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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.,	)	
Petitioners-Below/Appellants,	)	C.A. No. 427, 2019
v.	)	Court Below – Court of Chancery of the State of Delaware C.A. No. 2017-0385-JTL
STILLWATER MINING COMPANY,	)	
Respondent-Below/Appellee.	)	

APPELLEE STILLWATER MINING COMPANY'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

The trial court held – in a 139-page opinion that considered an extensive evidentiary record – that Stillwater "proved by a preponderance of the evidence that the sale process made the deal price a persuasive indicator of fair value." Op. 100. The trial court properly found that the Stillwater sale process exhibited hallmark "objective indicia" of reliability – (i) the merger was an arm's-length transaction with a third party; (ii) the Board did not have any conflicts of interest; (iii) Sibanye received material non-public information about Stillwater's value; (iv) Stillwater extracted multiple price increases from Sibanye during negotiations; and (v) not a single bidder emerged during the post-signing market check even though the Merger Agreement did not contain any exceptional deal protection features. The trial court used these indicia as a "starting point" in its detailed factual analysis of the process. Op. 49-52. As the finder of fact, the trial court analyzed each of Petitioners' alleged "flaws" in the sale process and correctly found that deal price was the best evidence of fair value. Op. 67-101.

Displeased with the deal price result of the trial court's thorough opinion, Petitioners confusingly claim on appeal that the trial court failed to "actually analyze the process," Br. 2, and suggest that the deal price "has since become the valuation floor," Br. 19 n.3, to which the Court should tack on $4.45 per share. Br. 2. Petitioners ask this Court, for the first time in an appraisal case,

to adjust the deal price upward because Stillwater "mined palladium and platinum" and "long-term prices of those commodities increased materially" in the five-month window between Signing and Closing. Br. 1.

Petitioners are wrong; they did not establish at trial that Stillwater's fair value increased between Signing and Closing. First, Petitioners incorrectly represent that platinum prices increased between Signing and Closing, when in fact they decreased by 3.7%. *See* B68-B71. Second, Petitioners inaccurately represent that the prices of platinum and palladium on the date of Closing are "long-term prices" that require a 25% *increase* in the deal price measure of value even though potential interlopers and the Stillwater stockholders who overwhelmingly approved the transaction obviously saw no such value increase. Petitioners adduced no evidence that would require such a leap of faith, much less establish that the trial court abused its discretion in declining to add $4.45 to the deal price. Nor do Petitioners address the legitimate concerns of the Stillwater Board, comprised of independent directors with decades of expertise in mining and the global commodities business, that the rise of electric vehicles threatens both the platinum and palladium markets.

Petitioners did not and cannot identify a persuasive reason for an upward adjustment to the deal price because: (i) the fixed deal price included a built-in 22.6% premium to the unaffected trading price, which absorbed the short-

term 5.9% basket-weighted commodity price increase; (ii) had Stillwater's fair value actually increased by Petitioners' alleged $500 million figure, a deal jumper would have emerged, and none did; and (iii) the stockholder vote, which occurred eight days before Closing and after the spot price of palladium had increased, showed that sophisticated institutions holding a supermajority of the Stillwater stock ratified the deal price as representative of fair value.

Petitioners also expended a third of their appeal brief addressing the trial court's statement that "Petitioners did not argue for an adjustment to the deal price." Op. 115. This surely refers to the trial court's finding that Petitioners did not develop non-conclusory arguments supported by proof for an adjustment to deal price in the record below. In addition to not fleshing out arguments and adducing evidence on the matters set forth above, Petitioners "argued" – without any supporting rationale – for an adjustment starting at $2.00 to $2.30 and over time increasing to the instant $4.45 to be applied in "exactly the same" way to two different indicators of value – the trading price and the deal price. The only consistent strain in Petitioners' series of adjustments is that each successive adjustment led to an artificial and opportunistic increase in value. Indeed, the trial court correctly held that Petitioners "failed to prove that the deal price should be adjusted upward to reflect a change in value between signing and closing." *Id.* Notwithstanding the trial court's clear findings here, Petitioners did not move for

re-argument or ask the court to appoint an independent valuation expert. Petitioners were given every opportunity to litigate this issue, but failed to meet their burden of proof.

The trial court's conclusion – after considering the extensive record (including that Stillwater's three proposed measures of value were all in a narrow band) – that Stillwater met its burden of demonstrating by a preponderance of the evidence that the deal price was the appropriate measure of Stillwater's fair value rests on sound legal and financial principles, was not an abuse of discretion, and should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The trial court did not err in concluding that the deal price, which represented a 22.6% premium to Stillwater's unaffected trading price and was approved by the holders of 75% of Stillwater's stock days before Closing, was the best evidence of fair value.

2. Denied. The trial court did not err when it found that Petitioners "failed to prove that the deal price should be adjusted upward to reflect a change in value between signing and closing" or when it stated that Petitioners "never argued for an adjustment to the deal price" and then listed all the non-conclusory arguments that Petitioners failed to make.

3. Denied. The trial court did not err by finding that Stillwater satisfied its burden in proving that the deal price provided the best evidence of fair value, and the trial court acted within its discretion in selecting one of Stillwater's market-based indicators of value.

4. Denied. The trial court did not err in finding that the sale process exhibited sufficient objective indicia of reliability to make the deal price the best evidence of fair value.

5. Denied. The trial court did not (i) disregard undisputed evidence that Petitioners were entitled to an increase in fair value; (ii) overlook

Petitioners' arguments; (iii) disregard its statutory duty; (iv) offer a speculative advisory opinion; or (v) improperly rely on merger price.

COUNTER-STATEMENT OF FACTS

I. STILLWATER FACED LONG-TERM CHALLENGES.

Before its acquisition by Sibanye (the "Merger"), Stillwater was a publicly-traded Delaware corporation primarily engaged in the business of mining and processing platinum group metals ("PGMs") from the J-M Reef in Montana. Op. 3.

In late 2013, after Stillwater's stock price had fallen to around $11 per share, McMullen was elected to Stillwater's board of directors (the "Board") and appointed CEO. B20. McMullen "generally turned the Company around" by achieving significant operational improvements and reducing costs. Op. 4; *see also* B29. At all relevant times, the other directors were independent, non-executive directors with extensive mining and/or financial experience. *See* Op. 4; B1304-B1307.

Stillwater's Board and management, however, grew concerned that both the palladium and platinum markets were facing a long-term "structural decline," largely due to the anticipated decline in the gasoline and diesel-powered automotive markets – the primary end-use of Stillwater's PGMS – in favor of electric vehicles. Op. 7; A2438:18-A2441:9; A1854:21-A1855:9. Accordingly, by the summer of 2015, the Board had begun to consider strategic alternatives,

including a potential merger of equals with Northern Star, Op. 7, as well as "the potential to sell all or some of the current business operations." B30; B311.

