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IN THE SUPREME COURT OF THE STATE OF DELAWARE

Verition Partners Master Fund Ltd. and Verition Multi-Strategy Master Fund Ltd., Petitioners-Below, Appellants v. Aruba Networks, Inc., Respondent-Below, Appellee.	No. 368, 2018 Court below: Court of Chancery C.A. No. 11448-VCL

ANSWERING BRIEF OF RESPONDENT-BELOW, APPELLEE

Dated: November 1, 2018

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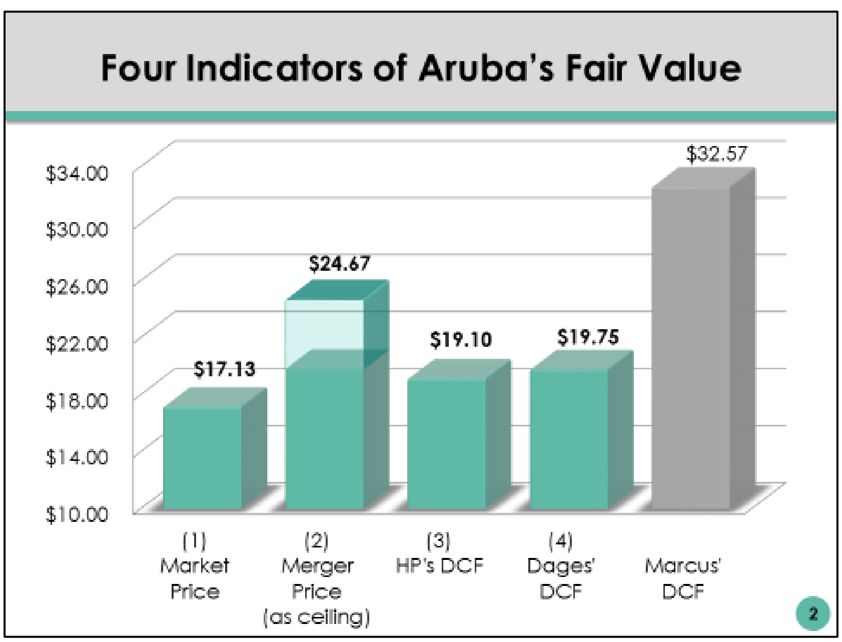
GLOSSARY

Aruba or Company or Respondent	Appellee Aruba Networks, Inc.
Autonomy	Autonomy plc
Br. or Brief	Appellants' Opening Brief
DCF	Discounted cash flow
Dell	*Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017)
DFC	*DFC Global Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346 (Del. 2017)
ECMH	Efficient capital markets hypothesis
HP	Hewlett-Packard Company
McKinsey	McKinsey & Company
Merger	The acquisition of Aruba by HP, as announced on March 2, 2015 and closed on May 18, 2015
Opinion or Op.	February 15, 2018 post-trial opinion (attached to Appellants' Opening Brief at Exhibit A)
Reargument Opinion or Rearg.Op.	May 21, 2018 opinion denying Petitioners' motion for reargument (attached to Appellants' Opening Brief at Exhibit B)
Verition or Petitioners	Verition Partners Master Fund Ltd. and Verition Multi-Strategy Master Fund Ltd.
2Q15	Aruba's second quarter results, announced February 26, 2015

NATURE OF PROCEEDINGS

On March 2, 2015, HP announced that it would acquire Aruba for $24.67/share in an arm's-length transaction—a quintessentially strategic acquisition that would create massive synergies. The $24.67 price reflected a 44% premium to Aruba's 30-day average unaffected share price of $17.13. After the announcement, Verition bought Aruba stock and sought appraisal.

During the litigation that ensued, Aruba proposed four indicators of its fair value: (1) market price of *$17.13*, (2) deal-price-less-synergies of *less than $24.67* (*i.e.*, merger price as ceiling), (3) HP's contemporaneous valuation of Aruba of *$19.10*, and (4) its expert's DCF of *$19.75*. Verition offered only one—its expert's DCF of *$32.57*. The following chart[1] shows how Aruba depicted the parties'



[1] A911-12.

ME1 28473490v.1

competing views of fair value at the post-trial argument, before *Dell* was decided:

While Aruba consistently argued that all four indicators of fair value deserved consideration, Aruba's position before *DFC*/*Dell* was that the trial court should award $19.75, as Aruba's expert proposed. After *DFC*/*Dell*, however, Aruba asked the trial court to award the market price of $17.13. This argument resulted not from underhanded "opportunism," as Verition charges, but from attentiveness to this Court's teachings in *DFC*/*Dell* that market price is an independent metric of fair value.

Verition chose a very different response to *DFC*/*Dell*. Ignoring the independent relevance of market price, Verition addressed only the relevance of deal price and the competing expert DCFs, and attacked HP's analysis on admissibility grounds. Having made that choice in the trial court, Verition now argues that it had no opportunity to litigate the reliability of market price. And yet at the same time, Verition argues that it established the unreliability of Aruba's unaffected market price because that price did not reflect Aruba's positive second-quarter earnings. The truth is that Verition addressed market price only in the context of whether it impacted the reliability of deal price. Like the petitioners in *DFC* and *Dell*, Verition's position was that the pre-announcement market price was in a "trough" that meant that the deal price negotiations started too low. This was the position Verition litigated. This was the position Verition lost.

Aside from ignoring the independent relevance of market price, Verition also failed to advance any challenge to Aruba's proffered market price metric of $17.13, which was Aruba's 30-day average unaffected price.[2] As the trial court found in disposing of Verition's motion for reargument, Verition "could have engaged on the proper measurement period for market value by noting that [it] believed that the market price was unreliable, but that if the court disagreed and chose to consider that metric, then the court should use a different measurement period."[3] It did not, and still does not do so now. Instead, Verition would have the court disregard *any* market price metric as an independent indicator of fair value whenever the market is unaware of a piece of positive information, or Verition would shift the burden of establishing the impact of such information onto appraisal respondents. These arguments, however, are neither preserved nor supported.

Rather, the trial court's decision rests on sound legal and financial principles. Market price is a reliable indicator of fair value under the semi-strong form of the ECMH, which this Court has embraced. It is also consistent with a deal-price-less-synergies approach to determining fair value. No one disputes that the Merger was expected to create massive synergies. But the trial court rightly noted that calculating expected synergies involves serious uncertainties, whereas

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[2] This is not a weighted average price as Verition contends on appeal.
[3] Rearg.Op.10-11.

“[t]he unaffected market price provides a direct measure of the collective judgment of numerous market participants about Aruba’s value as a going concern.”[4] Because the trial court determined that its own deal-price-less-synergies metric of $18.20 was fraught with potential human error, it was not an abuse of discretion to adopt the direct market price measure instead.

Although Verition argues that HP might have agreed to a slightly higher deal price were it not for alleged banker/executive conflicts and lack of competition, a higher deal price would merely have given Aruba shareholders a greater share of the synergies, not more of Aruba’s “intrinsic” value. Fair value is not the highest possible price, and the deal price was a ceiling on fair value in this transaction that indisputably generated massive synergies. Courts may properly disregard a litigation-driven expert DCF valuation contest when the market price and deal-price-less-synergies are reliable. That is all that happened here.

The trial court reasonably found that Aruba’s market price is an independent indicator of its fair value and that the proper metric of this market price was the $17.13 that Aruba offered and Verition never contested. It also reasonably found that the deal price was an appropriate ceiling on fair value. Contrary to Verition’s hyperbole, affirming the trial court’s reasonable exercise of discretion will not prompt a constitutional crisis or the death knell for appraisal cases. It will reflect

[4] Op.125.

this Court's precedents, this case's facts, and Verition's choices about how it wished to litigate this appraisal.

For these reasons and others discussed below, the trial court's appraisal award should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The trial court did not abuse its discretion in concluding that Aruba's fair value was its 30-day average market price of $17.13, and the trial court's opinion should be affirmed.

