EFiled: Feb 20 2018 12:24PM EST
Transaction ID 61707338
Case No. 11448-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

Verition Partners Master Fund Ltd. and Verition Multi-Strategy Master Fund Ltd., Petitioners, v. Aruba Networks, Inc., Respondent.	C.A. No. 11448-VCL

MOTION FOR REARGUMENT

Pursuant to Court of Chancery Rule 59(f), Petitioners move for reargument in connection with the Court's February 15, 2018 Memorandum Opinion (the "Opinion"), determining fair value of Aruba Networks, Inc. ("Aruba") to be $17.13 per share:

1. We understand the Court's frustration with many of the Supreme Court's pronouncements that, if taken literally, lead to an absurd result that no litigant would even ask for. This Court made that point well in its Opinion. However, in doing so, this Court made certain errors and/or abused its discretion in a way that will take away from its point on appeal. We ask that the Court fix these errors before entering final judgment so that the appeal can focus on the absurdity of the literal application of certain pronouncements made by the Supreme Court in *Dell* and *DFC* to appraisal actions.

2. "A [c]ourt will grant an applicant's motion for reargument where it appears that the '[c]ourt has overlooked a decision or principal [sic] of law that would have a controlling effect or the [c]ourt has misapprehended the law or the facts so that the outcome of the decision would be affected." *PNC Bank v. Marty's Mobile Homes, Inc.*, 2001 WL 849866, at *1 (Del. Ch. July 10, 2001) (quoting *Continental Ins. Co. v. Rutledge & Co., Inc.*, 2000 WL 268297 at *1 (Del. Ch. Feb. 15, 2000)).

3. Reargument is warranted because the Court misapprehended the legal principles applicable to an appraisal following the Supreme Court's decisions in *Dell*[1] and *DFC*[2] and made factual findings that are unsupported by the record.

4. ***First***, although "endorsing" the efficient capital markets hypothesis ("ECMH"), nowhere in *DFC* or *Dell* did the Supreme Court instruct that the Court of Chancery must defer (or give any weight to) the so-called "unaffected" market price. Rather, the superior tribunal simply referred to the ECMH to criticize the Court of Chancery's reliance on information that the Supreme Court deemed was known to the market as a reason for not giving substantial weight to the *deal price* in the transactions. Moreover, there is a crucial difference between ***semi-strong form*** market efficiency (*i.e.*, the view that stock prices reflect all publicly available

[1] *Dell Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.*, -- A.3d --, 2017 WL 6375829 (Del. Dec. 14, 2017).

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

information) and ***strong form*** market efficiency (*i.e.*, the view that stock prices reflect all information, both public and non-public). Even assuming that *Dell* constitutes a ringing endorsement of the ECMH generally, in context it is apparent that *Dell* addressed only the ***semi-strong*** form.

5. Clearly an appraisal petitioner is entitled to his/her proportionate share of the value of the on-going concern, regardless of whether all information concerning the value of that on-going concern has been disclosed to the market. If, for example, unbeknownst to the market there was a billion dollars in gold underneath a company factory, a dissenting stockholder seeking appraisal would be entitled to a value that included that gold ***regardless of whether it was known to the market and reflected in the stock price***. Similarly here, an appraisal petitioner is entitled to the benefits from Aruba's stellar 2Q2015 earnings, its dramatically improved operating margin, and its strong guidance for 3Q2015. Petitioners should not be deprived of that value – ***which was expected to increase the stock price such that a deal at $24.67 might not have gotten through***[3] – simply because HP leaked its bid into the market at around the same time as the quarterly earnings, thereby preventing the parties from discovering "where the stock would have

[3] Opinion at 75-76 ("Aruba management believed that an increase in the stock price [following 2Q2015 earnings announcement] would hurt their chances of getting the deal approved.").

settled based on [Aruba's] results and guidance."[4] The fact that Aruba's price traded ***above*** the $24.67 deal price following the earnings announcements[5] makes clear that the so-called $17.13 "unaffected" stock price deprives Petitioners of this increased value, in which §262 entitles them to share.