II. SIBANYE ACQUIRED STILLWATER AT A SIGNIFICANT PREMIUM TO MARKET FOLLOWING A ROBUST SALE PROCESS.

In January 2016, the Stillwater Board gave McMullen a "broad" mandate to pursue strategic alternatives. Op. 8; *see also* B32-33; B1076. Discussions with Northern Star continued, and in February 2016, two Northern Star representatives conducted a site visit at Stillwater. B1525; A2444:19-A2445:17.

On March 1, 2016, following an approach by Sibanye, McMullen met with Neal Froneman, Sibanye's CEO. Op. 10. From the outset, McMullen communicated to Froneman that any transaction would have to be at a significant premium to market. Op. 11. In June, both Sibanye and Northern Star (for the second time) toured Stillwater's mines. Op. 12. McMullen purposefully timed their visits to coincide to engender competition between interested parties. A2452:2-A2453:5; B36.

On July 21, 2016, Sibanye provided a preliminary, non-binding indication of interest at $15.75 per share in cash. Op. 13. Shortly thereafter, on July 27 to 28, 2016, Stillwater's Board met in "executive session" without

McMullen[1] to discuss Sibanye's offer, as well as a potential merger of equals with Northern Star. Op. 14; B1088-B1094. At the direction of the Board, on August 9, 2016, Stillwater executed a confidentiality agreement with Sibanye and provided data room access. Op. 15; A1856:13-24; A2458:16-A2459:2.

Rather than "rush into a deal" with Sibanye at that time, Op. 51, on August 10, 2016, the Board met and directed management to begin outreach to other potentially interested parties. Op. 16. With the help of Bank of America Merrill Lynch ("BAML") (among others), management sought to generate "as much interest as possible" in a transaction with Stillwater. Op. 16 (quoting A2561:16). Meetings were arranged with a number of potentially interested parties, including Hecla, Coeur, Kinross, and Goldfields. Op. 18. By September 29, 2016, management and others had contacted 14 potential alternative bidders apart from Sibanye and Northern Star. B1098; B38-B40. Both Hecla and Coeur were granted access to the data room by early October, and conducted site visits. B40-B41; B1095-B1096.

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[1] The Board frequently met in executive session, excluding management, to discuss important matters. Following the July 27 to 28, 2016 Board meeting, the Board consistently excluded McMullen – as the sole management director – from the executive sessions in order to ensure that they objectively evaluated the proposed transaction. A1857:13-A1858:18; A1870:16-A1872:18; A1875:17-1876:17; A1921:2-A1923:6.

On October 3, 2016, the Board reviewed a list of 18 potential acquirers and directed McMullen to (i) solicit proposals from investment banks and (ii) create an internal cash flow model to value the company. Op. 19-20. At this Board meeting, the Board also sought the advice of external counsel, Holland & Hart LLP, as to whether any conflicts existed and whether a special committee should be formed. A2470:21-A2471:4. With Holland & Hart LLP's advice, the Board concurred that no conflicts of interest existed that required a special committee. B1100; Op. 20.[2]

The Board met again on October 26 to 27, 2016 to select its financial and legal advisors for a potential transaction. Op. 21. The Board formally retained BAML on November 7, 2016, and BAML immediately conducted a market check, during which several additional parties expressed interest. Op. 22-27. Desiring to hire "additional legal counsel with substantial experience in advising Delaware

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[2] Although acknowledging certain of McMullen's outside interests, the trial court expressly found that they did not undermine the sale process, noting that "McMullen had ample reason to pursue the best deal possible for Stillwater," Op. 76, and that "[o]n balance, the evidence does not convince me that McMullen's divergent interests led either McMullen or the Board to accept a deal price that left a portion of Stillwater's fundamental value on the table." Op. 77-78.

publicly traded companies in respect of potential strategic transactions," the Board retained Jones Day on November 11, 2016.[3] Op. 22.

By the next Board meeting on November 23, 2016, 24 parties had received some type of formal or informal contact from BAML or Stillwater management. Of the 24 parties, Sibanye, Hecla, Coeur and Anemka accessed the data room and conducted site visits. Only Sibanye, however, submitted an indication of interest. *See* Op. 27. McMullen informed the Board that he viewed Sibanye's initial offer of $15.75 per share as insufficient. B48; B1102. At the Board's direction, BAML reached out to additional parties, and one, Northam, signed a non-disclosure agreement ("NDA") on December 1, 2016, and subsequently accessed the data room. B49-B50; B1105-B1114; B1220.

On December 1, 2016, Sibanye revised its offer to $17.50-$17.75 per share in cash. Op. 30. On December 2, 2016, Stillwater's Board rejected the revised offer. Op. 30. The Board also evaluated and rejected as inferior the

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[3] Following the July 27 to 28, 2016 Board meeting, the company's general counsel, Brent Wadman, expressed concerns about not "being privy to important facts that are happening that impact the company," first to McMullen, then to two Board members. A2390:13-A2391:12. He subsequently articulated his "concerns about conflicts and perceived conflicts" regarding the proposed transaction, A2404:23-24, which he identified as the lack of additional outside legal and financial counsel. A2404:19-A2405:11. As Wadman conceded, by November 11, 2016, Stillwater had engaged external financial and legal advisors, and all of his concerns had been addressed. A2410:1-A2424:23; B45-B46.

potential merger of equals transactions with Northern Star and Independence. Op. 30-31. That same day, BAML provided a financial analysis of Stillwater's alternatives to the Board, including the alternative of continuing to operate as an independent company. B1216; B1115-B1214. BAML also provided its internal discounted cash flow ("DCF") model valuing the company between $10.78 and $14.14 per share. Op. 30.

On December 3, 2016 – after Stillwater had "extracted multiple price increases" – Sibanye made its "best and final" offer of $18 per share. B51; Op. 50-51. By this point, although five parties had signed NDAs and gained access to Stillwater's material non-public information, Sibanye was the only party to have made a bid. Op. 33. At no time did any other party make a bid or ask for additional time to do so. Op. 80.

The Board did not immediately accept Sibanye's $18 per share offer. As the trial court noted, "[o]nly after Sibanye twice said that the $18.00 per share was its best and final offer did McMullen and the Board finally agree to transact." Op. 77. On December 8, 2016 ("Signing"), BAML provided an opinion to the Board that Sibanye's offer was fair to stockholders. Op. 33. The Board considered BAML's fairness opinion in its deliberations, approved the Merger, and signed the merger agreement ("Merger Agreement"). Op. 33.

That day – the last day of unaffected trading – Stillwater's shares closed at $14.68. Op. 35. The deal price represented a 22.6% premium over the unaffected trading price, and a 24.4% premium over the 30-day volume-weighted average price. Op. 35. During the previous two years, Stillwater's stock price had never traded above $15.58. Op. 35. On December 9, 2016, the Merger was announced ("Announcement").

