EFiled: Jul 30 2015 05:29PM EDT
Transaction ID 57633321
Case No. 9322-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PETITIONERS WHO VOTED IN FAVOR OF THE MERGER

By and through its undersigned counsel, Respondent Dell Inc. ("Dell" or the "Company") moves for partial summary judgment pursuant to Rule 56(b) as against the petitioners identified on the verified list in this matter as numbers 1, 2, 5, 7, 9, 10, 13, 15, 18, 23 & 24 (which were previously determined to be duplicative of one another), 26, 39, 42, 43 and 45. As set forth in the brief, affidavits and other supporting papers herewith, these petitioners' shares were voted in favor of the merger by the stockholder of record, and consequently are ineligible for the appraisal remedy. The Company further moves for a declaration that certain petitioners whose claims were previously dismissed on the basis of a different entitlement objection, identified on the verified list as numbers 21, 27, 29 & 30 (which were previously determined to be duplicative of one another), 44 and 50, are also ineligible for the appraisal remedy on the basis that their shares were voted in favor of the merger by the stockholder of record, and consequently are ineligible for the appraisal remedy. The grounds for this motion are further set forth in the brief, affidavit and other supporting papers filed herewith, and may be

further set forth in such reply papers and further written or oral submissions as the Court may allow.

RICHARDS, LAYTON & FINGER, P.A.

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

[PROPOSED] ORDER GRANTING RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PETITIONERS WHO VOTED IN FAVOR OF THE MERGER

WHEREAS in this action for appraisal pursuant to 8 *Del. C.* § 262, Respondent Dell Inc. has objected to the entitlement of certain petitioners to the statutory appraisal remedy on the basis that those petitioners' shares were voted in favor of the merger at issue by the stockholder of record, and has filed a motion for partial summary judgment on that objection (the "Motion");

WHEREAS the Court has heard and considered the submissions of the parties on the Motion, and has determined that the Motion should be granted on the basis that the shares belonging to the petitioners in question were voted in favor of the merger by the stockholder of record;

NOW THEREFORE IT IS ORDERED as follows:

1. Respondent's motion for partial summary judgment is GRANTED, and that this action is DISMISSED as to the petitioners identified by the following numbers on the verified list: 1, 2, 5, 7, 9, 10, 13, 15, 18, 23 & 24 (which were previously determined to be duplicative of one another), 26, 39, 42, 43, and 45.

2. The action has been previously dismissed as to the petitioners identified by the following numbers on the verified list: 21, 27, 29 & 30 (which were previously determined to be duplicative of one another), 44 and 50, on the basis of a different objection to entitlement to the appraisal remedy. The Court determines that the claims of these petitioners are also liable to dismissal on the basis that the shares in question were voted in favor of the merger by the stockholder of record.

Vice Chancellor

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Case No. 9322-VCL

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 August 6, 2015

RESPONDENT DELL INC.'S BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PETITIONERS WHO VOTED IN FAVOR OF THE MERGER

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Dated: July 30, 2015

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INTRODUCTION

When the Petitioners in the constituent cases filed their verified petitions for appraisal, they all alleged that they had not voted in favor of the Merger. It turns out that, as to nineteen of the named Petitioners, the evidence developed in discovery contradicts those allegations. The shares belonging to these Petitioners (the "Subject Petitioners")[1] were voted by proxy in favor of the Merger by the stockholder of record. Consequently, the Subject Petitioners have failed to meet a statutory prerequisite, *see* 8 *Del. C.* § 262(a), and are not entitled to the appraisal remedy.

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[1] The "Subject Petitioners" refers to the following Petitioners: T. Rowe Price Equity Income Fund (Verified List No. 1); T. Rowe Price Science & Technology Fund (No. 2); John Hancock Variable Insurance Trust Equity Income Fund (No. 5); John Hancock Funds II Equity Income Fund (No. 7); T. Rowe Price Institutional Common Trust Fund (T. Rowe Price Equity Income Trust) (No. 9); T. Rowe Price Institutional Large Cap Value Fund (No. 10); John Hancock Funds II Science & Technology Fund (Nos. 13 and 39); T. Rowe Price Equity Income Portfolio (T. Rowe Price Equity Income Series) (No. 15); John Hancock Variable Insurance Trust Science & Technology Fund (No. 18); Northwestern Mutual Series Fund (No. 21); T. Rowe Price US Equities Trust Large Cap Value (No. 23/24); Prudential Retirement Insurance & Annuity Co. (No. 26); T. Rowe Price Funds SICAV US Large Cap Value Equity Fund (No. 27); Manulife US Large Cap Value Equity Fund (No. 29/30); John Hancock Funds II Spectrum Income Fund (No. 42); Tyco International Retirement Savings & Investment (No. 43); TRPTC Milliken Stock Value Fund / Milliken Retirement Plan (No. 44); BNA Retirement Trust (No. 45); and Curtiss-Wright Corp. Retirement Plan / Large Cap Fund (No. 50).

Based on discovery it appears that the shares belonging to Petitioner Morgan Stanley Defined Contribution Trust (T. Rowe Price) (No. 20) were not voted. *See infra* n.15. Consequently, no application is made as to those shares.

Discovery on this issue has revealed the following facts: The Subject Petitioners' shares were held of record by Cede & Co. ("Cede") in the custody of State Street Bank & Trust Company ("State Street"). Cede, as it usually does, granted an omnibus proxy to its various participant banks and brokers, including State Street. State Street (like many Cede participants) in turn outsourced its obligation to collect and transmit its entitlement holders' voting instructions to Broadridge Financial Solutions, Inc. ("Broadridge"), [redacted] Broadridge, [redacted], executed client proxies which were delivered at the special meeting of Dell's stockholders on September 12, 2013 (the "Meeting"). [redacted] *See* Ex. 1 (Broadridge0001).[2] The votes in question are specifically identifiable by control numbers -- unique identifiers assigned by Broadridge and made available to the participant banks and brokers. Those control numbers enabled the Subject Petitioners to determine in the fall of

[2] Citations in the form "Ex. _" refer to exhibits to the Transmittal Affidavit of John D. Hendershot in Support of Respondent Dell Inc.'s Brief in Support of Motion for Partial Summary Judgment as to Petitioners Who Voted in Favor of the Merger, filed contemporaneously herewith.

2014 that their shares had been voted in favor of the Merger, and they enable the Court to make the same determination now.

Because it is clear that the stockholder of record (Cede), through a chain of proxies, actually voted the Subject Petitioners' shares in favor of the Merger, this action must be dismissed as to the Subject Petitioners. Their shares were converted by operation of the merger agreement and of 8 *Del. C.* § 251(b)(5) into the right to receive the merger consideration of $13.75 per share, without interest. Judgment should be entered accordingly.

STATEMENT OF FACTS

The material facts on this motion are undisputed and are drawn largely from the Subject Petitioners' own verified responses to interrogatories, as supplemented by third party discovery.

A. The Mechanics of Voting

As of the August 13, 2013, record date for determining stockholders entitled to vote at the Meeting, all of the Subject Petitioners held their shares in street name; the record owner of their shares was Cede.[3] All of the appraisal demands

[3] As discussed in the Court's July 13, 2015, opinion, *In re Appraisal of Dell Inc.*, 2015 WL 4313206, at *1, *3 (Del. Ch. July 13, 2015), five of the Subject Petitioners (Nos. 21, 27, 29/30, 44 and 50) have had their claims dismissed due to re-registrations of their shares, in breach of the continuous ownership requirement in Section 262(a). However, as related in the papers supporting the motion for partial summary judgment on that theory, all of the re-registrations occurred after the August 13, 2013, record date for the Meeting. Consequently, all of the Subject

that were delivered by Cede in connection with the Merger are framed in a way to make clear that Cede demanded appraisal on behalf of specified blocks of shares owned by specified beneficial owners, including the Subject Petitioners.[4] These shares also were represented by paper stock certificates that were issued shortly after the demands were submitted.[5]

Although Cede was the stockholder of record, Cede's role in the voting process was limited to enabling its participants, and by extension their clients (*i.e.*, the ultimate beneficial owners or their designees), to control how their respective shares would be voted. In this regard, Cede issued an omnibus proxy authorizing its participants (including banks and brokers who act as custodians and

---

Petitioners' shares were registered in the name of Cede as of the record date, and it was Cede that was entitled under Delaware law to vote those shares at the Meeting. *See* Ex. 2 ((Under Seal Brief in Support of Respondent's Motion for Partial Summary Judgment as to Entitlement Issues) ("Op. Entitlement Br.") (Trans. ID 56433605)), at 21, 24, 27, 30 (reflecting that Northwestern shares were re-registered August 27, 2013, Manulife shares were re-registered August 15, 2013, T. Rowe Price Funds SICAV shares were re-registered August 27, 2013, Milliken shares were re-registered August 15, 2013, and Curtiss-Wright shares were re-registered August 12, 2013). As detailed herein, these shares were voted in favor of the Merger.

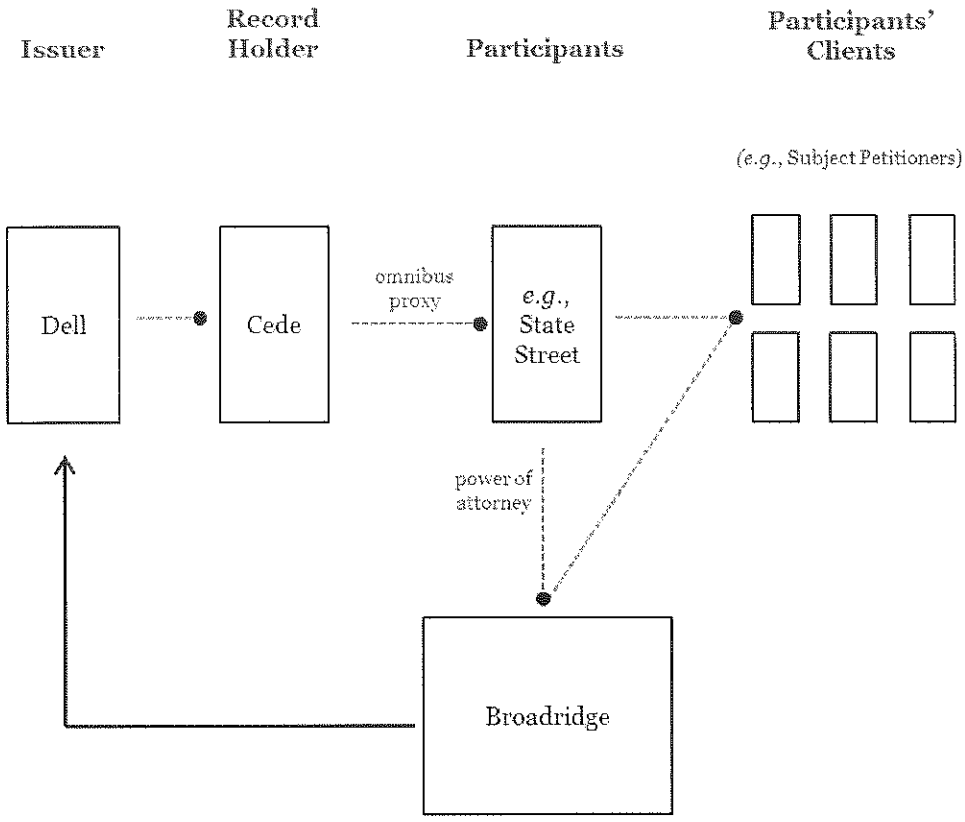
[4] Each demand states that Cede holds shares of record and that Cede "is informed by its Participant," an identified bank, broker or custodian, "that" a certain number of shares "are beneficially owned by" an identified beneficial owner, characterized as a "customer of Participant." Cede's form of demand then concludes, "In accordance with instructions received from Participant on behalf of its customer, we hereby assert appraisal rights with respect to the Shares." *See, e.g.*, Ex. 2 (Op. Entitlement Br.), Ex. 3 (Ex. 3-A at ENT00000870), Ex. 4 (Ex. 8-A at MAN00000002), Ex. 5 (Ex. 6-A at ENT00000727).

[5] *See* Ex. 2 (Op. Entitlement Br. at 4-5).

intermediaries for the ultimate beneficial owners) to exercise voting rights as to specified numbers of shares. *See* Ex. 6 (DELLVOT 627) (Cede omnibus proxy). Most of the Subject Petitioners' shares were held through State Street, which acted as custodian under an agreement with T. Rowe; certain of the Subject Petitioners used other custodians.

Most of Cede's participants -- including State Street and the other custodians involved -- sent the voting instructions of their respective clients to Dell through Broadridge, [redacted]. *See, e.g.*, Ex. 7 (SSBT 000275).[6] Thus, the chain of proxies begins with the ultimate holder of record (Cede), then proceeds to Cede's participants (such as State Street), then to Broadridge.

[6] *See also, e.g.*, Ex. 8 (TRP00015812) [redacted] Ex. 9 (NW00000112 at NW00000119) [redacted]



In connection with the Merger, it was Broadridge's client proxy cards (as well as client proxies from a few other intermediaries that fulfill the same function for other custodians) that were delivered to the Company and submitted at the Meeting. [redacted]

B. T. Rowe's Voting Protocol and Policies

The T. Rowe Petitioners[7] are funds or entities within the organization of T. Rowe Price & Associates, Inc. ("T. Rowe"). Discretion to determine how these petitioners' shares would be voted lay with the managers of the funds.[8] [redacted]

[redacted]

[redacted]

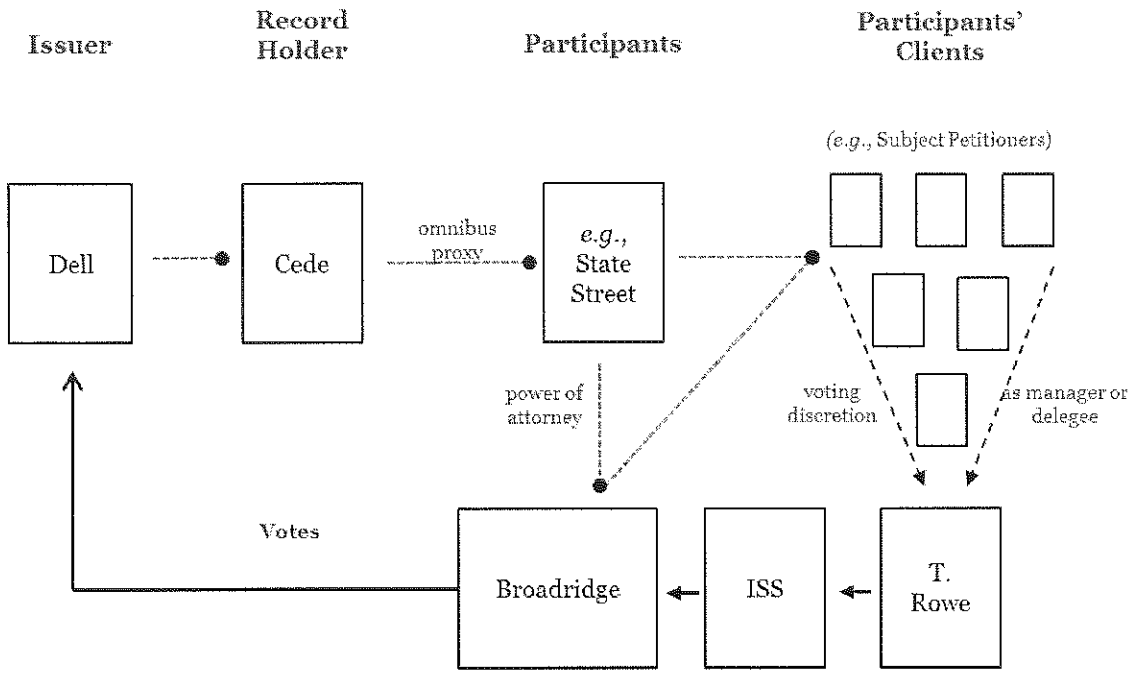
[redacted]

[7] This term refers to Petitioners T. Rowe Price Equity Income Fund, Inc. (Verified List No. 1); T. Rowe Price Equity Income Series, Inc., on behalf of T. Rowe Price Equity Income Portfolio (Verified List No. 15); T. Rowe Price Equity Income Trust, a sub-trust of T. Rowe Price Institutional Common Trust Fund (Verified List No. 9); T. Rowe Price Institutional Equity Funds, Inc., on behalf of T. Rowe Price Institutional Large Cap Value Fund (Verified List No. 10); T. Rowe Price Science & Technology Fund, Inc. (Verified List No. 2); T. Rowe Price U.S. Equities Trust (Verified List No. 23/24); and T. Rowe Price Funds SICAV US Large Cap Value Equity Fund (Verified List No. 27).

[8] *See* Ex. 10 ((Objections and Responses of T. Rowe Price and the T. Rowe Price Petitioners to Respondent's Second Set of Interrogatories Directed to Certain Petitioners on Issues Relating to Entitlement to the Statutory Appraisal Remedy) ("TRP Rog. Resp. No.__")), TRP Rog Resp. No. 1.

[9] *See* Ex. 11 ((Objections and Responses of the Non-T. Rowe Price Petitioners to Respondent's Second Set of Interrogatories Directed to Certain Petitioners on Issues Relating to Entitlement to the Statutory Appraisal Remedy) ("Non-TRP Rog. Resp. No.__")), Non-TRP Rog. Resp. No. 1; Ex. 12 ((Objections and Responses of Petitioner Northwestern Mutual Series Fund, Inc., on Behalf of its Equity Income Portfolio to Respondent's Second Set of Interrogatories Directed to Certain Petitioners on Issues Relating to Entitlement to the Statutory Appraisal Remedy) ("NW Rog. Resp. No.__")), NW Rog. Resp. No. 1; Ex. 13 ((Objections and Responses of the John Hancock Petitioners to Respondent's Second Set of Interrogatories Directed to Certain Petitioners on Issues Relating to Entitlement to the Statutory Appraisal Remedy) ("JH Rog. Resp. No.__")), JH Rog. Resp. No. 1.

T. Rowe in turn has a contractual relationship with Institutional Shareholder Services Inc. ("ISS") [redacted]. *See* Ex. 14 (TRP00015758 at TRP00015767). The voting structure may be illustrated as follows:



[redacted]. *See* Ex. 14 (TRP00015758 at TRP00015768) [redacted]

[redacted] *see also* Ex. 15 (TRP00017140 at TRP00017147) [redacted] Thus, all of the Subject Petitioners' voting instructions originated with T. Rowe and passed to ISS before being transmitted to Broadridge and then to the Company.

According to the T. Rowe Petitioners' responses to interrogatories, T. Rowe maintains an internal Proxy Recommendation System ("PRS"), and ISS maintains a different system known as Proxy Exchange ("PX"). *See* Ex. 10 (TRP Rog. Resp. No. 2). When a stockholder vote is scheduled, ISS's PX system generates a communication referred to as a "Meeting Record." *See id.* The arrival of a Meeting Record generates an email to the T. Rowe portfolio managers, alerting them to the need to submit voting instructions. *See id.* The T. Rowe portfolio managers are then able to review the Meeting Record in T. Rowe's PRS system and to submit voting instructions. *See id.*

The Meeting Record in T. Rowe's PRS system is pre-populated with voting instructions in accord with T. Rowe's "standard voting policy to submit voting instructions [*inter alia*] 'For' corporate transactions," such as mergers. *See id.* The T. Rowe portfolio managers may either leave the pre-populated voting instructions in place, or submit instructions against the voting policy. *See id.* Once the T. Rowe portfolio managers have entered their voting instructions in T. Rowe's

PRS system (whether by leaving the default instructions unchanged or by entering contrary instructions), other employees on the T. Rowe proxy team log into ISS's PX system and submit T. Rowe's voting instructions to ISS in accordance with the voting instructions that the portfolio managers had entered into PRS (or left untouched in PRS, as the case may be). *See id.*

C. T. Rowe's Voting Instructions On the Merger

Again according to the T. Rowe Petitioners' responses to interrogatories, the procedure outlined above was followed in advance of the originally scheduled vote on the Merger on Thursday, July 18, 2013. *See id.* The Meeting Record was generated on July 9, 2013, nine days before the scheduled vote. *See id.* The relevant portfolio managers determined to vote against the Merger and communicated their determinations to a T. Rowe Vice President and Corporate Governance Specialist. *See id.* This T. Rowe Vice President entered instructions accordingly in T. Rowe's PRS system on Tuesday, July 16, 2013. *See id.* Thereafter on the same day, another employee on T. Rowe's proxy team entered the same voting instructions into ISS's PX system that had been entered into T. Rowe's PRS system, and submitted the instructions to ISS. *See id.* A third employee on the T. Rowe proxy team exchanged emails with ISS the same day to confirm that ISS had received the instructions. *See id.*; *see also* Ex. 16 (TRP00015953) [redacted]).

The Meeting was convened on July 18 and immediately adjourned until the following Wednesday, July 24, to provide additional time to solicit proxies from Dell stockholders. On July 24, the Meeting was again convened and adjourned until Friday, August 2, for the same purpose. On August 2 -- in connection with an amendment to the Merger Agreement that, among other things, increased the Merger Consideration -- the Meeting was again convened and adjourned until September 12. A new record date for determining stockholders eligible to vote at the Meeting was also announced on August 2; the new record date, August 13, replaced a June 3 record date that would have been more than three months before the September 12 adjourned Meeting date. After all three of these adjournments, the same T. Rowe Vice President confirmed that T. Rowe's instructions to vote against the Merger remained in both T. Rowe's PRS system and ISS's PX system. *See* Ex. 10 (TRP Rog. Resp. No. 2).

On Wednesday, September 4, 2013 -- over a month after the last adjournment and after the announcement of the new record date, and eight days before the adjourned (now September 12) Meeting -- ISS sent T. Rowe a new Meeting Record. *See id.* According to T. Rowe, "ISS's PX system, unbeknownst to T. Rowe Price, deleted the original Meeting Record." *See id.* T. Rowe elaborates that on September 4, 2013, the ballots T. Rowe had previously submitted to ISS were "auto-invalidated by ISS's PX system." *See id.* Instead, the

new Meeting Record in ISS's PX system was pre-populated with voting instructions in accord with T. Rowe's Voting Policy (discussed above), *i.e.*, with instructions to vote the Subject Petitioners' shares in favor of the Merger. *See id.*

T. Rowe admits that, even though its proxy team had confirmed on four prior occasions that ISS had T. Rowe's instructions to vote against the Merger in its system, the team did not log in to ISS's PX system to confirm again. *See id.* That failure to check ISS's PX system is especially puzzling given that, again per T. Rowe's own interrogatory responses, an extended series of conversations had taken place between August 23 and September 5, between ISS representatives and the T. Rowe proxy team, regarding missing ballots.[10] *See id.* Even though T. Rowe and ISS both knew that there was an issue of missing voting instructions or ballots, T. Rowe did not log in to ISS's PX system to check whether its voting instructions remained in effect. As a result, at the time of the Meeting, the instructions in effect as to the Subject Petitioners' shares in ISS's PX system were to vote in favor of the Merger. *See id.*

D. [redacted]

Numerous custodians and other intermediaries, including State Street, rely on Broadridge to collect and deliver to issuers the voting instructions of their

[10] *See* Ex. 17 (ISS 1756-57), at ISS 1757 ([redacted]

various clients. Ex. 7 (SSBT000231-284). State Street's response to subpoena in this matter asserts that, [redacted] *See* Ex. 18 (DELLVOT 934, at DELLVOT 935). [redacted][11] [redacted]

[redacted]			
Ref. No.	**Petitioner**	**Shares**	**Broadridge Control Number**
1	T. Rowe Price Equity Income Fund	16,500,000	[redacted]
2	T. Rowe Price Science + Technology Fund	7,045,780	[redacted]
5	John Hancock Variable	1,271,400	[redacted]

[11] The control numbers appear to have been generated and assigned by the Broadridge system. The numbers have at least two functions: One is to identify beneficial ownership positions at the level of Broadridge's clients uniquely, and the other is to authenticate voting instructions. The control numbers are not provided to the issuer or the public; rather, each beneficial owner is provided with a unique number that enables that owner (or the owner's designee) to log into Broadridge's internet or telephone voting systems and give instructions as to how the shares will be voted.

[12] [redacted]

	Insurance Trust Equity Income Fund		
7	John Hancock Funds II Equity Income Fund	1,010,600	[redacted]
9	T. Rowe Price Institutional Common Trust Fund (T. Rowe Price Equity Income Trust)	965,100	[redacted]
10	T. Rowe Price Institutional Large Cap Value Fund	954,800	[redacted]
15	T. Rowe Price Equity Income Portfolio (T. Rowe Price Equity Income Series, Inc.)	685,800	[redacted]
18	John Hancock Variable Insurance Trust Science and Technology Fund	458,900	[redacted]
23 / 24	T. Rowe Price US Equities Trust Large Cap Value	552,100[13]	[redacted]
26	Prudential Retirement Insurance & Annuity Co.	256,500	[redacted]
42	John Hancock Funds II Spectrum Income Fund	93,900	[redacted]
43	Tyco International Retirement Savings & Investment	86,450	[redacted]
TOTAL		29,881,330	

See Ex. 20 (SSBT000230). [redacted]

[13] This Petitioner sought appraisal as to only 329,500 of the shares it owned. *See* Ex. 19 (Petition in No. 9322-VCL, ¶ 4(f)).

E. Broadridge Votes the Subject Petitioners' Shares In Favor of the Merger

[redacted]

Verified List No.	Subpoena Ref. No.	Petitioner	Shares	Broadridge Control Number
1	[redacted]	T. Rowe Price Equity Income Fund	16,500,000	[redacted]
2	[redacted]	T. Rowe Price Science + Technology Fund	7,045,780	[redacted]
5	[redacted]	John Hancock Variable Insurance Trust Equity Income Fund	1,271,400	[redacted]
7	[redacted]	John Hancock Funds II Equity Income Fund	1,010,600	[redacted]
9	[redacted]	T. Rowe Price Institutional Common Trust Fund (T. Rowe Price Equity Income Trust)	965,100	[redacted]

10	[redacted]	T. Rowe Price Institutional Large Cap Value Fund	954,800	[redacted]
13 & 39	[redacted]	John Hancock Funds II Science and Technology Fund	992,200[14]	[redacted]
15	[redacted]	T. Rowe Price Equity Income Portfolio (T. Rowe Price Equity Income Series, Inc.)	685,800	[redacted]
18	[redacted]	John Hancock Variable Insurance Trust Science and Technology Fund	458,900	[redacted]
20	[redacted]	Morgan Stanley Defined Contribution Master Trust (T. Rowe Price)[15]	[not included]	[redacted]
21	[redacted]	Northwestern Mutual Series Fund	347,300	[redacted]
23 / 24	[redacted]	T. Rowe Price US Equities Trust Large Cap Value	329,500[16]	[redacted]
26	[redacted]	Prudential Retirement Insurance & Annuity Co.	256,500	[redacted]
27	[redacted]	T. Rowe Price Funds SICAV US Large Cap Value Equity Fund	251,950[17]	[redacted]
29/30	[redacted]	Manulife US Large Cap Value Equity Fund	207,300	[redacted]

[14] [redacted] This fund sought appraisal for only 992,200 shares. *See* Ex. 21 (Petition in No. 9350-VCL, ¶ 4(b)).

[15] [redacted] *See* Ex. 1 (Broadridge 0001 at row 11). Accordingly, no application is made with regard to this petitioner.

[16] [redacted] his Subject Petitioner sought appraisal as to only 329,500 of the shares it owned. *See* Ex. 19 (Petition in No. 9322-VCL, ¶ 4(f)).

[17] [redacted] This Subject Petitioner sought appraisal as to only 251,950 of the shares it owned. *See* Ex. 19 (Petition in No. 9322-VCL, ¶ 4(g)).

42	[redacted]	John Hancock Funds II Spectrum Income Fund	93,900	[redacted]
43	[redacted]	Tyco International Retirement Savings & Investment	86,450	[redacted]
44	[redacted]	TRPTC Milliken Stock Fund Value / Milliken Retirement Plan	84,900	[redacted]
45	[redacted]	BNA Retirement Trust	80,000	[redacted]
50	[redacted]	Curtiss-Wright Corporation Retirement Plan / Large Cap Fund	31,525	[redacted]
TOTAL			**31,653,905**	

See Ex. 1 (Broadridge 0001). [redacted] *See supra*, Section D. Broadridge's transmittal affidavit further specifically confirms [redacted]

See Ex. 1 (DELLVOT00000938) (Broadridge Affidavit) ¶ 5.

Broadridge delivered the votes of the Subject Petitioners' shares (and those of numerous other investors) to the Company in the form of a series of documents labeled "Broadridge Client Proxy." [redacted]

[redacted].[18] Ex. 23 (DELLVOT 55, at DELLVOT 57). Several supplemental client proxies were also delivered. [redacted] *Id.* These Broadridge client proxies were handed in to the inspector of election at the Meeting and incorporated in the inspector's determination that a total of 1,013,326,409 shares, out of 1,758,001,669 eligible to vote, had been voted in favor of the Merger. Ex. 24 (DELLVOT 281).

F. Discovery of the Voting Issue

According to the T. Rowe Petitioners' interrogatory responses, T. Rowe was not aware that the Subject Petitioners' shares had actually been voted in favor of the Merger for over a year after the Meeting. *See* Ex. 10 (TRP Rog. Resp. No. 10). [redacted]

[18] [redacted] Ex. 22 (DELLVOT 368). [redacted]

[redacted] *See* Ex. 25 (ISS001322) (email chain).

[redacted], there is no dispute that in the late summer of 2014, several of the Subject Petitioners made federal securities filings stating that they had voted in favor of the Merger. Specifically, thirteen of the Subject Petitioners are mutual funds and are required by federal securities regulations to file Form N-PX, disclosing how they exercise their voting rights with respect to shares held in their funds. *See* 17 CFR § 270.30b1-4 (imposing reporting requirement); 17 CFR § 274.129 (prescribing form of report). These disclosures -- which were prepared on the basis of ISS's data in late July 2014 and filed with the SEC in August 2014 -- assert and acknowledge that the filing parties had in fact voted their shares in favor of the Merger, [redacted].[20] Ex. 10 (TRP Rog. Resp. No. 2); Ex. 12 (NW Rog Resp. No. 24); Ex. 13 (JH Rog. Resp. No. 24).

[20] Ex. 26 (SEC Form N-PX for the T. Rowe Price Equity Income Fund, Inc.), Ex. 27 (Form N-PX for T. Rowe Price Equity Series, Inc.); Ex. 28 (Form N-PX for T. Rowe Price Institutional Equity Funds, Inc.); Ex. 29 (Form N-PX for T. Rowe Price Science and Technology Fund, Inc.); Ex. 30 (Form N-PX for Northwestern Mutual Series Fund, Inc.); Ex. 31 (Form N-PX for the John Hancock Variable Insurance Trust–Science &Technology Trust); Ex. 32 (Form N-PX for

However, even though several of the Subject Petitioners had made public filings prepared with some level of internal quality control, Ex. 10 (TRP Rog. Resp. No. 2); Ex. 12 (NW Rog Resp. No. 24); Ex. 13 (JH Rog. Resp. No. 24), and even though Petitioners were actively pursuing this action when they made their filings, the Subject Petitioners claim that they did not become aware that their own filings indicated that their shares had been voted in favor of the Merger until approximately two months after the filings occurred. According to the T. Rowe Petitioners' interrogatory responses, an outside analyst contacted T. Rowe by email on October 27, 2014, to inquire whether its Form N-PX filings were accurate. Ex. 10 (TRP Rog. Resp. No. 10).

Despite the public nature of the Form N-PX filings, the Subject Petitioners have generally taken the position that they are not obliged to disclose what they have learned in the course of investigating the issue raised by the analyst, on the basis of privilege and work product protection. Ex. 11 (Non-TRP Rog. Resp. No. 16), Ex. 13 (JH Rog. Resp. No. 16), Ex. 12 (NW Rog. Resp. No. 16), Ex. 10 (TRP

John Hancock Funds II–Equity Income Fund); Ex. 33 (Form N-PX for John Hancock Variable Insurance Trust–Equity Income Trust), Ex. 34 (Form N-PX for John Hancock Funds II–Spectrum Income Fund). In addition, as of May 2015, several of the Subject Petitioners maintained publicly available websites disclosing proxy voting information, also stating that the relevant Petitioners had voted in favor of the Merger. *See* Ex. 35 (screen capture of proxy voting results for T. Rowe Price Equity Income Fund, Inc., T. Rowe Price Science and Technology Fund, Inc., T. Rowe Price Equity Income Portfolio, and T. Rowe Price Institutional Large Cap Value Fund).

