS OFFERED AMPLE EVIDENCE TO QUANTIFY THE PROPOSED ADJUSTMENT TO DEAL PRICE. 18

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

Blueblade Cap. Opportunities v. Norcraft,
2018 WL 3602940 (Del. Ch. Jul. 27, 2018) 13

Cede & Co. v. Technicolor, Inc.,
758 A.2d 485 (Del. 2000) 21

Golden Telecom, Inc. v. Glob. GT LP,
11 A.3d 214 (Del. 2010) 13, 14

Gonsalves v. Straight Arrow Publishers, Inc.,
701 A.2d 357 (Del. 1997) 21

Holmes v. Wooley,
788 A.2d 131 (Del. Jan 3, 2002)..9

M.G. Bancorporation v. Le Beau,
737 A.2d 513 (Del. 1999) 23

Merion Capital L.P. v. Lender Processing Servs., Inc.,
2016 WL 7324170 (Del. Ch. Dec. 16, 2016)..23

In re PetSmart, Inc.,
2017 WL 2303599 (Del. Ch. May 26, 2017)..21

INTRODUCTION

Respondent concedes that commodity prices increased between deal signing and closing. It concedes that the trial court's fair value determination failed to incorporate that increase. The trial court failed to do so based on its (erroneous) finding that Petitioners failed to advance such an argument. This appeal is taken from the trial court's ruling that "the petitioners did not argue for an adjustment to the deal price . . . .The petitioners ***accordingly*** failed to prove that the deal price should be adjusted upward to reflect a change in value between signing and closing." (Op. 115 (emphasis added).) The Court's conclusion plainly follows from the premise: the trial court believed that Petitioners did not argue to adjust the deal price, and *accordingly*, as a result, the trial court held that Petitioners failed to prove that the deal price should be adjusted.

Rather than address this error head-on, Respondent chooses to misinterpret and "spin" the trial court's plain ruling. Respondent argues that the trial court ***meant*** to say that Petitioners actually ***did*** make such an argument, but that the trial court considered the argument and rejected it for lack of proof—contrary to what the trial court ***actually*** said, which is that it did not consider the argument, because Petitioners failed to raise it. Thus, Stillwater insists that the trial court's plain language should be ignored. Stillwater's misreading follows from Stillwater's repeated, selective quotation of the above excerpt, by which it carefully omits the

word “accordingly” where the trial court placed it. The trial court did not make any finding on the sufficiency of Petitioners’ proofs on this issue, as Stillwater now suggests; the trial court held simply that Petitioners never made the argument, which is demonstrably incorrect. Since the argument was raised and had a clear impact on value at closing, the decision below must be reversed.

Another defective (and newly minted) feature of Stillwater’s argument is its distinction—never made below and nowhere reflected in the trial court’s ruling—between unaffected stock price and deal price. Though Respondent acknowledges that adjusting unaffected stock price is appropriate, it now claims that the same adjustment to the ***deal price*** would somehow be inappropriate, without any support in the record (or common sense). Petitioners’ valuation expert testified to the contrary without challenge. It is unassailable logic that the unexpected (and unforeseen) increase in commodity prices that occurred after the deal was signed and prior to closing was reflected in neither the deal price nor the unaffected stock price—which were both set without the benefit of this information.

Indeed, the trial court never indicated, as Stillwater now does, that the same adjustment could not be made to the undisturbed stock price or the merger price. Actually, the trial court explicitly held that Rosen used his figure of $2.00 to $2.30 per share to make adjustments to the unaffected trading price, and that “[i]n theory, he could have made similar adjustments to the merger price.” (Op. 110.) The trial

court's only stated reason for refusing to adjust the deal price is that it (erroneously) found, as stated in the next sentence of its opinion, that "the petitioners never argued for an adjustment *to the deal price* based on an increase in value between signing and closing." (Op. 110) (emphasis in original).

