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Income Statement Breach

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware

Towerview LLC; Hartz Capital Investments, L.L.C.; Metropolitan Capital Advisors, L.P.; Metropolitan Capital Advisors International, Ltd.; Jeffrey E. Schwarz; and Metropolitan Capital Advisors Select Fund, L.P., Petitioners,
v.
Cox Radio, Inc., Respondent.

C.A. No. 4809–VCP
|
Submitted: March 6, 2013
|
Decided: June 28, 2013

Attorneys and Law Firms

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MEMORANDUM OPINION

PARSONS, Vice Chancellor.

***1** This appraisal proceeding arises from the merger of a Delaware corporation with and into a subsidiary of its parent company, which owned 78% of the corporation's outstanding stock at the time of the merger. Following the announcement of the proposed merger, certain holders of the corporation's stock filed a breach of fiduciary duty action against the corporation, its directors, and its parent in March 2009. Those parties entered into an agreement of compromise and settlement to which the petitioners in this action objected. The merger was consummated on May 29, 2009. This Court ultimately approved the class action settlement over the petitioners' objections, and the Supreme Court affirmed. The petitioners now seek appraisal of their shares pursuant to 8 *Del. C.* § 262.

The petitioners maintain that the merger consideration of $4.80 per share substantially underestimated the value of their shares. They presented evidence from an industry expert and a valuation expert in support of their position. The petitioners' valuation expert assessed the fair value of the petitioners' shares to be between $11.05 and $12.12 per share. The respondent defended the merger price. It also retained an industry expert and a valuation expert. The latter expert opined that the fair value of petitioners' shares was in a range of $3.40 to $5.29, and suggested that the Court select the midpoint of that range, $4.28 per share, as the fair value of the petitioners' shares on the merger date. Having carefully considered the evidence presented at a four-day trial and the parties' extensive briefing and post-trial argument, I conclude that the fair value of petitioners' shares on the merger date is $5.75 per share.

I. BACKGROUND

A. The Parties

Each petitioner was a holder of Cox Radio, Inc.'s ("CXR" or the "Company") Class A common stock when, on May 29, 2009, Cox Enterprises, Inc. ("CEI"), through its wholly owned subsidiary Cox Media Group ("CMG"), acquired the publicly held stock in CXR. The petitioners are Towerview LLC (900,000 shares),[1] Hartz Capital Investments, L.L.C. (125,000 shares), Metropolitan Capital Advisors, L.P. (100,000 shares), Metropolitan Capital Advisors International, Ltd. (55,400 share), Jeffrey E. Schwarz (25,000 shares), and Metropolitan Capital Advisors Select Fund, L.P. (19,800 shares) (collectively, "Petitioners").

Respondent is CXR, a Delaware corporation headquartered in Atlanta, Georgia. CXR engaged in the radio broadcasting business. It owned, operated, or provided sales and other services for eighty-six stations clustered in nineteen markets.

B. Evidentiary Objections

Before reciting the facts of this case, I briefly address several evidentiary objections raised by Petitioners. Specifically, Petitioners complain that Respondent impermissibly relied on post-merger data and hearsay and that Respondent did not follow the agreed-upon practice for exchanging demonstratives. For the most part, I overrule Petitioners' objections. The Court will consider the evidence adduced by the parties and will attribute to it the weight the Court deems appropriate based on the credibility of the source and the relevance and probative value of the evidence. [2]

***2** I will address, however, a few of Petitioners' specific complaints. First, Petitioners object to a PowerPoint presentation apparently created by Petitioners' industry expert, John Chachas, and two others that is marked joint exhibit ("JX") 307. Under Rule 703 of the Delaware Rules of Evidence ("D.R.E."):

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. [3]

The fact that an expert may rely on a specific document, however, "does not mean that it would be admissible; to the contrary, a reliability analysis under Rule 703 is not a substitute for a hearsay ruling." [4] Thus, the admissibility of all documents objected to on hearsay grounds, even those relied upon by experts, "turns on whether it is admissible as non-hearsay or, if it is hearsay, if it qualifies for one of the hearsay exceptions." [5] A document may be considered nonhearsay if it is admitted as "basis evidence" to "help the factfinder understand the expert's thought process and determine what weight to give to the expert's opinion." [6]

Petitioners argue that because JX 307 "was not part of the discovery record or presented in any way at trial," it should be excluded as unsponsored hearsay. [7] Although JX 307 appears on the pre-trial exhibit list, Chachas did not refer to the document in his expert report or testify about it at trial or in his deposition. Hence, there is no basis for treating the document as admissible as nonhearsay to support Chachas's expert opinion under Rule 703. The document, therefore, is hearsay and Respondent has not argued that it qualifies for admission under any hearsay exception. Therefore, I sustain the objection to JX 307 and hold that it is inadmissible to the extent that Respondent relies on it for its truth.

Petitioners also object to the admissibility of certain analyst reports. They do not dispute that such reports are the type of evidence on which the experts in this case may rely. [8] Rather, Petitioners contend that Respondent is attempting to introduce the analyst reports as expert testimony in their own right. Petitioners also maintain that the reports are unreliable because the analysts are not independent. Respondent disagrees, arguing that this Court has admitted similar reports in past appraisal proceedings and that such reports are admissible to demonstrate, at least, the state of mind of analysts at the time of the merger. [9] In addition, Respondent notes that Petitioners relied on similar reports, including reports from credit rating agencies such as Moody's and Fitch. [10] Petitioners counter that reports from credit rating agencies are more reliable than analyst reports because those agencies are the industry's independent arbiters who reach their conclusions with inside information from CX R's management. Petitioners also emphasize that the reports they cite properly were introduced through their experts' reports and testimony. More importantly, perhaps, Respondent did not object to Petitioners' use of analyst or credit rating agency reports.

***3** The Delaware Supreme Court has observed that "[t]he danger exists ... that Rule 703 can be used as a 'back door' hearsay exception—a crafty litigant could give hearsay to its expert for the purpose of having the expert refer to it as a basis for the expert's opinion." [11] This danger does not appear to exist here. Petitioner tacitly has accepted the fact that analyst reports are proper evidence for the experts to consider; thus, the experts on both sides have discussed analysts' observations and quoted from analyst reports at length in their expert reports. [12] Instead, Petitioners appear to object only to the use of analyst reports not brought into evidence through an expert report or expert testimony.

As to analyst reports not used in the context of an expert report or expert testimony, the report would be admissible if it is "non-hearsay or, if it is hearsay, if it qualifies for one of the hearsay exceptions." [13] The analyst reports arguably are nonhearsay to the extent the parties offer them to help the Court "understand the expert's thought process and determine what weight to give to the expert's opinion." [14] To the extent a party relies on these reports as substantive evidence, they are hearsay. Thus, the Court's consideration of analyst reports will be limited (1) to considering the analyst reports identified in the exhibit list prepared in connection with trial and discussed by an expert in their expert report or at trial, a use which is unchallenged here, and (2) to assist the Court in evaluating the experts' opinions.

Lastly, Petitioners seek to limit use of Respondent's industry expert Bishop Cheen's testimony and rebuttal report to rebuttal only and to preclude its use in CX R's case-in-chief. Petitioners' argument in this regard is unpersuasive. Petitioners rely on two federal cases for the proposition that "rebuttal evidence may be used to challenge the evidence or theory of an opponent [but] not to establish a case-in-chief." [15] But, both those cases are distinguishable. [16] Petitioners also rely on the April 20, 2012 Stipulated Scheduling Order which states: "The scope of a party's rebuttal expert *report* shall be limited to rebutting positions taken in an opposing party's opening expert report." [17] The Scheduling Order also sets forth when the parties were to exchange their list of fact witnesses and states that "[t]hose listings are being provided to help avoid the need for depositions of fact witnesses after the close of discovery, and are made without prejudice to later modification; *the definitive list of trial witnesses shall be as set forth in the Joint Pretrial Order*." [18] The November 5, 2012 Joint Pre–Trial Order states that CXR plans to call "valuation expert Rajiv B. Gokhale and industry expert Bishop Cheen as live witnesses." The Order does not distinguish between witnesses being called in the parties' case-in-chief and being called as rebuttal witnesses.

***4** Pursuant to the Scheduling Order, Respondent identified its valuation expert on August 10, 2012 and reserved "the right to call any additional rebuttal experts necessary to address any non-valuation subject matters on which Petitioners intend to call an expert at trial." [19] On September 14, the date on which rebuttal expert reports were due to be exchanged, Respondent submitted Cheen's rebuttal report and the materials upon which he relied. Petitioners deposed Cheen on October 11, 2012.

In the context of this appraisal proceeding, Respondent reasonably could have expected to call a valuation expert and to reserve judgment on whether to call an additional expert until the necessity of rebutting a position advanced by Petitioners arose. The opening expert reports identified what would become a main issue: what kind of an economic rebound would have been expected at the time of the Merger. Petitioners submitted a report not only of their valuation expert, but also of an industry expert, John Chachas. The latter report provided Chachas's opinion on the radio industry environment and the prospects for a recovery of the industry in general and for CX R in particular. Although Cheen's rebuttal report served to rebut Chachas's opinions, it also was consistent with opinions already presented by Respondent's valuation expert in his expert report. Thus, Respondent was not hiding the ball and was not dilatory in presenting its case. Both parties have the same burden of proof in an appraisal proceeding. After Petitioners came forward with both a valuation expert *and* an industry expert, it was not surprising that Respondent elected to present an industry expert as well.

In addition, Petitioners had adequate time to respond to Cheen's opinions. Petitioners deposed Cheen and cross-examined him at trial. Thus, I perceive no material prejudice to Petitioners if, in rebutting Chachas's opinions, Cheen's opinions also served to support Respondent's case-in-chief. In these circumstances, Petitioners have presented no good reason to limit Cheen's testimony as they suggest. [20] Thus, I reject Petitioners' argument that Cheen's trial testimony and report should be admissible only for the purpose of rebutting Petitioners' case.

Having resolved the various evidentiary matters presented, I turn to my findings of fact and conclusions of law in this case.

C. The Facts

1. The Merger

On March 23, 2009, CEI announced a tender offer to acquire the publicly held stock of CXR for $3.80 per share. At that time, CEI indirectly owned 78.4% of CXR's outstanding shares and indirectly controlled 97% of CXR's voting power. On April 29, 2009, the tender offer price was increased to $4.80. After satisfaction of a majority of the minority condition of the tender offer, a short-form merger under 8 *Del. C.* § 253 was consummated on May 29, 2009 ("the Merger"). After the Merger, CX R became fully consolidated with CEI subsidiary CMG.

At the time of the tender offer and Merger, CXR's board consisted of eight directors: six who were affiliated with CEI or its subsidiaries and two who were not. The nonaffiliated directors served as a two-member special committee (the "Special Committee") that evaluated the Merger and ultimately concluded that the offer price was fair to the stockholders and recommended that the stockholders accept the offer and tender their shares. [21] The Special Committee's financial advisor was Gleacher Partners LLC ("Gleacher"). CEI's financial advisor was Citigroup Global Markets, Inc. ("Citi").

2. Management team

***5** Robert Neil was CXR's chief executive officer ("CEO") at all times relevant to this action. Neil Johnston was CXR's chief financial officer ("CFO") until the end of 2008 when he became the CFO of CMG. In January 2009, Charles Odom replaced Johnston as CXR's CFO. Lauren Tilson, a CXR accountant and manager of financial reporting, worked with Odom. [22] Eventually, Johnston changed roles at CMG to become the executive vice president of strategy and digital innovations and Odom became CMG's CFO.

3. Management's projections: long-range plans and current year forecasts

Every year, CXR management created bottom up five-year financial projections with input from regional managers. Management called these five-year projections the Company's long range plan, or "LRP." The LRPs were carefully prepared and thorough. They were submitted to and approved by the board of directors at the end of each year. Of the five years projected in the LRP, management considered the first year's forecast a "budget." That forecast includes monthly numbers. The four years that follow are the "out-years" and are considered at a higher level. [23] When examined retroactively, the LRPs consistently were overoptimistic, especially as to the out-years. [24] In addition to creating the LRPs annually, management routinely created monthly forecasts for the current year. [25] These monthly forecasts typically would provide new estimates for the next several months of the current year.

In December 2008, CXR's board of directors approved management's long range plan for the years 2009–2013 ("2009 LRP"). In somewhat of a departure from the Company's general practice, management also created a current year forecast in January 2009. This forecast received particular emphasis because, in the wake of the 2008 financial crisis, the Company had experienced a dramatic decrease in revenues since the 2009 LRP was approved in December 2008. Therefore, rather than forecast only the next few months, as was management's normal practice, management forecasted the entire year. [26] Management updated the current year forecasts again in February, March, April, and May. The most recent forecast before the Merger was the forecast created on May 20, 2009 ("the May Forecast"). [27] The monthly forecasts were not vetted and approved by the board. These forecasts, however, were prepared in the normal course of business and there is no evidence that they were not as thoughtfully prepared or as reliable as the board-approved LRPs.