Rog. Res. No. 16 ("Any information pertaining to this investigation is immune for [sic] disclosure pursuant to the attorney-client privilege and work product doctrines.")). They have also disclaimed knowledge as to how Broadridge actually voted their shares. Ex. 11 (Non-TRP Rog. Resp. Nos. 8, 9), Ex. 13 (JH Rog. Resp. Nos. 8, 9), Ex. 12 (NW Rog. Resp. Nos. 8, 9), Ex. 10 (TRP Rog. Resp. Nos. 8, 9). The T. Rowe Petitioners assert that they know only what ISS's system reflects, and the remaining Subject Petitioners [redacted]. Ex. 10 (TRP Rog. Resp. No. 22), Ex. 11 (Non-TRP Rog. Resp. No. 7), Ex. 13 (JH Rog. Resp. No. 7), Ex. 12 (NW Rog. Resp. No. 7). Notwithstanding the Subject Petitioners' position, documents produced by ISS in response to subpoena and subsequently by the T. Rowe Petitioners make clear that in the autumn of 2014, T. Rowe and ISS together conducted an investigation. Although T. Rowe has withheld numerous documents relating to that investigation on privilege grounds, the investigation determined within a few days that the Subject Petitioners' shares had been voted in favor of the Merger. On the morning of October 28, 2014 -- the day after T. Rowe was alerted to the issue, according to the interrogatory responses -- T. Rowe emailed ISS:

[redacted]

See Ex. 36 at ISS_000054-55 (emphasis added). [redacted]

[redacted]

See id. at ISS_000050 (emphasis added); *see also id.* at ISS_000054 [redacted]

[redacted]). Over the next several days, an extensive email exchange took place between ISS and T. Rowe on the subject. On the morning of November 4, 2014, a Vice President, Client Service & Consultants at ISS, sent the following email to two colleagues, [redacted]

[redacted]

See Ex. 37 (ISS_001952). According to an email in the same chain, sent later the same day, [redacted] Ex. 38 (ISS_002134). [redacted]

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21 [redacted]

Also on the morning of November 4, 2014, T. Rowe emailed State Street:

[redacted]

See Ex. 39 at TRP00017966. [redacted] Six days later, on November 10, [redacted] *See* Ex. 39 at TRP00017968.

[redacted]

Later the same day, November 10, 2014, [redacted]

These facts make clear that the Subject Petitioners' assertion that it is "not possible to know how the record holder actually voted the specific shares attributed to any specific individual beneficial owners of Dell shares," is incorrect. *See* Ex. 10 (TRP Rog. Resp. No. 15), Ex. 11 (Non-TRP Rog. Resp. No. 15), Ex. 13 (JH Rog. Resp. No. 15), Ex. 12 (NW Rog. Resp. No. 15). [redacted]

[redacted]

the Subject Petitioners' shares were voted in favor of the Merger by the stockholder of record, Cede, through its omnibus proxy in favor of custodians who returned their clients' votes using the Broadridge client proxy cards.

ARGUMENT

The burden of proving entitlement to the statutory appraisal remedy rests on the claimants seeking it. *See, e.g.*, *In re Hilton Hotels Corp.*, 210 A.2d 185, 187 (Del. Ch. 1965), *aff'd sub nom. Carl M. Loeb, Rhoades & Co. v. Hilton Hotels Corp.*, 222 A.2d 789 (Del. 1966); *DiRienzo v. Steel P'rs Hldgs., L.P.*, 2009 WL 4652944, at *7 (Del. Ch. Dec. 8, 2009). Well-established Delaware law provides that "[a]ppraisal rights are created by statute and, in order to partake in those rights, strict compliance with the precise statutory standards is essential." *Konfirst v. Willow CSN Inc.*, 2006 WL 3803469, at *2 (Del. Ch. Dec. 14, 2006); *see also In re Appraisal of Dell Inc.*, 2015 WL 4313206, at *10 (Del. Ch. July 13, 2015) (noting that "[t]he Delaware Supreme Court has endorsed a principle of strict construction" of the appraisal statute). The undisputed factual evidence set forth above proves that Cede, the record holder of the Subject Petitioners' shares, did, in fact, vote the Subject Petitioners' shares *for* the Merger. A dissenting stockholder's failure to comply strictly with the technical requirements of the appraisal statute -- such as the requirement that the stockholder not vote in favor of

the transaction -- are not excusable, irrespective of the equities. *See Berger v. Pubco Corp.*, 976 A.2d 132, 144 (Del. 2009). Accordingly, because there is no genuine dispute of material fact and because the Company is entitled to judgment as a matter of law, summary judgment must be granted against the Subject Petitioners. *See, e.g., Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 241 (Del. 2009).

I. THE STOCKHOLDER OF RECORD HAS VOTED THE SUBJECT PETITIONERS' SHARES IN FAVOR OF THE MERGER, THEREBY DISQUALIFYING THE SUBJECT PETITIONERS FROM THE APPRAISAL REMEDY.

The first sentence of 8 *Del. C.* § 262(a) imposes four prerequisites upon stockholders seeking appraisal. The statute confers appraisal rights upon "[a]ny stockholder of a corporation of this State who [1] holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, [2] who continuously holds such shares through the effective date of the merger or consolidation, [3] who has otherwise complied with subsection (d) of this section and [4] who has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228 of this title." *See* 8 *Del. C.* § 262(a) (bracketed numbers added); *see also Merion Capital LP v. BMC Software, Inc.*, 2015 WL 67586, at *3 (Del. Ch. Jan. 5, 2015) (characterizing the foregoing as "standing requirements"). The statute expressly defines the term "stockholder" to mean "a holder of record of stock in a corporation." *See* 8 *Del. C.*

§ 262(a). The relevant inquiry, therefore, is whether the stockholder of record -- Cede -- qualifies as a stockholder "who has [not] voted in favor of the merger."

For more than half a century, this Court has construed that question -- at least when applied to a stockholder of record who holds as a nominee for multiple beneficial owners -- to mean whether the stockholder of record has voted ***the shares as to which appraisal is sought*** in favor of the merger. *See Colonial Realty Corp. v. Reynolds Metals Co.*, 185 A.2d 754 (Del. Ch. 1962), *aff'd*, 190 A.2d 752 (Del. 1963); *see also Merion Capital*, 2015 WL 67586, at *3 & n.23 (construing prerequisite to oblige the record holder to show that it "has not voted in favor of or consented to the merger *with regard to those shares*" that were the subject of the demand) (emphasis added).

In the *Reynolds Metals* case, both this Court and the Delaware Supreme Court held that a nominee record holder that held on behalf of multiple beneficial owners could, under the language of the statute as it then existed, "split its vote" such that the nominee was allowed to vote certain shares registered in its name in favor of a merger on the instructions of one set of customers, but vote against the merger and seek appraisal as to other shares held for other customers.[24] *See* 185

[24] The statutory prerequisite in effect at the time of *Reynolds Metals* was phrased in the passive voice, referring to the shares being voted, rather than (as today, and since 1976) in the active voice and to the stockholder doing the voting. *See Reynolds Metals*, 185 A.2d at 757 ("The exact statutory language prescribing

A.2d at 757-58, 190 A.2d at 755. The Supreme Court on appeal analogized a nominee holding for multiple customers to an agent acting separately for multiple principals. *See* 190 A.2d at 755. On that view, the nominee record holder, though registered on the corporation's books as a single entity, in reality holds separately on behalf of each of its customers and exercises rights (including voting and appraisal rights, as well as other rights incident to stock ownership) separately for each of its customers, so that the nominee's actions on behalf of one customer can be imputed only to that customer, and not to other customers who might have instructed the nominee to act differently. Consequently, provided the nominee refrained from voting the shares belonging to the appraisal claimant in favor of the merger and met the other prerequisites as to those shares, the nominee was permitted to pursue appraisal of the claimant's shares.[25] *See* 190 A.2d at 756; *see*

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the voting condition is, 'and whose shares were not voted in favor of such consolidation or merger.'"); 60 Del. Laws ch. 371 (1976) (amendment making grammatical change). Counsel for the Company is not aware of any legislative history or contemporaneous commentary suggesting that the amendment sought to overturn the holding of *Reynolds Metals* or to prohibit the practice the decision approved. S. Samuel Arsht & Lewis S. Black, *Analysis of the 1976 Amendments to the Delaware Corporation Law*, at 390-94 (1976). Although the statute, literally read, now appears to disqualify any stockholder of record who votes even a single share in favor of a merger, the Company does not advocate that approach, which would be inconsistent with decades of practice.

[25] This understanding also is consistent with Article 8 of Delaware's Uniform Commercial Code, which obliges securities intermediaries (including nominee record holders) to exercise voting and appraisal rights if instructed by their respective entitlement holders. *See* 6 *Del. C.* § 8-506. Conversely, an

also Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd., 847 A.2d 340, 365 & n.71 (Del. Ch. 2004) (justifying rule of *Reynolds Metals* on the ground that Cede, though apparently treated as an aggregated unit in the appraisal statute, in reality "often represents a large number of beneficial holders in the same company, holders whose views on the advisability of a merger might diverge").

In this case, Cede exercised its voting rights exclusively in a manner designed to enable the beneficial owners or their designees to make their own voting decisions and to put them into effect through a chain of intermediaries. Cede did not determine how to vote any shares, but rather gave an omnibus proxy in favor of its participants.[26] Ex. 6 (DELLVOT 627). State Street, one of those participants, contracted with Broadridge for a variety of proxy voting and tabulation services. *See* Ex. 7 (SSBT 000231-284, at SSBT 000262). [redacted] Broadridge accepted voting instructions transmitted on the Subject Petitioners' behalf by ISS. [redacted]

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investor who holds through a nominee cannot "hijack the ownership rights" of other investors who happen to hold through the same nominee. *See Sutter Opportunity Fund 2, LLC v. Cede & Co.*, 838 A.2d 1123, 1129 (Del. Ch. 2003).

[26] This recognition also is mirrored in the form of demand that Cede delivered numerous times in this case. *See supra* n.3. In the demand context, Cede expressly purported to act on behalf of its participant and the participant's customer, not on its own behalf, and to demand appraisal of a specifically identified block of shares beneficially owned by that customer.

[redacted] Because the stockholder of record voted the shares as to which the Subject Petitioners seek appraisal in favor of the Merger, a standing requirement in Section 262(a) has been violated and the action must be dismissed as to the Subject Petitioners.

II. THE SUBJECT PETITIONERS CANNOT EXCUSE NON-COMPLIANCE WITH SECTION 262(a) BY RELIANCE ON VOTES DIRECTED BY OTHER INVESTORS.

The T. Rowe Petitioners' interrogatory responses suggest that they intend to argue that, because Broadridge's client proxy cards aggregate the votes of multiple investors at the custodian level (*e.g.*, at the level of State Street) and do not specifically identify the votes attributed to the Subject Petitioners' positions (by control number or otherwise), no basis exists to attribute specific votes to specific beneficial owners. *See* Ex. 10 (TRP Rog. Resp. No. 15). This contention lacks support in the law as well as the facts of the case.

As an initial matter, the Supreme Court in *Reynolds Metals* implicitly rejected this contention. The appellant issuer there argued that the shares held by the nominee broker were held on behalf of numerous clients as "fungible goods," such that it was impossible for the broker or the Court to distinguish between the shares the broker had voted in favor of the merger on behalf of one client and those voted against the merger on behalf of another, with the consequence that there was no way to prove that the shares as to which appraisal was sought were the same shares that had been withheld from voting in favor of the merger.[27] 190 A.2d at 756. The Supreme Court rejected this contention, characterizing the argument as merely a different form of the (incorrect and rejected) assertion that the statute disqualified all clients of a broker who voted a single share in favor of the transaction. *Id.*; *see supra* Section I.

Further, as described above, it is not true that the Subject Petitioners' votes are untraceable, nor that the shares were held in a manner rendering it impossible to distinguish between the votes attributable to one position and the votes

[27] In the case, the nominee, Bache & Co., was the holder of record of 81,384 shares. It returned two separate proxies, one voting 29,475 shares in favor and 612 shares against the merger, and a second voting 29,728 shares against the merger. *See* 185 A.2d at 754. It does not appear that either proxy or the written objection identified the beneficial owner of the 29,728 shares, as to which appraisal was sought. *See id.* at 754-55.

attributable to another.[28] Quite the contrary, the holders of separate positions were entitled to, and did, give separate voting instructions, even though those separate voting instructions were not listed separately on Broadridge's client proxy cards. To view Cede (or any of Cede's participants) as an unitary voter, in such a manner as to imagine that no underlying beneficial owner had the right to vote any specific block of shares, would be to ignore reality, in contravention of the approach prescribed in *Reynolds Metals*.

Moreover, the Subject Petitioners' apparent reading of Section 262(a) would enable an investor to give instructions to vote in favor of a merger, to see those instructions carried out, and to seek appraisal anyway, provided that investor happens, *per accidens*, to hold through the same nominee (or the same custodian) as other investors who have refrained from voting in favor of the transaction as to a sufficient number of shares. That rule would eviscerate the voting requirement of Section 262(a) in the public company context, and it is both contrary to the approach of *Reynolds Metals* and unsupported in the Court's more recent precedents.

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[28] As a factual matter, the Subject Petitioners' shares were not held in a fungible bulk in the Cede FAST account as of the meeting date. Their shares were represented by physical stock certificates stored in vaults at that time. *See, e.g.*, Ex 42 (ISS 000968) (

This Court has never held that an investor who is entitled to vote, and whose shares are actually voted in favor of a merger by the record holder's proxy acting on instructions attributable to that investor, may excuse non-compliance with the voting prerequisite of Section 262(a) by invoking the record holder's proxy's votes on behalf of other investors. What the Court has held is that an investor who acquires shares after the record date for determining entitlement to vote is not responsible for the votes cast on the instructions of the record-date owner. *See In re Appraisal of Transkaryotic Therapies, Inc.*, 2007 WL 1378345, at *1 (Del. Ch. May 2, 2007) (motion challenged solely entitlement of shares acquired after record date); *In re Appraisal of Ancestry.com, Inc.*, 2015 WL 66825, at *1 (Del. Ch. Jan. 5, 2015) (petitioner "purchased its shares of Ancestry after the record date for [the] transaction"); *cf. Merion Capital*, 2015 WL 67586, at *2 (petitioner acquired beneficial ownership of some shares before the record date and others after, but became the record holder of all its shares after the record date, and was not entitled to vote the shares as to which appraisal was sought). Properly read, these cases suggest (1) that the Court should view Cede's voting behavior as that of an agent acting severally for multiple principals -- as the Supreme Court in *Reynolds Metals* viewed the nominee's voting behavior, and as Article 8 of the Uniform Commercial Code envisions -- not as that of an aggregated unit, and (2) that the

voting behavior of Cede on behalf of the record-date owner is not normally attributable to the post-record date purchaser.

In *Transkaryotic*, the respondent corporation argued that, as to shares acquired through open-market purchases after the record date, the post-record date purchasers of beneficial ownership bore the burden of demonstrating that the shares had not been voted in favor of the transaction on the instructions of the unknown third parties who had beneficially owned the shares on the record date. 2007 WL 1378345, at *3. The Court rejected this contention, holding that an effort to match the post-record date purchasers' shares with the unknown parties that had owned them on the record date (if possible), to ascertain how those shares had been voted (if at all), and to determine whether those votes should be attributed to the post-record date purchasers, was impermissible under the circumstances. *Id.* at *4. For that holding, the Court relied, not on *Reynolds Metals* (which was cited in the papers but not mentioned in the Court's opinion), but on *Olivetti Underwood Corp. v. Jacques Coe & Co.*, 217 A.2d 683 (Del. 1966), which held that an issuer should not be allowed to inquire into whether a nominee seeking appraisal was properly authorized to do so by the beneficial owner, and then to seek to disqualify claimants who failed to present adequate proof of authority.[29] *Transkaryotic*, 2007

[29] Chancellor Seitz's decision in the *Olivetti Underwood* matter, which the Supreme Court affirmed, made clear that the issue before the Court was not

WL 1378345, at *4. That is, the Court construed the respondent's argument as a claim that the petitioners were obliged to prove that Cede had not acted for them when it cast votes in favor of the transaction (presumably on the instructions of the unknown third parties who may have owned shares, which may or may not have been transferred to the petitioners, on the record date), a claim that the Court rejected.

Reading the language of *Transkaryotic* broadly to support the view that the Court should view the record holder's votes exclusively on an aggregate basis -- that is, that the Court should ignore the voting instructions originating with the numerous beneficial owners and instead consider only whether Cede held of record a number of shares not voted in favor of the Merger greater than the number of shares for which the Petitioners seek appraisal -- is both an over-reading of dictum in *Transkaryotic* and inconsistent with the Supreme Court's holding in *Reynolds Metals*. The holding of *Transkaryotic* was only that a post-record date purchaser

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"whether a stockholder had complied with statutory prerequisites to appraisal." *See Abraham & Co. v. Olivetti Underwood Corp.*, 204 A.2d 740, 741 (Del. Ch. 1964), *aff'd sub nom. Olivetti Underwood Corp. v. Jacques Coe & Co.*, 217 A.2d 683 (Del. 1966). The Chancellor distinguished *Reynolds Metals* on the ground that, "[t]here is no question of any purported agent's authority here insofar as compliance with the appraisal statute is concerned." *See Abraham & Co.*, 204 A.2d at 741. The issue on this motion is not a collateral issue -- whether the nominee had proper authorization to seek appraisal on the beneficial owner's behalf -- but rather one of express statutory prerequisite -- whether the nominee record holder refrained from voting the beneficial owner's shares in favor of the merger.

need not demonstrate that the shares purchased were not voted in favor of the transaction on the instruction of the record-date beneficial owner. What the *Transkaryotic* Court rejected was the claim that, because the post-record date buyer (at least in theory) has the right to acquire a proxy to vote the shares, the post-record date buyer should be charged with the vote that may have been cast on the instructions of the record-date owner, and should bear the burden of proving the tenor of that vote. That theory, the Court wrote, would involve the Court and the parties in potential "misunderstandings or clashes of opinion between non-registered and registered holders of stock." *Transkaryotic*, 2007 WL 1378345, at *4 (quoting *Olivetti Underwood*, 217 A.2d at 686).

As appropriately understood, the holding of *Transkaryotic* is consistent with the approach adopted by the Supreme Court in *Reynolds Metals*, of viewing a nominee record holder as an agent separately for the record-date holder -- who may have directed a vote in favor of the transaction, but does not seek appraisal -- and for the post-record date purchaser -- on whose behalf the nominee record holder did not vote. On this reading, *Olivetti Underwood* precludes the effort to show that Cede's actions on behalf of one beneficial owner should be attributed to a different beneficial owner, at least where the two owners have not communicated with one another.

The *Transkaryotic* Court was not called upon to consider whether a beneficial owner who owns the shares continuously from the record date through the date of the vote, and whose shares are voted in favor of the transaction on instructions by that beneficial owner's securities intermediaries -- where there is no question of attributing Cede's actions on behalf of one investor to a different investor -- may establish entitlement to appraisal by relying on the votes cast by the nominee record holder on the instructions of other, unrelated investors. In this case, the record owner demanded appraisal on behalf of identified beneficial owners and then voted by proxy on behalf of the same identified beneficial owners. *See supra* Sections A, E. Where the record owner made demands on behalf of identified beneficial owners who had the right to direct how the record holder would vote the shares, and where the votes of the record holder on behalf of the several beneficial owners are separately identified, it makes no sense for the Court to ignore the manner in which the record holder actually voted those shares.

The Court's recent rulings in *Ancestry.com* and *BMC Software* likewise do not hold that an investor who holds continuously from the record date through the meeting date may allow its shares to be voted in favor of the transaction and still obtain appraisal provided the same record holder held a sufficient number of shares on behalf of other investors that were not voted in favor of the transaction. Both decisions deal exclusively with shares acquired after the record date for

determining entitlement to vote. Both cases, like *Transkaryotic*, reject the contention that a post-record date purchaser must demonstrate that it is not responsible for votes in favor of the merger cast on behalf of an unknown predecessor-in-interest.[30] *See Ancestry.com*, 2015 WL 66825, at *8; *Merion Capital*, 2015 WL 67586, at *7; *compare Transkaryotic*, 2007 WL 1378345, at *3.

The true rationale of all three cases, consistent with the rationale of *Reynolds Metals*, is that the behavior that counts for purposes of determining entitlement to appraisal is that of the record holder *on behalf of the appraisal claimant with respect to the shares as to which appraisal is sought.* To view Cede's voting behavior simply on an aggregate basis would be to ignore reality and to open the door to tactical conduct in future cases, enabling future appraisal claimants to direct votes in favor of a merger and still claim appraisal rights. That would functionally read the voting prerequisite out of the statute in the public company context.

[30] Notably, in *Merion Capital* -- in which the petitioner acquired record ownership of the shares after the record date -- the Court's opinion does not mention how the record-date record owner of the shares -- Cede & Co. -- had voted. Rather, the fact that the record owner who made the demand had not been eligible to vote at all was treated as a sufficient showing of compliance. *See Merion Capital*, 2015 WL 67586, at *8.

III. THE SUBJECT PETITIONERS CANNOT EXCUSE NON-COMPLIANCE BY REFERENCE TO LANGUAGE IN DELL'S PROXY STATEMENT.

The Subject Petitioners' interrogatory responses also suggest that they may contend that they relied on language in the Company's proxy statement for the September 12 meeting as a reason to assume that the voting instructions they had earlier conveyed to ISS would remain unaltered. The language in question reads as follows:

> If you have already voted by proxy in favor of the proposals contained on the proxy card using a properly executed WHITE proxy card or otherwise voted by proxy in favor of such proposals over the Internet or by telephone, you will be considered to have voted in favor of such proposals and do not need to take any action, unless you wish to revoke or change your proxy.

Ex. 43 (Proxy Statement). The Subject Petitioners offer that T. Rowe "took comfort from the reassurances contained in the Proxy submitted by Dell that if a stockholder previously had voted against the Merger it would be 'considered to have voted against [the Merger] and [it did] not need to take any action' unless it wished to change its vote." Ex. 10 (TRP Rog. Resp. No. 2).

Although the T. Rowe Petitioners do not forthrightly claim that they justifiably relied on the language that their interrogatory responses quote, any such reliance would be unreasonable in this context. The manner in which T. Rowe chose to deliver its voting instructions was through ISS, not through the paper

proxy card distributed to retail investors or through the internet or telephone voting systems maintained by Broadridge. [redacted] To the extent T. Rowe had already "voted" by proxy, T. Rowe's agents at ISS caused the revocation of that proxy and the granting of a new proxy instructing that the Subject Petitioners' shares be voted in favor of the Merger.

Moreover, T. Rowe's conduct in the days leading up to the Meeting is at odds with any contention that it believed its earlier instructions would be carried over. As described above, T. Rowe was aware of a number of ballots, including some of the Subject Petitioners' ballots as well as other ballots, being "missing" in the weeks before the Meeting. [redacted]

[redacted] *See* Ex. 20 (SSBT000230). And even though T. Rowe was aware of ballots being "missing," was aware of its own default policy of voting in favor of mergers, and had checked after each of the three adjournments of the Meeting to confirm that its previously-given instructions remained in effect, T. Rowe does not claim that anyone ever logged in to ISS's PX system in the days leading up to the Meeting to confirm those instructions again.

Finally, T. Rowe's reaction in the autumn of 2014 to the discovery that its shares had been voted in favor of the Merger is inconsistent with any claim that T. Rowe believed that the instructions in the proxy statement took precedence over its own agent's actions. [redacted] Ex. 37 (ISS_001952). There is no suggestion that anyone involved believed that the Company had undertaken to read investors' minds and to disregard the instructions the investors' agents actually gave in favor of earlier-given instructions to the contrary. Nor was there any apparent basis on which the Company could have done so.

IV. THE SUBJECT PETITIONERS CANNOT EXCUSE NON-COMPLIANCE ON THE BASIS OF THE NEGLIGENCE OR MISTAKE OF THEIR AGENTS, OR ON THE BASIS OF THE INSTRUCTIONS THEY CLAIM WERE GIVEN TO THOSE AGENTS.

The Subject Petitioners may also contend that their votes in favor of the Merger arose from mistakes in the process of transmission, and that T. Rowe Price's true instructions were to vote against the Merger. *See* Ex. 10 (TRP Rog. Resp. No. 2). Any objection founded in T. Rowe's intentions, or in a failure of its agents to pass along T. Rowe's instructions properly, must fail as a matter of law. A party's entitlement to appraisal is determined without regard to purpose or intentions. *See Salomon Bros. v. Interstate Bakeries Corp.*, 576 A.2d 650, 653 (Del. Ch. 1989); *Ancestry.com*, 2015 WL 66825, at *4. The Court requires strict compliance with other statutory prerequisites -- such as timely delivery of a demand signed by or on behalf of the stockholder of record -- and does not excuse non-compliance on the basis of the beneficial owner's intentions. *See, e.g.*, *DiRienzo*, 2009 WL 4652944, at *3. The Court has disqualified an appraisal claimant who returned proxy cards without instructions to vote for or against the merger, where proceeding in that manner allowed the claimant's shares to be voted in favor of the merger. *See Engel v. Magnavox Co.*, 1976 WL 1705, at *5 (Del. Ch. Apr. 22, 1976) (claim of Henry Frankel). Indeed, "the actions of the beneficial holders are irrelevant in appraisal matters, [and] the inquiry ends" at whether or not

the record holder has properly perfected appraisal rights under Section 262. *Transkaryotic*, 2007 WL 1378345, at *4.

Moreover, if an investor elects to hold shares in street name or through one or more intermediaries, that investor assumes the risk that the intermediaries will fail to exercise appraisal rights correctly. *See, e.g.*, *Enstar Corp. v. Senouf*, 535 A.2d 1351, 1354-55 (Del. 1987) (disqualifying shares from appraisal remedy where broker failed to deliver demand signed by or on behalf of stockholder of record); *Am. Hardware Corp. v. Savage Arms Corp.*, 136 A.2d 690, 692 (Del. 1957) ("If an owner of stock chooses to register his shares in the name of a nominee, he takes the risks attendant upon such an arrangement...."); *Salt Dome Oil Corp. v. Schenck*, 41 A.2d 583, 589 (Del. 1945) ("If, for any reason, [an investor] chooses to allow his shares to be registered on the corporate books in the name of another, it is not a denial of his right of actual ownership to require him to establish his rights and pursue his remedy through the nominee of his own selection."); *Scott v. Arden Farms Co.*, 28 A.2d 81, 84 (Del. Ch. 1942) (where trustees of voting trust had voted shares in favor of merger, trust certificate holders were "manifestly bound by the acts of the voting trustees, done in good faith and within the scope of their authority, in carrying out purposes of the trust").

That principle is equally applicable in this context. By choosing to rely on ISS to transmit its voting instructions, T. Rowe accepted the risk that ISS might

transmit voting instructions inconsistent with T. Rowe's true intentions. [redacted] Ex. 14 (TRP00015767); Ex. 15 (TRP00017140 at TRP00017147). Moreover, T. Rowe's behavior in the weeks leading up to the Meeting demonstrates that it was acutely aware of the possibility that its voting instructions could be incorrectly implemented in this instance. T. Rowe was aware of an issue regarding "missing ballots." On numerous occasions, T. Rowe accessed ISS's Proxy Exchange system and checked to confirm that its instructions remained in the system; it simply failed to check again in the days leading up to the Meeting in September 2013. *See supra* Section C.

Regardless of whether the fault lies with T. Rowe, ISS or both, the indisputable facts are that ISS instructed Broadridge to give proxies to vote the Subject Petitioners' shares in favor of the Merger, and that Broadridge in fact did so. *See supra* Sections C-E; *see* Ex. 1 (Broadridge 0001). Broadridge acted with authority from T. Rowe and the other Subject Petitioners in directing (as part of its client proxy) that the Subject Petitioners' shares be voted in favor of the Merger.[31]

[31] T. Rowe concedes that its original voting instructions were "wiped out from ISS's PX system in favor of the pre-populated instructions that were generated along with the New Meeting Record." Ex. 10 (TRP Rog. Resp. No. 2). Given that ISS's PX system actually contained instructions to vote the Subject

Consequently, the Subject Petitioners are properly charged with the votes that Cede (through its chain of proxies including Broadridge) actually cast as to the Subject Petitioners' shares.

Any contrary holding would introduce considerable doubt and inefficiency into the appraisal process and would invite tactical conduct. If a beneficial owner whose shares are voted in favor of a merger by a nominee may excuse non-compliance with the statutory prerequisites by showing that the vote resulted from an agent's mistake or faithlessness, then an in-depth inquiry into the investor's subjective intentions and the manifestations of those intentions will be required in every such case.[32] *Olivetti Underwood* appears to preclude that inquiry. 217 A.2d at 686. Further, the cost and uncertainty of that inquiry would give investors leeway to vote in favor of transactions with the intention of later claiming a factual excuse of negligence or mistake, if their votes are discovered. And allowing such an inquiry would be fundamentally discordant with both the text of the statute -- which refers only to the vote cast (or written consent given) by the stockholder of

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Petitioners' shares in favor of the Merger, [redacted] *See* RESTATEMENT (THIRD) AGENCY §§ 2.01, 2.02(2).

In contrast the inquiry here is a narrowly factual one: Were the Subject Petitioners' shares voted in favor of the Merger by the stockholder of record? That question is expressly contemplated by Section 262(a) [redacted]

record and not to anyone's intentions or desires -- and with the longstanding general principle that the corporation should be able to deal exclusively with the stockholder of record, and should not become involved in "possible misunderstandings or clashes of opinion between the non-registered and registered holder of shares." *Salt Dome*, 41 A.2d at 589.

CONCLUSION

For the reasons stated, judgment should be entered against the Subject Petitioners. Their shares were voted in favor of the Merger by the stockholder of record. Consequently, they have not complied with the prerequisites of Section 262(a) and are not entitled to appraisal, but rather are entitled to the Merger Consideration of $13.75 per share, without interest.

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Dated: July 30, 2015

EFiled: Aug 06 2015 10:00PM EDT
Transaction ID 57671924
Case No. 9322-VCL

CERTIFICATE OF SERVICE

I hereby certify that, on the 6th day of August, 2015, true and correct copies of the foregoing were caused to be served on counsel of record at the following address as indicated:

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EFiled: Jul 30 2015 05:29PM EDT
Transaction ID 57633321
Case No. 9322-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

COMPENDIUM OF SELECT AUTHORITIES CITED IN BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PETITIONERS WHO VOTED IN FAVOR OF THE MERGER

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Dated: July 30, 2015

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CASES

OTHER AUTHORITIES

EFiled: Jul 30 2015 05:29PM EDT
Transaction ID 57633321
Case No. 9322-VCL

Tab 1

42 Del.Ch. 95
Court of Chancery of Delaware, New Castle County.

ABRAHAM AND CO. et al., Plaintiffs,
v.
OLIVETTI UNDERWOOD CORPORATION,
a Delaware corporation, Defendant.

Nov. 5, 1964.

Brokers, who were minority stockholders involved in short form merger, sought a statutory appraisal of their stock. The resulting corporation objected. The Court of Chancery, Seitz, Chancellor, held that fact that brokers, who were registered stockholders, were not beneficial owners of stock, did not entitle corporation to raise any issue as to right of brokers to seek appraisal and did not impose on brokers any duty to supply proof that beneficial owners desired appraisal.

Order in accordance with opinion.

Attorneys and Law Firms

****740** ***96** Arthur J. Sullivan, of Morris, James, Hitchens & Williams, Wilmington, for certain stockholders.

Other stockholders appeared pro se.

Bruce M. Stargatt, of Morford, Young & Conaway, Wilmington, and Daggett H. Howard, Oscar Cox and Peter D. Ehrenhaft, of Cox, Langford & Brown, Washington, D. C., for defendant.

Opinion

SEITZ, Chancellor:

Certain minority stockholders involved in a short form merger under 8 Del.C. § 253 seek a statutory appraisal. The resulting ****741** corporation ('corporation') objects and this is the decision after hearing.

The corporation first contends that certain brokers who are registered stockholders and who seek an appraisal are not entitled thereto because they have failed to submit satisfactory proof of their authority to act for the beneficial owners of the stock involved. The fact of separate beneficial ownership was established in the course of the merger proceedings. No direct authority is cited in support of the corporation's position. The case of Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 357 U.S 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 has no application, as a cursory reading will show. The case of Reynolds Metal Co. v. Colonial Realty Corp., Del.Ch., 190 A.2d 752, dealt with the right of a broker registered owner to vote certain of such shares for a merger and then seek an appraisal as to other shares so held. Our Supreme Court ruled that such a broker was entitled to an appraisal even though it was not the beneficial owner. In discussing the case the court did say that the corporation could inquire into the authority of the registered stockholder to act as agent. The court cited Zeeb v. Atlas Powder Co., 32 Del.Ch. 486, 87 A.2d 123 as being applicable by analogy. In that case the corporation was held to have the burden of showing lack of authority in challenging a stockholder's right to an appraisal and in that connection was said to have the right to inquire

The Reynolds case involved the right of the corporation to question whether a stockholder had complied with statutory prerequisites to an appraisal. No such issue is here involved. The Zeeb case involved action by a purported agent of a registered stockholder and ***97** the issue was whether evidence of the agent's authority had to be presented by the agent. There is no question of any purported agent's authority here insofar as compliance with the appraisal statute is concerned. I conclude that neither the Reynolds nor the Zeeb case is applicable here.