Additionally, Stillwater tries to sweep under the rug the trial court's unfounded single-bidder analysis. The trial court found that since a single-bidder process would be "sufficient," the admittedly flawed sales process here was sufficient. The trial court thus sidestepped the analysis of whether deal price was reliable. Respondent now invents a detailed process analysis that the trial court itself never conducted. The trial court erroneously conflated two distinct issues—appraisal and fiduciary duty. A sloppy sales process might not constitute a breach of fiduciary duty. However, the question in an appraisal case is whether the sales process is sufficiently robust to be a reliable indicator of "fair value" and thereby justifies abandoning other traditional valuation techniques. The trial court's legal analytical flaws are thus far from consistent with "this Court's appraisal jurisprudence" (Answering Brief ("AB") 26), as the trial court itself expressly recognized.

Finally, Stillwater's accusation that Petitioners failed to demonstrate the quantum of the valuation increase by which the deal price should be adjusted misses the proofs Petitioners presented to the trial court, and which issue the trial court

never even reached (purportedly because Petitioners failed to argue for such an adjustment to deal price). Petitioners and their experts set forth a range of adjustments reflecting the valuation increase, which range resulted from the three varying inputs required for such an analysis. Because both sides' experts calculated the valuation adjustment by using a discounted cash flow analysis, the underlying inputs to that DCF were themselves in dispute, and only the trial court could select the inputs it deemed most appropriate. Thus, for instance, the valuation adjustment would vary depending on whether the trial court adopted (i) Respondent's discount rate (WACC) or Petitioners' WACC, (ii) Respondent's commodity prices or Petitioners' commodity prices, and (iii) the DCF model itself, which could be that of Respondent's expert, Petitioners' experts, or Stillwater's financial advisor, BAML.[1] The mere fact that different inputs would yield different proposed adjustments did not undermine Petitioners having met their burden of proof; only the trial court can properly determine which among the various possibilities Petitioners presented was the most accurate reflection of Stillwater's increase in value.

Petitioners argued to the trial court that $4.45 is the most appropriate figure by which to adjust the merger price—using Zmijewski's own model but Petitioners'

[1] Capitalized terms shall have the meanings from Petitioners' Opening Brief ("OB").

WACC and commodity pricing—and that as a threshold matter, a minimum adjustment of $2.95 is required, which is the output of Zmijewski's own calculation as he testified at trial (using his own model but with ***Respondent's*** WACC and commodity pricing).[2]

[2] Respondent implies that the other petitioners-below elected not to appeal because they embraced the trial court's ruling. (AB 16.) This is unfounded speculation, contradicted by various public news reports about BlueMountain. Nor should Respondent trivialize this appeal (AB 16), as the appealing Petitioners hold over 1,200,000 shares, which were each undervalued by at least $2.95. (OB 3.) There is thus over $3.54 million at stake here, hardly trivial.

ARGUMENT

I. THE TRIAL COURT'S RULING THAT PETITIONERS FAILED TO PROVE DEAL PRICE SHOULD BE ADJUSTED UPWARD RESULTED ONLY FROM ITS (ERRONEOUS) FINDING THAT PETITIONERS DID NOT ARGUE FOR IT.

Respondent disregards the plain language of the trial court's ruling:

> As this discussion shows, whether to adjust the deal price for an increase in value between signing and closing presents numerous difficult questions. In this case, the petitioners ***did not argue for*** an adjustment to the deal price, and so the parties did not have the opportunity to address these interesting issues.[3] The court will not take them up at this late stage in the proceeding. The petitioners ***accordingly*** failed to prove that the deal price should be adjusted upward to reflect a change in value between signing and closing.

(Op. 115 (emphasis added).)

Similarly, in analyzing Rosen's calculation[4] of Stillwater's increase in value between signing and closing, the trial court set forth how Rosen derived a figure to account for such increase and concluded:

---

[3] The trial court's finding that the parties lacked the "opportunity to address" this issue is based entirely on its mistaken holding that Petitioners did not raise the issue.

