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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SOURCEHOV HOLDINGS, INC., Respondent-Below, Appellant, v. MANICHAEAN CAPITAL, LLC; CHARLES CASCARILLA; EMIL KHAN WOODS; LGC FOUNDATION, INC; and IMAGO DEI FOUNDATION, INC., Petitioners-Below, Appellees.	No. 215, 2020 Court Below: Court of Chancery of the State of Delaware, C. A. No. 2017-0673-JRS

PETITIONERS-BELOW, APPELLEES' ANSWERING BRIEF

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Dated: September 25, 2020

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ABBREVIATIONS AND DEFINED TERMS

Appellant	SourceHOV Holdings, Inc.
Appellees	Manichaean Capital, LLC, Charles Cascarilla, Emil Khan Woods, LGC Foundation, Inc., and Imago Dei Foundation, Inc.
Apollo	Apollo Global Management
Backdated Valuation	Rothschild Project Komodo Discussion Materials Labelled "as of July 2017" that Rothschild in fact provided January 19, 2018
BancTec, Inc.	BancTec
Board	Board of Directors
Bloomberg	Bloomberg pricing service data
Chadha	Parvinder Chadha, founder, CEO and CIO of HandsOn, and SourceHOV Board Chairman
CCF	Capital Cash Flow
CEO	Chief Executive Officer
COO	Chief Operating Officer
DCF	Discounted Cash Flow
Delos	Delos Investment Fund, LP
E&Y	Ernst & Young
Exela	Exela Technologies, Inc.
Ex-Sigma	Ex-Sigma LLC
HandsOn	HandsOn Global Management, LLC
Jonovic	Andrej Jonovic, HandsOn executive, and son-in-law of Chadha
KPMG	KPMG, LLC
mCapM	Modified version of the Capital Asset Pricing Model
Manichaean	Manichaean Capital, LLC, Charles Cascarilla, Emil Khan Woods, LGC Foundation, Inc., and Imago Dei Foundation, Inc.

Millstein	Millco Advisors LP
MDP	Madison Dearborn Partners
Novitex	Novitex Holdings, Inc.
PIPE	Private Investment in Public Equity
Quinpario	Quinpario Acquisition Corp. 2
RBC	Royal Bank of Canada
Rothschild	Rothschild, Inc.
S&P CCC Bond Index	S&P U.S. Dollar Global High Yield Corporate Bond CCC Index
SourceHOV	SourceHOV Holdings, Inc.
SPAC	Special Purpose Acquisition Company
TransCentra	TransCentra, Inc.
Verma	Anhubhav Verma, SourceHOV finance executive
WACC	Weighted Average Cost of Capital

NATURE OF PROCEEDINGS

The Court should affirm the trial court's valuation of SourceHOV's equity at $4,591 per share, because it is firmly supported by the record and valuation principles. In its 76-page opinion, the trial court "carefully consider[ed]" the extensive evidentiary record. Op. 2. It held that Manichaean, with one exception, proved its "credible valuation" by a preponderance of the evidence and generally-accepted valuation principles. *Id.*

On each key issue, the trial court found SourceHOV's position "[i]n a word … incredible." Op. 3. SourceHOV (i) "disagreed with its own expert over which revenue projections to use" and over "fair value"; (ii) created a "Backdated Valuation" during litigation that it falsely tried to pass off as made in July 2017; and (iii) used a novel beta method that is not generally accepted and is inflated based on severely inaccurate Bloomberg data for privately-traded loans. Op. 53.

Desperate to avoid its severe credibility issues, SourceHOV on appeal incorrectly argues for the *de novo* standard of review that applies to statutory construction of Section 262. SourceHOV is wrong. The trial court ruled based on "credibility." Op. 52. Because the trial court carefully considered the evidence yet "ultimately chose not to accord" SourceHOV's arguments "any weight," the standard of review "must" be "whether the Court abused its discretion." *M.P.M. Enters. Inc. v. Gilbert*, 731 A.2d 790, 795 (Del. 1999). Under this highly deferential standard, the trial court's findings should be affirmed.

First, Manichaean's expert Meinhart followed standard valuation principles requiring that, for a private company like SourceHOV, the asset "beta must be an estimate based on the … betas of comparable, publicly traded companies."[1] His conservative 1.21 asset beta was based on 19 Guideline Publicly Traded Companies ("GPTCs") identified through a robust search. These GPTCs were particularly reliable, because they were also identified by SourceHOV "itself as comparable" and "by analysts, [and] others analyzing" SourceHOV, including advisers Rothschild, Morgan Stanley, and E&Y.[2] Meinhart directly addressed SourceHOV's capital structure by using three widely-used levering formulas to calculate beta, which is "the exact de-levering process" that valuation authorities recommend to address leverage differences. Op. 63.

SourceHOV's expert Jarrell admitted there is a "stack of books this high," supporting Meinhart's approach. A0877 at 829:5-22. But he abandoned this approach for a novel approach that he had "not seen" or "done" before, *id.* at 828:17-23, and that was inflated by inaccurate Bloomberg data, Op. 60-61.

Second, Meinhart properly chose a 9.73% cost of debt using a widely-used S&P CCC Bond Index that matched SourceHOV's CCC+/Caa1 rating. This was

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[1] *Blueblade Capital Opps. LLC v. Norcraft Cos.*, 2018 WL 3602940, *33 (Del. Ch. July 27, 2018) (citation omitted).

[2] *DFC Glob. Corp. v. Muirfield Value P'rs, L.P.*, 172 A.3d 346, 358 (Del. 2017).

consistent with Delaware cases and valuation authorities recognizing that in calculating the "Debt Cost of Capital …. estimates based on the debt's rating may be used."[3] Indeed, Meinhart is supported by the bond index SourceHOV's own expert cited, which had an 8.91% yield for CCC-rated bonds. A0835-36 at 661:1-664:23; B1972. In contrast, SourceHOV is wrong in citing yields-to-maturity at issuance for its 2014 debt and Exela's bonds, since they do not support Jarrell's 11% cost of debt, and are widely-known to "overestimate the debt cost of capital." (Op. 61 n.297 (citing A3993).)

Third, the trial court correctly chose the Lender Model projections as most reliable, because they were the most updated version of the 5% Equity Case that even *SourceHOV's own trial expert* adopted as most reliable. SourceHOV's appeal argument that it was "not in disagree[ment]" with Jarrell (Br. 37) is refuted by its own trial brief admitting this fact. B473; B517. Further, the Lender Model projections are the most updated projections, and are entitled to "great weight" because they were exclusively used with advisers, lenders, rating agencies and counterparties, whose input they incorporated.[4] They were also consistent with SourceHOV's operative reality of 10.1% revenue growth from 2014 to March 31,

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[3] B2375, Jonathan Berk & Peter DeMarzo, Corporate Finance p.432 (Pearson Educ. Ltd., 4th ed. 2017) ("Berk 4th"); *In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54, 109 (Del. Ch. 2014), *clarified on denial of rearg.*, 2014 WL 1094173, *2 (Del. Ch. Mar. 19, 2014) ("cost of debt" based on bond index).

[4] *Owen v. Cannon*, 2015 WL 3819204, **19-21 (Del. Ch. June 17, 2015).

2017, and more accurate in predicting first quarter 2017 results.

Moreover, SourceHOV's claim of "near certain default," Br. 1, is contradicted by its pre-trial admissions that "default was unlikely." Op. 19. Shortly before the Merger, SourceHOV admitted that:

> "The Company did not default or restructure debt to avoid default on any of its loans during the year ended December 31, 2016 and does not anticipate any defaults for one year after the date the December 31, 2016 financial statements are expected to be issued…." B1446.

SourceHOV's claim is also refuted by its financial adviser Rothschild's pre-litigation February 15, 2017 DCF valuing SourceHOV's equity at $931 million.

Finally, the record supports the trial court's factual finding that SourceHOV's second quarter 2017 results were not available as of the Merger. On the Merger date, SourceHOV admitted that "n[o] … financial statements are available as of any date or for any period subsequent to March 31, 2017." B1965. The day before the Merger, SourceHOV admitted only having "estimates" for May 2017 income. These pre-litigation admissions are directly on point, and should be dispositive.

Accordingly, the trial court's Opinion should be affirmed in its entirety.

SUMMARY OF ARGUMENT

In response to Appellant, Respondent-below:

1. Denied. The trial court did not abuse its discretion by finding that Manichaean's asset beta, cost of debt and management projections were by a preponderance of the evidence credible and supported by standard valuation techniques; *and* far more credible than SourceHOV's position, which: (i) relied on admittedly novel beta methodology unsupported by the record, (ii) used inaccurate and unreliable Bloomberg price data for the cost of debt; and (iii) disagreed with its own expert as to the most reliable projections and SourceHOV's equity value.