By the time of the stockholder vote on April 26, 2017, stockholders, primarily sophisticated institutions, *see* A1201, were on notice that the price of palladium had increased since Signing, Op. 91, and nevertheless voted overwhelmingly in favor of the Merger (approximately 75% of the outstanding common shares eligible to vote, and approximately 94% of all shares voted). Op. 37; B3-B4. During the 138-day post-signing market check between Signing and the stockholder vote, no other bidder made a topping bid despite the "comparatively low" deal protection features in the Merger Agreement. Op. 51; 96-97.

On May 4, 2017 ("Closing"), the Merger closed, with the price of palladium effectively unchanged from the time of the stockholder vote to the close of the Merger. Op. 38; B105. Petitioners-Below are hedge funds that acquired their shares after the Merger was announced and initiated this appraisal litigation

on May 22, 2017. B5-B19 (defining the "BlueMountain Petitioners," the "Brigade Petitioners," and the "Settling Petitioners").

III. THE TRIAL COURT DETERMINED THAT STILLWATER'S FAIR VALUE WAS $18.00 PER SHARE.

Following a four-day trial – at which eleven witnesses testified and 909 exhibits were introduced – and extensive post-trial briefing, the trial court found that "Sibanye proved by a preponderance of the evidence that the sale process made the deal price a persuasive indicator of fair value." Op. 100. The court found that "[t]he sale process" exhibited "objective indicia" that "suggest[] that the deal price was a fair price," Op. 49 (quoting *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1, 28 (Del. 2017); *see also DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 376 (Del. 2017)), including:

- "[T]he merger was an arm's-length transaction with a third party," not "involving a controlling stockholder." Op. 49.
- "[T]he Board did not labor under any conflicts of interest," as "[s]ix of the Board's seven members were disinterested, outside directors." Op. 50; *see also id.* at 76 ("McMullen had ample reason to pursue the best deal possible for Stillwater . . . To state the obvious, every $1 increment in the deal price generated another half-a-million dollars for McMullen.").

- “Sibanye conducted due diligence and received confidential information about Stillwater’s value.” Op. 50.
- “Stillwater negotiated with Sibanye and extracted multiple price increases.” Op. 50.
- The post-signing market check, which “lasted 138 days . . . and far longer than many of the passive, post-signing market checks that the Delaware courts have approved[]” “provides significant evidence of fairness, because ‘[f]air value entails at minimum a price some buyer is willing to pay – not a price at which no class of buyers in the market would pay.’” Op. 96.
- “[N]o bidders emerged during the post-signing phase,” even though “[t]he Merger Agreement did not contain any exceptional deal protection features, and the total amounts due via the termination fee and expense reimbursement provision were comparatively low.” Op. 51; *see also id.* at 70.
- Stockholders voted overwhelmingly in favor of the Merger eight days prior to Closing when “[t]he spot price of palladium was readily available public information.” Op. 90-91.

Continuing the analysis by considering the objections to the process put forth by Petitioners, the trial court found that the sale process compared

favorably with the sale processes upheld in *Aruba, Dell*, *DFC, PLX*, and *C&J Energy*. Op. 100. The trial court also found that Petitioners "*failed to prove that the deal price should be adjusted upward to reflect a change in value between signing and closing*." Op. 115.[4]

On October 8, 2019, Brigade Petitioners, who hold only 20% of the 5,833,523 shares that sought appraisal below, B5-B19, appealed the Court of Chancery's August 21, 2019 opinion and September 27, 2019 Post-Trial Judgment. The other Petitioners-Below did not file an appeal.

[4] As discussed below, Petitioners on appeal mischaracterize this finding, asserting that "merger price has since become the valuation floor, as the trial court convincingly eliminated unaffected trading price as a reliable metric." Br. 19 n.3. But the court did no such thing. Rather, the trial court found that "Sibanye made an initial showing that would be sufficient to support the reliability of the trading price as a valuation indicator absent contrary evidence," and expressly stated that its decision "*does not find* that the trading price was so unreliable that it could not be used as a valuation indicator. If a market-tested indicator like the deal price was unavailable, then this decision might well have given weight to the trading price." Op. 133 (emphasis added).

ARGUMENT

I. THE TRIAL COURT PROPERLY HELD THAT THE DEAL PRICE IS THE BEST MEASURE OF FAIR VALUE.

A. Question Presented.

Whether the trial court abused its discretion in holding that the deal price is the best evidence of fair value. *See* A2994-3016.

B. Standard of Review.

The standard of review for an appraisal decision is abuse of discretion. *Dell,* 177 A.3d at 5. "[T]his Court must give deference to the Court of Chancery if its determination of fair value has a reasonable basis in the record and in accepted financial principles relevant to determining the value of corporations and their stock." *DFC*, 172 A.3d at 348–49.[5]

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[5] Petitioners agree that appraisal decisions are reviewed for abuse of discretion. *See* Br. 14. Although they also contend that "[l]egal errors are reversed as a matter of law," *id.*, they do not specify whether they contend that any portion of the trial court's opinion constitutes legal error. To the extent Petitioners argue that the trial court's discussion about a hypothetical single-bidder process, which Petitioners concede is non-binding *dicta*, constitutes legal error that should be reviewed *de novo*, this Court need not address such *dicta* in affirming the trial court's opinion. *See infra* Section I.C.3. Therefore, all issues fairly presented to this Court on appeal should be reviewed for abuse of discretion. *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 35 (Del. 2005).

C. **Merits of the Argument.**

1. **The Trial Court Properly Found that the Sale Process Was Reliable.**

In 2017, the Court issued its decisions in *DFC* and *Dell*. Just this year, the Court issued its opinion in *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128 (Del. 2019). This "recent triumvirate of appraisal cases," Op. 53, explains that although there may be no judicial presumption in favor of deal price, this "does not in any way signal [this Court's] ignorance to the economic reality that *the sale value resulting from a robust market check will often be the most reliable evidence of fair value*." *DFC*, 172 A.3d at 366 (emphasis added). Thus, in *DFC* the Court concluded that "the best evidence of fair value was the deal price, as it resulted from an open process, informed by robust public information, and easy access to deeper, non-public information, in which many parties with an incentive to make a profit had a chance to bid." *DFC*, 172 A.3d at 349.

In *Dell* this Court also concluded that "the deal price deserved heavy, if not dispositive, weight." *Dell*, 177 A.3d at 23. The Court reasoned that "many of the same objective indicia of reliability" present in *DFC* were present in *Dell*. *Id*. at 28–30. Specifically, the Court held that:

> [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, then failure to give the resulting price heavy weight . . . abuses even the wide discretion afforded the Court of Chancery in these difficult cases.

Id. at 35.

