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Stillwater Appraisal: Delaware Supreme Court Affirms Chancery Court Reliance on Deal Price in Determining "Fair Value"

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Affirms Chancery Court ruling that sales process was not sufficiently tainted to warrant reliance on other methodologies or reflect recent spike in commodity price

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INTRODUCTION

Under Section 262 of the Delaware General Corporation Law ("*DGCL § 262*"), a stockholder unhappy with the consideration payable in a merger is entitled to dissent from the transaction and seek a Delaware Court of Chancery ("*Chancery Court*") appraisal of the "fair value" of the stockholder's shares. As the Delaware Supreme Court ("*Supreme Court*") explained in *Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co.*, 240 A.3d 3 (Del. 2020) ("*Stillwater*"), "[t]o reach this per-share valuation, the court should first envisage the entire pre-merger company as a 'going concern[ ]' . . . and assess its value [on the closing date of the merger] . . . ." In this connection, the Chancery Court "has discretion to select one of the parties' valuation models as its general framework or to fashion its own." Ultimately, however, the Chancery Court "must determine fair value, and 'fair value is just that, "fair." It does not mean the highest possible price that a company might have sold for.' "

Notably, DGCL § 262 provides the Chancery Court with significant leeway in determining "fair value." The Chancery Court typically selects negotiated deal price (less synergies) as the basis for determining fair value. Nonetheless, the Supreme Court steadfastly has refused to adopt a bright-line rule favoring negotiated deal price or, for that matter, any other valuation methodology for purposes of DGCL § 262. Rather, the Chancery Court is directed to consider "all relevant factors" in discerning fair value, which may include (i) negotiated deal price, (ii) stock market trading price if the target is a public company, (iii) a comparable companies analysis, (iv) a discounted cash flow ("*DCF*") analysis, (v) myriad other measures, or (vi) a combination of any of the foregoing. As such, appraisal litigation is highly fact specific, and outcomes vary.

II. LEGAL BACKGROUND

In recent years, the Supreme Court has gone to great lengths—despite refusing to anoint negotiated deal price as the preferred methodology for determining "fair value"—to explain when negotiated deal price should be used, and when it should not.

- *First*, in *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346 (Del. 2017) ("*DFC*"), the Supreme Court took issue with the Court of Chancery's reasoning for rejecting deal price as relevant to fair value. The *DFC* Court noted that "our refusal to craft a statutory presumption . . . does not in any way signal our 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 . . . .” The *DFC* Court instructed the Chancery Court, on remand, “to better explain its decision to give equal weight to the negotiated deal price,” a comparable companies analysis, and a DCF analysis in determining “fair value” (quoting the following source). For a discussion of *DFC*, see Robert S. Reder & Blake C. Woodward, *Delaware Supreme Court Refuses to Establish a Presumption Favoring Deal Price in Statutory Appraisal Proceedings*, 71 VAND. L. REV. EN BANC 59 (2018).

- *Second*, in *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017) (“*Dell*”), the Supreme Court criticized the Chancery Court’s exclusive reliance on a DCF analysis, observing that the Chancery Court erred when it assigned no weight to market value or deal price as part of its valuation analysis. Further, while in a given case, the market is not always the best indicator of value, and it need not always be accorded some weight, based on the factual record, “the market-based indicators of value—both Dell’s stock price and deal price—have substantial probative value.” For a discussion of *Dell*, see Robert S. Reder & Micah N. Bradley, *Dell Appraisal: Delaware Supreme Court Rejects Chancery Court Valuation Giving No Weight to Deal Price in Connection with Management-Led LBO*, 72 VAND. L. REV. EN BANC 201 (2019).
- *Third*, in *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128 (Del. 2019) (“*Aruba*”), the Supreme Court considered the Chancery Court’s exclusive reliance on a target company’s unaffected market price. Rejecting the lower court’s approach, the *Aruba* Court emphasized the “considerable weight” a court should give to the deal price “absent deficiencies in the deal process.” For a discussion of *Aruba*, see Robert S. Reder & Martin Shepherd, *Aruba Appraisal: Delaware Supreme Court Rejects Chancery Court’s Exclusive Reliance on Trading Price in Determining “Fair Value” Under DGCL § 262*, 73 VAND. L. REV. EN BANC 239 (2020).
- *Finally*, in *Fir Tree Value Master Fund, LP v. Jarden Corp.*, 236 A.3d 313 (Del. 2020) (“*Jarden*”), the Supreme Court affirmed the Chancery Court’s exclusive reliance on a target company’s “unaffected market price” in determining “fair value,” even though it yielded a valuation nearly 20% *lower than* the negotiated deal price. The Chancery Court was critical of the sale process, noting it “ ’raise[d] concerns’ and ‘left much to be desired.’ ” In particular, (i) the target company CEO “acted with

> 'little to no oversight by the Board,' " (ii) he "volunteered 'a price range' " to [the purchaser] "before negotiations began in earnest," and (iii) there was no "pre-signing or post-signing market check." The *Jarden* Court affirmed, observing that a target's "sale price does not act as a valuation floor . . . [where] the deal price resulted from a flawed sale process." For a discussion of *Jarden*, see Robert S. Reder & James H. Ryan, *Jarden Appraisal: Delaware Supreme Court Affirms Chancery Court's Exclusive Reliance on Unaffected Market Price in Determining "Fair Value" Under DGCL § 262*, 74 VAND. L. REV. EN BANC 241 (2021).