2. Denied. The trial court did not abuse its discretion in finding that SourceHOV's second quarter 2017 results were not reasonably available as of the July 12, 2017 Merger, because SourceHOV admitted on that date that "n[o] … financial statements are available as of any date or for any period subsequent to March 31, 2017." B1965. SourceHOV similarly admitted on July 11, 2017 that it only had estimates for May 2017 income statements.

3. Denied. The trial court did not abuse its discretion in its credibility determination that SourceHOV's Chadha was "not believable" because of his "litigation-driven effort" to "create [a] Backdated Valuation" and pass it off as being made in July 2017, and his "failure to acknowledge that scheme when it was finally exposed in discovery, taints all of his testimony." Op. 56-57.

COUNTER-STATEMENT OF FACTS

This action relates to a July 12, 2017 merger ("Merger") in which SourceHOV, a private company, became a wholly-owned subsidiary of Exela subsidiary Ex-Sigma. B536. The Merger was part of a Business Combination through which SourceHOV combined with Novitex, and Nasdaq-listed SPAC Quinpario, and the combined company was renamed Exela. B537.

A. The Parties

Manichaean owned 10,304 shares of the common stock of *Id.*; B538-39 ¶¶1-5; B1890-93.A0753-54 at 448:18-449:2. They formally became SourceHOV stockholders in 2014, when a SourceHOV affiliate acquired BancTec. *Id.*; A2721. Manichaean collectively invested a total of "$32 million" into their SourceHOV investment. A0754 at 450:7-11.

SourceHOV is a business process outsourcing and financial technology company that had three business units: (i) Information and Transaction Processing Solutions; (ii) Healthcare Solutions, providing consulting and outsourcing; and (iii) Legal and Loss Prevention Solutions. B539 ¶7; A2722.

SourceHOV's controlling stockholder was HandsOn, a family investment office run by Parvinder Chadha, HandsOn's CEO and founder. B540 ¶9. HandsOn and its affiliates held approximately 80% of SourceHOV common stock. A0733 at 368:20-23. Chadha was SourceHOV's Board Chairman, and HandsOn Partner and

COO Jim Reynolds was Board Co-Chairman. B540 ¶¶ 10-11.

B. SourceHOV's Strategy of Growth Through Acquisitions

SourceHOV's was formed in April 2011 through the combination of two firms. A2721. In November 2014, SourceHOV acquired BancTec, which expanded its services into the banking and payments industry. *Id.*; A0693 at 305:10-13.

In September 2016, SourceHOV acquired TransCentra, an outsourced "biller" and "payment processor." A2848. By "November 1, 2016," B1169, SourceHOV sought to acquire Novitex, a document management and digital business services provider. A2476. Novitex's majority stockholder was Apollo. B541 ¶17. HandsOn and Apollo originally discussed "an all-cash acquisition" of Novitex. A2623.

C. The Merger and Business Combination

By January 3, 2017, SourceHOV hired new financial advisers, Rothschild and Morgan Stanley, and pursued a different Novitex deal structure: a combination adding Quinpario, B542 ¶¶25, 27; B545 ¶41, which would give access to the public markets. A2623-24; A0670 at 215; B545 ¶41.

On February 21, 2017, the parties executed the original Business Combination Agreement. A2597. The original Proxy Statement disclosed a "SourceHOV Existing Equity Value" of "$806" million. B1719. As Rothschild testified, this value was based on an "IPO discount" of "25 percent," A3478, to the fully-distributed $1.003 billion value of Exela stock to be exchanged for SourceHOV stock. A0140 at 127.

On June 15, 2017, the parties revised the Business Combination. A2452-53; A2619. The revisions (i) placed SourceHOV's pre-deal stockholders in Ex-Sigma, (ii) had Quinpario contribute less cash ($33.4 million, down from $200 million), and (iii) increased the PIPE Investment to $242.1 million (from $74 million). Ex-Sigma received 54.9% of Exela stock, giving HandsOn majority control. A2452-53; A2619.

SourceHOV was the Business Combination "acquirer" as "the largest entity" with the greatest voting power and management control. A2513. The revised Proxy Statement disclosed $"645" million as "SourceHOV's Existing Equity Value," A2529, based on the value for 80,600,000 shares to be paid in exchange for SourceHOV stock ($8 per Exela share) after a 25% IPO discount. A2577. Excluding the discount, the fully-distributed value was "$806" million. A3501.

SourceHOV went years without a board meeting, including for the Merger. Although Manichaean had information rights, SourceHOV rarely provided financial statements. A0767 at 502:5-504:2.

D. <u>SourceHOV's Operative Reality Was a History of 10% Compound Annual Revenue Growth Rates</u>

SourceHOV had a history of 10% compound annual revenue growth ("CAGR"). From 2014-2016, SourceHOV's core business CAGR, was "10.2%," B1677, from $651 million to $790 million. A2843. From "2014 to LTM 3/31/17"

(March 31, 2017) its revenue CAGR was "10.1%." B1028. Its revenue grew "9.3%" in first quarter 2017. A2724.

Similarly, SourceHOV had 4.2-10% revenue growth from 2010-13:

SOURCEHOV REVENUE GROWTH FROM 2010-2013[5]

	2010	2011	2012	2013
SourceHOV Revenue (millions)	$480	$500	$525	$577
Annual Growth Rate	N/A	4.2%	5%	10%

E. SourceHOV's History of Creating and Meeting Projections

SourceHOV regularly made financial projections. A0643 at 107; B735-803; A2000-01; B1751. And it had a "Track Record of Meeting Targets." B942; B789.

First, SourceHOV's March 2017 5% Lender Model Projections accurately predicted first quarter 2017 revenue and gross profits, determined months later on May 15, 2017. B1720; B1472-79. SourceHOV's Mr. Verma, who helped create projections, admitted: "lender model projections came in close to the actual" revenue for "Q1 2017," A0649 at 131:6-132:13, which came in "closer to the lender model than they did for the bank case," A0650 at 133:10-134:2.

SourceHOV Met Lender Model First Quarter 2017 Projections

	Rev.	Gross Profit
Lender Model[6]	$218.7M	$63.4M
Actuals[7]	$218.3M	$74.6M

5 B791 ("Revenue" "480"-"525" million 2010-12, "CAGR: 5%"); B942 (2013 "Actual" revenue $"577" million).

6 B1475, lines 10 & 15.

7 A2507; A2724; A3410-11.

Actuals vs. Model	**Hit**	***Beat +17.6%***

Second, SourceHOV beat its 2016 Credit Agreement Adjusted EBITDA projections that it made in fourth quarter 2015. "[A]ctual Adjusted EBITDA … of "$185[]" million," beat the projected "$183.9 million." B1443.

Third, SourceHOV met its April 2013 multi-year projections for 2013-2016:

SourceHOV Beat 2013-2016 Projections

(in millions)	**2013**	**2014**	**2015**	**2016**
Apr. 2013 Projections	$555[8]	$575	$596	$618
Actuals	$577[9]	$651[10]	$805	$790
Result	Beat 4%	Beat 13%	Beat 35%	Beat 28%

Fourth, SourceHOV met its April 2011 revenue projections for 2011-2013:

(in millions)	**2011**[11]	**2012**	**2013**
April 2011 Projections	$500	$520	$536
Actuals	$500	$525	$577[12]
Result	Met	Beat 1%	Beat 8%

F. The 5% Revenue Growth Lender Model Was SourceHOV's Most Updated Set of Projections, and was Exclusively Used with Financial Advisers, Deal Partners, Rating Agencies and Lenders

The 5% "Lender Model" was updated from the 5% growth "Equity Case" in March 2017, and was the most reliable.

[8] B797 (2013-2016 projections).

[9] B910.

[10] A2354 (2014-2016 actuals).

[11] B942 ("April 2011" projections and 2011-2013 actuals).

[12] B910.

1. <u>SourceHOV's Own Expert and Management Chose the 5% Revenue Growth Projections as Most Reliable</u>

SourceHOV's projections resulted from a robust, "iterative process" with multiple layers of feedback. A0620 at 14:1-15:8; A0276 at 31:19. After a robust review, the Board "sign[ed] off" on them. A0620 at 15:9-22. *First*, Verma admitted that management stood behind the 5% Equity Case projections over the Bank Case:

> "A. They could simply select bank case or equity case, and you know, get the answer that they were looking for.
>
> Q. ***Well, when people said, 'Well, what is the projections management stand behind,' how did they figure that out?***
>
> A. ***So those were the equity case projections***."[13]

Second, *SourceHOV's own expert* chose the "Equity Case" 5% revenue growth projections as "the most reliable indicator of value of SourceHOV's shares … and based his fair value determination entirely upon that analysis." B517; A3602 ¶111.

