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Case No. 11448-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

RESPONDENT'S ANSWER IN OPPOSITION TO PETITIONERS' MOTION FOR REARGUMENT

Dated: February 27, 2018

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Respondent respectfully submits this Answer in Opposition to Petitioners' Motion for Reargument (or "Mot."), DI 190.[1]

1. The Court's well-settled standard for a motion for reargument is narrow:

> "Proper grounds for a motion for reargument are that the Court has overlooked a controlling precedent or misapprehended the law or the facts of the case in a way that would have changed the outcome of the underlying decision."

Shroeder v. Buhannic, 2016 WL 3763254, at *1 (Del. Ch. July 13, 2016) (order denying motion for reargument or clarification). "Rule 59 is not a vehicle to rehash or more forcefully present arguments already made, however," or to "introduc[e] new arguments that a party did not previously make." *Id.* "Such tactics frustrate the efficient use of judicial resources, place the opposing party in an unfair position, and stymie 'the orderly process of reaching closure on the issues.'" *Blevins v. Metzgar*, 2017 WL 2709748, at *1 (Del. Ch. June 22, 2017).

2. Petitioners' Motion for Reargument fails to demonstrate that the Court either "overlooked precedent or legal principles that would have controlling effect,

[1] Capitalized terms herein have the same meanings as in Respondent's prior briefing, DI 138 ("Resp. Pre-Trial Br."), DI 163 ("Answering"), DI 167 ("Sur-reply"), DI 174 ("Resp. DFC Br."), DI 188 ("Resp. Dell Br."). Petitioners' post-trial supplemental briefs are referred to as "Pets. DFC Br." and "Pets. Dell Br.," DI 175 and DI 187, respectively. All emphasis is added and citations are omitted unless otherwise noted.

or misapprehended the law or the facts such as would affect the outcome of the decision." *Id.* Instead, Petitioners have either rehashed arguments already made, or raised entirely new ones that they should have raised previously.

3. Lest there be any doubt, Respondent did take the position that the Company's 30-day average trading market price of $17.13 prior to February 25, 2015 was informative of the Company's fair value in the opening lines of every one of its briefs and at the outset of oral argument.[2] The degree of emphasis Respondent placed on the market price increased following *DFC Global Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346 (Del. 2017), and then *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, —A.3d—, 2017 WL 6375829

[2] Answering at 1 ("[HP] paid $24.67 per share for [Aruba]—a significant premium over the unaffected market value of $17.13 per share"); *id*. at 3 ("Aruba's 30 day average unaffected market price was $17.13"); *id*. at 37 ("The market for Aruba stock was a 'thick and efficient' one, such that Aruba's stock price reflected its going concern value."); Sur-reply at 1 ("Marcus' valuation far exceeds . . . Aruba's unaffected market value of $17.13."); Resp. DFC Br. at 1 ("[*DFC*] confirms Aruba's position that the Court should reject Verition's proposed DCF fair value of $32.57 and adopt Aruba's proposed DCF fair value of $19.75 because the latter is consistent with . . . Aruba's pre-transaction trading price of $17.13"); Oral Arg. Tr. at 97-98 ("I would submit that these four numbers, Aruba's unaffected contemporaneous market price of 17.13 a share, the merger price of 24.67 a share as a ceiling, and HP's valuation . . . of Aruba at 19.10 a share, and the DCF valuation of Mr. Dages of no greater than 19.75 a share, all cluster around the same valuation range."), *id*. at 98-104 (discussing $17.13 market price as the first indicator of fair value); *see* Resp. Pre-Trial Br. at 1 (discussing the merger price premium to multiple measures of Aruba's market price (1-day, 30-day and 1-year averages)).

(Del. 2017).[3] In its final post-trial brief on the implications of *Dell*, Respondent took the unequivocal position that "***in response to the Supreme Court's recent guidance in Dell and [DFC], Aruba now understands that its pre-transaction market price is indeed the single most important mark of its fair value***." Resp. Dell Br. at 1. Accordingly, Respondent concluded that "***the Court should find fair value to be Aruba's 30-day unaffected market price of $17.13***." *Id.* at 14. In that brief, Respondent also anticipated and showed how *Dell* disposed of many of the concerns Petitioners now raise in their Motion for Reargument. Resp. Dell Br. at 10-12 (addressing the impact of Aruba's positive second quarter earnings and Project Greyhound in light of semi-strong versus strong form efficiency, Dell's consideration of a 90-day average in that case, and adjusting the market price to account for post-announcement developments).[4]

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[3] The Court also acknowledged that Aruba's arguments evolved in response to recent Delaware Supreme Court precedent. *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 2018 WL 922139, at *24 (Del. Ch. Feb 15, 2018) (hereinafter, "Op. at _").

