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Case No. 9322-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: APPRAISAL OF DELL INC.	)))	C.A. No. 9322-VCL

ORDER DENYING MOTION TO AMEND OR ALTER THE JUDGMENT AND MOTION FOR REARGUMENT

1. Petitioner Morgan Stanley Defined Contribution Master Trust has moved pursuant to Court of Chancery Rule 59(e) to alter or amend the court's post-trial opinion (the "Opinion"), which determined that the fair value of Dell's common stock at the effective time of the Merger was $17.62 per share. In the alternative, petitioner has moved for reargument pursuant to Court of Chancery Rule 59(f). Petitioner contends that the Opinion's calculation of fair value based on Hubbard's adjusted BCG 25% Case contained mathematical errors. Capitalized terms not defined herein are used as defined in the Opinion.

2. Under Rule 59(e), a motion to alter or amend the judgment "may be granted if the [movant] demonstrates (1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct a clear error of law or to prevent manifest injustice." *Nash v. Schock*, 1998 WL 474161, at *1 (Del. Ch. July 23, 1998).

3. Under Rule 59(f), "a motion for reargument may be granted if the moving party demonstrates that the Court's decision was predicated upon a misunderstanding of a material fact or a misapplication of the law." *Ravenswood Inv. Co., L.P. v. Winmill*, 2011 WL 6224534, at *3 (Del. Ch. Nov. 30, 2011) (quotation marks omitted). To obtain

reargument, the movant must demonstrate that the court "overlooked a decision or principle of law that would have controlling effect" or "misapprehended the law or the facts so that the outcome of the decision would be affected." *Miles, Inc. v. Cookson Am., Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995). A court will not grant a motion under Rules 59(e) or (f) if the movant "merely restates arguments already made in slightly different form and rejected by the Court." *Anvil Hldg. Corp. v. Iron Acq. Co.*, 2013 WL 4447840, at *1 (Del. Ch. Apr. 16, 2013).

4. In this case, it is more appropriate to analyze the movant's argument under Rule 59(f) than under Rule 59(e). Rule 59(e) contemplates amending a final order, which the court has not yet entered. A motion pursuant to "Rule 59(e) is a motion to 'alter or amend a *judgment.*'" *Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 536911, at *2 (Del. Ch. May 11, 2001). This court's rules "define a judgment as 'any order from which an appeal lies,'" and thus the requirements for Rule 59(e) are not met when the court has not yet issued a final order. *Id.* (citing Ct. Ch. Rs. 54(a) & 58). By contrast, this court has treated a Rule 59(f) motion as the appropriate procedural vehicle to correct a mathematical error in a fair value determination. *See Doft & Co. v. Travelocity.com Inc.*, 2004 WL 1366994, at *1 (Del. Ch. June 10, 2004).

5. In contending that this court made mathematical errors, the petitioner made two mathematical errors of its own. First, the petitioner used a mistaken figure for post-tax stock-based compensation. Both experts adopted the same $362 million pre-tax stock-based compensation figure. *Compare* JX 908A ¶ 47 (Revised Expert Rebuttal Report of Bradford Cornell), *with* JX 896A ¶ 198-99 (Revised Expert Report of Glenn Hubbard).

Cornell suggested the Opinion "deduct[] an after-tax amount of $286 million in each year ($362 million multiplied by 1 less the 21% tax rate)" instead of Hubbard's figure of $243 million. JX 908A ¶ 47 (Revised Expert Rebuttal Report of Bradford Cornell). Because the Opinion adopted Cornell's suggested tax rate, it used Cornell's adjustment for stock-based compensation. The Opinion subsequently made adjustments that Hubbard advocated, but the initial figure came from Cornell. The motion and its supporting affidavit did not account for the initial use of Cornell's figure.

6. Second, the petitioner incorrectly assumed that the fair value calculation included Dell's net operating loss carryforwards (the "NOLs"). The motion and supporting affidavit treated the Opinion as having added back the NOLs when adjusting Dell's net cash because Hubbard proposed it and "[p]etitioners did not dispute this amount." Dkt. 405 at 6 n.13. Yet in his expert report, Cornell *criticized* Hubbard for adding the NOLs even though it increased the value of Hubbard's DCF analysis. Cornell's pre-trial report stated, "None of the twelve DCF analyses I have reviewed includes a deferred tax asset for Dell's NOL carryforwards. Further, Professor Hubbard has not provided any evidence that Dell's management did not include the effect of these carryforwards in determining that 21.0% was the appropriate tax rate to apply in Dell's projections." JX 908A ¶ 79 (citation omitted). The court relied on this well-reasoned analysis and did not add the NOLs.

7. The motion and affidavit reflect a deeper error in assuming that the Opinion used Hubbard's Excel spreadsheet for the Bank Case. The Opinion used the Bank Case forecasts prepared by Cornell and implemented the specific adjustments identified in the

Opinion. The Opinion also calculated terminal value using the methodology employed by Cornell.

8. The petitioner's motion does not identify any mathematical errors or other mistakes warranting adjustments. Accordingly, the motion to amend or alter the judgment and the motion for reargument are DENIED.

/s/ Judge Laster, J. Travis
The Honorable J. Travis Laster
Dated: June 16, 2016