2. <u>SourceHOV Exclusively Used 5% Revenue Growth As its "Base Model" and "Conservative" Projections with its Auditor, Financial Advisers, Ratings Agencies and Lenders</u>

SourceHOV exclusively used 5% revenue growth projections as its base

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[13] A0276 at 33:2-19 (emphasis added); *accord* A0620-21 at 16:14-17:7; A0644 at 111:8-14.

model projections in at 10 key presentations.[14]

First, financial adviser Rothschild exclusively used the 5% Equity Case projections in a February 15, 2017 "valuation" presentation for "board" consideration in "deciding on fairness or unfair opinion." A3467-68; A3476. ***Rothschild's "Standalone SourceHOV [] DCF" equity valuation was "$931" million.*** A3482 (emphasis added).

Second, SourceHOV on March 14, 2017 identified the 5% Equity Case as its "base model projection" in a standard, FASB-required Memo to auditor KPMG for purposes of auditing financial statements ("KPMG Memo").[15] The KPMG Memo identifies the Equity Case as "base model" or "base projections" *at least 16 times*. B1441, 1444-45, 1449-50, 1459, 1462. Only the Equity Case was formally labelled the "base model." A0648 at 126:6-127:9; A0652 at 142:1-3.

Third, SourceHOV presented only the 5% Lender Model projections to Rating

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[14] B1355 (Apollo); B1323 (Morgan Stanley); B1331 (Rothschild); A1699-1927 & B1362 (Rating agencies, "Working Cap" Tab, "SourceHOV Standalone"); B1426 (public); A3476 (Rothschild); B1442 & B1463 (KPMG, "FCF-Base Model" Tab); B1472-75 (Rating Agencies, line 10, columns M-Q); B1757 (Lenders); B1762 (Lenders).

[15] B1456 ("base model projection provided by Anhubhav Verna [sic]"); *accord* B1463 ("FCF-Base Model" Tab, lines 55-59, columns k-v). "[A]ll entities" were required to provide auditors with such a memo analyzing their ability to continue as a going concern, under a "new standard" that became "effective for annual periods ending after December 15, 2016, and interim periods thereafter," FASB Standards Update (ASU) 2014-15. B1435-36.

Agencies and Lenders like RBC from March through June 27, 2017.[16] As Verma admitted, the Lender "model was also based on the equity case" and "lenders were not actually provided with the alternative bank case." A0648 at 127:10-20.

Fourth, SourceHOV only used the Lender Model in a May 2017 KPMG Memo Update, attaching it as the 2017 "Base Model," and calling its projections "conservative."[17]

3. In March 2017, SourceHOV Updated Only the Lender Model – Not the Bank Case

The Lender Model 5% projections were updated in March 2017 based on "feedback" from "bankers," like RBC Capital, rating agencies, and Apollo.[18] SourceHOV did not update the Bank Case.

G. The Proceedings Below

1. Manichaean Expert Meinhart Used Standard Valuation Techniques in Calculating SourceHOV's Asset Beta

Manichaean's expert applied standard valuation techniques in identifying "publicly traded peer group companies" and "deriv[ing] betas ... from those peer group companies … as a proxy for the beta" of SourceHOV's assets. A0791 at

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[16] B1475, line 10 columns M-Q (rating agencies); B1760-62 (lender RBC); B1799 (same); B1757 (lender Morgan Stanley).

[17] B1710; B1713 (2017 "$911.4" million "Base Model" Output-4 Tab).

[18] A0277 at 34:15-25; B1464-66 (Apollo); B1471 (Apollo); B1472 (RBC, attaching "Komodo RAP Model vAgencies.xlsx").

597:17-598:5. Respondent's expert admitted this is supported by academic literature:

> "The textbooks are all going to be … you've got to do this [peer betas]….Yes, you'll find that everywhere. ***Mr. Meinhart explained it, and I agree. A stack of books this high…. Lots of authority for it.***"[19]

First, Meinhart identified 19 GPTCs through independently searching S&P Capital IQ's database using seven "Standard Industrial Classification" codes, three industry classifications and eight key words. A0791 at 598:14-600:14; A3847-48; A3887-95 (describing GPTCs).

Second, Mr. Meinhart ranked his 19 GPTCs into three groups, as follows:

- **<u>Group 1:</u>** Three GPTCs, in bold below, that also were identified by (a) SourceHOV's advisor E&Y as comparable *to all three SourceHOV business units* in a March 2017 goodwill impairment memo, and (b) Rothschild's February 2017 Valuation and SourceHOV's deal Proxy.

- **<u>Group 2</u>**: Fourteen GPTCs, in italics below, that were identified as comparable by Meinhart, Rothschild, and SourceHOV in the deal proxy.

- **<u>Group 3</u>**: Two independently identified by Meinhart, MicroStrategy and Global Payments.[20]

[19] A0877 at 829:5-22 (emphasis added); *accord* A3932: Pratt & Grabowski, 204 *Cost of Capital, Applications and Examples*, 204 (5th ed. Wiley & Sons 2014) ("Pratt & Grabowski").

[20] A0791-93 at 600:15-606:6; A3848-49.

GPTC Overlap: Rothschild, SourceHOV, E&Y & Meinhart

Rothschild Feb. 2017 Valuation[21]	SHOV Proxy Statement[22]	E&Y March 2017 Goodwill Memo[23]	Meinhart Search[24]
Fidelity Info.	**Fidelity Info.**	**Fidelity Info**	**Fidelity Info.**
Fiserv	**Fiserv**	**Fiserv**	**Fiserv**
Jack Henry	**Jack Henry**	**Jack Henry**	**Jack Henry**
Black Knight	*Black Knight*		*Black Knight*
Broadridge	*Broadridge*		*Broadridge*
Capita plc	*Capita plc*		*Capita plc*
Cognizant	*Cognizant*	*Cognizant*	*Cognizant*
Computershare	*Computershare*		*Computershare*
Conduent	*Conduent*		*Conduent*
DST Systems	*DST Systems*		*DST Systems*
Exlservice Hldgs.	*Exlservice Hldgs.*	*Exlservice Hldgs.*	*Exlservice Hldgs.*
First Data	*First Data*		*First Data*
Genpact	*Genpact*	*Genpact*	*Genpact*
Iron Mountain	*Iron Mountain,*		*Iron Mountain*
Open Text Corp.	*Open Text Corp.*		*Open Text Corp.*
Wipro Ltd.	*Wipro Ltd.*	*Wipro Ltd.*	*Wipro Ltd.*
WNS (Holdings)	*WNS (Holdings)*	*WNS (Holdings)*	*WNS (Holdings)*

Morgan Stanley also identified 11 of Meinhart's 19 GPTCs as comparable: Fidelity Info., Fiserv, Jack Henry, First Data, Genpact, ExlService, WNS, Iron Mountain, Open Text, Cognizant, and Wipro. B1104.

Third, to address SourceHOV's leverage, Mr. Meinhart used three widely-accepted unlevering formulas – "the Hamada formula, the Harris-Pringle formula, and the Fernandez formula" – to unlever and lever the betas, using three different

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[21] A3480-81.

[22] A2710-11.

[23] B1547.

[24] A3848-49.

company leverage ratios. A0827 at 627:14-21. Two of the ratios were SourceHOV's *actual* "capital structure," reflected "in Rothschild's" February 2017 and Backdated Valuations.[25] Valuation authorities recommend this exact process of using unlevering formulas to control for leverage differences.[26]

Meinhart's Use of Beta Unlevering Formulas[27]

Unlevering Formula	Unlevered	Relevered 17% Debt	Relevered 62.1% Debt	Relevered 51.5% Debt
Hamada	1.210	1.366	2.459	2.019
Harris-Pringle	1.203	1.412	2.011	1.726
Fernandez	1.210	1.343	1.726	1.545

Meinhart chose the Hamada formula as the most "widely accepted" formula. A0828 at 633:3-634:2.

Fourth, Meinhart conservatively chose a 1.21 unlevered (asset) beta using the "highest beta" of the 19 GPTCs – not the 0.81 median. A0827 at 628:13-629:1. By using the highest, Meinhart incorporated all 19 GPTCs, so any subset supports his asset beta.

Notably, Meinhart's asset beta was higher – and more conservative – than the asset beta for all three GPTC firms of a similar size to SourceHOV:

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[25] A3836-37 & nn.61-62 (citing A3477 (51.5% debt), and A3501 (62.1% debt)).

[26] A3937 (Pratt & Grabowski p.244 "Formulas for Unlevering and Levering Equity Betas"); A3970 (Damodoran, *Investment Valuation*, 199 (3d. ed. 2012) ("Damodoran") ("process of levering and unlevering of betas allows us to control for differences in financial leverage")).

[27] A3875.

Company	Enterprise Value	Unlevered Beta[28]
Exl Service Holdings Inc.	$1.69 billion	0.873
WNS (Holdings) Limited	$1.66 billion	0.81
MicroStrategy Inc.	$1.53 billion	1.203

Meinhart also used a size premium to "adjust for the size differential between SourceHOV" and other firms. Op. 63 (quoting A3834).