4. Economic environment at the time of the Merger

***6** At the time of the Merger, the United States was experiencing the worst recession since World War II ("the 2008/2009 Recession"). [28] By May 2009, it had become the longest recession since World War II. The radio industry, like all U.S. industries, was experiencing a deep contraction. [29] "[T]he downturn that gripped all ad-driven media beginning in 2008 was among the worst in 50 years." [30] On average, U.S. advertising revenues in the radio industry had declined by 29% between 2005 and 2009.[31] The 10–year compound annual growth rate ("CAGR") for the industry was –2.0%.[32]

a. Prospects for economic recovery

In March 2009, Ben Bernanke and the Federal Reserve announced that they would begin quantitative easing.[33] The Federal Reserve's injection of $1.75 trillion into the financial system helped to spur the beginning of an economic recovery.[34] By March 2009, the economy and the radio industry were experiencing some recovery.[35]

b. Expected robustness of the radio industry's recovery

The parties advanced widely divergent views on the prospects for recovery in the radio industry, generally, and at CXR, in particular, as of May 2009. The differences between those two views present the main issues in this appraisal case. In the years leading up to the 2008/2009 Recession, the radio industry had been experiencing fragmentation with increased competition from new media such as MP3 players, satellite radio, general digital media such as iPods, and internet radio.[36] The industry had lost pricing power. To maintain their sell-through rates for advertising, radio stations reportedly had lowered prices.[37] Analysts worried that these rates "would not recover due to the intense pressure on public radio companies to discount rates in order to get business."[38]

Even in early 2009, however, CXR's management touted the Company's future prospects to shareholders and industry analysts.[39] Management observed that radio audiences were growing[40] and that CXR had the best management in the radio industry.[41] At a March 4, 2009 earnings call, CXR CEO Neil stated that although "the near-term outlook on the economy remains very difficult, we continue to be optimistic about both the prospects of [CXR] and the radio industry in general."[42] Regarding media fragmentation, Neil remarked: "Actually, I'm pretty optimistic on the listener's side. For all of the baloney that we heard about satellite radio five, six, seven years ago, it certainly is dubious at best as to whether that really is a business."[43]

***7** In addition to CXR's management's views, rating agencies such as Moody's and Fitch considered the downturn in the radio industry to be cyclical and expected CXR to "improve to levels consistent with an investment-grade rating."[44] Analysts covering the radio industry and other radio station companies, however, expressed concerns about the increased pressure on advertising.[45] They recognized that the industry was in a cyclical downturn but also mentioned that secular trends presented challenges to the industry's recovery.[46]

CXR had cut its expenses slightly in response to the 2008/2009 Recession; its expenses were down by 1% in 2008.[47] But, the Company refused to make any drastic across-the-board cuts. CXR was unique in its peer group in publicly rejecting major cost reductions such as reducing its workforce.[48] After CXR management made this pronouncement in the March 2009 earnings call, the Company's stock price dropped sharply from the $5–$6 range to a low around $3 per share.[49] Other causes of the drop in CXR's stock price in March 2009 included a Goldman report that put a sell on the stock at a $3 target and the fact that CXR stock was being shorted.[50] Notably, however, radio insiders and owners, in addition to CEI, were making investments in radio industry businesses in early 2009.[51]

5. Management projections: May Forecast

***8** As noted, by early 2009, CXR's management's expectations for 2009 had plummeted compared to the 2009 LRP. The January reforecast showed projected revenues and operating cash flow ("OCF") down by 14.7% and 37.6%, respectively, compared to the 2009 LRP.[52] By May, management's projections for 2009 departed negatively from the 2009 LRP by 16.8% in revenue and 40.1 % for OCF.[53] Although the 2009 numbers diverged dramatically from the 2009 LRP forecasts, management continued to look to the 2009 LRP to some extent. For example, Bond & Pecaro[54] made use of the 2009 LRP in its Statement of Financial Accounting Standards No. 142 ("FAS 142") valuation report as of December 31, 2008[55] and in its ongoing appraisal process for 2008.[56] Bond & Pecaro did not simply incorporate management's projections into its valuation models, but apparently considered the 2009 LRP as one of many documents it referred to in creating its own projections. [57]

CXR management also continued to circulate the 2009 LRP in early 2009, sending it to at least three people. First, Odom sent the 2009 LRP as background information to Grace Huang, the new senior director of corporate strategy at CMG, on January 8, 2009. [58] Odom's email responded to a request from Huang, which stated that she was "trying to get up to speed on the businesses and [was] looking for overall financials; budget/board presentations that can help provide a quick snapshot of the Radio business." [59] Odom attached "a couple of files that should be helpful," including a PowerPoint presentation created in 2008 regarding CXR's "2009 Budget Meeting" and two additional documents entitled "November Financial Package" and "November One Sheet." [60] The 2009 Budget Meeting PowerPoint contained sixty slides, several of which summarized or discussed the 2009 LRP. [61] Odom informed Huang that "the 2009 budget presentation ... gives a good strategic overview of the company and lays out our strategy for 2009." [62] One slide entitled "Radio Strategic Review" set forth CXR's strengths. They included that radio usage was growing, that radio was attractive to advertisers because the medium is personal and targeted, and that radio was resilient. [63] After briefly describing the other two documents he attached, Odom told Huang that "the combination of these items should give you a good overview of the company." [64]

Second, on March 26, 2009, Odom sent nine documents, including the 2009 LRP, to Harry Bond at Gleacher. According to Odom's transmittal email, he simply was attaching information Gleacher had requested. [65]

Third, in an email dated April 28, 2009, CXR accountant Tilson sent the 100–page version of the 2009 LRP to Kimberly Smith, a junior auditor at Deloitte and one of the people that Odom and Tilson regularly dealt with regarding FAS 142 issues. [66] Tilson's email, however, did not contain any subject reference or any text.

6. The Tilson Memo

***9** Tilson sent another email that has become a central point of dispute in this action. On May 15, 2009, Tilson sent an email, with a copy to Odom, regarding "FAS 142" to Deloitte auditors Barry McLaurin and Charles Crawford. The email included an attached memo, the "Tilson Memo," dated May 11, 2009. Earlier, on May 1, Odom had sent Tilson a request:

> Please draft a short memo that discusses why we didn't do a FAS 142 analysis at the end of Q1 (3) in short the reasons are: [1] When the 12/31/2008 valuation was performed, current business conditions existed and the weakness that we're currently experiencing was anticipated and incorporated into that valuation (3) [2] Tender offer (3) although offer prices reflect a lower value than our 12/31/[08] valuation (3) due to current depressed market outlook (3) this is an ongoing process (3) no assurance that the current price is actually what the ultimate price will be (3) Etc.etc ... [67]

Thereafter, Tilson and Odom exchanged several drafts of such a memo. By May 15, the Tilson Memo had been finalized. The final memo states, in part:

> [CXR] believes that deteriorated first quarter 2009 results are for the most part already included in the year-end model due to the timing of the test and management's knowledge of this continuing deterioration. As such, *the deteriorating environment currently impacting [CXR]'s stock price and market cap are taken into account in management's projections at December 31, 2008.* Furthermore, any revenue declines greater than those projected are largely offset by expense recoveries such that net cash flows are comparable. *Lastly, [CXR] also believes that future years' growth is attainable due to recovery in the industry.* In regards to Bond & Pecaro's analysis of historical private radio market values, although public market values have declined, private market values have not ever declined (even during prior recessions) to the level currently reflected by the public markets. [68]

This language ignited several rounds of fireworks in this litigation. Based on it, Petitioners moved to reopen this Court's judgment approving the class action settlement in May 2010, [69] and requested leave to file a breach of fiduciary duty complaint. Petitioners accused CXR of withholding from the Special Committee, from this Court, and from the Delaware Supreme Court management's beliefs that the 2009 LRP remained relevant and that the radio industry was recovering. I considered and denied that motion. [70] In arguing the motion, the parties discussed FAS 142 testing extensively. For purposes of this appraisal action, a brief summary should suffice.

FAS 142 analysis involves the valuation of a company's intangible assets. FAS 142 goodwill impairment testing assumes that the company will sell the groups of assets being valued to a buyer "for their highest and best use." [71] Odom likened FAS 142 valuations to a private-market value: "They have attributes of a private-market value, which is very different and has different assumptions than publicly valuing a company as a going concern." [72] According to FAS 142, intangible assets should be tested for impairment once per year or more frequently if changes in circumstances indicate that the assets may be impaired. [73] The company that owns the intangible asset in question has the discretion to decide whether to conduct an interim impairment test. One indicator of impairment that might lead to an interim test is a decline in a company's stock price and market capitalization. CXR experienced such a decline in early 2009.

***10** Consistent with Odom's initial email to Tilson, the Tilson Memo purports to explain why CXR elected *not* to perform an interim impairment valuation of CXR's FCC licenses and goodwill as of March 31, 2009, notwithstanding the decline in the Company's stock price and market capitalization. Odom explained at trial that, although Bond & Pecaro's FAS 142 valuation was for the year 2008, it was not finalized until the middle of February 2009. [74] According to Odom, between February and March 31, 2009, "[t]he private-market valuation ha[d] been stable and ... ha[d] been within this band for years and years and years.... And so that would indicate that the FAS 142 valuation would be substantially the same." [75] Thus, CXR determined that an interim test was unnecessary and denominated the Tilson Memo as a memo "To: File" to document that conclusion and the fact that management had considered the issue. [76]

Although the parties strenuously contest this issue, the Tilson Memo's reference to "management's projections at December 31, 2008" apparently was an ambiguous reference to Bond & Pecaro's projections, and not to the 2009 LRP. Odom credibly testified that the disputed reference pertained to the Bond & Pecaro projections as of December 31, 2008. [77] He described the projections Bond & Pecaro prepared regarding its FA S 142 valuation. Moreover, his explanation is corroborated by the Bond & Pecaro report itself, entitled "Fair Market Valuation of Cox Radio, Inc. as of December 31, 2008" (the "FAS 142 Analysis"). [78] Using sources like Miller Kaplan or SNL Kagan, Bond & Pecaro assessed how it thought industry revenues, in the markets CXR operates in, would perform in the future. In addition, using sources such as Arbitron, Bond & Pecaro considered what percentage of audience shares the Company's stations could garner in those markets. Based on the percent of audience shares a company could secure, the company would get that percentage of projected revenues. [79]

The FAS 142 Analysis provides the following explanation of how Bond & Pecaro arrived at its cash flow projections:

> The assumptions used in the cash flow models reflect historical performance and trends *in the* [*CXR*] *market clusters,* as well as industry norms for similar stations. These assumptions, especially those pertaining to station revenue shares and operating profit margins, are, in part, reflective of the actual and forecast performance of [CXR] as station owner. However, based on radio industry data, the revenue shares and operating margins used in the cash flow models all fall within a reasonable range of what could be expected from a typical market participant. [80]

In addition to the explanation Bond & Pecaro provided in its report, Petitioners' expert, D r. Samuel Kursh, opined in his report that the reference in the Tilson Memo to "management's projections at December 31, 2008" referred to "Bond & Pecaro's DCF." [81] At his deposition, Kursh testified that he was not aware of anything in Bond & Pecaro's FAS 142 Analysis that was predicated on the 2009 LRP, but he backtracked at trial. On the witness stand, Kursh asserted that Bond & Pecaro did use the 2009 LRP in its FAS 142 Analysis. [82]

As noted above, Bond & Pecaro had access to the 2009 LRP when it created its projections. In fact, CMG's Amended and Restated Offer to Purchase for Cash All Outstanding Shares of Class A Common Stock, disclosed that Bond & Pecaro's valuation was "based, in part, with consideration of the Long Range Plan." [83] In addition, Bond & Pecaro's FAS 142 Analysis explicitly states that its assumptions "especially those pertaining to station revenue shares and operating profit margins, are, in part, reflective of the actual and forecast performance of [CXR] as station owner." [84] Thus, I find that Bond & Pecaro did use the 2009 LRP to some extent in the FAS 142 Analysis.

7. Expert valuation reports

a. Petitioners' expert Kursh

***11** Both parties retained proficient experts. Petitioners' valuation expert, Kursh, provided an expert report and rebuttal report. [85] In his expert report, Kursh relied solely on a discounted cash flow ("DCF") analysis. Kursh used the May Forecast to project cash flows for 2009 and the 2009 LRP to project cash flows for years 2010–2013. Because the May Forecast reflected the current economic crisis and recession, Kursh anticipated an eventual recovery to the levels projected in the 2009 LRP for the out-years. Specifically, he projected that CXR's OCF would return to the levels projected in the 2009 LRP after eighteen months. Based on an equation that took into account inflation, population growth, and increased productivity, Kursh chose a terminal growth rate of 2.5%. Petitioners characterize this choice as conservative in light of CXR's strong position in the radio industry and its operating leverage. [86]

With these inputs, Kursh determined a fair value for CXR of at least $11.05 per share. Kursh also identified certain adjustments to the 2009 LRP that he believed represented appropriate additions to the cash flow projections. On that basis, Kursh opined that the $11.05 value he obtained in his DCF should be increased to reflect those adjustments. The items of potential additional value include CXR's retained cushion and omitted deferred taxes. [87] Based on these suggested adjustments, Kursh increased his per-share value by $1.07 to a total of $12.12 per share.

b. Respondent's expert Gokhale

Respondent's expert is Rajiv B. Gokhale. Gokhale also relied primarily on DCF analyses. He performed two. In his first analysis, Gokhale used the May Forecast to project 2009 cash flows and he estimated 2010–2013 cash flows using the actual EBITDA CAGR CXR experienced in the four years following the 2000/2001 recession ("May Forecast DCF"). [88] In his second analysis, he constructed projections for 2009–2010 based on a combination of consensus analyst EBITDA estimates for CXR and, to project cash flow in years 2011–2013, Gokhale used the actual EBITDA CAGR CXR experienced in the three years following the 2000/2001 recession ("Third–Party DCF"). [89] Gokhale determined not to use projections from the 2009 LRP because, by May 2009, he believed that both CXR management and analysts had lowered their projections significantly for 2009 and later years. He did use some inputs from the 2009 LRP in his DCF, however, such as depreciation and the projected expenditures for the long-term incentive plan ("LTIP"). [90]

***12** Gokhale calculated a weighted average cost of capital ("WACC") using the capital asset pricing model ("CAPM") to determine the cost of equity. Gokhale's model yielded a range from 5.81 % to 7.65%, if he excluded a small stock premium, and 7.03% to 9.27%, if he included such a premium. He ultimately used a WACC of 8.0% to discount CXR's unlevered free cash flows. Gokhale also selected a perpetuity growth rate of 1.25% based on analyst projections that ranged from negative 1 % to positive 2%.

