



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE HANDY & HARMAN, LTD. STOCKHOLDERS LITIGATION	: : : : :	CONSOLIDATED C.A. No. 2017-0882-TMR <b>Original Filed: October 23, 2019</b> <b>Public Version Filed: October 25, 2019</b>
---	-----------------------	--

**AFFIDAVIT OF JASON M. LEVITON**

COMMONWEALTH OF MASSACHUSETTS  COUNTY OF SUFFOLK	: : : :	S.S.
--	------------------	------

Jason M. Leviton, being duly sworn, deposes and says:

1. I am a partner with the law firm of Block & Leviton LLP (“Block & Leviton”), which serves as Court-appointed Co-Class Counsel for the Class in the Action.<sup>1</sup> I submit this affidavit in support of Plaintiff’s Brief in Support of Motion to Approve Settlement and Award Attorneys’ Fees and Expenses (the “Brief”) to provide the Court with certain background facts as well as insight into how Plaintiffs’ counsel approached the case.

2. Before filing our complaint, we conducted a thorough analysis of public filings as well as internal books-and-records of the Company obtained pursuant to a Section 220 demand. Through plenary discovery, we obtained, reviewed, and analyzed over 230,000 pages of documents from Defendants and a number of third parties, including financial advisors (Duff & Phelps and Corporate Fuel), actuarial

---

<sup>1</sup> Defined terms have the same meaning as those used in the Brief.

advisors (Willis Towers Watson), and other third parties relevant to potential conflicts between Frankfurt and Lichtenstein [REDACTED]. While we were ultimately able to obtain the necessary documents without the need for motion practice, the meet-and-confer negotiations were lengthy and frequently contentious. We were forced to threaten motion practice on several instances and through those efforts were able to compel, among other things, a costly retrieval from backup tapes of critical Excel models that had been deleted by Duff & Phelps.

3. During the course of the litigation we deposed seven fact witnesses: Patrick DeMarco (Special Committee member), Garen Smith (Special Committee member), Christopher Gregory (Duff & Phelps), John Bolebruch (Corporate Fuel), Matthew Luczyk (Corporate Fuel), Douglas Woodworth (Steel's CFO), and Sharon Korinek (Steel's Senior VP Finance). We had prepared for the depositions of Robert Frankfurt (Chair of Special Committee), Jeffrey Svoboda (Board member), and John McNamara (Board member). Joel Fleming, a partner in my firm, was *literally* on his way to the airport for Mr. Frankfurt's deposition when we agreed to delay these depositions to facilitate a mediation.

4. In the course of this litigation and to prepare for the various mediations, we retained and worked with two experts: a corporate finance expert who is well-known to this Court and a highly qualified expert in the valuation of pension

obligations. By the time that we reached an agreement in principle to resolve the Action, both experts had completed first drafts of their expert reports.

5. Class Counsel believe that the Settlement is fair, reasonable, and adequate, and should be approved. In evaluating the strength of the case and the value of any potential settlement, we focused on focused on two key variables: the likelihood of establishing liability and the likely recoverable damages.

6. The most significant driver of liability was the standard of review. Defendants asserted that the applicable standard of review was business judgment, arguing that they complied with the requirements of *MFW*, insofar as Steel's offer was conditioned on special committee approval and a majority of minority stockholders tendering their shares. To obtain entire-fairness review, Lead Plaintiff and the Class would have had to prove that (i) the Special Committee was not independent or adequately empowered or (ii) the stockholders who tendered their shares were coerced or not fully informed.

7. In Class Counsel's judgment, Lead Plaintiff likely would have been able to make this showing. Discovery revealed several serious disclosure and process problems. Among other issues:

- a. Undisclosed Error in Duff & Phelps' DCF Model. The Proxy stated that in its discounted cash flow analysis that "Duff & Phelps calculated HNH's terminal value in 2021 using a perpetuity

growth formula.” In fact, due to an error in the perpetuity growth formula in Duff & Phelps’ model, Duff & Phelps actually [REDACTED]

[REDACTED]

b. Undisclosed Duff & Phelps Conflicts. The Proxy disclosed that Duff & Phelps had previously represented the special committees of three Steel affiliates in transactions with Steel: Steel Excel Inc., DGT Holdings Corp. and CoSine Communications, Inc. What the Proxy failed to disclose was that [REDACTED]