[1] **[2]** In Salt Dome Oil Corp. v. Schenk, 28 Del.Ch. 433, 41 A.2d 583, 158 A.L.R. 975, our Supreme Court emphasized that in an appraisal proceeding the corporation is required to look only to the registered stockholder. It gave as one reason for its conclusion the fact that in this type of situation the corporation ought not to be involved in possible differences between the registered and beneficial owner. That reasoning is also pertinent when, as here, the corporation seeks to raise an issue of the registered owner's authority. To suggest that because a corporation learns that a registered owner seeking an appraisal is not the beneficial owner imposes on the corporation a duty to seek proof of his authority to act is to inject the corporation into one of the very problems from which it is insulated by being able to rely on the stock ledger. This is particularly true where, as here, the corporation has no evidence that the registered owners may be acting contrary to the wishes of the beneficial owners. The court cannot agree with the corporation's suggestion that as to some the record negatived the possibility that they acted with authority. Thus, in this posture of the case at least, the corporation has no right to raise any issue as to the right of a registered owner to

seek a statutory appraisal and such a stockholder has no duty to supply proof as to that issue. It follows that these broker-registered stockholders are entitled to an appraisal.

The corporation next contends that the communications of certain stockholders (Shields & Co. and Teitelbaums) do not constitute the written demands for payment required by the appraisal statute.

As noted, this was a short form merger under 8 Del.C. § 253. That section provides in part that 'If any such stockholder [minority stockholder of the subsidiary] shall within 20 days after the date of mailing of the notice object in writing to said merger ****742** and demand in writing from the surviving corporation payment for his stock * * *' then, absent an agreement, he is entitled to an appraisal. Under this ***98** type of merger minority stockholders do not receive notice prior to the effectuation of the merger. Thus, it can be seen that the statutory requirements of both an objection and a demand for payment would seem anomalous. The probable fact is that such language was carried over from the practice applicable to appraisal procedures in the so-called regular merger where stockholders receive notice of a proposed merger. However, I am not directly concerned with the objection requirement because both stockholders admittedly objected in writing.

[3] The question is whether the communications which constituted objections also fulfilled the 'written demand for payment' requirement of the statute. In the communications these stockholders state that they 'object' to the merger or say that they desire to 'register objection' thereto. The stockholders rely on these communications as constituting, by fair implication, demands for payments. They cite Delaware authority to the effect that if a writing can be said by fair implication to constitute a demand for payment then the court will deem it sufficient for purposes of the appraisal statute. There can be no quarrel with the law. The question is whether under any reasonable reading of the language of these communications a demand for payment was made. I cannot so conclude. All that one can say of the letters is that the stockholders objected to the merger. I agree that since the stockholders were offered only cash under the terms of the merger the communications had little purpose apart from a possible appraisal. Nevertheless, the statutory ceremony of objection and demand is mandatory and the court is not free to construct a demand in the obsence of any words of that general tenor. Moreover, these stockholders received a copy of the Delaware statute setting forth the objection and demand provision. Thus, they were on notice.

I therefore conclude that these particular stockholders are not entitled to an appraisal. Other objections as to their claims need not be considered.

[4] Finally, I consider objections raised to certain claims for failure to comply with one or more of the various provisions of this court's order of July 16, 1964 providing for the filing of claims, etc. The failures relate to the requirement that the claims be verified, that ***99** copies of stock certificates be filed and copies of purported written objections and demands be filed.

I point out initially that the corporation does not contend that there was any failure to meet any statutory requirements. The question then is whether the enumerated failures with respect to the requirements of the court order are sufficient to deny an appraisal to these stockholders. The answer may perhaps be found by resolving the questions as to whether the elements of noncompliance disrupt the orderly administration of this appraisal proceeding or operate to the corporation's prejudice.

Certainly the absence of a verification on the claim is not important. The same is true of the failure to attach copies of purported written objections and demands because the corporation presumably received them or it would have a statutory basis for opposing such claims. The failure to file a copy of the stock certificates is not sufficient to interfere with the orderliness of the proceedings. Nor can it prejudice the corporation because under 8 Del.C. § 262(g) the corporation can request the court to require the stockholder to submit her stock certificate for notation of these proceedings thereon when the appraiser is appointed or thereafter. I therefore conclude that the objections based on the failure to comply with the court order do not deprive these stockholders of their right to an appraisal.

[5] Next, the stockholder claimant who surrendered her certificates and received ****743** payment is clearly not entitled to an appraisal.

[6] Finally, I consider the H. N. Whitney Goadby & Company claim which was filed in the form of a letter to the Clerk of this court even before the statutory period for seeking an appraisal. The sole question is whether this stockholder filed any written claim pursuant to the requirement of the court order. Here I think the court must insist on certain orderliness in the proceedings. The failure to file a claim deprived the corporation of notice and an opportunity to investigate. The granting of permission to file it now would further delay this matter. On balance I conclude that this

stockholder's claim is denied for failure to reasonably comply with the direction of this court's order to file a claim.

Present order on notice.

All Citations

42 Del.Ch. 95, 204 A.2d 740

Tab 2

2015 WL 66825
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

In re Appraisal of Ancestry.Com, Inc.

CONSOLIDATED C.A. No. 8173–VCG | Submitted: October 14, 2014 | Decided: January 5, 2015

Attorneys and Law Firms

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MEMORANDUM OPINION

GLASSCOCK Vice Chancellor

***1** Ancestry.com, Inc. ("Ancestry") was acquired in 2012 by a private equity firm in a cash-out transaction. Merion Capital L.P. ("Merion"), one of the Petitioners in this appraisal action, purchased its shares of Ancestry after the record date for that transaction. The shares were held in fungible bulk by a record owner, Cede & Co. ("Cede"). Merion caused Cede to file a timely appraisal demand for the shares beneficially owned by Merion. A stockholder may seek appraisal only for shares it has not voted in favor of a merger; Cede had at least as many shares not voted for the merger as those for which Merion sought appraisal. That is, Cede had sufficient shares it had not voted in favor of the merger to "cover" its demand on behalf of Merion. Merion then filed this petition for appraisal of the shares.

A plain reading of the appraisal statute as it existed prior to 2007—and case law construing it—indicates that it is the record holder of shares whose actions with respect to the merger determine standing to seek appraisal; the beneficial owner's actions are irrelevant. Ancestry points out, however, that Section 262 as it existed prior to 2007 required the record owner to file the appraisal action on behalf of the beneficial owner, that the 2007 amendment to Section 262(e) allowed, for the first time, the beneficial owner to file suit in its own name, and that Merion did so here. Thus, argues Ancestry, it is Merion, not Cede, that must show it did not vote in favor of the merger. Moreover, according to Ancestry, because Merion purchased its stock after the record date, it must show that its predecessors did not vote in favor of the merger with respect to these shares as well. Since it cannot demonstrate the latter fact, Ancestry posits, Merion lacks standing here. Ancestry accordingly seeks summary judgment.

Ancestry's arguments notwithstanding, a plain reading of the statute discloses that, for standing purposes, it remains the record holder who must not have voted the shares for which it seeks appraisal. Even if the focus were on the beneficial owner rather that the record owner, Merion did not vote in favor of the merger—to have standing, the statue requires that the stockholder must not have voted the stock for which appraisal is sought in favor of the merger; Section 262 imposes no requirement that a stockholder must demonstrate that previous owners also refrained from voting in favor. Accordingly, Ancestry's Motion for Summary Judgment is denied.

I. BACKGROUND FACTS

A. The Acquisition

Respondent Ancestry is "the world's largest online family history resource."[1] Its subscription-based websites allow subscribers to "discover, preserve and share their family history."[2] Merion, a Petitioner, is a hedge fund that buys stock following merger announcements for the purpose of seeking an appraisal as one of its investment strategies, a practice sometimes known as "appraisal arbitrage."[3]

1 Resp't's Mot. for Summ. J. at 4.

2 Stanco Aff. Ex. 2, at 4.

3 *Id.* Ex. 10, at 81:17–24. I note that Samuel Johnson—one of the partners of Merion, not the great lexicographer—did not consider this phrase to be an accurate characterization of the investment strategy in light of the technical definition of "arbitrage." *See id.* at 76:21–78:20. For a fuller description of trade in appraisal causes of action, see *Merion Capital LP v. BMC Software, Inc.*, C.A. No. 8900–VCG, at 2 (Del. Ch. Jan. 5, 2015).

***2** In December 2012, Ancestry was acquired by the private equity firm Permira Advisors ("Permira") for $32 per share in cash. The transaction was announced on October 22, 2012 and the preliminary proxy was filed on October 30. The definitive proxy was filed on November 30, 2012, indicating a record date of November 30 and a meeting date of December 27, 2012. [4] Following the acquisition, two verified petitions for appraisal were filed. One, filed by Merion, sought an appraisal of 1,255,000 shares, [5] while the second, filed by two affiliated hedge funds, Merlin Partners LP and The Ancora Merger Arbitrage Fund, LP, sought appraisal of a total of 160,000 shares. [6]

4 Stanco Aff. Ex. 1.

5 Verified Pet. for Appraisal, *Merion Capital, L.P. v. Ancestry.com, Inc.*, C.A. No. 8173–VCG (Jan. 3, 2013).

6 Pet. for Appraisal of Stock, *Merlin Partners LP v. Ancestry.com, Inc.*, C.A. No. 8175–VCG (Jan. 3, 2013).

Merion first began purchasing Ancestry shares on December 4, four days after the record date. [7] On December 12, Samuel Johnson, the portfolio manager at Merion, notified Cede, the record owner of shares, that it would be exercising its appraisal rights. [8] The majority of Merion's purchases occurred between December 12 and December 17, when it purchased 1,005,100 of the 1,255,000 shares for which it seeks appraisal. [9] On December 18, 2012, Cede notified Ancestry that it was asserting appraisal rights with respect to 1,255,000 shares beneficially owned by Merion. [10]

7 Stanco Aff. Ex. 18, at MER 0000032.

8 *Id*. Ex. 17, at MER 0003055.

9 *Id*. Ex. 18, at MER 0000032.

10 *See id*. Ex. 24, at MER 0000547.

In its Petition for Appraisal, Merion asserted that it "did not vote in favor of the merger" and that "[n]one of the petitioner's shares were voted in favor of the merger." [11] This assertion notwithstanding, Merion does not put forth any evidence to verify that, in fact, none of its shares were voted in favor of the merger by prior owners. [12] Merion purchased all of its shares on the open market after the record date and neither knows who the sellers were, [13] nor acquired proxies from prior owners to vote its shares. [14]

11 Verified Pet. for Appraisal ¶ 8.

12 Stanco Aff. Exs. 21, 22; *see also id.*Ex. 10, at 41:8–20 (Merion's corporate representative testified that Merion "ha[d] no evidence that could permit it to meet its burden to show that it holds shares not voted in favor of the merger.").

13 *Id.* Ex. 19 (Petitioner's Supplemental Responses and Objections to Respondent's First Set of Interrogatories (Response No. 1)); *Id.*Ex. 10, at 43:14–25.

14 *Id.* Ex. 10, at 39:2–8; 73:11–20.

B. Procedural History

The appraisal petitions were consolidated and I held trial from June 17–19, 2014. In May 2014, a few weeks before trial, Ancestry filed its Motion for Summary Judgment, solely as to Merion's Petition, arguing that Merion could not show that the shares for which it sought appraisal were not voted in favor of the merger. The question before me on this Motion for Summary Judgment, therefore, is whether a beneficial owner is required to show that the specific shares for which it seeks appraisal have not been voted in favor of the merger.

I reserved consideration of the Motion for Summary Judgment until after full briefing. I heard oral argument on the Motion for Summary Judgment, along with post-trial argument, on October 14, 2014; this Opinion relates only to the Motion for Summary Judgment. For the following reasons, I deny the Respondent's Motion. The appraisal decision will issue separately.

II. STANDARD OF REVIEW

Summary judgment is appropriate when the moving party demonstrates that "there are no issues of material fact in dispute and the moving party is entitled to judgment as a

matter of law." [15] The parties here agree that no genuine issue of material fact exists; [16] the only issue is whether, as a matter of law, Merion has met the statutory requirements of Section 262.

15 Ch. Ct. R. 56(c).

16 Answering Br. in Opp'n to Resp't's Mot. for Summ. J. at 8.

III. ANALYSIS

A. History of Appraisal

***3** I find it appropriate to take occasion here to retrace the history of this "creature of statute" [17] before considering the modern iteration and the issues concerning it that are now before me.

17 *Kaye v. Pantone, Inc.*, 395 A.2d 369, 374 (Del. Ch.1978).

At common law, mergers could only be consummated upon the unanimous favorable vote of a company's stockholders. The unanimity requirement created in stockholders a veto power that "made it possible for an arbitrary minority to establish a nuisance value for its shares by refusal to cooperate." [18] When the Delaware General Corporation Law was enacted in 1899, our General Assembly provided for consolidation or merger by less-than-unanimous vote of the stockholders:

> Any two more corporations organized under the provisions of this Act or existing under the laws of this State ... may consolidate into a single corporation....; the directors or a majority of them, of such corporations, as desire to consolidate, may enter into an agreement signed by them, and under the corporate seals of the respective corporations, prescribing the terms and conditions of consolidation....
>
> Written notice of the time and place of a meeting to consider the purpose of entering into such an agreement, shall be mailed to the last known post office address of each stockholder of each corporation ..., and the written consent of the owners of at least *two-thirds* of the capital stock of each corporation shall be necessary to the validity and adoption of such an agreement.... [19]

18 *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 535, n.6 (1941); *see, e.g., Paine v. Saulsbury*, 166 N.W. 1036 (Mich.1918) (refusing to allow a 99% stockholder to dissolve a corporation because the 1% minority stockholders would not agree), *cited in In re Unocal Exploration Corp. Shareholders Litig.*, 793 A.2d 329, 339 (Del. Ch.2000), *aff'd sub nom.*,*Glassman v. Unocal Exploration Corp.*, 777 A.2d 242 (Del.2001).

19 21 Del. Laws c. 273 § 54 (1899) (emphasis added).

At the same time, however, recognizing the need for give-and-take to compensate dissenting stockholders for their loss of the ability to block mergers, an appraisal remedy was provided by statute [20]:

> If any stockholder in either corporation consolidating aforesaid, who objected thereto in writing, shall within twenty days after the agreement of consolidation has been filed and recorded, as aforesaid, demand in writing from the consolidated corporation payment of his stock, such consolidated corporation shall, within three months thereafter, pay to him the value of the stock at the date of consolidation. [21]

That section provided for a three-person panel to ascertain the value of the stock in anticipation of disagreement of valuation. The panel was to be comprised of one individual chosen by each of the dissenting stockholder and the consolidated corporation, and the third to be chosen by those two together. [22]

20 *See Reynolds Metals Co. v. Colonial Realty Corp.*, 190 A.2d 752, 755 (Del.1963); *Francis I. duPont & Co. v. Universal City Studios*, 343 A.2d 629, 634 (Del.1975); *Meade v. Pac. Gamble Robinson Co.*, 51 A.2d 313, 316 (Del. Ch.1947) (citing *Chicago Corp. v. Munds*, 172 A. 452 (Del. Ch.1934), *decree aff'd*,58 A.2d 415 (Del.1948)); Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 Duke L.J. 613, 614 (1998). *But see*Robert B. Thompson, *Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law*, 84 Geo. L.J. 1, 14 (1995) (noting that not all states provided for appraisal in tandem with allowing mergers by less-than-unanimous vote).

21 21 Del. Laws c. 273 § 56 (1899).

22 *Id.*

***4** The appraisal statute has been amended many times since its inception at the turn of the twentieth century, as would be clear to any reader of the statutory language above who is familiar with the modern statute. In its earlier iterations, appraisal was simply designed to serve as "a statutory means whereby the shareholder can avoid the conversion of his property into other property not of his choosing" [23]—characterized by scholars as a historic "liquidity purpose." [24] In the wake of an evolution of a "more fungible view of property rights," where the difference between shares of a selling and surviving corporation is perhaps not always significant, and in light of national securities markets providing liquidity in many cases, the place for appraisal within our corporate law changed. [25] Appraisal, it is theorized, came to serve instead "as a check against opportunism by a majority shareholder in mergers and other transactions in which the majority forces minority shareholders out of the business and requires them to accept cash for their shares." [26] More recently, a market has arisen between the stockholders subject to a merger—protection of whom was the traditional concern of the appraisal statute—and those who purchase stock from them pending the merger, seeking to maximize value through appraisal litigation. A vigorous debate exists as to whether such litigation is wholesome; [27] for my purposes, however, it is important to note that appraisal rights are a creation of the legislature, not judge-made law, and are "not determined with reference to a stockholder's purpose." [28] My function here is to ensure compliance with the statutory prerequisites, and if they are met, to determine fair value.

23 *Francis I. duPont & Co.*, 343 A.2d at 634.

24 *See* Thompson, *supra* note 20, at 4–5; Wertheimer, *supra* note 20, at 615.

25 Thompson, *supra* note 20, at 4.

26 *Id.* ("In earlier times, policing transactions in which those who controlled the corporation had a conflict of interest was left to the courts through the use of fiduciary duty or statutes that limited corporate powers. Today, that function is left for appraisal in many cases. The overwhelming majority of appraisal cases in the last decade reflect this cash-out context: less than one in ten of the litigated cases illustrate the liquidity/fundamental change concern of the classic appraisal remedy."); *see also* Wertheimer, *supra* note 20, at 615–16 ("The remedy fulfills this function ex ante, deterring insiders from engaging in wrongful transactions, and ex post, providing a remedy to minority shareholders who are subjected to such transactions."(footnote omitted)).

27 *See, e.g.*,Minor Myers & Charles R. Korsmo, *Appraisal Arbitrage & the Future of Public Company M & A*, 92 Wash. U.L.Rev. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm? abstract_id=2424935.

28 2 Edward P. Welch et al., Folk on the Delaware General Corporation Law § 262.05 (6th ed. 2014).

B. The Appraisal Statute

1. *Overview of the Appraisal Statute*

The right to appraisal of stock is set out in 8 *Del. C.* § 262. Subsection (a) sets forth the standing requirement, describing those stockholders who "shall be entitled" to appraisal:

> Any stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, who has otherwise complied with subsection (d) of this section and who has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228 of this title shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock under the circumstances described in subsection (b) and (c) of this section. As used in this section, the word "stockholder" means a holder of record of stock in a corporation.... [29]

Thus, in order for a petitioner to perfect the appraisal remedy according to the plain language of Section 262(a), the petitioner need only show that the *record holder* of the stock for which appraisal is sought: (1) held those shares on the date it made a statutorily compliant demand for appraisal on the corporation; (2) continuously held those shares through the effective date of the merger; (3) has otherwise complied with subsection (d) of the statute, concerning the form and timeliness of the appraisal demand; and (4) has not voted

in favor of or consented to the merger with regard to those shares.

29 8 *Del. C.* § 262(a).

Section 262(d) provides that notice of a merger invoking appraisal rights must be given to the "stockholder," that is, the "holder of record of stock" [30] and prescribes how that record holder perfects appraisal rights, by making a written demand prior to the vote. Finally, the most recent iteration of subsection (e) sets out the procedure by which a record stockholder who has complied with subsections (a) and (d) and is otherwise entitled to appraisal may file its petition. It also provides such record holder the opportunity to request a statement from the company setting forth "the aggregate number of shares not voted in favor of the merger or consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares." [31] The subsection concludes with the following provision: "Notwithstanding subsection (a) of this section, a ... beneficial owner ... may in such person's own name, file a petition or request from the corporation the statement described in this subsection." [32] Therefore, reading subsections (d) and (e) together, the statute provides that the stockholder of record eligible for appraisal must provide the written demand, but once that is done, either the holder of record *or* the beneficial owner may demand information regarding aggregate shares subject to appraisal, and either may file the appraisal petition.

30 *Id.*

31 *Id.* § 262(e).

32 *Id.*

***5** To reiterate, here, Cede was the holder of record with respect to shares not voted for the transaction, and thus had standing to make a demand under subsections (a) and (d). It did so. With respect to those shares, the beneficial owner, Merion, filed the petition in its own name, pursuant to subsection (e). In this situation, Ancestry argues that Merion must demonstrate that *it*, and not Cede, meets the requirements of subsection (a), and that subsection (e), read properly, imposes on Merion an obligation to demonstrate not merely that it did not vote the stock in question for the merger, but that no one else did so, either. This Court previously faced an analogous issue in another case, *In re Appraisal of Transkaryotic Therapies, Inc.*

2. *Transkaryotic and the 2007 Amendment to Section 262(e)*

In *Transkaryotic*, decided in 2007, this Court was asked "whether under 8 *Del. C.* § 262 a beneficial owner, who acquires shares after the record date, must prove that each of its specific shares for which it seeks appraisal was not voted in favor of the merger?" [33] Ultimately, then-Chancellor Chandler answered that question in the negative, concluding that "[u]nder the literal terms of the statutory text and under longstanding Delaware Supreme Court precedent, only a record holder, as defined in the DGCL, may claim and perfect appraisal rights. Thus, it necessarily follows that the record holder's actions determine perfection of the right to seek appraisal." [34] More pointedly, the Court held that "the actions of the beneficial holders are irrelevant in appraisal matters." [35] The Court considered the way in which shares of stock are often held:

> [M]ost securities issued by domestic companies listed on the NYSE and on the Nasdaq are "on deposit" with central securities depositories, such as the Depository Trust Company ("DTC"). Securities deposited at DTC as part of its book-entry system are generally registered in the name of DTC's nominee, Cede & Co. ("Cede"), making DTC's nominee the registered owner or record holder of these securities. The securities deposited as a part of this system are held in an undifferentiated manner known as "fungible bulk," which means that no DTC participant, no customer of any participant (such as an intermediary bank or broker), and no investor who might ultimately have a beneficial interest in securities registered to Cede, has any ownership rights to any particular share of stock reflected on a certificate held by Cede. [36]

Simply put, the Court found that it was "incorrect" to "assum[e] that Cede's aggregate share vote on the [merger] may be traced to 'specific shares' attributable to specific beneficial owners." [37]

33 *In re Appraisal of Transkaryotic Therapies, Inc.*, 2007 WL 1378345, at *1 (Del. Ch. May 2, 2007); *see also id.* at *3 ("The question presented in this case can be stated thusly: Must a beneficial shareholder, who purchased shares *after* the record date but before the merger vote, prove, by documentation, that each newly acquired share (*i.e.*, after the record date) is a share not voted in favor of the merger by the *previous* beneficial shareholder?").

34 *Id.* at *3.

35 *Id.* at *4.

36 *Id.* at *2.

37 *Id.*

Cede had voted some shares in favor of the merger and some against, but the Court ultimately found that this did not preclude Cede's petition for appraisal with respect to shares not voted in favor of the merger; *i.e.*, Cede, having otherwise perfected its appraisal rights with respect to approximately 11 million shares for which appraisal was sought, and having voted approximately 17 million shares against the merger, was able to exercise appraisal rights for the 11 million shares held by the beneficial owner. [38]

38 *Id.* at *4.

***6** Following the *Transkaryotic* decision, which noted that only *record holders* could "*claim* and perfect appraisal rights," [39] the General Assembly amended Section 262(e) of the appraisal statute to add, in relevant part,

> Notwithstanding subsection (a) of this section, a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person *may, in such person's own* name, file a petition or request from the corporation the statement described in this subsection. [40]

39 *Id.* at *3 (emphasis added).

40 8 *Del. C.* § 262(e) (emphasis added).

Notably, when presented with occasion to reconsider the role of beneficial owners in appraisal actions in light of modern trading practices, the General Assembly decided to allow beneficial owners to file a petition in their own name and seek a statement from the corporation, [41] but did not otherwise amend Section 262 to allow beneficial owners to perfect appraisal rights by not voting in favor and making a timely demand; those provisions remain applicable only to "stockholders," still defined as "record owners." Further, the General Assembly took no action to amend the statute in light of the Court's holding that a record owner need only show that the number of shares that it did not vote in favor of the merger is equal to or greater than the number of shares for which it perfected appraisal on behalf of petitioning beneficial owners. There is, in short, no indication that the Court's observation that "the actions of beneficial holders are irrelevant in appraisal matters" [42] is no longer accurate, except with respect to rights granted in Section 262(e).

41 Ancestry makes an argument based on the statutory language describing the statement from the corporation; I address it below.

42 *Transkaryotic*, 2007 WL 1378345, at *4.

C. Application of the Statute to these Facts

Merion's argument in this case is statutory and quite simple—it involves a straightforward reading of the statute, considered in light of this Court's decision in *Transkaryotic*. Essentially, Merion argues that, as beneficial owner, it must cause the stockholder—*i.e.*, Cede & Co., the record owner—to make demand. Cede must also have had sufficient shares not voted in favor of the merger, per the *Transkaryotic* decision, to cover the number of shares for which Merion sought appraisal. Having thus perfected appraisal rights through Cede, the beneficial owner may file in its own name in light of the 2007 amendment to Section 262(e), which Merion did here. Thus, Merion concludes, it has standing to pursue appraisal.

Ancestry argues to the contrary: "The statute as amended permits Merion to bring its own petition, but does nothing to excuse Merion from the obligation that has always attached to every Delaware appraisal petitioner to show that the shares it seeks to have appraised were not voted in favor of the merger." [43] In other words, Ancestry assumes that in amending subsection (e) of Section 262 to allow beneficial owners to bring a petition, the General Assembly necessarily, if silently, amended the standing requirements of subsection (a).

43 Opening Br. in Supp. of Mot. for Summ. J. at 2.

***7** As this Court has previously stated,

> In interpreting a statute, Delaware courts must ascertain and give effect to the intent of the legislature. If the statute is found to be clear and unambiguous, then the plain meaning of the statutory language controls. The fact that the parties disagree about the meaning of the statute does not create ambiguity. Rather, a statute is ambiguous only if it is reasonably susceptible of different interpretations, or if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature. If a statute is ambiguous, however, courts should consider the statute as a whole, rather than in parts, and read each section in light of all others to produce a harmonious whole. Courts also should ascribe a purpose to the General Assembly's use of statutory language, and avoid construing it as surplusage, if reasonably possible. [44]

44 *In re Krafft–Murphy Co., Inc.*, 62 A.3d 94, 100 (Del. Ch.2013), *quoted in In re Krafft–Murphy Co., Inc.*, 82 A.3d 696, 702 (Del.2013) (footnotes and internal quotations omitted); *see also Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc.*, 36 A.3d 336, 342–43 (Del.2012) ("At the outset, a court must determine whether the provision in question is ambiguous. Ambiguity exists when a statute is capable of being reasonably interpreted in two or more different senses. If the statute is unambiguous, then there is no room for judicial interpretation and the plain meaning of the statutory language controls. If it is ambiguous, we consider the statute as a whole, rather than in parts, and we read each section in light of all others to produce a harmonious whole."(internal footnotes and quotation marks omitted)).

Additionally,

> where a provision is expressly included in one section of a statute, but is omitted from another, it is reasonable to assume that the [l]egislature was aware of the omission and intended it. The courts may not engraft upon a statute language which has been clearly excluded therefrom by the [l]egislature. [45]

45 *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del.1982).

In consideration of the foregoing principles, I find Section 262 to be unambiguous, and thus, its plain meaning controls. Accordingly, as applied to these facts, I find that: (1) Cede, the record owner, made demand as required by Section 262(a); (2) consistent with *Transkaryotic*, Cede had at least as many shares not voted in favor of the merger as the number for which demand was made; and (3) in exercise of its rights under Section 262(e), the beneficial owner, Merion, filed its petition in its own name. Under the unambiguous language of subsection (a), Merion has standing to pursue appraisal here.

Ancestry suggests that giving the statute its plain meaning could lead to an absurdity: an "interpretation that relieves an appraisal petitioner of the burden of showing that the shares it seeks to have appraised were 'not voted in favor of the merger' leads to absurd results inconsistent with the statute's text" because "the number of shares that qualify for appraisal cannot exceed the number of shares not voted in favor of the merger." [46] This is not, to my mind, a concern on the facts presented, because under the statute it is the record holder's burden to show that it did not vote in favor of the merger with respect to the shares for which appraisal is sought. *Transkaryotic* teaches that, for stock held in fungible bulk, the record holder must have refrained from voting a number of shares sufficient to cover the demand. Cede meets that requirement here.

46 Opening Br. in Supp. of Mot. for Summ. J. at 16.

***8** The potential for "over-appraisal" posited by Ancestry is a theoretical concern where the appraisal arbitrageur acquires stock after a record date, which stock may have been voted in favor of the merger by the seller. I discuss this issue briefly in connection with a discussion of the information rights conveyed to stockholders in Section 262(e) below, and more fully in *Merion Capital LP v. BMC Software, Inc.* [47] Suffice it to say here that Ancestry raises a theoretical problem which is not present in the case before me, and which in any event would at most threaten a policy goal of the statute, not render

the statute absurd or inoperable. Such a concern may of course be addressed by the legislature, but it is insufficient to permit me to look past the unambiguous language of the statute.

47 C.A. No. 8900–VCG, at 18–20 (Del. Ch. Jan. 5, 2015).

The plain language of the statute, including the 2007 amendment to Section 262(e), does not impose on beneficial owners any new burden in connection with affording them the opportunity to file petitions in their own names. Further, nothing has changed the longstanding requirement under Delaware law that "[t]o be entitled to appraisal, the beneficial owner must ensure that the record holder of his or her shares makes the demand." [48] That record holder—not the beneficial owner—is subject to the statutory requirements for showing entitlement to appraisal and demonstrating perfection of appraisal rights under Sections 262(a) and (d). While beneficial owners may file a petition in their own names, the record holder is still required to comply with the statutory requirements in order for that petition to be viable.

48 *Dirienzo v. Steel Partners Holdings L.P.*, 2009 WL 4652944, at *3 (Del. Ch. Dec. 8, 2009).

Even if Section 262 did impose the voting/consent prohibition of subsection (a) on a beneficial owner petitioning for appraisal, Merion would meet that requirement here. Merion did not cause its stock to be voted for the merger. Ancestry points out that Merion cannot demonstrate that the stock it beneficially owns—held in fungible bulk by Cede—was not voted for the merger by the sellers. The plain language of the standing requirement of subsection (a) focuses on the actions of the *stockholder*, not on the shares, however. Ancestry argues that not imposing a share-tracing requirement [49] on arbitrageurs could lead to the result discussed above: theoretically, more shares could be appraised than the total not voted for the merger.

49 I use the term "share-tracing requirement" as a shorthand for the burden that Ancestry suggests the statute imposes on appraisal petitioners; it is somewhat imprecise, as Ancestry suggests that the burden could be met in a number of ways, including through, for instance, a petitioner buying shares after the record date also buying sufficient proxies to cover the number of shares for which it seeks appraisal. *See infra* note 54.

To demonstrate that this could not comport with legislative intent, Ancestry points to the requirement that subsection (e) imposes on the corporation to provide an informational statement. Section 262(e) provides that a stockholder or beneficial owner

> upon written request, shall be entitled to receive from the corporation ... a statement setting forth the *aggregate number of shares not voted in favor of the merger or consolidation* and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares. [50]

This information, Ancestry points out, is intended to provide a potential petitioner with information about the pool of other potential litigants, so that it can assess whether the costs of appraisal litigation can be allocated in a way that makes the litigation financially viable. In order for this statement to provide usable information, Ancestry argues, a share-tracing requirement must be imposed on arbitrageurs; otherwise, "shares not voted ... with respect to which demands ... have been received" may inadequately describe the pool of eligible shares, which could include shares voted for the merger by prior owners now held by arbitrageurs. Once again, Ancestry has merely pointed out that the statute may not perfectly fulfill what it suggests is the policy goal of the legislature. If the General Assembly wishes to address the "problems" caused by appraisal arbitrage, either substantive or with respect to the operation of Section 262, presumably it will do so, but the fact that, in Ancestry's reading, the statutory language is an imperfect representation of legislative intent does not give a judge license to rewrite clear statutory language; nothing Ancestry has pointed out makes operation of the statute impossible or leads to a result that is absurd.

50 *Id.* § 262(e).

***9** Finally, Ancestry contends that Section 262(e) contains an explicit share-tracing requirement. Ancestry points to the following language from Section 262(e): "a person who is a beneficial owner of *shares of such stock* held ... by a nominee *on behalf of such person* may, in such person's own name, file a petition [for appraisal]." [51] It argues that "shares of such stock" refers to the earlier sentence in that subsection imposing on the company the information reporting requirement discussed above—"shares not voted in favor of the merger or consolidation and only with respect to which demands for appraisal have been received." [52] Notably, however, Ancestry concedes that "[t]he subsections

of § 262 pertaining to the *perfection* of appraisal rights were not amended to refer to beneficial owners." [53]

51 Reply Br. in Supp. of Resp't's Mot. for Summ. J. at 7 (alterations in original) (quoting 8 *Del. C.* § 262(e)).

52 8 *Del. C.* § 262(e); *see also* Reply Br. in Supp. of Resp't's Mot. for Summ. J. at 7.