Most recently, in *Aruba* this Court awarded deal price minus synergies as the measure of fair value. In so doing, it noted "the long history of giving important weight to market-tested deal prices in the Court of Chancery and this Court," *Aruba*, 210 A.3d at 135; *see id.* n.41 (collecting cases), and underscored that "a buyer in possession of material nonpublic information about the seller is in a strong position (and is uniquely incentivized) to properly value the seller when agreeing to buy the company at a particular deal price," and "*that view of value should be given considerable weight by the Court of Chancery absent deficiencies in the deal process*." *Id.* at 137 (emphasis added).

Although these decisions "do not establish legal requirements for a sale process," Op. 49, they are, as the trial court recognized "highly informative," Op. 48–49, and make clear that rather than searching for some "legal requirements" for a sale process, courts must examine the unique facts of each case. *See, e.g., DFC*, 172 A.3d at 348–49; *Dell*, 177 A.3d at 22 n.105; *Aruba*, 210 A.3d at 141; Op. 44. That is precisely what the trial court did here.

First, the trial court found the following five "indicia of reliability" present in this case: (i) the Merger was an arm's-length transaction with a third

party; (ii) there were no conflicts of interest among the Stillwater Board; (iii) Sibanye conducted due diligence, received access to confidential information about Stillwater's value, and had a "sharp[] incentive to engage in price discovery"; (iv) Stillwater extracted multiple price increases from Sibanye; and (v) no bidders emerged during the post-signing phase. *See* Op. 49–52; *supra* at 13-15.

The trial court concluded that these "objective indicia . . . provide a cogent foundation for relying on the deal price as a persuasive indicator of fair value." Op. 52. Tellingly, Petitioners do not take issue with the trial court's findings with respect to these objective indicia.

2. The Trial Court Considered All of Petitioners' Objections to the Reliability of the Sale Process.

The trial court made clear that the "indicia [described above] are a starting point for analysis, not the end point." Op. 49. Accordingly, and notwithstanding Petitioners' puzzling argument that the trial court "avoid[ed] examining Stillwater's actual sale process," Br. 38, the court went on to spend another *35 pages* – a quarter of the opinion – analyzing each and every one of Petitioners' alleged "flaws" in the sale process. *See* Op. 67–101.

First, the trial court found that any deficiencies in the sale process relating to McMullen's authorization to engage with potential bidders or the time at which the Board "meaningfully engaged" in the process "do not inherently

disqualify the sale process from generating reliable evidence of fair value," because Stillwater formally retained BAML in November, conducted a pre-signing canvas of interested bidders, and signed a Merger Agreement that facilitated a meaningful post-signing market check. Op. 67–70.

Second, the trial court found that although "McMullen appears to have been motivated by his desire to maximize his personal wealth and retire," Op. 76, "McMullen's personal interests as a whole do not appear materially different from interests that have not been sufficient in other cases to undermine the reliability of sale processes," Op. 77, and did not lead him or the Board "to accept a deal price that left a portion of Stillwater's fundamental value on the table, particularly in light of the effective post-signing market check that Stillwater conducted." Op. 77–78.

Third, the trial court found that BAML's pre-signing efforts "were a positive factor for the sale process," Op. 79, and that the alleged "soft sell" approach did not detract from that process, Op. 78. The fact that BAML reached out to 14 parties, four of whom engaged in the process, benefitted the sale process as "BAML contact[ed] the 'logical strategic buyers' before Stillwater signed up its deal with Sibanye." Op. 80.

Fourth, the fact that Sibanye might have been able to pay more than $18 per share, but would not raise its offer, in fact supports the deal price as

establishing fair value. This is particularly true because Sibanye conducted due diligence, received access to material non-public information, and was uniquely incentivized to value Stillwater properly. Op. 86–87.

The trial court also considered, but rejected, Petitioners' "perfunctory challenges" to the post-signing phase. Op. 88. *First*, the trial court found that Petitioners' objections related to the Merger Agreement were contradicted by the terms of the Agreement itself and fundamentally misunderstood the purpose of the contract, which was "to provide stockholders with the ability to opt for the comparative certainty of deal consideration equal to $18.00 per share." Op. 90–91. *Second*, the trial court properly concluded that the Merger Agreement's defensive measures were "sufficient to permit an effective post-signing market check," which lasted 138 days. Op. 91–92, 96. Thus, the fact that no one other than Sibanye bid "provides significant evidence of fairness." Op. 96. *Third*, the trial court found that the Stillwater stockholder vote in favor of the Merger was another "positive factor when evaluating whether the deal price reflected fair value." Op. 99–100.

Petitioners do not address *any* of the trial court's specific findings regarding the pre- and post-signing phases of the transaction. Instead, Petitioners rely on the conclusory assertion that "[t]he court below failed to analyze the sales process for Stillwater to determine whether it provided reliable evidence of third-party market valuation." Br. 37. However, this argument is belied by the trial

court's thorough analysis of the sale process, summarized above. "The sale process was not perfect," the trial court found, "and the petitioners highlighted its flaws, but the facts of this case, when viewed as a whole, compare favorably or are on par with the facts in *C & J Energy*, *PLX*, *DFC*, *Dell*, and *Aruba*." Op. 100. In light of this Court's teaching that "fair value is just that, 'fair[]'[;] [i]t does not mean the highest possible price that a company might have sold for had Warren Buffett negotiated for it on his best day and the Lenape who sold Manhattan on their worst," Op. 44 (citing *DFC*, 172 A.3d at 370), the trial court did not abuse its discretion in concluding that the deal price is the best measure of fair value.

Petitioners' arguments on appeal do not show that this conclusion is an abuse of discretion. To the contrary, Petitioners support the trial court in arguing that the deal price should only be used as the measure of fair value where there is (i) outreach to all logical buyers, (ii) sufficient information made available to interested bidders, and (iii) no "undue impediments" imposed by the deal structure, Br. 35, inasmuch as the trial court considered each of these factors and found that the Stillwater sale process satisfied each. *First*, the trial court found that Stillwater and BAML did reach out to all logical buyers, concluding that while Petitioners "criticized the timing, pacing, and scope of the pre-signing process, [] *it resulted in BAML contacting the 'logical strategic buyers' before Stillwater signed up its deal with Sibanye*." Op. 80 (emphasis added).

Second, the trial court noted that despite Petitioners' criticism of the "soft sell" approach used prior to BAML's retention, BAML's outreach included informing potential counterparties that Stillwater was exploring "strategic alternatives," Op. 24, which, in addition to BAML's other pre-signing efforts, gave potential bidders a "leg up" because they "had the benefit of knowing that a transaction potentially was afoot," Op. 81. The court further found that "[t]here is no evidence that any [bidders] were alienated or put off by the Company's pre-signing efforts," and that "a total of seven parties engaged to some degree" as a result of BAML's outreach. Op. 80–81. As regards Sibanye, it "entered into an NDA with Stillwater, conducted extensive due diligence, [and] obtained access to material nonpublic information.'" Op. 87. In addition to Sibanye, four parties – Hecla, Coeur, Anemka and Northam – accessed the data room. Thus, there was sufficient information made available to those parties who expressed a potential interest in bidding.