Gokhale performed a comparable companies analysis, but found that it was of limited value because market values of debt were unavailable for all but one comparable company. Furthermore, due to the economic and financial slowdown in 2008, the book values of debt did not provide a good proxy for market values. Consequently, Gokhale concluded that the multiples obtained by a comparable companies methodology were unreasonably high and that using those multiples would overstate the value of CXR shares. He did not attempt a comparable transactions analysis because there were no North American radio broadcasting merger and acquisition transactions between July 2008 and the end of 2009.

D. Procedural History

After the initial tender offer, holders of CXR stock filed a class action complaint in this Court alleging direct and indirect breaches of fiduciary duty against CXR, its board, CEI, and CMG in connection with the proposed Merger. Those holders agreed to settle that case and filed a stipulation for compromise and settlement on September 4, 2009. Petitioners filed their petition for appraisal on August 14, 2009 (the "Petition"). They also objected to the class action settlement. Notwithstanding Petitioners' objection, the Court approved the settlement on May 6, 2010. The Supreme Court affirmed the Court's ruling on November 22, 2010. As noted earlier, Petitioners later filed a motion for leave to file their own breach of fiduciary duty complaint that this Court denied on October 26, 2012.

A four-day trial was held on the appraisal Petition on November 13–16, 2012. After full post-trial briefing, I heard the parties' final arguments on March 6, 2013. This Memorandum Opinion constitutes my post-trial findings of fact and conclusions of law on the Petition. For the reasons that follow, I conclude that the fair value of CX R stock on the date of the Merger was $5.75 per share.

E. Parties' Contentions

Petitioners contend that, at the time of the Merger in May 2009, participants in the radio industry, including CXR management, expected the industry to snap back from the low the industry was experiencing in early 2009. According to Petitioners, CXR was the star of the industry. Petitioners contend that CXR, therefore, was poised to achieve the best recovery in the industry once that recovery inevitably occurred. Thus, Petitioners assert that the Court reasonably can assume that CXR would have rebounded relatively quickly to the 2009 LRP. According to Petitioners, the evidence demonstrates that management continued to rely on and disseminate the 2009 LRP throughout early 2009. This, they argue, indicates that management believed that "recovery" meant an eventual return to the 2009 LRP projections. In Petitioners' view, the sole question to be answered here is when one would have expected that cyclical recovery to occur. Petitioners contend that Kursh's valuation used proper standards to provide an answer to this question. Hence, Petitioners aver that Kursh's valuation is appropriate and urge this Court to adopt his conclusion as to the fair value of CXR stock on May 29, 2009.

***13** The Company paints an entirely different picture of the expectations of CX R management and others, such as industry analysts, in early 2009. Respondent contends that, when the Merger was completed on May 29, 2009, the 2009 LRP no longer provided a realistic set of financial projections. According to Respondent, CX R management had rejected the 2009 LRP and did not expect the radio industry to recover to pre-recession levels. Although management expected to achieve some cyclical recovery, Respondent denies that management foresaw a return to the 2009 LRP projections within a relevant time horizon. Secular changes in the industry that pre-dated the 2008/2009 Recession and that Recession itself, according to Respondent, set a new baseline for the radio industry.[91] Based on its premise that the 2009 LRP was obsolete, Respondent argues that Gokhale appropriately relied on CX R's historical recovery from the 2000/2001 recession to estimate CXR's 2010–2013 performance and that the Court should adopt his value conclusion.

II. ANALYSIS

Under Section 262 of the Delaware General Corporation Law, stockholders who meet certain requirements are entitled to an appraisal by the Court of Chancery of the fair value of their shares of stock.[92] During such an appraisal proceeding, the Court of Chancery

> shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors.[93]

The Court's task is to perform an independent evaluation of "fair value."[94] "It is within the Court of Chancery's discretion to select one of the parties' valuation models as its general framework, or fashion its own, to determine fair value in the appraisal proceeding."[95] Fair value in the context of an appraisal proceeding is the "value to a stockholder of the firm as a going concern, as opposed to the firm's value in the context of an acquisition or other transaction." [96] "Only the speculative elements of value that may arise from the 'accomplishment or expectation' of the merger," that is, any synergistic value, should be excluded from a fair value calculation on the date of the merger. [97] "One of the most important factors to consider is the very 'nature of the enterprise' subject to the appraisal proceeding." [98]

In an appraisal proceeding, both sides have the burden of proving their respective valuations by a preponderance of the evidence. [99] If neither party satisfies its burden, however, the Court must use its own independent judgment to determine the fair value of the shares. [100] The Court may consider "proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court." [101] Among the techniques that Delaware courts have relied on to determine the fair value of shares are the DCF approach, the comparable transactions approach, and comparable companies analyses. [102]

A. The Parties Rely on DCF Analyses

***14** Both experts relied primarily on a DCF analysis. [103] The experts agreed that both a comparable transactions and a comparable companies analysis would be unreliable for various reasons. [104] Kursh also noted that CXR and CEI "routinely commissioned other valuation experts to perform valuations for [CXR] for various purposes, and these consultants, like Bond & Pecaro, relied on DCFs." [105] In addition, this Court routinely has relied on DCF analyses as a reliable valuation method in appraisal proceedings. [106] Thus, I find that a DCF analysis is the best valuation method by which to value Petitioners' CXR stock.

The three main inputs into a DCF analysis are: (1) the OCF projections; (2) a discount rate; and (3) a terminal value.

1. OCF projections

The disparity in the experts' value conclusions mainly results from the differing cash flow projections chosen by each expert. Pre-merger management projections are an appropriate starting point from which to derive data in the appraisal context because they are not tainted by post-merger hindsight and usually are created by an impartial body. [107] Management also is in the best position to forecast the company's future before the merger. [108] Nevertheless, "[i]f Management forecasts are prepared a significant period of time before the merger, it may be necessary to make minor changes to them reflecting actual results as of the merger date." [109] Here, the 2009 LRP reflects management's thorough pre-merger five-year projections. The reliability of the 2009 LRP, however, is severely undermined by the changes that took place in the economy and the radio industry between the creation of the LRP projections in October 2008 and the Merger date of May 29, 2009. Significantly, CXR's management itself recognized these changes and considerably reduced projections for 2009 in the months leading up to the Merger.

***15** Both Kursh and Gokhale agree that the May Forecast, which is management's last forecast before the Merger, is an appropriate starting point for a valuation of the Company. The May Forecast projects 2009 only. From there, the experts' views diverge widely: Kursh assumes that CXR will return to the 2009 LRP projections sometime between the end of 2010 and 2013. Once CXR's revenues return to the level specified in the 2009 LRP, Kursh assumes that thereafter revenues will conform to the projected values in the 2009 LRP from that time until the end of 2013. In contrast, Gokhale does not expect CXR's OCF to return to the 2009 LRP levels at any time before 2013. Nor does he project any dramatic upswing after the significant decline CXR experienced in the recession, as reflected in the May Forecast for 2009. Instead, Gokhale projects that cash flow in 2010–2013 will grow at a steady rate derived from averaging the EBITDA CAGRs that CXR experienced in the three or four years after the 2000/2001 recession.

The differences between the approaches of the two experts are illustrated graphically in the figure below. The solid line that depicts OCF starting at approximately $160 million in December 2007 and ending at $138 million in 2013 represents the 2009 LRP. The dotted line depicts the adjusted forecast for 2009, *i.e.,* the May Forecast, that both experts adopted. The line that begins at the low point of the May Forecast, representing December 2009, and extends to December 2013 with a very modest positive slope, reflects the projections Gokhale used in his DCF model. [110] The steeper dashed lines leading to the 2009 LRP line show each of four recovery scenarios Kursh considered. Ultimately, Kursh based his valuation on the second of those lines, which roughly depicts a return to the 2009 LRP OCF levels by December 2011.

The primary issue I must decide in this appraisal case, therefore, is how quickly, if at all, the radio industry in general, and CXR in particular, would have been expected to recover to pre-recession expectations, *i.e.,* to the 2009 LRP in the case of CXR. Kursh, on the one hand, assumes a recovery to the 2009 LRP within eighteen months. [111] Gokhale, on the other hand, assumes no "recovery" from the contraction the radio industry experienced in 2008 and 2009. In Gokhale's view, the combination of the secular decline that had been plaguing the industry for several years and the 2008/2009 Recession had created a new baseline for the industry from which CXR would have been expected to grow at a steady rate.

The models Kursh and Gokhale use vary slightly in several other ways as well. The two experts disagree on inputs such as LTIP payments, debt, retained cushion, deferred taxes, capital expenditures and depreciation, and the number of CXR shares outstanding. I consider first how to project free cash flow and I then consider the other inputs.

a. Economic recovery; a return to the LRP?

In the months leading up to the Merger, CXR management believed that the Company would experience some recovery from the recession. [112] CXR believed that the Company was "well positioned to benefit as the economy begins to recover." [113] Audiences were growing. [114] CXR management's belief in a "recovery" and a "bright future," however, does not necessarily justify an inference that the Company reasonably would have been expected to be able to achieve the projections in the 2009 LRP.

***16** The radio industry had undergone, and continued in early 2009 to experience, a secular decline. [115] It had been experiencing a steady decline in revenue and stock price since around 2004 based, in part, on new competition. Notably, however, the secular concerns began as early as 2006. [116] The 2009 LRP was prepared in October 2008 and approved by the board in December 2008. Therefore, the 2009 LRP already would have accounted for this secular decline in the industry to some degree. But, the rapid decline in revenue and OCF the industry experienced in the early months of 2009 was unanticipated: "the depth of the erosion in the 2008/2009 recession was unusually swift and severe." [117] The severity of the decline had changed the landscape for CXR. [118] By May 2009, management had reduced its projected EBITDA for 2009 by 41% compared to the 2009 LRP, and its OCF by 40%. [119]

In addition, Respondent provided some evidence that CXR's long range plan was consistently over-optimistic as to the out-years. [120] Comparing, for example, management's LRP projections in 2002 and 2003 regarding the out-years 2007 and 2008, respectively, the actual EBITDA for 2007 and 2008 was 35% and 43% lower than management had projected it would be in the 2002 and 2003 LRPs. [121] Reducing the 2013 EBITDA figure in Kursh's model of $124 million, which equals the 2009 LRP projection, by 35% or 43% lowers that figure to $80.6 and $70.68 million, respectively. [122] These numbers are generally in the same range as the 2013 EBITDA numbers Gokhale used in his May Forecast DCF model ($76.12 million) and in his Third–Party DCF model ($84.17 million).

