

Chancery Judge Denies Bid For Redo In HP-Aruba Appraisal

By **RJ Vogt**

Law360 (May 21, 2018, 9:17 PM EDT) -- A Delaware Chancery Court judge on Monday denied a bid for reargument from investors of Aruba Networks Inc., who claimed he misapplied state law by shaving 30 percent off the deal price in an appraisal action over Hewlett-Packard Co.'s \$2.8 billion acquisition of the company.

Vice Chancellor J. Travis Laster had issued a 129-page opinion in February that found Aruba stockholders led by hedge funds Verition Partners Master Fund Ltd. and Verition Multi-Strategy Master Fund Ltd., who held out and sued for a better deal, should get \$17.13 per share rather than the \$24.67 actual payout or the \$19.75 per share that Aruba later proposed in response to the deal challenge.

That ruling, which potentially slashed nearly \$17.3 million from the per-share return for the largest investors in the suit, was based in large part on recent Delaware Supreme Court decisions that reversed Chancery Court opinions calling for payouts well above deal price for Dell's \$25 billion take-private deal and DFC Global's \$1.3 billion private equity buyout.

After the shareholders asked for reargument, the vice chancellor was forced to re-examine his own decision's rationale. In Monday's opinion, he stood his ground and wrote that the remedy for correcting any potential errors must now be sought with the senior tribunal on appeal.

"The petitioners have not shown that I misapprehended the facts or the applicable law," Vice Chancellor Laster wrote. "When preparing the post-trial ruling, I reasoned through the issues as best I could and reached what I believe is the correct determination of fair value."

At the heart of the case was the stockholders' push for an \$18 million higher price for their shares, based on a complex analysis of the company's current and future cash flows and guided in part by research questioning the expectation that markets always act rationally. A Nobel Prize was awarded last year to University of Chicago scholar Richard Thaler for his work in that area.

Following a three-day trial in December 2016, the vice chancellor in February acknowledged some information leaks, confidentiality breaches and conflicts, but ultimately found the deal appeared "run-of-the-mill" and said that "nothing about the deal structure could be considered exploitive" or a reason to look beyond the market prices.

The shareholders' motion contended eight grounds for reargument. In Monday's opinion, the vice

chancellor first addressed their argument that he had acted “arbitrarily and capriciously” by using a 30-day average to determine the market price, pointing out they had never contested the 30-day metric or offered a different one until challenging his decision. He also pointed out that, “even now, the reargument motion does not argue that the court should have used a particular measurement period.”

Investors had also said he misapprehended the law because his valuation period — between January and February 2015 — was months before the Aruba sale closed. In response, the judge said his post-trial ruling explicitly noted neither side proved Aruba’s value had changed by closing, and thus the time gap between evidence of value and the valuation date was insignificant.

Another element of the reargument bid was the investors’ contention that the vice chancellor found information not impounded into the trading price — specifically, that Aruba management knew internally it would beat market perceptions but let people think what they wanted to so the company could announce the merger at the same time it announced strong quarterly results.

But Vice Chancellor Laster said “for the petitioners now to argue that I should have constructed and considered a different market price constitutes a new argument,” not adequate for relief.

He also rejected their claim that his decision was based on an unnecessary belief he was required to rely on market price, pointing out that he never said it was required.

“Instead, I perceived that Dell and DFC endorsed the reliability of the unaffected market price as an indicator of value, at least for a widely traded company, without a controlling stockholder, where the market for its shares has attributes consistent with the assumptions underlying the efficient capital markets hypothesis,” he wrote. “As a result, I believe that trial courts now can (and often should) place heavier reliance on the unaffected market price.”

As for whether “relying on the unaffected market price is ridiculous,” as the investors alleged, Vice Chancellor Laster said “I do not share that view.”

“I do not dispute that the post-trial ruling takes an approach that differs from prior Court of Chancery precedent,” he wrote. “Delaware Supreme Court decisions on appraisal that pre-dated Dell and DFC expressed skepticism about the reliability of the market price as an indicator of fair value. In my view, Dell and DFC changed things.”

The investors had additionally claimed that “no litigant would even ask for” the fair value conclusion he had reached. The judge pointed out Monday that Aruba “actually did propose that I rely on the unaffected market price,” or \$17.13 per share. Though Aruba later raised its valuation opinion to \$19.75, the vice chancellor said he ultimately found the court was required to make its “own, independent valuation determination.”

The final two arguments raised in the reargument bid contested that his post-trial ruling was “an act of political theater” designed to show the state’s high court how it was wrong in Dell and DFC, and that he had violated his judicial oath.

Vice Chancellor Laster noted that though “the human mind does not offer an Archimedean perch for self-assessment” he tried to take seriously the petitioners’ claim that he did not act in good faith, carefully rereading DFC, Dell and his own ruling. Ultimately, he said, “I personally do not believe that I issued the post-trial ruling out of frustration.”

Marc J. Sonnenfeld of Morgan Lewis & Bockius LLP, who represents Aruba, told Law360 Monday that the 51-page opinion is “thorough and thoughtful,” adding that it provides “useful guidance to practitioners on the standard for fair value under the appraisal statute and the weight to be given various types of evidence.”

“The court adhered to its conclusion that, applying the efficient capital markets hypothesis endorsed by Dell and DFC, the most persuasive evidence of Aruba’s fair value was its unaffected trading price of \$17.13 per share,” he said.

Sonnenfeld’s co-counsel Michael P. Kelly of McCarter & English LLP said he thought “it is a shame that this brilliant, hard working judge had to spend so much time responding to the many obviously unfounded ad hominem attacks made upon him.”

“He deserves better,” Kelly said.

Counsel for the Verition funds did not immediately respond to a request for comment on Monday.

The Verition funds are represented by Stuart M. Grant, Michael J. Barry, Christine M. Mackintosh, Michael T. Manuel and Rebecca A. Musarra of Grant & Eisenhofer PA.

Aruba is represented by Michael P. Kelly and Steven P. Wood of McCarter & English LLP and Marc J. Sonnenfeld, Karen Pieslak Pohlmann and Laura Hughes McNally of Morgan Lewis & Bockius LLP.

The case is Verition Multi-Strategy Master Fund Ltd. et al. v. Aruba Networks Inc., case number 11448, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Pamela Wilkinson.