Finally, Meinhart calculated discount rates for his DCF and CCF models. He relevered betas using the three different capital structures. And he estimated a DCF Present Value Discount Rate of 11.2 percent using mCAPM. A0830-31 at 639:24-646:11; A3834-40; A3843-45.

For his CCF, Mr. Meinhart used the 1.21 unlevered (asset) beta for the pre-tax WACC.[29] He applied the 1.21 beta using mCAPM to estimate SourceHOV's "unlevered cost of equity capital" at 12.0%, as "the most convincing support for the proper present value discount rate." A0832 at 647:11-650:14; A3842; A3873. He also conservatively used the three capital structures, and chose a "12.4%" discount rate, in the range of all inputs. A0832-33 at 650:15-652:21; A3873.

Placing 50-50 weight on DCF and CCF, Meinhart calculated a $1.81 billion enterprise value, and a $798.7 million equity valuation, or $5,079 per share. A0831

[28] A3875-76.

[29] A3828; A0827-28 at 629:2-631:21; B2306, Richard S. Ruback, "Capital Cash Flows: A Simple Approach to Valuing Risky Cash Flows," 89, *Financial Management* (Summer 2002) (CCF is a modified DCF method that calculates discount rate on unlevered basis, and addresses leverage at later stage in process).

at 646:2-12, A0833-34 at 652:22-656:17; A3846; A3852-53. He also calculated a GPTC $2.074 billion enterprise valuation. But he had "more confidence in" his DCF and CCF conclusions. A3852.

2. <u>Meinhart Conservatively Selected a Cost of Debt Based on SourceHOV's Credit Rating</u>

Meinhart followed standard valuation techniques by conservatively selecting SourceHOV's cost of debt using the 9.73% weighted average market yield from the widely-used S&P CCC Bond Index, following the index's methodology.[30] This was based on SourceHOV's CCC+/Caa1 debt rating on the Merger date. B1383 ("Caa1"); A1536-38 ("CCC+"). Valuation authorities recognize that in calculating the "Debt Cost of Capital …. estimates based on the debt's rating may be used." B2375 (Berk 4th p.432).

Indeed, Respondent's expert Jarrell relied on an ICE "Bank of America Merrill Lynch Bond Index with a credit rating of CCC and lower" in his report. A3629. Using only the CCC-rated bonds in Jarrell's bond index, its yield was 8.91% – lower than Meinhart. A0835-36 at 661:1-664:23; B1972.

<u>Meinhart and Jarrell Bond Indexes with CCC-Rated Bonds</u>

Source	Cost %
Meinhart: S&P CCC Bond Index	9.73%
Jarrell: ICE BAML 10+ Year Index, CCC-Only Bonds	8.91%

[30] A0830-31 at 642:2-643:7; A3838; B2361 (S&P CCC Index uses "Market value weighted" "Weighting Method").

Meinhart's cost of debt is also conservative compared to the weighted average yields of the S&P CCC Bond Index bonds with SourceHOV's exact CCC+/Caa1 rating – and similar maturities:

S&P CCC Index Groups	Weighted Average Yield 7/12/17
Entire Index[31]	9.73%
CCC+ and Caa1-Rated Bonds Only[32]	8.35%
CCC+/Caa1-Only w/5-10 yr. Duration	7.44%

The 9.73% cost of debt is also conservative given SourceHOV's "weighted average interest rate of 9%" on total "debt outstanding" on the Merger date. A2737-38; A3838; A3713.

3. SourceHOV's Expert Abandoned Standard Valuation Techniques by Using a Novel Beta Method Created-for-Litigation, Which He Improperly Inflated Using Incorrect Data

SourceHOV's expert admittedly used a made-for-litigation beta method:

> "But just a taking a beta of the debt and saying, I'm done, I'm going to use that as my minimum possible estimate for the unlevered asset beta, I've not seen that. I've not done that. I thought of that for this case because of these facts. I think it's—hopefully, it will catch on."[33]

The trial court refused to be a "laboratory" for a new theory. Op. 59 n.287.

Jarrell also violated valuation principles. *First*, he violated the settled principle that when valuing a private "closely held business," "[y]ou need to use a

[31] A3838; B2425.

[32] A0831 at 643:9-18; B2270-72 (spreadsheets of CCC+/Caa1 & with 5-10 yrs.).

[33] A0877 at 828:17-23.

proxy beta … estimated by [i]dentifying guideline public companies." A3932 (Pratt & Grabowski); B2380 (Duff & Phelps, *2018 Cost of Capital Navigator*).

Second, Jarrell overstated his debt beta by relying on Bloomberg pricing data that used false information about SourceHOV's bank loans, including:

- Falsely reporting that SourceHOV had an extra $550 million in debt: a (i) "SRCHOV TL 1L USD" tranche of "$350" million with a false "Maturity of "4/29/17" and (ii) a "SRCHOV TL 2L USD" tranche of "$200" million with a false "Maturity" of "4/29/18." A0757-59 at 463:6-469:4; B1028.

- Falsely reporting prices for the nonexistent "SRCHOV TL 1L USD" loan from 2014 through April 28, 2017. A0759-60 at 471:1-475:3; B1032; B2452-51.

- Not using "actual trading" prices or trading "volume" information. A0331 at 48:5-24; *accord* B1033; B1192 (no reported trades).

Jarrell improperly used such data, since the loans were not publicly traded. They were private bank loans that only "trade[d] by appointment," "not on an exchange," and had no efficient market. A0760 at 473:16-24; A0887 at 870:13-19 (same). Jarrell's report admits relying on "Bloomberg" data – and nothing else supports the calculation of his 11% debt rate. A3589 & n. 101; A3629.

Third, Jarrell violated the valuation principle that "Betas of debt generally correlate with credit ratings," by ignoring the Duff & Phelps, *Cost of Capital* debt beta of 0.71 for Caa-rated debt with like SourceHOV's. B2393-94. His 1.4 beta is *double* the Duff & Phelps 0.71 debt beta for Caa-rated debt on June 30, 2017.

4. **<u>SourceHOV Disagreed with its Own Expert, Backdated a Valuation Created Mid-Litigation, and Spun a False Tale of 'Near Certain Default' that is Refuted by its Own Pre-Trial Admissions</u>**

At the trial level, SourceHOV abandoned its credibility to pursue a litigation-driven valuation. *First,* it *disagreed with its own expert* both as to its equity valuation ($271.4 vs. $468.1 million) and in arguing for a Bank Case over 5% projections. Op. 54. Jarrell repeatedly admitted, including under oath, that his "fair value of SourceHOV's equity" opinion was "four hundred sixty-eight point one million dollars." A0323 at 15:11-15; B2276. SourceHOV's trial brief admits Jarrell chose the "Equity Case" 5% projections as "the most reliable indicator of value of SourceHOV[] … and based his fair value determination entirely upon that analysis." B517; A3602 ¶111; A0857 at 752–53.

Second, SourceHOV made a false, litigation-driven claim of "near certain default" (Br. 1) that is contradicted by its pre-trial admissions "that a default was unlikely," Op. 19, including:

- SourceHOV certified compliance with debt covenants for all quarters pre-Merger, and made required debt payments. B1037-38; B1127-28; B1614-15; B1747-48.

- None of SourceHOV's financial statements received a going concern qualification from auditor KPMG.

- On March 14, 2017, SourceHOV told auditor KPMG:

    - "***The Company did not default or restructure debt to avoid default on any of its loans … and does not anticipate any defaults for one year after the***

date the December 31, 2016 financial statements are expected to be issued…," B1446 (emphasis added), and

- The "Company did not trip any of the loan covenants … and does not anticipate they will after the date the December 31, 2016 financial statements are expected to be issued." *Id.*

- In May 2017, just two months pre-Merger, SourceHOV told KPMG: "***The Company continuously monitors its covenant compliance*** …. Further, ***the Company does not anticipate any financial difficulties or liquidity issues … for one year after the date the December 31, 2016 financial statements were issued***….," and

  - "The Company believes they will have access to sufficient capital resources to fund its business for at least the next twelve months, ***including the repayment of debt obligations if needed***." (B1710-11 (emphasis added).)

- SourceHOV made similar representations on July 12, 2017. B1842; B1965.

- Reynolds admits that after raising $20 million in late-2016/early-2017, SourceHOV had a "cushion" to meet debt covenants, "for over a year."[34]

- Debt rating agencies did not downgrade SourceHOV's debt between September 2016 and the Merger. A0672 at 223:1-224:15.

Third, SourceHOV engaged in misconduct by having Rothschild create a reduced valuation in January 2018 (*four months into litigation*), backdating it, and passing it off as being presented in "July 2017." On January 3, 2018, Chadha directed his son-in-law, Jonovic, to get a "revised" valuation from Rothschild.

