

CLIENT ALERT

Delaware Chancery Court Embraces Market Price in the First Post-*Dell* Public Company Appraisal Decision

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On February 15, 2018, Vice Chancellor J. Travis Laster of the Delaware Court of Chancery embraced the use of unaffected pre-deal market price in the first public company appraisal decision following last December's landmark Delaware Supreme Court ruling in *Dell Inc. v. Magnetar Global Event Driven Master Fund Ltd.* Citing extensively to *Dell*, Vice Chancellor Laster ruled in *Verition Partners v. Aruba Networks, Inc.* that the most persuasive evidence of fair value for Aruba was the company's 30-day average unaffected market price. In selecting this price—\$17.13 per share, a 30 percent discount from the deal price—Aruba solidifies market-based indicators as the dominant factor in the court's appraisal analysis. The shareholders have filed a motion for reargument and have indicated that they intend to appeal the decision.

In May 2015, Hewlett-Packard Company acquired Aruba Networks, Inc. at a price of \$24.67 per share in cash. Verition and other stockholders challenged this merger price through an appraisal proceeding filed on August 28, 2015, and after two years of discovery a three-day trial took place early last December. The *Dell* decision was issued shortly thereafter, leading to post-trial briefing on its implications in *Aruba*. The parties filed these submissions on January 26, 2018, and Vice Chancellor Laster's ruling followed.

The 129-page *Aruba* decision highlights the importance of market factors on appraisal in light of the Delaware Supreme Court's decisions in *Dell* and *DFC Glob. Corp. v. Muirfield Value P'srs, L.P.*, 172 A.3d 346 (Del. 2017). As Vice Chancellor Laster observed, because "Delaware law has embraced a traditional formulation of the efficient capital markets hypothesis, the unaffected market price provides a direct route to the [fair value], at least for a company that is widely

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traded and lacks a controlling stockholder.” According to the *Aruba* court, the unaffected market price will accurately reflect fair value absent exploitation of the stockholders.

Vice Chancellor Laster deemed the deal structure in *Aruba* clearly non-exploitative, albeit imperfect. The decision acknowledged that there were occasionally misaligned incentives among Aruba’s bankers, as well as some information leaks and confidentiality breaches related to the transaction, but otherwise labeled it a “run-of-the-mill, third-party deal.” This was not the case of a controlling shareholder looking to squeeze others out, there was no insider advantage, there were no clear conflicts of interest, and negotiations were robust.

Similarly, Vice Chancellor Laster found that a lack of competition did not render the merger problematic. Although HP was the only prospective buyer, the plaintiffs did not identify any other potential bidders, and evidence at trial indicated that none existed. Moreover, quoting *DFC* and *Dell*, Vice Chancellor Laster wrote that “the purpose of an appraisal is not to make sure that the petitioners get the highest conceivable value,” and the issue “is not whether a negotiator has extracted the highest possible bid.” Therefore, although the plaintiffs “proved that the company’s negotiators might have done better,” there was “no reason to believe that they left any of Aruba’s fundamental value on the bargaining table.”

Beyond unaffected market price, the court also considered, and ultimately rejected, two additional valuation methodologies advanced by the parties: the deal price and the parties’ competing DCF analyses:

- While acknowledging that *DFC* and *Dell* give “substantial probative value” to deal price when a widely held, publicly traded company has been sold in an arm’s-length transaction, Vice Chancellor Laster concluded that the difficulties in quantifying the synergies involved in the *Aruba* transaction, which must be excluded from the deal price, made this metric a less reliable indicator of fair value. Using “deal-price-less-synergies” was also problematic because it continued to incorporate the reduced agency costs that resulted from the buyer’s ownership of the entire company, which, like synergies, are a value resulting from the transaction that must be extracted from the fair value calculations.
- Similarly, Vice Chancellor Laster concluded that a DCF analysis is only a valuable substitute in cases with a lack of credible market information. With no evidence that market price could not be relied upon as a proxy for fair value, there was “significant doubt regarding the reliability” of the proposed DCF analysis despite “its seemingly sound methodology.”

While adopting market price as the correct measure in *Aruba*, Vice Chancellor Laster was careful to limit his conclusions to the facts presented: “By awarding fair value based on the unaffected market price, this decision is not interpreting *Dell* and *DFC* to hold that market price is now the standard for fair value. Rather, Aruba’s unaffected market price provides the best evidence of its going concern value.”

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Aruba serves as a strong reminder of the risks faced by shareholders contemplating appraisal actions, which, even when successful, can be a timely and costly process. While appraisal petitioners are generally entitled to interest compounded quarterly while the litigation is pending, the decision to engage in protracted appraisal litigation becomes significantly more risky when a court adopts a fair value determination triggered by an unaffected market price that is 30 percent lower than the deal price. Although *Aruba* acknowledges that the Delaware Supreme Court has not set out a bright-line rule, momentum is currently on the side of market factors and away from DCF or expert analyses generally as the proper estimate of fair value. In a strongly worded motion for reargument, the plaintiffs have already suggested that the *Aruba* ruling may gut the statutory appraisal remedy altogether because the unaffected market price will generally always be lower than the deal price. The final word from the Delaware Supreme Court in *Aruba* may not come down until much later in 2018.

If you have any questions about the *Aruba* decision or appraisal generally, please contact the following attorneys or the attorney with whom you regularly work.

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