[REDACTED]

c. Problems With The Advisor-Selection Process. The Proxy told stockholders that “in consultation with the other special committee members, [the Chair of the Special Committee] Mr. Frankfurt

identified, interviewed and negotiated retention terms with potential independent financial advisors and legal counsel to the special committee.” In fact, [REDACTED]

[REDACTED]

[REDACTED] Shortly after, he hired Duff & Phelps.

d. Undisclosed Relationship Between Frankfurt and Lichtenstein. The Proxy stated that the Chair of the H&H Special Committee, Robert Frankfurt, was “independent.” In fact, Frankfurt has a long-standing relationship with Warren Lichtenstein (the founder, CEO, Chairman, and largest stockholder of Steel Partners) and describes Lichtenstein as a [REDACTED] Less than a week after Steel Partners made the initial offer to H&H, Lichtenstein emailed Frankfurt

[REDACTED] “ [REDACTED]” Frankfurt replied.

Shortly after the Transaction closed, [REDACTED]

Earlier in their relationship, Frankfurt and Lichtenstein met in college, briefly lived together after college, and worked together at Steel Partners for many years after that. [REDACTED]

e. Undisclosed Change To Duff & Phelps' Pension Valuation. With the Proxy, stockholders were given a copy of Duff & Phelps' final banker book. Steel told the SEC—in a document publicly filed before the tender closed—that earlier versions of the Duff & Phelps banker books “included the same valuation methodologies[,] ... were substantially identical in form to the final presentation,” and “present[ed] the same analyses[.]”As the lead Duff & Phelps banker conceded at his deposition, however, Duff & Phelps did not use the same valuation methodology in its final presentation [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] But in the final presentation [REDACTED]

[REDACTED]—Duff & Phelps

estimated the impact of H&H's unfunded liability by using the "Termination Method": estimating the after-tax cost of terminating the pension plan. Using the Termination Method [REDACTED]

[REDACTED]

[REDACTED]

8. Given the serious process and disclosure problems outlined above, Class Counsel believed that there was a strong likelihood that *MFW* would not apply and that Defendants would bear the burden of proving a fair price. We had serious concerns, however, about whether we would be able to obtain a damages award larger than the Settlement.

a. H&H's Market Price and Deal Price Would Have Been A Drag On Our Ability To Obtain A Larger Damages Award. In a string of recent cases, the Supreme Court has emphasized that courts should give significant weight to "real-world" evidence of fair value, including the unaffected market price and the deal price. Even in cases with a controller or significant process problems, the Court has given significant weight to unaffected market price and deal price as a "reality check." Here, the Transaction was not "*Dell* Compliant" and the market for H&H stock was not efficient, so the market price and deal price would not have been dispositive. But we believed there was a

significant risk that the Court would be reluctant to credit a DCF analysis that yielded a value for H&H reflecting a premium much higher than the 55% premium to unaffected market price achieved through the Settlement.

b. Other Key Variables In the Damages Analysis. Because this was a controller buyout, Class Counsel believed that the Court would perform a discounted cash flow analysis—subject to a reality check against real-world market evidence—to determine a fair price for H&H.

i. *Cash Flow Projections.* We made a strategic choice to obtain testimony that locked Defendants into the projections that Duff & Phelps used because those projections would support significant damages once the other changes discussed below were made.

ii. *Discount Rate.* The discount rate is usually calculated based upon company's WACC. WACC is the sum of: (1) the percentage of the company's capital structure that is financed with equity, multiplied by the company's cost of equity capital, *plus* (2) the percentage of the company's capital structure that is financed with debt, multiplied by its after-tax



cost of debt. While we believed it might be possible to convince the Court to make certain marginal adjustments to various inputs to the cost-of-equity-capital calculation, the most significant variable in this case related to the choice of capital structure. (The greater the weight given to H&H's cost of debt, the lower the WACC, and, thus, the higher the value of the Company.)