2. Denied. The trial court did not abuse its discretion in determining that deal-price-less-synergies would be a reliable indicator of fair value on the facts of this case; and in declining to weigh this metric given concerns regarding measurement errors and agency costs.

3. Denied. The trial court did not abuse its discretion in rejecting Verition's expert's DCF as inconsistent with market price and deal-price-less-synergies.

COUNTER-STATEMENT OF FACTS

I. HP Acquired Aruba At A Significant Premium To Market Price Due To The Potential For Substantial Synergies.

Aruba sold wireless networking products that allow mobile devices to connect to the internet,[5] similar to the wireless routers that consumers use in their homes. But before the Merger, Aruba did not successfully sell the wired hardware needed to make the ultimate connection to the internet.[6]

HP, on the other hand, was a leading global provider of technology products, including a successful line of wired networking solutions, but it did not have a successful wireless business.[7]

As mobile devices have become more prevalent, many companies have sought a single vendor for their connectivity needs so that, in the words of industry insiders, they have "one throat to choke" when there is a problem.[8] Until the Merger, the only vendor that offered an effective portfolio of both wired and wireless products was Cisco, which dominated the market.[9]

Seeking to strengthen its weak wireless business, HP had evaluated a variety of wireless companies as potential acquisition targets over the years.[10] But Aruba

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[5] A173.
[6] A328;A354.
[7] A157;A375.
[8] A474;A409-10.
[9] A474.
[10] A1685;A1694-95;A1698-99.

was the only one big and strong enough to attract HP's continued interest.[11] Aruba had been first-to-market with the most recent generation of wireless products,[12] and was anticipated to be first-to-market with the next generation of products.[13]

HP approached Aruba about a potential acquisition in late August 2014.[14] HP had no affiliation with any Aruba Board member or executive,[15] nor was it a controlling stockholder of Aruba.[16] As everyone recognized—including the executives, board members and bankers involved in the deal, industry insiders and analysts, and the court below—such an acquisition would be the quintessential synergistic strategic transaction.[17] In the words of Dan Warmenhoven, the chair of Aruba's Board, HP and Aruba were the "perfect match."[18]

Aruba's Board considered Qatalyst and Evercore as potential financial advisors and retained Qatalyst, believing it was "the best firm to get [Aruba] a competitive bidder."[19] That said, finding a competitive bidder was unlikely given the lack of third parties with the "financial wherewithal" and "strategic interest in mobile technology" such that there would be "compelling synergies" that could

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[11] A1721.
[12] A174.
[13] A1814;B508.
[14] A2054.
[15] A162-70.
[16] A347;A353.
[17] Op.123; A378-79;A408-09;A418;A1212;A1222-23;A1292;A1694;A1847-48;B122;B127;B155;B160.
[18] A375.
[19] A370;A421.

allow them to be competitive with any proposal from HP.[20] Although Qatalyst and Aruba's CEO reached out to seven potential strategic buyers, no one was remotely interested.[21] Other than a transaction with HP, Aruba's "only (but strong) weapon [was] to say we go alone."[22] This was no surprise,[23] least of all to HP, which was keenly aware of the competitive landscape.[24]

Throughout the fall of 2014, HP's Corporate Development team, led by Joakim Johansson, conducted due diligence and performed a detailed analysis of HP's business case for acquiring Aruba.[25] The team made two key assumptions: (1) that, as a stand-alone entity, Aruba would be able to achieve the operating margin expansion that it had been planning (*i.e.*, increase profitability by cutting costs); and (2) when combined with HP, significant synergies would allow the combined entity to aggressively grow revenue and market share.[26] HP also anticipated significant cost savings, but the primary driver of the synergies was revenue increases.[27] The Corporate Development team produced a DCF valuation of standalone Aruba at $2 billion, or $18.76/share, and found that, if combined with HP, Aruba would be worth $3.6 billion, or $31.17/share, based on $1.6 billion

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[20] B168;B171.
[21] A392;B666.
[22] B176.
[23] B176.
[24] A1689;A1721,
[25] A1689;A1716;A2056.
[26] A1694.
[27] A1694;A1723;A1741.

in anticipated synergies (about $1.3 billion in revenue increases and $300 million in cost savings).[28] Given this valuation, the team planned to suggest that the Board authorize HP to acquire Aruba for up to $3 billion, or $26.66/share.[29] At this price, HP would be paying Aruba shareholders approximately $1 billion of the $1.6 billion in anticipated synergies.[30]

The Corporate Development team presented their analysis to HP senior executives and Board members in November 2014.[31] While HP's CEO, Meg Whitman, was generally "support[ive]" of the deal,[32] others "pushed back on the model."[33] They felt HP "need[ed] to be ultra-cautious" as there was "no room for error" following HP's acquisition of Autonomy in 2011, in which Autonomy had defrauded HP as to its value.[34] These concerns led HP to retain McKinsey to evaluate its margin expansion and synergy assumptions.[35] HP also asked Aruba for more information and time to weigh a potential transaction.[36] Frustrated with the lack of progress, Aruba broke off negotiations.[37]

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[28] A1226;A1228.
[29] A1212.
[30] A1707.
[31] A1209;A1269.
[32] B178.
[33] B180; *see also* A1711.
[34] B180;A158.
[35] A1269;A1719.
[36] A422;A2057.
[37] A2057.

At the same time, Aruba's stock was on a downward trajectory, including its November 20 announcement of lower-than-expected guidance for 2Q15, and continuing through December and January after the announcement of employee retention issues.[38] Aruba's reduced guidance and falling stock price did not cause HP to change its model, which was based on Aruba's long-term strategic value to HP rather than Aruba's stock price or short-term financial results.[39] So, although Aruba had disengaged, HP continued working on the deal with McKinsey and then Barclays, its financial advisor.[40] McKinsey conducted a "granular customer backed assessment, based on interviews and surveys with 120+ purchasing executives and channel partners" and concluded that HP could expect synergies in line with HP's estimates, driven by "customers' desire to acquire Wired+Wireless technology from a single vendor."[41] Barclays also concluded that HP's model was reasonable.[42]

Bolstered by these third-party assessments, HP Corporate Development met with the HP executive team on January 9, 2015 and recommended that they seek

[38] B519;B113;B118.
[39] A1715-16; B220.
[40] B213.
[41] B183.
[42] A1518.

Board authorization to bid up to $26.50/share with a starting bid of $24/share,[43] but considered starting with a lower bid.[44]

With the executive team's confidence in a potential Aruba acquisition restored, HP looked to reopen merger discussions by inviting Aruba's CEO, Dominic Orr, to a dinner at Whitman's home, which took place on January 21, 2015.[45] Orr was receptive, but given the effort that had already been expended that fall, he was concerned that HP not waste Aruba's time with protracted due diligence.[46] Whitman understood Orr's concerns about delay, and she and Orr discussed trying to sign a deal by early March.[47] HP was amenable to this timing because it was planning a major corporate reorganization that would involve splitting into two companies, and would freeze all transactions before the split.[48] For its part, Aruba wanted to announce the deal before an industry conference during the first week of March.[49]

At the same dinner, the two sides briefly discussed HP's acquisition of Autonomy and Whitman's opinion that Autonomy was guilty of fraud.[50] Qatalyst had represented Autonomy in that acquisition, and Orr later learned that Whitman

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[43] B220.
[44] A1286.
[45] A192;A2057;B210.
[46] A1383;B179.
[47] A441;A1299.
[48] A1383;A1522;A1716;B445.
[49] A1299.
[50] A371;A1296.

did not want to negotiate with Qatalyst again.[51] Aruba's solution was to engage Evercore to negotiate with HP, but to keep Qatalyst in the "back-room" to advise Aruba.[52] Aruba believed that this combination would maximize value to Aruba and its shareholders.[53] Aruba also retained Wilson, Sonsini Goodrich & Rosati as its legal counsel.[54]