[34] A0051 at 60:10-20; A0059-60 at 93:23-94:5. Meinhart and the trial court rejected the capital raise price as unreliably low, due to its "conflicted nature"—HandsOn and Delos both set the price and invested—and it was well below Rothschild's $931 million "value" at that time. (Op. 37 n.184 (quoting A3854).)

B548-49 ¶¶63-64. When Rothschild dated the valuation January 2018, Jonovic emailed Chadha, then asked Rothschild to change the date: "the cover page says Jan 2018, …. Happy for it to simply say July 2017." B550 ¶71. After Rothschild changed the date, Jonovic emailed Chadha "Done." *Id.* ¶72; B2207-8.

The Backdated Valuation reduced Rothschild's SourceHOV Standalone DCF" by "$250 million," from $931 million in February 2017, to $675 million. A0691 at 297:3-21. Its purpose was for use in this action. A0746 at 418:7–419:7.

SourceHOV produced the Backdated Valuation without metadata, and without the related January 2018 emails. B550-51 ¶¶73, 76. It only produced the related emails *after* Manichaean demanded production when Rothschild disclosed the truth months later. *Id.*; A0146 at 152:8-19. SourceHOV's June 2018 Interrogatory Responses prove intent to backdate: It swore Rothschild presented the Backdated Valuation at a meeting "in … July 2017." A3551. After getting caught, Chadha and Jonovic kept lying, by claiming the Interrogatory Response was "accurate." A0501 at 119:14-121:11; B352 at 143:2-145:17.

5. <u>The Trial Court Properly Determined SourceHOV's Equity Value was $4,591 Per Share</u>

On January 30, 2020, the trial court issued its Opinion that SourceHOV's equity value was "$4,591 per share." Op. 76. Through 76 pages, the trial court "carefully consider[ed] the evidence" from both parties. Op. 3. It ruled based on "credibility. Who presented the more credible witnesses; who presented the more credible case?" Op. 53. It held "the careful analysis of" Petitioner's "expert," Meinhart, was most credible, since "his testimony" was "credible and [his] conclusions are well supported by the evidence." Op. 76.

In stark contrast, the trial court held "[i]n a word, Respondent's proffer of fair value is incredible," Op. 3, because "(i) Respondent disagreed with its own expert over which revenue projections to use … [and] "with respect to SourceHOV's fair value"; (ii) … the Backdated Valuation; and (iii) Jarrell's bespoke approach to calculating … beta lacks foundation, both within the expert valuation community and the facts of record." Op. 53.

The trial court's valuation is supported by SourceHOV's pre-trial valuations:

<u>Comparison of SourceHOV Equity and Enterprise Valuations</u>

Valuation Source	Enterprise Value	Equity Value
Rothschild February 2017 Standalone DCF[35]	$2.04B	$931M
Meinhart Valuation[36]	$1.81 B	$798.7M
E&Y Mar. 2017 Goodwill Valuation[37]	$1.78 B	~$750M
Trial Court Valuation	**$1.73B**	**$721.9M**
Rothschild January 2018 Standalone DCF[38]	$1.78B	$675M
Jarrell Valuation[39]	$1.53B	$468.1M
Respondent's Litigation Position[40]	$1.34 B	$271.4M

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[35] A3482.

[36] A3857.

[37] B1549.

[38] A3506.

[39] A3912.

[40] B473.

On March 26, 2020, the trial court entered a judgment of $57,698,426.14 plus interest for Manichaean.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT PETITIONERS' EVIDENCE ASSET BETA, COST OF DEBT, AND MANAGEMENT PROJECTIONS WAS CREDIBLE

A. Question Presented

Whether the trial court abused its discretion in finding that Petitioners' evidence of (1) asset beta, (2) cost of debt, and (3) management projections, was credible and supported by accepted valuation principles. Op. 52-65.

B. Scope of Review

This Court reviews Court of Chancery appraisal decisions for "abuse of discretion and 'grant[s] significant deference to the factual findings of the trial court.'" *Fir Tree Value Master Fund, LP v. Jarden Corp.*, --- A.3d ----, 2020 WL 3885166, *7 (Del. July 9, 2020) (quoting *DFC*, 172 A.3d at 363). A fair value determination should be upheld "if it has a 'reasonable basis in the record and in accepted financial principles.'" *Id.* (citation omitted). This is "a formidable standard" and Chancery Court fair value determinations receive a "high level of deference on appeal," because it "has developed an expertise in cases of this type." *Golden Telecom, Inc. v. Glob. GT LP*, 11 A.3d 214, 219 (Del. 2010).

Further, it is "entirely proper for the Court of Chancery to adopt one expert's model, methodology, and calculations if they are supported by credible evidence and the judge analyzes them critically." *Id.* The Chancery Court's factual findings should be affirmed as "long as they are supported by the record" and "even if" this Court "might independently reach a different conclusion." *Id.*

Where, as here, a trial court after careful consideration "ultimately chose not to accord" the losing party's evidence "any weight" – yet admitted it into evidence – the inquiry must be "whether the Court abused its discretion." *M.P.M. Enters.* 731 A.2d at 795. In contrast, *de novo* review applies only "to the extent the trial court decision implicates the statutory construction of § 262." *Id.* But the decision here rested on "credibility." Op. 53. The trial court had "discretion to weigh the evidence," with this Court's "review one of abuse of that discretion." *M.P.M. Enterps.*, 731 A.3d at 795 (citation omitted). Given the serious credibility gap in this case, the trial court should be affirmed under this (or any) standard.

C. Merits of Argument

The trial court properly found that Manichaean's evidence of asset beta, cost of debt, and management projections was credible and supported by standard valuation principles. Op. 53-55, 57-64

1. <u>The Trial Court Did Not Abuse its Discretion in Finding Manichaean's GPTC Asset Beta was Supported by Record Evidence and Valuation Principles</u>

The trial court did not abuse its discretion in adopting Manichaean's expert Meinhart's GPTC proxy asset beta, because it was thoroughly supported by the record, and SourceHOV's own expert admitted there is a "stack of books this high, and "lots of authority" for this approach. A0877 at 829:5-22.

First, academic authority and Delaware case law holds that Meinhart's proxy-asset-beta approach is sound, and it is the only accepted approach for estimating the asset beta of a private company like SourceHOV:

- A3933: (Pratt & Grabowski p.220): "*You need to use proxy beta when the subject business is a . . . closely held business*… A *proxy* beta can be estimated by: ….
    - Identifying *guideline public companies* …." (emphasis added).
- B2380: (Duff & Phelps p.4): "You need to use proxy beta when the subject business is a . . . closely held business."
- A3974: (Damodoran p.671): "We can estimate … betas for private firms … by looking at the average betas for publicly traded … companies."[41]

Delaware courts hold that for private companies and public companies with insufficient trading histories, "beta *must* be an estimate based on the [observed] betas of comparable, publicly traded companies."[42] Specifically, for a "private company" that "does not trade on the public markets, its beta cannot be determined by direct measurement," and instead courts should look "to comparable companies in order to

[41] Rothschild agreed. A0168 at 240:12-16 ("this is a private firm, generally, so you have to infer what investors would require as a cost of equity from publicly-traded, quote, unquote, 'peers'").

[42] *Blueblade*, 2018 WL 3602940, *33 (emphasis added).

come up with a proxy for [] beta."[43]

Second, Meinhart's GPTC selection has strong record support, because pre-litigation, SourceHOV and its financial adviser Rothschild identified 17 of his 19 companies as comparable to SourceHOV. A3480-81; A2710-11. Further, financial advisers Morgan Stanley and E&Y identified 11 and 8 of Meinhart's GPTC's as comparable, respectively. B1104; B1547. This Court has held that the choice of comparable companies is reliable where the same companies have been identified "by analysts, others analyzing" the company, and the company "itself as comparable."[44]

Third, Meinhart properly addressed SourceHOV's actual leverage and capital structure by using three different unlevering formulas (Hamada, Harris-Pringle and Fernandez), all of which led support his selected asset beta. A3875; *see* Formulas Chart § G.1 *supra*. As the trial court held, Op. 64, using these formulas is *exactly* what the academic literature recommends "to control for differences in financial

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[43] *Andaloro v. PFPC Worldwide, Inc.*, 2005 WL 2045640, *14–15 (Del. Ch. Aug. 19, 2005); *accord Del. Open MRI Radiology Assocs., P.A. v. Kessler*, 2006 WL 4764042, *33 (Del. Ch. Apr. 26, 2006) ("lack of sufficient public trading to provide a reliable beta, forc[es] a resort to the use of data from … comparable companies").