Finally, the trial court found that Petitioners' objections with respect to the Merger Agreement were a "turn down a blind alley" because Petitioners "never engaged with the terms of the Merger Agreement," Op. 89, which the court found "did not preclude or impermissibly impede a post-signing market check." Op. 95. Thus, by *Petitioners' own reasoning*, the trial court properly relied upon the deal price as the best evidence of fair value.

Petitioners also incorrectly suggest that the fact that no one other than Sibanye bid made the sale process unreliable. *See* Br. 37. But this Court recently observed:

> It cannot be that an open chance for buyers to bid signals a market failure simply because buyers do not believe the asset on sale is sufficiently valuable for them to engage in a bidding contest against each other. If that were the jurisprudential conclusion, then the judiciary would itself infuse assets with extra value by virtue of the fact that no actual market participants saw enough value to pay a higher price. That sort of alchemy has no rational basis in economics.

Aruba, 210 A.3d at 136; *see also Dell*, 177 A.3d at 29. Thus, contrary to Petitioners' assertions, "[t]he failure of any other party to come forward provides significant evidence of fairness." Op. 96.

3. The Trial Court's Discussion of a Hypothetical Single-Bidder Process is *Dicta* That is Nevertheless Supported by Delaware Supreme Court Precedent.

Petitioners take issue with the fact that the trial court considered "a hypothetical 'single-bidder' process" and this Court's fiduciary duty jurisprudence. Br. 37–39. However, they concede that the trial court's "hypothetical" consideration was "non-binding *dicta*" that did not "address the facts of this case." Br. 37; *id.* at n.7. *Dicta*, of course, is non-binding as legal precedent and need not be considered on appeal. *Aruba*, 210 A.3d at 129–30 (noting that Supreme Court did not need to respond to *dicta* and that the "key issue" was whether the Court of

Chancery abused its discretion in arriving at its fair value determination). Even though *dicta*, the trial court's hypothetical supports its ultimate conclusion, based on a thorough analysis of this Court's appraisal jurisprudence, that the deal price here was an appropriate measure of fair value.

Indeed, the trial court's hypothetical and its reasoning are supported by this Court's precedent. *See* Op. 53–67; *Dell*, 177 A.3d at 30–31 (awarding deal price and observing that the Court of Chancery's "own summary remarks suggest the deal price deserves weight as the court characterized the sale process as one that 'easily would sail through if reviewed under enhanced scrutiny'"). Moreover, no court – including those cited by Petitioners, *see* Br. 38 n.9[6] – has held categorically that fiduciary duty precedents may not be considered in an appraisal proceeding. To the contrary, "[w]here a company relies on the merger price as evidence of fair value, allegations of breach of fiduciary duty or other improper actions during the sales process are relevant to whether the merger price is credible

[6] Notably, all of the cases cited by Petitioners are Court of Chancery opinions that pre-date this Court's clarification of appraisal standards in *DFC*, *Dell*, and *Aruba*. Petitioners also note that this Court has already ruled that "an exclusive negotiation with the ultimate buyer, lacking any pre-signing market check" constitutes an unreliable sale process that cannot be relied upon in an appraisal proceeding. *See* Br. 39 n.10. But the process in this case was fundamentally different than in *Global GT LP v. Golden Telecom, Inc.*, 993 A.2d 497 (Del. Ch.), *aff'd*, 11 A.3d 214 (Del. 2010), because there was no post-signing market check in *Golden Telecom*.

evidence of fair value." *Gearreald v. Just Care, Inc.*, 2012 WL 1569818, at *4 n.26 (Del. Ch. Apr. 30, 2012); *see also Alabama By-Prods. Corp. v. Neal*, 588 A.2d 255, 258 (Del. 1991) (affirming appraisal decision that considered evidence of unfair dealing). Petitioners' suggestion that the Court of Chancery is forbidden from considering compliance with the enhanced scrutiny standard in fiduciary duty cases as one of the "relevant factors" in an appraisal proceeding is contrary to common sense and relevant precedent.

In summary, Petitioners cannot – and have not – overcome the trial court's reasoned decision to award fair value on the basis of the deal price, much less show that it was an abuse of discretion.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO MAKE ANY UPWARD ADJUSTMENTS TO THE DEAL PRICE.

A. Question Presented.

Whether the trial court abused its discretion in declining to make any upward adjustments to the deal price. *See* A3425:23-3426:9.

B. Standard of Review.

See supra Section I.B.

C. Merits of the Argument.

1. The Trial Court Properly Concluded That the Deal Price, without Adjustments, Was the Best Evidence of Fair Value at Closing.

a. No Adjustment to Deal Price Was Warranted.

(i) Petitioners Mischaracterize the Trial Court's Holding and the Record Below.

In an attempt to manufacture appealable error, Petitioners rely on the narrowest reading of the trial court's statement that "[P]etitioners did not argue for an adjustment to the deal price," Op. 115, devoting nearly a third of their brief to attacking this statement. *See* Br. Section II (discussing prior conclusory requests for upward adjustments).[7] But Petitioners' argument ignores the trial court's

[7] Petitioners point to various instances in their post-trial briefs in which they requested an upward adjustment to deal price, with no argument for why adjustments to deal price were warranted or how their proposed figures were derived. As discussed in more detail below, *infra* Section II.C.1.a(ii), Petitioners merely asserted that the commodity price adjustments that the (Continued . . .)

extensive analysis of what Petitioners failed to prove, namely "*that the deal price should be adjusted upward to reflect a change in value between signing and closing*." Op. 115. (emphasis added). 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.

Petitioners attempt to confuse the record by incorrectly equating the parties' competing adjustments to the *unaffected trading price* with Petitioners' proposed adjustment to the *deal price*. As the trial court noted, the unaffected trading price and deal price are distinct conceptual approaches to measuring fair value, with potentially "significant differences" between the two. Op. 110.

The most fundamental difference, of course, is the differing nature of the two markets that underlie these market-based indicators of value. The unaffected trading price is the trading price of Stillwater's stock on the day prior to Announcement, which is a measure of value if the stock is trading in an efficient market. It does not take into account any post-Announcement developments.

(. . . continued)

parties' experts made to *unaffected trading price* should be applied equally to the deal price, with no supporting evidence or analysis. Such conclusory arguments are not entitled to any weight. *See Jarmon v. Dep't of Servs. for Children, Youth & Their Families*, 911 A.2d 803 (Table), 2006 WL 3113122, at *3 (Del. 2006) ("This Court will not give conclusory arguments, without more, any weight.").