[4] Respondent wrongly implies that Petitioners' mining expert, Matthews, changed his DCF simply to make up for a calculation mistake. (AB 41 n.14.) Respondent chided Matthews for attributing value to inferred resources in the mine-adjacent areas and for assigning value to the exploration zones in a supplemental November 2018 report that Matthews had not valued in his May 2018 initial report. Yet, Respondent fails to apprise the Court that (i) between May and November 2018, the trial court granted Petitioners' motion to compel Respondent to produce documents concerning the Wheaton Transaction demonstrating that Stillwater valued its inferred resources in the mine-adjacent areas the same as it did for probable reserves,

> Rosen used this figure to make adjustments to the unaffected trading price. ***In theory, he could have made similar adjustments to the merger price.*** (Emphasis added).
>
> As this discussion indicates, the petitioners never argued for an adjustment ***to the deal price*** based on an increase in value between signing and closing. (Emphasis in original).

(Op. 110.)

The trial court's clear-cut holding was that Petitioners did not ask for an adjustment to the deal price. Respondent tries to circumvent this and infer that what the trial court ***really meant*** was that Petitioners did argue for an adjustment to deal price, but did such a lousy job that the trial court treated its effort as non-existent, concluding, metaphorically, that it was ***as if*** Petitioners never argued for a deal-price adjustment: "The clear import of the trial court's finding was that it did not accept Petitioners' conclusory assertions, which the court found tantamount to no argument at all." (AB 29.) This is nonsense.

---

thus validating Matthews' decision to ascribe value to those resources (A3295); and (ii) the only reason Respondent's experts did not opine on the value of the exploration zones is that their counsel instructed them to value the zones at zero. (A2800(1074:19)-A2801(1075:11); AR11.) The $296 million valuation impact resulting from these resources had no relationship to any cost calculations, nor has Respondent provided any evidence to support such a link.

The "clear import" of the trial court's ruling was that it found Petitioners did not argue for a deal price adjustment, and as a consequence of which—*i.e.*, "accordingly"—they failed to prove that deal price should be adjusted upward. No wonder that Respondent surgically omits the word "accordingly" when it cites this excerpt of the opinion, carefully quoting only the language before and after it to conceal the connection between the trial court's premise and conclusion. (AB 44.) One need not divine whether the trial court found Petitioners "tantamount" to not making the argument, when the trial court stated its finding that Petitioners never made the argument.

Respondent elides the clear language of the opinion because it cannot disprove that Petitioners did in fact argue for an adjustment to deal price, many times, at every stage of the proceeding. (OB 24-32.) Indeed, Respondent is forced to admit as much: "Petitioners' valuation expert argued for adjusting the unaffected trading price ***and*** the deal price by $2.00 to $2.30 per share to capture commodity price changes based on Petitioners' expert's DCF model." (AB 41 (emphasis in original).)

Respondent does not, because it cannot, deny that Delaware appraisal law would have allowed the trial court to make an adjustment to the deal price. Indeed, after analyzing a series of relevant appraisal cases, the trial court held: "The decisions thus indicate that an adjustment to the deal price can be warranted." (Op. 108.)

"It is neither [this Court's] function nor [its] province to attempt to ascertain the methodology and intent behind a decision of a trial judge when so doing would require this Court to ignore a written judgment." *Holmes v. Wooley*, 788 A. 2nd 131 2002 WL 27436, at *2 (Del. Jan 3, 2002). Nor can Respondent rewrite the trial court's holding in an attempt to undo the court's error. *See id.* ("[W]e cannot ignore the plain language of the . . . opinion that is before us. . . This Court cannot uphold any ruling where the trial judge's own words suggest that he failed to follow the mandated process.").

II. RESPONDENT'S NEWLY MINTED THEORY THAT THE SAME ADJUSTMENT CANNOT BE MADE TO DEAL PRICE AND UNAFFECTED STOCK PRICE IS CONTRADICTED BY THE TRIAL COURT'S RULING AND TRIAL RECORD.

