



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: APPRAISAL OF DELL INC.

Consol. C. A. No. 9322-VCL

PUBLIC VERSION
FILED 04/28/2015

**PETITIONERS ANSWERING BRIEF
IN OPPOSITION TO RESPONDENT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT ON ENTITLEMENT ISSUES**

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DATED: April 21, 2015

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PRELIMINARY STATEMENT

A common problem today is the auto-correct function that operates on mobile devices. Auto-correct changes what is typed into a mobile device on a tiny screen into what the device believes the typist most likely intended. This can result in sentences being sent that were never what the typist intended to send. The current motion calls for this Court to decide whether the “auto-correction” of the name of the record holder by a custodial bank to its own nominee name in an attempt to facilitate Petitioners’ appraisal rights can deny Petitioner those appraisal rights.

There is no doubt that the record holder is the sole party allowed to demand appraisal and perfect appraisal rights. It does not matter what the beneficial owner does or does not do. Either the record owner has complied with the statute or it has not. Here, there is no dispute that the record owner properly perfected appraisal rights for the stock beneficially owned by Petitioners.

Similarly, there is no dispute that the Petitioners properly petitioned the Court to determine the fair value for the Dell shares that they beneficially owned. The question presented here is whether after appraisal rights are perfected, if the custodial bank changes the name of the nominee listed as the record holder from Cede & Co., to its own nominee, without the knowledge or permission of the beneficial holder, for the purposes of *protecting* the right to appraisal, the custodial

[REDACTED]
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[REDACTED].

bank's unilateral conduct actually defeats the Petitioners' right to appraisal. Respondents claim that this change of nominee deprives Petitioners of their appraisal rights. Petitioners disagree. The facts are undisputed.

NATURE AND STAGE OF THE PROCEEDING

Petitioners have sought an appraisal of their shares of Dell Inc. ("Dell" or the "Company"). On October 29, 2013, Dell was taken private in a merger transaction initiated at the behest of the Company's founder and Chief Executive Officer Michael S. Dell (the "Merger"). Under the terms of the Merger, non-dissenting shares were converted into the right to receive \$13.75 per share in cash. Petitioners instituted actions against Dell on February 6, 2014, for the purpose of obtaining an appraisal by the Court of the fair value of their Dell shares. This Court consolidated all appraisal actions pending against Dell by Order dated April 10, 2014. The consolidated appraisal action is set for a trial on the merits to begin on October 5, 2015.

On December 5, 2014, Dell moved for partial summary judgment (the "Motion") on the grounds that certain Dell shareholders who had instituted appraisal actions – including Petitioners – purportedly are not entitled to seek appraisal. This is the answering brief of Petitioners Northwestern Mutual Series Fund, Inc., on behalf of its Equity Income Portfolio ("Northwestern"), The

Milliken Retirement Plan (“Milliken”), Manulife US Large Cap Value Equity Fund (“Manulife”), T. Rowe Price Funds SICAV US Large Cap Value Equity Fund (“TRP SICAV”), Curtiss-Wright Corporation Retirement Plan (“Curtiss-Wright”) (these five, collectively, “Petitioners”), and T. Rowe Price US Equities Trust Large-Cap Value/T. Rowe Price Retirement Date Trust (“TRP US Equities Trust”) in opposition to the Motion.

STATEMENT OF FACTS

On July 12, 2013, prior to the scheduled July 18, 2013 shareholder vote on the Merger, Cede & Co., the record holder of Dell shares and nominee of The Depository Trust Company (“DTC”), asserted appraisal rights with respect to the shares beneficially owned by Petitioners.¹ Petitioners have agreements with custodial banks to protect assets such as physical stock certificates. Petitioners TRP SICAV and Northwestern both use J.P. Morgan Chase as their custodial bank. Petitioners Curtiss-Wright, Milliken, and Manulife each use The Bank of New York Mellon as their custodial bank. The custodial banks do not function as the investment managers for Petitioners and, therefore, do not make investment decisions for the shares beneficially owned by Petitioners.

¹ Dell’s exhibits 3-A (ENT00000721), 6-A (ENT00000727), 8-A (MAN00000002), 10-A (ENT00000581), and 15-A (ENT00000552).

At the request of Petitioners, these custodial banks instructed DTC to have its nominee, Cede & Co., demand appraisal on behalf of the shares beneficially owned by Petitioners. In each of the demand letters submitted to Dell by Cede & Co. asserting appraisal rights, the number of shares to which the demand related was identified, as well as the record holder, the custodial bank and the beneficial owner of those shares.