53 Opening Br. in Supp. of Mot. for Summ. J. at 20 (emphasis added).

Subsection (e) expands the rights of petitioners under Section 262. It allows beneficial owners as well as record holders to seek appraisal, and gives such petitioners an informational right. The language Ancestry points to is simply insufficient to work the legislative change Ancestry posits: to place the burden of demonstrating perfection of rights to appraisal on the beneficial owner and impose a share-tracing requirement. Nothing in the above-quoted subsection suggests that the General Assembly intended to require beneficial owners who made post record-date purchases to show that their specific shares were not voted in favor of the merger, in contradiction to the approach taken in *Transkaryotic* which accounted for the fact that beneficially-owned shares are typically held in fungible bulk.

Ancestry's real argument is that allowing arbitrageurs appraisal rights for shares they acquired after the record date could lead to an unwholesome result, namely, extending appraisal rights to shares voted *for* the merger by prior owners, potentially resulting in more shares appraised than the number not voted for the merger. They ask me to remedy this by imposing a requirement on beneficial owners who petition for appraisal, a requirement that is not found in the statute: tracing the voting history of their shares. [54] To do so would be to exercise a legislative, not a judicial, function. [55]

54 Ancestry points out that "tracing"—speaking strictly—the voting history of a particular share is not required to avoid the unwholesome result addressed above; Ancestry suggests that a petitioner could simply buy sufficient proxies to cover the number of shares for which it seeks appraisal, and suggests other ways of satisfying this policy concern. This argument proves too much; it clarifies that there are a number of ways to address what Ancestry sees as a problem with the statute. This is a matter requiring legislative, not judicial, deliberation. *See Merion Capital LP v. BMC Software, Inc.*, C.A. No. 8900–VCG, at 18–20 (Del. Ch. Jan. 5, 2015).

55 *See, e.g.*,*In re Adoption of Swanson*, 623 A.2d 1095, 1099 (Del.1993) ("It is beyond the province of courts to question the policy or wisdom of an otherwise valid law. Instead, each judge must take and apply the law as they find it, leaving any changes to the duly elected representatives of the people."(internal citation omitted)); *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155, 160 (Del. Ch.2013) ("If a valid statute is not ambiguous, the court will apply the plain meaning of the statutory language to the facts before it. It would usurp the authority of our elected branches for this court to create a judicial exception to the words 'all ... privileges' for pre-merger attorney-client communications regarding the merger negotiations. That sort of micro-surgery on a clear statute is not an appropriate act for a court to take."(internal footnotes omitted)).

IV. CONCLUSION

***10** I find that Cede perfected Merion's appraisal rights with respect to the shares for which is seeks appraisal, and that Merion is entitled to bring a petition for appraisal of those shares in its own name under Section 262(e). For the foregoing reasons, the Respondent's Motion for Summary Judgment is denied. An appropriate order accompanies this Memorandum Opinion.

ORDER

AND NOW, this 5th day of January, 2015,

The Court having considered the Respondent's Motion for Summary Judgment as to Merion Capital, L.P., and for the reasons set forth in the Memorandum Opinion dated January 5, 2015, IT IS HEREBY ORDERED that the Respondent's Motion is DENIED.

SO ORDERED:

All Citations

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Tab 3

2007 WL 1378345
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

In re: APPRAISAL OF TRANSKARYOTIC THERAPIES, INC.

No. Civ.A. 1554-CC. | Submitted Feb. 9, 2007. | Decided May 2, 2007.

Dear Counsel:

CHANDLER, J.

***1** For the reasons set forth below, after carefully considering counsel's arguments, I deny respondents' motion for partial summary judgment.

I. NATURE AND STAGE OF THE PROCEEDINGS

This action for statutory appraisal under 8 *Del. C.* § 262 arose from the July 27, 2005 merger of Transkaryotic Therapies, Inc. ("TKT") with and into a wholly-owned subsidiary of Shire Pharmaceuticals Group plc ("Shire"). Between August 10, 2005 and November 23, 2005, five petitions for appraisal of 10,972,650 shares of TKT were filed in this Court on behalf of twelve different beneficial shareholders (the "Petitioners") of TKT. This Court consolidated the several actions by Orders dated November 21 and December 28, 2005, and discovery began on December 11, 2006. On April 6, 2006, TKT filed this motion for partial summary judgment.

II. BACKGROUND FACTS

TKT was a biopharmaceutical company focused on researching, developing, and commercializing treatments for rare diseases resulting from protein deficiencies. On April 21, 2005, TKT announced a definitive merger agreement with Shire under which Shire would acquire TKT. Shire agreed to pay $37 per share, representing a 44% premium over the average TKT closing share price for the four weeks before the announcement. The record date was set for June 10, 2005 and TKT held a meeting of stockholders on July 27, 2005. At that meeting, 52% of stockholders approved the merger.

As of the record date (June 10, 2005), nominal petitioner, Cede & Co., was the record holder of 29,720,074 shares of TKT. Cede voted 12,882,000 shares in favor of the merger, 9,888,663 against it, and abstained or did not vote 6,949,411 shares in connection with the merger. On the record date, petitioners were beneficial owners of 2,901,433 of the 10,972,650 shares for which petitioners now seek appraisal. Petitioners purchased the remaining 8,071,217 (10,972,650-2,901,433 = 8,071,217) shares (the "disputed shares") after the record date but before the effective date of the merger. Petitioners seek appraisal as to all the shares they own.

III. CONTENTIONS

The motion before me boils down to one issue: whether under 8 *Del. C.* § 262 a beneficial owner, who acquires shares after the record date, must prove that each of its specific shares for which it seeks appraisal was not voted in favor of the merger?

TKT argues that a shareholder seeking appraisal bears the burden of proving compliance with the prerequisites of § 262. Where a petitioner cannot demonstrate such compliance, this Court will disqualify that petitioner's shares from the appraisal proceeding. TKT concedes that the term shareholder, under § 262, refers only to the record holder. TKT contends, however, that the record owner acts only as an agent to the beneficial owner. Thus, a purchasing beneficial owner takes subject to the actions and inactions of the previous beneficial owner. If the previous beneficial owner voted stock in favor of the merger, the current beneficial owner may not seek appraisal for those shares. If the previous beneficial owner voted against the merger, the current owner may seek appraisal for those shares. If no record exists as to how the previous beneficial owner voted, then this Court must not allow appraisal since the petitioner would not have complied with its burden under § 262.

***2** Petitioners cannot establish that the disputed shares were not voted in favor of the merger. Additionally, TKT submits that petitioners cannot rely on Cede's negative votes [1] because there is no proof that those specific shares are the shares that petitioners hold. Thus, petitioners are not entitled to appraisal of the disputed shares as a matter of law according to TKT.

1 It is undisputed that Cede was record owner of 16,838,074 shares that can be counted as "no votes" for appraisal purposes. Shares not voted or for which Cede abstained from voting are included in no votes for § 262 purposes. Thus, Cede's 9,888,663 no votes, together with its abstentions for 6,949,411 shares equals 16,838,074 TKT shares "eligible" for an appraisal demand.

Petitioners respond that TKT's argument is contrary to the express provisions of the statute, is inconsistent with established precedent, and makes no sense in light of modern securities practice. TKT's analysis, petitioners argue, incorrectly places the burden on the beneficial holder, a party with no official appraisal rights under § 262. Neither statute nor case law supports or justifies such a requirement. Instead, petitioners contend that Delaware law contradicts TKT's contentions. Section 262 makes clear that the record holder must comply with the appraisal statute. Further, a corporation must rely on its record to determine who holds rights as a stockholder, including appraisal rights. As such, where the record owner (in this case, Cede) has proven compliance, Delaware law requires nothing more, argues petitioners.

Petitioners also attack TKT's argument as inconsistent with modern securities practice. That is, TKT incorrectly assumes that Cede's aggregate share vote on the TKT merger may be traced to "specific shares" attributable to specific beneficial owners. That assumption, however, is incorrect. According to petitioners, most securities issued by domestic companies listed on the NYSE and on the Nasdaq are "on deposit" with central securities depositories, such as the Depository Trust Company ("DTC"). Securities deposited at DTC as part of its book-entry system are generally registered in the name of DTC's nominee, Cede & Co. ("Cede"), making DTC's nominee the registered owner or record holder of these securities. The securities deposited as a part of this system are held in an undifferentiated manner known as "fungible bulk," which means that no DTC participant, no customer of any participant (such as an intermediary bank or broker), and no investor who might ultimately have a beneficial interest in securities registered to Cede, has any ownership rights to any particular share of stock reflected on a certificate held by Cede. Rather, DTC's participants have an electronic book-entry position representing securities held in their DTC accounts. That book-entry position represents a participant's pro-rata portion of Cede's aggregate holding in a given security. Transfers of those positions (through trading in public stock markets) are effected by electronic book-entry adjustments to the accounts of the affected participants, and are cleared and settled with trades among all other such participants through DTC's settlement system, including on a continuous net settlement basis. Thus, petitioners contend that although it may be possible for an issuer or its agents to determine the total number of merger-related votes and appraisal demands ultimately attributable to the shares of Transkaryotic Therapies, Inc. common stock held by Cede in fungible bulk, the nature of the system is such that none of those votes or demands were ever related to "specific shares" or "blocks of shares."

IV. ANALYSIS

A. Rule 56: Motion for Summary Judgment

***3** The standard for reviewing a Court of Chancery Rule 56 motion for summary judgment is well-settled. Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." [2] 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." [3] The nonmoving party, however, "may not rest upon mere allegations or denials of [the] pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." [4] Moreover, the Court may award summary judgment to the nonmoving party when the undisputed material facts of record show that the other party is clearly entitled to such relief. [5] Respondents sufficiently show that no genuine issue of material fact exists regarding compliance with § 262(a). Respondents fail to show, however, that they are entitled to judgment as a matter of law.

2 *Korn v. New Castle County*, 2005 Del. Ch. LEXIS 25, at *13, 2005 WL 396341 (Feb. 14, 2005).

3 *Elite Cleaning Co. v. Walter Capel and Artesian Water Co.*, 2006 Del. Ch. LEXIS 105, at *8, 2006 WL 1565161 (June 2, 2006).

4 *Id.*

5 *See Cont'l Ins. Co. v. Rutledge & Co.*, 2000 Del. Ch. LEXIS 40, at *2, *3-4 & *6 n. 3, 2000 WL 268297 (Feb. 15, 2000) ("Chancery Court Rule 56 gives that court the inherent authority to grant summary judgment *sua sponte* against a party seeking summary judgment ... when the

'state of the record is such that the non-moving party is clearly entitled to such relief.'") (quoting *Stroud v. Grace*, 606 A.2d 75, 81 (Del.1992)).

B. 8 Del. C. § 262

Historically, all major corporate decisions required unanimous shareholder consent. This requirement created a veto power and allowed even a single shareholder to obstruct corporate action. In order to prevent nuisance blocking, the Legislature enacted statutes permitting fundamental corporate changes without unanimous shareholder consent. Concurrently, the Legislature created appraisal rights in an effort to compensate minority holders for the loss of the veto power and to give dissenters the right to demand fair value of shares. [6] Thus, the primary purpose of § 262 is to protect the contractual rights of shareholders who object to a merger [7] and to fully compensate shareholders for any loss they may suffer as a result of a merger. [8]

6 R. Franklin Balotti & Jesse A. Finkelstein, Del. Law of Corp. and Bus. Org., § 9.42 (3rd ed. Supp.2005).

7 *Root v. York Corp.*, 39 A.2d 780 (Del.Ch.1944).

8 *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del.1983).

This limited legislative remedy provides a dissenting shareholder with an absolute right to the judicially determined fair value of its shareholdings. [9] The right, however, is available only to a shareholder who, as defined in the DGCL, is a "holder of record of stock in a stock corporation." [10] Further, the record holder bears the ultimate burden of establishing its right to appraisal. [11] The record holder must make written demand for appraisal before the vote, continuously hold such shares through the effective date of the merger, and neither vote in favor of the merger nor consent to it in writing pursuant to 8 *Del. C.* § 228. [12] Although compliance with the statutory formalities has been strictly enforced, [13] a record holder has an absolute right to proceed under § 262 once the record holder complies with its requirements. [14] No other person or entity, however, may demand appraisal pursuant to § 262. [15]

9 8 *Del. C.* § 262(a).

10 *Id.*

11 *Schneyer v. Shenandoah Oil Corp.*, 316 A.2d 570, 573 (Del.Ch.1974).

12 8 *Del. C.* § 262(a).

13 *Lutz v. A.L. Garber Co.*, 340 A.2d 186, 187 (Del.Ch.1974).

14 *Kaye v. Pantone, Inc.*, 395 A.2d 369, 372-73 & 375 (Del.Ch.1978).

15 *See, e.g., Bandell v. TC/GP, Inc.*, 1996 Del. LEXIS 23, 1996 WL 69789 (Jan. 26, 1996); *Enstar Corp. v. Senouf*, 535 A.2d 1351, 1356 (Del.1987); *Neal v. Ala. By-Prods. Corp.*, 1988 Del. Ch. LEXIS 135, at *2, 1988 WL 105754 (Oct. 11, 1988).

The question presented in this case can be stated thusly: Must a beneficial shareholder, who purchased shares *after* the record date but before the merger vote, prove, by documentation, that each newly acquired share (*i.e.*, after the record date) is a share not voted in favor of the merger by the *previous* beneficial shareholder? The answer seems simple. No. Under the literal terms of the statutory text and under longstanding Delaware Supreme Court precedent, only a record holder, as defined in the DGCL, may claim and perfect appraisal rights. Thus, it necessarily follows that the record holder's actions determine perfection of the right to seek appraisal.

***4** In *Olivetti Underwood Corp. v. Jacques Coe & Co.*, the Delaware Supreme Court specifically addressed the relationship between a corporation and beneficial holders in the context of an appraisal. [16] It considered whether a respondent corporation had a right to require each broker-petitioner to prove, as a prerequisite to the statutory right of appraisal, that it was duly authorized by the beneficial owner of the stock to seek appraisal. The Court answered by stating that "... there must be order and certainty, and a sure source of information, so that the corporation may know who its members are and with whom it must treat...." [17] Therefore, "corporations ought not be involved in possible misunderstandings or clashes of opinion between non-registered and registered holders of stock." [18] Instead, a corporation "may rightfully look to the corporate books as the sole evidence of membership" because under Delaware law, "there is no recognizable stockowner under § 262 except a registered stockholder." [19] "The relationship between, and the rights and obligations of, a registered stockholder and his beneficial owner are not relevant issues in a proceeding of this kind." [20] A beneficial owner must "establish his rights and pursue his remedy through the nominee of his own selection." [21] It follows then that the determinative record

regarding compliance with § 262 requirements is that of the record holder.

16 217 A.2d 683 (Del.1966).

17 *Olivetti Underwood Corp.*, 217 A.2d at 685 (quoting *Salt Dome Oil Corp. v. Schenck*, 41 A.2d 583 (Del.1945)).

18 *Id.* at 686.

19 *Olivetti Underwood Corp.*, 217 A.3d at 686.

20 *Id.* at 687.

21 *Id.* at 686.

The issue here mirrors that in *Olivetti Underwood Corp.* Respondent corporation, TKT, seeks to examine relationships between Cede (the record holder) and certain non-registered, beneficial holders in order to determine the existence of appraisal rights. But the Supreme Court has already deemed this relationship to be an improper and impermissible subject of inquiry in the context of an appraisal. The law is unequivocal. A corporation need not and should not delve into the intricacies of the relationship between the record holder and the beneficial holder and, instead, must rely on its records as the sole determinant of membership in the context of appraisal. Thus, following the clear teachings of *Olivetti Underwood Corp.*, I conclude, in the circumstances here, that only Cede's actions, as the record holder, are relevant.

Cede is and has been the record holder of 29,720,074 shares of TKT at all relevant times. "It is understood by now that an entity like Cede & Co. that is a record holder (but not beneficial holder) of a company's shares can vote certain of those shares against a merger, and others in favor, and seek appraisal as to the dissenting shares." [22] Thus, the fact that Cede voted shares in favor and against the merger does not preclude Cede from petitioning this Court for appraisal of those shares not voted in favor of the merger. It is uncontested that Cede voted 12,882,000 shares in favor of the merger and 16,838,074 against, abstained, or not voted in connection with the merger. It is further uncontested that Cede otherwise properly perfected appraisal rights as to all of the 10,972,650 shares that petitioners own and for which appraisal is now sought. Thus, because the actions of the beneficial holders are irrelevant in appraisal matters, the inquiry ends here. Cede, the record holder, properly perfected appraisal rights under § 262. As a result, Cede may exercise appraisal rights for all 10,972,650 contested shares.

22 *Union Ill. 1995 Inv. L.P. v. Union Fin. Group, Ltd.*, 847 A.2d 340, 365 (Del.Ch.2004).

***5** Respondents raise one policy concern that deserves mentioning. They argue that this decision will "pervert the goals of the appraisal statute by allowing it to be used as an investment tool for arbitrageurs as opposed to a statutory safety net for objecting stockholders." [23] That is, the result I reach here may, argue respondents, encourage appraisal litigation initiated by arbitrageurs who buy into appraisal suits by free-riding on Cede's votes on behalf of other beneficial holders-a disfavored outcome. [24] To the extent that this concern has validity, relief more properly lies with the Legislature. Section 262, as currently drafted, dictates the conclusion reached here. Only the record holder possesses and may perfect appraisal rights. The statute simply does not allow consideration of the beneficial owner in this context. The Legislature, not this Court, possesses the power to modify § 262 to avoid the evil, if it is an evil, that purportedly concerns respondents.

23 Opening Br. in Supp. of Respondents' Mot. for Partial Summ. J. at 1.

24 *But cf. Salomon Bros., Inc. v. Interstate Bakeries Corp.*, 576 A.2d 650, 652-53 (stating that appraisal rights are not determined by reference to a stockholder's motives or purpose).

IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 2007 WL 1378345

Tab 4

40 Del.Ch. 515
Court of Chancery of Delaware, New Castle County.

COLONIAL REALTY CORPORATION, a corporation of the State of Delaware, et al., Plaintiffs,
v.
REYNOLDS METALS COMPANY, a corporation of the State of Delaware, Defendant.

Nov. 21, 1962.

Corporate merger appraisal action. Defendant moved for summary judgment. The Court of Chancery, Short, Vice Chancellor, held that a stockholder which voted some of the shares registered in its name for a proposed merger was not thereby precluded from seeking an appraisal as to other shares registered in its name and voted against the merger.

Motion for summary judgment denied.

Attorneys and Law Firms

****754** ***516** Aubrey B. Lank, of Theisen & Lank, Wilmington, for plaintiffs.

Aaron Finger, of Richards, Layton & Finger, Wilmington, for defendant. Gustav B. Margraf, Richmond, Va., of counsel.

Opinion

SHORT, Vice Chancellor.

This is a merger appraisal action. It is now before the court on defendant's motion for summary judgment.

On April 18, 1961, the board of directors of defendant Reynolds Metals Company, a Delaware corporation (Reynolds), and the board of directors of Tilo Roofing Company, Inc., a Delaware corporation (Tilo), entered into an agreement of merger, subject to stockholders' approval, for merging Tilo into Reynolds. A special meeting of Reynolds stockholders was called to be held on July 26, 1961 for the purpose of approving the proposed merger. On the record date for voting Bache & Co., one of the plaintiffs, was the registered holder of 81,384 shares of Reynolds' common stock. [1] On July 24, 1961 Bache & Co. gave its proxy to Reynolds wherein it voted 29,475 shares for and 612 shares against the proposed merger. On July 25, 1961, Bache & Co. gave its proxy to Reynolds wherein it voted 29,728 shares of common stock against ****755** the proposed merger. [2] Also on July 25, 1961 a written objection to the merger was transmitted to Reynolds by Bache & Co., advising 'that we are the record holders of a number of shares of your company's stock, among which we are holding 29,728 shares for one customer who has asked us to dissent to the proposed merger of Tilo Roofing into Reynolds Metals,' and further advising that at the stockholders' meeting of July 26, 1961 it would vote 29,728 shares against the merger. The appraisal sought in this proceeding is as to these 29,728 shares.

1 There is some disagreement between the parties as to the total number of shares registered in the name of Bache & Co. For present purposes it is not necessary to resolve this point.

2 Though receipt of this proxy is apparently denied by defendant, for purposes of the present motion it is immaterial whether the second proxy was received.

On August 1, 1961, the agreement of merger was effected by filing said agreement in the office of the Recorder of Deeds in and for New Castle County, Delaware. On September 14, 1961 plaintiffs ***517** were advised by Reynolds Metals Company, the surviving corporation, that their demands for payment were refused. This litigation followed.

The motion here under consideration presents the single question as to whether or not a stockholder who has voted some of the shares registered in his name in favor of a merger is thereby precluded from proceeding under Title 8 Del.C. § 262 for an appraisal of other shares registered in his name and voted against the merger.

Section 262 of Title 8 Del.C. permits a dissatisfied stockholder to withdraw from a corporate enterprise after a merger and to obtain the cash value of his shares provided that (1) he objects to the proposed merger in writing prior to the meeting at which the stockholders' vote on the merger is to be taken, (2) his shares were not voted in favor of the merger, and (3) he makes written demand for payment within the time limited by the statute.

Defendant contends that not only the language of the statute itself, but the theory upon which it is founded precludes a stockholder who has voted some of the shares registered in his name for a merger from claiming the right of appraisal as to other shares of which he is the registered owner. The theory behind the statute, says defendant, is to compel an election by

the stockholder to remain with the enterprise or to withdraw therefrom. It points to language in several opinions of this court and the Supreme Court as supporting this theory. See Zeeb v. Atlas Powder Company, 32 Del.Ch. 486, 87 A.2d 123; Southern Production Co., Inc. v. Sabath, 32 Del.Ch. 497, 87 A.2d 128; Cole v. National Cash Credit Association, 18 Del.Ch. 47, 156 A. 183; Stephenson v. Commonwealth and Southern Corporation, 19 Del.Ch. 447, 168 A. 211. The applicability of these cases will be hereafter considered.

Plaintiffs, on the other hand, contend that neither the statutory language nor the cases relied on by defendant compel the conclusion that a broker, registered owner may not vote shares held for the benefit of one customer in favor of a merger and at the same time file an objection and seek an appraisal with respect to shares held for the benefit of another customer.

The question presented is one of first impression in this state. It was, however, considered in the recent case of ***518** Bache & Co. v. General Instrument Corporation, Appellate Division of the Superior Court of New Jersey, 74 N.J.Super. 92, 180 A.2d 535, certification denied 38 N.J. 181, 183 A.2d 87. The New Jersey court in construing similar statutory language held that a brokerage firm which held blocks of stock in its 'street name' for various beneficial owners was not, by having voted one or more blocks in favor of a merger, precluded from seeking appraisal as to another block. The court, in concluding that only a registered holder of stock is a 'stockholder' within the meaning of that term as used in the appraisal statute, quoted at length from the opinion of our Supreme ****756** Court in Salt Dome Oil Corp. v. Schenck, 28 Del.Ch. 433, 41 A.2d 583, 158 A.L.R. 975. It also cited and quoted from Zeeb v. Atlas Powder Company, supra, to the effect that the primary purpose of requiring a stockholder who opposes a merger to object in writing prior to the stockholders' meeting called to vote upon the proposed merger is to inform the corporation and other stockholders of the number of possible dissenters and, as such, potential demandants of cash for their shares. After observing that 'the realties of present-day security practices' must be accorded judicial recognition, the court said:

'* * * But we cannot agree with defendant's position that because plaintiff voted the major part of the shares standing in its name in favor of the merger, the rights of the dissenters should be ignored. If defendant were correct, it could dismiss completely the thought of an appraisal demand as to any dissenting shares contained in a split vote, even if demand were made within the period allowed for such application and even if the company had been informed that one beneficial owner had instructed the record owner (plaintiff) to vote the owner's shares against the merger.

'Clearly, defendant was fully apprised as to the possible number of dissenting shares here involved. Were we to subscribe to defendant's argument, we would have to assert that plaintiff, because it voted more shares for the merger than against, has *in toto* voted for the merger. To do this would be to ignore the distinctive character of plaintiff as a stock brokerage firm, to overlook the character of modern-day security transactions, and to wipe out a beneficial owner's rights which the statute is specifically designed to protect. A liberal construction, rather ***519** than a rigid and technical one, should govern in a situation like the present one. * * * We deem the number of shares voted against the merger, and not the identity of the dissenter, to be the important consideration. * * *

'To deny one beneficial owner the right to obtain an appraisal because the brokerage house has followed the instructions of other such owners by transmitting their wishes to the company (here, by casting their votes in favor of the merger at the meeting called for that purpose) would be to deny the full effectiveness of a purchase of stock bought and held in a 'street name.' Such a contract of purchase is declared 'valid and effective' by R.S. 46:34–2, N.J.S.A. * * *. One might well ask how such a contract can be 'effective' as between broker and customer if the right of appraisal is lost by the brokerage house's following its customers' directions. A liberal reading of the statute requires that plaintiff be given the right to demand appraisal of the stock of Colonial Realty Corporation.'

[1] While I agree with the result reached by the New Jersey court, I am unable to subscribe to certain of the bases upon which it relied. In the first place, it is apparent that the court regarded the broker-customer relationship there appearing, as here, as requiring special treatment. It cannot be said from anything appearing in the opinion that the court recognized the right of *any* stockholder to pursue the remedy of appraisal even though he had voted some of his shares in favor of a merger. This may be the necessary result of the conclusion reached but it was not the court's manner of approach to the problem. Secondly, the court's statement that 'the statute is specifically designed to protect' the beneficial owner's rights is certainly not in accord with the view which the courts in this state have taken with respect to § 262. In Salt Dome Oil Corp., v. Schenck, supra, the Supreme Court held that a beneficial owner was not a stockholder within the meaning of § 262, and,

not being a stockholder, was not entitled ****757** 'to interject himself in matters of internal management' such as merger proceedings. In American Hardware Corp. v. Savage Arms Corporation, Del., 136 A.2d 690, Chief Justice Southerland said that an owner of stock whose shares are registered ***520** in the name of a nominee 'takes the risks attendant upon such an arrangement.' It is thus clear that the courts of Delaware do not regard the appraisal statute as specifically designed to protect a baneficial owner's rights. Thirdly, the New Jersey court placed emphasis upon a statutory declaration of the validity and effectiveness of a purchase of stock bought and held in a 'street name,' and pointed out that to give 'effective' recognition to such a contract required the result there reached. No comparable statute of this state has been cited and I am aware of none. Plaintiffs may not, therefore, rely upon this ground to establish their right.

The real question presented by the present motion is, already observed, whether a stockholder who has voted some of the shares registered in his name for a proposed merger may dissent as to other shares not so voted and obtain an appraisal therefor.

Though there is language in certain opinions of the courts of this state which might, at first glance, be regarded as indicating that a stockholder who has voted in favor of a merger may not also seek an appraisal, a reading of such language, when considered in the light of the particular problem confronting the court, would seem to indicate that it has little bearing upon the issue here involved. For example, in Southern Production Co., Inc. v. Sabath, supra, the court said 'that upon the completion of the steps required to perfect the right to appraisal the stockholder has made an election to withdraw from the corporate enterprise and take the value of his stock—an election which is irrevocable unless one of the three conditions specified in the statute shall subsequently occur.' This language must be read in the light of the question to which the court's attention was directed, namely, whether an appraisal proceeding could be dismissed over the objection of the surviving corporation. The quoted language is followed by these words: 'The right of the corporation to initiate the appraisal proceeding, and the language of the third condition requiring—or at least necessarily implying—its consent to withdrawal, leave little doubt of the legislative intent.' The court was not concerned with the problem here involved, nor do I see any necessary suggestion in the language used which is determinative of that problem. In Cole v. National Cash Credit Association, supra, this court, in holding that a stockholder could bring an action to enjoin a fraudulent merger, ***521** observed that the merger statute does not compel a minority stockholder to be forced into the status of a stockholder in the consolidated enterprise and then said: 'The option is given to each dissenting stockholder to elect whether he will take his allotment of stock in the consolidated company. If he prefers to dissociate himself from the consolidation, he may * * * secure a valuation of his stock.' Again, I can see nothing in the quoted language which is decisive of the present question. Other cases cited by defendant contain similar language but involved very different questions. It is to be observed that none of the cases so cited deals specifically with the question as to how the shares of a stockholder are voted, whether for or against the merger, or, as here, both for and against the merger. In spite of the language used in these cases, I do not regard it as in any sense intended to answer the question as to whether a stockholder may split the vote of his shares in a merger proceeding.

Defendant argues that the language of the statute itself precludes a stockholder from splitting his shares so as to approve of the merger in part and dissent therefrom in part. The exact statutory language prescribing the voting condition is, 'and whose shares were not voted in favor of such consolidation or merger.' Defendant says that the statute does not speak of a ****758** stockholder *some of whose shares* were not so voted. Neither does it speak of a stockholder *any of whose shares* were not so voted. It certainly cannot be said that the statute expressly, or by unavoidable intendment, disqualifies a stockholder who has voted some of his shares in favor of a merger from seeking an appraisal of other shares as to which he has fully complied with the statutory requirements. Nor, as already observed, is there anything in the decided cases which necessarily points to such a disqualification. In these circumstances, a realistic approach to the issue is warranted.

[2] **[3]** Merger statutes, it has been held, are enacted for the benefit not only of dissenters, but of majority stockholders and the public welfare. Salt Dome Oil Corp. v. Schenck, supra. Whatever conclusion may here be reached, I can see neither benefit nor harm to the public welfare. No consideration, therefore, need be given to that interest. With respect to the majority stockholders, I fail to see now any disadvantage is occasioned to them if a stockholder ***522** is permitted to split his vote and apply for appraisal as to some of his shares. The stockholder here gave the required written notice of objection to the merger with respect to the very shares for which an appraisal is sought. The basic purpose of requiring such written objection prior to the meeting of stockholders called to vote upon a proposed

merger 'is to inform the corporation and its other stockholders of the number of possible dissentients and, as such, potential demandants of cash for their shares.' Zeeb v. Atlas Powder Co., supra. The other stockholders here were afforded such information by the written objection communicated to the corporation. The objection stated the number of shares as to which dissent was made. The objection also informed other stockholders of the fact that it was made on behalf of a customer of the registered owner. If, for any reason, the identity of the customer was of interest to the corporation or other stockholders inquiry in that regard could have been made. In fact, the objection itself noted that a copy thereof was directed to Colonial Realty Corporation, one of these plaintiffs and claimant to the beneficial ownership of the shares referred to. Therefore, not only was not corporation and its other stockholders fully informed of the dissent, but Bache & Co., the registered holder of the shares involved, voted the same against the merger. Not only do the facts disclose no disadvantage to the majority stockholders, but the corporation does not claim that it is in any way injured or harmed by the procedure followed by the registered owner.

[4] The desirability of permitting a stockholder to split his vote and seek appraisal as to shares not voted in favor of a merger is particularly evident in the situation here presented. As the New Jersey court points out in Bache & Co. v. General Instrument Corp., supra, the realities of the market place in security transactions should not be ignored. It is common knowledge that brokers such as Bache & Co. hold many blocks of stock in their 'street name' for numerous beneficial owners. To say that the broker should be denied the right to object to a merger and seek appraisal of shares held for one beneficial owner because other beneficial owners insist upon voting in favor of the merger is to ignore the reality of a recognized practice. While the registration of shares in the name of the nominee is at the peril of the beneficial owner, nevertheless, I can see no reason, either ***523** practical or legal, why the beneficial owner should be required, in order to effectively object to a merger and seek appraisal, to have the shares held by the nominee transferred to the beneficial owner's name upon the corporate records. Various delaying factors might well prevent a transfer and registration within the time limited to enable the true owner to dissent. Moreover, the expense of transferring the shares may be substantial. Since the holding of shares in 'street name' is a common and wide-spread practice and undoubtedly serves legitimate and ****759** useful purposes, the true owner should not be penalized for following the practice.

Practical considerations suggest the desirability of permitting a stockholder to split his stock in merger proceedings. Where this can be done without disadvantage to the majority stockholders and without contravening applicable statutory provisions, the right of the stockholder to so proceed should be recognized.

The motion for summary judgment is denied. Order on notice.

All Citations

40 Del.Ch. 515, 185 A.2d 754

End of Document

Tab 5

2015 WL 67586
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

Merion Capital LP and Merion Capital II LP, Petitioners,
v.
BMC Software, Inc., Respondent.

C.A. No. 8900–VCG | Date Submitted: October 7, 2014 | Date Decided: January 5, 2015

Attorneys and Law Firms

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MEMORANDUM OPINION

GLASSCOCK, Vice Chancellor

***1** This action, and a similar case in which I am simultaneously issuing a memorandum opinion,[1] concern an interpretation of the standing requirements under the appraisal statute, 8 *Del. C.* § 262, as amended in 2007. The respondent company alleges that the amendment altered those standing requirements, which precludes the petitioning stockholders' standing here. Accordingly, the respondent company seeks summary judgment.