Notwithstanding its erroneous assumption that Petitioner did not request a merger price adjustment, the trial court recognized that Petitioners may well have sought the same mathematical adjustment to the deal price as they did to the unaffected stock price: "Rosen used this figure to make adjustments to the unaffected trading price. ***In theory, he could have made similar adjustments to the merger price***." (Op. 110 (emphasis added.)) Respondent's newly expressed incredulity at doing so is lawyer-driven speculation lacking foundation in the record and directly at odds with the trial court's own acknowledgment.

Respondent accuses Petitioners of "incorrectly equating the parties' competing adjustments to the ***unaffected trading price*** with Petitioners' proposed adjustment to the ***deal price***." (AB 29.) Respondent's discussion that follows fails to cite any record evidence other than one document, B1583-88, its own expert's demonstrative exhibits that accompanied his trial testimony, which itself is not evidential. In any event, this document simply compares both sides' valuation experts' recommended adjustments to unaffected stock price, and fails to show that a proposed adjustment to unaffected stock price is somehow inappropriate when applied to the deal price. Moreover, Rosen testified to this very issue, first explaining how the improvement in commodity pricing would increase the

unaffected stock price by the time of closing, then 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(330:16-19).)

Such testimony is entirely consistent with, and supported by, the trial court's finding that Rosen "could have made similar adjustments to the merger price." (Op. 110.) The trial court did not take issue with applying the deal price of the same proposed adjustment to unaffected stock price;[5] actually, the court recognized that Rosen might request the same adjustment. Nor did Respondent ever challenge Rosen on this point on cross-examination or in post-trial briefing. Stillwater's protestations that the accretion in value as measured by both sides' valuation experts must be different, depending on whether that adjustment was made to the unaffected stock price or the deal price, is not supported in the record, contrary to common sense, and contradicted by the trial court's ruling.

---

[5] Respondent overstates the trial court's finding regarding the reliability of unaffected stock price (AB 16 n.4); the trial court clearly rejected unaffected trading price as a reliable metric: "The reliability of adjusted trading price depended on reliability of unaffected trading price, and the record provides sufficient reason for concern about incorporating a trading price metric. This decision therefore does not give any weight to the adjusted trading price." (Op. 133-34.) Respondent has not cross-appealed or otherwise preserved any rights to contest this determination.

III. <u>RESPONDENT DISREGARDS THE TRIAL COURT'S NOVEL (AND ERRONEOUS) CONCLUSION THAT A SALES PROCESS CAN BE MEASURED AGAINST A SINGLE-BIDDER PROCESS.</u>

Respondent downplays the trial court's unprecedented pronouncement that a single-bidder process would yield a sufficiently reliable deal price as a proxy for fair value in Delaware appraisal cases under the logic of recent decisions. Despite Respondent's urging that the trial court analyzed the deal features specific to this case, it only measured them as compared to its single-bidder process. Even the trial court recognized that its approach was novel and lacked foundation:

> To reiterate, in 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.)

Similarly, the trial court acknowledged the unique, unprecedented nature of its single-bidder analysis:

> I am not suggesting that the Delaware Supreme Court has ever endorsed a single-bidder process for purposes of appraisal, nor that any of the precedents that this decision has discussed are squarely on point. 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 on the facts of any particular case.

(Op. 67.)

The Court then held: "It nevertheless seems to me that if the proponent of a single-bidder process could show that the merger agreement allowed for a passive post-signing market check in line with what decisions have held is sufficient to satisfy enhanced scrutiny, and if there were no other factors that undermined the sale process, then the deal price would provide persuasive evidence of fair value." (Op. 67.)