6. This Court acknowledged the palpable disconnect between Delaware's longstanding rejection of market fundamentalism[6] and the Supreme Court's seeming about-face in *Dell*, noting that it did "not question the authority of the Delaware Supreme Court to endorse a traditional framing of the efficient capital markets hypothesis as method of assessing the reliability of market prices in

---

[4] Opinion at 44; JX509.

[5] Opinion at 45.

[6] Opinion at 68-69 n.305; *see also*, *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 611 (Del. Ch. 2010)(Strine,V.C.) ("The plaintiffs would have me fault the Board for not following blindly some crude rendition of the semi-strong form of the efficient capital markets hypothesis, one in which any board should treat the current market price as a reliable guidepost to decisionmaking. ***My understanding of ECMH is that it makes much less drastic claims***."); *Paramount Commc'ns Inc. v. Time Inc.*, 1989 WL 79880, at *19 (Del. Ch. Jul. 14, 1989) ("***[J]ust as the Constitution does not enshrine Mr. Herbert Spencer's social statics, neither does the common law of directors' duties elevate the theory of a single, efficient capital market to the dignity of a sacred text.***"); Leo E. Strine, Jr., *Who Bleeds When The Wolves Bite? A Flesh-And-Blood Perspective On Hedge Fund Activism And Our Strange Corporate Governance System*, YALE LAW JOURNAL, Vol. 126, pg. 1870 at 1930 (Apr. 2017) ("***[T]he claim of the efficient market hypothesis is not that a corporation's stock at any time is a reliable estimate of fundamental value***, but rather that it is not possible to design a trading strategy that will outguess the guesses of the market as a whole."); Travis Laster on Appraisal Rights, Audio blog post. The CLS Blue Sky Blog, Blue Sky Banter (Feb. 28, 2017), available at http://clsbluesky.law.columbia.edu/2017/02/28/25668/ (last visited February 16, 2018).

appraisal proceedings" and that "[o]nce the Delaware Supreme Court has done so, the obligation of a trial judge is to adhere to that endorsement and its implications."[7] The problem with this reasoning is that the Supreme Court did not adopt a "traditional framing" of the ECMH as this Court interpreted it. Neither *Dell* nor *DFC* required the Court of Chancery to weight the supposedly "unaffected" market trading price *at all*. Rather, it used the ECMH to criticize a significant departure from *deal price*. This Court's adherence to what it views as a "traditional framing" of the ECMH that was neither endorsed nor adopted by the Supreme Court, therefore, materially injured Petitioners, who have real money at stake.

7. ***Second***, this Court decided that Petitioners were entitled to the "unaffected" pre-deal stock price. We recognize that the Court believes it was constrained to do that no matter how ridiculous this Court might believe that is. But how does the Court determine "unaffected price"? Why did the Court arbitrarily and capriciously select the average of a 30 day period? There is no record evidence or citation to support that choice. Does an efficient market really take 30 days to adjust to provide evidence of fair value, even in the Bizzaroland we find ourselves in? Why isn't it 90 days? Why isn't it 1 day? The period chosen

[7] Opinion at 68-69, n.305.

makes a substantial difference if fair value is pegged to stock price,[8] yet the Court provides no justification in the law, in the valuation literature, or in the factual record for the 30 day period it chose. And should HP be allowed to game the system by leaking information about the deal to the market and "bundling" it with a positive earnings release to obscure the impact that Aruba's actual performance would have had on the "unaffected" trading price? As a court of equity, this Court should not reward such gamesmanship.[9]

8. ***Third***, the measuring point for the valuation is supposed to be the closing date (May 18, 2015), but the Court effectively used the 30 day period between January 26, 2015 and February 24, 2015 as the "valuation date."[10] During those intervening months (which the Court effectively ignored),[11] Aruba continued

[8] By way of example, had the Court selected 1 day, the fair value would have been $18.38; had it selected 90 days, it would have been $18.81; had it selected 120 days, it would have been $19.51; had it selected the opening price the day HP first approached Aruba about a deal, it would have been $22.01. This arbitrary selection makes a material difference.