Considering the severe 2008/2009 Recession and economic uncertainty in early 2009, I am wary of accepting Petitioners' position that a valuation on May 29, 2009 would anticipate a near-term return to even the 2009 LRP's 2011–2013 cash flow projections. In an appraisal case, this Court is charged with the difficult task of putting itself back in time to consider without the benefit of hindsight what the company's fair value was in light of its "operative reality" at the time of the merger. [123] A valuation in early 2009 inevitably would account for a certain degree of uncertainty about the future. Indeed, CXR's management's expectations for the immediate future had plummeted. [124] I give some weight to these sobered expectations and, to a lesser extent, to the hindsight observation that management's out-year projections perennially tended to be optimistic. At the same time, however, I am cognizant of the fact that the percipient witnesses, *e.g.,* Johnston and Odom, worked for Respondent both at the time of the Merger and at the time of their testimony and that their current memories of the relevant period may be less probative than what CXR's management actually stated in early 2009. At a minimum, I take with a grain of salt the clarity with which Respondent's fact witnesses now claim to have appreciated CXR's prospects in early 2009. In any event, and notwithstanding the 2008/2009 Recession, Petitioners advanced three main reasons why, based on all factors known or knowable at the time of the Merger, a valuation as of May 29, 2009 should be premised on an eventual return to the 2009 LRP projections. I consider each argument in turn.

i. Plucking theory

***17** First, Kursh relied on Milton Friedman's "plucking theory" for the proposition that a "large contraction in output tends to be followed on the average by a large business expansion; a mild contraction, by a mild expansion." [125] Based on this theory, Kursh assumes that the steep recession the radio industry experienced in 2008 and 2009 would be followed by a steep recovery. Kursh argues that, in the previous ten business cycles, dating back to 1948, the economy returned to pre-recessionary real gross domestic product ("GDP") levels during the first three quarters of their recovery, with the two longest recessions of sixteen months obtaining pre-recessionary real GDP levels in less than three and two quarters, respectively. [126]

Kursh conceded, however, that a recession coupled with a financial crisis, like the 2008/2009 Recession, would show a sluggish recovery. [127] Moreover, the plucking theory relates to recessions and recoveries in terms of a nation's GDP. Kursh relies on a correlation between real GDP and advertising revenue in the radio industry to support his assumption that the radio industry and CXR, like the economy in general, would experience a steep recovery, and, thus, would return to the 2009 LRP. Kursh, however, failed to prove that a correlation between GDP and radio advertising revenue exists. He did not address this correlation in his expert or rebuttal reports. Moreover, Gokhale testified to the contrary. Gokhale asserted that in the 1990s and early 2000s there was some correlation between GDP growth and advertising growth, but that the correlation had broken down by about 2001. [128]

In response to Gokhale's criticism, Kursh presented two articles at trial to support the alleged correlation: an article from the Journal of Marketing Research which studied advertising expenditures in business cycles [129] and a document from the White House website, apparently drafted by the Obama administration's Council of Economic Advisers. [130] Kursh asserts that the Journal of Marketing Research article indicates that for every 1 % of GDP growth, radio advertising revenues will grow by 1.69%. [131] H e then used an equation from the White House document to conclude, based on a 4.69% decline in real GDP from 2007 to 2009, [132] that it would have been reasonable in May 2009 to expect 17% growth in nominal GDP in the two years following the recession. [133] From this projected growth in nominal GDP, Kursh calculated that radio advertising revenues would have been expected to grow 28.7% by 2011. Applying this growth rate to the May Forecast's 2009 revenue projections, Kursh asserts that he would have expected CXR to have 2011 revenue of $434 million. The 2009 LRP projected CXR's 2011 revenue of $425.9 million. Thus, according to Kursh, these articles support his conclusion that one calculating the fair value of CXR shares in May 2009 should have expected CXR's financial situation to recover to the 2009 LRP projections by the end of 2011.

***18** There are several problems with Kursh's presentation. First, the cited White House document does not provide clear support for a growth rate of 17% in nominal GDP and there is no additional support for such a growth rate in the record. The White House document itself projects GDP growth rates around 2%, significantly less than the rate Kursh purports to derive from a regression formula presented in that document. [134] Second, Petitioners failed to prove a correlation existed between GDP growth and advertising revenue growth as of May 2009. Indeed, one document that Kursh relied on in his rebuttal report states that "[i]n recent years, the relationship between advertising growth and GDP has broken down." [135]

Furthermore, Kursh did not reference the Journal of Marketing Research or White House articles, the underlying data, or the analysis he proffered at trial in his expert or rebuttal report. These belatedly introduced documents do not constitute credible evidence for the propositions for which Kursh uses them. Although Kursh identified these sources *after* completing his expert and rebuttal reports, he attempted to use them to demonstrate an important assumption underlying the valuation reflected in his reports. As previously noted, the documents themselves do not clearly support the steep growth rates that Kursh advocates. Thus, even if I accepted the plucking theory, *i.e.,* that real GDP would be expected to return to pre-recessionary levels in three quarters, Petitioners have not shown that radio advertising revenues would grow apace with GDP, let alone at a rate of 1.69% for every 1% of GDP growth. [136] Therefore, I am not persuaded by Petitioners' plucking theory argument. That is, I consider it unlikely that in May 2009, a 17% nominal GDP growth rate would have been expected for 2009 and that this projected GDP growth rate would have supported a reasonable belief that CXR's advertising revenues would have grown nearly 29% between 2009 and the end of 2011 to put CXR back on track thereafter to achieve the revenue and cash flow projections for the remaining out-years in the 2009 LRP.

ii. Management's emails

Petitioners' second argument in support of a return to the 2009 LRP projections is that CXR's management continued in early 2009 to believe in the validity of the 2009 LRP as evidenced by their dissemination of that LRP to auditors, lenders, appraisers, and controlling stockholders in the normal course of business. According to Petitioners, this demonstrates management's belief that these projections remained accurate. For this assertion, Petitioners rely on three emails sent by CXR management. The first is from Odom to new CMG employee Grace Huang; [137] the second is from Odom to Harry Bond, a representative of the Special Committee's financial advisor Gleacher; [138] and the third is from Tilson to Kimberly Smith, an auditor at Deloitte. [139]

***19** In the first email, Odom sent the 2009 LRP and two other documents to CMG's new employee Huang on January 8, 2009 to give her a strategic overview of the Company. Notably, the 2009 Budget Meeting PowerPoint, which discussed the 2009 LRP, was created in October 2008 as an update to the 2009 budget. The other two documents appear to have been prepared in November 2008. Odom sent the January 8, 2009 email to Huang before management had performed its first reforecast for 2009 on January 27, 2009. According to Petitioners, at least, Huang was CMG's new senior director of corporate strategy. [140] Nevertheless, both the timing of this email and its purpose, *i.e.,* providing a new employee a high-level overview of the Company's strategy, undermine its probative value as evidence of management's beliefs about CXR's expected financial performance around May 29, 2009. At most, Odom's email demonstrates that management believed in early January 2009 that its opinions regarding the budget and strategic plan at the end of 2008 still provided a viable basis for communicating "a good strategic overview of the company" to a new CXR insider. It provides scant support for an inference that in May 2009, after management had adjusted the 2009 LRP's projected OCF downward by 40%, CXR's management expected to recover to the 2009 LRP levels in the near future.

Odom's March 26, 2009 email to Gleacher representative Bond likewise gives no indication that, by attaching the 2009 LRP, Odom was advocating its continued applicability. The 2009 LRP was one of nine documents attached to the email. Odom stated that he would send several more emails to Bond, presumably with additional attachments. In the Special Committee's review of CXR's intrinsic value, it is hardly surprising that the Committee and its investment banker would request the 2009 LRP. Ultimately, however, the Special Committee concluded that the 2009 LRP was "no longer reflective of [CXR]'s current intrinsic value." [141]

According to CXR's April 3, 2009 Schedule 14D–9, shortly after Odom's email to Bond, on March 31, 2009, the Special Committee, its outside counsel, and Gleacher met with Odom and Neil and received "an update on the company's current results of operations as well as an overview of management's assumptions and qualifications underlying the projections that management provided to Gleacher." [142] Thereafter, the Committee concluded that "the decline in the Company's value is not temporary and, as a consequence, the historical valuations of the Company are no longer reflective of its current intrinsic value." [143] In reaching this conclusion, the Special Committee noted that management prepared a forecast in February 2009 that reflected estimated 2009 EBITDA of 48% and 55% less than actual EBITDA in 2008 and 2007, respectively. [144]

Odom credibly testified that he thought the Special Committee's conclusions were appropriate. [145] Management's communications with the Special Committee and Gleacher in April and May 2009, therefore, comport with the position they now take, *i.e.,* that by early 2009 the 2009 LRP no longer represented CXR's future prospects. Based on the contemporaneous evidence that management had communicated its decision not to rely on the 2009 LRP to the Special Committee and the Committee's financial advisor, I do not consider Odom's failure expressly to disclaim the 2009 LRP in his email to Bond to suggest that Cox management expected that CXR would return to the 2009 LRP.

The last email, an April 28, 2009 email from Tilson to Smith, contained no subject line and had no content. Consequently, Petitioners and this Court can only speculate as to why Tilson emailed the 2009 LRP to this Deloitte auditor in April 2009. Without more, the email does not indicate that management was advocating the accuracy of the 2009 LRP in April 2009. The emails to Huang, Bond, and Smith, therefore, do not demonstrate that management believed that the Company would recover to the 2009 LRP projections.

iii. The Tilson Memo

***20** Lastly, Kursh relies on the Tilson Memo in his expert report to conclude that "Radio management believed that the 2009 LRP remained a reliable basis by which to value the Company as of March 31, 2009." [146] I am not convinced, however, that the opinion expressed in the Tilson Memo means that management believed the 2009 LRP provided a reliable basis for valuing the Company as of May 2009. Indeed, around this time, management was reforecasting 2009 with revenues dropping by 17% and EBITDA projections dropping by 41 % compared to the 2009 LRP. [147] Management's significantly lower projections in the May Forecast severely undermine the continued viability of the 2009 LRP, a point Kursh ignores in his expert and rebuttal reports. [148]

Furthermore, the Tilson Memo addressed FAS 142 valuation. Odom credibly explained the context of the statements made in the Tilson Memo. In addition, Odom testified that the reference to "management's projections at December 31, 2008" referred to Bond & Pecaro's projections. [149] Although Bond & Pecaro had access to the 2009 LRP, it produced its own projections for purposes of the FAS 142 valuation. Bond & Pecaro's projections were, in fact, notably lower than the 2009 LRP projections in every market cluster except one. [150] In addition, Odom explained that although the FAS 142 valuation was done "as of December 31, 2008," the valuation was not finalized until February 2009, long after the 2009 LRP was created and after CXR had begun to experience dramatic decreases in revenues in early 2009. Thus, although the Tilson Memo states that the "deteriorating environment currently impacting [CXR]'s stock price and market cap are taken into account in management's projections at December 31, 2008," it is likely that the Bond & Pecaro projections also accounted for the deteriorating environment *in January 2009*. [151]

In sum, Petitioners have proven that a recovery was expected for the industry and that management believed that CXR had a bright future. [152] Even considering management's expressed optimism, however, I do not consider it reasonable to base a determination of the fair value of C R as of May 29, 2009 on the assumption that the Company would recover in the near term to levels reflected in the out-years of the 2009 LRP, which Respondent persuasively has demonstrated no longer was reliable. [153] Rather, the record indicates that projections based on the depressed environment that management recognized in the May Forecast for 2009 and a modest recovery after that, rather than what was reflected in the five-year 2009 LRP projections, would represent best CXR's operative reality and perceived prospects.

***21** Thus, the May Forecast provides an appropriate starting point for projecting CXR's operating free cash flows after December 2009. I find that, in the circumstances of this case, a valuation of CXR should include some recognition of a limited cyclical recovery from the deep low CXR experienced in early 2009 and that was reflected in the May Forecast. In this regard, Gokhale's approach provides a more appropriate starting point. Kursh's approach, which predicts a return to the

2009 LRP by the end of 2011, is too optimistic and is not supported by the record. Therefore, I begin with Gokhale's model as a general framework. [154] I consider next Gokhale's projected recovery scenarios.

b. Gokhale's cash flow projections

As noted previously, Gokhale used two sets of projections. The first set of projections incorporated the May Forecast for 2009 EBITDA and then estimated 2010–2013 using the actual EBITDA CAGR that CXR experienced in the four years following the 2000/2001 recession. [155] Gokhale's second set of projections uses consensus analyst EBITDA estimates for 2009 and 2010 and estimates for 2011–2013 based on the annual EBITDA CAGR that CXR experienced in the three years following the 2000/2001 recession.

The number of analysts following the radio industry in early 2009 was approximately three to six. [156] With such a low number of analysts, the accuracy of the analysts' forecasts is questionable. [157] Furthermore, I already have determined that the May Forecast for 2009 reflects management's best projections at the time of the Merger and should be used as a starting point for the DCF analysis. [158] Therefore, I adopt Gokhale's May Forecast DCF as a starting framework. [159]

***22** Before turning to Gokhale's May Forecast DCF, I note that Kursh and Petitioners criticized Gokhale's model in several respects. I carefully considered Petitioners' criticisms and will address two of them here. First, in his growth rate calculations, Gokhale evaluates 2001 on an annual basis rather than a quarterly basis. Kursh asserts that by doing so, Gokhale understated the recessionary impact because the 2000/2001 recession occurred during only the middle eight months of 2001. In the other four months, CXR experienced two months of a "normal" expansionary economy and two months of a "high-growth" economy in recovery. [160] Kursh did not identify, however, what adjustments, if any, he would make to Gokhale's growth rates to address his criticism. Additionally, Gokhale responded to Kursh's criticism at trial: "It wasn't clear what Dr. Kursh was suggesting [ ] to do with that information, we tested what happens if you tried some of the data he had in his table, and it didn't seem to affect my conclusions." [161] Thus, I reject Kursh's objection to the way in which Gokhale evaluated the 2001 results.