Here, however, there were many "other factors" undermining the sale process, but the trial court was able to avoid tackling them head-on by finding Stillwater's sale process to be "additive, not subtractive" to a single-bidder process, acknowledging that "[t]hey might not have added much, but they did not detract from what Stillwater could have achieved through a single-bidder process focused on Sibanye followed by a post-signing market check." (Op. 53.) Regardless of whether its single-bidder analysis was itself dicta, the trial court used its single-bidder model as a benchmark by which to measure the adequacy of Stillwater's sale process, and to arrive at its holding. Thus, contrary to Respondent's position (AB 25), the single-bidder analysis must be considered on appeal.[6]

---

[6] In *Golden Telecom*, this Court already rejected the reliability of a "single-bidder process," which, by definition, involves a transaction that is "off-market" to all but one bidder, necessarily lacking a market check. Contrary to Respondent's suggestion (AB 26 n.6), *Golden Telecom* remains binding precedent, even subsequent to *DFC, Dell*, and *Aruba*. *See, e.g.*, *Blueblade Cap. Opportunities v. Norcraft*, 2018 WL 3602940, at *2 (Del. Ch. Jul. 27, 2018) ("I am cognizant of the Delaware Supreme Court's embrace of 'deal price' as a strong indicator of fair value

Among the "other factors" that the trial court failed to analyze altogether, and a glaring omission from Respondent's description of the sale process, is that Sibanye never set the purchase price according to Stillwater's fair value or commodities prices. Rather, the pricing metric was set based on a fixed premium (30%) to Stillwater's stock price, which premium, ultimately, Sibanye did not pay for lack of financing. (Op. 11 (citing A1128:38:15-39:10).) While the trial court assumed that "Sibanye had the ability to pay more" (Op. 86-87; AB 21-22), the record evidence shows that Sibanye had reached the upper limit of its financing and lacked any such ability. As Richard Stewart, Sibanye's corporate representative, testified, Stillwater's $17.80 offer "was the limit of the financing [the company] could afford," and Stewart's "mandate was to go no higher." (AR2(148:10-18).) Stillwater only "managed to push that to the final offer, which was 18," following "an internal discussion with [its] executive board and banks;" Stillwater then "made it absolutely clear [that it] just couldn't go beyond that due to financing constraints." (*Id.* at 148:21-149:2.) Respondent now urges that the deal price expressly accounted for

---

in *Dell* and *DFC*. . . . In both cases, however, despite having been urged to do so, the Supreme Court declined to adopt a rule that the deal price is presumptively reflective of fair value."). Moreover, Respondent attempts to distinguish *Golden Telecom* on the ground that it lacked a post-signing market check. (AB 26 n.6.) *Golden Telecom* focuses entirely on the pre-signing market phase and does not contain any discussion or analysis as to whether there was a post-signing market check. *Golden Telecom, Inc. v. Glob. GT LP*, 11 A.3d 214 (Del. 2010).

any increase in commodity prices (AB 34-35), but no record evidence supports that suggestion.

Another factor that the trial court identified as a problem but failed to fully analyze was that Brian Schweitzer, Stillwater's Board Chairman, admitted on cross-examination that during the February 18, 2016 board meeting, he was unaware that "McMullen [Stillwater's CEO] had already had his first discussions with the Sibanye representatives in January [2016]," and that "[t]he first time [he] heard about a potential transaction with Sibanye was at the July [2016] board meeting," five months ***after*** McMullen's first discussions with Sibanye. (A1915(189:1-4, 22-24)-1916(190:1).) Schweitzer further acknowledged on cross that at the July 2016 board meeting, he was unaware "McMullen had meetings with Sibanye reps in March 2016," that "Sibanye's financial advisor had been working on a rights offering since May [2016]," and that "Sibanye had a confidential multi-day site visit between June 5th and 8th." (A1917(191:4-14).)[7] While the trial court recognized that

[7] Respondent wrongly suggests that Stillwater's general counsel's objections to the sale process were somehow mollified once financial and legal advisors were engaged. (AB 11 n.3.) Wadman himself said no such thing, testifying that he "raised serious concerns about real and perceived conflicts of interest concerning Mr. McMullen's involvement in the process" even after outside counsel became involved. (A2395(669:6)-A2397(671:5) (deposition of Brent Wadman, JX 526).) Such concerns included McMullen's private meetings with Sibanye, without others present "to avoid misinterpretations about what [McMullen] was offering up on behalf of the company" and "[t]he control of information flow between Sibanye and

"McMullen's self-interested testimony [about keeping the Board informed] conflicted with Schweitzer's more credible testimony and other record evidence" (Op. 12 n.6), the trial court should have, but failed to, analyze the harmful impact of these issues on the validity of merger price as a proxy for fair value.