In an effort to protect these appraisal rights and prevent the shares from mistakenly being tendered in the Merger, upon receipt of the appraisal demands, DTC removed the shares for which it had demanded appraisal from its book-entry system — the Cede FAST Account. As these shares were no longer registered in electronic book-entry form, Dell instructed its transfer agent, American Stock Transfer & Trust Company, LLC (“AST”), to issue physical stock certificates for these shares. AST issued physical stock certificates in the name of Cede & Co. for the shares beneficially owned by Petitioners on July 24, 2013.²

On August 5, 2013, Cede & Co., which operates solely as a nominee and holding company and not a custodian for securities, endorsed all of the physical certificates and sent them to the appropriate custodial banks for the beneficial

² Dell’s Exhibits 3-D (NW00000004), 6-D (NW00000006), 8-C (MAN00000003), 10-D (MIL00000003), and 15-D (CW00000003).

owners of those Dell shares.³ Petitioners' custodial banks, however, have a standard operating requirement that physical certificates be registered in their own nominee's name to be stored in their vaults.⁴ This standard operating requirement exists to enable transfer of the shares directly from the custodial bank if needed without requiring Cede & Co. to pull its historical records about the shares months or possibly years into the future and agree to the subsequent transfer.

Over the next three weeks, Petitioners' custodial banks, following their own internal standard operating procedure, surrendered the Dell shares to AST and requested that AST reissue the shares in the name of their own nominees.⁵ Shortly after AST reissued the shares beneficially owned by Milliken and Manulife in the name of Hare & Co., a routine weekly sweep by the custodian of its own vault was undertaken and these shares were re-deposited into the Cede FAST Account.⁶ All of these transfers were done without Petitioners' knowledge and without Petitioners' explicit consent.

³ Exhibit A-1 (BNYME00000006-7); Exhibit B-1 (BNYME00000045-46); Exhibit C-1 (BNYME00000078-79); Exhibit D-1 (AMSTR00000724-25); Exhibit E-1 (AMSTR00000744-45).

⁴ Dell's Exhibit 6-F.

⁵ Dell's Exhibit 15-E (AMSTR00000514); Exhibit B-2 (BNYME00000047); Exhibit C-2 (AMSTR00000478-80); Dell's Exhibit 6-E (AMSTR00003036).

⁶ Exhibits B-3 (BNYME00000040), B-4 (BNYME00000050), C-3. (BNYME00000072), and C-4 (BNYME00000082).

On September 12, 2013, almost two months after the shareholder vote was initially scheduled, a majority of Dell’s shares voted in favor of the Merger. A few weeks later, on October 4, 2013, The Bank of New York Mellon, the custodial bank for Manulife and Milliken, realized that the shares beneficially owned by these Petitioners had been re-deposited to the Cede FAST Account and withdrew the shares again from DTC and had new certificates issued in the name of its nominee, Hare & Co.⁷ Again, these transfers were done without Petitioners’ knowledge and without Petitioners’ explicit consent.

The Merger closed on October 29, 2013 – more than three and a half months after Cede & Co. submitted the written demands for appraisal on behalf of the shares beneficially owned by Petitioners. Thereafter, Petitioners each timely filed their petitions seeking this Court’s appraisal of their shares.⁸

ARGUMENT

Summary judgment is warranted only where “there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of

⁷ Exhibits B-3 (BNYME00000040), B-5 (BNYME00000054), C-3 (BNYME00000072), and C-5 (BNYME00000086).

⁸ See Curtiss-Wright Petition, C.A. 9379-VCL, filed 2/21/14 (Dkt. #1, Trans. ID # 55020559); Manulife Petition, C.A. 9378-VCL, filed 2/21/14 (Dkt. #1, Trans. ID # 55029425); Milliken Petition, C.A. 9364-VCL, filed 2/19/14 (Dkt. #1, Trans. ID # 55017584); TRP SICAV Petition, C.A. 9322-VCL, filed 2/6/14 (Dkt. #1, Trans. ID # 54899182); Northwestern Petition, C.A. 9321-VCL, filed 2/6/14 (Dkt. #1, Trans. ID # 54899167).

law.” *In re Appraisal of Transkaryotic Therapies, Inc.*, No. 1554-CC, 2007 WL 1378345, at *3 (Del. Ch. May 2, 2007) (citation omitted). “Justice demands that the Court view the facts in the light most favorable to the nonmoving party, and the moving party has the burden of demonstrating that there is no material question of fact.” *Id.*

I. PETITIONERS TRP US EQUITIES TRUST AND MANULIFE DO NOT OBJECT TO THE ELIMINATION OF DUPLICATED DEMANDS

Petitioners TRP US Equities Trust and Manulife do not object to Dell’s request that the duplication of their demands be eliminated. Specifically, Petitioner TRP US Equities Trust does not object to the elimination of demand number 23, as it is duplicative of demand number 24. Similarly, Petitioner Manulife does not object to the elimination of demand number 29, as it is duplicative of demand number 30.