[44] *DFC*, 172 A.3d at 358; *id.* at 387-88 (multiple "different firms" selected six GPTCs); *Blueblade*, 2018 WL 3602940, *34 n.346 ("My selection of GPCs is further supported by RBC and Citi's choices of GPCs").

leverage."[45] Meinhart also used two leverage scenarios derived directly from SourceHOV's *actual* "capital structure" as implied by "Rothschild's" two SourceHOV valuations – refuting SourceHOV's claim that they were hypothetical (Br. 3).[46]

Fourth, Meinhart's GPTC selection adequately addresses size issues by using three companies with similar enterprise values to SourceHOV, and by using a size premium. The betas for all three firms is lower than Meinhart's beta:

Company	**Enterprise Value**[47]	**Unlevered Beta**
Exl Service Holdings Inc.	$1.69 billion	0.873
WNS (Holdings) Limited	$1.66 billion	0.81
MicroStrategy Inc.	$1.53 billion	1.203

Meinhart's choice of GPTCs Fidelity Info., Fiserv, and Jack Henry is particularly sound, since E&Y chose these as comparable to all three SourceHOV business units. B1547. And since Meinhart picked the highest of the 19 GPTC betas, his beta is supported by any GPTC subset.

Fifth, the academic literature also warns against an unduly narrow "definition

[45] A3970 (Damodaran p.199); A3937 (Pratt & Grabowski p.244, "Formulas for Unelevering and Levering Equity Betas").

[46] A3836-37 & nn. 61-62 (citing A3477 (51.5% debt), and A3501 (62.1% debt)). Meinhart's use of levering formulas and SourceHOV's actual capital structure thus is consistent with SourceHOV's DCF cases (Br. 22 n.6). *Cede & Co. v. JRC Acq'n Corp.*, 2004 WL 286963, *7 (Del. Ch. Feb. 10, 2004); *Gilbert v. M.P.M. Enters., Inc.*, 1998 WL 229439, *1-2 (Del. Ch. Apr. 24, 1998), *aff'd*, 731 A.2d 790 (Del. 1999); *Hintmann v. Fred Weber, Inc.*, 1998 WL 83052, *5 (Del. Ch. Feb. 17, 1998); *In re Radiology Assocs. Inc. Litig.*, 611 A.2d 485, 493 (Del. Ch. 1991).

[47] A3875-76.

of comparable," since it would "compromise the biggest benefit" of GPTC proxy betas in "the savings in standard error" compared to a single-firm measurement. A3970 (Damodoran p. 199). Instead, a "commonsense principle" applies that if "there are relatively few" GPTCs "not only do you have to become less selective, you might have to broaden the definition of comparable to bring other firms into the mix." *Id.*

Delaware courts have followed this academic authority by repeatedly holding that it is proper to use a proxy asset "comparable beta" based on "comparable companies," even where the experts or the court gave no weight to a full comparable companies valuation.[48] Thus, the trial court properly adopted Manichaean's expert's asset beta. In stark contrast, SourceHOV cites inapposite *public company* cases (Op. 28 & nn.10-11) to incorrectly claim that GPTC proxy betas should not be used where a full GPTC valuation is not adopted. These inapposite cases all involved "heavily traded" public companies, for which direct raw (or smoothed) betas were found more

[48] *M.P.M. Enterps.*, 731 A.2d at 793-94 (affirming use of "comparable beta" based on "comparable companies" even though court rejected comparable companies valuation); *Blueblade*, 2018 WL 3602940, *28, *34 (using comparable companies in beta, despite finding full comparable companies valuation was not reliable); *In re Appraisal of Orchard Enterps.*, 2012 WL 2923305, *2, *18 n.116 (Del. Ch. July 18, 2012), *aff'd* sub nom. *Orchard Enters., Inc. v. Merlin P'rs LP*, 2013 WL 1282001 (Del. Mar. 28, 2013) (ORDER) (using comparable companies beta but rejecting comparable companies valuation).

credible than non-comparable GPTC proxy betas.[49] But here SourceHOV was a "closely held corporation" that was "not … public," making it both proper and required to use a GPTC proxy beta, despite the court not using a full GPTC valuation.[50]

Moreover, Meinhart's widely-accepted GPTC proxy beta methodology is far more credible than Jarrell's novel methodology, which he had "not seen" and "not done" before, and used for just "for this case." A0877 at 828:17-23. Neither SourceHOV nor *Amici* cite any peer-reviewed study or treatise stating it is proper to estimate an asset beta by "just taking a beta of the debt and saying, I'm done" as Jarrell did. *Id.* The Modigliani & Miller theories they cite are not proposed as methods for estimating asset betas. Jarrell's approach was properly rejected for lack of proof that it was "generally accepted" and for relying on flawed data.[51]

Jarrell's novel approach is particularly problematic for a *private company*,

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[49] *In re Appraisal of Jarden Corp.*, 2019 WL 3244085, *2 (Del. Ch. July 19, 2019), *aff'd*, --- A.3d ----, 2020 WL 3885166 (Del. July 9, 2020); *In re Appraisal of DFC Glob. Corp., revd. sub nom. DFC Glob. Corp. v. Muirfield Value P'rs, L.P.*, 2016 WL 3753123, **10, 14 (Del. Ch. July 8, 2016), *rev'd* 172 A.3d 346 (Del. 2017) ("DFC was a public company"); *Merion Capital, L.P. v. 3M Cogent, Inc.*, 2013 WL 3793896, **1, 16 (Del. Ch. July 8, 2013) (Cogent "publicly traded on the NASDAQ Global Select Market under the symbol COGT").

[50] *M.P.M. Enterps.*, 731 A.2d at 790, 792; *Blueblade*, 2018 WL 3602940, *33 ("beta must be an estimate based on the [observed] betas of comparable, publicly traded companies (*i.e.*, a 'proxy beta')").

[51] *M.G. Bancorp., Inc. v. Le Beau*, 737 A.2d 513, 523 (Del. 1999) (affirming rejection of valuation opinion under *Daubert* standard, and for lack of credibility).

since it conflicts with the settled principle that when valuing a private "closely held business," you "need to use a proxy beta … estimated by [i]dentifying guideline public companies." A3932 (Pratt & Grabowski); B2380 (Duff & Phelps). SourceHOV's loans were not publicly traded; but rather "trade[d] by appointment" – "not on an exchange." A0760 at 474:16-24; A0887 at 870:13-19 (same); A0331-32 at 47-53. This made his direct estimation of debt beta inherently unreliable.[52]

Even worse, Jarrell's "flawed execution" was compounded by using inaccurate Bloomberg data. (Op. 3, 61.) The "Bloomberg" data was exposed as unreliable, for overstating the total amount of SourceHOV's debt by $550 million; inaccurately reporting that debt would mature in 2017-18; and pricing nonexistent debt, without actual trading or volume data. A0757-60 at 463:6-469:4, 471:1-475:3; B1028; B1032; B2452-51; A0331 at 48:5-24. Jarrell tried to disclaim Bloomberg data at trial. But his report clearly relies on "Bloomberg," A3589 & n. 101; A3629, and nothing else supports his calculation of an 11% rate.

Finally, Jarrell ignored that his 1.4 debt beta was double the Duff & Phelps debt beta of 0.71 for Caa-rated debt like SourceHOV's, which shows that it was

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[52] *See Blueblade*, 2018 WL 3602940, *27, *33 ("limited" evidence of "trading history" unreliable for beta); *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, *23 (Del. Ch. May 3, 2004) (rejecting direct beta for public stock where market inefficient); B2374 (Berk 4th p.419) ("bank loans … are traded infrequently if at all" so "as a practical matter we can rarely obtain reliable data for the returns of such individual debt").

overstated, since "[b]etas of debt generally correlate with credit ratings."[53]

2. The Trial Court Did Not Abuse its Discretion in Finding that Meinhart's Cost of Debt Based on SourceHOV's Credit Rating was Credible and Supported by Valuation Authority

The trial court had firm record support for adopting Meinhart's 9.73% cost of debt based on SourceHOV's CCC+/Caa1 credit rating, (B1383 ("Caa1"); A1536-38 ("CCC+")), using the weighted average market yield from the widely used S&P CCC Bond Index. A0830-31 at 642:2-643:7; A3838. Valuation authorities recognize that in calculating the "Debt Cost of Capital … estimates based on the debt's rating may be used." B2375 (Berk 4th p.432).

Meinhart's cost of debt is also supported by the weighted average yields of the CCC-rated bonds from the index SourceHOV's own expert used. A3629 (Jarrell Rpt.). CCC-rated bonds from Jarrell's index had an 8.91% yield, below Meinhart. A0835-36 at 661:1-664:23; B1972.

Meinhart and Jarrell Bond Indexes with CCC-Rated Bonds

Source	Cost %
Meinhart: S&P CCC Bond Index	9.73%
Jarrell: ICE BAML 10+ Year Index, CCC-Only Bonds	8.91%

Further, the weighted average yields to maturity of SourceHOV's exact CCC+/Caa1

[53] B2393-94 (Duff & Phelps); A3933 (Pratt & Grabowski, same); B2374, Berk 4th p.419 ("approximate beta using estimates of betas of bond indices by rating category."); *Jarden*, 2019 WL 3244085, *44 (using Duff & Phelps debt beta for cost of debt).

rating in the S&P CCC index was 8.35%, providing further support.[54]

Consistent with the valuation authority quoted above, Delaware courts have consistently adopted a cost of debt "based on the yield to maturity of an index of" similarly "rated bonds."[55] Accordingly, the overwhelming weight of record evidence, valuation authority, and Delaware case law, supports the trial court's finding that Meinhart's cost of debt was credible.