These flaws passed muster under the trial court's single-bidder analysis, but that standard lowers the bar so drastically that nearly all public M&A must result in a deal price ruling, so long as there is some time, however short in duration, between the announcement of a deal and its closing. This is so even where the transaction's deal-protection terms—a break fee, matching rights, and a no-shop provision—impose the most restrictive provisions designed to afford maximum protection to the deal by deterring potential deal-jumpers from topping the bid. The trial court's ruling ignores the fact that a deterrent ***pre***-signing process followed by a similarly exclusive ***post***-signing process—both of which require only the barest discharge of a company's fiduciary obligation to entertain incoming bids—leaves virtually no room for meaningful competition throughout the life cycle of the transaction.

While the trial court catalogued a series of deal features, it never undertook a rigorous legal analysis regarding the sufficiency of those factors to determine whether the deal process was sufficiently reliable to render deal price a reasonable

---

the board and the rest of the company." (A2395(669:13)-A2396(670:4), A2398(672:6-20).)

proxy for fair value, other than to say that they were on par with, or slightly better than, what a single-bidder process would involve.

IV. PETITIONERS OFFERED AMPLE EVIDENCE TO QUANTIFY THE PROPOSED ADJUSTMENT TO DEAL PRICE.

The trial court found, and the parties had not disputed, that Stillwater's value increased between signing and closing.[8] Rosen testified at trial that, just as Zmijewski did, he calculated the effect of the basket pricing of PGM materials (A2053(327:9-22)), and that his analysis would be an identical exercise if the starting point was merger price instead of unaffected stock price. (A2053(327:9)-A2058(332:7).) Zmijewski testified that he used the same methodology as Rosen to conclude that fair value increased between signing and closing, but he reached a different number given his different inputs and assumptions. (A2810(1084:6)-A2812(1086:4).)

The pricing table that Petitioners presented to the trial court summarizes what Rosen and Zmijewski described at trial, showing the results of (i) the BAML model, (ii) the Zmijewski model, and (iii) the Rosen-Matthews model, using the price forecasts and WACCs of Rosen and Zmijewski. (A3425(107:23)-3426(108:24); A3015; A3270.) It was up to the trial court to select which combination of the

---

[8] As the trial court held, "Stillwater's trading price was heavily influenced by commodity prices for palladium and, to a lesser degree, platinum." (Op. 3.) Significantly, "[b]etween signing and closing, the prices of palladium and platinum increased materially, with a direct effect on Stillwater's value." (Op. 110 (A1541 (quoting Stillwater Mining Company, Annual Report (Form 10-K) (Feb. 16, 2017))).)

model, pricing forecasts, and WACC inputs it believed to be most appropriate, and the resultant figure would reflect the precise quantum by which to adjust the merger price. These figures were set forth in Petitioners' pricing table included in both of their post-trial briefs:

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

As Petitioners demonstrated at trial, Rosen used composite pricing forecasts provided by Bloomberg, which in turn relied on eighteen to nineteen analysts. (A1981(255:24)-A1982(256:21).) Rosen made no adjustments to such data but used it raw, as is. As Rosen testified, Bloomberg is "representative of what market participants might think as of the transaction date and the announcement date." (*Id.*) As Rosen explained, he used the 90-day Bloomberg consensus price forecast for 2017, which was approximately $775, noting that the Bloomberg consensus price forecasts are the median of analyst forecasts for each commodity recorded within 90 days of the transaction date. (A1980(254:11)-A1981(255:20); AR38; A1300; AR3.) As Rosen testified, the 90-day Bloomberg consensus palladium price forecast was expected to reach $875 by the year 2021, an approximately 13% increase from the 2017 forecasted price. (A1300.) This is all in

stark contrast to Respondent's pricing data, which is the product of a series of subjective adjustments made by its expert. (A2702(976:11)-A2703(977:14).)