Defendants' position—which mirrored Duff & Phelps' approach—was that the Court should use the Company's projected capital structure, in which debt made up 10% to 20% of the capital structure. Lead Plaintiff would have tried to persuade the Court to use the Company's actual capital structure, in which debt made up almost 40% of the capital structure. Under the former approach, Duff & Phelps calculated a midpoint WACC of 12%. The latter approach would yield a WACC of approximately 11%, which would have increased H&H's value by over \$10 per share relative to Duff & Phelps' analysis.

Although a number of cases endorse the use of actual capital structure, the Court has also suggested that a target/expected capital structure can be appropriate, where, as here, the capital structure is in flux or projected to change. Based

on the evidence in this case—including H&H’s management projections, which showed declining leverage over time—we believed there was a strong likelihood that the Court would rely on H&H’s expected capital structure.

iii. *Terminal Value.* The Court typically uses the Gordon Growth method to calculate the terminal value in a DCF. Duff & Phelps used that method, but, as noted above, made a critical error that [REDACTED]  
[REDACTED]  
[REDACTED]. Holding everything else equal, correcting this error would increase H&H’s value by [REDACTED]  
[REDACTED]. At trial, however, Defendants would likely have been able to mitigate the impact of this change by arguing for a lower perpetuity growth rate than the 3.25% rate used by Duff & Phelps.

iv. *Pension Liability.* After calculating H&H’s enterprise value via a DCF analysis, the Court would have then been required to make additional adjustments to determine the Company’s equity value. Often, this is a simple exercise, in which the equity value is the enterprise value minus debt plus

cash. In this case, however, there was another significant variable that would have been a major battleground in the fair-price fight at trial: the impact of H&H's underfunded pension liability—*i.e.*, the GAAP Method, the ERISA Method, or the Termination Method. As set forth in the Brief we would have argued that the Court should value the impact of H&H's underfunded pension using either the GAAP Method or the ERISA Method. Defendants would have argued for the Termination Method.

If we were able to convince the Court to use the ERISA Method, that would have increased H&H's value by another \$6.15 per share (relative to the GAAP Method). But many of the same criticisms that applied to the Termination Method would apply equally to the ERISA Method. We could not identify precedents for the use of either method to value underfunded pension obligations in a sale transaction. Ultimately, we thought it was most likely that the Court would use the GAAP Method.

c. *Value of the Series A Preferred.* The final key variable in calculating damages was the value of the Steel Series A Preferred that was offered as consideration for Class members' common stock in H&H. Class members received 1.484 shares of Steel's Series A

Preferred in exchange for each share of H&H. We did not think that there was a serious risk that the Court would value the Preferred Stock by reference to the \$25.00 per share liquidation price that Steel referenced in various public filings. We would have argued that the Series A Preferred units should be valued based on their trading price: \$21.99. But the market for the Series A Preferred did not bear all of the hallmarks of efficiency: the shares were relatively thinly traded and not widely covered by analysts. Class Counsel believed there was a significant possibility that the Court would accept the \$23.62/share intrinsic valuation for the Series A Preferred calculated by Duff & Phelps.

9. Based on the factors identified above, our experts advised us that classwide damages would, most likely, range from \$37.6 million to \$62.7 million depending on the approach that the Court used to value the Series A Preferred shares (market price vs. “intrinsic” value) and H&H’s underfunded pension liability (GAAP Method vs. ERISA Method):

		<i>Series A Preferred</i>	
		<b>“Intrinsic Value”</b>	<b>Market Price</b>
<i>Pension</i>	<b>GAAP</b>	\$37.6M	\$48.7M
<i>Liability</i>	<b>ERISA</b>	\$51.7M	\$62.7M

The \$30 million settlement, therefore, reflects a recovery of 48 to 79 cents on the dollar—a remarkable result for Class members by any measure.

10. Class Counsel, including Block & Leviton, represented Plaintiff in this action on a fully contingent basis.

11. Block & Leviton attorneys and paraprofessionals dedicated 2,853.4 hours to the prosecution of the action from its commencement (including pre-litigation discovery and other work prior to the filing of the complaint) through July 9, 2019 (the date of the Stipulation). Between July 9, 2019 and October 23, 2019, Block & Leviton attorneys and paraprofessionals devoted an additional 43.2 hours to the Settlement.