1 *In re Appraisal of* Ancestry.com, *Inc.*, C.A. No. 8173–VCG (Del. Ch. Jan. 5, 2015).

I. BACKGROUND FACTS

A. The Merger

This appraisal action stems from a take-private merger between Respondent BMC Software, Inc. ("BMC") and two Delaware corporations formed by a consortium of private equity buyers solely for the purpose of taking BMC private—Boxer Parent Company Inc. and its wholly owned subsidiary Boxer Merger Sub Inc. (collectively, "Boxer").[2] BMC, also a Delaware corporation, is "one of the world's largest software companies," providing "IT management solutions for large, mid-sized, and small enterprises and public sector organizations around the world."[3] On May 6, 2013, BMC and Boxer entered into an Agreement and Plan of Merger (the "Merger Agreement") whereby Boxer was to acquire BMC for $46.25 per share of common stock.[4]

2 Sirkin Aff. Ex. 2, at 19. The buyer group consists of Bain Capital, LLC, Golden Gate Private Equity, Inc., Insight Venture Management, LLC, and Westhorpe Investment Pte Ltd. *Id.*

3 *Id.*

4 Sirkin Aff. Ex. 4, at 2. In the months following the execution of the Merger Agreement, BMC and Boxer further negotiated an equity roll-over for a BMC stockholder and a $0.05 increase in merger consideration. *Id.* The parties eventually agreed to the roll-over but not the price increase, and executed that change in Amendment No. 1 to the Merger Agreement. *Id.*

Petitioners Merion Capital LP and Merion Capital II LP (collectively, "Merion") are self-described "event-driven investment" funds,[5] or, in the words of the Respondent, "hedge fund[s] that specialize[ ] in appraisal arbitrage."[6] "Appraisal arbitrage" is a phrase commonly used to denote an investment strategy whereby an investor acquires an equity position in a cash-out merger target with the specific intention of exercising the statutory stockholder appraisal right found in 8 *Del. C.* § 262; in the subsequent appraisal action the court awards the appraisal petitioners what the court determines to be the fair value of the target, which, if the target was undervalued in the transaction, represents a positive return on the arbitrage investor's initial investment. Pursuant to this investment strategy, Merion determined that the "consideration offered in the [BMC/Boxer] merger ... [was] considerably below the value of BMC" and began purchasing shares of BMC stock on the public market, through a series of brokers, in July 2013.[7] By July 17, 2013, Merion had acquired 7,629,100 shares of BMC common

stock and, as the beneficial owner of those shares, moved to perfect its right under the appraisal statute. [8]

5 Pet'rs' Answering Br. in Opp'n to Resp't's Mot. for Summ. J. at 6; *see also* Sirkin Aff. Ex. 8, at 15:23–16:8 ("Q. What did [Merion founder] Mr. Barroway tell you about what he envisioned the business of Merion to be? A. He said that ... they're looking to start an event—he's a former lawyer, and looking to start an event-driven fund and needed someone with analytical capability, merger experience, and that one of those strategies of the fund would be pursuing appraisal rights.").

6 Opening Br. in Supp. of Resp't's Mot. for Summ. J. at 7.

7 Sirkin Aff. Ex. 8, at 23:16–20, 212:20–219:12.

8 *Id.* at 248:13–252:17.

***2** Because only the record holder of shares can make the statutorily required demand for appraisal on the corporation under Section 262, [9] a beneficial owner seeking appraisal must direct the record holder of its shares to make a demand for appraisal on the beneficial owner's behalf. [10] Typically, according to Merion, a beneficial owner would accomplish this by directing an intermediary broker to direct the record holder to issue the demand; in this instance, however, when Merion attempted to direct its broker to pass along its demand request to the record owner of its BMC shares, Cede & Co. ("Cede"), the nominee of the Depository Trust Company ("DTC"), the broker refused, citing a policy change within the broker company. [11] Merion claims that, as a result, the "unexpected news left [it] with only one path for ensuring that its appraisal demand would be timely submitted—*i.e.*, take the steps necessary to have its holdings in BMC stock withdrawn from the fungible mass at DTC/Cede and registered directly with BMC's transfer agent, Computershare." [12] In other words, Merion sought to become not only the beneficial owner of its shares but also the record holder, so that Merion itself could make the statutorily required appraisal demand on BMC. [13] Over the next few days Merion carried out that task, and on July 19, 2013, Computershare confirmed that it had transferred 7,629,100 shares of BMC common stock from the fungible bulk at DTC/Cede to Merion, which now held the shares in record name on its books. [14] On July 22, 2013, Merion delivered its formal demand for appraisal of those shares to BMC. [15]

9 *See*8 *Del. C.* § 262(a) ("Any stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, ... who has otherwise complied with subsection (d) of this section ... shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock.... As used in this section, the word 'stockholder' means a holder of record of stock in a corporation...."); *id.* § 262(d) ("Each stockholder electing to demand the appraisal of 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.").

10 The operation of modern securities practice, including the delineation between beneficial owners and record holders of stock and the ubiquity of central securities depositories like the Depository Trust Company, has been previously chronicled by this Court, and I do not find it necessary to replicate that information here. The reader is referred to former Chancellor Chandler's opinion in *In re Appraisal of Transkaryotic Therapies, Inc.*, 2007 WL 1378345, at *2 (Del. Ch. May 2, 2007), for a thorough discussion of the topic.

11 Sirkin Aff. Ex. 8, at 277:4–20.

12 Pet'rs' Answering Br. in Opp'n to Resp't's Mot. for Summ. J. at 12. Merion's portfolio manager, Samuel Johnson, explained that Merion itself could not petition DTC/Cede to make the appraisal demand because Merion was not a participant in DTC/Cede, which is why it was required to rely on a broker to communicate with DTC/Cede. *See* Sirkin Aff. Ex. 8, at 278:2–7 ("[A]s a street name beneficial holder of stock, which is what we were at the time, we cannot go directly to Cede & Co. and ask them to sign this [demand] letter. Only participants in DTC are allowed to interact with DTC or Cede.").

13 Sirkin Aff. Ex. 8, at 278:11–279:4.

14 *See* Sirkin Aff. Ex. 10, at 1–2 (stock transfer confirmation).

15 *See* Sirkin Aff. Ex. 15 (demands for appraisal).

On the heels of Merion's appraisal demand, on July 24, 2013, BMC held a special meeting of stockholders to vote on the proposed merger of BMC with and into Boxer. [16] Holders of BMC common stock as of the June 24, 2013 record date, representing 141,454,283 shares, approved the merger by over a two-thirds vote: 95,033,127 shares were voted for adopting the Merger Agreement while 46,421,156

shares were not voted for adopting the Merger Agreement. [17] Subsequently, the take-private merger between Boxer and BMC closed on September 10, 2013 with each share of BMC being converted into a right to receive $46.25 in cash. [18]

16 Sirkin Aff. Ex. 2, at 21.

17 Sirkin Aff. Ex. 4, at 4. A majority vote was required for BMC to adopt the Merger Agreement. Sirkin Aff. Ex. 2, at 22.

18 Sirkin Aff. Ex. 5, at 2.

B. Procedural History

On September 13, 2013, Merion commenced this action by filing its Verified Petition for Appraisal of Stock. In that Petition, Merion represented that it "did not vote [its 7,629,100 shares of BMC] in favor of the Merger, [has] not sought to exchange [those shares] for payment from BMC Software in connection with the Merger, and [has] not withdrawn [its] demand for appraisal of [those shares]." [19] Following stipulated discovery between the parties, BMC filed its Motion for Summary Judgment on July 28, 2014. I heard oral argument on this Motion in court on October 7, 2014.

19 Pet. for Appraisal ¶ 5.

C. The Parties' Contentions

***3** The narrow legal issue before this Court arises out of the specific factual circumstances surrounding Merion's appraisal demand. Under the statute, had Merion simply been successful in getting its original record holder Cede to make the appraisal demand, Merion would have proper standing to file its appraisal action. [20] However, because Merion withdrew its BMC shares from DTC/Cede and itself became the record holder demanding appraisal, BMC claims Merion can no longer satisfy the statute's standing requirements. In support of that contention, BMC argues that Section 262 only permits the appraisal of shares not voted in favor of the merger and that, consequently, Merion, as the record holder, bears the burden of proving that *each share* it seeks to have appraised was not voted by any previous owner in favor of the merger—a burden, if it exists, that Merion concededly has not met. [21] Conversely, Merion argues that no such burden exists in Section 262 and, in fact, has been previously rejected by this Court. Rather, Merion argues that, under the appraisal statute, it is only required to show that *it* has not voted the shares for which it seeks appraisal in favor of the merger—a standard that Merion concededly has met.

20 *See*8 *Del. C.* § 262(a); *infra* note 49; *In re Appraisal of Ancestry.com, Inc.*, C.A. No. 8173–VCG, at 12–14 (Del. Ch. Jan. 5, 2015) (finding that *Transkaryotic* remains in force to permit a record holder to perfect appraisal rights for beneficial owners as long as the record holder holds sufficient shares in fungible bulk not voted in favor of the merger to cover the number of shares for which the beneficial owner seeks to have appraised).

21 Johnson explained in his deposition that, because Merion purchased its shares on the open market, it cannot identify the entities from which it purchased its shares. Sirkin Aff. Ex. 8, at 216:11–14. In addition, because Merion's shares were transferred from the "fungible mass at DTC/Cede," Merion is not able to say how the specific shares it came to hold on record were voted in the transaction; nor did Merion take any additional steps to ensure that those shares were not voted in favor of the merger, such as acquiring proxies from the prior owners of the shares. *Id.* at 217:15–219:12.

1. *The Appraisal Statute*

In Section 262 of the Delaware General Corporation Law, the Delaware General Assembly has granted stockholders appraisal rights in certain transactions—including, relevantly here, cash-out mergers—so long as the standing requirements of the statute are met. Those requirements are set forth in Section 262(a), which provides that:

> Any stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, who has otherwise complied with subsection (d) of this section and who has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228 of this title shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock under the circumstances described

> in subsection (b) and (c) of this section. As used in this section, the word "stockholder" means a holder of record of stock in a corporation.... [22]

Thus, in order for a petitioner to perfect the appraisal remedy according to the plain language of Section 262(a), the petitioner need only show that the *record holder* of the stock for which appraisal is sought: (1) held those shares on the date it made a statutorily compliant demand for appraisal on the corporation; (2) continuously held those shares through the effective date of the merger; (3) has otherwise complied with subsection (d) of the statute, concerning the form and timeliness of the appraisal demand; and (4) has not voted in favor of or consented to the merger with regard to those shares. [23]

22 8 *Del C.* § 262(a).

23 BMC conceded at oral argument that where Section 262(a) refers to a stockholder "who has neither voted in favor of the merger or consolidation nor consented thereto in writing," the statute means the stockholder has not voted in favor of the merger or consented to it with respect to the shares it seeks to have appraised. *See* Oral Arg. Tr. 12:13–17 ("THE COURT: Well, when it says the stockholder voted, I assume that we all agree that the statute means with respect to those shares. MR. REIMER: And I think it means with respect to those shares.").

***4** Noticeably absent from this language, or any language in the statute, is an explicit requirement that the stockholder seeking appraisal prove that the *specific shares* it seeks to have appraised were not voted in favor of the merger. Regardless, BMC argues that this Court should find such a share-tracing requirement [24] implicit in the statute's requirements, considering the overall purpose of Section 262, references in other subsections of the statute to how specific shares were voted, and the policy concern that, without a share-tracing requirement, stockholders could have purchased shares voted by their predecessors in favor of the merger, resulting in a theoretical possibility that appraisal could be sought for more shares than actually dissented in the merger vote.

24 I use the term "share-tracing requirement" as a shorthand for the burden that BMC suggests the statute imposes on appraisal petitioners; it is somewhat imprecise, as BMC suggests that the petitioner could meet the burden in a number of ways, some of which do not involve tracing —speaking strictly—the voting history of a particular share, such as a post record-date purchaser of shares purchasing sufficient proxies to cover the number of shares for which it seeks appraisal. *See infra* note 53.

According to BMC, the legislative purpose behind Section 262 favors an interpretation of the statute that includes a share-tracing requirement. Citing the appraisal statute's origin as a reaction to the common-law rule whereby a single dissenting stockholder could prevent a merger, [25] BMC explains that "Section 262 represents 'a limited legislative remedy ... intended to provide shareholders, who dissent from a merger asserting the inadequacy of the offering price, with an independent judicial determination of the fair value of their shares.' " [26] From this genesis, BMC extrapolates that it was always the General Assembly's intent that "only shares that did not vote in favor of the merger [be] eligible for appraisal under the language of Section 262." [27]

25 For a brief history of the appraisal statute, see *In re Appraisal of Ancestry.com, Inc.*, C.A. No. 8173–VCG, at 6–9 (Del. Ch. Jan. 5, 2015).

26 Opening Br. in Supp. of Resp't's Mot. for Summ. J. at 14 (quoting *Ala. By–Products Corp. v. Neal*, 588 A.2d 255, 256 (Del.1991)).

27 *Id.* at 15.

As further proof of an implicit share-tracing requirement, BMC points to Section 262(e), as amended in 2007, which provides that:

> Within 120 days after the effective date of the merger or consolidation, any stockholder who has complied with the requirements of subsections (a) and (d) of this section hereof, upon written request, shall be entitled to receive from the corporation surviving the merger or resulting from the consolidation a statement setting forth the aggregate number of shares not voted in favor of the merger or consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares. [28]

BMC concedes that subsection (e) is designed to be an informational tool "to permit dissenting stockholders 'to learn how many shares might qualify for appraisal,' " so that these dissenting stockholders might share the costs of the appraisal action.[29] Nonetheless, BMC argues that the reference in this subsection specifically to "shares not voted in favor of the merger or consolidation and with respect to which demands for appraisal have been received" indicates the General Assembly's intent that appraisal only be available for shares that can be shown to have not been voted in favor of the merger. In other words, BMC asks this Court to interpret the requirements of subsection (a) in light of the reference to specific shares in subsection (e), such that "not only does an appraisal petitioner carry the burden of showing that it 'did not vote in favor of the merger,'§ 262(a), it also must show the shares for which it seeks appraisal are 'shares not voted in favor of the merger,'§ 262(e)." [30] Any other interpretation of the statute, BMC argues, would not give effect to the statute's purpose or all of its provisions, and, specifically, would frustrate the informational goal of subsection (e). [31]

28 8 *Del. C.* § 262(e).

29 Opening Br. in Supp. of Resp't's Mot. for Summ. J. at 15 (quoting H.R. 16, 131st Gen. Assembly 11, 63 Del. Laws c. 25, § 14 (Del.1981) (legislative synopsis)); *see also* Oral Arg. Tr. 5:21–6:3 ("[Subsection] (e) talks about there having—there needing to be—the information that can be obtained, which, of course, the legislature tells us is in order for the party seeking appraisal to know with whom they can share the costs and so on, is to let them know how many shares might qualify for appraisal is the legislative purpose.").

30 Opening Br. in Supp. of Resp't's Mot. for Summ. J. at 15–16.

31 *See id.* at 16 ("If any stockholder who did not itself vote in favor of the merger could seek appraisal for the shares it held at closing, without regard to how those shares were voted, then Section 262(e)'s statement of shares requirement would be entirely superfluous, as it would not show 'how many shares might qualify for appraisal.' " (quoting *Cordero v. Gulfstream Dev. Corp.*, 56 A.3d 1030, 1035–36 (Del.2012))).

***5** Finally, BMC argues that policy concerns dictate that this Court find an implicit share-tracing requirement in Section 262:

> [I]f an appraisal petitioner need only demonstrate that it did not vote in favor of the merger itself, ... nothing would prevent a majority, or even all of a corporation's shares from seeking appraisal, notwithstanding the fact that for a transaction to have been approved, at least a majority of the shares would have had to have been voted in favor of it. [32]

Theoretically, BMC points out, absent a share-tracing requirement "an appraisal arbitrageur, like Merion, [could] purchase[ ] most or all of a corporation's shares after the record date without securing proxies or revocations of proxies, and then [seek] appraisal for those shares even though the record-date holder voted them for the merger." [33] Considering the purpose of Section 262"to provide a remedy to minority stockholders who dissented from the merger," such a possible outcome would be absurd, BMC argues, and must be precluded by construing the statute so that "only shares not voted in favor of a merger are eligible for appraisal." [34]

32 *Id.* at 16–17.

33 *Id.* at 17.

34 *Id.*

2. *The Teachings of Transkaryotic*

This case is not the first time this Court has visited the conflicts that arise when the alleged intent of the appraisal statute collides with the realities of modern securities practice. In 2007, then-Chancellor Chandler considered a similar, but factually distinct, situation in *In re Appraisal of Transkaryotic Therapies, Inc.* [35] In *Transkaryotic*, the record holder of stock, Cede, petitioned for appraisal on behalf of a group of beneficial owners for over ten million shares of a merger target, including over eight million shares that the beneficial owners had acquired after the record date but before the effective date of the merger. [36] On a motion for partial summary judgment, the Court considered whether "a beneficial shareholder, who purchased shares *after* the record date but before the merger vote, [must] prove, by documentation that each newly acquired share (*i.e.*, after the record date) is a share not voted in favor of the merger by the *previous* beneficial shareholder." [37] Relying on the plain

language of Section 262, as it existed at the time, the Court answered in the negative, determining that since "only a record holder ... may claim and perfect appraisal rights,""it necessarily follows that the record holder's actions determine perfection of the right to seek appraisal." [38] Since Cede held over 16 million shares that it did not vote in favor of the merger, the Court concluded that Cede could, and did, perfect appraisal rights for all of the beneficial owners' 10 million shares. [39]

35 2007 WL 1378345 (Del. Ch. May 2, 2007).

36 *Id.* at *1.

37 *Id.* at *3.

38 *Id.*

39 *Id.* at *4.

In the wake of *Transkaryotic*, the General Assembly amended Section 262 to explicitly allow beneficial owners to directly file petitions for appraisal, [40] potentially raising questions about the continuing impact of the case. [41] Despite this fact, and despite that *Transkaryotic* is factually distinct from this case, both Merion and BMC argue that *Transkaryotic* supports their diametric positions. Merion highlights that the *Transkaryotic* decision rejected imposing a share-tracing requirement on Section 262 and underscores the Court's discussion, en route to that holding, of the difficulties of tracing votes to specific shares due to the reality of modern securities practice, where most securities are "held in an undifferentiated manner known as 'fungible bulk' " on deposit at central securities depositories, such as DTC. [42] Conversely, BMC emphasizes the Court's reliance in its holding on Cede's ability to prove it held an amount of shares that had not been voted in favor of the merger greater than the amount being sought for appraisal, claiming this as proof that under *Transkaryotic*,"at a minimum, record holders like Merion bear the burden to show that the shares they seek to have appraised were not voted in favor of the merger." [43]

40 *See*8 *Del. C.* § 262(e) ("Notwithstanding subsection (a) of this section, a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person may, in such person's own name, file a petition or request from the corporation the statement described in this subsection.").

41 *But see infra* note 49.

42 *Transkaryotic*, 2007 WL 1378345, at *2.

43 Opening Br. in Supp. of Resp't's Mot. for Summ. J. at 22.

II. STANDARD OF REVIEW

***6** Summary judgment is appropriate only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [44] In making that determination, the court must "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." [45] The parties have agreed that there is no dispute as to the material facts of the case, and so the only issue that remains is whether, as a matter of law, Merion has met the statutory requirements of Section 262.

44 Ch. Ct. R. 56(c).

45 *E.g.*,*Transkaryotic*, 2007 WL 137835, at *3 (quoting *Elite Cleaning Co. v. Walter Capel and Artesian Water Co.*, 2006 WL 1565161, at *3 (Del Ch. June 2, 2006)).

III. ANALYSIS

Merion is an arbitrageur which seeks to capitalize on what it perceives to be an undervalued transaction. Section 262 permits the existence of appraisal arbitrage by allowing investors to petition for appraisal of stock purchased after a merger is announced. [46] The parties dispute whether the arbitrageur here has fully perfected its right to appraisal under the statute. Specifically, BMC asks this Court to determine whether Section 262 requires Merion to demonstrate that each share it seeks to have appraised is a share that was never voted in favor of the merger, not just by itself, but by any owner. Because I find that the unambiguous language of the statute does not give rise to any such share-tracing requirement, and that Merion has otherwise complied with the requirements of Section 262, I hold that Merion has perfected its right to appraisal.

46 *See*8 *Del. C.* § 262(a) ("Any stockholder of a corporation of this State who holds shares of stock *on the date of the making of a demand* pursuant to subsection (d) of this section with respect to such shares, who

> continuously holds such shares *through the effective date of the merger or consolidation*... shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock....” (emphasis added)); *cf. Transkaryotic*,2007 WL 137835, at *5 (“Respondents raise one policy concern that deserves mentioning. They argue that this decision will ‘pervert the goals of the appraisal statute by allowing it to be used as an investment tool for arbitrageurs as opposed to a statutory safety net for objecting stockholders.’ That is, the result I reach here may, argue respondents, encourage appraisal litigation initiated by arbitrageurs who buy into appraisal suits by free-riding on Cede's votes on behalf of other beneficial holders—a disfavored outcome. To the extent that this concern has validity, relief more properly lies with the Legislature. Section 262, as currently drafted, dictates the conclusion reached here.”(footnotes omitted)).

A. The Standing Requirements of Section 262

As mentioned above, in order to properly perfect the appraisal remedy under the plain language of Section 262(a), a petitioner need only show that the record holder of the stock for which appraisal is sought: (1) “[held such] shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares;” (2) “continuously [held] such shares through the effective date of the merger or consolidation;” (3) “has otherwise complied with subsection (d) of this section;” and (4) “has neither voted [such shares] in favor of the merger or consolidation nor consented thereto in writing.” [47] The statute's requirements are directed to the *stockholder*—expressly defined as the *record holder*—and whether *it* has owned the stock at the appropriate times, whether *it* has made a sufficient demand, and whether it has voted the shares it seeks to have appraised in favor of the merger. My interpretation of Section 262(a) as clear in that regard is consistent with *Transkaryotic*. In that case, then-Chancellor Chandler determined that Cede did not have to demonstrate that each individual share it sought to have appraised was a share it did not vote in favor of the merger, but was only required to show that it held a quantity of shares it had not voted in favor of the merger equal to or greater than the quantity of shares for which it sought appraisal. [48] The Court's focus was on the *petitioner/record holder*, not on the *shares*—in other words, on whether Cede had sufficient shares it had not voted in favor of the merger to satisfy the demand, not whether those specific shares were shares Cede had voted in favor of the merger. [49]

47 8 *Del. C.* § 262(a).

48 *See Transkaryotic*,2007 WL 137835, at *4 (“It is uncontested that Cede voted 12,882,200 shares in favor of the merger and 16,838,074 against, abstained, or not voted in connection with the merger. It is further uncontested that Cede otherwise properly perfected appraisal rights as to all of the 10,972,650 shares that petitioners own and for which appraisal is now sought. Thus, because the actions of the beneficial holders are irrelevant in appraisal matters, the inquiry ends here. Cede, the record holder, properly perfected appraisal rights under § 262. As a result, Cede may exercise appraisal rights for all 10,972,650 contested shares.”).

49 This principle is unaffected by the post-*Transkaryotic* amendment to Section 262(e) granting beneficial owners the right to file appraisal petitions and receive a report of appraisal shares. In making this amendment, the General Assembly left the standing requirements of Section 262(a) entirely untouched, including notably the statute's definition of “stockholder” as “a holder of record.” 8 *Del. C.* § 262(a). Therefore, although procedurally a beneficial owner may now initiate the legal action, its substantive right to appraisal is still dependent on whether the record holder has perfected appraisal according to Section 262(a). For a more in-depth discussion of the status of *Transkaryotic* following the 2007 amendment, see *In re Appraisal of Ancestry.com, Inc.*, C.A. No. 8173–VCG, at 12–14 (Del. Ch. Jan. 5, 2015).

***7** Contrary to BMC's position, the meaning of the unambiguous language in Section 262(a) does not change in light of a reading of Section 262(e), such that the two subsections together imply a limitation that only shares not voted in favor of the merger are eligible for appraisal and, consequently, a requirement that the petitioner must identify how each share was voted. Subsection (e) of the appraisal statute exists to aid those seeking appraisal by, among other things, providing similarly situated petitioners with information that may aid in pooling resources and granting beneficial owners the ability to file appraisal actions. It is antithetical to that intention to interpret the language of subsection (e) to impose, on the statute as a whole, an additional hurdle for appraisal petitioners; rather, the effect of the language in subsection (e) referencing how individual shares were voted is necessarily limited to defining the scope of the petitioner's informational right, in which that language is found. It is true, as BMC argues, that the language chosen by the General Assembly may theoretically be ineffective, in light of appraisal arbitrage, in facilitating

disclosure of the total number of shares for which appraisal is sought. At most, this fact indicates that the General Assembly may not have picked a fail-safe method to achieve its goals; it may not have fully considered the theoretical possibility that shares acquired after the record date not voted in favor of the merger by the acquirer may nonetheless have been so voted by the seller, leading, hypothetically, to the number of shares for which appraisal is sought exceeding the number not voted for the merger. This fact does *not* show that the General Assembly meant to impose an additional standing requirement for appraisal petitioners, let alone one that is contrary to the plain language of Section 262(a). Had the General Assembly intended the statute to include a share-tracing requirement, I conclude it would have explicitly written that requirement into the provision governing standing, subsection (a), rather than utilizing the backhanded method of introducing language in subsection (e)—a portion of the statute meant to enhance, not limit, rights to appraisal. [50]

50 *See Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del.1982) ("[W]here a provision is expressly included in one section of a statute, but is omitted from another, it is reasonable to assume that the Legislature was aware of the omission and intended it. The courts may not engraft upon a statute language which has been clearly excluded therefrom by the Legislature.").

Finally, I do not consider it appropriate to weigh the public policy concern raised by BMC, namely that a failure of this Court to read a share-tracing requirement into the statute could allow "a majority, or even all of a corporation's shares from seeking appraisal, notwithstanding the fact that for a transaction to have been approved, at least a majority of the shares would have had to have been voted in favor of it." [51] It is undisputed that such a situation is not present here: Merion has sought appraisal for 7,629,100 shares stemming from a transaction where 95,033,127 of the total 141,454,283 voting shares voted to approve the merger. [52] As a member of the judicial branch, it is inappropriate for me to presume to rewrite an unambiguous statute to address a problem that has not occurred, may not occur, and, in any event, is certainly not before me now. [53] It may be true that the plain language of Section 262 does not adequately serve all the purposes of that statute. It is possible that appraisal arbitrage itself leads to unwholesome litigation. [54] However, in evaluating my role in alleviating these concerns through the adjudication of this case, I find former Chancellor Chandler's words in *Transkaryotic*—wherein over seven years ago he considered whether his decision would "pervert the goals of the appraisal statute by allowing it to be used as an investment tool for arbitrageurs"—to be particularly apposite:

> To the extent that [these] concern[s] ha[ve] validity, relief more properly lies with the Legislature. Section 262, as currently drafted, dictates the conclusion reached here.... The Legislature, not this Court, possesses the power to modify § 262 to avoid the evil[s], if [they are] evil[s], that purportedly concern[ ] [the Respondent]. [55]

51 Opening Br. in Supp. of Resp't's Mot. for Summ. J. at 16–17.

52 Sirkin Aff. Ex. 4, at 4.

53 *See, e.g.*,*In re Adoption of Swanson*, 623 A.2d 1095, 1099 (Del.1993) ("It is beyond the province of courts to question the policy or wisdom of an otherwise valid law. Instead, each judge must take and apply the law as they find it, leaving any changes to the duly elected representatives of the people."(internal citation omitted)); *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155, 160 (Del. Ch.2013) ("[A]s has long been recognized by the Delaware Courts, when the General Assembly has addressed an issue within its authority with clarity, there is no policy gap for the court to fill. If a valid statute is not ambiguous, the court will apply the plain meaning of the statutory language to the facts before it. It would usurp the authority of our elected branches for this court to create a judicial exception to the words 'all ... privileges' for pre-merger attorney-client communications regarding the merger negotiations. That sort of micro-surgery on a clear statute is not an appropriate act for a court to take."(internal footnotes omitted)). Even assuming, *arguendo*, that the "over-appraisal" concern was before me in this case and I found it necessary to fix that problem, I would still be unclear as to the practical framework of the solution. BMC generally argues for a share-tracing requirement that would allow only shares not voted in favor of the merger to be appraised, but BMC does not champion any specific requirement; rather, BMC suggests that an appraisal arbitrageur could satisfy this general burden in various ways, such as by purchasing its shares prior to the record date and itself voting the shares, or by securing proxies or revocations of proxies for shares acquired

after the record date. Opening Br. in Supp. of Resp't's Mot. for Summ. J. at 26–27. The fact that multiple avenues exist to remedy what Merion sees as a problem with the statute—none of which have been vetted by the General Assembly—further illustrates that BMC's concern requires legislative, not judicial, deliberation.

54 *But see* Minor Myers & Charles R. Korsmo, *Appraisal Arbitrage & the Future of Public Company M & A*, 92 Wash. U.L.Rev. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm? abstract_id=2424935 (arguing that the recent rapid growth in appraisal arbitrage should be welcomed as a benefit to stockholders and corporate law generally, because empirical evidence suggests "appraisal arbitrage focuses private enforcement resources on the transactions that are most likely to deserve scrutiny, and the benefits of this kind of appraisal accrue to minority shareholders even when they do not themselves seek appraisal"); George S. Geis, *An Appraisal Puzzle*, 105 Nw. U. L.Rev. 1635, 1661–77 (2011) (suggesting that expanded appraisal rights could serve as a "back-end market check on controller abuses," whereby, "if the controller hopes to expropriate value from minority shareholders through a cut-rate offer, outside investors will have incentives to purchase the shares and seek appraisal under *Transkaryotic*," but arguing that, in order to curb meritless litigation, the appraisal statute should be amended to include an embedded put option).

55 *In re Appraisal of Transkaryotic Therapies, Inc.*, 2007 WL 137835, at *5 (Del. Ch. May 2, 2007).

B. Application of Standing Requirements

***8** Having not found any implicit share-tracing requirement present in the statute, I turn to the four explicit standing requirements set forth in Section 262(a). It is undisputed that Merion has satisfied all of these requirements. Merion made a written demand for appraisal of 7,629,100 shares of BMC common stock on July 22, 2013, at which time it held all shares for which it sought appraisal. The appraisal demand Merion delivered to BMC was timely and sufficiently informative. After delivering its demand for appraisal of the 7,629,100 shares of BMC common stock that it owned, Merion continued to hold those shares throughout the date that the merger of BMC into Boxer became effective, on September 10, 2013. Finally, at no point did Merion ever vote any of the shares for which it seeks appraisal in favor of the BMC/Boxer merger. Consequently, Merion has perfected its right to have its 7,629,100 shares of BMC common stock appraised by this Court.

IV. CONCLUSION

For the foregoing reasons, BMC's Motion for Summary Judgment is denied. An appropriate order accompanies this Opinion.

ORDER

AND NOW, this 5th day of January, 2015,

The Court having considered the Respondent's Motion for Summary Judgment, and for the reasons set forth in the Memorandum Opinion dated January 5, 2015, IT IS HEREBY ORDERED that the Respondent's Motion is DENIED.

SO ORDERED:

All Citations

Not Reported in A.3d, 2015 WL 67586

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Tab 6

42 Del.Ch. 588
Supreme Court of Delaware.

OLIVETTI UNDERWOOD CORPORATION,
Respondent Below, Appellant,
v.
JACQUES COE & CO., Egger & Co., Gerstley, Sunstein & Co., Carl M. Loeb, Rhoades & Co., Merrill, Lynch, Pierce, Fenner & Smith, Schweickart & Co., Tewes & Co., Tucker & Co., and Wood, Walker & Co., Petitioners Below, Appellees,
and
Charles Alverson et al., Claimants Below, Appellees.

March 3, 1966.

Petition for statutory appraisal of stock following short form merger. The Chancery Court, New Castle County, Seitz, Chancellor, 204 A.2d 740, held that petitioners were eligible to seek appraisal and surviving corporation appealed. The Supreme Court, Herrmann, J., held that surviving corporation could not require brokers who were registered owners of stock in predecessor to prove they were duly authorized by beneficial owner to seek appraisal of stock as prerequisite to staturory right of appraisal, and that failure of certain stockholders to comply with court order by not filing verified claims together with copies of their demands and objections attached, did not disentitle them to appraisal absent showing that failure disrupted orderly administration of appraisal proceeding or operated to corporation's prejudice.

Affirmed.

****683** ***588** Upon appeal from Order of the Chancery Court of New Castle County.

Attorneys and Law Firms

***589** H. Albert Young and Bruce M. Stargatt, of Young, Conaway, Stargatt & Taylor, Wilmington, and Oscar Cox, Daggett H. Howard and Peter Ehrenhaft, of Cox, Langford & Brown, Washington, D. C., for respondent below, appellant.