Second, Petitioners criticize Gokhale for not including a revenue line in his DCF analyses. Gokhale focused instead on operating free cash flow. Gokhale asserts that he used the same "bottom up" approach that CXR's management used. [162] In challenging that approach, Petitioners cited a reputable valuation treatise by Bradford Cornell. [163] Specifically, Petitioners note that, in item "1" of his "Cash Flow Forecasting Checklist," Cornell states: "***1. The sales forecast is generally the most critical element of a cash flow forecast.***" [164] Cornell goes on to explain that:

> Wherever possible, historical data, either for the firm or its industry, should be examined to assess the reasonableness of the sales forecasts—which leads to the second point on the checklist.
>
> ***2. The sales forecast should be consistent with the firm's historical performance and the historical performance of the industry.*** While it is always possible that a company will develop in unexpected ways, so that the future does not resemble the past, this is not the best way to bet. Appraisals based on forecasts that depart markedly from historical patterns are suspicious [165]

Although a sales forecast "generally" may be the most important element in a cash flow forecast, Gokhale's approach appears reasonable in this case. His model is based on management's full projections, which included their sales forecasts. Consistent with management's own bottom up approach, Gokhale's model begins with OCF from management's projections and grows them at a rate that is based on CXR's historical performance. Thus, although Gokhale's approach may not be warranted in every case, I find it to be supported adequately by his credible explanations and by the valuation literature.

Turning now to Gokhale's DCF, the May Forecast DCF begins with the 2009 OCF projections from the May Forecast and grows them at a rate of 4.6% each year until 2013. This growth rate finds support in the record. For example, in the 2009 LRP, management had projected OCF values for 2010–2013 with annual growth rates ranging from 3.4% to 4.1%, and it projected EBITDA for 2010–2013 with annual growth rates ranging from 1.4%

to 2.7%. [166] In addition, the J.P. Morgan report that both parties relied on projected a 2010 EBITDA growth rate for CXR of 5.1%. [167] Gokhale's steady growth rate, however, does not factor in any significant recovery from the depths of the recession which caused management to adjust its 2009 EBITDA down by 41%.

***23** After the 2000/2001 recession, CXR's OCF grew by 9.28% in 2002, 0.44% in 2003, 5.18% in 2004, and 4.06% in 2005. [168] That recession was mild compared to the recession that affected CXR in 2009. [169] Implicit in Gokhale's use of a steady growth rate of 4.6% for the years 2010–2013 is his apparent assumption that there would be virtually no cyclical aspect of the recovery commensurate with the depth or severity of the 2008/2009 Recession compared to the 2000/2001 recession. He justified this approach largely based on alleged secular challenges facing CXR and the radio industry. The evidence supports Respondent's position that secular concerns existed in the radio industry in May 2009 and that those concerns, among other things, would have tempered any projected recovery. The record also suggests, however, that the 2008/2009 Recession was attributable to cyclical factors or to matters affecting the economy generally, such as the financial crisis. Relying on the plucking theory, Petitioners' expert opined that the rebound in CXR's EBITDA in 2010 would have reflected an increase of *37.6%*. I believe that is too high, but find that some increase in the degree of projected initial recovery is appropriate. Thus, I conclude that an appropriate recovery in this case would include a growth rate comparable to the rate of growth CXR experienced in the first year after the 2000/2001 recession with growth thereafter returning to the steady rate of 4.6% that Gokhale projected.

Gokhale identified the recovery CX R experienced after the 2000/2001 recession as an appropriate point of comparison to evaluate what CXR's expected recovery would be after the 2008/2009 Recession. Even in the milder 2000/2001 recession, CXR's OCF grew in 2002, the first year coming out of the recession, by approximately double the rate at which it grew in the following years when it returned to a lower somewhat steady rate of growth. Consistent with what occurred in 2002, I find that some bump in growth would have been expected in 2010, the first year coming out of the 2008/2009 Recession. The growth rate in 2002 was 9.28%. This rate is significantly higher than the growth rates in 2003 (0.44%), 2004 (5.18%), and 2005 (4.06%). I recognize that the 9.28% rate already is factored into Gokhale's CAGR of 4.6% and that that rate would be lower without the first year's 9.28% growth rate. Nevertheless, I find that it is reasonable to expect that the 4.6% steady growth rate that Gokhale used would follow some uptick in 2010 to account for the cyclical aspect of the 2008/2009 Recession. [170] Thus, although it may be an imperfect model, [171] I conclude that adopting a 2010 OCF growth rate of 9.28% followed by 4.6% growth in years 2011–2013 appropriately accounts for CXR management's optimism and the expectations of population growth in its key markets without resorting to the 2010 growth rate of 37.6% and the 2011 growth rate of 27.3% that Kursh advanced and that I find to be unsupportable. [172]

Gokhale's 4.6% growth rate is higher than the annual growth rates projected in the 2009 LRP. Thus, a 9.28% rebound in 2010 followed by steady growth at that rate comports with some degree of optimism about CXR's future, while remaining generally conservative. In addition, I make no adjustments to projected expenses in 2010 related to the higher growth rate because CXR's projected expenses were fairly stable due to its relatively high fixed cost base. [173] Thus, any decrease to OCF from a proportional increase in expenses would be minimal. Based on the complete record, I find these assumptions to be appropriate and, thus, I adopt the growth rates indicated.

c. Other DCF analysis inputs

i. LTIP

***24** Kursh assumes no LTIP payments in 2009–2013 and a $4 million payment in the terminal period. [174] The 2009 LRP that Kursh relies on, however, includes LTIP expenses of approximately $50 million between 2009 and 2013. Management's May Forecast also includes a 2009 LTIP expense of $3.604 million. [175] Kursh explained that he did not expect CXR to incur any cash expenditure under the LTIP plan because "[a]ctual LTIP payments over the 2009 LRP period, however, are zero; all grants though 2007 are projected to be 'under water.' " [176] Gokhale, on the other hand, started with the

LTIP payments projected in the LRP and proportionally scaled them down based on the lower EBITDA that he projected. [177]

The record supports Gokhale's approach. Kursh did not explain sufficiently why he would not expect management to be compensated with LTIP payments when his models projected strong performance, *e.g.,* a 2009–2013 EBITDA CAGR of 16.5%. In contrast, Gokhale began with management projections and accounted for his projected decrease in revenue and EBITDA by decreasing LTIP payments proportionally. In addition, Gokhale's assumptions better align with management's projections for 2009. For these reasons, I adopt Gokhale's projected LTIP payments.

ii. Debt

Kursh uses a net debt figure of $380.1 million, which Petitioners assert was CXR's net debt on the date of the Merger. [178] Gokhale used a slightly higher debt figure of $385.6 million, but the source of Gokhale's figure is not clear. He relied either on the Merrill Lynch Corporate Bond Index or on an internal CXR financial document as of April 30, 2009. [179] I also note that Gokhale did not criticize Kursh's use of $380.1 million. Therefore, I have used $380.1 million as the amount of CXR's net debt on the date of the Merger.

iii. Retained cushion and deferred taxes

In Kursh's report, he suggests two items of potential additional value: retained cushion and deferred taxes. But, Kursh did not adjust his DCF model to demonstrate any changes he advocates based on these two items. [180] Instead, he provides a number that he opines should be added to the per-share value derived from his DCF calculation. As for the retained cushion, Kursh relies on a statement by Odom that management decreased revenues by $2 million and increased expenses by $2 million each year to manage CEI's expectations. Kursh argues that this $4 million dollar figure should be added to a final fair value calculation. At Kursh's suggested discount rate of 8.1%, the retained cushion represents additional value of $0.62 per share.

The evidence Petitioners present, however, does not provide clear support for adding back their suggested $0.62 per share of retained cushion. Kursh relies on Odom's deposition testimony in which Odom states that "on occasion we would either soften the revenues or add additional expenses in our consolidation to lower the expectation that we would communicate to [CEI]." [181] Odom explained that the purpose of this adjustment was because the numbers they received "from the field ... tended to be overly optimistic." [182] Based on this testimony, I am not persuaded that the May Forecast OCF is low by $4 million dollars and that, consequently, it would be appropriate to add $0.62 per share to a fair value calculation of CXR stock. That is, Petitioners have not met their burden of proof on this point. I therefore have not added any value to the final fair value calculation based on the so-called retained cushion.

***25** As to the second item, deferred taxes, the add-back suggested by Kursh for 2009– 2024 is $0.45 per share assuming an 8.1 % discount rate. Kursh relies on documents drafted by Gleacher in late March and early April 2009 to explain this adjustment. [183] One of the documents shows declining deferred taxes from 2014 to 2018 with a net deferred tax amount of $13.5 million in 2014, $6.9 in 2015, $0.1 in 2016, $0.0 in 2017, and ($0.2) in 2018. [184] Kursh admits that Odom could not explain the offsets that were not CXR's work product. [185] Kursh also stated that the worksheets he relied on were created later than the 2009 LRP but had "nothing to do with the LRP other than the deferred tax issue." [186] In addition, Kursh did not discuss the context of the Gleacher documents or explain why it would be appropriate to use them instead of management's projections in his DCF analysis. Indeed, Kursh admitted that he was "less firm" on the item of omitted deferred taxes because his valuation was based on the 2009 LRP and this change would be a modification to the LRP. [187]

Having considered the relevant evidence and arguments of the parties, I am not convinced by Kursh's report and testimony that the deferred tax figures Gleacher projected in its documents support making any change to the deferred taxes projected by CXR management in the 2009 LRP. Hence, Petitioners have not proven that $0.45 per share should be added to the fair value of CXR based on omitted deferred taxes.

iv. Capital expenditures and depreciation

Gokhale used depreciation figures from the 2009 LRP and set capital expenditures equal to depreciation. [188] Kursh made the assumption that depreciation would be higher than capital expenditures into perpetuity. Kursh acknowledged that this approach was problematic. [189] He stated, however, that the problem did not affect his valuation because the effect this assumption had on his projected share price was offset by the value of a tax benefit that he did not include in his DCF. [190] Both parties, therefore, reasonably accounted for capital expenditure and depreciation projections. Because I have adopted Gokhale's model as a general framework, I adopt his treatment of capital expenditures and depreciation, as well.

v. Number of shares outstanding

Petitioners assert that CXR had 79.1 million shares outstanding on the date of the Merger, and Kursh used this number in reaching his conclusion on fair value. The basis for the Petitioners' number, however, is not clear. According to Gokhale, CXR had 79.5 million shares outstanding on the date of the Merger. [191] In addition, CXR's 14D–9, dated April 3, 2009, states that CXR had 79.5 million shares outstanding as of that date. Based on this evidence, I find that the actual number of shares of CXR stock outstanding as of the Merger date was 79.5 million.

Gokhale added 4.5% to this number to account for the dilution that would occur because of shares awarded under the LTIP. [192] Thus, he used 83.07 million as the number of shares outstanding. Kursh objected to this dilution, arguing that it was inconsistent with Gokhale's valuation and that it was inappropriate to divide CXR's value as of May 29, 2009 by the number of shares that might be outstanding at some undefined date in the future. [193] Indeed, neither Gokhale nor Respondent explained why it would be appropriate to adjust the value of CXR shares as of May 29, 2009 based on a potential future share dilution. Petitioners also highlight that Gokhale's approach is too speculative "given the LTIP's opacity and the extremely vague deposition testimony about how it worked in practice." [194] I find, therefore, that Respondent has not demonstrated that a deviation from the actual number of shares outstanding on the Merger date is appropriate here. Therefore, I will use the figure of 79.5 million shares to value CXR's stock. [195]

2. Terminal value

***26** In calculating terminal value, the parties dispute the appropriate terminal, or perpetuity, growth rate. Kursh opined that a terminal growth rate of between 2% and 3% would be appropriate. He used a 2.5% rate in his DCF analysis. Gokhale chose a perpetuity growth rate of 1.25%. Both experts expected inflation of around 2–2.5%.1 [196] "[T]he rate of inflation is the floor for a terminal value estimate for a solidly profitable company that does not have an identifiable risk of insolvency." [197]

Respondent argues that the perpetuity growth rate for CX R should be less than inflation because CXR "was not a mature, stable company." [198] This argument is without merit. [199] The evidence shows that CXR faced certain secular challenges around 2009, but there is no evidence that it faced an identifiable risk of insolvency. Even Respondent's expert projected a stable future for the Company. Additionally, to support his proposed growth rate of 1.25%, Gokhale cites industry analysts and financial advisors who projected perpetuity growth rates between negative 1% and positive 2%, either for the radio industry in general or, in two of Gokhale's three sources, in valuing CXR's equity specifically. Notably, however, two of the three sources Gokhale cites applied perpetuity growth rates around the expected rate of inflation of 2%. [200]

Kursh asserts that his rate of 2.5% is conservative based on an inflation rate of 2%, an assumed long-term growth rate of 1.7%, and productivity of about 1%. [201] According to Kursh, these inputs support a "generally regarded" historical growth rate of 4%–6%. [202] Kursh also observed that Bond & Pecaro's 2008 enterprise valuation applied a 2.5% OCF growth rate from 2014 through 2018. [203] Gokhale counters, however, that Bond & Pecaro used long-term growth rates that ranged *from 1.0% to 2.5%,* and did not simply apply a 2.5% growth rate as Kursh suggested.[204] In addition, Gokhale asserts that Kursh's rate is unsupportable and is based on a finding that for every one percent of revenue growth, CXR's free cash flow will grow by two percent into perpetuity, an assumption that Gokhale argues is unreasonable.[205] Kursh responds that his assumption stems, in part, from CXR's operating leverage, stating that “if revenues simply kept up with inflation, the fall to the bottom line would be a little bit higher because of operating leverage, the fall of the free cash flow.”[206] A more reasonable assumption, according to Gokhale, is that free cash flow would grow at the same rate as revenue indicating that CXR is stable and maintaining its margins into perpetuity.[207] In this regard, Gokhale notes that Kursh's implied expected revenue growth rate of 1 % to 1.5% is in line with the perpetuity growth rate of 1.25% that Gokhale applies.[208]

***27** As noted, the rate of inflation generally is the “floor for a terminal value.”[209] “Generally, once an industry has matured, a company will grow at a steady rate that is roughly equal to the rate of nominal GDP growth.”[210] Some experts maintain that “the terminal growth rate should never be higher than the expected long-term nominal growth rate of the general economy, which includes both inflation and real growth.”[211] Moreover, both experts in this case acknowledged that the expected long-term inflation rate in 2009 was 2%–2.5%. There also was some evidence that the expected rate of real GDP growth was between 2.5% and 2.7%, but this evidence was not particularly reliable.[212] I find that the radio industry is a mature industry and that CXR was a solidly profitable company. Thus, a long-term growth rate at least equal to expected inflation is appropriate here.

