



BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

MEMORANDUM

FROM: Mark Lebovitch, Esq.
Jeroen van Kwawegen, Esq.
John Vielandi, Esq.

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RE: *In re: Appraisal of Dell Inc.*, C.A. No. 9322 VCL (Del. Ch. May 11, 2016)

On May 11, 2016, the Delaware Chancery Court issued a significant decision that potentially affects every investor asserting appraisal rights. In *In re: Appraisal of Dell Inc.*, C.A. No. 9322 VCL (Del. Ch. May 11, 2016), the Court held that if a corporate respondent can show that the petitioners shares were voted in favor of the merger, then the petitioner is not entitled to appraisal and will receive the merger consideration without any interest. The petitioner's intent and efforts to vote against the merger are irrelevant, and standing will be denied even if the vote in favor of the merger was the result of an inadvertent mistake. *Dell* is a reminder that investors must ensure that they comply with the statute's technical requirements, including that shares to be appraised are not voted in favor of the merger.

A. Background

Dell is an appraisal proceeding involving Michael Dell's offer to take Dell, Inc. private at \$13.75 per share in a deal valued at 24.9 billion. In addition to other investors, fourteen mutual funds sponsored by T. Rowe Price & Associates, Inc. ("T. Rowe Price") filed appraisal petitions seeking payment of the fair value of over 30 million Dell shares. T. Rowe Price had consistently and publicly opposed the deal.

In order to properly perfect appraisal rights under Section 262 of the Delaware General Corporation Law, an investor must show that the record owner of the investor's shares: (i) made a written demand for appraisal prior to the stockholder vote; (ii) owned the shares for which the investor is seeking appraisal at the time the written demand was made; (iii) continuously held such shares through the effective date of the merger; and (iv) neither voted in favor of the merger nor consented to the merger in writing.

Determining whether the record holder voted specific shares either in favor or against a deal has always been difficult because the record holder of almost every publicly traded share is Cede & Co. ("Cede"), which is the nominee of the Depository Trust Company. DTC holds all of its shares in fungible bulk in the name of Cede. Thus, it is often very difficult, if not impossible, to determine which specific shares Cede voted on behalf of specific beneficial owners. Three

recent opinions have addressed this practical reality and, in all three, the Court determined that appraisal petitioners were not required to prove that their specific shares were voted against the deal in question by Cede. See, e.g. *In re Appraisal of Transkaryotic Therapies, Inc.*, 2007 WL 1378345 (Del. Ch. May 2, 2007); *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 67586 (Del. Ch. Jan. 5, 2015); *In re Appraisal of Ancestry.com, Inc.*, 2015 WL 66825 (Del. Ch. Jan. 5, 2015).

In all three of these cases, the Court determined that in order to be eligible to seek appraisal, the shares for which appraisal is sought cannot have been voted in favor of the merger. Furthermore, at least where more shares abstained or were voted against the deal than sought appraisal, the Court ruled that petitioners do not have any “share-tracing” obligation that would require them to introduce specific evidence detailing how their specific shares were voted. This was largely driven by the practical reality in those cases that the petitioners bought shares on the open market after the record date and no evidence as to how those specific shares had been voted could exist given that Cede is the record owner for almost every public shareholder and the manner in which it holds shares generally precludes such share tracing.

B. The Dell Decision

The issue of whether the petitioners in *Dell* voted in favor of the deal first came to light after certain of the funds, as required by federal law, filed Forms N-PX disclosing how they voted their securities. These forms disclosed that shares in certain T. Rowe Price funds were voted in favor of the merger despite T. Rowe Price’s vocal public opposition against the deal. T. Rowe Price conducted an investigation and discovered that although it had previously instructed Institutional Shareholder Services Inc. (“ISS”), its proxy advisor, to vote its shares against the deal at the shareholder meeting, T. Rowe Price’s initial voting instructions were overwritten by ISS’s electronic system when Dell re-scheduled its meeting. As a result, despite T. Rowe Price’s attempt to vote against the Dell deal, its shares were voted in favor.

In *Dell*, defendants argued that T. Rowe Price shares voted in favor of the transaction could not seek appraisal because they did not meet the statutory requirements. T. Rowe Price argued that it should be allowed to proceed with its appraisal since the relevant funds owned less shares than the number of shares that abstained or voted against the deal and, according to *Transkaryotic*, *BMC*, and *Ancestry*, no tracing was required.

The Court rejected T. Rowe Price’s argument and distinguished these three cases from the situation presented in *Dell*. Specifically, in *Transkaryotic*, *BMC*, and *Ancestry*, there was no evidence one way or the other as to how the specific shares at issue were voted. In those situations, petitioners do not need to trace how their specific shares were voted. However, in *Dell*, there was evidence that proved that T. Rowe Price’s shares were voted in favor of the deal. When such evidence exists and is persuasive, appraisal rights are not available. Although no one disputed that T. Rowe Price intended to vote against the deal, that intent and T. Rowe Price’s efforts were irrelevant given evidence of the actual vote. Therefore, the court ordered that, after years of litigation, T. Rowe price receive the merger consideration for the shares without any interest.

C. Conclusion

Dell makes clear that where companies are able to prove that an appraisal petitioner's shares were voted in favor of a deal, that petitioner will not be able to pursue an appraisal. Thus, the main lesson investors ought to take from *Dell* is that, when seeking appraisal, they must be extremely careful and diligent to make sure that all formalities are followed. Investors must closely monitor the process through which they send an initial appraisal demand before a shareholder vote and the process by which they cast their ballots to ensure they do not lose their appraisal rights due to an inadvertent failure to comply with basic formalities. The petitioners' intent and efforts are irrelevant in the face of evidence that technical requirements in the appraisal statute are not followed.

We believe the most prudent position an investor that wants to pursue an appraisal can take is to vote against the deal, rather than abstaining, so that the investor is actively involved and can better ensure a mistake does not occur.