Stillwater's expert proposed adjusting the *unaffected trading price*[8] through a DCF-derived adjustment to estimate Stillwater's hypothetical *trading price* if commodity prices at Closing had existed one day prior to Announcement. B1583-B1588. The adjustment was calculated on the basis of numerous inputs, including commodity price forecasts, which, as Petitioners acknowledge, are correlated to the *spot price* of Stillwater's commodities.[9] In examining the reliability of the parties' DCF models, the trial court correctly followed this Court's guidance regarding expert-derived, litigation-driven valuation methods – "a trial court should have greater confidence in market indicators and less confidence in divergent expert determinations." Op. 138. The trial court also found that the parties' "experts disagreed over many inputs, with small changes producing large swings in value," Op. 135, and these disagreements "undercut the reliability of the DCF model as a valuation indicator." Op. 138.

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8 Notably, Respondent's expert's adjusted trading price range of $16.68 to $17.63 was asserted by Stillwater as *one of four* indicators of fair value at Closing, which fell within the unaffected trading price *as a fair value floor* and deal price as *a fair value ceiling*. B1532.

9 *See* Br. 28 ("Rosen opined . . . that an upward adjustment to Stillwater's merger price was justified based on the increase in commodity prices – *i.e., the spot price of palladium* – between signing and closing.") (emphasis added); *see also* Br. 8, 15.

In contrast, the deal price is a fundamentally different indicator of value because, at its core, the deal price is based on how much a willing bidder will pay for the entire company, and for how much the stockholders will sell their shares. Here, there is record evidence testing both of these points almost until the date of Closing. Specifically, the post-signing market check (during which an interloper could have intervened with a higher bid) and the stockholder vote (at which time the stockholders could have voted down the sale) both tested the validity of the deal price up to eight days before Closing. As a result, the deal price does not become "stale" after Announcement, and therefore, unlike the unadjusted trading price, requires no adjustment for increased commodity prices. And while Petitioners disparage both of these factors as rejected by the trial court, the Opinion does nothing of the sort, but merely presents the type of arguments that the parties would presumably have made had the issue been properly presented below. Op. 115.

Petitioners further mischaracterize Stillwater's position at trial by suggesting that Stillwater "agreed" that there was an increase in Stillwater's *fair value* between Signing and Closing. Br. 14-23; *see also id.* at 4. Stillwater never agreed with Petitioners' unsupported assertion that the commodity price changes between Signing and Closing had any effect on the $18 per share deal price as a measure of *fair value*. To the contrary, both the Board and management

consistently expressed the view that commodity prices were volatile and that the market for platinum and palladium faced long-term "structural decline," regardless of any short-term increases that may occur. A2438:18-A2441:9; A1854:21-A1855:5.

Petitioners ignore the inherent conceptual differences between these two measures of value, and in conclusory fashion,[10] incorrectly assert that the DCF-derived adjustment to the unaffected trading price should be grafted directly on to the deal price. Petitioners' attempts to add a DCF-derived adjustment to the deal price should therefore be rejected.

(ii) Petitioners Failed to Prove That an Adjustment to Deal Price Was Warranted.

Petitioners' appeal is based on the false premise that the deal price acts as the *fair value floor* in the absence of traditional synergies, Br. 19 n.3, and should be adjusted upward to account for the change in commodity prices between Signing and Closing. As the trial court noted, however, not a single Delaware

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[10] *See, e.g.,* A1546 (asserting that same $2.00 to $2.30 adjustment to unaffected trading price "would be required" if the deal price were "determined to provide a relevant starting point" with no explanation for deal price as starting point); A2056:19 (asserting at trial that unaffected trading price adjustments "would be exactly the same" to adjust the deal price, with no supporting explanation for why the deal price should be the starting point).

appraisal decision has "made adjustments to the deal price to reflect a valuation change during the post-signing period," even though a significant temporal gap between signing and closing for "widely held, publicly traded compan[ies]," like Stillwater, is common in modern mergers. Op. 104-105 (citing *Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.*, 847 A.2d 340, 358 (Del. Ch. 2004) (declining to make post-signing adjustments to deal price where no evidence that increases in value between signing and closing were "sustainable"); *In re PetSmart, Inc.*, 2017 WL 2303599, at *31 (Del. Ch. May 26, 2017) (declining to make post-signing adjustments to deal price where no evidence that increase in sales growth between signing and closing "was indicative of a long-term trend");[11] *see also* Op. at App. (collecting cases). The proponent of such an unprecedented adjustment therefore "must carry its burden by identifying a persuasive reason for the change and proving the amount." Op. 108; *see also Merion Capital LP v. BMC Software Inc*, 2015 WL 6164771, at *17 (Del. Ch. Oct. 21, 2015). Petitioners failed to carry their burden on both counts – Petitioners proved neither (i) a persuasive reason for the upward adjustment, nor (ii) the amount. *See* Op. 115 ("[Petitioners] failed to prove that the deal price should be adjusted upward.").

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[11] Contrary to Petitioners' assertions, *see* Br. 21, these cases are apposite because they all involve situations where, as here, the petitioners *failed to prove* that post-signing changes had permanent effects on value.

Petitioners did not and cannot identify a persuasive reason for an upward adjustment to the deal price because: (i) the fixed deal price included a built-in premium of 22.6% over Stillwater's unaffected trading price that absorbed any short-term commodity price fluctuations; (ii) Petitioners failed to show that the increase in the price of palladium between Signing and Closing was a permanent change that altered the long-term prospects of Stillwater; (iii) had Stillwater's fair value actually increased by Petitioners' alleged adjustment (*i.e.*, 25% above the deal price), a deal jumper would have emerged and none did; and (iv) the stockholder vote, which occurred mere days before Closing and after the spot price of palladium had increased, reflected the belief of sophisticated institutional holders of a supermajority of Stillwater's stock that the deal price was representative of fair value.

First, the Stillwater Board purposefully negotiated a fixed deal price of $18 per share, which included a built-in premium of 22.6% over Stillwater's unaffected trading price. The trial court found that, due to the short-term volatility of Stillwater's commodities, "Stillwater did not want the merger consideration to float with the price of palladium" because, as McMullen explained, Stillwater "wanted to know with certainty . . . the number that we were taking to shareholders as the value proposition," which the trial court sanctioned as "a legitimate goal." Op. 90. Indeed, Stillwater expressly carved out commodity price changes from the

Merger Agreement's definition of "Material Adverse Effect" in order to lock in the transaction in the event commodity prices *declined* after Signing. *See* A2495:16-A2496:17 ("[S]ome members of the Board especially were very concerned . . . about announcing a transaction and then having it fall away, or having the buyer have the ability to retrade price if metal prices fell.").