At some point between the January 9, 2015 presentation to HP executives and the January 29, 2015 Board meeting, HP's Corporate Development team revisited its strategy and lowered the suggested walkaway price from $26.50 to $25.[55] According to Johansson, they did so based on the premium to Aruba's stock price that HP was willing to pay as well as HP's "overall strategic valuation" of Aruba.[56] Based on this lower walkaway price, Barclays suggested reducing the starting bid to $23.50.[57] Ultimately, HP offered $23.25 on January 31, 2015.[58]

On February 4, 2015, Aruba countered at $29,[59] providing a list of reasons for its counteroffer.[60] Among those reasons was that Aruba management felt its stock was trading low because some analysts expected Aruba to "miss" its second

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51 A371;A373;A421.
52 A372.
53 A1348-49.
54 A2054.
55 A1714;A1734;A1961.
56 A1714.
57 B224;B230.
58 A2057;B268.
59 A2058.
60 A1312.

quarter—which quarter had just ended on January 31—when in fact Aruba had "beat consensus and [would] have [a] good guide."[61] The market also did not know that Aruba had only been able to deliver those strong results by depleting its cushion of backlogged orders because bookings during the second quarter came in low,[62] or that Aruba's iconic CEO planned to retire in the near future.[63] Regardless, HP formulated its next counteroffer based on Aruba's fundamental strategic value to HP, not on Aruba's then-current trading price or short-term results.[64] HP countered at $24.67, based in part on receiving an updated share count from Aruba.[65] Under HP's prior understanding of the share count, its counteroffer would have been $24. Aruba accepted HP's counteroffer on February 10.[66]

On February 25, Bloomberg leaked the news that HP was in talks to buy Aruba, but made no suggestion as to the deal price.[67] Frank Quattrone at Qatalyst speculated that HP could have been the source of the leak,[68] but Quattrone's partner, George Boutros, disagreed.[69] Following the leak, Aruba's stock price

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[61] A1309;A1312.
[62] A293;A363-65;A439;A444;B793.
[63] A292.
[64] A1535;B272.
[65] A255-57.
[66] A2059.
[67] A2005.
[68] B276.
[69] B342.

increased 21% from $18.38 to close at $22.24.[70] The next day, February 26, Aruba's stock price was relatively stagnant and, after the market closed, Aruba announced its results for 2Q15.[71] These results marginally beat analyst consensus and Aruba's prior guidance for the quarter, and Aruba's updated guidance moving forward was in line with analyst consensus.[72] On Friday, February 27, Aruba's stock price increased 9.7% to close at $24.81.[73]

On March 1, 2015, HP and Aruba's boards approved the Merger.[74] At this point, HP Corporate Development's final model valued standalone Aruba at $19.10/share and anticipated synergies of $1.4 billion.[75] On March 2, the parties executed the Merger Agreement and formally announced the Merger.[76] On April 2, Aruba's competitor, Ruckus, announced that it was releasing the next generation of wireless products, thus beating Aruba in being first-to-market.[77] But this negative development did not delay the Merger, which closed on May 18, 2015.[78]

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[70] A261;A2060.
[71] B668.
[72] B134.
[73] A264.
[74] A2060-61.
[75] A1956-61.
[76] A2061.
[77] A290;A477;B788.
[78] A72.

At the May 1, 2015 meeting of stockholders, approximately 98% of the shares represented voted in favor of the Merger.[79]

Before the leak, the 30-day average closing price of Aruba's common stock was $17.13, and at $24.67, the deal price amounted to a 44% premium over this price.[80]

II. The Market For Aruba's Stock Was Efficient.

The market for Aruba's stock bore the hallmark indicators of efficiency: Aruba's market capitalization was $2.5 billion; it had no controlling stockholder and a deep public float of 109 million shares outstanding, with 104 million, or 96%, of those available to freely trade; its weekly trading volume was 9.5 million shares (8.7% of its shares outstanding);[81] its stock had a narrow bid-ask spread in the year prior to the leak of .055%;[82] and, Aruba was broadly covered by 33 equity analysts,[83] and at least five industry analysts.[84] Additionally, Aruba's stock price immediately reacted to unexpected news:[85]

[79] Op.48-49.
[80] A2009.
[81] B144.
[82] Op.61.
[83] Op.60.
[84] B563;B593;B615;B622;B363.
[85] Op.62

Date	Announcement	Aruba Price Change	S&P Price Change
8/26/14	Earnings beat consensus; guidance beat consensus[86]	5% increase	0%
11/20/14	Earnings beat consensus; guidance lower than consensus[87]	14% decrease	.5% increase
2/25/15	Merger leak	21% increase	.1% decrease
2/26/15	Earnings beat consensus, guidance in line with consensus[88]	9.7% increase	.3% decrease

III. In The Trial Court, Verition Relied Solely On Its Expert's DCF And Argued That The Deal Price Should Be Disregarded, Never Disputing That The Relevant Market Price Metric For Aruba's Stock Was $17.13.

Throughout this litigation, Aruba offered the trial court multiple indicators of fair value, including:

- the market price of *$17.13*;
- a deal-price-less-synergies value of *less than $24.67*;
- HP's valuation of Aruba of *$19.10*; and
- its expert's DCF value of *$19.75*.

[86] B90.
[87] B102.
[88] B134.

Verition, in contrast, offered the trial court only one option—its expert's DCF value of $32.57. Other than advocating for that valuation, Verition confined its case to challenging the reliability of the deal price. Verition simply ignored Aruba's arguments that the market price of $17.13 was a reliable indicator of fair value and only endeavored to discredit HP's valuation on admissibility grounds.

On December 19, 2017, the trial court requested additional post-trial briefing on the implications of *Dell*, as well as the market attributes of Aruba's stock as compared to those of *DFC* and *Dell*.[89]

In its brief addressing *Dell*, Aruba showed that the market for its stock satisfied the requirements for semi-strong form efficiency, and stated clearly 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***."[90] Aruba concluded that "the Court should find fair value to be . . . $17.13."[91] Aruba also explained that *Dell* disposed of many of the concerns that it thought Verition was likely to raise in its brief addressing *Dell*. These included whether $17.13 was a proper metric for market price, the impact of Aruba's positive second quarter earnings in light of semi-strong versus strong form

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[89] B74.
[90] A1014 (emphasis added).
[91] A1027.

efficiency, and the ability of the Court to adjust the market price to account for developments between the leak and the merger close.[92]

Verition raised none of these concerns in its post-*Dell* brief, stubbornly refusing even to contemplate that market price may be an independent indicator of fair value. Instead, Verition quickly conceded that the market indicators for Aruba's stock were similar to those found to support market efficiency in *DFC* and *Dell*;[93] and, despite this Court's directive that, under these circumstances, market price is evidence of fair value, Verition used the briefing opportunity to press its arguments against deal price and in support of its expert's DCF.[94]

IV. The Trial Court Determined That Aruba's Fair Value Was $17.13 And Reaffirmed This Decision After Verition Requested Reargument.

Following extensive post-trial briefing, the trial court determined that fair value was $17.13 per share, finding that:

- *DFC/Dell* endorse using Aruba's **market price** because Aruba's stock traded in an efficient market;
- **Deal-price-less-synergies** would be an appropriate measure of fair value here given the reliability of the deal price, but HP's measurement of synergies and the trial court's apportionment of synergies was prone to error, and any deal-price-less-synergies metric

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[92] A1023-25.
[93] A996.
[94] A1005;A1009.

would still be inflated by the value that HP would create by reducing agency costs; and

- *DFC/Dell* caution against relying on litigation-driven **expert DCF valuations** when reliable market indicators are available; and here Verition's expert's DCF of $32.57 was unreliable because it was inconsistent with the market price and deal price, and Aruba's expert's DCF valuation of $19.75, while comporting with market evidence, was unpersuasive due to its selection of certain inputs.