[4] Because Respondent repeatedly advocated for use of the market price and the Court asked for and received evidence of market efficiency, this case is different from *In re Appraisal of AOL Inc.*, No. 11204, slip. op. at 24 n.118 (Del. Ch. Feb 23, 2018), where Vice Chancellor Glasscock declined to consider the market price because "no party has advocated such here, and [] no evidence concerning the efficiency of the market for AOL stock is before me."

4. Unlike Respondent, Petitioners did not update their litigation position on market price as an ***independent*** indicator of fair value after *DFC* and *Dell*, and instead relied solely on their expert's DCF and their arguments that the merger price should be disregarded. After *DFC*, Petitioners simply argued that that case upheld longstanding precedent that the deal price is not entitled to presumptive weight in determining fair value. Pets. DFC Br. at 1-2. After *Dell*, Petitioners admitted that they "did not litigate 'market efficiency'" and conceded that the market indicators for Aruba's stock were similar to those found to support market efficiency in *Dell* and *DFC*. Pets. Dell Br. at 3-4.[5] Yet they still did not approach Aruba's market price as a potential ***independent*** indicator of fair value, and never took the position that Aruba's 30-day average trading price was not the relevant market price metric. Instead, Petitioners argued that the market price did not support giving weight to the deal price because it was in a trough and because Aruba's earnings release was bundled with the merger announcement. Pets. Dell Br. at 5-7.

5. In reaching its fair value conclusion, the Court found that the Delaware Supreme Court's decisions in *Dell* and *DFC* (a) "endorse using the market price of a widely traded firm as evidence of fair value," (b) "endorse using

[5] Petitioners never contradicted Respondent's repeated statement that Petitioners had conceded that the market for Aruba's stock was efficient. Sur-reply at 6, Resp. DFC Br. at 1, 3, Resp. Dell Br. at 3.

the deal price [reduced for synergies] in a third-party, arm's length transaction as evidence of fair value," and (c) "caution against relying on discounted cash flow analyses prepared by adversarial experts when reliable market indicators are available." Op. at *1-2. Applying these principles, the Court determined that: (a) there was "sufficient evidence of market efficiency" such that Aruba's 30-day average unaffected market price was a "possible proxy for fair value," Op. at *1; (b) "the merger was an arm's-length transaction that provided stockholders with consideration of $24.67 per share" from which the Court derived a deal-price-less synergies valuation of $18.20 per share, Op. at *2; and (c) the DCF valuations offered by both parties' experts were unreliable. *Id*. Thus, the Court was left with two indicators of fair value: market price and deal-price-less-synergies. The Court decided, however, that its deal-price-less-synergies figure was likely tainted by human error and inflated due to the value created by reducing agency costs. Op. at *3-4. Accordingly, the Court was left with only market price, which the efficient capital markets hypothesis provides is necessarily consistent with a deal-price-less-synergies approach. Op. at *4.

6. In its opinion, this Court correctly applied *DFC* and *Dell* to address many of the legal and evidentiary contentions Petitioners rehash here, and found that "[i]n its supplemental submissions on the implications of *Dell* and *DFC*, the

petitioners alluded to potential objections to the Delaware Supreme Court's framing of the efficient capital markets hypothesis, but they did not develop those objections in any meaningful way." Op. at *24 n.257. Petitioners' failure to grapple with the *DFC* and *Dell* decisions is not a sufficient reason to grant reargument. Similarly, Petitioners have failed to allege that this Court misapprehended any of the facts relevant to the Court's opinion. Respondent addresses each of Petitioners' four arguments for reargument in turn.