As *Jarden* demonstrated, negotiated deal price is not always the best indicator of fair value. Serious flaws in the sales process can lead the Chancery Court to other valuation methodologies including, as in *Jarden*, unaffected market price.

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The reliability of a sales process was the central issue facing the Chancery Court when various stockholders ("*Petitioners*") of Stillwater Mining Co. ("*Stillwater*") dissented from a merger in which Sibanye Gold Ltd. ("*Sibanye*") acquired Stillwater for $18 per share in cash ("*Merger Price*"). Petitioners, claiming that the sales process was flawed, sought an appraised value under DGCL § 262 reflecting an upward spike in commodity prices between signing and closing. The Chancery Court rejected Petitioners' attacks on the sales process, ruling that the Merger Price "was the most persuasive indicator of Stillwater's fair value at the time of the merger." The Supreme Court affirmed.

III. FACTUAL BACKGROUND

A. Stillwater Initiates Sales Process

Stillwater is "primarily engaged in the business of mining and processing platinum group metals ("PGMs")" and "also owns one of the largest PGM recycling operations in the world." As a result, "Stillwater's common stock trading price is heavily influenced by the spot and forward pricing of the PGM palladium."

Due to concerns with "long-term 'structural decline[s]' " in the palladium markets, Stillwater's board of director's ("*Board*") "began to consider strategic alternatives, including a merger of equals or the sale of some of Stillwater's business operations." In 2016, "as Stillwater's stock price declined, reflecting a decrease in the spot price of palladium

that continued throughout the year," the Board authorized Stillwater's CEO ("*CEO*") "to inquire into strategic opportunities and report back to the Board." Around that same time, due to his "unease" with Stillwater's situation, CEO "began considering his exit."

At Sibanye's request, but without advising the Board, CEO met with his Sibanye counterpart on March 1. At this meeting, CEO requested that Sibanye provide " 'an informal proposal' that included 'an idea of valuation' and 'transaction structure.' " Then, in July, as "Stillwater's stock price and the price of palladium had largely recovered," Sibanye submitted "a preliminary, non-binding indication of interest at $15.75 per share in cash." After Sibanye signed a confidentiality agreement, Stillwater provided Sibanye with access to a data room to pursue its bid.

While CEO "continued to focus on courting Sibanye," despite contrary instructions from the Board "to generate 'as much interest as possible,' " Stillwater's financial advisor "contacted a list of fifteen potential acquirers." By the end of November, twenty-four potential purchasers were contacted, but only Sibanye "submitted an indication of interest." After the Board rejected "two merger of equals proposals," on December 3 Sibanye "made its 'best and final' offer of $18 per share to acquire Stillwater," reflecting "a 24.4% premium over the 30-day volume-weighted average price." On December 8, after the Board approved Sibanye's offer, the parties signed a merger agreement ("*Merger Agreement*"). Sibanye and Stillwater publicly announced the transaction the next day.

Although "the commodity price for palladium . . . increased by nine percent, improving Stillwater's value," during the 138-day period between signing and the Stillwater stockholder vote to approve the transaction, "no other bidder made a topping bid." Notwithstanding these developments, "on April 26, 2017, approximately 75% of the issued outstanding shares eligible to vote approved the merger." The transaction closed about a week later.

B. Petitioners Seek Appraisal

Petitioners commenced their appraisal action on May 22. After a four-day hearing, the Chancery Court found that "the sale process was sufficiently reliable to make the deal price a persuasive indicator of fair value." The Chancery Court also ruled that "Stillwater's trading price . . . was a less persuasive indicator than the deal price," while neither of the competing DCF analyses "provided a persuasive indicator of fair value." On this basis, the Chancery Court not only fixed the $18 transaction price as fair value, but also rejected Petitioners' bid for "an

upward adjustment to the price to account for Stillwater's increase in value after signing."

On appeal, Petitioners claimed that the Chancery Court "abused its discretion by ignoring the flawed sale process." Also, they argued that the Chancery Court "relied on an incorrect conclusion to justify its decision to not adjust the deal price upward to account for rising commodity prices." The Supreme Court rejected each of these arguments.

IV. The Supreme Court's Analysis

In *Stillwater*, the Supreme Court explained that "[s]o long as the Court of Chancery has committed no legal error, its factual findings will not be set aside on appeal unless they are clearly wrong." In other words, the Supreme Court will "defer to the trial court's fair value determination if it has a 'reasonable basis in the record and in accepted financial principles relevant to determining the value of corporations and their stock.' " Based on its determination that the Chancery Court did not abuse its discretion, the Supreme Court affirmed the Chancery Court's ruling that Stillwater's fair value was $18.00 per share, equal to the Merger Price.