Verition moved for reargument, objecting *inter alia* to the trial court's interpretation and application of the ECMH. In addition, Verition faulted the court for obscuring "the absurdity of the literal application of certain pronouncements made by the Supreme Court in *Dell* and *DFC*,"[95] and accused the Vice Chancellor of following Supreme Court precedent to the point of violating his oath to uphold the Delaware Constitution, and ringing the death knell for appraisal cases.[96] The trial court denied Verition's motion, finding that many of Verition's arguments were belatedly raised, and defended its good-faith attempt to follow this Court's holdings.

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[95] A1039.
[96] A1045-46.

ARGUMENT

I. THE TRIAL COURT'S AWARD OF ARUBA'S $17.13 MARKET PRICE AS FAIR VALUE SHOULD BE AFFIRMED.

A. QUESTION PRESENTED

Whether the trial court abused its discretion in determining that Aruba's fair value was $17.13.

B. STANDARD OF REVIEW

The standard of review for an appraisal decision is abuse of discretion.[97] "[T]his Court must give deference to the Court of Chancery if its determination of fair value has a reasonable basis in the record and in accepted financial principles relevant to determining the value of corporations and their stock."[98]

C. MERITS OF ARGUMENT

The trial court's award of $17.13 was supported by record evidence and sound economic and legal principles, and this Court should reject Verition's challenges to it. The trial court appropriately interpreted *DFC/Dell* to provide that "if a company's shares trade in a market having attributes consistent with the assumptions underlying a traditional version of the semi-strong form of the [ECMH], then the unaffected trading price provides evidence of the fair value of a proportionate interest in the company as a going concern."[99] Here, the trial court

[97] *Dell*, 177 A.3d at 1.
[98] *DFC*, 172 A.3d at 348-49.
[99] Op.55-56 (footnote omitted).

found that those assumptions were met based on evidence in the record, as well as stock price data properly subject to judicial notice.[100] The trial court further rejected Verition's argument that the market price was generally depressed and unreliable due to (1) the market's overreaction to the 2Q15 revenue guidance and (2) the market's failure to understand the implications of Aruba's cost-cutting efforts.[101] While Verition had offered this argument to support its position that the deal price should be rejected because it was opportunistically timed to take advantage of a trough trading price,[102] the trial court considered it in the context of market price as an independent indicator of fair value.[103] The trial court further found that the entanglement of the merger announcement with the earnings announcement did not call into question the integrity of the market price.[104] Accordingly, the trial court appropriately awarded Aruba's proffered market price metric of $17.13.

Now, Verition objects to the trial court's application of the ECMH and the $17.13 market price metric. As an initial matter, Verition failed to adequately raise these objections earlier despite ample opportunity to do so, and therefore these arguments are waived. Verition cannot excuse this waiver by arguing that it was

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[100] Op.11n.40.
[101] Op.63-74.
[102] *See, e.g.*, A997;A1000-1001.
[103] Op.63-78.
[104] Op.74-78.

Aruba's obligation to prove how the 2Q15 results would impact its stock price; VeritION had that burden, which it did not attempt to satisfy and indeed cannot satisfy based upon the evidence of record. Not only does Verition lack any evidentiary basis to challenge the trial court, but sound economic principles support the trial court's application of the ECMH, which is consistent with Delaware law. There was no abuse of discretion here.

1. Verition Waived Its Objections To The Trial Court's Use Of $17.13 As Market Price.

The central theme of Verition's appeal is a groundless assertion that it was "unfair" for the trial court to rely on market price because Verition purportedly had "no opportunity" to submit evidence or argue against Aruba's "opportunistic" assertion that market price was fair value.[105] This is false. Verition simply ***never responded*** to Aruba's consistent position that its 30-day average market price of $17.13 was informative of fair value, stated in the opening lines of ***every one*** of Aruba's pre- and post-trial briefs.[106] When the trial court requested additional briefing on the market efficiency for Aruba's stock and implications of *Dell*, plainly signaling that it might rely on market price, Verition did not contest that the market for Aruba's stock bore the hallmark indicators of efficiency, or that $17.13 was a suitable metric of market price, or claim that it needed to submit more

[105] Br.2,25.
[106] Rearg.Op.10n.41; *see, e.g.*, B57.

evidence on these issues. Instead, Verition refused to acknowledge that market price could be independently informative of fair value, and doubled down on its argument that deal price should be rejected because the deal was “opportunistically timed” to take advantage of a “trough” price.[107]

Even when Verition moved for reargument, it did not ask to submit more evidence or argue that the trial court should have used a particular measurement period.[108] Instead, Verition claimed that the trial court’s use of the 30-day average price was “arbitrar[y] and capricious[].”[109] But as the trial court explained:

> The petitioners ***never contested the 30-day metric***, nor did they offer a different one. ***They took the broader position that Aruba’s market price was depressed and unreliable***. The petitioners could have engaged on the proper measurement period for market value by noting that they believed that the market price was unreliable, but that if the court disagreed and chose to consider that metric, then the court should use a different measurement period. . . . Rather than engaging in this manner, ***the petitioners did not advocate in favor of any metric for market value***.[110]

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[107] A997;A1000-02.

[108] *See generally* A1039-48.

[109] A1043.

[110] Rearg.Op.10-11 (emphasis added); *see also id*. (“Had the petitioners engaged on the measurement period, then the respondent doubtless would have provided support for the 30-day metric. In response to the Reargument Motion, the respondent has cited authorities indicating that using a 30-day period is both ‘generally considered acceptable in the financial community’ and within a court’s discretionary judgment.”); *see also* Rearg.Op.11n.43 (citing cases and literature offered by Aruba); B84-85.

The trial court also clarified that its statement that "no one argued for" the market price (a statement Verition perpetuates on appeal)[111] was more "complicated" than Verition made it seem, explaining that "***respondent actually did propose that I rely on the unaffected market price***."[112] But Verition regarded Aruba as "bound" by its contention at oral argument, before *Dell* was decided, "that the minimum fair value for Aruba was its expert's DCF valuation of $19.75."[113] In the end, the trial court concluded that it was required to, and did, make its own valuation determination.[114]

Arguments that were not addressed to the trial court are waived on appeal.[115] Supreme Court Rule 8 provides that "[o]nly questions fairly presented to the trial court may be presented for review." As this Court has stated, "[w]e place great value on the assessment of issues by our trial courts, and it is not only unwise, but unfair and inefficient, to litigants and the development of the law itself, to allow parties to pop up new arguments on appeal they did not fully present below."[116]

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[111] Br.1.
[112] Rearg.Op.36 (emphasis added).
[113] Rearg.Op.37-38.
[114] Rearg.Op.38.
[115] *Shawe v. Elting*, 157 A.3d 152, 162-63 (Del. 2017).
[116] *DFC*, 172 A.3d at 363. *See Merion Capital L.P. v. Lender Processing Servs., Inc*., 2016 WL 7324170, at *33 (Del. Ch. Dec. 16, 2016) (finding "it was too late for the Company to argue in its post-trial briefs that the court should deduct synergies" when it had not previously litigated that issue).