The legitimacy of the Board's decision to shield the deal price from the short-term fluctuations of the PGM market is evidenced by the fact that, while palladium prices increased between Signing and Closing, platinum prices *decreased* by 3.7%. *See* B188-B191. And while Stillwater's basket-weighted commodity prices increased by 5.9% between Signing and Closing, the trial court found that "the petitioners' criticism that the Board did not exercise its fiduciary out based on changes in commodity prices is another wrong turn" because "[t]he Merger Agreement was not attempting to give the stockholders the benefit of a transaction that included the potential upside or downside that would result from changes in the price of palladium after signing." Op. 90-91. Rather, the Merger Agreement was legitimately designed to provide stockholders with the "comparative certainty" of $18 per share deal consideration, which the Stillwater Board negotiated to be at a significant premium to market. *See* Op. 91.

Second, Petitioners failed to show that the increase in the spot price of palladium between Signing and Closing was a "sustainable" change "indicative of

a long-term trend" that altered the fair value of Stillwater. *Union Ill.*, 847 A.2d at 358–59 (rejecting proposed upward adjustment where petitioners "did not persuasively explain why th[e] brief uptick in [net income margin] signaled a sustainable trend"); *In re PetSmart*, 2017 WL 2303599, at *31 (rejecting petitioners' proposed upward adjustment to account for an "uptick" in sales growth because the "temporary [uptick] provided no basis to alter [the Board's] view of the Company's long-term prospects"). In fact, the record is unequivocal that the palladium and platinum markets are cyclical and highly volatile, as confirmed by Petitioners' own expert at trial. A2200:10-23 (referring to PGM prices as "all over the map"). As to the palladium market specifically, McMullen testified that:

> It's a more illiquid market . . . [with] quite significant price spikes and dips over the short run. And if you look at a 10, 20-year price chart of palladium, you can see it has long periods . . . five, seven, ten-year periods – of just sort of bungling along at a pretty low price, and then every now and then it has this sort of price spike that goes up quite high. The amplitude of that can be quite a lot, but they're very short lived, and then it comes back down again.

A2439:23-A2440:9.

Further, the Stillwater Board was aware that, while PGM prices may increase *in the short term*, palladium and platinum faced significant long-term risk as electric vehicles replace traditional vehicles in the coming decade. *See* B812 (slide, in Board presentation, titled "Precious metals in autocatalysis likely to

continue growth in short to mid-term, *but long term high risk from large-scale EV [Electric Vehicle] adoption*") (emphasis added). Recognizing the long-term impact of electric vehicles, the Chairman of Stillwater's Board testified that "during the next 20 years, the world is going to go to electric cars, they'll use substantially fewer gasoline and diesel cars . . . . As we switch to electric cars, the demand for platinum and palladium will markedly go down." A1854:23-A1855:5; *see also* A2440:23-A2441:9; A1408-A1409. At trial and in their briefing, Petitioners put forward no evidence to the contrary. Petitioners therefore failed to prove that the short-term palladium price increase at Closing was "indicative of a long-term trend" or had permanent value-increasing effect. *See PetSmart*, 2017 WL 2303599, at *31.[12]

Third, the absence of a topping bid during the 138-day post-signing market check validates the deal price. If Stillwater's value had in fact increased by

[12] On appeal, Petitioners point to the current spot price of palladium. *See* Br. 16 n.2. The current palladium price level resembles the "spike" described by McMullen which occurs before prices "come back down again" and is not indicative of a long-term trend. A2439:19-A2440:9. As Petitioners' own expert conceded in his opening report, palladium similarly hit a record high of $911 per ounce in 2014, only to come crashing down to $470 in January 2016. A1299. There is no basis to assume – and Petitioners have not proved – that any run-up in prices would be sustainable. In any event, these post-hoc factors are irrelevant, as appraisal petitioners are only entitled to fair value "as of the merger date." *Dell*, 177 A.3d at 5 (citing 8 *Del. C.* § 262).

more than $500 million, as Petitioners contend, a deal jumper would have perceived that value and offered more than the deal price. The alleged increase in value of $4.45 per share clears the negligible hurdle of the termination and reimbursement fees (*i.e.*, $26.5 million or 21.6 cents per share). Op. 111. Further, as the trial court noted, the spot price of palladium began to increase in February 2017, leaving ample time for a deal jumper to emerge, yet none did. Op. 112. The four parties who accessed Stillwater's material non-public information during the pre-signing process would have had a leg up and every incentive to submit a topping bid during the post-signing market check if Petitioners' claim of fair value inflation were true. As in *Dell*, Petitioners pointed to no evidence that another party was interested in bidding but was deterred from doing so. Op. 70 (citing *Dell*, 177 A.3d at 29); Op. 111. And Petitioners failed to show that Sibanye's matching rights, which compared favorably to the suite of deal protections in *Aruba* and *C&J Energy*, had any deterrent effect whatsoever. Op. 91 (rejecting Petitioners' "conclusory" objections to matching rights).[13]

Finally, the stockholder vote, which approved the deal price days before Closing and months after commodity prices became known to the market, is

[13] *See also Aruba*, 210 A.3d at 136 (finding that deal protections in merger agreement, which included matching rights, nevertheless provided potential buyers an open chance to bid); *see also C&J Energy Servs., Inc. v. City of Miami Gen. Emps.*, 107 A.3d 1049, 1068 (Del. 2014).

likewise persuasive evidence that no upward adjustment was appropriate. Op. 100. As the trial court noted, "the spot price of palladium was readily available public information that Stillwater's stockholders could take into account when deciding how to vote." Op. 91. "If stockholders" – nearly all sophisticated, institutional investors, *see* A1201 – "believed that the Company was worth more, they could have voted down the Merger and retained their proportionate share of the Company as a going concern," which presumably they would have done if Stillwater was worth 25% more than the deal price as Petitioners contend. Op. 100.

Although Petitioners raised perfunctory challenges to the stockholder vote by alleging that the proxy should have disclosed (i) McMullen's plans to leave the company; (ii) Wadman's resignation; and (iii) speculative resources prohibited from disclosure under S.E.C. Industry Guide 7, *see* Op. 97-98, *none* of these alleged disclosure defects (which Stillwater contests) has any relation whatsoever to *commodity price changes* between Signing and Closing, which is the sole factor upon which Petitioners base their purported deal price adjustment. Further still, the trial court found with respect to the proxy disclosure that it was "not convinced that [Petitioners'] arguments are sufficient to undermine the stockholder vote as an expression of the preference of a supermajority of Stillwater's stockholders for a

sale" of Stillwater at $18 per share. Op. 99. Stillwater's stockholders therefore ratified the $18 per share deal price as representative of fair value.

The trial court's findings that Petitioners "failed to prove that the deal price should be adjusted upward to reflect a change in value between signing and closing," Op. 115, and that the deal price acted as a *fair value ceiling*, were not an abuse of discretion and should therefore be affirmed.

b. Petitioners Failed to Prove the Amount of Any Post-Signing Adjustment.