Furthermore, Rosen's reliance on the analysts' forecasts as collected in the Bloomberg data is significant because he was thus careful to utilize pricing forecasts reflecting the market's ***long-term*** expectation of future prices, as opposed to prices in the spot market reflecting prices of an immediate, specific date. (A1300.) While Respondent now speculates that prices may fluctuate, Rosen's pricing methodology was designed to capture long-term price expectations throughout a five-year projection period, thus providing a long-term estimate that takes into account any near-term changes in value.[9] (A1300; AR3.) It is precisely because Rosen accounted for future pricing expectations that his pricing estimates and valuation conclusion are not subject to the vagaries of short-term ups and downs, but can be relied on as what the Bloomberg-sampled industry analysts felt were the most reasonable long-term projections available as of the deal closing. That Rosen's pricing assumptions reflected Stillwater's operative reality is evidenced by the fact that palladium pricing has continued to exceed—and has well over doubled—those assumptions, as shown in the following illustrative screen shot of Bloomberg's

[9] Respondent misleadingly suggests that Rosen's proposed upward adjustment was tied to the ***spot*** price of palladium (AB 30 & n.9), when in fact Rosen specifically opined that his proposed adjustment relied on long-term forecasts, ***not*** on spot pricing.

three-year palladium pricing (ticker “XPD”) since the December 9, 2016 transaction date:[10]

Respondent tries to walk back its own concession that Stillwater’s value rose between signing and closing, downplaying the increase in palladium prices as a

[10] Delaware courts regularly consider competent evidence of events post-dating the transaction in an appraisal matter, when those events are relevant to the reasonableness of a company’s pre-closing views of its future business prospects. *See, e.g.*, *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 499 (Del. 2000) (court may consider post-merger sales data to validate pre-merger sales forecasts); *In re PetSmart, Inc.*, 2017 WL 2303599, at *20 n.268 (Del. Ch. May 26, 2017) (“post-closing performance is probative of the reliability of the management projections”); *Gonsalves v. Straight Arrow Publishers, Inc.*, 701 A.2d 357, 362 (Del. 1997) (post-merger evidence admissible “to show that plans in effect at the time of the merger have born fruition”).

short-term, unsustainable phenomenon. (AB 35-37.) This is contradicted by the record. Respondent's own expert, Zmijewski, undertook an analysis in order to capture that increase in Stillwater's value between signing and closing. Zmijewski did identify such an increase in Stillwater's value that needed to be accounted for, freely recognizing that an adjustment to the unaffected stock price was needed given the increase. Noticeably absent from his analysis was any disclaimer or other indication that the increase was not sustainable or long-term,[11] and Respondent's recent attempt to downplay that increase in value as such is wholly unsupported. Similarly, Respondent's suggestion that the future of electric cars may impact long-term demand for platinum and palladium (AB 36-37) is speculative at best. Respondent relies entirely on just a few statements that are entirely abstract and devoid of evidentiary value—for example, Stillwater's Board Chairman's subjective layman's belief that "the world is going to go to electric cars." (AB 37 (citing A1854:23-A1855:5).) Respondent's conjecture about the supposed long-term risk that electric vehicles may someday pose to platinum and palladium prices is thus no more specific and factual than the risks of an earthquake or any other event that may or may not impact this market.

[11] Likewise, Zmijewski never opined that his proposed increased price adjustment to the unaffected stock price could not also be applied to the deal price.