Moreover, Meinhart's cost of debt is more credible than Jarrell's 11% based on inaccurate and unreliable Bloomberg pricing data. Even *Amici* decline to support Jarrell's cost of debt calculation. Amicus Br. at 7 n.10.

Finally, SourceHOV is misguided in citing yields-to-maturity at issuance for parts of SourceHOV's (9.5%) and Exela's debt (10%), because they do not support Jarrell's much higher 11% figure. Instead, SourceHOV's "weighted average interest rate of 9%" on its total "debt outstanding" provides further support for Meinhart's

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[54] A0831 at 643:9-18; B2270-72 (spreadsheets of CCC+/Caa1.). The S&P CCC Index expressly employs a "Market value weighted" "Weighting Method." B2361; B2411 ("weighted by market value"). Thus, SourceHOV improperly asks the Court to *break the Index's own rules* in advocating yields "weighted based on face value." Br. at 24.

[55] *Rural Metro*, 88 A.3d at 109 (Del. Ch. 2014), *clarified on denial of rearg.*, 2014 WL 1094173, *2 ("7.5% cost of debt" based on index); *accord Merion Capital L.P. v. Lender Processing Servs., Inc.*, 2016 WL 7324170, *28 (Del. Ch. Dec. 16, 2016) ("yield to maturity of a BB-rated bond index"); *Lane v. Cancer Treatment Ctrs. of Am.*, 2004 WL 1752847, *30 (Del. Ch. July 30, 2004) ("Moody's Baa Corporate Bond Yield"); *see also Blueblade*, 2018 WL 3602940, *32 & nn. 325-327 (cost of debt based primarily using "ICE of BofAML US High Yield" and "S&P U.S. High Yield Corporate" bond indices).

9.73% cost of debt.[56]

Moreover, valuation authorities reject calculating cost of debt using yields-to-maturity of below-investment-grade debt like SourceHOV's and Exela's, because "calculating the cost of below-investment grade debt by using yield to maturity sets the cost of debt too high."[57] The yields-to-maturity for such debt overstates the actual cost of debt, because lenders increase promised yields above their expected return to address "the possibility that interest and principal payments may be delayed or omitted," or that debt may be subject to a "restructuring." B2301, B. Cornell, *Corporate Valuation* p.188 (Business One Irwin 1993). This is a "Common Mistake" that valuation authorities reject.[58]

3. <u>The Trial Court Did Not Abuse its Discretion in Finding that the Lender Model 5% Projections Were Most Reliable – Particularly Since SourceHOV's Own Expert Adopted 5% Projections</u>

The trial court properly adopted SourceHOV's Lender Model 5% revenue

[56] Even Exela's weighted average interest rate of "9.7 percent" near the time of the Merger (A0836 at 666:11-24, A0887 at 869:9-870:4; B2013-14), is consistent with Meinhart's cost of debt, since Moody's gave Exela the same "Caa1-PD" "Probability of Default" rating as SourceHOV, and gave Exela's bonds the same "B3" rating as SourceHOV's first lien debt. B1806; A1521.

[57] *Jarden*, 2019 WL 3244085, *44 (rejecting B2-rated yields as overstating the cost of debt, and instead using Duff & Phelps debt beta); A1210 (SourceHOV B2 in 2014); B1806 (B3, Exela)

[58] A3993, Jonathan Berk & Peter DeMarzo, *Corporate Finance* 412 (Pearson Education Limited, 3rd ed. 2013); B2359-60, K. Butler, *Multinational Finance*, 333-34 (6th ed. 2016) (same); B2375, Berk 4th p.432 (for below investment-grade debt, "the debt cost of capital, which is expected return to investors, is less than its yield to maturity, which is its promised return").

growth projections as management's most reliable projections.

First, SourceHOV management and *its own expert* adopted 5% growth projections. SourceHOV's trial brief admits that Jarrell chose the "Equity Case" 5% revenue growth projections as the most reliable indicator of value of SourceHOV[]" and "based his fair value determination entirely upon that analysis." B517; A3602 ¶111. SourceHOV also disagreed with Jarrell as to SourceHOV's equity value – $271.4 million ($1,633 per share) vs. $468.1 million ($2,818 per share). B473; B517. SourceHOV misstates the facts in arguing it was "not in disagree[ment]" or "at odds" with Jarrell. Br. 37. Jarrell's own testimony and trial exhibit admit that "Jarrell['s] Opinion" was that SourceHOV's equity value was "468.1 million" using 5% projections.[59]

Further, SourceHOV's Verma admitted the 5% "equity case" was the set of projections "management stand[s] behind" between the "bank case or equity case." A0276 at 33:2-19; *accord* A0620-21 at 16:14-17:7, A0644 at 111:8-14.

Second, the Lender Model 5% projections are most reliable, since they are consistent with SourceHOV's historic 10.1% revenue growth, and were exclusively used with, and incorporated feedback from, financial advisers, lenders, rating

[59] B2276; A0323 at 15:11-14; A3602 at 44 ¶111. Under Rule 702 "an expert cannot materially change his opinions after the expert discovery cutoff," and trying to do so eviscerates credibility. *3M Cogent*, 2013 WL 3793896, *9.

agencies and deal counterparties.[60] *See Owen*, 2015 WL 3819204, *19 (adopting projections used with financial adviser feedback). The Lender Model 5% projections have enhanced reliability, since they were exclusively used with, and "tested" by, sophisticated third parties including Rothschild, auditor KPMG, deal counterparties Apollo and Quinpario, and lenders.[61] *Owen*, 2015 WL 3819204, *19 (projections used by financial adviser "Grant Thornton").[62]

Third, the Lender Model projections should be given particularly "great weight" because they were used with SourceHOV's lenders, who are "a financing source." *Id.* *20-21. Delaware precedent holds that projections used with financing sources receive great weight, as management is presumed to use its "best estimate" with lenders, since it is a "'federal felony to knowingly obtain any funds from a financial institution by false or fraudulent pretenses.'" *Id.* *20 (quoting *Delaware Open MRI Radiology Assocs.*, 890 A.2d at 332). This precedent is more compelling here, since SourceHOV provided the Lender Model both to lenders and to auditor KPMG for purposes of preparing financial statements. Providing false projections to either of them is a felony. 15 U.S.C. §§78m, 78ff.

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[60] *See* Counter-Statement of Facts §§ D-F, *supra*.

[61] A0277 at 34:15-25 (Lender Model updated March 2017); B1464-66 (Apollo); A3467-76 (Rothschild); B1456-63, B1710 (auditor KPMG); B1760-62 (Lenders).

[62] *Accord Andaloro*, 2005 WL 2045640, *10-11; (adopting projections used by financial adviser); *Emerging Commc'ns*, 2004 WL 1305745, *13 (adopting projections used with "financial and legal advisors").

Fourth, the Lender Model is most reliable as the most recently updated set of projections – updated around March 20, 2017. B1464. Projections "prepared closest to the [] Merger" are usually "the best indicator of [] management's then-current estimates and judgments." *Orchard Enters.*, 2012 WL 2923305, *13; *Glob. GT LP v. Golden Telecom Inc.*, 993 A.2d 497, 510 n.82 (Del. Ch. 2010) (adopting "more recent" projections used with financial adviser). The Bank Case was not updated.

Fifth, as Verma admitted, the Lender Model was more accurate, because actual first quarter 2017 revenues came in "closer to the lender model than they did for the bank Case." A0650 at 133:10-134:2; A0649 at 131:6-132:13. *See Owen*, 2015 WL 3819204, *21 (adopting March 2013 projections that were "in line" with "performance in March and April 2013").

Accordingly, the trial court properly adopted the Lender Model 5% projections. In stark contrast, SourceHOV is misguided (at 35-36 nn.18-20) in citing inapposite cases where management had no "history of creating and, therefore, had virtually no experience with, long-term projections" – let alone meeting them.[63]

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[63] *In re Appraisal of PetSmart, Inc.*, 2017 WL 2303599, *33 (Del. Ch. May 26, 2017); *accord LongPath Capital, LLC v. Ramtron Int'l Corp.*, 2015 WL 4540443, **6, 18 (Del. Ch. June 30, 2015) ("management had not previously created multi-year forecasts"); *Merlin P'rs LP v. AutoInfo, Inc.*, 2015 WL 2069417, *8 (Del. Ch. Apr. 30, 2015) ("Management had never prepared anything resembling the Management Projections before"); *In re Nine Sys. Corp. S'holders Litig.*, 2014 WL 4383127, *41 (Del. Ch. Sept. 4, 2014) (rejecting projections that "missed" targets "three-months out … by a factor of three," where no history of meeting projections nor evidence that "Board adopted those projections").