Verition had ample opportunity below to argue that it would be unfair to rely on $17.13 as an independent indicator of fair value. For tactical reasons, Verition chose not to take that opportunity. This Court should not "indulge" Verition's attempt to raise these issues for the first time on appeal.[117]

2. Verition's Burden-Shifting Scheme Is An Effort To Escape The Effect Of Its Waiver.

Perhaps recognizing that it did not preserve its challenges to the $17.13 market price metric, Verition asks this Court to impose a novel shifting of the burden of proof when considering market price. Verition argues that if the trial court finds that there is unknown information—here, the 2Q15 results—it should be the respondent's burden to establish that such information would have no price impact or to define the potential impact.[118]

Verition's proposal, however, would violate Delaware law, which specifically rejects the "bursting bubble" rule adopted by the Federal Rules of Evidence.[119] This rule "requires only that the opposing party produce ***some*** evidence to rebut the presumption [in question]."[120] "Instead, [Delaware] Rule [of Evidence] 301(a) keeps the burden of proof on the opposing party until there is

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117 *Chester Cnty. Emps.' Ret. Fund v. New Residential Inv. Corp.*, 2018 WL 2146483, at *1 (Del. May 10, 2018).
118 Br.24
119 *Ala. Elec. Pension Fund v. Brown*, 988 A.2d 412, 418 n.19 (Del. 2010) (citation omitted).
120 *Id.* (emphasis added).

sufficient evidence to *persuade* the trier of fact that the presumed fact has been rebutted."[121] Here, once the trial court found the market was efficient, the market price was presumed to provide evidence of fair value.[122] To challenge this, it was Verition's obligation to persuade the trier of fact that the market price was not in fact informative of fair value.[123] But Verition failed in its challenge to the reliability of the market price generally and made no effort to specifically address the price impact of the 2Q15 results. Verition's decision not to present evidence or argument on the latter does not constitute grounds for reversal.

3. Even Now, Verition Cannot Satisfy Its Burden To Show The Market Price Is Unreliable Based On The 2Q15 Results.

While this Court need not consider it, the impact of Aruba's 2Q15 results on its market price is unclear as the trial court noted in denying reargument.[124] Verition's list of five pieces of "undisputed evidence" does not change this conclusion or satisfy its burden to show the price impact of that information.[125]

First, Verition cannot rely on the price drop following Aruba's November 20 announcement of lowered *guidance*, to show the impact of Aruba's actual

[121] *Staats v. Lawrence*, 1990 WL 168242, at *2 (Del. Oct. 3, 1990) (TABLE).
[122] *Dell*, 177 A.3d at 1 ("the evidence suggests that the market for Dell's shares was actually efficient and, therefore, likely a possible proxy for fair value").
[123] Rearg.Op.49 ("perhaps future petitioners will demonstrate the existence of information that was unknown to the market and argue for a specific valuation impact").
[124] Rearg.Op.12-13,15-16.
[125] Br.22-23.

results.[126] As Verition has recognized, and as is typical of many companies, the market reacted more strongly to Aruba's guidance than to its actual results.[127]

Second, the price increase following the announcement of the 2Q15 results on February 26 would have reflected expectations about the Merger, news of which had leaked on February 25, and which impact must be excised from fair value.[128] Also, the February 26 announcement included favorable guidance, which could have driven the price increase.[129]

Third, Verition's reliance on one member of Aruba management noting that Aruba's stock price did not yet reflect its 2Q15 results is no substitute for expert testimony or even rational argument suggesting a way to determine the impact of these results on the market price.[130]

Fourth and fifth, evidence of the parties' fears of stock runs and eagerness to "finalize a deal" does not justify dismissing or increasing the market price.[131]

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[126] Br.22.

[127] A672;A803;A1001;B23-24;B330-31 (Boutros describing market reaction to Aruba's guidance versus earnings); *see generally* Tim Koller et al., Valuation: Measuring and Managing the Value of Companies 350 (2010) ("more than 40 percent of companies delivering a positive earnings surprise actually have a negative return, or vice versa"); *id*. ("There is good reason why missing or meeting short-term EPS targets explains so little of share price volatility: investors place far more importance on a company's economic fundamentals than on reported earnings.").

[128] Rearg Op.15-16.

[129] B134.

[130] Br.22.

[131] Br.23.

Verition relies solely on language from *Glassman v. Unocal Exploration Corp.*, 777 A. 2d 242, 248 (Del. 2001), to support its position that scienter should matter in an appraisal case. But *Glassman* was simply explaining that elements of a company's value should not be perceived restrictively, and the Court in fact reiterated the principle that "equitable claims may not be engrafted onto a statutory appraisal proceeding."[132] Moreover, contrary to Verition's position that ***both*** parties were "afraid [of] 'stock runs,'" the document Verition cites shows only that Aruba, not HP, was concerned about this.[133] Nor is Verition's contention that HP and Aruba purposefully "rushed to finalize a deal before Aruba's 2Q15 results were announced" supported by the evidence. Aruba and HP planned to, and did, announce the deal on Monday, March 2,[134] which was *after* Aruba's earnings announcement on Thursday, February 26, and which was consistent with the timing discussed by Orr and Whitman at the January 21 dinner.[135]

Finally, if Verition were correct that merely identifying unknown information without establishing a price impact requires rejection or adjustment of the market price, the trial court would have to reconsider the negative

[132] *Glassman*, 777 A.2d at 248. As the trial court noted, it is not clear that *Glassman* has "continuing relevance to a widely held, publicly traded entity" considering it "involved a short-form merger in which a controlling stockholder eliminated the minority." Op.66.
[133] Br.13,23 (citing A1314).
[134] B677.
[135] A1299.

developments that Aruba established at trial: the positive 2Q15 results were driven by Aruba burning through its backlog,[136] Orr planned to retire soon,[137] and Ruckus beat Aruba in being first-to-market with the next generation of products.[138]

Given Verition's failure to develop meaningful argument in the trial court on how the evidence it now offers undermines market price, no reconsideration is necessary.

4. Market Price As A Measure Of Fair Value Is Based On Sound Financial Principles.

Using market price as an indicator of value is not, as Verition has claimed, "ridiculous" or "absurd,"[139] but is in fact strongly endorsed by the financial community. Verition's challenge to the trial court's award of market price as inconsistent with the ECMH and the views of financial economists should be rejected for multiple reasons.[140]

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136 A293.
137 A292.
138 A290;A477;B788.
139 Rearg.Op.32.
140 Op.1,55-56.

First, Verition did not preserve its objections to the ECMH. As the trial court explained in denying reargument, "[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 [ECMH], but they did not develop those objections in any meaningful way."[141] Accordingly, these objections are waived.

Second, while it is too late to do so now on appeal, Verition still does not meaningfully develop such objections to the ECMH.

Verition refers to the value of a proportionate interest in the company as a going concern as "fundamental value," and insists that the ECMH does not actually measure this, but relates only to "informational efficiency (stock prices will reflect publicly available information)."[142] Verition goes on to state that "[v]irtually no financial economists believe that securities markets are 'fundamentally efficient.'"[143]

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[141] Op.55-56n.257.

[142] Br.26-27.

[143] Br.27. Verition's only support for this statement is the purported quote from Andrei Shleifer, *Inefficient Markets: An Introduction to Behavioral Finance*, 5, 24 (Clarendon Lectures) (2000), that "[fundamental] efficiency only emerges as an extreme special case, unlikely to hold under plausible circumstances." But Verition changed the word "market" to "fundamental." Contrary to Verition's suggestion that fundamental efficiency has been broadly rejected in the established field of financial economics, Shleifer explains that market efficiency generally is the exception, not the rule, in the emerging field of behavioral finance.

But the very economists Verition relies on acknowledge that an efficient market should be both informationally efficient and fundamentally efficient.[144] And, as this Court has recognized, empirically, "the relationship between market valuation and fundamental valuation has been strong."[145] "The extent to which company valuations based on the fundamental approach have matched stock market values over the past four decades is remarkable."[146]

To be sure, some behavioral finance scholars contend that U.S. securities markets may not be efficient, and, in particular, that they are not fundamentally

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[144] Br.27-28 (citing Aswath Damodaran, *Investment Valuation: Tools and Techniques for Determining the Value of Any Asset*, Wiley Finance, 3d Ed., 111 (2012) ("If markets are in fact efficient, the market price provides the best estimate of value.")); Shleifer, *supra* note 143, at 2-3 (explaining that in efficient markets investors value each security for its fundamental value and stock prices will be close to fundamental value); Daniel R. Fischel, "*Efficient Capital Markets, the Crash, and the Fraud on the Market Theory*," 74 CORNELL L. REV. 907, 913-14 (1989) (discussing informational efficiency and value efficiency); *Expert Report of Eric L. Talley*, May 18, 2018, submitted in *In re Appraisal of Columbia Pipeline Group*, C.A. No. 12736-VCL (Transaction ID 62055439, Ex. F) ("Talley Report"), at 6 ("A securities market is said to price efficiently when, 'given the available information, actual prices at every point in time represent very good estimates of intrinsic values.'") (citation omitted); *see also* Op.6n.20 (collecting articles supporting the point that the ECMH provides that the unaffected market price for a company that is widely traded and lacks a controlling stockholder is the pro rata value of the corporation as a going concern).