II. PETITIONERS ARE ENTITLED TO AN APPRAISAL UNDER SECTION 262

Dell claims that the custodial banks’ re-registering of Petitioners’ shares in the name of a nominee other than Cede & Co. – actions taken without Petitioners’ knowledge or explicit consent – have stripped Petitioners of their entitlement to seek appraisal. As a matter of equity, Dell must be wrong. The appraisal rights for Petitioners’ beneficially owned stock were perfected, Petitioners properly filed

their petitions for appraisal, and, as such, Petitioners should not be punished for the custodial banks' automatic transfer of nominee names due to their internal standard operating procedures.

A. PETITIONERS' APPRAISAL RIGHTS WERE PERFECTED

The appraisal rights for the shares beneficially owned by Petitioners were perfected as required under 8 Del. C. §262(d). “Appraisal rights shall be perfected as follows . . . Each stockholder electing to demand the appraisal of such stockholder’s shares shall deliver to the corporation, before the taking of the vote on the merger or consolidation, a written demand for appraisal of such stockholder’s shares.” 8 Del. C. § 262(d)(1). To be sufficient, the demand need only reasonably inform the corporation of the identity of the stockholder and that the stockholder intends to demand appraisal. *Id.* Once a sufficient demand is delivered to the company, the appraisal rights are perfected. *See Transkaryotic*, 2007 WL 1378345, at *3 (“[I]t necessarily follows that the record holder’s actions determine perfection of the right to seek appraisal.”).

Here, the record holder of Petitioners’ shares, Cede & Co., complied with Section 262(d) by delivering written demands for all of the shares held by Petitioners on July 12, 2013, six days prior to the first time the shareholder vote



was scheduled.⁹ Each of these demands identified the beneficial owner of the shares and specifically asserted appraisal rights with respect to the shares beneficially owned by Petitioners.¹⁰ Dell does not dispute that Cede & Co. perfected the appraisal rights for Petitioners' shares.

Dell's reliance on *Enstar Corp. v. Senouf*, 535 A.2d 1351, 1354-55 (Del. 1987), is inappropriate as *Enstar* has no bearing on this case. The Delaware Supreme Court held in *Enstar* that a company cannot "be blamed for the failure of a nominee or broker to correctly perfect appraisal rights for a beneficial owner." 535 A.2d at 1355. The Supreme Court explained that the beneficial owner bears the risk when the appraisal rights were not perfected, because otherwise the company would be embroiled "in a morass of confusion and uncertainty" as to whether an appraisal had been demanded. *Id.* at 1356.

Here, however, it is undeniable that Petitioners' appraisal rights were perfected. As described in detail, *supra*, on July 12, 2013, the record holder of Petitioners' shares submitted timely written demands to Dell seeking appraisal for these shares as required under Section 262. This is sufficient to perfect Petitioners' appraisal rights, 8 *Del. C.* § 262(d)(1), and to notify Dell that Petitioners were

⁹ Dell's exhibits 3-A (ENT00000721), 6-A (ENT00000727), 8-A (MAN00000002), 10-A (ENT00000581), and 15-A (ENT00000552).

¹⁰ *See id.*

seeking the appraisal remedy. *See Alabama By-Products Corp. v. Cede & Co.*, 657 A.2d 254, 263 (Del. 1995). As such, the ““morass of confusion and uncertainty”” regarding whether the record holders and beneficial owners agreed to pursue appraisal is non-existent.

B. PETITIONERS PROPERLY FILED THEIR PETITIONS FOR APPRAISAL

Petitioners properly filed their petitions for appraisal less than 120 days after the effective date of the Merger, October 29, 2013. Section 262(e) provides that a beneficial owner of shares held by a nominee may file a petition in its own name within 120 days after the effective date of the merger. 8 *Del. C.* § 262(e). *See also Merion Capital LP v. BMC Software, Inc.*, C.A. No. 8900-VCG, 2015 WL 67586, at *5 (Del. Ch. Jan. 5, 2015) (“In the wake of *Transkaryotic*, the General Assembly amended Section 262 to explicitly allow beneficial owners to directly file petitions for appraisal . . .”). The deadline to file a petition in this case was February 26, 2014. Petitioners, all beneficial owners of shares of Dell stock, filed petitions in their own names prior to February 26, 2013.¹¹ Dell concedes that these petitions were timely and properly filed.