SourceHOV also mischaracterizes this Court's *DFC* ruling as ruling on the reliability of management projections. (Br. at 36 & n.20). But *DFC* did not rule on the reliability of projections – and instead merely rejected a trial court's reargument decision to make an "aggressive upward move to increase the perpetuity" growth rate, which contradicted its original ruling without justification. 172 A.3d at 378-79. These cases are inapposite, because SourceHOV had a "Track Record of Meeting" multi-year projections since 2011, and the Lender Model projections were updated with advisers, lenders, and counterparties.[64]

[64] B942 ("April 2011" projections and 2011-13 actuals); B797 (2013-16); B910 (2013 actuals); A2354 (2014-2016 actuals); B1464-66 (Apollo); A3467-68, A3476 (Rothschild); B1760-62 (Lenders).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS FACTUAL FINDING THAT SECOND QUARTER 2017 RESULTS WERE NOT AVAILABLE ON THE MERGER DATE, GIVEN SOURCEHOV'S PRE-TRIAL ADMISSION ON THE MERGER DATE *ITSELF* THAT THESE RESULTS WERE NOT AVAILABLE

a. Question Presented

Whether the trial court abused its discretion in its factual finding that SourceHOV's second quarter 2017 financial results were not reasonably available, when SourceHOV management represented on July 12, 2017 valuation date itself that these results were not available. Op. 70-71.

b. Scope of Review

This Court reviews Chancery Court appraisal decisions for abuse of discretion, and factual findings "supported by the record" should be affirmed "even if" the court "might independently reach a different conclusion." *See Golden Telecom*, 11 A.3d at 219.

c. Merits of Argument

The trial court's factual finding that SourceHOV's second quarter 2017 financial statements were not reasonably available on July 12, 2017 is supported by record evidence directly on point. *First*, SourceHOV confirmed this fact on the July 12, 2017 Merger date *itself*, when it represented to its auditor that "n[o] … financial statements are available as of any date or for any period subsequent to March 31, 2017." B1965. This directly shows that second quarter 2017 financial information was not reasonably knowable on that date.

Even one month post-Merger, on "August 9, 2017," only "unaudited" results were available, A3385, and SourceHOV had no audited second quarter results.

Second, SourceHOV told its auditor KPMG on July 11, 2017 (one day pre-Merger) that it only had "estimates" for May and June income statements. A3925.

Third, when Rothschild created a Backdated Valuation in January 2018, it used the same "net debt figures as of March 31, 2017" and "cash flows discounted to March 31, 2017," as Meinhart and the trial court.[65]

Delaware courts have recognized that "post-merger documents that related to pre-merger financial data" may "not be admissible in a Section 262 hearing," where, as here, the data could not be ascertained on the Merger date.[66] The standard requires that the information could reasonably "be ascertained" on "the date of the merger." [67] Here, SourceHOV's own admissions on the Merger date itself (and the day before) show that, even though it tried, it was unable to ascertain this information at that time.

Thus, it was not an abuse of discretion for the trial court to use SourceHOV's

[65] B2187; B2190; *accord* A0776 at 539-40 ("usually takes time" to prepare financial results, and not "instantaneously" available).

[66] *Lane v. Cancer Treatment Ctrs. of Am., Inc.*, 1994 WL 263558, *4 (Del. Ch. May 25, 1994).

[67] *Tri-Cont'l Corp. v. Battye*, 74 A.2d 71, 72 (Del. 1950).

March 31, 2017 financial statements, as the last SourceHOV financial statements ascertainable on the Merger date.[68] In contrast, SourceHOV cites inapposite cases (Br. at 39-41), including where courts cited projections started pre-Merger, where "the assumptions underlying" them and the projected "numbers … were arrived at by the" the Merger date.[69] None of these cases involved admissions on the Merger date itself that information was not available.

SourceHOV admitted on the valuation date itself that this information was not knowable, so the trial court did not abuse its discretion in making the credibility determination that it was not knowable.

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[68] *Domain Assocs., L.L.C. v. Shah*, 2018 WL 3853531, *17 (Del. Ch. Aug. 13, 2018) (refusing to include "projected revenue" for event planned after merger date); *accord Kahn v. Household Acq. Corp.*, 591 A.2d 166, 175 (Del. 1991) (rejecting "post-merger offers," despite proximity to merger, because value not known as of merger).

[69] *Gholl v. eMachines, Inc.*, 2004 WL 2847865, *8 (Del. Ch. Nov. 24, 2004); *Cede & Co. v. Technicolor, Inc.*, 2003 WL 23700218, *7 & n.34 (Del. Ch. Dec. 31, 2003), *aff'd in part, rev'd in part*, 884 A.2d 26 (Del. 2005) (projections begun "in December 1982" before "January 24, 1983" merger, validated what was capable "of proof" as of merger, and both experts "heavily relied on" them); *Le Beau v. M. G. Bancorp., Inc.*, 1998 WL 44993, *12 n.28 (Del. Ch. Jan. 29, 1998), *aff'd in part*, 737 A.2d 513 (Del. 1999) (valuation only "updated (to reflect information available as of the Merger date)"); *cf. PetSmart*, 2017 WL 2303599, *34 (rejecting argument that post-merger evidence "bolstered" claim).

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT SOURCEHOV BACKDATED A REDUCED VALUATION THAT IT HAD ROTHSCHILD CREATE MID-LITIGATION, AND HAD ITS JANUARY 2018 DATE REMOVED

a. Question Presented

Whether the trial court abused its discretion in finding that SourceHOV backdated a reduced valuation that it had Rothschild create mid-litigation, and falsely passed it off as being made in July 2017. Op. 56-57.

b. Scope of Review

Chancery Court credibility findings are reviewed for abuse of discretion and should be accepted if they are "supported by the record." *Golden Telecom*, 11 A.3d at 219.

c. Merits of the Argument

The trial court properly found that SourceHOV's Chadha was "not believable," and that his "litigation-driven effort to persuade Rothschild to create the Backdated Valuation" and "failure to acknowledge that scheme when it was finally exposed … taints all of his testimony." Op. 56-57. This credibility determination was made after carefully considering Chadha's false trial testimony, evidence, and SourceHOV's Interrogatory Responses. *Id.* nn.275-76. The Chancery Court "is the sole judge of the credibility of witnesses." *Ala. By-Prod. Corp. v. Neal*, 588 A.2d 255, 259 (Del. 1991) (citation omitted).

The record strongly supports the trial court's finding. In January 2018, Chadha demanded a "revised" valuation from Rothschild. B548 ¶63. Jonovic (after emailing Chadha) instructed Rothschild to change the date from January 2018 "to simply say July 2017." B550 ¶71; B2207-08. The Backdated Valuation reduced Rothschild's Standalone DCF by "$250 million." A069 at 297:3-21; A0746 at 418:7–419:7.

The intent to backdate is plain from SourceHOV's June 2018 Interrogatory Responses, where it swore that Rothschild presented the Backdated Valuation at a meeting "in … July 2017." *Id.* After getting caught, Chadha and Jonovic *still* falsely testified this was "accurate." A0501 at 119:14-121:11; B352 at 143:2-145:17 (same).

Bedrock evidentiary principles support the trial court's finding:

> "'*a party's falsehood …in the preparation and presentation of his cause, his fabrication or suppression of evidence* … is receivable against him as an *indication of his consciousness that his case is a weak or unfounded one*; and … the fact itself of the cause's lack of truth and merit.'"

McCool v. Gehret, 657 A.2d 269, 276, n.7 (Del. 1995) emphasis added) (quoting 2 *Wigmore on Evidence* § 278(2) (Chadbourn Rev. 1979).[70] The trial court's finding should be affirmed.[71]

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[70] *Accord Fox v. CDX Hldgs., Inc.*, 2015 WL 4571398, *28-30 (Del. Ch. July 28, 2015), *aff'd*, 141 A.3d 1037 (Del. 2016) (manipulation of evidence).

[71] SourceHOV's brief does not challenge – and waives any challenge to – the trial court rulings on (i) debt interest tax shields (Op. 65-67); (ii) depreciation and goodwill (Op. 67-70); and (iii) total shares outstanding, and exclusion of RSUs (Op.

CONCLUSION

For the foregoing reasons, the Chancery Court's opinion and judgment should be affirmed.

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71-72 & Exs. B-C). *See* Sup. Ct. R. 14(b)(vi)(A)(3); *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004). Also, under Rule 9(a) the Court should not consider A4132-45, since these documents were not presented at trial. *Del. Elec. Co-op., Inc. v. Duphily*, 703 A.2d 1202, 1206 (Del. 1997).