[145] *DFC*, 172 A.3d at 370.

[146] Koller, *supra* note 127, at 326; *id.* ("[M]anagers can safely assume that share prices reflect the markets' best estimate of intrinsic value."); *id.* at 354 ("[S]tock price data suggest that the market digs deeply beneath not just reported earnings but all of a company's accounting information in order to understand the underlying economic fundamentals.").

efficient.[147] Indeed, the trial court expressly acknowledged this body of literature when it found that Verition had not adequately developed its objections to the ECMH below.[148] Regardless, as Professor Fischel explains in an article on which Verition relies, "the results and the interpretation of these studies have been ***extremely controversial***," and "[t]he implications . . . for the concept of efficient capital markets" and "[fundamental] efficiency in particular, are still unclear."[149] What is clear is that "[n]o evidence demonstrates that a better model exists for ascertaining the value of a publicly-traded firm's assets than looking at the prices of its securities."[150] Even "behavioral economists do not dispute that market prices generally remain the best available indicia of share value[.]"[151] As the trial court found, even though the market price may not perfectly equate to fundamental value, "it nevertheless generates a measure of value that is more likely to be accurate than other methodologies."[152] This Verition does not dispute.

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[147] These studies posit that this is because arbitrage is limited, whereas the ECMH requires that arbitrageurs will step in to correct any mispricings. Jeff Schwartz, "*Fairness, Utility, and Market Risk*," 89 OR. L. REV. 175, 204 (2010); *see* Inefficient Markets, 1-2, 24.

[148] Op.55n.257.

[149] Fischel, *supra* note 144, at 914 (emphasis added). Shleifer, *supra* notes 142&143, at 177, also relied on by Verition (Br.27) acknowledged even more recently that "[b]ehavioral finance . . . has many years to grow."

[150] Fischel, *supra* notes 144,149, at 914.

[151] Brief of Financial Economists as *Amici Curiae* in Support of Respondents at 11, *Halliburton Co. v. Erica P. Fund, Inc.*, No. 13-317, 2014 WL 526436 (2014).

[152] Rearg.Op.34.

Moreover, the ECMH's implication that market price is a measure of fair value is not undermined by the fact that efficient markets are not perfect and that they actually depend on the existence of undervalued and overvalued stocks at the margins.[153] As Fischel explains, "the constant search by market professionals for mispriced securities is the mechanism whereby prices reflect information about underlying values."[154] But the existence of an undervalued or overvalued stock is "in no way inconsistent with the critical role of market prices as a proxy for underlying values."[155] It remains the exception, not the rule, and one that Verition must prove applied to Aruba. Verition did not even try.

Thus, Verition's argument that the trial court's finding is inconsistent with established financial principles surrounding the ECMH fails.

5. Market Price As Fair Value Is Consistent With Delaware Law.

Verition similarly errs in arguing that the use of market price is inconsistent with Delaware legal precedent.[156]

First, the trial court's decision is entirely consistent with *DFC/Dell*. This Court in *DFC/Dell* and the trial court here were well aware of the difference between semi-strong form efficiency (where stock prices reflect public

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[153] Br.28-29.
[154] Fischel, *supra* notes 144,149,&150, at 915.
[155] *Id*.
[156] Br.19-35.

information) and strong form efficiency (where stock prices reflect public and private information).[157] *Dell*'s instruction that the market price is indicative of fair value where the market for the stock is semi-strong efficient assumes there will be inside, private information that is not reflected in the stock price.[158] In other words, there will always be private information that is not reflected in the stock price, but that does not invalidate it as an indicator of fair value. *Dell*'s deference to market price cannot be avoided simply by arguing that the next earnings announcement had not been released. Indeed, the unaffected market price in *Dell* was "uninformed" as to future negative earnings announcements in that case, but this did not justify ignoring market price.[159] Otherwise, it would never come into play.

The trial court also correctly found that *DFC/Dell* support considering market price as an independent measure of fair value for the following reasons:

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[157] Rearg.Op.14.

[158] *Dell*, 177 A.3d at 25 (describing how a semi-strong efficient market digests "all ***publicly available*** information") (emphasis added).

[159] *Dell* considered the 90-day average price of $9.97 prior to the leak in that case on January 14, 2013 (*i.e.*, beginning October 16, 2012). *Dell*, 177 A.3d at 35 n.179; *In re Appraisal of Dell, Inc.*, 2016 WL 3186538, at *35 (Del. Ch. May 31, 2016). The fact that Dell announced negative 3Q earnings on November 15, 2012, and negative fiscal earnings on May 16, 2013, did not result in the Court's declining to consider the market price. *Dell*, 177 A.3d at 10, 14.

- Discussing the ECMH was not "logically necessary" to reach the conclusions regarding the reliability of the deal price in *DFC*/*Dell*.[160]
- *DFC/Dell* "devoted considerable space to [ECMH]," and were "forceful in their endorsement of market prices as an indicator of [fair] value."[161]
- *DFC/Dell* stressed that the trial court must take into account accepted financial and economic principles, and the ECMH is one such principle.[162]
- *Dell* "appeared to regard [the trial court's] failure to give weight to the stock price as a separate and distinct source of error."[163]
- *DFC/Dell*'s endorsement of the ECMH moderates the attractiveness of what some consider the concerning practice of appraisal arbitrage.[164]

While Verition argues that "*DFC* specifically *rejected* deference to market price in determining fair value,"[165] the language Verition relies on is the precursor to the Court's directive that a trial court must not blindly defer to market price in

[160] Rearg.Op.21.
[161] Rearg.Op.23.
[162] Rearg.Op.26-28.
[163] Rearg.Op.28.
[164] Rearg.Op.29.
[165] Br.30.

circumstances involving a controlling shareholder.[166] Here, there is no controlling stockholder, and the trial court carefully considered and rejected Verition's proffered evidence of market mispricing.[167]

Second, Verition wrongly declares that under "established" Delaware law, individual shares of stock trade at a discount to their proportionate share of the company's going-concern value (referred to as an implicit minority discount or "IMD").[168] Verition relies largely on inapposite cases where a minority shareholder is squeezed out by a controller, justifying fair value adjustments derived from a comparable-company analysis.[169] Courts have "consistently (and properly) declined to make any such upward adjustment to the results of [DCF] analysis."[170] Verition also errs in describing the IMD as "well-accepted in corporate finance."[171]

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[166] *DFC*, 177 A.3d at 367.
[167] Op.28-34.
[168] Br.31-32.
[169] *See* cases cited at Br.31-32. As for *Cavalier Oil Corp. v. Hartnett*, 564 A.2d 1137 (Del. 1989) (Br.32n.132), it also involved the appraisal of a minority stockholder's shares of a closely held corporation where the Court correctly declined to apply a minority discount to a DCF analysis, and the Court did not suggest that all publicly traded shares are subject to a discount. *Cavalier Oil*, 564 A.2d at 1138, 1145.
[170] Lawrence Hamermesh & Michael Wachter, *The Short and Puzzling Life of the "Implicit Minority Discount" in Delaware Appraisal Law*, 156 U. PA. L. REV. 1, 6 (Nov. 2007).
[171] Br.32. As Verition's parenthetical explanation of Albert Choi and Eric Talley's article, *Appraising the 'Merger Price' Appraisal Rule* (May 17, 2018) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888420), recognizes, Choi and Talley would suggest the existence of an IMD only when shareholders' rights are "heterogeneous." Here, they were not. And Margolin and Kursh actually

"[N]ot a single piece of financial or empirical scholarship affirms the core premise of the IMD—that public company shares systematically trade at a substantial discount to the net present value of the corporation."[172] To the contrary, "[a]s a matter of generally accepted financial theory . . . share prices in liquid and informed markets do generally represent [] going concern value . . . [T]here is no evidence that such prices systematically and continuously err on the low side," requiring upward adjustment based on an IMD.[173] No such adjustment is necessary here.