7. ***First***, Petitioners incorrectly assert that the Court misunderstood *Dell* and *DFC* to require that deference be given to the unaffected market price. Mot. ¶ 4. Not so. The Court expressly stated that "this decision is not interpreting *Dell* and *DFC* to hold that market price is now the standard for fair value." Op. at *4; *see* Op. at *54 ("This approach does not elevate 'market value' to the governing standard under the appraisal statute."). Remarkably, Petitioners posit that *DFC* and *Dell* do not require the Court to give any weight to the market price, and that the Delaware Supreme Court's analysis of market price only related to the weight that should be afforded to the deal price. Mot. ¶ 4. This Court correctly found that *DFC* and *Dell* teach that if a company's shares trade in an efficient market, the unaffected trading price provides independent evidence of "the fair value of a proportionate interest in the company as a going concern." Op. at *25; *see id.* at

*25 n.264 (noting that in *Dell*, the Delaware Supreme Court reversed the trial court's fair value determination because, among other reasons, "the trial court gave no weight to Dell's stock price . . . . But the evidence suggests that the market for Dell's shares was actually efficient and, therefore, likely a possible proxy for fair value"). And Petitioners do not challenge this Court's correct finding that Aruba's common stock traded in a market that "had the basic attributes" of an efficient one. Op. at *26.

8. Petitioners' objection that *Dell* addressed only the semi-strong form of market efficiency (that stock prices reflect public information), whereas fair value for purposes of an appraisal proceeding should be measured by a market price generated by a strong-form efficient market (in which stock prices reflect public and private information), Mot. ¶ 4, simply reflects their disagreement with the Delaware Supreme Court.[6] Moreover, it is plainly an effort to rehash their prior argument that the deal price should be rejected because "the parties opportunistically negotiated the price when material information concerning Aruba's performance was not known to the market." Pets. Dell Br. at 5-6

[6] This objection is also belated and, like earlier objections, "not develop[ed] . . . in any meaningful way." Op. at *24 n.257. Indeed, this distinction was something Aruba argued in its post-trial brief on *Dell*, Resp. Dell Br. at 11, explaining that *Dell* did not require strong-form market efficiency, only semi-strong efficiency for the market price to be a reliable indicator of fair value.

(emphasis omitted). The Court addressed and rejected this argument. Op. at *28-34. In doing so, it properly relied on the Delaware Supreme Court's framing of the semi-strong form of the efficient capital markets hypothesis and considered the same evidence that Petitioners advance here, including that the market was supposedly unaware of the 2Q2015 results and guidance, Op. at *31, the implications of the purported decision by Aruba management to bundle together the earnings release with the merger announcement, Op. at *33-34, the fact that Aruba's stock price traded briefly above the deal price, Op. at *34, and the suggestion that HP leaked the deal.[7]

9. ***Second***, the Court did not "arbitrarily and capriciously" select the 30-day average unaffected trading price, and Petitioners' point that there is "no record evidence or citation to support that choice" is ridiculous. Mot. ¶ 7. As shown above, Respondent consistently set forth Aruba's 30-day average trading price

[7] While Petitioners misrepresent that, as a fact, "HP leaked its bid into the market," Mot. ¶ 5, the Court correctly noted that it was only internal "speculat[ion]" at Qatalyst that HP leaked the news. Op. at *20 & n.209, relying on JX 510 (email from Quattrone to Boutros reflecting Quattrone's speculation that "this could just be their [HP's] way of making SURE our results and subsequent stock price reaction won't be easy to measure by leaking it themselves" (JX 510 at 1)), and Boutros Dep. 206-07. Contrary to Petitioners' suggestion, the leak ***did not*** reflect any bid or merger price. JX 1522. Moreover, at Mr. Boutros's deposition, when Petitioners' counsel asked "Do you believe HP leaked the story to Bloomberg", Mr. Boutros responded, "I don't." JX 602, Boutros Dep. 254:9-14.

prior to the Bloomberg leak as the relevant market price metric.[8] ***Petitioners never contested this metric or offered a different one.*** Even now, Petitioners do not advocate for any particular trading price metric. Mot. at 6 n.8 (setting forth, "[b]y way of example," 1-day, 90-day and 120-day averages). Their failure to suggest any particular trading price metric as appropriate is simply a Trojan horse for their argument that market price—however measured—is inappropriate as a measure of fair value. Moreover, their feigned surprise at the Court's use of the 30-day average trading price cannot make up for their failure to dispute this metric previously. *See Merion Capital L.P. v. Lender Processing Servs., Inc.*, 2016 WL 7324170, at *33 (Del. Ch. Dec. 16, 2016) (finding that it was "too late" for the Company to argue that the court should deduct synergies when it had not previously litigated that issue).[9]

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[8] For example, a 30-day average has the benefit of correcting for "what appears to be common knowledge on the street: impending merger announcements are poorly held secrets," such that the market reaction to mergers and earnings announcements often occurs before the public announcement. Arthur J. Keown and John M Pinkerton, *Merger Announcements and Insider Trading Activity: An Empirical Investigation*, The Journal of Finance (Sept. 1981), 866.

