

Dell Response Confirms Need for Court Clarification of Settlement

Dell has responded to last week's motion for court clarification of the settlement terms it must offer¹ all claimants with statements defining a settlement that is clearly different from what was orally summarized as a basis for the court's approval, effectively supporting the need for review of the actual agreement.

This is the response that Dell filed ("Response"):

- [October 18, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Respondent Dell Inc.'s Response to Petitioner Cavan's Motion to Clarify and Enforce Order Approving Settlement](#) (9 pages, 596 KB, in [PDF](#) format)

Instead of providing a copy of the agreement, Dell has presented a new explanation of the settlement as a payment to release rights to appeal only two specified decisions in the case (Response paragraph 5, page 4):

5. The Settling Petitioners had (and have released through the settlement approved by the Court) two potential appeal issues that neither Cavan nor any other petitioner or claimant has, to wit, (1) the claim that the Court erred in its May 11, 2016, opinion, which disqualified certain petitioners from the appraisal remedy based on their shares having been voted in favor of the merger,^[footnote reference] and (2) the claim that the Court erred in its May 31, 2016, order denying the Settling Petitioners an "equitable award of interest."

The paragraph then states that these two specified grounds for appeal "have a different value than those belonging to petitioners or claimants who may contend that the continuous ownership decision was incorrect," and that those grounds for appeal are explicitly excluded from the settlement. In the footnote, Dell further states that there was no reason to settle rights to appeal a continuous ownership decision because the five T Rowe Price petitioners that had been disqualified on that basis had also voted in favor of the merger, and therefore "if petitioners were to succeed on appeal on the continuous ownership issue but not on the voting issue, those petitioners would still be barred from the appraisal remedy."²

Aside from the implausibility of experienced lawyers and an experienced client agreeing to pay \$28 million to settle only two particular grounds for appeal rather than all possible

¹ See the [October 14, 2016 Forum Report: Asking the Court to Define Fair Settlements in Dell Appraisal](#); for the motion itself, see [October 14, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Motion of Petitioner Cavan to Clarify and Enforce Order Approving Settlement](#).

² This October 18 Response definition of settlement, for releasing rights to appeal only the two decisions relating to voting and "equitable interest," provides a foundation for Dell's arguing in Response paragraph 10 that the settlement would not be relevant even to the three claimants that lost their rights to appraisal of 752,691 shares for the same continuous ownership reasons as the five T Rowe Price petitioners, and in the same [July 28, 2015 Order](#). Dell's Response does not reconcile this position, however, to the fact that the five T Rowe Price petitioners that were disqualified based on ownership were not in fact among the claimants disqualified based on voting.

grounds for appeal, this October 18 Response definition is clearly inconsistent with the oral summary of a settlement in the June 27 Conference on which the Court based its approval.³ Counsel for Dell in fact *explicitly included* the continuous ownership grounds for appeal in his June 27 explanation of the settlement to the Court:

[page 3, identifying the parties to the agreement] It is just the former stockholders who were affected by the continuous ownership decision of last year, and then the voting rights decision.

[pages 4-5] These are shares that were excluded by the continuous ownership decision and/or the voting decision of a few weeks ago. And what we have done is agreed that we will pay those folks in exchange for releases where they release their appeal rights.

...they will get some modicum of interest, and in exchange, they will be releasing their appeal rights with respect to continuous ownership and the voting decision.

Addressing less dramatic inconsistencies, it should be noted that nothing was found anywhere in the transcript of the June 27 Conference suggesting that the agreement of Dell to “pay those folks in exchange for releases where they release their appeal rights” was intended to provide for something as unconventional as limiting those releases to a couple of decisions and allowing the T Rowe Price petitioners to retain rights to appeal all other decisions. And it seems reasonable for us to assume that if there had been any hint of such a provision in the transcript, Dell would have made a point of it in their Response.

However the Court determines what Dell must offer other claimants in this case, we should expect everyone on all sides to benefit from the opportunity this controversy has provided to define needed standards for fair appraisal settlements as an important foundation of long term corporate stock investment.⁴

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³ See the transcript of the June 27, 2016 Teleconference Regarding Proposed Settlement presented as Affidavit Exhibit 3 on PDF pages 27-49 of the previously referenced [October 14, 2016 Motion of Petitioner Cavan](#).

⁴ For views of a disinterested expert, see [October 19, 2016, Brett M. McCartney of Morris James published in Delaware Business Court Insider: "Dismissed Dell Appraisal Claimants Settle With Company;"](#) for broader concerns raised by the Dell decisions based on continuous ownership and voting, see [September 29, 2016, J. Travis Laster of the Court of Chancery of the State of Delaware, keynote speech to the Fall 2016 meeting of the Council of Institutional Investors: "The Block Chain Plunger: Using Technology to Clean Up Proxy Plumbing and Take Back the Vote."](#)