¹¹ *See* Curtiss-Wright Petition, C.A. 9379-VCL, filed 2/21/14 (Dkt. #1, Trans. ID # 55020559); Manulife Petition, C.A. 9378-VCL, filed 2/21/14 (Dkt. #1, Trans. ID # 55029425); Milliken Petition, C.A. 9364-VCL, filed 2/19/14 (Dkt. #1, Trans. ID # 55017584); TRP SICAV Petition, C.A. 9322-VCL, filed 2/6/14 (Dkt. #1, Trans. ID

Defendant's reliance upon *Salt Dome Oil Corp. v. Schenck*, 41 A.2d 583, 589 (Del. Ch. 1945), therefore, is misplaced. In *Salt Dome*, the sole focus was on the question of whether a holder of a certificate registered in the name of another (essentially a beneficial owner) was a stockholder for purposes of the appraisal statute and, therefore, could demand appraisal of and payment for his shares. *Salt Dome Oil Corp.*, 41 A.2d at 585. The Court held that because the term stockholder is ordinarily taken to apply to the holder of the legal title to the shares of stock and a corporation ordinarily knows only the registered holders of its shares, a beneficial owner is not a stockholder and, therefore, cannot demand appraisal. *Id.* at 585, 588-589.

As discussed, *supra*, in the 70 years since the *Salt Dome* case was decided, the appraisal statute has been amended to allow a beneficial owner to file an appraisal petition in its own name. 8 *Del. C.* § 262(e); *see also In re Ancestry.Com, Inc.*, No. 8173-VCG, 2015 WL 66825, at *8 (Del. Ch. Jan. 5, 2015) (recognizing the 2007 amendment to Section 262(e), which affords beneficial owners the opportunity to file petitions in their own names). The *Salt Dome* case's holding – that only record holders are stockholders and that only record holders can file appraisal petitions – is inapplicable to this case.

54899182); Northwestern Petition, C.A. 9321-VCL, filed 2/6/14 (Dkt. #1, Trans. ID # 54899167).

C. EQUITABLE PRINCIPLES SHOULD ENTITLE PETITIONERS AN APPRAISAL OF THEIR SHARES AS THEY DID NOT TAKE ACTIONS CONTRARY TO THE PURPOSE OF THE CONTINUOUS HOLDING REQUIREMENT

Petitioners recognize that to be entitled to an appraisal, the statutory language requires that the record holder must hold shares of stock on the date of making a demand, continuously through the effective date of the merger. 8 *Del. C.* § 262(a). This requirement, however, must “be liberally construed for the protection of objecting stockholders, within the boundaries of orderly corporate procedures and the purposes of the requirement.” *Raab v. Villager Industries, Inc.*, 355 A.2d 888, 891 (Del. 1976). Clearly, the purpose of the continuous holding requirement is to ensure that a stockholder does not receive double compensation for its shares by both selling its shares before the closing of the merger and receiving the fair value of those shares after an appraisal proceeding.

Petitioners are not seeking to receive double compensation for their shares of Dell stock – Petitioners never sold their shares after perfecting their appraisal rights. While the custodial banks’ standard operating procedures caused the nominee names to be transferred from Cede & Co. to the custodial banks’ nominee, the beneficial owners of the shares never changed, nor did any money

change hands.¹² These routine, ministerial transfers of nominee names, following the ordinary practices of Wall Street, were undertaken automatically by the custodial banks without consulting or informing Petitioners. Therefore, following the purpose of the continuous holding requirement, equitable principles should apply to protect Petitioners' rights to an appraisal of the fair value of the stock they have continuously owned since their appraisal rights were perfected despite the ministerial transfer of the nominee name in the interim. *See Robson v. Jones*, 3 Del. Ch. 51, 75 (Del. Ch. 1866) (stating that equity is applied "to protect *rights* already existing, but which through mistake, accident, or neglect, lack the requisites necessary to give effect to them at law"); *Alabama By-Products Corp. v. Cede & Co.*, 657 A.2d 254, 255-57, 263 (Del. 1995) (holding that because the right to appraisal vests at the time of perfection, the redemption of the beneficial owners' shares by the custodian and record holder without the knowledge of the beneficial owners did not extinguish the beneficial owners' right to an appraisal of the fair value of their shares).

¹² *See, e.g.*, Exhibit F (AMSTR00000549) (J.P. Morgan certifying that the transfer into J.P. Morgan's nominee name "does not constitute a change in beneficial ownership.")

CONCLUSION

For all of the foregoing reasons, Dell's motion for summary judgment as to entitlement issues against Petitioners Northwestern, TRP SICAV, Manulife, Milliken, and Curtiss-Wright should be denied.

Dated: April 21, 2015

Respectfully submitted,

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