

## Court Defines Responsibility for Voting in Appraisal Demands

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The recent decision of the Delaware Chancery Court concerning the T. Rowe Price voting error in the Dell appraisal case (“Opinion Enforcing Dissenter Requirement”)<sup>1</sup> has provided important guidance for compliance with the procedural requirements of appraisal rights, as well as valuable observations about the “proxy plumbing” that must be relied upon for a much broader range of purposes.

Some initial views of the Opinion’s relevance, applicable to both long term shareholders and “appraisal arbitrage” investors, are summarized below.<sup>2</sup> Further comments, either for private discussion or for reporting to Forum participants, will of course be welcomed.

### Court guidance on determining responsibility for voting

The Opinion distinguishes the T. Rowe case from the “appraisal arbitrage” cases based on an investor’s control of the vote relating to particular shares for which appraisal is demanded, and on the availability of evidence to determine how those shares were in fact voted.<sup>3</sup>

In the appraisal arbitrage cases, the Opinion explains, the investors purchased their shares after the record date for voting so that it was not possible to determine who had controlled the vote and how the particular shares were voted. It is therefore reasonable in those cases to allow an appraisal demand based on the investor’s beneficial ownership of shares held in “fungible bulk” by the record holder (the Cede affiliate of Depository Trust Company) that were not voted in favor of a transaction. The new Opinion thus supports the recent decisions allowing appraisal arbitrage investors to rely upon the voting actions or inactions of other, unidentified beneficial owners.

What is different about the T. Rowe case is that the investor was the beneficial owner of shares on the record date, and controlled the voting of those shares. This makes it possible to obtain evidence of how the investor caused those particular shares to be voted. The records of T.

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<sup>1</sup> See [May 11, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Opinion Enforcing Dissenter Requirement](#) (70 pages, 625 KB, in [PDF](#) format).

<sup>2</sup> For various published views, see the following articles (the first two were distributed to Forum participants; subsequent articles have been posted for reference and listed in the “[Entitlement to Appraisal Rights](#)” section of the research page for the Forum’s Dell project):

- [May 11, 2015 Law360: "Chancery Knocks T. Rowe Price Funds Out Of Dell Appraisal"](#)
- [May 12, 2016 Austin Business Journal: "Major Dell stockholder ruled ineligible for share appraisal process"](#)
- [May 12, 2016, Richards, Layton & Finger, PA: "In re Appraisal of Dell Inc.: Delaware Court of Chancery Provides Guidance on 'Dissenting Stockholder' Requirement"](#)
- [May 13, 2016 Bloomberg View: "T. Rowe Price Voted for the Dell Buyout by Accident"](#)
- [May 13, 2016 Reuters: "T Rowe Price loses lawsuit over 2013 Dell buyout"](#)
- [May 18, 2016 Delaware Business Court Insider: "T. Rowe Price Shares Ineligible for Appraisal, Court Rules"](#)
- [May 18, 2016 Bloomberg BNA: "'Voting Mix-Up' Causes T.Rowe to Lose Dell Appraisal Suit"](#)

<sup>3</sup> For the court’s plainly rational explanation, see pages 27-28 (PDF pp.28-29) of the [Opinion](#).

Rowe as well as those of the service providers that executed T. Rowe's instructions could be examined to determine how each of the T. Rowe accounts voted their Dell shares, and the court found that the evidence proved that the shares for which appraisal was sought had been voted in favor of the merger, and as a result do not qualify for appraisal.<sup>4</sup>

### **Reliability of proxy plumbing to execute and trace voting instructions**

The ability to establish facts about T. Rowe's votes would not have been possible without recent efforts to improve the shareholder proxy process.<sup>5</sup>

The Opinion starts with a remarkably understandable summary of the "Byzantine" system through which T. Rowe and most other professionally managed investors vote their corporate shares. Then, in more than twenty pages that follow, the Opinion describes how the votes of each beneficial owner account were executed and identifies the records by which the votes can be traced. The court concludes not only that the facts of votes can be established, but that the "daisy chain" of service providers are to be respected for making a badly designed regulatory process function reliably.

### **Investor's risk of procedural errors**

The observation of T. Rowe's losing a couple of years of its investors' earnings – according to the Opinion, the shares are entitled to only the October 2013 merger price, without any interest<sup>6</sup> – has naturally focused attention on the risks and potential costs of procedural errors in appraisal rights investments.

The example clearly demonstrates a need to comply with the strict administrative requirements of the legal process for appraisal rights, but the following observations suggest that investors can reasonably expect to satisfy these requirements if they rely upon informed professional guidance and normal levels of care.

- This is the only known case of an investor voting the wrong way, in this or any other recent appraisal case.
- As noted in the Opinion, the T. Rowe officials responsible for proxy voting had processed the voting instructions properly and confirmed them three times for repeated adjournments of the shareholder meeting, demonstrating that they understood how to

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<sup>4</sup> The decision concerned 31,052,130 Dell shares in 14 mutual fund and pension accounts managed by T. Rowe Price, as listed on page 20 (PDF p.21) of the [Opinion](#).

<sup>5</sup> See, for example, [August 17, 2011, Weinberg Center for Corporate Governance at the University of Delaware: "Report of Roundtable on Proxy Governance: Recommendations for Providing End-to-End Vote Confirmation."](#)

<sup>6</sup> The final amount of losses has not yet been determined since counsel for T. Rowe has submitted a motion for an "equitable" award of interest based on sympathy for the error, and the response of Dell's counsel suggests that they may seek compensation for expenses incurred as a result of T. Rowe's failure to disclose the voting error for months until it was revealed in news reports; see [May 19, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Certain Petitioners' Motion for an Equitable Award of Interest](#) (6 pages, 23 KB, in [PDF](#) format) and [May 23, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Respondent Dell Inc.'s Opposition to Certain Petitioners' Motion for an Equitable Award of Interest](#) (12 pages, 58 KB, in [PDF](#) format).

manage the process. However, in the final vote that ultimately counted, nobody from the proxy staff logged into the system.<sup>7</sup>

- The same fund managers made two other unusual, completely different processing errors in their administration of the Dell shares for which they were responsible: they failed to maintain the required continuous ownership of stock in 5 accounts, losing appraisal rights for an additional 922,975 shares;<sup>8</sup> and for one account, they failed to process any voting instructions at all, which error made that account the only one of the twenty petitioners managed by T. Rowe that is now entitled to appraisal rights.<sup>9</sup>



Please let me know if you have any questions about these observations.

*GL – May 25, 2016*

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<sup>7</sup> See pages 11-13 (PDF pp.12-14) of the [Opinion](#).

<sup>8</sup> See [July 13, 2015, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Memorandum Opinion](#) (54 pages, 358 KB, in [PDF](#) format).

<sup>9</sup> See footnote #1 on page 1 of the Brief in Support of Motion (PDF p.10), [July 30, 2015 \(public version of brief filed August 6, 2015\), In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Respondent Motion for Partial Summary Judgment as to Petitioners Who Voted in Favor of the Merger](#) (151 pages, 4.1 MB, in [PDF](#) format).