Arthur J. Sullivan, of Morris, James, Hitchens & Williams, Wilmington, for petitioners below and certain claimants below, appellees.

****684** WOLCOTT, C. J., and CAREY and HERRMANN, JJ., sitting.

Opinion

HERRMANN, Justice.

This appeal brings up for review certain portions of an Order of the Chancery Court determining the eligibility of the appellees to seek appraisal of stock of Underwood Corporation after its merger into Olivetti Underwood Corporation, the appellant.

The merger was the ‘short form’ type provided by 8 Del.C. § 253 for the merging of parent and subsidiary corporations. The merger terms provided that the minority stockholders would be entitled to receive $10. per shares for their stock in Underwood. There was no provision for an exchange of Underwood stock for shares in the appellant surviving corporation.

The action for appraisal was brought under the Statute by certain Underwood stockholders (hereinafter ‘broker-petitioners'). In the ordinary course of the proceedings, the Court entered an Order permitting other stockholders of Underwood (hereinafter ‘claimants') to file claims for appraisal. The appellant disputes the standing of 9 petitioners and 15 claimants to seek appraisal.

The petitioners are stockbrokers and registered stockholders of Underwood. In transmitting their demands for appraisal, they put the appellant on notice that they were not the beneficial owners of the stock registered in their names. The appellant addressed interrogatories to the broker-petitioners regarding their authority to demand appraisal on behalf of the beneficial owners. At the hearing, the broker-petitioners declined to submit proof of such authority, resting on their view of the law of Delaware that they were not required so to do. The appellant, for its part, offered in evidence the broker-petitioners' answers to the interrogatories showing that they are not the real parties in interest, that some do not know the identity of the ***590** beneficial owners as of the merger date, and that most seek appraisal as to only part of the stock registered in their names, while holding other shares for which no appraisal is being requested.

As to the claimants, the Order of the Chancery Court permitted them to establish their standing in the appraisal proceedings by filing verified claims, including copies of the written objections and demands sent to the appellant; and

the Order stated that stockholders who did not comply with these requirements would be barred from seeking appraisal. None of the claimants filed verified claims with copies of their objections and demands attached as required by the Order.

For the reasons stated in its opinion reported at 204 A.2d 740, the Chancery Court held, *inter alia*, that the appellant is not entitled to question the authority of the broker-petitioners to seek the appraisal of stock registered in their names; and, as to the claimants, the Chancery Court held that the non-compliance with its Order did not deprive them of their right to appraisal. From those portions of the Order below, the appellant appeals.

I.

Reduced to fundamentals, the first question before us is this: Does the appellant have the right to require each broker-petitioner to prove, as a prerequisite to the statutory right of appraisal, that it was duly authorized by the beneficial owner of the stock, registered in its name, to seek the appraisal?

The Delaware case most nearly in point isIn re Northeastern Water Co., 28 Del.Ch. 139, 38 A.2d 918 (1944). There, the corporation contended that a registered stockholder, not the 'real' owner, may not seek an appraisal after merger unless his ****685** authority be shown. The Chancery Court rejected the contention stating:

'No sufficient reason appears why the corporation should be permitted to challenge the action of the present registered holders. A liberal construction of the appraisal statute requires the avoidance of complexities in proceedings under it, particularly where the corporation will not be subjected to risks of liability. ***591** Since the registered holders are entitled to proceed under the statute, proof that they have complied with its requirements should be enough to establish their right to an appraisal. Accordingly, the claimants need not furnish evidence of their authority to act. * * *.'

In the instant case, the Chancery Court expressed similar views:

'* * * To suggest that because a corporation learns that a registered owner seeking an appraisal is not the beneficial owner imposes on the corporation a duty to seek proof of his authority to act is to inject the corporation into one of the very problems from which it is insulated by being able to rely on the stock ledger. This is particularly true where, as here, the corporation has no evidence that the registered owners may be acting contrary to the wishes of the beneficial owners. * * *.'

[1] The appellant must concede, as we believe it does, that under Salt Dome Oil Corp. v. Schenck, 28 Del.Ch. 433, 41 A.2d 583, 158 A.L.R. 975 (1945), denying the right of appraisal to unregistered stockholders, it is settled that only the registered owner of stock is a 'stockholder' within the meaning of the merger-appraisal provisions of the Delaware Corporation Law. Coyne v. Schenley Industries, Inc., Del.Ch., 155 A.2d 238 (1959). The appellant contends, nevertheless, that while it has the right to restrict its dealings to registered stockholders, and is not obliged to recognize unregistered owners, it has a concurrent right (though not a duty) to require the stockholders of record to prove their authority to act in these proceedings for the beneficial owners.

As the source of this latter right, the appellant points to Reynolds Metals Co. v. Colonial Realty Corp. Del.Ch., 190 A.2d 752 (1963). In that case, the identity of, and authorization by, the beneficial owner was not in issue. This Court there held that the vote in favor of the merger cast by the stockbroker, as the registered holder of certain shares, did not make the broker ineligible to demand appraisal as to other shares held in his name. In discussing one of the corporation's contentions, this Court stated that if the corporation questioned whether the broker was acting as agent for another in demanding ***592** payment, it could inquire into the facts; that the burden was on it to do so; and that if 'the corporation receive two opposing proxies from a broker, and a demand for appraisal in respect of the shares represented by only, one, and if (as is probably unlikely) the broker fails to inform the corporation that he is acting for a customer, the corporation can readily ascertain the fact.' These statements were clearly *obiter dicta*. We now have to decide whether they are to be given the force and effect of law.

[2] The essence of the matter was stated by this Court in the *Salt Dome* case:

'* * * With respect to matters intracorporate affecting the internal economy of the corporation, or involving a change in the relationship which the members bear to the corporation, there must be order and certainty, and a sure source of information, so that the corporation may know who its members are and with whom it must treat, and that the members may know, in a proper case, who their associates are. Especially is this true in a merger proceeding which is essentially an intracorporate affair. The merging corporations are entitled to know who the objecting stockholders are ****686** so that the amount of money to be paid to them may be provided. The stockholders in general are entitled to know the dissentients and the extent of the

dissent. * * * The corporation ought not to be involved in possible misunderstandings or clashes of opinion between the non-registered and registered holder of shares. It may rightfully look to the corporate books as the sole evidence of membership. On the other hand, the non-registered holder of a stock certificate is deprived of no essential right. He has it in his power to record the transfer of his shares and thereby become a member of the corporation in the full legal sense. If, for any reason, he chooses to allow his shares to be registered on the corporate books in the name of another, it is not a denial of his right of actual ownership to require him to establish his rights and pursue his remedy through the nominee of his own selection. Any disadvantage is the result of his own non-action. To hold that one who does not possess the essential rights incident to stockownership is, nevertheless, a ***593** stockholder as against the corporation, and, as such entitled to interject himself in matters of internal management, is to disregard essential verities and must lead to unnecessary confusion.'

We cannot better express the reasoning for the principles which necessarily follow: The corporation is entitled to confine itself to dealing with registered stockholders in intracorporate affairs such as mergers; it should avoid becoming involved in the affairs of registered stockholders vis-á-vis beneficial owners; and, in so doing, in the best interests of all stockholders, the corporation should avoid becoming involved in the expensive and time-consuming trial of such collateral issues in merger appraisal proceedings. We hold that insofar as the *dicta* in the *Reynolds* case may be contrary to the foregoing, it will be disregarded.

The appellant makes several *a priori* arguments in support of its position that it has the right, although not the duty, to inquire into a registered stockholder's authority to seek appraisal when he is not the beneficial owner.

The appellant argues that, under the Statute, the right of the stockholder is to decide, in his own interest, whether or not to avail himself of the right to an appraisal and to be bound by it; that if the stockholder chooses to act through a nominee, he and the nominee should be required to 'meet certain reasonable requirements' and 'carry out their arrangements properly'; that this is particularly so because the corporation may 'expose itself to considerable risk if it ignores all but the record stockholder in the face of knowledge that the record stockholder is not the true owner and in the face of the possibility that the record stockholder is taking unauthorized actions which the true owner does not consider to be in his best interests.'

We think that the reasoning of the appellant here is unclear, at best. In referring to a beneficial owner as a stockholder, the appellant seems to ignore the rule of the *Salt Dome* case that there is no recognizable stockowner under the merger-appraisal provisions of our Corporation Law except a registered stockholder. In referring to possible liability on the part of the corporation for limiting its recognition to ***594** stockholders of record, the appellant gives to little credit, we think, to the general coverage afforded by the *Salt Dome* case which questionably entitles it to limit such recognition to registered stockholders. Nothing in the record of this case indicates that the appellant is on notice that any broker-petitioner is acting contrary to the wishes of its beneficial owners. Under the circumstances, the argument based upon possible liability of the appellant is too conjectural.

The appellant asks 'why the nominee and the true owner should be relieved of their responsibility of carrying out the terms of their relationship and providing satisfactory evidence thereof to the Court.' The answer is that, under the controlling Statute ****687** and cases, the relationship between, and the rights and obligations of, a registered stockholder and his beneficial owner are not relevant issues in a proceeding of this kind. Compare Societe a Internationale, etc. v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958).

The appellant also asks why the corporation should be precluded from knowing its adversaries—why preserve the secrecy of the identity and instructions of the beneficial stock owner. The short answer, we think, is, why not? The argument places unwarranted emphasis upon stockholders as 'adversaries' in statutory appraisal proceedings. Since the appellant is entitled to confine itself to registered stockholders, thus avoiding expensive involvement in the private affairs of its stockholders, what valid reason is there for it to involve itself in the identity of, or the rights and obligations of, beneficial owners with whom it has no privity, and to whom it has no legal obligation on proceedings of this kind?

[3] The appellant gives only one reason which merits further discussion: We are told that unless the appellant is permitted to inquire into the identity and authority of the beneficial owners, it will be unable to determine whether a beneficial owner is seeking to take inconsistent positions by accepting the $10. per share, offered under the merger plan, for a portion of his stock, and demanding appraisal as to the balance. In *Reynolds*, it was unnecessary to rule on the right of a

registered stockholder holding the beneficial ownership to split his ***595** demand for appraisal, and we limited the holding of that case to the ruling that a broker as nominee may do so. Since the instant case also involves broker-nominees, it is controlled by *Reynolds*. We do not have for decision here the basic question underlying the appellant's argument: May a beneficial owner of record qualify for appraisal[1] if he votes some shares in favor of the merger and demands appraisal of the rest, thus partially withdrawing from the enterprise? That question is not presented here because (1) this is not the 'regular' (8 Del.C. §§ 251, 252) type of merger as to which a dissenting stockholder may vote, and because (2) the minority stockholders are not being offered the choice of remaining in the enterprise by accepting shares in the surviving corporation, their choice being limited under the merger arrangements to accepting the offer of $10. per share or demanding an appraisal[2]. Insofar as that choice is concerned, we find no valid reason in the letter or spirit of the Statute, in the cases, or in considerations of fairness, which would bar a stockholder from 'hedging' his position by electing to accept the offered price as to some of his stock and demanding appraisal as to the rest. We think that stockholders should have such flexibility and freedom of choice; and we so hold.

1 8 Del.C. § 262(b) qualifies for appraisal those stockholders 'whose shares were not voted in favor' of the merger. It is noteworthy, however, that § 253(e) makes only §§ 262(c) to (j) applicable to a § 253 merger.

2 A § 253 merger of parent corporation and subsidiary is accomplished by resolution of the board of directors of the parent corporation when the parent is the surviving corporation. The parent corporation is empowered by § 253 to pay cash to minority stockholders of the subsidiary and thereby eliminate their interest in the corporation. See generally, Coyne v. Park & Tilford Distillers Corp., 38 Del.Ch. 514, 154 A.2d 893 (1959).

The statements in *Salt Dome* and cases such as Chicago Corp v. Munds, 20 Del.Ch. 142, 172 A. 452 (1934) and Federal United Corporation v. Havender, 24 Del.Ch. 318, 11 A.2d 331 (1940), upon which appellant relies in support of its 'unitary rights' argument, are inapposite because they relate to regular mergers as to which dissenting stockholders have the right to vote. We limit the law of the instant case to its facts and, as in *Reynolds*, we reserve ****688** for another day ***596** the general question of the right of a beneficial owner of record to an appraisal of part of his holdings where he has the option of remaining in the enterprise.

The appellant relies upon Davis v. Fraser, 307 N.Y. 433, 121 N.E.2d 406 (1954) Holding that a corporation cannot be compelled to pay dividends to stockbrokers who were registered stockholders, in the face of notice that they were nominees only and not the real owners. Because of the factual distinctions, and its inconsistency with the views of this Court set forth in *Salt Dome* and *Reynolds*, we find the *Davis* case to be unpersuasive.

Accordingly, in our judgment, the Chancery Court was correct in holding that the broker-petitioners are not required to prove their authority and are eligible to seek appraisal.

II.

[4] The question of the standing of the claimants is less difficult. The Court below concluded that their failure to comply with its Order, by not filing claims which were verified together with copies of their demands and objections attached, did not 'disrupt the orderly administration of this appraisal proceeding or operate to the corporation's prejudice.' Compare Jacques Coe & Co. v. Minneapolis-Moline Co., 32 Del.Ch. 1, 84 A.2d 815 (1949). This conclusion, we think, is justified. We are of the opinion that the Chancery Court did not abuse its discretion in excusing the claimants from compliance with its Order, in the absence of a clear showing that the waiver operated to the appellant's prejudice.

We approve, therefore, the conclusion of the Court below that the claimants were not deprived of their right to appraisal by the non-compliance asserted.

For the reasons stated, the portions of the Order appealed are affirmed.

All Citations

42 Del.Ch. 588, 217 A.2d 683

End of Document

Tab 7

41 Del.Ch. 183
Supreme Court of Delaware.

REYNOLDS METALS COMPANY,
Defendant Below, Appellant,
v.
COLONIAL REALTY CORPORATION
et al., Plaintiff Below, Appellees.

April 29, 1963.

Corporate merger appraisal action. The Court of Chancery, New Castle County, Short, Vice Chancellor, 185 A.2d 754, denied the defendant's motion for summary judgment, and the defendant appealed. The Supreme Court, Southerland, C. J., held that a stockbroker holding shares in its name as nominee for various customers, by voting some shares in favor of a merger was not thereby precluded from seeking an appraisal as to other shares held for other customers and which he voted against the merger.

Affirmed.

****753** ***184** Appeal from a judgment of the Court of Chancery of New Castle County denying defendant's motion for summary judgment. Affirmed.

Attorneys and Law Firms

Aaron Finger, of Richards, Layton & Finger, Wilmington, for appellant.

Aubrey B. Lank, of Theisen & Lank, Wilmington, for appellees.

SOUTHERLAND, C. J., and WOLCOTT and TERRY, JJ., sitting.

Opinion

SOUTHERLAND, Chief Justice.

This case involves the right of an unregistered stockholder to obtain appraisal of his stock after a merger. The facts are these:

On August 1, 1961, Tilo Roofing Company, Inc., a Delaware corporation, was duly merged into Reynolds Metals Company, also a Delaware corporation, under the provisions of the General Corporation Law. At and before the Reynolds stockholders meeting, Bache & Co., a New York firm of stockbrokers, was the record owner of 81,647 shares of Reynolds common stock. It voted 29,475 shares in favor of the merger. It also voted 29,728 shares against the merger, having duly filed written objection thereto before the meeting. These latter shares were beneficially owned by Colonial Realty Corporation. Thereafter Bache & Co. made due demand upon Reynolds for payment of $80 a share for the account of its customer. The demand was refused.

On December 14, 1961, Bache & Co. filed a petition for the appointment of an appraiser. Defendant moved for summary judgment. ***185** The case was heard on the pleadings, affidavits and deposition. The Vice Chancellor denied the motion, ruling that petitioner was entitled to the appraisal. Defendant appeals.

The sole question in the case is whether the vote in favor of the merger cast by the broker as the registered holder of certain shares makes the broker ineligible under the law to demand appraisal in respect of other shares.

8 Del.C. § 262(b) provides as follows:

> 'The corporation resulting from or surviving any consolidation or merger shall within 10 days after the date on which the agreement of consolidation or merger has been filed and recorded, notify each stockholder in any corporation of this State consolidating or merging, who objected thereto in writing and whose shares were not voted in favor of such consolidation or merger, and who filed such written objection with the corporation before the taking of the vote on such consolidation or merger, that the agreement has been filed and recorded. The notice shall be sent by registered mail, return receipt requested, addressed to the stockholder at his last known address as it appears on the books of the corporation. If any such stockholder shall within 20 days after the date of mailing of the notice demand in writing, from the corporation resulting from or surviving such consolidation or merger, payment for his stock, such resulting or surviving corporation shall, within ****754** 30 days

> after the expiration of the period of 20 days, pay to him the value of his stock on the date of the recording of the agreement of consolidation or merger, exclusive of any element of value arising from the expectation or accomplishment of such consolidation or merger.'

[1] Under these provisions a dissenting stockholder, to obtain appraisal, is required to take these steps: (1) object in writing before the meeting; (2) not vote his stock in favor of the merger; and (3) to make written demand for payment. Zeeb v. Atlas Powder Co., 32 Del.Ch. 486, 87 A.2d 123. So far as it was possible to do so Bache & Co., on behalf of Colonial, complied with the statute. Defendant admits that Bache & Co. could split its vote for the purpose of voting on ***186** the merger. But it contends that it cannot split its demand for appraisal.

Defendant's argument is this:

Only a registered stockholder is entitled to recognition under the appraisal statute (Salt Dome Oil Corp. v. Schenck, 28 Del.Ch. 433, 41 A.2d 583, 158 A.L.R. 975), and only then if his shares have not been voted in favor of the merger. Since Bache & Co. is a single entity, its decision to vote *any* of its shares in favor of the merger renders it ineligible to demand appraisal.

Now, if defendant is right, all of the customers of a broker who wish to exercise the right of appraisal are without remedy if one other customer holding a single share insists that the borker vote it in favor of the merger. Naturally, a contention leading to such a conclusion is not an appealing one. But defendant says it is compelled by our decisions. Let us examine them.

In the Salt Dome case, an unregistered stockholder sought appraisal of his shares. The Supreme Court denied the remedy. It was held that with respect to intracorporate matters affecting the internal economy of the corporation, there must be order and certainty, and the corporation was entitled to look to the corporate books as sole evidence of membership. Chief Justice Layton also said:

'On the other hand, the non-registered holder of a stock certificate is deprived of no essential right. He has it in his power to record the transfer of his shares and thereby become a member of the corporation in the full legal sense. If, for any reason, he chooses to allow his shares to be registered on the corporate books in the name of another, it is not a denial of his right of actual ownership to require him to establish his rights *and pursue his remedy through the nominee of his own selection*. Any disadvantage is the result of his own non-action.' (Emphasis supplied)

There is thus nothing in the Salt Dome case denying a beneficial stockholder the right to pursue the remedy of appraisal through his ***187** nominee. That is exactly what Colonial has done here. It would be strange, indeed, if that were not possible.

We have above referred to the unjust consequence of defendant's contention—the refusal of appraisal rights to beneficial stockholders if the broker votes *any* shares in favor of the merger. Defendant replies that it is the stockholder's own fault for leaving his stock in street name. He cites American Hardware Corp. v. Savage Arms Corp., 37 Del.Ch. 59, 136 A.2d 690. In that case a ten days' notice of a stockholders' meeting was claimed to be unreasonably short because there was a contest and because one-third of the outstanding shares were held in brokers' accounts. Pointing out that only the registered stockholders could vote, we said:

> 'If an owner of stock chooses to register his shares in the name of a nominee, he takes the risks attendant upon such an arrangement, including the risk that he may not receive notice of corporate proceedings, or be able to obtain a proxy from his nominee.'

****755** So he does. But what has that to do with this case?

[2] Defendant argues that when Colonial chose to leave its stock in street name it ran the risk of losing the right of appraisal, because the broker might vote someone else's shares in favor of the merger. Of course, no such situation was even hinted at in the American Hardware case, nor is such a case fairly within the intent of the quoted language. The risks the stockholder takes are such risks as are attributable to the necessity of protecting the corporation's right to rely on the registration of ownership, as pointed out in the Salt Dome case. But if that right is protected, there is no reason why the broker as registered owner cannot assert the right of appraisal on behalf of any customer who instructs him to do so. Defendant is not harmed in any way by requiring it to recognize such a right. Failure to do so would work manifest injustice.

[3] **[4]** Defendant concedes that a trustee holding shares for the benefit of two beneficiaries under a trust could vote one beneficiary's shares in favor of the merger and demand appraisal of the remaining ***188** shares. This, says defendant, is because there are two entities voting, a trustee for A and a trustee for B. For the matter of that, so are there really two entities in cases such as the one before us: Bache & Co., agent for Colonial, and Bache & Co. agent for other customers—or, perhaps, Bache & Co. in its own right. True, Bache & Co. is not registered as an agent on the corporate books. But this inflicts no disadvantage on the corporation. If it questions whether Bache & Co. is acting as an agent in demanding payment for shares, it may inquire into the facts. And the burden is on it to do so. Zeeb v. Atlas Powder Co., supra involved the authority of an attorney at law to object in writing to a merger as attorney for the stockholders. We held it not unreasonable 'to require the corporation to inquire of the stockholder concerning the existence of the agency' if in doubt of the fact. The Zeeb holding furnishes an analogy here. If the corporation receives two opposing proxies from a broker, and a demand for appraisal in respect of the shares represented by only one, and if (as is probably unlikely) the broker fails to inform the corporation that he is acting for a customer, the corporation can readily ascertain the fact.

Defendant cites Vanadium Corporation of America v. Susquehanna Corporation, D.C., 203 F.S 686, in which Judge Leahy quoted from and relied upon the American Hardware case. The Vanadium case is so far afield on the facts that it is of no help here. It concerns the requested modification of an injunctive order in an anti-trust suit in order to permit one of the real defendants, also a broker, to vote in respect of shares of stock held by innocent customers not involved in the alleged wrong doing. It is evident that the controlling consideration that guided the court was the necessity not to weaken 'the protective sanctions' of the injunction.

Defendant builds two arguments on the history of the statutory right of appraisal after merger. (See Chicago Corporation v. Munds, 20 Del.Ch. 142, 172 A. 452; Cole v. National Cash Credit Association, 18 Del.Ch. 47, 156 A. 183, and Southern Production Co. v. Sabath, 32 Del.Ch. 497, 87 A.2d 128.)

[5] At common-law a single stockholder could prevent a merger. This power derived from the result that he would otherwise be forced ***189** to continue in a new or changed enterprise against his will. When the law was changed to permit a specified majority to override his objection, the right of appraisal was given to the dissenter in compensation for the loss of the common-law right. But, says defendant, this right of appraisal was in effect an option 'completely to retire from the enterprise' and receive the value of his stock in money. To accord the right of appraisal to a stockholder ****756** of the absorbing corporation, which is not after the merger a 'changed enterprise', results in an abuse of the right. True, defendant admits, the wording of the statute permits it; but this is a highly technical right and it should not be enlarged beyond the technical wording of the statute, which strictly limits those eligible to demand appraisal to stockholders who did not vote in favor of the merger. Thus, one technical argument, says defendant, is answered by another.

How a court could base an effective rule upon the distinction suggested is not clear. How could the construction of § 262 depend upon such a distinction?

In any event, we think that there is nothing of substance in the point.

[6] On the brief, defendant makes the further argument that the legislative policy evidenced by the history of the statute is inconsistent with the claimed right of a stockholder *partially* to withdraw from the enterprise, that is, to vote some shares in favor of the merger and to demand appraisal of the rest. Defendant admits (as we understand it) that a broker could refrain from voting on the merger and then demand appraisal in respect only of the shares of a customer who demands appraisal. At any rate we think he could do so. Since this case involves only shares held by a broker as nominee, it is unnecessary for us to deal with the broader question, that is, the right of an individual stockholder to an appraisal of part of his holdings.

Defendant advances yet another contention. It says that shares of stock in street name are fungible goods. The shares which Bache & Co. voted against the merger, and in respect of which it demanded appraisal, are not identifiable; i. e., cannot be distinguished from the shares voted for the merger. It is impossible, therefore, (says defendant), ***190** to say that we can identify any stock that was not voted in favor of the merger.

[7] This argument seems inconsistent with defendant's admission that Bache & Co. could properly split its vote. In any event, what difference does it make that at the time of voting the shares were not represented by identified certificates? After the appraisal is made, certificates representing the shares will be surrendered. Defendant is really repeating in another form its contention that a vote by a

broker of one share in favor of the merger disqualifies all the other shares from appraisal. For the reasons heretofore given, we disagree.

This is a case of first impression in this State, and we have thus far dealt with it largely with *a priori* reasoning, which in our opinion justifies the conclusion above indicated, that is, that Bache & Co. is entitled to the relief sought.

[8] Even so, a comment must be made upon a recent decision in our sister state of New Jersey. In Bache & Co. v. General Instrument Corporation, 74 N.J.Super. 92, 180 A.2d 535, Certification denied, 38 N.J. 181, 183 A.2d 87, the Superior Court of New Jersey construed language in the New Jersey merger statute similar to ours. The court held that a brokerage firm which held blocks of stock in street names for various beneficial owners was not precluded, by having voted some shares in favor of the merger, from demanding appraisal in respect of other shares. As the Vice Chancellor said below, all of the reasoning of the New Jersey court is not applicable to our statutory scheme. But with the underlying thought in the opinion we are in agreement. This is the recognition of the realities of modern stock practices and the necessity to afford such protection to stock beneficially owned as is not inconsistent with protection of the corporation's rights.

We are in accord with the Vice Chancellor's holding, although as above indicated, we confine our decision to the facts of this case—the case of a beneficial owner and a nominee.

The judgment below is affirmed.

All Citations

41 Del.Ch. 183, 190 A.2d 752

End of Document

Tab 8

Code of Federal Regulations
Title 17. Commodity and Securities Exchanges
Chapter II. Securities and Exchange Commission
Part 270. Rules and Regulations, Investment Company Act of 1940 (Refs & Annos)

17 C.F.R. § 270.30b1–4

§ 270.30b1–4 Report of proxy voting record.

Currentness

Every registered management investment company, other than a small business investment company registered on Form N–5 (§§ 239.24 and 274.5 of this chapter), shall file an annual report on Form N–PX (§ 274.129 of this chapter) not later than August 31 of each year, containing the registrant's proxy voting record for the most recent twelve-month period ended June 30.

Credits
[68 FR 6581, Feb. 7, 2003]

SOURCE: 50 FR 37655, Sept. 17, 1985; 50 FR 40485, Oct. 4, 1985; 50 FR 42682, Oct. 22, 1985; 51 FR 9778, March 21, 1986; 52 FR 42284, Nov. 4, 1987; 52 FR 42428, Nov. 5, 1987; 55 FR 7710, March 5, 1990; 56 FR 8124, Feb. 27, 1991; 56 FR 26030, June 6, 1991; 58 FR 19343, April 14, 1993; 58 FR 49427, Sept. 23, 1993; 60 FR 11889, March 2, 1995; 61 FR 13976, March 28, 1996; 62 FR 47938, Sept. 12, 1997; 62 FR 64978, Dec. 9, 1997; 63 FR 13987, March 23, 1998; 64 FR 46834, Aug. 27, 1999; 66 FR 3757, Jan. 16, 2001; 67 FR 19870, April 23, 2002; 67 FR 57295, Sept. 9, 2002; 68 FR 5365, Feb. 3, 2003; 68 FR 36671, June 18, 2003; 69 FR 46389, Aug. 2, 2004; 71 FR 36655, June 27, 2006; 73 FR 71923, Nov. 26, 2008; 77 FR 70120, Nov. 23, 2012; 79 FR 1329, Jan. 8, 2014, unless otherwise noted.

AUTHORITY: 15 U.S.C. 80a–1 et seq.,80a–34(d), 80a–37, 80a–39, and Pub.L. 111–203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.; Section 270.01–1 also issued under sec. 38(a) [15 U.S.C. 80a–37(a)];; Section 270.0–1(a)(7) is also issued under 15 U.S.C. 80a–10(e);; Section 270.0–11 also issued under secs. 8, 24, 30 and 38, Investment Company Act [15 U.S.C. 80a–8, 80a–24, 80a–29 and 80a–371], secs. 6, 7, 8, 10 and 19(a), Securities Act [15 U.S.C. 77f, 77g, 77h, 77j, 77s(a)] and secs. 3(b), 12, 13, 14, 15(d) and 23(a), Exchange Act [15 U.S.C. 78c(b), 78*l*, 78m, 78n, 78*o*(d) and 78w(a)];; Section 270.6a–5 is also issued under 15 U.S.C. 80a–6(a)(5)(A)(iv)(I).; Section 270.6c–9 is also issued under secs. 6(c) [15 U.S.C. 80a–6(c)] and 38(a) [15 U.S.C. 80a–37(a)];; Section 270.6c–10 is also issued under sec. 6(c) [15 U.S.C. 80a–6(c)];; Section 270.6(e)–3(T) also issued under sec. 6(e), 15 U.S.C. 80a–5(e);; Section 270.8b–11 is also issued under 15 U.S.C. 77s, 80a–8, and 80a–37.; Section 270.10e–1 is also issued under 15 U.S.C. 80a–10(e);; Sections 270.12d1–1, 270.12d1–2, and 270.12d1–3 are also issued under 15 U.S.C. 80a–6(c), 80a–12(d)(1)(J), and 80a–37(a).; Section 270.12d3–1 is also issued under 15 U.S.C. 80a–6(c).; Section 270.17a–8 is also issued under 15 U.S.C. 80a–6(c) and 80a–37(a);; Section 270.17d–1 is also issued under 15 U.S.C. 80a–6(c), 80a–17(d), and 80a–37(a);; Section 270.17e–1 is also issued under 15 U.S.C. 80a–6(c), 80a–30(a), and 80a–37(a);; Section 270.17f–5 also issued under sec. 6(c) (15 U.S.C. 80a–6(c);; Section 270.17g–1 is also issued under 15 U.S.C. 80a–6(c), 80a–17(d), 80a–17(g), and 80a–37(a);; Section 270.17j–1 is also issued under secs. 206(4) and 211(a), Investment Advisers Act (15 U.S.C. 80b–6(4) and 80b–11(a));; Section 270.19b–1 is also issued under secs. 6(c) (15 U.S.C. 80a–6(c)), 19(a) and (b) (15 U.S.C. 80a–19(a) and (b), and 38(a) (15 U.S.C. 80a–37(a)).; Section 270.22c–1 also issued under secs. 6(c), 22(c), and 38(a) [15 U.S.C. 80a–6(c), 80a–22(c), and 80a–37(a)].; Section 270.22e–3T is also issued under 15 U.S.C. 80a–6(c) and 80a–37(a).; Section 270.23c–3 also issued under 15 U.S.C. 80a–23(c).; Section 270.24f–2 also issued under 15 U.S.C. 80a–24(f)(4).; Section 270.30a–1 is also issued under 15 U.S.C. 78m, 78*o*(d), 80a–8, and 80a–29.; Section 270.30a–2 is also issued under 15 U.S.C. 78m, 78*o*(d), 80a–8, 80a–29, 7202, and 7241; and 18 U.S.C. 1350, unless otherwise noted.; Section 270.30a–3 is also issued under 15 U.S.C. 78m, 78*o*(d), 80a–8, and 80a–29, and secs. 3(a) and 302, Pub.L. 107–204, 116 Stat.

745.; Section 270.30b1–1 is also issued under 15 U.S.C. 78m, 78*o*(d), 80a–8, and 80a–29.; Section 270.30b2–1 is also issued under 15 U.S.C. 78m, 78*o*(d), 80a–8, and 80a–29, and secs. 3(a) and 302, Pub.L. 107–204, 116 Stat. 745.; Section 270.30d–1 is also issued under 15 U.S.C. 78m, 78*o*(d), 80a–8, and 80a–29, and secs. 3(a) and 302, Pub.L. 107–204, 116 Stat. 745.; Section 270.30e–1 is also issued under 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78*l*, 78m, 78n, 78*o*(d), 78w(a), 80a–8, 80a–29, and 80a–37;; Section 270.31a–2 is also issued under 15 U.S.C. 80a–30.

Current through July 21, 2015; 80 FR 43263.

End of Document

Tab 9

Code of Federal Regulations
Title 17. Commodity and Securities Exchanges
Chapter II. Securities and Exchange Commission
Part 274. Forms Prescribed Under the Investment Company Act of 1940 (Refs & Annos)
Subpart B. Forms for Reports

17 C.F.R. § 274.129

§ 274.129 Form N–PX, annual report of proxy voting record of registered management investment company.

Currentness

This form shall be used by registered management investment companies, other than small business investment companies registered on Form N–5 (§§ 239.24 and 274.5 of this chapter), for annual reports to be filed not later than August 31 of each year, containing the company's proxy voting record for the most recent twelve-month period ended June 30, pursuant to section 30 of the Investment Company Act of 1940 and § 270.30b1–4 of this chapter.