A. Reliability of Stillwater's Sale Process

In attacking the reliability of the Merger Price as a proxy for fair value, Petitioners criticized the efficacy of both the pre-signing process and the post-signing process. In rejecting these critiques, the Supreme Court explained that the Chancery Court had "examined Stillwater's sale process" against the backdrop of *DFC*, *Dell*, and *Aruba* and, on this basis, "determined that it also presented ' "objective indicia" that "suggest[ed] that the deal price was a fair price." ' "

In this connection, the Chancery Court "highlighted five key objective indicators that supported the reliability of Stillwater's sale process": (i) the merger "was an arm's length transaction with a third party," (ii) the Board had no "conflicts of interest," (iii) Sibanye "conducted due diligence and received confidential information," (iv) Stillwater was able to negotiate "multiple price increases," and (v) no third parties emerged with a topping bid "during the post-signing phase." Although "these indicators are fewer indicia of fairness than this Court identified when reviewing the sale processes in *DFC*, *Dell*, or *Aruba*," the Chancery Court "did not abuse its discretion by determining that 'the objective indicia that were present provide a

cogent foundation for relying on the deal price as a persuasive indicator of fair value.' "

1. Pre-Signing Process

The Chancery Court noted several potential "flaws" in the pre-signing process, including CEO's pivotal role in the negotiations, the Board's "lack of 'meaningful oversight,' " CEO's "desire to maximize his personal wealth and retire," and "the 'abbreviated pre-signing process' " with its focus on Sibanye. Although these factors were not "ideal," the Chancery Court found them outweighed by the financial advisor's "pre-signing canvas, the repeated rejections of Sibanye's offers, and an effective post-signing market check." Moreover, CEO'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."

2. Post-Signing Process

Petitioners complained that the Merger Agreement did not allow Stillwater stockholders to benefit from the rising market price of palladium between signing and closing. The Chancery Court rejected this opportunity to second guess the Board. As the Chancery Court observed, "[t]he Merger Agreement was trying to provide stockholders with the ability to opt for the comparative certainty of deal consideration equal to $18.00 per share," rather than continuing to risk upward and downward swings in the commodities markets. Further, the Merger Agreement provided Stillwater stockholders with the ability to vote against the transaction had they "wanted to capture the increased value of palladium."

Petitioners also complained that the Merger Agreement's "deal protections," which prohibited Stillwater from soliciting third party offers and provided Sibanye with "matching rights" should an unsolicited third-party bid emerge, "deterred interested buyers from making a topping bid." But, according to the Chancery Court, *Aruba* and other decisions featured a "similar suite of deal protections" that "did not preclude or impermissibly impede a post-signing market check."

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In sum, the Supreme Court recognized that while the Stillwater sale process "was not perfect" and Petitioners certainly "highlighted its

flaws," " 'the facts of this case, when viewed as a whole, compare favorably' with this Court's precedents." Accordingly, the Chancery Court "did not abuse its discretion" in deferring to the Merger Price in determining fair value for purposes of DGCL § 262.

B. Deal Price Adjustment Not Warranted

Petitioners also claimed that the Chancery Court abused its discretion by failing "to adjust the deal price upward to reflect the rising commodity prices between signing and closing." Because "[t]he time for determining the value of a dissenter's shares is the date on which the merger closes . . . , if the value of the corporation changes between the signing of the merger agreement and the closing, then the fair value determination must be measured by the 'operative reality' of the corporation at the time of the merger."

The Supreme Court noted, however, that "in an appraisal proceeding, the party seeking an adjustment to the deal price reflecting a valuation change between signing and closing bears the burden to identify that change and prove the amount to be adjusted." Based on its review of the Chancery Court's analysis, the Supreme Court recognized that the Chancery Court "was unconvinced by Petitioners' conclusory arguments" and "considered and rejected the notion of a deal price adjustment based on gaps in Petitioners' arguments." As such, "Petitioners failed to meet their burden of proof." The Supreme Court, therefore, saw no reason to upend the Chancery Court's determination.

CONCLUSION

Consistent with *DFC*, *Dell*, and *Aruba*, *Stillwater* reaffirmed the important, albeit not dispositive, role that negotiated deal price usually plays in determining "fair value" for purposes of DGCL § 262. A recognition that a sales process was not perfect, and was in fact "flawed," will not necessarily lead the Supreme Court to overturn a Chancery Court determination that the process nevertheless "was sufficient to support reliance on the deal price as evidence of fair value." "[F]air value," according to the Supreme Court, " 'does not mean the highest possible price that a company might have sold for.' "

Because the standard for overturning a Chancery Court determination under DGCL § 262 is abuse of discretion, the Supreme Court is reluctant to second guess the trial court unless its "factual findings . . . are clearly wrong and the doing of justice requires their overturn." In this case, while "Stillwater's sale was 'rough and ready,' " in light of "the arm's-length nature of the Merger, the premium over

market, and the substance of what took place during the sale process, it is not possible to say that an award at the deal price would result in the petitioners being exploited." Accordingly, the *Stillwater* Court found no basis to "hold that the Court of Chancery abused its discretion in reaching [its] conclusion based on the record before us."