The question remains whether the growth rate should exceed the rate of inflation to some extent. In that regard, like Respondent, I question the reasonableness of Kursh's apparent assumption that free cash flow will grow at double the rate of CXR's revenues forever. Indeed, the radio industry was experiencing increased competition and fragmentation in 2009. Thus, I am not willing to use Kursh's 2.5% rate. Petitioners have demonstrated, however, that, because of CXR's operating leverage, an increase in revenue would lead to a slightly higher increase in OCF. In addition, I note that the increase in the 2010 growth rate from 4.6% to 9.28% leads to about a 1 % increase in OCF margins using the assumptions in the demonstrative Petitioners' presented during Gokhale's cross examination.[213]

Having carefully considered the parties' competing positions, I find that it is reasonable to apply a terminal growth rate of 2.25%, which may be slightly higher than the inflation rate.[214] This number comports with the experts' inflation expectations and the weight of the other relevant evidence in the record. I therefore adopt a 2.25% perpetuity growth rate.

3. Discount rate

Petitioners and Respondent virtually agree on the appropriate discount rate, using rates of 8.1 % and 8.0%, respectively. This variance of 0.1 % is relatively minor. Because I have used Gokhale's analyses as a general frame of reference and because the lower discount rate used by Gokhale favors Petitioners, I find Respondent's discount rate of 8.0% to be reliable and I adopt it here.

B. Statutory Interest

Kursh calculated prejudgment interest at the legal rate compounded quarterly, assuming a placeholder award date of December 31, 2012. Respondent does not oppose Kursh's method of calculating the interest due. Therefore, interest is awarded at the legal rate compounded quarterly.[215] Kursh's calculation should be updated to the date of the final judgment entered pursuant to this Memorandum Opinion.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I adopt Gokhale's May Forecast DCF analysis as a general framework for determining the fair value of CXR. I further find that the following changes should be made to his calculations: (1) the number of outstanding shares should equal the number of shares of CXR stock outstanding on the Merger date, *i.e.,* 79.5 million; (2) CXR's debt should be equal to $380.05 million; (3) the perpetuity growth rate should be 2.25%; and (4) the growth rate for OCF should be 9.28% in 2010 and 4.6% in 2011–2013. With these adjustments, the Court determines that Petitioners are entitled to receive $5.75 per share of CXR stock, plus interest as stated above from May 29, 2009 to the date of judgment. Counsel shall work cooperatively to prepare and file promptly a proposed form of final judgment.

All Citations

Not Reported in A.3d, 2013 WL 3316186

Footnotes

1 Towerview LLC tendered 200,000 shares in connection with the merger.

2 *See S. Muoio & Co. v. Hallmark Entm't Invs. Co.,* WL 863007, at * 2 n.2 (Del. Ch. Mar. 9, 2011) ("I have considered the parties' briefing regarding numerous outstanding objections to the admissibility of testimony, reports, exhibits, documents, demonstrative exhibits, rebuttal exhibits and testimony, and handwritten notes. I overrule all of the objections and admit all of the items which are the subject of these continuing objections. I will accord each item the weight and credibility that it appropriately deserves."); *see also S. Muoio & Co. v. Hallm ark Entm't Invs. Co.,* 2010 WL 3611404, at *2–3 (Del. Ch. Sept. 16, 2010) (declining to exclude expert and rebuttal testimony and reports in favor of admitting them and according them whatever weight they deserve).

3 D.R.E. 703.

4 *O'Dell v. Fiorucci,* WL 2083926, at * 1 (Del.Super. May 12, 2011) (quotation marks and alterations omitted) (citing *Gannett Co. v. Kanaga,* 750 A.2d 1174, 1187 (Del.2000)).

5 *Id.* at *2.

Williams v. Illinois, – U.S. –, –, 132 S.Ct. 2221, 2240 (2012 (applying Federal Rule of Evidence 703). The Supreme Court stated: "For example, if the factfinder were to suspect that the expert relied on factual premises with no support in the record, or that the expert drew an unwarranted inference from the premises on which the expert relied, then the probativeness or credibility of the expert's opinion would be seriously undermined. The purpose of disclosing the facts on which the expert relied is to allay these fears—to show that the expert's reasoning was not illogical, and that the weight of the expert's opinion does not depend on factual premises unsupported by other evidence in the record—not to prove the truth of the underlying facts." *Id.* at 2240.

7 Pet'rs' Responsive Post–Trial Br. ("Pet'rs' Answering Br.") 20.

8 Pet'rs' Opening Post–Trial Br. 46.

9 *See* Resp'ts' Post–Trial Reply Br. ("CXR Reply Br.") 3–4 (citing cases and noting that the Court previously has taken judicial notice of equity analysts' predictions under D.R.E. 201). Although it is not entirely clear, Respondent appears to rely on analyst reports to demonstrate the truth of their assertions, *e.g.,* that the radio industry was experiencing a secular decline in the years leading up to 2009, and not merely to demonstrate the analysts' state of mind.

10 Indeed, Petitioners' valuation expert relied on at least one of the reports that Petitioners now challenge as unreliable. *See* JX 482 at 10 n.21.

11 *Gannett Co. v. Kanaga,* A.2d 1174, 1187 (Del.2000).

12 *See, e.g.,* JX 481, Chachas Rep., at 10 (Petitioners' industry expert relying on reports from analysts at J.P. Morgan, BMO Capital Markets, and Wachovia Capital Markets); JX 482 at 9–10 (Petitioners' valuation expert citing analyst reports from Wachovia, J.P. Morgan, and BMO Capital Markets); JX 392 (Respondent's valuation expert citing reports from Wachovia Capital Markets, Dow Jones News Services, Wall Street Strategies, Barrington Research, and Gabelli & Company).

13 *O'Dell v. Fiorucci,* WL 2083926, at *2 (Del.Super. May 12, 2011) (quotation marks and alterations omitted) (citing *Gannett Co. v. Kanaga,* 750 A.2d 1174, 1187 (Del.2000)).

14 *Williams,* S.Ct. at 2240; *see also* 1 K. Broun, McCormick on Evid. § 15 & n.7 (7th ed.2013) (noting that there is some dispute as to whether the admission of reports relied on by experts are put to a "nonhearsay use" when they are used for the limited purpose of showing the basis of the expert's opinion).

15 Pet'rs' Answering Br. 5 (citing *Marmo v. Tyson Fresh Meats, Inc.,* 457 F.3d 748, 759 (8th Cir.2006) and *Crowley v. Chait,* 322 F.Supp.2d 530, 551 (D.N.J.2004)).

16 In *Crowley,* the court declined to allow the plaintiff's expert to submit a rebuttal report as a "do over" because his primary expert report was based on unreliable information. *Crowley,* 322 F.Supp.2d at 551. In *Marmo,* the Eighth Circuit

considered an appeal from a jury verdict on a nuisance claim. There, the plaintiff identified its rebuttal expert two years after disclosing its other expert witnesses. After the defendant moved to exclude the plaintiff's expert from offering an opinion on medical causation, the plaintiff withdrew its expert as a witness in its case-in-chief and attempted to re-designate its rebuttal expert as a primary witness. The trial court denied the motion to re-designate, finding that the motion was not supported by good cause and that the defendant would be substantially prejudiced. The Eighth Circuit affirmed that ruling in part based on the distinction between rebuttal evidence and case-in-chief evidence and on the district court's wide discretion to determine the order in which parties adduce proof. *Marmo,* 457 F.3d at 758–59. The *Marmo* case bears little resemblance to this appraisal case, however. Here, the rebuttal expert at issue was neither offered to replace an inadequate expert witness nor identified late in the proceedings. Furthermore, Petitioners suffered no demonstrable prejudice from this Court's allowing Respondent's industry expert to testify during its case-in-chief in this bench trial.

17 Stip. Scheduling Order 5 (emphasis added).

18 *Id.* at 1–2 (emphasis added).

19 Pet'rs' Reply Br. Ex. B.

20 *Cf. Air Products & Chems., Inc. v. Airgas, Inc.,* WL 383933, at * 4 & n.27 (Del. Ch. Jan. 24, 2011) (holding that a rebuttal expert's report was admissible and the rebuttal expert could testify as to an issue that was not addressed in the expert's report, in part, because the actions of the party advancing the rebuttal expert's report and testimony were justified and there was no potential prejudice to the party opposing the rebuttal expert).

21 JX 153 at 6.

F22 Tr. 531 (Odom). Citations in this form are to the trial transcript. When the identity of the testifying witness is not evident from the text, it is indicated parenthetically as in this case.

23 Tr. 301, 304–05, 309 (Johnston) ("That is the one [the 2009 budget] where we actually have monthly numbers behind it which focus on the year ahead. And then 2010 through '13 are the out years which are done at a very high level.").

24 JX 122 at 75481; JX 610 at 4.

25 Tr. 309 (Johnston).

26 Tr. 501 (Odom) ("One thing [I did upon recognizing that revenues were evaporating] is that I advocated that the company do a full and complete reforecast in January. That would have been something a bit unusual for us because we (3) would not typically do a reforecast all the way though the end of the year. They typically were focused just a couple of months out."); Tr. 318–19 (Johnston) (stating that normally managers re-submitted the projections they had put into the LRP for the January forecast because the two forecasts were so close in time, but that in January 2009 managers were asked to do a full bottom up reforecast of the year).

27 JX 212, May Forecast.

28 JX 482, Kursh Rebuttal Rep., at 3. Petitioners and Respondent each presented evidence from two experts. The opening reports of those experts are cited to in the following format, which is for one of Respondent's experts: "Gokhale Rep." Any rebuttal reports are cited to in the form used for Petitioners' expert Kursh in this footnote.

29 *See* Tr. 314–15 (Johnston) (stating that he had a negative perspective in early 2009 on the state of the U.S. economy and that the radio industry's top three categories were experiencing extreme weakness due to banks going out of business and not advertising, the auto industry going into serious recession with a default on bonds, and very weak retail sales in December); JX 394, Cheen Rep., at 2 & 9.

30 JX 418 at 6.

31 JX 590; Tr. 155 (Cheen).

32 JX 590.

33 Tr. 89–90 (Cheen).

34 *See* Tr. 23–24 (Schechter); Tr. 99 (Cheen).

35 *See* JX 392, Gokhale Rep., 5 & Ex. A; JX 393, Gokhale Rebuttal Rep., Ex. 6 (chart demonstrating CXR stock price between October 28, 2008 and May 29, 2009); JX 481 at 7 & 22 (stating that the degree of the decline started flattening in the first and second quarters of 2009 suggesting, according to Chachas, that a new "bottom" would be sometime in late 2009); *see also* JX 153 at 10 ("The Company's management informed the Special Committee that, *while the operating environment was stabilizing,* the March 2009 results were below what had been projected in the February Forecast." (emphasis added)).

36 JX 394 § III.C; Tr. 31 (Cheen).

37 Tr. 38 (Cheen).

38 JX 394 at 6.

39 *See* JX 171.

40 JX 481 at 6, 11, 13, 20 (noting that Neil emphasized this point in an earnings call); Tr. 108 (Cheen admitting he did not know if CXR's audiences or ratings were increasing from 2004–2009).

41 Tr. 400 (Johnston stating CXR was the best company in the industry); Tr. 438–39 (Chachas stating the same and that Cox's management was really routinely viewed as among the best managers in the business?); Tr. 105 (Cheen describing Neil as an outstanding manager).

42 JX 171 at 34; JX 174; Tr. 105 (Cheen). This was the last earnings call Neil held before the Merger. Tr. 106–07 (Cheen).

43 JX 171 at 38

44 Tr. 487 (Chachas discussing JX 190A and B); Tr. 93 (Cheen opining that part of the radio industry's downturn in 2008 and 2009 was cyclical and part was secular).

45 *See* JX 392 at 4 (citing analyst reports expressing concerns about advertising budgets being trimmed, and radio station companies' public documents attributing a decline in revenue to an industry-wide decline in radio advertising and advertisers' shifting away from traditional media to new media outlets).