Third, Verition's contention that the trial court's approach will cause negative behavior in the context of hostile takeovers has no bearing on this case.[174] Appraisal proceedings, which are creatures of statute, are distinct from hostile takeover cases, which are based on common-law fiduciary duties. The former focuses on fair value,[175] whereas the latter focuses on whether the directors had reasonable grounds to believe the takeover was a threat to the corporation.[176] As one commentator has stated, "forcing both types of claims into the same analytical

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support that "the financial-oriented" approach to fair value is that "in an efficient market the price of a stock must converge to its proportionate interest in the firm." Brett A. Margolin & Samuel J. Kursh, *The Economics of Delaware Fair Value*, 30 DEL. J. CORP. L. 2, 419-20 (2005) (cited in Br.32n.124).

[172] Hamermesh & Wachter, *supra* note 170, at 5.

[173] *Id*. at 60.

[174] Br.5,33.

[175] *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1153 (Del. 1989).

[176] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

box is a self-evident mistake."[177] Because "fair value" determinations in the appraisal context are so different from the judgment-laden determinations that directors must make in the hostile takeover context, decisions in appraisal cases are unlikely to cause sea changes in the hostile takeover context.

Fourth, the trial court's award of market price does not "effectively eliminate[]" appraisal.[178] As the trial court explained, "future appraisal decisions will consider subtler aspects of the [ECMH]," at least if future petitioners (unlike Verition) develop such arguments.[179] "Depending on the facts and the persuasiveness of the experts, future petitioners might demonstrate that the trading price is not a reliable indicator of value. Or perhaps future petitioners will demonstrate the existence of information that was unknown to the market and argue for a specific valuation impact."[180] And Verition itself acknowledges that the implications of this case, along with *DFC/Dell*, may be limited to publicly traded companies that lack a controlling stockholder and where the deal price is at a premium to market price.[181] It does not "violate the Delaware Constitution . . . to

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[177] C. Korsmo and M. Myers, Reforming Modern Appraisal Litigation, 41 DEL. J. CORP. L. 279, 322 (2017).
[178] Br.34.
[179] Rearg.Op.48.
[180] Rearg.Op.48-49.
[181] Br.35.

interpret the appraisal statute, even if it refines the litigation target zone for petitioners in appraisal proceedings."[182]

[182] Rearg.Op.49.

II. THE TRIAL COURT PROPERLY FOUND THAT DEAL-PRICE-LESS-SYNERGIES WOULD BE RELIABLE BUT CHOSE NOT TO RELY ON THIS METRIC.

A. QUESTION PRESENTED

Whether the trial court properly concluded that the deal price here was a reliable ceiling on fair value, and disregarded its deal-price-less-synergies metric of $18.20 because the calculation and apportionment of synergies was prone to error and inflated due to agency costs.

B. STANDARD OF REVIEW

The standard of review for an appraisal decision is abuse of discretion.[183] "[T]his Court must give deference to the Court of Chancery if its determination of fair value has a reasonable basis in the record and in accepted financial principles relevant to determining the value of corporations and their stock."[184]

C. MERITS OF ARGUMENT

The trial court properly followed *DFC/Dell* in finding that the deal price was a reliable ceiling on fair value, and in declining to weigh its deal-price-less-synergies metric.

1. The Trial Court Properly Found That Deal Price Was A Reliable Ceiling On Fair Value.

The trial court's conclusion that the deal price was reliable and functioned as a ceiling on fair value is supported by law and facts that Verition does not contest.

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[183] *Dell*, 177 A.3d at 1.
[184] *DFC*, 172 A.3d at 348-49.

First, Verition does not dispute that "fair value is just that, 'fair.' It does not mean the highest possible price that a company might have sold for."[185] Nor does Verition challenge that, in evaluating the deal process, courts must examine the following factors: self-dealing, arm's-length negotiations, exploitation, a minority squeeze-out, a management buyout, "members of management or a large blockholder[ ]rolling over their shares or otherwise receiving differential treatment;"[186] and whether the merger agreement included defensive terms that would support a breach of fiduciary duty claim.[187] Those are the factors that might conceivably undermine the reliability of the deal price.

Ignoring the trial court's enumeration of these factors, Verition baselessly argues that the trial court treated "'non-exploitation' . . . [as] dispositive."[188] The record shows the opposite. The trial court correctly considered whether Verition was "exploited" as one of multiple factors in assessing the reliability of the transaction. Its analysis clearly passes muster under *DFC/Dell*.[189]

Second, while Verition suggests that a deal price is probative of fair value only if it "resulted from extended sales processes that generated competing

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[185] Op.100 (quoting *DFC*, 172 A.3d at 370).
[186] Op.82-83 (also quoting *DFC*, 172 A.2d at 370-71 and *Dell*, 177 A.3d at 33).
[187] Op.83,86.
[188] Br.42.
[189] Verition admits that "*Dell* suggests that 'non-exploitation,' [is] potentially relevant." Br.43.

bids,"[190] it does not dispute that *DFC/Dell* stated that fair value (i) need not result from a competitive auction, and (ii) must be "a price some buyer is willing to pay" and not a hypothetical price.[191] Nor does Verition dispute the trial court's finding that Verition "failed to identify any other likely bidder who would have paid more for Aruba."[192] Instead, Verition focuses on the trial court's speculation that "[p]erhaps different negotiators could have extracted" a higher price from HP.[193] But the test is not whether the process resulted in the highest possible price; it is whether the deal price is "within a range of fair value."[194] Verition does not contest that the transaction between HP and Aruba included massive synergies,[195] some portion of which were shared with Aruba and included in the deal price.[196] Because the deal price included synergies, any higher deal price would only reflect "HP sharing a greater portion of the anticipated synergies with Aruba's stockholders. It would not have changed Aruba's standalone value. Hence, it

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190 Br.41-42.
191 Op.89; *see also* Op.89n.354 (collecting language from *Dell* about need to identify another bidder to prove that lack of competition affected deal price); *see also DFC*, 182 A.3d at 376 n.154 (finding that "the fact that the ultimate buyer was alone at the end provides no basis for suspicion" and noting that "the absence of synergistic buyers for a company is itself relevant to its value.").
192 Op.93.
193 Op.101.
194 *DFC*, 172 A.3d at 370 (citation omitted).
195 Op.123.
196 Op.84n.345.

would not have affected Aruba's fair value for purposes of an appraisal."[197] As a result, the trial court correctly found that "the deal price in this case operates as a ceiling for fair value."[198]

Even if it did matter, the record does not clearly support Verition's claim that "HP lowered its planned offer *because* it faced no competition,"[199] or because of the alleged conflicts.[200] The trial court said only that "HP's bidding tactics ***suggest*** that HP knew it did not face competition," not that there was a causal relationship between the lack of competition and a lower opening bid.[201] As for the trial court's observation that HP lowered its bid from $24 to $23.25 after Orr expressed enthusiasm at the January 21st dinner, the documents on which the trial court relied support a different story. They show that, in early January, HP contemplated an opening bid of $24 when the walkaway price was $26.50,[202] but by the January 29 Board meeting, when the walkaway price had been lowered to $25, HP lowered its opening bid to $23.25.[203] The record does not reflect whether HP lowered its walkaway price before or after the January 21 dinner, but it does reflect that HP and Barclays discussed whether to start at a price lower than $24

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[197] Op.101.
[198] Op.122.
[199] Br.40.
[200] Br.38-39.
[201] Op.92-93 (emphasis added).
[202] A1294.
[203] Op.92 ("HP planned to . . . negotiate up to $25.00"); A1950 (cited at Op.92n.368).

before the dinner with Orr, and that it was Barclays that reiterated this suggestion after the dinner.[204] Moreover, at that time, Barclays could not have been motivated by the banker conflict, as it was unaware of Qatalyst's involvement.[205] Facing a limit of $25, it is logical that HP would lower its opening bid to allow for more room to negotiate. Thus, contrary to Verition's assertion that "it is difficult to imagine what more persuasive showing one could possibly make"[206] about why HP lowered its bid, it is fairly easy to imagine the reasonable competing inference that HP lowered its opening bid because of the lowered walkaway price.