Petitioners were well aware that the trial court might choose to accept Respondent's commodity pricing inputs, or the valuation model that Respondent or the financial advisor utilized to account for the commodity price increase between signing and closing. Accordingly, Petitioners presented the range of possible values that might result from any combination of such inputs (*e.g.*, Zmijewski's pricing with Petitioners' WACC, or Rosen's pricing with Respondent's WACC). The trial court should then have selected those inputs and so accounted for the post-signing valuation increase. After all, "[i]n discharging its statutory mandate, the Court of Chancery has the discretion to select one of the parties' valuation models as its general framework or to fashion its own." *M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 525–26 (Del. 1999). Further, "[t]he Court may evaluate the valuation opinions submitted by the parties, select the most representative analysis, and then make appropriate adjustments to the resulting valuation," and "[w]hen ... none of the parties establishes a valuation that is persuasive, the Court must make a determination based on its own analysis." *Merion Capital L.P. v. Lender Processing Servs., Inc.*, 2016 WL 7324170, at *29 (Del. Ch. Dec. 16, 2016).

The simple fact that Petitioners presented a range of numbers does not detract from the viability of the mathematics underlying each such calculation. Thus, for instance, if the trial court selected Petitioners' prices and WACC, but used Zmijewski's model, the correct price adjustment would be $4.45, as Petitioners

argued to the trial court. If *Petitioners'* model, prices, and WACC were selected, the adjustment should be $4.33. During the course of the proceedings, recognizing that the trial court might select a different set of inputs, Petitioners also presented the trial court with other possibilities, such as $3.87 (using BAML's model with Petitioners' prices and WACC), as well as $3.62, the average of the three midpoints ($3.52, $3.70, and $3.64) resulting from each of the three possible models. Once the trial court chose the three inputs for determining the price increase, the final figure would follow from the options Petitioners proffered. As a threshold matter, as Petitioners demonstrated to the trial court, even using Respondent's (Zmijewski's) model, and Respondent's commodity prices and WACC, the minimum adjustment needed to be made to the merger price is an increase of $2.95. (A3269.)

If the trial court was uncertain as to which inputs should be used to determine the valuation adjustment needed, the trial court should have definitively determined how much that valuation increase should be. Given the parties' universal agreement that an increase in value took place, and that the most appropriate method of measuring such increase was by a DCF, the trial court should have requested targeted, supplemental briefing on the issue if it believed that the parties had not provided enough specific information for it to do so.[12] The Chancery Court has a

[12] Respondent wrongly suggests that the trial court found that deal price acted as a "fair value ceiling." (AB 40.) While *Respondent* advocated that position, the trial court never so found. Rather, the trial court's decision actually suggested in several

statutory duty to appraise, apart from and independent of the parties' litigation burdens.

---

instances that fair value can *exceed* deal price. (*See, e.g.*, Op. 108 ("At a minimum, it would seem to make sense to adjust the deal price for inflation."), 109 ("The nature of Stillwater's business makes this case a plausible one for an upward adjustment that goes beyond inflation.").)

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 repeatedly argued in the proceedings below for such an adjustment to merger price.

Petitioners respectfully request entry of 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 (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).

HEYMAN ENERIO
GATTUSO & HIRZEL LLP

/s/ Samuel T. Hirzel, II
Samuel T. Hirzel, II (# 4415)
Elizabeth A. DeFelice (# 5474)
300 Delaware Avenue, Suite 200
Wilmington, DE 19801
(302) 472-7300
Words: 5,497
Attorneys for Petitioners-Below/Appellants Brigade Leveraged Capital Structures Fund Ltd. and Brigade Distressed Value Master Fund Ltd.

OF COUNSEL:

LOWENSTEIN SANDLER LLP
Lawrence M. Rolnick
Steven M. Hecht
1251 Avenue of the Americas
New York, NY 10020
(212) 262-6700

Dated: January 9, 2020

CERTIFICATE OF SERVICE

Samuel T. Hirzel, II, Esquire, hereby certifies that, on January 9, 2020, copies of the foregoing *Petitioners-Below/Appellants' Reply Brief on Appeal* was served electronically upon the following counsel:

S. Mark Hurd, Esquire
Lauren Neal Bennett, Esquire
MORRIS, NICHOLS, ARSHT & TUNNEL LLP
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347

/s/ Samuel T. Hirzel, II
Samuel T. Hirzel, II (# 4415)