[9] *See Matter of Appraisal of Shell Oil Co.*, 1990 WL 201390, at *29 (Del. Ch. Dec. 11, 1990) (explaining that it "was not improper, as a matter of law" to base the unaffected market price either "on the day prior to the offer announcement" or a day "30 days prior to the merger announcement"), *aff'd*, 607 A.2d 1213 (Del. 1992); *see In re Olivetti Underwood Corp.*, 246 A.2d 800, 805 (Del. Ch. 1968) (rejecting corporation's position that the price should be "fixed at 13 3/8 because that was the closing price on the day preceding the tender"; "I do not understand [*Levin v. Midland-Ross Corp.*, 194 A.2d 50 (Del. Ch. 1963)] to hold as a matter of

10. ***Third***, the Court did not "effectively ignore" (Mot. ¶ 8), the intervening period between when the merger leaked on February 25, 2015 and when the merger closed on May 18, 2015, but found that "neither side proved that Aruba's value had changed materially by closing." Op. at *53. The Court was not obligated to do what Petitioners did not even attempt, that is to construct a hypothetical uninfluenced market value as of the merger closing date. *See Tri-Cont'l v. Battye*, 74 A.2d 71, 74 (Del. 1950) ("the absence of [an actual market value uninfluenced by the merger] does not require the construction of a hypothetical market value to be given effect in the final determination of value"); *see also* Resp. Dell Br. at 12 (relying on *Tri-Continental* and suggesting a potential adjusted market price). Petitioners, therefore, have not identified any misapprehensions of law or facts in the Court's analysis; they just do not like the Court's conclusion. But this is not a basis for granting reargument.

11. ***Fourth***, Petitioners are wrong in their overarching suggestion that "this decision has eliminated the statutory right to appraisal . . . in the context of a publicly traded company" and that "the economic reality will mean that there can never be an appraisal for a public company receiving a premium offer, regardless

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law that the last day of trading on an open market is the measure of market value"; finding that appraiser's pegging market value at $14.25 based on the period preceding the announcement of the offer was "reasonable under the circumstances").

of the size of that premium." Mot. ¶ 9. This contention that appraisal rights have been "annihilate[d]" or "eliminate[d]" ignores the language in this Court's opinion. The opinion is very clear that its "approach does not elevate 'market value' to the governing standard . . . . The governing standard for fair value under the appraisal statute remains the entity's value as a going concern. For Aruba, the unaffected public market price provides the best evidence of its value as a going concern." Op. at *54. The result for other public companies may be different depending on the evidence. *See, e.g.*, *In re Appraisal of AOL Inc.*, No. 11204, slip op. at 24 n.118 (post-*Dell* case ascribing full weight to DCF valuation). Here, this Court carefully applied the principles of law set forth in *Dell* and *DFC* to the evidence presented by the parties and reached the sound conclusion that Aruba's fair value was its market price. Op. at *55. Petitioners made the tactical decision to rely solely upon their expert's DCF and their argument that the merger price should be disregarded, and never challenged that the relevant market price metric for Aruba's stock was $17.13. That their litigation strategy was not successful is not a constitutional crisis.[10]

[10] Nor is Professor Subramanian's disagreement with the *Dell* decision a reason to grant reargument. *See* Mot. ¶ 9 n.12. Moreover, even Professor Subramanian acknowledges in the essay cited by Petitioners that "appraisal remains alive in Delaware." Guhan Subramanian, *Appraisal After Dell*, Forthcoming in *The Corporate Contract in Changing Times: Is the Law Keeping Up?* (U. Chicago Press), at 26 (cited in Mot. ¶ 9 n.12).

12. For these reasons, Petitioners fail to meet the standard for reargument, and Petitioners' Motion for Reargument should be denied.

DATED: February 27, 2018

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CERTIFICATE OF SERVICE

I, Michael P. Kelly, hereby certify that on February 27, 2018, I caused a copy of the foregoing Respondent's Answer in Opposition to Petitioner's Motion for Reargument to be served via File & ServeXPress on the following:

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