Credits
[68 FR 6584, Feb. 7, 2003]

Editorial Note: Form N–PX was added at 68 FR 6584, Feb. 7, 2003.

SOURCE: 33 FR 19003, Dec. 20, 1968; 52 FR 42284, Nov. 4, 1987; 57 FR 56836, Dec. 1, 1992, unless otherwise noted; 59 FR 43467, Aug. 24, 1994; 59 FR 52701, Oct. 19, 1994; 67 FR 19870, April 23, 2002; 67 FR 57296, Sept. 9, 2002; 67 FR 69979, Nov. 19, 2002; 68 FR 5366, Feb. 3, 2003; 68 FR 6051, Feb, 5, 2003; 68 FR 6581, Feb. 7, 2003; 68 FR 36672, June 18, 2003; 69 FR 11264, March 9, 2004; 79 FR 1329, Jan. 8, 2014, unless otherwise noted.

AUTHORITY: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l*, 78m, 78n, 78*o*(d), 80a–8, 80a–24, 80a–26, 80a–29, and Pub.L. 111–203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.; Section 274.101 is also issued under secs. 3(a), 406, and 407, Pub.L. 107–204, 116 Stat. 745.; Section 274.128 is also issued under 15 U.S.C. 78j–1, 7202, 7233, 7241, 7264, and 7265; and 18 U.S.C. 1350.; Section 274.130 is also issued under 15 U.S.C. 7202 and 7241.

Current through July 21, 2015; 80 FR 43263.

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Tab 10

Restatement (Third) Of Agency § 2.01 (2006)

Restatement of the Law - Agency

Database updated June 2015
Restatement (Third) of Agency

Chapter 2. Principles of Attribution

Topic 1. Actual Authority

§ 2.01 Actual Authority

An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.

Comment:

a. Scope and cross-references. Section 1.03 defines manifestation. Section 2.02 covers the scope of actual authority, including criteria with which to assess the reasonableness of an agent's belief. Sections 3.01 and 3.02 state the means by which a principal creates actual authority, including circumstances in which a writing is required.

b. Terminology. As defined in this section, "actual authority" is a synonym for "true authority," a term used in some opinions. The definition in this section does not attempt to classify different types of actual authority on the basis of the degree of detail in the principal's manifestation, which may consist of written or spoken words or other conduct. See § 1.03. As commonly used, the term "express authority" often means actual authority that a principal has stated in very specific or detailed language.

The term "implied authority" has more than one meaning. "Implied authority" is often used to mean actual authority either (1) to do what is necessary, usual, and proper to accomplish or perform an agent's express responsibilities or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent. These meanings are not mutually exclusive. Both fall within the definition of actual authority. Section 2.02, which delineates the scope of actual authority, subsumes the practical consequences of implied authority.

The term "inherent agency power," used in Restatement Second, Agency, and defined therein by § 8A, is not used in this Restatement. Inherent agency power is defined as "a term used … to indicate the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent." Other doctrines stated in this Restatement encompass the justifications underpinning § 8 A, including the importance of interpretation by the agent in the agent's relationship with the principal, as well as the doctrines of apparent authority, estoppel, and restitution.

c. Rationale. Actual authority is a consequence of a principal's expressive conduct toward an agent, through which the principal manifests assent to be affected by the agent's action, and the agent's reasonable understanding of the principal's manifestation.

An agent's actions establish the agent's consent to act on the principal's behalf, as does any separate manifestation of assent by the agent. When an agent acts with actual authority, the agent's power to affect the principal's legal relations with third parties is coextensive with the agent's right to do so, which actual authority creates. In contrast, although an agent who acts with only apparent authority also affects the principal's legal relations, the agent lacks the right to do so, and the agent's act is not rightful as toward the principal. Actual authority often overlaps with the presence of apparent authority. See § 2.03, Comment *c*.

The focal point for determining whether an agent acted with actual authority is the agent's reasonable understanding at the time the agent takes action. Although it is commonly said that a principal grants or confers actual authority, the principal's initial manifestation to the agent may often be modified or supplemented by subsequent manifestations from the principal and by other developments that the agent should reasonably consider in determining what the principal wishes to be done. A principal's manifestations may reach the agent directly or indirectly. Often a principal's manifestation will state that the agent should refrain from acting in a particular way. In that situation, the agent's failure to act conforms to the principal's expressed wishes.

Illustration:
Illustration:

1. P gives A a power of attorney authorizing A to sell a piece of property owned by P. P subsequently says to A, “Don't sell the property. Lease it instead.” After P's statement, A has actual authority only to lease.

The presence of actual authority requires that an agent's belief be reasonable at the time the agent acts. It is also necessary that the agent in fact believes that the principal desires the action taken by the agent.

Illustrations:
Illustrations:

2. Same facts as Illustration 1, except that A overhears P say to a third party that P no longer wishes to sell the property and wishes A to lease it. A has actual authority only to lease because A knows P does not wish the property to be sold.

3. Same facts as Illustration 1, except that, after telling A to lease the property instead of selling it, P tells F that P regrets making this statement and wishes that the property be sold. A is unaware of P's statement to F. A sells the property to T, showing T the power of attorney. T is unaware of P's oral statements to A and F. A did not have actual authority to sell the property. A acted with apparent authority as defined in § 2.03.

Unless a principal's manifestation expressly states that the authority is irrevocable and constitutes a power given as security or an irrevocable proxy as defined in § 3.12, the principal has power to revoke actual authority even when the principal has contracted not to do so. If a principal's revocation of actual authority breaches a contract with an agent, the agent's authority terminates but the principal is subject to liability to the agent for breach of contract.

Illustration:
Illustration:

4. Same facts as Illustration 1, except that the power of attorney states that A's authority to sell shall be irrevocable by P for six months, in exchange for A's promise to use best efforts to sell the property. At the end of three months, P tells A that P revokes A's authority. A's authority is terminated, but P is subject to liability for breach of contract.

A principal's manifestation to an agent often consists of an intentional act. However, a principal may also convey actual authority to an agent through unintended conduct that the agent reasonably believes to constitute an expression of the principal's intentions.

Illustrations:
Illustrations:

5. P drafts and executes a power of attorney authorizing A to sell a piece of property. Following a change of mind, P drafts and executes a second power authorizing A only to lease the property. P inadvertently sends the first power to A and does not otherwise communicate with A regarding the nature of A's authority. A has actual authority to sell the property.

6. Same facts as Illustration 5, except that after A receives the power of attorney from P, P sends A a letter asking for a status report on A's efforts to lease the property. The letter also states that P is glad the property will not be sold. After receiving P's letter, A lacks actual authority to sell the property because it is not reasonable for A to believe that P wishes A to sell it.

A principal's manifestation to an agent may be expressed in a form that is observable by third parties. Such an expression provides guidance to the agent and creates a record of the content of the principal's manifestation to the agent. The principal's expression also constitutes a basis for apparent authority when third parties observe it. Indeed, a primary function of stating an agent's authority in a formal written instrument such as a power of attorney is to enable the agent to display the instrument to third parties to demonstrate the agent's authority. See § 1.04(7), which defines power of attorney. Despite this connection between actual and apparent authority, actual authority itself affects a principal's legal relations with third parties separately and without reference to any apparent authority conferred on the agent by the principal. This is because by conferring actual authority a principal consents to the agent's possession of power to act with legal consequences for the principal regardless of the belief of third parties concerning the existence or extent of that authority. Section 2.03 defines apparent authority and specifies the circumstances under which it is created.

It is misleading to characterize actual authority as reflecting a principal's "intention," without further elaboration. If not expressed in a form observable or discernible by an agent, the principal's intention is ineffective because creating an agency relationship does not merge the agent with the principal, and the agent is not deemed to know all that the principal knows or wishes. An agent's actual authority is grounded in the principal's manifestations (however indirect) to the agent, not the principal's unexpressed will, mental state, or unknown wishes. See § 3.01 for further elaboration.

Most conferrals of authority combine two elements. The first, always present, is a manifestation, however general or specific, by a principal as to the acts or types of acts the principal wishes to be done. The second, less invariably present, consists of instructions or directives that specify how or within what constraints acts are to be done. A principal's communications to an agent begin with an initial expression granting authority, followed in many instances by instructions or directions that clarify matters, prescribe in more specific terms what the principal wishes the agent to do, or reduce or enlarge the scope of the agent's authority. A principal's manifestations may raise questions—at one end, as to whether the principal wishes the agent to move beyond the acts explicitly specified in order to fulfill the principal's implicit purpose and, at the other end, as to whether implicit restrictions apply in addition to the limits the principal has stated. An agent must interpret the principal's manifestations and determine how to act. The context in which the relationship is situated, including the nature of the principal's objectives and the custom generally followed in such circumstances, affects how the agent should interpret the principal's manifestations. On an agent's duty to the principal to act only within the scope of actual authority, see § 8.09.

If a principal states directions to an agent in general or open-ended terms, the agent will have to exercise discretion in determining the specific acts to be performed to a greater degree than if the principal's statement specifies in detail what the agent should do. It should be foreseeable to the principal that an agent's exercise of discretion may not result in the decision the principal would make individually. Regardless of the detail in a principal's statements or other conduct, an agent's duty is to interpret them reasonably to further purposes of the principal that the agent knows or should know, in light of facts that the agent knows or should know when the agent acts. When a principal's instructions are ambiguous, or if circumstances change, it will often be reasonable for the agent to seek clarification from the principal rather than speculating about the principal's wishes. Section

2.02(2) states circumstances under which an agent's interpretation is reasonable. If an agent's interpretation is reasonable at the time the agent acts, the agent is not subject to liability to the principal even if, after the fact, the principal can demonstrate that the agent's interpretation was erroneous.

Many forms of action, including inaction, by an agent may carry legal consequences for the principal if the agent's act is done with actual or apparent authority. Thus, an agent's speech constitutes action for this purpose if the agent's actual or apparent authority encompasses speaking on behalf of the principal.

d. General and special agents. Courts have long distinguished between "general agents" and "special agents," a distinction that rests on both the objects of the discretion granted an agent and the mode of regulating the agent's exercise of discretion. The labels matter less than the underlying circumstances that warrant their application. The prototypical special agent is a real-estate broker who is authorized to conduct a single transaction. A special agent may also be authorized to conduct a series of transactions specified by the principal. The prototypical general agent is a manager of a business, who has authority to conduct a series of transactions and who serves the principal on an ongoing as opposed to an episodic basis. The transaction-by-transaction nature of a principal's relationship with a special agent may limit the principal's potential benefit from associating with the agent while also limiting the principal's risks. Both special and general agents have discretion, but special agents exercise it within compasses more specifically identified by the principal. A special agent may, of course, exercise considerable discretion as, for example, would an art dealer retained by a connoisseur as a special agent to buy on the connoisseur's account a painting to be chosen by the special agent. A principal may provide instructions to general as well as to special agents that further delimit their actual authority by restricting the discretion the agent would otherwise possess.

e. Organizational principals. When a principal is an organization, the relationship between actual authority and apparent authority may be difficult to untangle due to the significant role of custom and practice. In many organizations, including large and complicated ones, written job descriptions do not exist for many executive and managerial positions. See Comment *c* to § 1.03 for a discussion of manifestations made by organizations. Apparent authority as it applies to executives of corporations and other legally constituted organizations is discussed in § 3.03, Comments *c-e*.

Actual authority to do an act that is treated as the act of the organization spans its highest levels of hierarchy to its lowest. Executive or managerial capacity is not a sine qua non for the existence of actual authority.

Illustration:
Illustration:

7. P Corporation employs A as a clerk in its mail room. A's duties include initialing receipts presented by carriers. A initials a receipt for a valuable package shipped by T using C, a carrier. A's action acknowledges receipt by P Corporation.

f. Agent acts without authority. An agent's conduct may generate legal consequences for the principal in the principal's relations with third parties even when the agent's conduct exceeds or otherwise diverges from the agent's actual authority. Such deviations by the agent breach the agent's duties to the principal. See § 8.09. If the principal suffers loss as a consequence of the agent's acts, the agent is subject to liability to the principal for loss caused the principal. See id., Comment *b*. Under the circumstances stated in §§ 7.07 and 7.08, the principal will be subject to vicarious liability for an agent's tortious wrongdoing. As to conveyances and transactions entered into by an agent, the doctrine of apparent authority stated in § 2.03 assigns legal consequences to the principal distinct from the consequences of actual authority.

Reporter's Notes

*a. Comparison with Restatement Second, Agency, and codifications.*No difference in substance is intended between this definition and its counterpart in Restatement Second, Agency. The definition has been expanded to encompass points made in the commentary to Restatement Second, including the focus of actual authority on the agent's understanding at the time the agent acts. See Restatement Second, Agency § 7 (defining "authority" as "the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him").

Codifications of agency in the United States do not include a counterpart definition of actual authority. They appear to treat it as an idea too fundamental to require definition. See, e.g., Cal. Civil Code § 2304 (1985) ("WHAT AUTHORITY MAY BE CONFERRED. An agent may be authorized to do any acts which his principal might do, except those to which the latter is bound to give his personal attention") and § 2299 ("ACTUAL AGENCY. An agency is actual when the agent is really employed by the principal"); La. Civil Code § 2994 (1998) ("The principal may confer on the mandatary general authority to do whatever is appropriate under the circumstances").

b. Terminology."True authority" is used as a synonym for actual authority in Hartong v. Partake, Inc., 72 Cal.Rptr. 722, 737 (Cal.App.1968); SMP, Ltd. v. Syprett, Meshad, Resnick & Lieb, P.A., 584 So. 2d 1051, 1055 (Fla.App.1991); Blake v. Hooker-Barnes, Inc., 378 S.E.2d 716, 718 (Ga.App.1989); Podolan v. Idaho Legal Aid Servs., Inc., 854 P.2d 280, 287 (Idaho App.1993); In re Lester, 386 N.Y.S.2d 509, 514 (Sup.1976); and Diston v. EnviroPak Med. Prods., Inc., 893 P.2d 1071, 1076 (Utah App.1995).

"Implied authority" is defined to mean authority to do acts collateral or incidental to perform the "main authority" in many cases, including Bodell Constr. Co. v. Stewart Title Guar. Co., 945 P.2d 119, 124 (Utah App.1997) and Willey v. Mayer, 876 P.2d 1260, 1264 (Colo.1994). "Implied authority" has also been defined to mean an agent's reasonable interpretation of the agent's authority. See Kanavos v. Hancock Bank & Trust Co., 439 N.E.2d 311, 314-315 (Mass.App.1982), remanded for retrial on other grounds, 479 N.E.2d 168 (Mass.1985). Industry custom is a reference point for implied authority in Johnston v. American Cometra, Inc., 837 S.W.2d 711, 715 (Tex.App.1992) (industry custom supports implied authority of operators of gas well to sell gas on behalf of nonoperator owners of working interests).

For the proposition that a principal's negligent conduct may effectively convey actual authority, see Federal Land Bank of Omaha v. Sullivan, 430 N.W.2d 700 (S.D.1988) (under codification in S.D. Consol. L. § 59-3-2, actual authority is defined as "such as a principal intentionally confers upon the agent, or intentionally or by want of ordinary care, allows the agent to believe himself to possess"; bank created actual authority by acquiescing in its attorney's actions in settling case, thereby leading attorney to believe he had authority to settle).

For assessments of the determination not to use the term "inherent agency power" in this Restatement, see Gregory Scott Crespi, The Proposed Abolition of Inherent Agency Authority by the Restatement (Third) of Agency: An Incomplete Solution, 45 Santa Clara L. Rev. 337 (2005); Kornelia Dormire, Inherent Agency Power: A Modest Proposal for the Restatement (Third) of Agency, 5 J. Small & Emerging Bus. L. 243 (2001); John Dwight Ingram, Inherent Agency Powers: A Mistaken Concept Which Should Be Discarded, 29 Okla. City U. L. Rev. 583 (2004); Matthew P. Ward, A Restatement or a Redefinition: Elimination of Inherent Agency in the Tentative Draft of the Restatement (Third) of Agency, 59 Wash. & Lee L. Rev. 1585 (2002). For earlier assessments of inherent agency power, see Steven A. Fishman, Inherent Agency Power-Should Enterprise Liability Apply to Agents' Unauthorized Contracts?, 19 Rutgers L.J. 1 (1987); Roger J. Goebel, The Authority of the President over Corporate Litigation: A Study in Inherent Agency, 37 St. John's L. Rev. 29 (1962); John A. C. Hetherington, Trends in Enterprise Liability Law and the Unauthorized Agent, 19 Stan. L. Rev. 76 (1966); Edward A. Mearns, Vicarious Liability for Agency Contracts, 48 Va. L. Rev. 50 (1962); Warren A. Seavey, Agency Powers, 1 Okla. L. Rev. 3 (1948).

*c. Rationale.*An account that treats actual authority as a power that is conferred on the agent is Wesley N. Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 46-47 (1913) ("[t]he creation of a relation of agency involves, *inter alia*, the grant of legal powers to the so-called agent, and the creation of correlative liabilities in the principal"). Hohfeld characterizes authority as "an abstract or qualitative term corresponding to the concrete 'authorization,'—

the latter consisting of a particular group of operative facts taking place between the principal and the agent." Hohfeld concludes that the powers of agents are "[e]ssentially similar" to powers of appointment in relation to property interests, to the power of a sheriff to sell property under a writ of execution, to the power of a donee to revoke a gift made *causa mortis*, and to the statutory power of sale of a pledgee. As applied to agency, these comparisons tend to emphasize a principal's initial manifestation to an agent and to disregard the importance of the agent's understanding of the principal's wishes at the later time when the agent takes action.

The primary purpose of a power of attorney is characterized as enabling an agent to establish authority in the eyes of third parties in Villanueva v. Brown, 103 F.3d 1128, 1136 (3d Cir.1997); accord, Heine v. Newman, Tannenbaum, Helpern, Syracuse & Hirschtritt, 856 F.Supp. 190, 195-196 (S.D.N.Y.1994).

For the propositions that an agent must hold the belief that the principal desires an action, and that the belief must be reasonable, see Cho Mark Oriental Food, Ltd. v. K & K Int'l., 836 P.2d 1057, 1062 (Haw.1992) (to determine whether an agent acted with implied actual authority, " 'the relevant inquiry is whether the agent reasonably believes, because of the conduct of the principal (including acquiescence) communicated directly or indirectly to him, that the principal desires him so to act' "; agent, who helped friend buy property in exchange for commission, did not have implied authority on behalf of purchaser to help another friend obtain a lease to occupy the same property because agent did not believe he acted for owner in lease transaction and obtained no commission) (quoting Lewis v. Washington Metro. Area Transit Auth., 463 A.2d 666, 670 n.7 (D.C.1983)). Failure to prove that the agent held the belief that the principal authorized an action defeats a claim based on actual authority in Opp v. Wheaton Van Lines, Inc., 231 F.3d 1060, 1065 (7th Cir.2000) (insufficient evidence to support grant of summary judgment for carrier on issue of whether owner's former spouse had actual authority to execute release of liability presented by moving company retained by owner of goods; record contained no testimony from former spouse or movers that would indicate whether he believed he had authority to execute release because owner asked him to open the door for the movers but did not ask him to sign anything). See also Sarkes Tarzian, Inc. v. U.S. Trust Co. of Florida Sav. Bank, 397 F.3d 577, 583-585 (7th Cir.), cert. denied, 126 S. Ct. 398 (2005) (as a matter of law, agent lacked actual authority to bind principal to deal when unrebutted testimony established that agent had actual authority only to negotiate deal).

The principle that an agent's reasonable interpretation protects the agent from subsequent liability to a principal who subsequently argues that the agent interpreted the principal's instructions erroneously is stated in Credit Agricole Indosuez v. Muslim Commercial Bank Ltd., [2000] Lloyd's Law Rep. 275, 280 (Ct. App.) ("an agent is to be excused for acting on a reasonable, even if ultimately wrong, interpretation of his principal [sic] instructions"). The court applied this principle by analogy to the relationship in the case, between a bank that issued a letter of credit and the confirming bank that interpreted the instructions contained in the letter of credit to determine the documents required by the letter of credit. Drafted by the issuing bank, the letter of credit contained inconsistent and ambiguous provisions. The court relied on the statement in Midland Bank, Ltd. v. Seymour, [1955] 2 Lloyd's L. Rep. 147, 153 (Q.B.D.) that "when an agent acts on ambiguous instructions he is not in default if he can show that he adopted what was a reasonable meaning. It is not enough to say afterwards that if he had construed the documents properly he would on the whole have arrived at the conclusion that in an ambiguous document the meaning which he did not give to it would be better supported than the meaning which he did give to it."

*d. General and special agents.*For a durable discussion of the distinction between general and special agents, see Butler v. Maples, 76 U.S. 766, 773-775 (1869). Restatement Second, Agency, treated "general agent" and "special agent" as defined terms in § 3: "(1) A general agent is an agent authorized to conduct a series of transactions involving a continuity of service. (2) A special agent is an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service." The prototypes of the special and general agent are as stated in J. Dennis Hynes & Mark J. Loewenstein, Agency, Partnership & the LLC: The Law of Unincorporated Business Enterprises xxxii-xxxiii (6th ed. 2003). Although the classification of agents into "general" and "special" might logically draw distinctions on the basis of the extent of authority or the extent of the act, the distinction underlying these labels generally relies on the extent of the act. See 1 Floyd R. Mechem, A Treatise in the Law of Agency 38 (2d ed. 1914). For contemporary usage of "special agent," see, e.g., Guardian Life Ins. Co. v. Chemical Bank, 727 N.E.2d 111, 115 (N.Y.2000) (insurance broker, not a general agent of an insurer, may be insurer's special agent

for purposes of collecting premium from insured, processing insured's requests for policy loan or dividend withdrawal, or delivering insurer's check to insured; risk of loss for checks improperly paid on forged endorsements shifted from drawee bank to insurer); Hartzell Fan, Inc. v. Waco, Inc., 505 S.E.2d 196, 201 (Va.1998) (agreement between manufacturer and sales representative made representative a special agent of manufacturer for purpose of receiving customer payments and forwarding them to manufacturer; representative converted customer checks by endorsing and negotiating them, entitling manufacturer to offset commissions due representative against amount of checks converted).

In maritime usage, a “general agent” does many things in advance of the arrival of a vessel or after its departure. There is a presumption that a general agent looks solely to the credit of the owner for payment; unless the presumption is rebutted, the agent may not assert a maritime lien against the vessel. See Sunrise Shipping, Ltd. v. M/V American Chemist, 1999 A.M.C. 2906 (E.D.La.1999). Whether an agent is a general or a special agent depends on the facts. Id. at 2915.

Case Citations - by Jurisdiction

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C.A.1,

C.A.1, 2013. Cit. in sup. Private equity funds that were organized as Delaware limited partnerships sued multiemployer pension fund, seeking a declaratory judgment that they were not liable to the fund under the Multiemployer Pension Plan Amendments Act (MPPAA) for the withdrawal pension obligations of a bankrupt company that was part of their portfolio. The district court granted summary judgment for plaintiffs. Reversing in part and remanding, this court held that one of the private equity funds was a "trade or business" within the meaning of the MPAA for the purpose of imposing on it portfolio company's withdrawal liability. The court reasoned that, under Delaware law, the general partner of that fund, in providing management services to portfolio company, was acting as an agent of the fund, and thus its management activities could be attributed to the fund. Moreover, even absent Delaware law, the partnership agreements themselves granted actual authority for the general partner to provide management services to portfolio companies like the one in this case. Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund, 724 F.3d 129, 147.

C.A.1

C.A.1, 2012. Quot. in sup. Monastery brought a copyright-infringement action against archbishop who was a former member of monastery, alleging that archbishop posted on his website monastery's translations of ancient religious texts from their original Greek into English. The district court granted summary judgment for plaintiff. Affirming, this court held, inter alia, that, regardless of whether the law mandated a showing of volitional conduct to establish direct infringement, defendant engaged in sufficient acts of authority and control over the computer server and material actually posted that he could be held liable for direct infringement of plaintiff's works; because priest-monk who personally uploaded plaintiff's works to defendant's website acted as defendant's agent in both building and handling the technical aspects of the website, defendant as principal could be held liable for the authorized acts of monk as his agent. Society of Holy Transfiguration Monastery, Inc. v. Gregory, 689 F.3d 29, 57.

C.A.1, 2011. Com. (c) quot. in ftn. Ophthalmology practice brought a breach-of-contract action against provider of direct-deposit payroll services, alleging that, over a six-year period, plaintiff's employee who was the designated payroll contact with defendant had directed defendant to pay her substantially more than her authorized annual salary, and defendant had in fact done so. Affirming the district court's grant of summary judgment for defendant, this court held that plaintiff, by placing its employee in a position where it appeared that she had authority to order additional checks and by acquiescing in her acts through its failure to examine the payroll reports, created apparent authority in employee such that defendant reasonably relied on her authority to issue the additional paychecks. The court noted that, in contrast to apparent authority, actual authority referred to the manifestation that a principal made to its agent. Ophthalmic Surgeons, Ltd. v. Paychex, Inc., 632 F.3d 31, 38.

C.A.2

C.A.2, 2012. Cit. in sup. Shipowner sued supplier of marine shipping fuel, seeking a declaratory judgment that it was not contractually bound to arbitrate with defendant. The district court dismissed the action. Vacating and remanding, this court held, inter alia, that nothing in the record unequivocally showed that managing company (which had signed, purportedly on plaintiff's behalf, defendant's fuel-order confirmations containing an arbitration clause) had actual authority to act for plaintiff; leasing agreements between plaintiff and the charterers of its vessels, under which plaintiff allegedly retained a variety of rights, did

not necessarily show that managing company was acting on plaintiff's behalf, and not on its own. Garanti Finansal Kiralama A.S. v. Aqua Marine and Trading Inc., 697 F.3d 59, 71.

C.A.3,

C.A.3, 2013. Quot. in disc. Female high-school-basketball official brought, inter alia, a Title VII claim against state interscholastic athletic association and international association of basketball officials, among others, alleging that defendants were vicariously liable for the actions of a local board, which was a chapter of state association and whose members were associated with international association, in excluding her from officiating at boys' high-school-varsity-basketball games. The district court dismissed the complaint with prejudice. Affirming in part and remanding in part, this court held, among other things, that defendants lacked sufficient control over the board to be vicariously liable for its alleged Title VII violations In making its decision, the court noted that vicarious liability due to an agency relationship could be based on the agent's actual authority, and it could also be based on apparent authority. Covington v. International Ass'n of Approved Basketball Officials, 710 F.3d 114, 120.

C.A.3

C.A.3, 2011. Quot. in ftn., com. (b) quot. in ftn. Architectural firm sued property owners and replacement firm hired by owners to finish a project begun by plaintiff's architect, alleging, among other things, that defendants violated its copyright in the design for the project. The district court granted summary judgment for defendants on plaintiff's copyright claim, finding that the copyright was owned by another firm that employed architect when he initiated the design. Affirming that portion of the decision, this court held that there was no evidence to support plaintiff's allegation that the other firm, acting through architect as its executive officer, orally assigned the copyright to plaintiff, noting that the only writing memorializing the alleged assignment was dated nearly nine years after it took place and more than four years after this action was filed. Barefoot Architect, Inc. v. Bunge, 632 F.3d 822, 831.

C.A.4

C.A.4, 2012. Quot. in sup. Nursing-home operator petitioned for judicial review of a National Labor Relations Board (NLRB) order that it cease and desist from refusing to bargain with union as the exclusive bargaining representative of nursing home's employees. This court denied nursing home's petition and enforced the NLRB order, holding that the union was properly certified. The court rejected nursing home's argument that the union-representation election should have been set aside because it was improperly tainted by the allegedly racially inflammatory comments made by the executive director of a civil-rights organization's Virginia chapter, concluding that the Virginia chapter was not union's apparent agent, where the evidence fell far short of showing that it was instrumental in every step of the campaign process, and executive director's remarks were made months before the election. Ashland Facility Operations, LLC v. N.L.R.B., 701 F.3d 983, 990.

C.A.7

C.A.7, 2008. Cit. in disc. Sole shareholder of corporation that operated gas station sued oil company, alleging that defendant violated the Petroleum Marketing Practices Act by terminating gas station's franchise without the statutorily required notice and cause. The trial court granted summary judgment for defendant, holding that plaintiff lacked prudential standing because he suffered only an indirect, derivative injury as sole shareholder of corporation, the real party in interest. Affirming, this court held that there was no factual or legal support for plaintiff's position that he was entitled to bring this suit in his own name as agent for corporation as undisclosed principal, since plaintiff failed to show that he had actual authority, and acted on behalf of an undisclosed principal, and that defendant had notice that plaintiff was acting on behalf of an undisclosed principal. Rawoof v. Texor Petroleum Co., Inc., 521 F.3d 750, 758.

C.A.8

C.A.8, 2012. Cit. in sup. Former key executives brought a breach-of-contract action against employer, seeking pro rata distributions pursuant to performance and stock agreements issued under employer's unfunded long-term incentive and equity compensation plans, which were not governed by ERISA. The district court entered judgment for plaintiffs. Affirming in part, this court held, inter alia, that defendant's senior vice president of administrative services did not have implied authority to determine that plaintiffs would not receive payments under the agreements; under the plans' structures, the executive compensation committee (ECC), not defendant or its senior executives, was the designated administrator for the agreements, and there was no evidence that the ECC implicitly delegated any authority to defendant's vice president. Schaffart v. ONEOK, Inc., 686 F.3d 461, 472.

C.A.9

C.A.9, 2011. Cit. in sup. Argentinian residents sued German corporation under the Alien Tort Statute and the Torture Victims Protection Act, alleging that defendant's Argentinian subsidiary collaborated with state-security forces to kidnap, detain, torture, and kill plaintiffs and/or their relatives during Argentina's "Dirty War." The district court granted defendant's motion to dismiss for lack of personal jurisdiction. Reversing and remanding, this court held that defendant was subject to personal jurisdiction in California through the contacts of its U.S. subsidiary; defendant had more than enough control over its U.S. subsidiary to establish that U.S. subsidiary was defendant's agent for purposes of personal jurisdiction, because defendant had the right to control nearly every aspect of U.S. subsidiary's operations. Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 923.

C.A.9, 2009. Com. (d) cit. in diss. op. Argentinean residents sued German manufacturer of motor vehicles, alleging human rights violations committed in Argentina by manufacturer's Argentinean subsidiary during the 1970's military regime. The district court granted defendant's motion to dismiss for lack of personal jurisdiction. Affirming, this court, conducting a minimum-contacts analysis, held that the contacts of manufacturer's United States subsidiary could not be imputed to manufacturer, because manufacturer's United States subsidiary exercised insufficient control over and did not serve as manufacturer's representative. The dissent argued that, at common law, agents could exercise a considerable amount of discretion in performing their functions, and that a less stringent showing of control was required for the limited purpose of establishing personal jurisdiction. Bauman v. DaimlerChrysler Corp., 579 F.3d 1088, 1099.

C.A.9, Bkrtcy.App.

C.A.9, Bkrtcy.App.2011. Sec. and com. (b) quot. in disc. and cit. in sup. Debtor objected to proofs of claim filed by party to master repurchase agreements through which party had sold debtor's loans to buyer, alleging that party failed to show that it had express authority to file the proofs of claim as buyer's authorized agent. The bankruptcy court held that party had authority to file the proofs of claim. Affirming, this court held that the bankruptcy court did not err when it determined that buyer's express authorization for party to pursue buyer's interests in debtor's case necessarily included an authorization to file the disputed claims. In re Palmdale Hills Property, LLC, 457 B.R. 29, 47, 48, 50.

C.A.10,

C.A.10, 2013. Quot. in sup. Retailer of replacement contact lenses brought a claim for service-mark infringement under the Lanham Act against competitor, alleging, among other things, that a third-party marketer hired by competitor, known as an affiliate, had purchased keywords resembling plaintiff's 1800CONTACTS mark and was using the mark in the text of its online ads. The district court granted summary judgment for defendant. Affirming in part, this court held, inter alia, that defendant was not vicariously liable for its affiliate's allegedly infringing actions under agency law, because, even if the affiliate was an

agent (or, more precisely, a subagent) of defendant, it lacked actual authority from defendant to include plaintiff's mark in ads for defendant. The court noted that there was undisputed evidence that the affiliate did not believe that defendant authorized him to publish ads displaying plaintiff's mark in his text, and thus the subjective component of actual authority was absent. 1-800 Contacts, Inc. v. Lens.com, Inc., 722 F.3d 1229, 1251.

C.A.10

C.A.10, 2008. Quot. in sup. After passenger who was accompanying her husband in a tanker truck he was driving on a work-related trip was injured when the truck rolled over, she sued husband's employer, alleging that defendant was vicariously liable for husband's negligence. The district court entered summary judgment for defendant. Affirming, this court held that plaintiff failed to establish any basis under Wyoming law on which a rational jury could have decided that her husband had actual authority, whether express or implied, or apparent authority to invite her to travel with him; it was not reasonable for husband to assume that he had implied actual authority, derived from his past dealings with and duties for defendant, to invite plaintiff to accompany him. Beardsley v. Farmland Co-Op, Inc., 530 F.3d 1309, 1316.