Even if Petitioners had proved that short-term commodity price fluctuations between Signing and Closing required an upward adjustment to the deal price (which they did not), they failed to prove the amount. The proponent of any adjustment carries the burden of sufficiently quantifying the value of the adjustment. *See BMC*, 2015 WL 6164771, at *17 (declining to adjust for synergies because the record was not "sufficient to show what quantum of value should be ascribed" to the adjustment).

Throughout the course of this litigation, Petitioners have put forward inconsistent proposed adjustments to the deal price – beginning with a $2.00 to $2.30 adjustment initially, rising over time as set forth below, and now demanding an unsupported $4.45 adjustment. *Compare* A1542, A1546 *with* Br. 11-12. This inflated adjustment is yet another unprincipled attempt to create value where there

is none,[14] and should be rejected. A2056:16-19 (Petitioners' expert describing in conclusory fashion that application of an adjustment to the unaffected trading price to the deal price is "exactly the same"); Op. 110.

The evolution of Petitioners' proposed adjustment is as follows: in their expert reports and at trial, 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. *See* Op. 110; *see also* A1542, A1546. These figures were based on the unproven assumption that DCF adjustments to the unaffected trading price can be mapped onto deal price on a one-to-one basis, A2054:21-A2056:5, but as set forth above, they cannot. *See supra* Section II.C.1.a. In their pre- and post-trial briefing, Petitioners presented entirely different numbers based on the same faulty assumption. In their pretrial brief, Petitioners then argued for an upward adjustment to the deal price of $3.87, which was purportedly based on their valuation expert's price forecasts and WACC, applied to *BAML*'s DCF model. A1721. In their post-trial brief, Petitioners again changed the quantum of their

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[14] Notably, Petitioners' mining expert changed his DCF model following a $350 million cost mistake by later attributing an additional $296 million in value to Stillwater's Iron Creek and Boulder assets after initially assigning them no value due to the speculative nature of their inferred resources and the uncertain capital costs to develop them. *See* B1503; A1622.

adjustment by considering various WACCs, prices, and DCF models (set forth in a table) – and ultimately settled on an "average [adjustment] of $3.62 per share." A1720 n.224; A3014-A3016. One of the numbers in this table – which purportedly represents an adjustment based on Petitioners' WACC and prices, applied to *Respondent's expert's* DCF model – is $4.45. A3015. Though they did not argue for this specific adjustment in their post-trial brief, at post-trial oral argument, Petitioners argued for adding "at a bare minimum . . . the commodity price increase" of "$4 and change." A3425:8-22. When the trial court pressed Petitioners for the derivation of the various figures in their table, Petitioners again failed to provide any persuasive support:

> The Court: So your friend [Respondent] posited that he didn't know where you got the new range of petitioners' prices and WACCs that were on page 56 of your brief and 30 of the reply brief. *What is your response to that?* [Respondent] captures the chart that's on those two pages of your brief that talks about the impact of the commodity prices. *And he says new figures were presented in the following table, and he says he's not sure where you got your prices and WACCs*.

A3425:8-A3426:9 (emphasis added). In response, Petitioners asserted that their expert created the figures in the table from Bloomberg forecasts and his own WACC, A3426:10-15, but failed to provide any sufficient explanation to replicate their black-box calculation.

Petitioners' proposed $4.45 adjustment thus has no support in the record. Petitioners failed to explain how this figure was derived, and have never provided a rationale for their abandonment of their own expert's DCF model in favor of Respondent's DCF model combined with Petitioners' opaque prices and WACC (with the only conclusion left to draw that Petitioners selected this permutation because it yielded the highest value at $4.45). *See* Br. 18. Thus, even if Petitioners had shown that an adjustment to deal price was required (which they did not), they did not provide a reliable basis for its calculation. The trial court thus properly concluded that Petitioners failed to prove the quantum of any adjustment. *See BMC*, 2015 WL 6164771, at *17.

2. The Trial Court Satisfied Its Statutory Duty.

Having failed to satisfy their burden of proof, Petitioners attempt to pass blame onto the Court of Chancery, arguing that the trial court failed to meet its independent duty to determine fair value. In an appraisal proceeding, however, "the burden to establish fair value by a preponderance of the evidence rests on both the petitioner and the respondent." *In re Appraisal of Solera Holdings, Inc.*, 2018 WL 3625644, at *12 (Del. Ch. July 30, 2018). Accordingly, "the Court's first task . . . is to drill down on the parties' positions to see if they are grounded in the evidence and in sound methodology . . . . *Only then can the Court discern the*

extent to which further valuation analyses may be required." *PetSmart*, 2017 WL 2303599, at *25 (emphasis added).

Here, the trial court drilled down, in an opinion spanning 139 pages, on the "extensive evidentiary record" that comprised 283 stipulations of fact, 909 exhibits, 21 depositions, and testimony from three fact witnesses and seven expert witnesses over the course of a four-day trial. *See* Op. 2. As the court explained, its findings were "based on a preponderance of the evidence." Op. 2. Specifically, the trial court held that Sibanye "proved by a preponderance of the evidence that the sale process made the deal price a persuasive indicator of fair value." Op. 100. The trial court further found that Petitioners "failed to prove that the deal price should be adjusted upward to reflect a change in value between signing and closing." Op. 115. Thus, Petitioners' suggestion that the trial court abdicated its duty by failing to request supplemental briefing is a *non sequitur* that has no bearing on the issues before this Court. *See* Br. 25, 33–34.[15] That Petitioners failed to prove that any upward adjustment should be made is *their* failing, not the trial court's.

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[15] Nor is the trial court obligated to appoint an independent valuation expert. *See In re Appraisal of Shell Oil Co.*, 607 A.2d 1213, 1222 (Del. 1992) ("[T]he Court of Chancery has the inherent authority to appoint neutral expert witnesses[;] [t]here is, of course, no requirement that the court do so.").

III. THE TRIAL COURT'S DECISION DID NOT CONTRADICT ITS *DICTA* ON UPWARD ADJUSTMENT TO THE DEAL PRICE.

A. Question Presented.

Whether the trial court abused its discretion in discussing upward adjustment to the deal price in *dicta*. *See* Op. 111-114.

B. Standard of Review.

See supra Section I.B.

C. Merits of the Argument.

Petitioners make much of the trial court's discussion in *dicta* of potential "counterarguments," Op. 111-114, casting that discussion as the court being "unconvinced by its own ruling." Br. 41. To the contrary, the court's detailed consideration of arguments that Petitioners *did not make* and potential evidence that they *did not present* underscores the fact that Petitioners failed to prove their case, and shows that the trial court did in fact engage in a thorough analysis before determining that Petitioners failed to prove that an adjustment to the deal price was warranted. Accordingly, and for the reasons discussed above, *see supra* Section II.C, the trial court properly found that the unadjusted deal price was the best evidence of fair value.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's fair value award of $18.00 per share.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 20, 2019, a copy of the foregoing documents were electronically served via File & Serve*Xpress*, upon the following counsel of record:

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