12. The total lodestar amount for attorney/paraprofessional time based on my firm's current rates is \$1,768,595.00 through July 9, 2019 and \$1,792,705.00 in total. The hourly rates shown below are the usual and customary rates in all of our cases.

13. A breakdown of the lodestar is as follows:

<b>June 26, 2017 Through July 9, 2019</b>			
<b>Name</b>	<b>Hours</b>	<b>Billing Rate</b>	<b>Lodestar</b>
Jeffrey C. Block (P)	1.0	\$950.00	\$950.00
Jason M. Leviton (P)	946.1	\$825.00	\$780,532.50
Joel A. Fleming (P)	660.2	\$725.00	\$478,645.00
Thomas Kirchofer (A)	0.3	\$615.00	\$184.50
Bradley Vettraino (A)	118.7	\$465.00	\$55,195.50
Nathaniel Silver (A)	10.20	\$450.00	\$4,590.00
Amanda R. Crawford (A)	558.4	\$425.00	\$237,320.00
Jeffrey Gray (A)	222.5	\$395.00	\$87,887.50
Elizabeth Newman (A)	56.0	\$395.00	\$22,120.00
Sue Fort (A)	216.0	\$395.00	\$85,320.00
Elizabeth Davey (PL)	54.0	\$250.00	\$13,500.00
Brooke Jordy (PL)	10.0	\$235.00	\$2,350.00
<b>TOTAL:</b>	<b>2,853.40</b>		<b>\$1,768,595.00</b>

Partner (P), Associate (A), Paralegal (PL)

<b>July 10, 2019 Through October 22, 2019</b>			
<b>Name</b>	<b>Hours</b>	<b>Billing Rate</b>	<b>Lodestar</b>
Jason M. Leviton (P)	11.7	\$825.00	\$9,652.50
Joel A. Fleming (P)	5.9	\$725.00	\$4,277.50
Amanda R. Crawford (A)	22.10	\$425.00	\$9,392.50
Rachel Murphy (PL)	3.5	\$225.00	\$787.50
<b>TOTAL:</b>	<b>43.2</b>		<b>\$24,110.00</b>

Partner (P), Associate (A), Paralegal (PL)

14. My firm's individual expenses total \$158,184.03. Those expenses are broken down by category below:

<b>Expense Type</b>	<b>Amount</b>
Experts	\$78,915.00
Travel/Lodging	\$34,655.17

Expense Type	Amount
Research / E-Discovery Platform	\$16,144.70
Deposition Fees	\$15,639.04
Mediation Fees	\$8,654.25
Printing/Copying	\$3,139.00
Postage	\$347.67
Court Fees	\$346.90
Delivery/Courier Service/Process Server	\$342.30
<b>TOTAL</b>	<b>\$158,184.03</b>

15. The expenses and charges pertaining to this case are reflected in the books and records of my firm. These books and records are prepared from receipts, expense vouchers, check records and other documents and are an accurate record of the expenses.

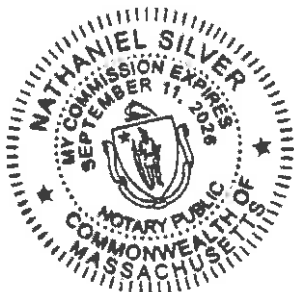
Executed this 23rd day of October, 2019.

  
Jason M. Leviton

Sworn to and subscribed  
before me this 23rd day of October 2019

  
\_\_\_\_\_  
Notary Public

My commission expires: 9/11/2026



**CERTIFICATE OF SERVICE**

Aaron M. Nelson, Esquire, hereby certifies that on October 25, 2019, a copy of the foregoing Public Version of the Affidavit of Jason M. Leviton was served electronically upon the following:

Thomas A Uebler, Esquire  
Kerry M. Porter, Esquire  
McCullom D'Emilio Smith Uebler LLC  
1523 Concord Pike, Suite 300  
Wilmington, DE 19803

A. Thompson Bayliss, Esquire  
Daniel J. McBride, Esquire  
Abrams & Bayliss LLP  
20 Montchanin Road, Suite 200  
Wilmington, DE 19807

/s/ Aaron M. Nelson  
Aaron M. Nelson (# 5941)