46 *See* Tr. 649–50 (Gokhale) (discussing analysts' opinion that the radio industry was going through a secular decline and that the value of an investment in the radio industry since 2003 demonstrates the secular shift). Petitioners deny that the radio industry had experienced a secular decline in the years leading up to 2009 or that it continued to experience a secular decline in 2009. According to Petitioners' industry expert, Chachas, a "secular decline is when businesses actually lose fundamental pieces of their P & L and do not recover and they continue to either erode or stay at levels that are markedly reduced." Tr. 447–48. Chachas provided examples such as the paging industry and the pay phone business. *Id.* at 448. Respondent's industry expert, Cheen, on the other hand, asserted that a secular decline occurs when there has been a fundamental change in the industry, which could be the result of an economic or operating factor. Tr. 34. Cheen provided examples of the Yellow Pages and the newspaper industry. *Id.* at 49. I find that Cheen's view is more consistent with the evidence presented and, therefore, adopt his somewhat broader definition of a "secular" change.

47 JX 171 at 39–40 (Neil stating that every local manager is focused on expenses and that "I think we have proven that we're pretty good stewards of expenses"); Tr. 75 (Cheen stating that management discussed cutting expenses in earnings calls both in November 2008 (regarding the third quarter 2008) and in March 2009 (regarding the fourth quarter 2008)).

48 JX 481 at 8 (citing CXR's March 4, 2009 fourth quarter 2008 earnings call).

49 *See* JX 481 at 7–8, 15, 23–24; JX 393 Ex. 6.

50 *See* JX 146 (email from Citi representative to Johnston discussing valuation trends).

51 Tr. 463 (Chachas stating that, in 2009, owners in Entercom, Cumulus Radio, and Radio One bought more stock in their companies).

52 *See* JX 449 at 15653.

53 JX 212.

54 The valuation firm Bond & Pecaro performed a fair market valuation of CXR stations within different market clusters and an analysis of CXR's FCC licenses in connection with the Company's FAS 142 compliance.

55 JX 214, Bond & Pecaro: Fair Market Valuation of Cox Radio, Inc. as of December 31, 2008, at 5822 (stating that the assumptions used in its cash flow models, "especially those pertaining to station revenue shares and operating profit margins, are, in part, reflective of the actual and forecast performance of [CXR] as station owner"); *see also* JX 431A, Bond & Pecaro: Analysis of FCC Licenses Cox Radio, Inc. as of December 31, 2008.

56 JX 469, letter to the SEC from CXR (Apr. 20, 2009), at 12; JX 430; JX 434.

57 JX 214; *see also* Tr. 419–20 (Johnston) ("[Bond & Pecaro] ha [d] lots of information at their disposal. But if one reads the methodology that they are using in the document that they provide the company, they do not use our [2009] LRP to determine their FAS 142 valuation.").

58 *See* JX 596; Tr. 590 (Odom).

59 JX 596 at 45409.

60 *Id.*

61 Tr. 592 (Odom).

62 JX 596 at 45409.

63 *Id.* at 45426

64 *Id.* at 45409.

65 JX 152.

66 *See* JX 417; Tr. 638–39, 602 (Odom). There were several iterations of the 2009 LRP.

67 JX 90 (ellipses in original).

68 JX 95 (emphasis added).

69 *In re Cox Radio S'holder Litig.,* WL 1806616 (Del. Ch. May 6, 2010), *aff'd,* 9 A.3d 475, 2010 WL 4721568 (Del.2010) (ORDER). The Tilson Memo was not produced in the limited discovery that took place related to the settlement but was produced in discovery during this appraisal action.

70 *See Towerview LLC v. Cox Radio, Inc.,* C.A. No. 4809–VCP (Nov. 7, 2012) (TRANSCRIPT), Docket Item Number 88.

71 Tr. 536 (Odom).

72 *Id.*

73 *See* JX 95; Tr. 530 (Odom); JX 393 ¶ 6.

74 Tr. 539 (Odom explained "that the business conditions we were seeing in the first quarter, or in January, even, were discussed with Bond & Pecaro" and that those conditions "were considered in [Bond & Pecaro's] 12/31/08 valuation").

75 *Id.*

76 Tr. 535 (Odom). The Tilson Memo contained the heading: "To: File[;] From: Lauren Tilson[;] RE: Impairment Testing Under FAS 142." JX 95.

77 Tr. 541

78 *See* JX 214 at 3–4.

79 Tr. 540 (Odom).

80 JX 214 at 3 (emphasis added).

81 JX 480, Kursh Rep., at 11.

82 Tr. 258.

83 JX 385 at 30.

84 JX 214 at 3.

85 *See* JX 480; JX 482.

86 *See* JX 481 at 7 ("[T]he radio business typically run[s] at 35% to 45% operating margins."). Petitioners assert that the 2009 LRP projected CXR OCF margins around 30% and EBITDA margins around 27%–28%. Tr. 729 (Gokhale) (discussing Petitioners' calculations on cross examination).

87 JX 480 Ex. G.

88 The only difference between operating cash flow and EBITDA in CXR's financial projections is that the OCF projections are slightly higher because they include the cost of the Company's noncash long-term incentive plan ("LTIP"). Tr. 497 (Odom); *see also* Tr. 325–26 (Johnston). At trial, Gokhale used the terms EBITDA and operating cash flow interchangeably. His DCF analysis applies historical EBITDA growth rates to project future operating cash flows. Gokhale explained that his EBITDA numbers grew at a lower rate than his OCF numbers because he assumed LTIP payments would grow from 2009–2014. Tr. 730. Petitioners do not challenge specifically the reasonableness of Gokhale's application of historical EBITDA growth rates, rather than OCF growth rates, to project future operating cash flows. Furthermore, the difference in the two sets of numbers is relatively minor. Therefore, Gokhale's use of EBITDA growth rates appears to be appropriate. *See* Tr. 403 (Johnston) ("[E]ssentially, the terms operating cash flow and EBITDA are synonymous.").

89 In his Third–Party DCF, Gokhale averaged only the first three years coming out of the 2000/2001 recession to calculate the CAGR he used. As a result, Gokhale used a higher CAGR of 5.3% in the Third–Party DCF compared to the 4.6% he used in the May Forecast DCF. *See* Tr. 668–69.

90 Tr. 659.

91 Tr. 37–38 (Cheen); Tr. 650–51 (Gokhale).

92 *Del. C.* § 262. There is no dispute that Petitioners are entitled to an appraisal under Section 262.

93 *Id.* § 262(h); *see also Tri–Cont'l Corp. v. Battye,* 74 A.2d 71, 72 (Del.1950) ("[M]arket value, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of merger and which throw any light on future prospects of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholders' interest, but must be considered by the agency fixing the value.").

94 *Golden Telecom, Inc. v. Global GT LP,* A.3d 214, 217 (Del.2010).

95 *Cede & Co. v. Technicolor, Inc.,* A.2d 289, 299 (Del.1996).

96 *Golden Telecom, Inc.,* A.3d at 217.

97 *Weinberger v. UOP, Inc.,* A.2d 701, 713 (Del.1983); *see also Technicolor,* 684 A.2d at 299.

98 *Rapid–American Corp. v. Harris,* A.2d 796, 805 (Del.1992).

99 *M.G. Bancorp., Inc. v. LeBeau,* A.2d 513, 520 (Del.1999).

100 *Gonsalves v. Straight Arrow Publ'rs, Inc.,* A.2d 357, 362 (Del.1997); *Taylor v. Am. Specialty Retailing Gp.,* 2003 WL 21753752, at *2 (Del. Ch. July 25, 2003).

101 *Weinberger,* A.2d at 713.

102 *See Dobler v. Montgomery Cellular Hldg. Co.,* WL 2271592, at *8 (Oct. 4, 2004); *see also Cede & Co. v. JRC Acq. Corp.,* 2004 WL 286963, at *2 (Del. Ch. Feb. 10, 2004) (utilizing the DCF approach); *Gentile v. Singlepoint Fin., Inc.,* 2003 WL 1240504, at *6 (Del. Ch. Mar. 5, 2003) (utilizing the comparable transactions approach); *Borruso v. Commc'ns Telesystems Int'l,* 753 A.2d 451, 455 (Del. Ch.1999) (utilizing the comparable company approach).

103 Gokhale used a comparable companies analysis as a reasonableness check on the value he obtained through his DCF analysis. He concluded, however, that “the comparable companies valuation is of limited use in determining the value of CXR's Class A shares.” JX 392 at 12. Kursh concluded that neither a comparable companies nor a comparable transactions approach would be reliable and, therefore, did not attempt either approach. JX 480 at 5.

104 *See* JX 392 at 10–12 (Gokhale: “[T]he EV/EBITDA multiples used in the [comparable companies] calculation above are overstated because they are based on the book value of debt, and using these multiples would overstate the value of CXR's shares.”); JX 480 at 5–8 (Kursh: “[Comparable publicly traded companies and transactions methods] observe and apply market multiples, and their reliability hinges upon the ability to accurately estimate both the numerators (equity and market values) and denominators (recurring earnings) of the multiples. [T]he industry focus and timing of this valuation present challenges to such accuracy.”); *see also* Tr. 670–75 (Gokhale).

105 JX 480 at 8.

106 *See M.G. Bancorp., Inc. v. Le Beau,* A.2d 513, 523 (Del.1999) (“The discounted cash flow methodology has been relied upon frequently by parties and the Court of Chancery in other statutory appraisal proceedings.”); *Ryan v. Tad's Enters., Inc.,* 709 A.2d 682, 702 (Del. Ch.1996) (“The discounted cash flow valuation model is well-established and accepted in the financial community.”), *aff'd,* 693 A.2d 1082 (Del.1997) (ORDER).

107 *Cede & Co. v. Technicolor, Inc.,* WL 23700218, at *7 (Del. Ch. July 9, 2004).

108 *Id.* (citing *Gilbert v. MPM Enters., Inc.,* 709 A.2d 663, 669 (Del. Ch.1997)).

109 *Id.*

110 Although the slopes from the 2009 LRP and Gokhale's projections after 2009 appear to be the same in this somewhat simplified graph, they are, in fact, slightly different. Gokhale's projections reflect a CAGR of 4.6%, while the OCF growth rates for 2010–2013 in the 2009 LRP ranged from 3.4% to 4.1 %.

111 Kursh reasons that expecting a recovery within eighteen months is reasonable because the recession lasted approximately eighteen months. Tr. 220 (Kursh). He thus selected a return to the LRP in 2011 because 2011 would be the first full year of recovery after the recession ended in mid–2009 plus eighteen months. *Id.*

112 JX 95 (“[CXR] also believes that future years' growth is attainable due to recovery in the industry.”).

113 *See* JX 171 at 34.

114 JX 481 at 6 (“One of the positive indicators sustaining the belief that radio ad revenue would recover was the measurement of audience, which continued to grow.”); JX 398, Entercom Communications Corp. Reports Fourth Quarter and 2008 Annual Results, at 1 (CXR competitor Entercom Communications Corp.'s CEO stating “[a]t a time of unprecedented change in media usage that is severely impairing a number of other media, radio posted an all-time record number of listeners in 2008 and remains the most cost-effective major advertising medium in the nation”).

115 *See* JX 394 at 2; JX 392 at 3 (Gokhale observing in his expert report that “[i]n the two years prior to [CEI's] tender offer for CXR's Class A shares, the economic fortunes and public market valuations of radio stations (and companies that owned such stations) had been in steady decline”); Tr. 649 (Gokhale).

116 *See* JX 394 at 2; Tr. 37 (Cheen) (stating that the secular decline may have started as early as 2006).

117 JX 481 at 7.

118 JX 480 at 10 (“Standard [CXR] business practice provided for monthly forecasting of current year results, but this process appeared to *receive special attention in January 2009.*”(emphasis added)); Tr. 501 (Odom) (“One thing [I did upon recognizing that revenues were evaporating] is that I advocated that the company do a full and complete reforecast in January. That would have been something a bit unusual for us because% y(4)”).

119 JX 212 at 6692.

120 Tr. 689 (Gokhale); Tr. 626 (Odom) (stating that he never communicated to CMG, outside auditors, or the Special Committee that the LRP's projections for the out-years were consistently overly optimistic but that those circumstances were “just factual”).

121 LRP projections for the years 2004, 2005, 2006, and 2007 showed similar trends. *See* Tr. 304 (Johnston) (stating that "each year, as we got closer, our estimates got better," but that in each succeeding year between 2002 and 2008, CX R management lowered its out-year estimates but still missed its projected results).

122 Tr. 689 (Gokhale).

123 *See Gearreald v. Just Care, Inc.,* WL 1569818, at *5 (Del. Ch. Apr. 30, 2012).

124 *See* JX 212; Tr. 315–16 (Johnston) ("Given the numbers that we were seeing in January [2009], given my expectation for the year, I realized that the out years would have no bearing on reality."); Tr. 503–04 (Odom) ("There was no way that the [2009] LRP, either the 2009 results or the out-year results, could be anywhere near reality. There is no way to recover from this dramatic a drop and just bounce right back. It just is not reality. So I didn't believe that the [2009] LRP had any validity."); *see also* JX 180, CMG's March 23, 2009 offer to purchase CXR stock at $3.80 per share, at 11 ("[I]n light of the continued decline in advertising revenue experienced by [CXR] in the first two months of 2009, as reflected in the February Forecast, [CEI] and [CMG] senior management believed that the long range plan approved by the Radio board of directors in December 2008 no longer accurately reflects the prospects of [CXR]. Senior management believed that [CXR]'s prospects were better modeled using the growth expectations used for the long range plan and applying those rates to the February Forecast as a baseline....").