[9] As Chief Justice Strine explained, "you don't reward people for doing hinkey things" that make it difficult to value stock, then accept the argument "goodie for us, you can't precisely value it because we did such wacky stuff that no one can put a precise price on it." *In re Loral Space and Commc'ns Inc. Consol. Litig.*, C.A. No. 2808-VCS, at 39 (Del. Ch. Dec. 2, 2008) (TRANSCRIPT). Yet that is precisely what happened here.

[10] Further calling into question the validity of this choice, the evidence established that this 30 day period was an "affected period" during which Aruba was trading on a "misconception" that the Company had missed its 2Q2015. Opinion at 74-75.

[11] The Court's decision to effectively ignore these intervening months conflicts with its recognition that Aruba's fair value "during the period before the

to be run, continued to turn out increasingly better results, and began to show the operating leverage that Wall Street had begun to demand in the quarters leading up to the merger. How does the Court's choice of time period take that activity into account?

9. ***Finally***, as the Court knows, following what this Court believes to be the literal instructions from the Supreme Court leads to a result that fair value for appraisal purposes will ***always*** be lower than deal price and therefore this decision has eliminated the statutory right to appraisal provided by the General Assembly in the context of a publicly traded company. As this Court shows, because the unaffected stock price will ***always*** be lower than a deal that offers any kind of premium – and because deal price less synergies will ***always*** be lower than deal price – the economic reality will mean that there can never be an appraisal for a public company receiving a premium offer, regardless of the size of that premium. While this Court is obligated to follow precedent set by the Delaware Supreme Court, this Court took an oath to Delaware to uphold the Delaware Constitution, which creates three branches of government, including the legislature. When the Supreme Court says something that can be interpreted to eliminate a right guaranteed by the statutory law of Delaware, this Court has an obligation to interpret the Supreme Court's pronouncements in a way that doesn't annihilate that

---

announcement of the transaction" "could be different than Aruba's fair value as of the closing." Opinion at 124. The evidence established that it was.

right. While we do recognize the frustration shared by this Court and many commentators[12] with the Supreme Court failing to respect this Court's discretion, making its own findings of fact (many of which are wrong),[13] and sitting as if it were the trial court without the benefit of trial,[14] the litigants before you are real with real dollars at stake. In this battle of legal titans, let's minimize the collateral damage.

[12] *See, e.g.*, Guhan Subramanian, *Appraisal After* Dell, Forthcoming in *The Corporate Contract in Changing Times: Is the Law Keeping Up?* (U. Chicago Press).

[13] *Id.* at p.16 (Supreme Court's finding that Blackstone had proposed waiting until the go-shop to consider a bid "happens to be false"); at p.24 (Supreme Court's description of Subramanian's testimony "is wrong" and his "ultimate conclusion was the opposite of what the Supreme Court claimed").

[14] *Id.* at 26 (the Supreme Court conducted a "*de novo* review of the deal process"; "[T]he idea that Vice Chancellor Laster's grade for the *Dell* deal process amounted to an 'abuse of discretion' defies credulity. If the Dean of Harvard Law School scrutinized the faculty's grades in such a manner, there would be no point for faculty to provide grades in the first place.").

Dated: February 20, 2018

Respectfully submitted,

/s/ Stuart M. Grant

Stuart M. Grant (#2526)
Michael J. Barry (#4368)
Christine M. Mackintosh (#5085)
Michael T. Manuel (#6055)
Rebecca A. Musarra (#6062)

GRANT & EISENHOFER P.A.
123 Justison Street
Wilmington, DE 19801
(302) 622-7000

Counsel for Petitioners

WORDS: 2,008

CERTIFICATE OF SERVICE

I, Christine M. Mackintosh, do hereby certify that on this 20th day of February, 2018, I caused a true and correct copy of *Petitioners' Motion for Reargument* to be filed and served via File and Serve*Xpress* upon the following:

Michael P. Kelly
Andrew S. Dupre
Daniel J. Brown
MCCARTER & ENGLISH, LLP
Renaissance Center
405 N. King Street, 8th Floor
Wilmington, DE 19801

/s/ Christine M. Mackintosh
Christine M. Mackintosh (#5085)