CLIENT ALERT

Delaware Supreme Court Rejects Chancery Court's Reliance on Unaffected Share Price in Overturning *Aruba* Appraisal Decision

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On April 16, 2019, the Delaware Supreme Court issued its highly-anticipated appraisal decision in *Verition Partners v. Aruba Networks, Inc.*, holding that the Chancery Court abused its discretion in using Aruba Networks, Inc.'s 30-day average unaffected market price—$17.13 per share—as determinative of the company's fair value. Instead, the Court adopted Aruba's own measure of "deal price minus synergies"—$19.10 per share—and ordered final judgment in this amount. The judgment amount represents an approximately 22% reduction from the $24.67 deal price. *Aruba* reaffirms that, absent unique circumstances, the Delaware courts will, in fully-shopped deals, continue to afford primacy to a market-tested deal price in appraisal cases.

The Chancery Court's February 15, 2018 *Aruba* decision contained an extensive analysis of the Delaware Supreme Court's landmark 2017 rulings in *DFC Glob. Corp. v. Muirfield Value P'rs, L.P.*[1] and *Dell Inc. v. Magnetar Global Event Driven Master Fund Ltd.*,[2] which collectively emphasized the importance of deal price and market-based indicators as the predominant factors in determining a public company's "going concern value" for appraisal purposes. However, in his decision, Vice Chancellor Laster interpreted the Supreme Court's guidance in *DFC* and *Dell* as endorsing his novel use of

1 172 A.3d 346 (Del. 2017).

2 177 A.3d 1 (Del. 2017).

"unaffected market price" as the most persuasive evidence of fair value. As summarized by the high court, "the Court of Chancery . . . seemed to suggest that rote reliance on market prices was compelled based on its reading of *DFC* and *Dell*."

The Supreme Court, however, made clear in *Aruba* that *DFC* and *Dell* required no such rote reliance. Instead, the Delaware Supreme Court noted that those decisions did not mark a deviation from established appraisal principles:

> "[T]he trial judge seemed to find it novel that *DFC* and *Dell* recognized that when a public company with a deep trading market is sold at a substantial premium to the preannouncement price, after a process in which interested buyers all had a fair and viable opportunity to bid, the deal price is a strong indicator of fair value, as a matter of economic reality and theory. The apparent novelty the trial judge perceived is surprising, given the long history of giving important weight to market-tested deal prices in the Court of Chancery and this Court."

The Delaware Supreme Court further emphasized that *DFC* and *Dell* did not depart from traditional market indicia of value. In short, "*DFC* and *Dell* merely recognized that a buyer in possession of material nonpublic information about the seller is in a strong position (and is uniquely incentivized) to properly value the seller when agreeing to buy the company at a particular deal price, and that view of value should be given considerable weight by the Court of Chancery absent deficiencies in the deal process."

The Delaware Supreme Court also took issue with the Chancery Court's rejection of the familiar "deal price minus synergies" measure due to the perceived difficulty in quantifying, and deducting, certain "agency costs." As summarized by the Delaware Supreme Court, "the theory underlying the [Chancery Court's] decision appears to be that the acquisition would reduce agency costs essentially because the resulting consolidation of ownership and control would align the interests of Aruba's managers and its public stockholders." However, neither party in the litigation raised these agency cost concerns, and the Court rejected this as an "inapt theory" that lacked a sufficient evidentiary basis. The Delaware Supreme Court also found that Vice Chancellor Laster's injection of "his own speculative idea"—simply because synergy calculations appeared difficult—was in error. While estimating synergies may inherently involve "imprecision," it is "no more [imprecise] than other valuation methods," and the record here created a reliable estimate of deal price minus synergies that the Chancery Court should have followed.

Finally, the Delaware Supreme Court was troubled by the Chancery Court's departure from the parties' own valuation arguments and *sua sponte* introduction of share price analysis, finding that these decisions "injected due process and fairness problems into the proceedings."

Notwithstanding that the final Delaware Supreme Court judgment was ultimately higher than the valuation in the Chancery Court's decision, the amount was still over 20% lower than the deal price and significantly less than the amount sought by

Verition in the proceeding. In this regard, *Aruba* continues to illustrate the hurdles that face stockholders contemplating appraisal actions in Delaware, at least in cases involving public company deals that are properly shopped. The decision also builds on the teachings of *DFC* and *Dell* and affirms the primacy of a market-tested deal price in Delaware's appraisal jurisprudence.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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