125 JX 482 at 4 (citing Milton Friedman, "Monetary Studies of the National Bureau," *The National Bureau Enters Its 45th Year*, 44th Annual Report 7–25 (1964)).

126 JX 482 at 5.

127 Tr. 281 ("Q. So prior to [Bordo and Haubrich's] test in June 2012, the conventional wisdom was that a recession coupled with a financial crisis would show a sluggish recovery; right? A. And I effectively assumed the sluggish recovery. If the longest recovery on record is four quarters and I go six, that's sluggish to me, because there are many recoveries that occurred much quicker than that.").

128 Tr. 684 (Gokhale). Petitioners' industry expert, Chachas, asserted in his report that "[t]he radio industry is cyclically highly correlated to general GDP." JX 481 at 8. He presented a chart depicting the growth in media and radio advertising versus growth in nominal GDP between 1990 and 2009 to demonstrate this correlation. *Id.* at 9, Ex. 5. The chart depicts a correlation of 80% between nominal GDP and radio revenue in this nineteen-year time span. Chachas's chart, however, is consistent with Gokhale's testimony that a correlation existed between 1990 and 2001, but that by 2001 the relationship changed, if not broke down completely.

129 *See* JX 507.

130 *See* JX 583.

131 Tr. 181–82 (Kursh).

132 *See* JX 584. This number is taken from a Bureau of Economic Analysis report.

133 Tr. 190–91.

134 *See* JX 583 at 1, 4 (stating that the Congressional Budget Office's forecasted GDP growth for 2010 is 2.6% and that the Federal Reserve's " 'central tendency' is 2.5%–2.7% for long-run growth" compared to the 13% real or 17% nominal GDP growth suggested by Kursh); Tr. 686–88 (Gokhale).

135 JX 341, J.P. Morgan, *Broadcasting/TV and Radio: Is it 2010 Yet?* (Dec. 18, 2008), at 13896 ("In recent years, the relationship between advertising growth and GDP has broken down—with annual ad spending lagging GDP in six of the past ten years. While there are many potential causes for this (media fragmentation causing a shift to media outlets with lower CPMs, weakness in the domestic auto business, etc.), the effect is what really matters—media companies have become more competitive in the chase for ad dollars. For TV and radio in particular, industry revenue growth has lagged GDP growth in recent years following a significant period of outperformance."). *But see* Tr. 244–45 (Kursh) (observing that the J.P. Morgan report reflects only one analyst's opinion).

136 Tr. 191–92 (Kursh).

137 JX 596.

138 JX 152.

139 JX 417.

140 Pet'rs' Opening Post–Trial Br. 20.

141 JX 153 at 10.

142 *Id.*

143 *Id.*

144 *Id.* at 9. The Special Committee asked for, and management provided, operating performance and financial conditions through March 2009. These results indicated that, although the operating environment was stabilizing, the actual March 2009 results were below what had been projected in the February forecast. *Id.* at 10.

145 Tr. 515–17 (Odom) (stating that he thought the Special Committee's conclusion was reasonable and that he did not recall the Special Committee having a more bearish view of the future of CX R than management).

146 JX 480 at 10.

147 JX 212 at 6692; Tr. 233 (Kursh).

148 In describing management's budgeting process, Kursh stated: "[A]s the year turned, [management] would continue to reforecast that particular year. And in our case, while that reforecasting of 2009 was going on, the long-range plan was unchanged. So they continued to believe it or they didn't bother to change it." Tr. 171–72. Petitioners provided no evidence, however, that, historically, management had updated the out-years of its long range plan when it adjusted a forecast for the current year. To the contrary, all evidence indicates that, in the ordinary course of business, management regularly would update the current year's monthly budgets and, once a year, would create and present to the board of directors between October and December a budget for the next year and high-level projections for the four following years. *See* Tr. 501 (Odom). Thus, management's failure to update the 2009 LRP in the first or second quarter of 2009 is not inconsistent with Respondent's position that management would not have relied on that forecast in valuing CXR in May 2009.

149 Tr. 539–41 (Odom).

150 *See* JX 214; JX 606 at 17–32. In Bond & Pecaro's FAS 142 valuation, it calculated an enterprise value using its DCF model for each market cluster and then aggregated those values. Tr. 525–25 (Odom).

151 Tr. 528–29 (Odom).

152 *See* JX 341 ("There are several reasons to expect a nice rebound in 2010"); JX 592 (2008 CX R Letter to Shareholders in which CXR President Neil states that he sees "a bright future for our industry in general and for [CXR] in particular").

153 *See* *Doft & Co. v. Travelocity.com Inc.*, 2004 WL 1152338, at *5 (Del. Ch. May 20, 2004) (finding from a review of all the evidence that the company's five-year plan "does not provide a reliable basis for forecasting future cash flows," including "that management held the strong view that [its] projections should not be relied upon because the industry was so new and volatile that reliable projections were impossible").

154 I also find Gokhale's valuation approach to be more reliable generally. Gokhale's expert report not only explains the calculations in his DCF analyses, but also includes the underlying formulas he used. Kursh's report, on the other hand, did not explain clearly his calculations or how he arrived at his results. Indeed, Gokhale could not replicate Kursh's DCF analysis exactly. *See* JX 393 at 10 n.35 ("Dr. Kursh does not fully explain his DCF calculations, and we did not exactly replicate his DCF analysis. Our replicated numbers are slightly higher than those reported in Dr. Kursh's Exhibit H.").

155 Gokhale testified that he used the CAGR for CXR from 2001–2005 to project OCF growth for 2009–2013 because it was the most recent data of what growth rates looked like coming out of a downturn that would be reflective, in some sense, of the secular shift that CXR and the radio industry were beginning to experience. Tr. 658; *see also* JX 481 at 3 (Chachas likening the radio industry's share price contraction "during the recession following the bursting of the 'tech bubble' in mid–2000" to the contraction the radio industry experienced in the 2008/2009 Recession"); Tr. 64 (Cheen) (discussing the radio industry's recovery after the 2000/2001 recession).

156 Tr. 62 (Cheen) (number of analysts down to a half dozen or less); Tr. 432 (Chachas) (number of analysts covering the radio broadcasting space was three or four in 2008 and 2009).

157 Tr. 176 (Kursh) (stating that in one of his valuation books, Damodaran asserts that the number of analysts is absolutely critical and that if you have a small sample, you're probably not getting a very good result, and that analysts look short term while valuation looks long term); JX 593, Bloomberg, *Analysts' Accuracy on U.S. Profits Worst in 16 years* (Aug. 22, 2008); Tr. 431–32 (Chachas) (stating that analysts' recommendations are not good proxies for value because they are inherently chasing data and moving as a group).

158 *See Doft & Co. v. Travelocity.com Inc.,* WL 1152338, at *5 ("Delaware law clearly prefers valuations based on contemporaneously prepared management projections because management ordinarily has the best first-hand knowledge of a company's operations.").

159 *See* JX 392 Ex. J.

JX 482
at 6.
Tr.
719.

162 Tr. 662–63 ("I believe various gentlemen here from the company have described it as really a bottom's-up plan that led to revenues and subtraction of profits. And then what I'm doing is taking the EBITDA, or operating cash flow, that comes out of this pretty full plan, and growing that EBITDA at a rate that EBITDA grew in similar periods.").

163 *See* Bradford Cornell, *Corporate Valuation: Tools for Effective Appraisal and Decision Making (1993).*

164 *Id.* at 126 (emphasis in original).

165 *Id.*

166 JX 392 at 8 n.30.

167 JX 341 at 13950.

168 JX 602. CXR's revenues over the same period grew by 6.4% in 2002, 1.3% in 2003, 2.9% in 2004, and –0.1 % in 2005. JX 603.

169 *See* JX 482 at 3–5.

170 *See* JX 482 Exs. L, M.

171 *See Prescott Gp. Small Cap, L.P. v. Coleman Co., Inc.,* W L 2059515, at * 31 (Del. Ch. Sept. 8, 2004) ("[T]he task of enterprise valuation, even for a finance expert, is fraught with uncertainty."); *Id.* ("Experience in the adversarial[ ] battle of the experts' appraisal process under Delaware law teaches one lesson very clearly: valuation decisions are impossible to make with anything approaching complete confidence.") (quoting *Cede & Co. v. Technicolor, Inc.,* 2003 W L 23700218, at * 2 (Del. Ch. Dec. 31, 2003)).

172 *See Cede & Co. v. Technicolor, Inc.,* WL 23700218, at *2 (Del. Ch. Dec. 31, 2003) (The value of a corporation is not a point on a line, but a range of reasonable values, and the judge's task is to assign one particular value within this range as the most reasonable in light of all of the relevant evidence and based on considerations of fairness); Tr. 484 (Chachas) (stating that he would classify a four or five percent revenue growth rate in 2010 as a snapback because "[w]hen you've fallen 19 percent in the preceding year if you're up by 5 in the following, I think the performance is actually very substantial").

173 Tr. 324–25 (Johnston).

174 Tr. 222; JX 480 Ex. H.

175 JX 212.

176 JX 480 at 14.

177 Tr. 660.

178 *See* JX 480 at 19 (citing JX 411 at 17148).

179 *Compare* Resp't's Opening Post–Trial Br. 22 n.8 ("CXR's debt was not publicly traded, requiring Gokhale to use a proxy for the cost of CXR's debt. As of May 29, 2009, CXR's credit rating was BBB-; therefore, Gokhale selected the Merrill Lynch BBB Corporate Bond Index as the proxy.") *and* JX 392 at 9 ("[T]he cost of debt we used is based on the yield on the Merrill Lynch BBB Corporate Bond Index as of May 29, 2009) *with* Gokhale Dep. 141 (responding in the affirmative to the question "You get that number [net debt of 385.6 million] from an internal financial document as of April 30, 2009, correct?").

180 Kursh and Gokhale both used the deferred tax numbers from the 2009 LRP in their DCF models: approximately $12.80 million for the remainder of 2009, $21.26 million in 2010, $20.79 million in 2011, $19.47 million in 2012, and $16.96 million in 2013.

181 Odom Dep. 302.

182 *Id.*

183 *See* JX 80; JX 428 at 17741

184 JX 80.

185 Tr. 219.

186 *Id.*

187 Id. at 219–20.

188 Tr. 669.

189 Tr. 208, 276.

190 Tr. 215–16.

191 Gokhale Dep. 144–45; *see also* JX 153 (stating that as of March 31, 2009, CXR had 20.8 Class A and 58.7 Class B shares outstanding).

192 Gokhale explained in a footnote that the 4.5% dilution "is based on the median historical percentage of shares available for stock-based compensation to shares outstanding." JX 392 at 10 n.38.

193 JX 482 at 11.

194 Pet'rs' Opening Post–Trial Br. 46.

195 *Cf. Prescott Gp. Small Cap, L.P. v. Coleman Co.,* WL 2059515, at * 12 (Del. Ch. Sept. 8, 2004) (declining to address the petitioners' argument that three million shares of stock had been issued at an unfairly low price and should be disregarded and using the actual number of shares outstanding as of the merger date in the appraisal proceeding).

196 *See* Tr. 663 (Gokhale); Tr. 197 (Kursh).

197 *Global GT LP v. Golden Telecom, Inc.,* A.2d 497, 512 (Del. Ch.), *aff'd,* 11 A.3d 214 (Del.2010).

198 Resp't's Opening Post–Trial Br. 42.

199 *See* JX 394 at 13 (Respondent's expert referring to the industry as a mature industry); JX 481 at 35 ("[CXR] was a premium asset in the industry."); *id.* at 7 ("Unlike newspaper publishers, which were perceived to be rapidly losing their base of customers, radio had not only retained its audience but it had continued to grow listeners.").

200 JX 392 at 9 (stating that, in DCF analyses of CX R equity, Citi applied a perpetuity growth rate of 1 % to 2% and Gleacher used a rate of 2%).

201 Tr. 198–99 (Kursh); JX 568 (presenting historical projected population growth for CXR's five largest markets).

202 Tr. 198.

203 JX 480 at 15.

204 JX 393 at 10–11.

205 *Id.* at 11.

206 Tr. 198–99.

207 JX 393 at 11.

208 Tr. 694.

209 *Global GT LP v. Golden Telecom, Inc.,* A.2d 497, 512 (Del. Ch.), *aff'd,* 11 A.3d 214 (Del.2010).

210 *Id.* at 511; *see also* Bradford Cornell, *Corporate Valuation: Tools for Effective Appraisal and Decision Making* 146–47 (1993).

211 Shannon P. Pratt & Alina V. Niculita, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies* 248 (5th ed.2008).

212 *See supra* note 134 and accompanying text.

213 *See* Tr. 727–31; JX 602; JX 603.

214 *See* Tr. 297–98 (Johnston).

215 *See Del. C.* § 262(h) ("Unless the Court in its discretion determines otherwise for good cause shown, interest from the effective date of the merger through the date of payment of the judgment shall be compounded quarterly and shall accrue at 5% over the Federal Reserve discount rate (including any surcharge) as established from time to time during the period between the effective date of the merger and the date of payment of the judgment.").

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