Accordingly, Verition fails to show that the trial court abused its discretion in concluding that the deal price is a reliable ceiling on fair value.

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[204] A1286 (cited at Op.92n.368).
[205] A1531.
[206] Br.40.

2. The Trial Court's Decision To Give No Weight To Its Own Deal-Price-Less-Synergies Metric Was Not An Abuse Of Discretion.

Verition also criticizes the trial court's measurement and apportionment of synergies, but that criticism attacks a strawman. The trial court acknowledged that its deal-price-less-synergies figure of $18.20 could have "errors at multiple levels" and chose not to rely on it.[207] Accordingly, this Court need not address Verition's challenges to those calculations which fail nonetheless.

First, the trial court did rely on admissible evidence supporting its measurement of synergies.[208] As described in the opinion, the evidence of synergies challenged by Verition consisted of non-hearsay business records, the creation of which were explained by Johansson, and Verition "selective[ly] introduc[ed]" other versions of those same documents.[209] Contrary to Verition's argument[210] (and it appears the trial court was mistaken as to this as well), the deck on which the trial court relied (JX350 at A1209) ***was*** an exhibit at the Johansson deposition, and Verition questioned Johansson about it extensively, including HP's measurement of synergies and McKinsey's validation of those numbers.[211] While

[207] Op.126.
[208] Op.84-86.
[209] Op.85-86n.346.
[210] Br.44
[211] A1692;A1741. The Johansson deposition transcript and exhibits (included at A1269, B179, and B181) were properly before the trial court pursuant to Chancery Rule 32(a)(3).

Aruba may not share the trial court's concerns regarding potential errors in the measurement of those synergies,[212] Verition's argument that those measurements should not have been considered at all because they were hearsay fails.[213]

Second, Verition's substantive quibble with the measurement of synergies—only belatedly raised in its brief addressing *DFC* although it had nothing to do with *DFC*[214]—is meritless. Verition notes without explanation that "revenue synergies . . . included revenue from a preexisting contract between Aruba and HP that was independent of the merger."[215] But, the suggestion that HP's existing, immaterial relationship with Aruba could generate the revenue gains that HP anticipated from the deal was debunked at the post-trial oral argument.[216] Aruba's OEM relationships accounted for 10% of its revenue, and the HP relationship accounted for just 1% of that 10%.[217]

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[212] Op.126

[213] This record stands in stark contrast to that in *Huff Fund Inv. Partnership v. CKx, Inc.*, 2014 WL 2042797 (Del. Ch. May 19, 2014), relied on by Verition. Br.44n.171. The cost savings that court found did not "speak for themselves" were savings that a private equity buyer expected to be able to achieve but that could have been obtainable by the target as a going concern. *Huff*, 2014 WL 2042797, at *3. Here, the Merger was a strategic acquisition and it is clear on the face of the documents that the expected synergies were from both cost savings and revenue increases directly attributable to combining Aruba with HP. A1222-23;A1956.

[214] A808-09

[215] Br.44.

[216] A948-51.

[217] A1239.

Third, the trial court followed sound, albeit limited, methodology to apportion synergies and Aruba agrees that the trial court's selection of the midpoint in apportioning those synergies was appropriate. The choice of a midpoint is not unprecedented in appraisal cases[218] (including by Verition's expert who relied on a midpoint value as one of his DCF inputs).[219]

Fourth, Aruba agrees with the trial court's concern that the deal price was inflated by the value created by a post-deal reduction in agency costs, which finds support in academic literature.[220] While Verition did not contest the trial court's determination regarding agency costs on reargument, Verition now incorrectly claims that the trial court erred in concluding that the value accruing from reduced agency costs must be deducted from the deal price because "the value of control is properly part of the going concern."[221] In support of this assertion, Verition relies solely on *In re Appraisal of Solera Holdings, Inc.*,[222] but the cases *Solera* cites addressed the "control premium" inherent in a controlling block of shares in the target company, not the "control premium" paid to obtain control of a company.[223]

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[218] *See, e.g.*, *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 6164771, at *13 (Del. Ch. Oct. 21, 2015) (using midpoint to arrive at terminal growth rate); *In re Appraisal of SWS Grp., Inc.*, 2017 WL 2334852, at *18 (Del. Ch. May 30, 2017) (using midpoint to arrive at size premium).
[219] A876.
[220] Op.126-27.
[221] Br.45&n.177.
[222] 2018 WL 3625644 (Del. Ch. July 30, 2018).
[223] I*d.* at *33-34.

It is clear that the premium HP paid for control of Aruba—control that the trial court correctly recognized results in reduced agency costs—was ***not*** part of Aruba's value as a going concern.[224]

These concerns led the trial court to exclude its deal-price-less-synergies metric of $18.20 in its calculation of fair value. This was not an abuse of discretion, but the exercise of sound judgment.

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[224] *DFC*, 172 A.3d at 368, 369 n.117.

III. THE TRIAL COURT PROPERLY DISREGARDED VERITION'S EXPERT'S DCF.

A. QUESTION PRESENTED

Whether the trial court abused its discretion in finding that Verition's expert's DCF valuation of $32.57 was inconsistent with the Aruba's market price and deal-price-less-synergies, such that it was not informative of Aruba's fair value.

B. STANDARD OF REVIEW

The standard of review for an appraisal decision is abuse of discretion.[225] "[T]his Court must give deference to the Court of Chancery if its determination of fair value has a reasonable basis in the record and in accepted financial principles relevant to determining the value of corporations and their stock."[226]

C. MERITS OF ARGUMENT

Verition claims that the trial court erred by disregarding its expert's DCF valuation of $32.57. Verition does not dispute that if the market price and deal price are considered reliable indicators of fair value, then under *DFC/Dell* the trial court should disregard an expert's DCF that significantly diverges from these indicators.[227] As established *supra* at Argument §§I&II, the deal price and market price are indeed reliable, so it was proper for the trial court to disregard Verition's

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[225] *Dell*, 177 A.3d at 1.
[226] *DFC*, 172 A.3d at 348-49.
[227] Br.47-48.

expert's DCF because it diverged from these values. Moreover, the trial court found that Verition's expert's DCF was by no means perfect and had "concern[s]" with its low beta and "expresse[d] no view" on its use of "the risk-free rate rather than the projected rate of inflation as the floor for [the] terminal growth rate." [228] This assignment of error, therefore, fails with the others.

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[228] Op.113-14&n.441.

IV. CONCLUSION

For these reasons, the Court should affirm the trial court's fair value award of $17.13 per share.

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CERTIFICATE OF SERVICE

I, Michael P. Kelly, hereby certify that on November 1, 2018, I caused a copy of the foregoing Appendix to Appellee's Answering Brief to be served via File & Serve*XPress* on the following:

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