C.A.11

C.A.11, 2011. Cit. in sup. Mexican farm workers hired as guest workers through the Department of Labor's H-2A visa program brought suit under the Fair Labor Standards Act against Georgia onion grower that employed them, alleging that they were entitled to reimbursement from defendant for the fees that employment agencies had charged them. The district court granted summary judgment for defendant. Affirming in part, this court held, inter alia, that, under principles of agency law, defendant was not liable for the fees, because plaintiffs failed to present substantial evidence that defendant provided employment agencies with the authority to collect those fees; defendant never expressly permitted nor acquiesced in the collection of the fees, and the agreement that defendant signed with contractor it employed to facilitate the hiring of plaintiffs made no reference to the collection of fees from workers. Ramos-Barrientos v. Bland, 661 F.3d 587, 600.

D.Ariz.

D.Ariz.2008. Cit. in case quot. in disc. Manufacturer of indoor tanning products sued Internet reseller that purchased manufacturer's products from tanning salons and resold them on reseller's websites, alleging, among other things, that defendant caused some of plaintiff's distributors to sell plaintiff's products to defendant, thereby breaching their distributorship agreement with plaintiff. Granting in part defendant's motion for summary judgment, this court rejected plaintiff's argument that even if defendant had never purchased the products directly from a distributor, the salons were acting as plaintiff's agents when they purchased the products from the distributors. The court held that the evidence did not support a finding of actual authority, because it did not show that plaintiff had the right to control the salons' transactions with distributors, but rather that plaintiff and the salons entered into arms-length transactions. Designer Skin, LLC v. S & L Vitamins, Inc., 560 F.Supp.2d 811, 826.

D.Del.Bkrtcy.Ct.

D.Del.Bkrtcy.Ct.2007. Quot. in sup. Company that performed maintenance and repair work at Chapter 11 debtor's oil refinery brought an adversary proceeding against debtor, alleging that debtor agreed to pay plaintiff's prepetition claims in full if company rebuilt the refinery's coker unit without delay. Granting judgment for plaintiff, this court held, inter alia, that debtor's chief operating officer (COO), as the senior client representative for debtor in its relationship with plaintiff, had actual and apparent authority to make the oral statements allegedly binding debtor to the agreement, and that the COO's statements to plaintiff were ratified by other members of debtor's senior management. In re Orion Refining Corp., 372 B.R. 688, 694.

D.D.C.

D.D.C.2012. Cit. in sup. Commercial real estate broker brought a breach-of-contract action against limited-liability company (LLC) and its sole member, alleging that defendants failed to pay it certain commissions pursuant to a brokerage agreement. Granting in part plaintiff's motion for summary judgment, this court held that, because LLC's sole member entered into the brokerage agreement as LLC's agent, and acted within the scope of his actual authority as LLC's agent, LLC was a party to the agreement, and was legally bound by its terms. Uhar & Co., Inc. v. Jacob, 840 F.Supp.2d 287, 290.

D.D.C.2011. Sec. and com. (c) quot. in sup. Purported sub-subcontractor on a transit-authority-bridge project sued contractor for breach of a construction contract, alleging that subcontractor's principal had actual authority from contractor to hire plaintiff for dredging work. This court granted summary judgment for defendant on the ground that plaintiff breached the sub-subcontract by failing to purchase insurance; it also concluded that subcontractor's principal did not have actual authority to enter into the sub-subcontract with plaintiff. The court explained that subcontractor and its principal were explicitly prohibited from further contracting out subcontractor's responsibilities under its subcontract with contractor without first obtaining contractor's written permission, and contractor's principal asserted that he neither provided prior written permission nor otherwise consented to plaintiff's sub-subcontract purportedly signed on contractor's behalf. A-J Marine, Inc. v. Corfu Contractors, Inc., 810 F.Supp.2d 168, 175, 176.

D.D.C.2007. Cit. in sup. §§ 2.01-2.03. Relator and the United States sued bidders on an Egyptian wastewater project using United States aid agency funds, alleging conspiracy to rig bids and submission of false claims. Denying government's motion to compel production of documents from defendants' expert witnesses, this court rejected government's argument that defendants' counsel accepted service of subpoenas duces tecum for the experts. The court stated that it knew of no authority for the proposition that attorneys who had retained expert witnesses on behalf of their clients became ipso facto agents of those expert witnesses for the purposes of service of process whereby the witnesses delegated to them the right to waive any objection they might have to the subpoenas the lawyers accepted; to determine liability on the principal for the acts of an agent, one looked at what the principal did, and, here, there was no evidence that the witnesses waived their objections. Miller v. Holzmann, 471 F.Supp.2d 119, 121.

M.D.Fla.

M.D.Fla.2010. Cit. in ftn. Shipyard employee sued the United States, alleging that he was injured while performing contract repair work for a steel renewal project aboard a vessel owned by defendant. After a bench trial, this court found in favor of defendant, holding, among other things, that the conduct of the project's port engineer, who had been retained by defendant's managing agent for the vessel, was not attributable to defendant. The court reasoned, in part, that, even assuming that port engineer was an agent of defendant's managing agent, he was not a subagent of defendant, because managing agent did not have either actual or apparent authority to appoint him as a subagent; plaintiff produced no evidence that defendant authorized managing agent to delegate its responsibilities or that defendant authorized port engineer to act on its behalf. Green v. U.S., 700 F.Supp.2d 1280, 1302.

M.D.Fla.2009. Cit. in disc. Estate and family of rental-car passenger who died following an accident in which the car's brake system allegedly seized brought action for negligence, strict liability, and breach of warranty against franchisor of rental-car franchisee that provided the car. Granting summary judgment for defendant, this court held, inter alia, that defendant was not vicariously liable for franchisee's provision of the allegedly defective vehicle under theories of agency or respondeat superior. The court reasoned, in part, that a franchisee's mere use of a franchisor's trademarks was insufficient as a matter of law to establish the reliance prong of apparent authority, and nothing in the franchise agreement went beyond a typical franchise relationship such that franchisor participated in directing or managing franchisee's business. Estate of Miller v. Thrifty Rent-A-Car System, Inc., 637 F.Supp.2d 1029, 1037.

S.D.Ga.

S.D.Ga.2010. Quot. in sup. Mexican farm workers hired through Department of Labor program sued employer under the Fair Labor Standards Act, seeking unpaid wages. Granting in part defendant's motion for summary judgment, this court held that defendant was not responsible for reimbursing plaintiffs for processing and recruiting fees collected from plaintiffs by private employment service companies, because those companies did not have apparent authority to charge the fees in question. The court denied plaintiffs' motion for reconsideration, concluding that companies also lacked actual authority from defendant to collect recruiting and processing fees; there was no evidence that defendant authorized companies to collect the fees. Ramos-Barrientos v. Bland, 728 F.Supp.2d 1360, 1383.

D.Idaho,

D.Idaho, 2011. Cit. in sup. Direct and indirect purchasers of potatoes sued, among others, nongrowing licensor of brand name, alleging, among other things, that licensor was vicariously liable under the Sherman Antitrust Act for the involvement of licensee potato growers cooperative in a price-fixing scheme. Granting licensor's motion to dismiss, this court held, among other things, that plaintiffs' allegations were insufficient to support the conclusion that licensor invested licensee with actual or apparent authority to act on its behalf; while licensor and licensee had some united interests, this was not enough to plausibly suggest that one entity was the agent of the other without an indication that either was directing or in a position to control the other. In re Fresh and Process Potatoes Antitrust Litigation, 834 F.Supp.2d 1141, 1167.

D.Md.

D.Md.2007. Quot. in sup. After a contract to purchase real property fell through, property owner sued prospective buyer's mother for breach of contract, alleging that she was the real party in interest. This court granted mother's motion to dismiss, holding that buyer was a necessary and indispensable party whose participation would destroy diversity jurisdiction. The court rejected plaintiff's argument that buyer was a mere agent of mother who had actual authority to enter into the contract solely on behalf of mother, pointing to evidence suggesting that mother and buyer were joint venturers rather than principal and agent, including evidence that buyer was the one who decided to purchase the property and who approached mother about investing in the property. R-Delight Holding LLC v. Anders, 246 F.R.D. 496, 502.

D.Mass.

D.Mass.2006. Quot. in disc. (T.D. No. 2, 2001). Seller of out-of-service railcars and parts brought breach-of-contract and related equitable action against company, after company refused to pay for railcars purchased by officer of business that shared offices and resources with company, alleging that officer had represented that he was authorized to act on company's behalf. This court granted summary judgment for company, holding, inter alia, that seller failed to provide any evidence raising a genuine issue as to whether officer acted with the actual authority of company, and that the only possible inference from evidence in the record was that he did not, because he was an officer of the business only. The court noted that the relevant test for actual authority was the agent's reasonable belief, derived from actions of the principal, about the extent of his authority. CSX Transp., Inc. v. Recovery Express, Inc., 415 F.Supp.2d 6, 9-10.

E.D.Mich.

E.D.Mich.2009. Com. (c) quot. in sup. Retired union employees and their spouses filed a class action against former employer, asserting, among other things, that they were not bound by an agreement between defendant and union that purportedly relieved defendant of any future liability for plaintiffs' vested health insurance benefits. Denying summary judgment for defendant, this court held, inter alia, that it was not reasonable for union or employer to conclude that union had actual implied authority to

enter the agreement on plaintiffs' behalf; while plaintiffs manifested their assent to union negotiating or engaging in discussions with employer to protect and improve their health insurance benefits, they did not manifest their assent to union negotiating reductions to their benefits or relieving employer of its liability for those benefits. Yolton v. El Paso Tennessee Pipeline Co., 668 F.Supp.2d 1023, 1036.

E.D.N.Y.

E.D.N.Y.2009. Quot. in sup. Surety that issued bid, payment, and performance bonds for a construction project sued, among others, general contractor, seeking to recover losses it sustained as a result of contractor's failure to complete the project. Granting summary judgment for surety, this court held, inter alia, that, while the procurement of the bid bond and submission of the bid were purportedly the unauthorized acts of contractor's employee, contractor's subsequent manifestations of assent were sufficient to ratify employee's actions. The court concluded that the fact that employee was responsible for handling all of the paperwork required to operate contractor and prepared bids, contracts, and specifications for subcontractors was insufficient to show that employee was acting with contractor's actual or apparent authority. RLI Ins. Co. v. Athan Contracting Corp., 667 F.Supp.2d 229, 235.

S.D.N.Y.

S.D.N.Y.2010. Quot. in case quot. in sup. Bank sued general partnership and its general partners for breach of contract, seeking to enforce the terms of an interest rate swap agreement that allowed defendants and their various business entities to pay a lower interest rate on their mortgage loans from bank. Granting summary judgment for plaintiff, this court held that defendants were bound by the terms of the agreement. The court rejected defendant's argument that plaintiff did not have reason to believe that one partner's wife, who was partnership's bookkeeper and signed the agreement purportedly on behalf of partnership, had authority to sign the agreement; regardless of wife/bookkeeper's actual or apparent authority to sign, partnership ratified the agreement when one partner signed a confirmation document in connection with the transaction and partnership performed and received benefits pursuant to the agreement for more than three years. U.S. Bank Nat. Ass'n v. Ables & Hall Builders, 696 F.Supp.2d 428, 439.

S.D.N.Y.2009. Cit. in sup. Lender sued guarantor, seeking to enforce a guaranty agreement, after it was discovered that the agreement and the underlying loan were part of an alleged fraud scheme perpetrated by certain directors and officers of guarantor. Granting summary judgment for lender, this court held, inter alia, that the guarantee was not unenforceable on the basis that guarantor's agent, who signed the agreement on guarantor's behalf, was aware of or participated in the alleged fraud scheme. The court rejected guarantor's argument that because guarantor's agent was acting in his own interest, adverse to guarantor's, he could not bind guarantor; while this principle would apply to the issue of agent's implied actual authority to sign the agreement, it did not apply to the instant situation, in which guarantor's board had unambiguously conferred express actual authority on agent to execute the agreement. UBS AG, Stamford Branch v. HealthSouth Corp., 645 F.Supp.2d 135, 144.

S.D.N.Y.Bkrtcy.Ct.

S.D.N.Y.Bkrtcy.Ct.2013. Quot. in sup., cit. in ftn., com. (b) cit. in ftn., com. (c) quot. in sup. and cit. in ftn. Official committee of unsecured creditors in the Chapter 11 bankruptcy case of debtor/automobile manufacturer brought an adversary proceeding against administrative agent of secured creditors that had made a $1.5 billion term loan to debtor prepetition, seeking a determination that the loan was unsecured. Granting summary judgment for defendant, this court held, inter alia, that defendant did not give actual authority to debtor to terminate the term-loan lien when it mistakenly included a termination statement with respect to that lien in a batch of termination statements regarding the liens on an unrelated real-estate financing; neither debtor nor defendant intended, or believed, that their documents would affect anything other than the real-estate-financing liens, and neither thought that defendant had authorized debtor to have them affect anything else. Moreover, debtor did not have implied

authority to do tasks other than those that were appropriate to terminating the real-estate financing, for which debtor had been expressly authorized. In re Motors Liquidation Co., 486 B.R. 596, 621, 622, 637.

S.D.N.Y.Bkrtcy.Ct.2008. Quot. in sup. Hotel owner brought an adversary proceeding against debtor airline, seeking, in part, a declaration that it was not bound by hotel-service agreements (HSAs) negotiated by its hotel manager that allowed debtor's employees to occupy rooms in the hotel at preferential rates. Denying debtor's motion for summary judgment, this court held that manager lacked actual authority to bind plaintiff to the terms of the HSAs under the management agreement between manager and plaintiff, since the management agreement expressly denied manager the authority to enter into contracts that extended beyond the term of the management agreement and were not terminable at the end of its term. In re Northwest Airlines Corp., 383 B.R. 283, 292.

D.Or.

D.Or.2012. Cit. in ftn. Borrowers sued, among others, nominee/agent for residential mortgage lender and its successors, seeking to stop a nonjudicial foreclosure of their home that nominee commenced as the "beneficiary" listed under the deed of trust. Denying in part defendants' motion to dismiss, this court held that, under the Oregon Trust Deed Act, nominee was not the beneficiary of plaintiffs' trust deed, because it did not make the underlying loan to plaintiffs, and the trust deed did not secure it in the event of plaintiffs' default. The court, however, rejected plaintiffs' argument that, because nominee was not the real beneficiary, it lacked the authority to assign the trust deed to noteholder, reasoning that the Act did not forbid an agent such as nominee, when acting with authority and on behalf of its principal, the beneficiary, from making assignments, recording those assignments, appointing a successor trustee, or doing anything else that a beneficiary could do on its own. James v. ReconTrust Co., 845 F.Supp.2d 1145, 1152.

E.D.Pa.

E.D.Pa.2013. Quot. in sup. Homeowners who allegedly were victims of a series of foreclosure rescue scams brought claims for fraud and violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law against title-insurance company, contending that defendant was liable for the deceptive conduct of its closing agent, because closing agent acted with express authority according to the terms of the agency agreement between itself and defendant. Granting summary judgment for defendant, this court held that liability could not be imputed to defendant, because there was insufficient evidence that an agency relationship existed between closing agent and defendant for anything outside the scope of selling title insurance. The court pointed to evidence that the closing agent's authority was expressly limited to its role as a policy agent for defendant. Duffy v. Lawyers Title Ins. Co., 972 F.Supp.2d 683, 695-696.

E.D.Pa.2010. Com. (a) cit. in ftn. Employee of tax-preparation franchisee brought civil-rights action against supervisors, franchisee, and franchisor, alleging that supervisors sexually harassed, assaulted, and threatened her during her employment. Denying in part defendants' motion to dismiss, this court held, inter alia, that plaintiff alleged sufficient facts to raise a plausible claim that she was an employee of franchisor for purposes of federal and state employment laws. The court reasoned, in part, that plaintiff might be able to show that franchisor directly exercised significant control over her daily activities, or that franchisor indirectly exercised, through its authority to control franchisee's operations, significant control over her activities. Myers v. Garfield & Johnson Enterprises, Inc., 679 F.Supp.2d 598, 606.

E.D.Va.

E.D.Va.2013. Quot. in sup., quot. in case quot. in sup. South Korean corporate defendant moved to quash service of process and to dismiss an indictment charging it and five of its officers and employees with violations of federal trade-secret statutes and obstruction of justice. Granting in part defendant's motion to quash service, this court held, inter alia, that the government failed to prove that service of process on defendant's wholly owned New Jersey subsidiary was effective service on defendant

under the theory that subsidiary was defendant's managing or general agent, because the government did not present sufficient facts to show that subsidiary had authority (or acted as if it had authority) to take actions with legal consequences for defendant. While subsidiary sold defendant's products to American and Canadian customers, it did so by binding itself, and not defendant, to contracts, and then purchasing the products from defendant and distributing them to the customers. U.S. v. Kolon Industries, Inc., 926 F.Supp.2d 794, 810, 813.

Alaska

Alaska, 2009. Quot. in ftn. After native village corporation leased 20 acres of land to school district for the building of a school, corporation sued school to reform or invalidate the lease, which specified a lease rate of $1 per year, alleging, in part, that a valid lease was never formed because corporation's board chairman, who signed the lease on behalf of the corporation, lacked the authority to bind corporation. The trial court entered summary judgment for school. Affirming, this court held, inter alia, that, because it was reasonable for school to believe that corporation had authorized its board chair to sign the lease on its behalf, chair had apparent authority to sign the lease and bind corporation. The court noted that, given the outcome of the apparent-authority issue, there was no need for it to decide whether chair had actual authority, but it observed that there was insufficient evidence to conclude that he reasonably believed that corporation's shareholders had authorized the lease in its final form prior to signing. Askinuk Corp. v. Lower Yukon School Dist., 214 P.3d 259, 264.

Ariz.App.

Ariz.App.2011. Com. (b) quot. in case quot. in disc. Captive insurer sued captive manager, among others, alleging breach of contract. The trial court granted summary judgment for manager on the basis that the execution and performance of a release of claims between the parties constituted an accord and satisfaction. Reversing and remanding, this court held that material issues of disputed fact existed as to plaintiff's president's actual or apparent authority to bind plaintiff to the release. The court reasoned that evidence that the release was completely unauthorized and contrary to plaintiff's board's wishes could have permitted a factfinder to conclude that president lacked actual authority; moreover, issues of fact existed regarding the reasonableness of defendant's reliance on president's apparent authority, given that no claims had been asserted, defendant had not requested a release, plaintiff did not obtain much value in exchange for the release, and defendant was negotiating to purchase a company in which president had an ownership interest. Best Choice Fund, LLC v. Low & Childers, P.C., 269 P.3d 678, 687.

Ariz.App.2007. Cit. in disc., com. (b) quot. in disc. and cit. in sup. Estate of nursing-home patient sued nursing home for, in part, negligence and breach of contract. The trial court dismissed the complaint and compelled arbitration. Affirming, this court held, inter alia, that patient had implicitly authorized his wife to act as his agent to bind him to the alternative-dispute-resolution agreement that she signed when patient was admitted to defendant's facility. The court concluded that, absent any contrary evidence, the medical records that defendant produced, revealing a history of wife's acting and making decisions on patient's behalf, reflected that patient intended wife to act as his agent. Ruesga v. Kindred Nursing Centers, L.L.C., 215 Ariz. 589, 161 P.3d 1253, 1261, 1262.

Conn.App.

Conn.App.2009. Quot. in sup. Prospective sellers of real property sued limited-liability company and principal of company who sought to acquire the property for a proposed auto raceway, after defendants were unable to obtain the necessary zoning approvals and the sale did not take place. After a bench trial, the trial court rendered judgment for defendants. Affirming, this court held, inter alia, that a licensed real-estate agent who was acting as the parties' dual agent for the sale did not have actual authority to bind defendants by accepting certain unilateral changes made by plaintiffs to the contractual closing date. The court cited testimony by both principal and agent that at no time did principal give agent the authority to bind company, and that everyone involved with company understood that no one except principal himself had the authority to bind company. LeBlanc v. New England Raceway, LLC, 116 Conn.App. 267, 275, 976 A.2d 750, 758.

Del.

Del.2013. Quot. in disc., cit. in ftn. Racing official who was suspended by state harness-racing commission for allegedly altering a judging sheet brought a promissory-estoppel claim against commission, claiming that commission reneged on its promise to reinstate him if he was acquitted of the criminal charges against him. After the jury returned a verdict for official, the trial court granted commission's motions for judgment as a matter of law and a new trial. Reversing and remanding for reinstatement of the jury's verdict, this court held that the evidence was sufficient to support a finding that commission promised to reinstate official, and that commission expressly authorized the administrator of racing, its executive officer, to convey that promise to official; the court cited administrator's testimony that, when he posed the question of official's reinstatement to commission, commission members looked at each other and then said "Yes." Harmon v. State, Delaware Harness Racing Com'n, 62 A.3d 1198, 1201.

Del.Ch.

Del.Ch.2008. Quot. in sup., cit. in ftn. Company's minority shareholder, who had brought an action against majority shareholder for a declaratory judgment concerning her right to compete with the company, moved to enforce an agreement purportedly reached by the parties to settle the dispute, after majority shareholder refused to sign it. Granting plaintiff's motion, this court held that defendant was bound to the settlement agreement, since, under the principles of agency law, defendant's long-time attorney, business associate, and close personal friend, who had agreed to the settlement after protracted negotiations, had actual, implied, and apparent authority to settle the dispute, even though he was not counsel of record in the case; attorney's implied authority, a form of actual authority that could extend the scope of an agency relationship, was evidenced by defendant's permission for him to speak “in [defendant's] name,” along with their course of dealings over 20 years. Dweck v. Nasser, 959 A.2d 29, 40, 43.

Iowa

Iowa, 2010. Cit. in sup. Assignee of lessor sued lessee, after lessee defaulted on an equipment lease for a beverage cart to be used on its golf course. The trial court granted summary judgment for plaintiff. The court of appeals reversed and remanded. Affirming as modified, this court held, inter alia, that questions of fact remained as to whether defendant's employee had actual or apparent authority to enter into the lease on behalf of defendant. The court cited an affidavit by defendant's director/owner, which, in refuting the existence of actual authority, stated that employee was not authorized to enter into the lease, and, in refuting the existence of apparent authority, averred that vendors were aware that golf professionals such as employee did not have authority to enter into the type of transaction at issue. Frontier Leasing Corp. v. Links Engineering, LLC, 781 N.W.2d 772, 776.

Ky.App.

Ky.App.2011. Com. (c) quot. in sup. Mother of an incapacitated adult nursing-home resident, in her capacity as resident's guardian, brought negligence and other claims against owners, operators, managers, and administrators of the nursing home, alleging that resident sustained numerous injuries while he was staying at the home. The trial court denied defendants' motion to compel arbitration pursuant to an alternative-dispute-resolution agreement that plaintiff signed during resident's admission to the home, which took place prior to her appointment as his guardian. Affirming, this court pointed out that plaintiff signed the agreement in her own name, without listing in what legal capacity she had to act as resident's representative, and held that the trial court did not err by finding that plaintiff lacked either actual or apparent authority to act on resident's behalf. The court noted that both actual and implied authority were granted to the agent by the principal, and that actual authority could be found when there was a manifestation by the principal to the agent that the agent could act on account of the principal, and consent by the agent so to act. Kindred Nursing Centers Ltd. Partnership v. Brown, 411 S.W.3d 242, 249.

Mass.

Mass.2006. Quot. in sup. (T.D. No. 2, 2001). Landowner sued neighbors, challenging, inter alia, the validity of an escrow agreement, negotiated through neighbors' attorney, concerning the transfer of ownership of a triangular parcel of landowner's property to neighbors. The trial court ruled, among other things, that the agreement was enforceable. Affirming that portion of the decision, this court held, inter alia, that there was ample evidence in the record to support the trial court's finding that neighbors gave their attorney the authority to make appropriate binding agreements on their behalf to obtain title to the parcel. The court noted that an agent acted with actual authority when, at the time of taking action that had legal consequences for the principal, the agent reasonably believed, in accordance with the principal's manifestations to agent, that the principal wished the agent so to act. Haufler v. Zotos, 446 Mass. 489, 498, 845 N.E.2d 322, 330.

Neb.

Neb.2014. Com. (c) quot. in sup. Certain members of a family farming partnership sued another member, alleging that defendant entered into a series of grain contracts on behalf of the partnership without authority to do so, resulting in significant losses to the partnership. After a bench trial, the trial court found that defendant did not have authority to enter into the contracts and awarded plaintiffs damages. Affirming, this court held that there was sufficient evidence to support the trial court's findings that a majority of the managing partners had not approved the contracts, as required by the partnership agreement. While defendant was generally responsible for handling the paperwork of the partnership, including the signing of contracts on behalf of the partnership, it was undisputed that entering into the contracts was a significant decision requiring approval of a majority of the managing partners, and the trial court found credible plaintiffs' testimony that they were unaware of the contracts before the partnership entered into them. Elting v. Elting, 288 Neb. 404, 415, 849 N.W.2d 444, 452.

Neb.2009. Coms. (b) and (c) cit. in ftn. Son, as mother's next of kin and trustee of her estate, sued nursing home in connection with injuries, pain, and suffering allegedly sustained by mother while she was a patient. The trial court granted defendant's motion to compel arbitration pursuant to an arbitration agreement signed by defendant on behalf of mother as part of the paperwork for her admission. Reversing and remanding, this court held that, while mother authorized defendant to sign the required admission papers, his actual authority did not extend to signing the arbitration agreement, because it was not a condition of admission, and defendant was not justified in relying solely on mother's authorization of defendant to sign admission papers as apparent authority to bind her to an arbitration agreement, because nothing in the record suggested that a reasonable person would have expected an arbitration agreement to be included with admission documents for a nursing home. Koricic v. Beverly Enterprises—Nebraska, Inc., 278 Neb. 713, 718, 773 N.W.2d 145, 150.

N.J.

N.J.2010. Quot. in sup. Lawyers' fund for client protection, as subrogee of attorney's clients whose funds deposited with attorney to close on a new home had been misappropriated by attorney from attorney's trust account, sought to recover the amount of the stolen funds from title insurer from which attorney, after the theft, purchased title insurance for the home. The trial court granted summary judgment for defendant; the appellate division reversed. Reversing and remanding for reinstatement of the original judgment for defendant, this court held that defendant was not liable for the misappropriation by attorney, in part because no agency relationship existed between attorney and defendant at the time the funds were misappropriated; insurer never represented to attorney's clients that attorney had actual or apparent authority to act on its behalf. New Jersey Lawyers' Fund for Client Protection v. Stewart Title Guar. Co., 203 N.J. 208, 220, 1 A.3d 632, 639.

N.J.Super.App.Div.

N.J.Super.App.Div.2011. Quot. in case quot. in disc. After the roof of its warehouse collapsed, landlord sued, among others, managing general agent of tenant's former liability insurer, alleging that defendant was professionally negligent in causing tenant's policy to be improperly canceled and for failing to reinstate it. The trial court granted summary judgment for defendant. Affirming, this court held, inter alia, that tenant's premium-finance lender had apparent authority to act for tenant in canceling the policy following tenant's default on its payments to lender, and defendant was entitled to rely on that authority to cancel the policy, even if lender's power of attorney authorizing cancellation of the policy for nonpayment did not comply with statutes governing creation of a valid power of attorney; defendant had received no notice that the power of attorney was invalid, and tenant had created the appearance of authority by allowing lender to procure the policy and renew it. AMB Property, LP v. Penn America Ins. Co., 418 N.J.Super. 441, 454, 14 A.3d 65, 72.

Pa.

Pa.2010. Cit. in ftn. Committee of creditors established for corporate debtor brought adversary proceeding against corporation's auditor and auditor's successor, alleging that defendants colluded with debtor's officers to fraudulently misstate debtor's finances. After the district court granted summary judgment for defendants on grounds that officers' fraud was imputed to debtor, because they provided auditor with false financial statements in the first place, the court of appeals certified to this court for review questions of first impression centering on the availability of an imputation-based in pari delicto defense in an auditor-liability scenario. Answering the questions, this court held, inter alia, that, in factual circumstances entailing secretive, collusive conduct of an agent and an auditor, Pennsylvania law rendered imputation unavailable, as the auditor had not proceeded in material good faith. Official Committee of Unsecured Creditors of Allegheny Health Educ. and Research Foundation v. PriceWaterhouseCoopers, LLP, 605 Pa. 269, 989 A.2d 313, 336.

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Tab 11

Restatement (Third) Of Agency § 2.02 (2006)

Restatement of the Law - Agency

Database updated June 2015
Restatement (Third) of Agency

Chapter 2. Principles of Attribution

Topic 1. Actual Authority

§ 2.02 Scope of Actual Authority

(1) An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act.

(2) An agent's interpretation of the principal's manifestations is reasonable if it reflects any meaning known by the agent to be ascribed by the principal and, in the absence of any meaning known to the agent, as a reasonable person in the agent's position would interpret the manifestations in light of the context, including circumstances of which the agent has notice and the agent's fiduciary duty to the principal.

(3) An agent's understanding of the principal's objectives is reasonable if it accords with the principal's manifestations and the inferences that a reasonable person in the agent's position would draw from the circumstances creating the agency.

Comment:

a. Scope and cross-references. Manifestation is defined in § 1.03. Section 2.01 defines actual authority. Actual authority is distinct from apparent authority, defined in § 2.03.

b. Terminology. This section encompasses what is often termed "implied authority," which is a form of actual authority. See § 2.01, Comment *b*. This section also encompasses situations in which the agent reasonably believes the principal wishes action to be taken due to necessity. The term "agency by necessity" is not used in this Restatement.

c. Rationale. Actual authority is an agent's power to affect the principal's legal relations in accord with the agent's reasonable understanding, at the time the agent acts, of the principal's manifestations to the agent. The determination of reasonableness is a question for the trier of fact, unless a directed verdict is required. If an agent's understanding is reasonable, the agent has actual authority to act in accordance with the understanding, although the principal subsequently establishes that the agent was mistaken. The agent's belief must be grounded in a manifestation of the principal, including but not limited to the principal's written or spoken words. See § 3.01. Thus, it is often said that implied authority is actual authority proved circumstantially, which means it is proved on the basis of a principal's conduct other than written or spoken statements that explicitly authorize an action.

Even when a principal has given an agent a detailed verbal articulation of the agent's authority, and the principal's language does not itself admit of real doubts or uncertainty about its meaning, the agent must decide what to do at the time the agent takes action. If the principal has stated the agent's authority in a formal written instrument, the formality of the statement itself is relevant to, and often dispositive of, whether the agent could reasonably believe that the principal intended to consent to the agent's power to do acts beyond or other than those stated in the instrument. In this basic respect, actual authority differs from a promise or an agreement, although promises and agreements that are constitutive elements of a contract between a principal and an agent may coincide with a manifestation of assent by the principal that creates actual authority under § 3.01. Reasonableness is a common element in legal analysis applicable to both. However, the focal point for determining whether an agent's interpretation of the principal's manifestation was reasonable is the time the agent decides what action to take. This inquiry determines whether the agent acted with actual authority because the agent reasonably believed the principal consented to the agent's action. In contrast, the inquiries that underlie contractual interpretation are not comparably focused on the reasonableness of one party's belief. In resolving questions of contractual interpretation, the primary inquiry is ascertaining the parties' shared meaning to determine whether there is a contract and what rights and duties it creates. Moreover, questions of interpretation that determine whether an agent acted with actual authority have a temporal focus that moves through time as the agent decides how to act, while questions of contractual interpretation focus on the parties' shared meaning as of the time of a promise or agreement.

d. Acts necessary or incidental to achieving principal's objectives. If a principal's manifestation to an agent expresses the principal's wish that something be done, it is natural to assume that the principal wishes, as an incidental matter, that the agent take the steps necessary and that the agent proceed in the usual and ordinary way, if such has been established, unless the principal directs otherwise. The underlying assumptions are that the principal does not wish to authorize what cannot be achieved if necessary steps are not taken by the agent, and that the principal's manifestation often will not specify all steps necessary to translate it into action.

Illustrations:
Illustrations:

1. P employs A, an auctioneer, to sell goods owned by P. A has authority to accept bids on P's behalf.

2. P, a dealer in antiques, employs A to enter into contracts on P's behalf for the purchase of antiques. A has authority to sign memoranda of sale to satisfy the Statute of Frauds. Separately, a writing may be necessary to establish A's authority. See § 3.02.

3. A, the patriarch in a family each of whose adult members owns an interest in Blackacre, is authorized by the other family members to settle a lawsuit with T, a lessee who timbers Blackacre under the lease. A's authority to settle the lawsuit does not by itself imply authority to transfer fee-simple interests in Blackacre to T on behalf of the other family members.

If an agent does not believe that authority encompasses taking action that, viewed objectively, is necessary or incidental to achieving the principal's objectives, it is arguable that the agent acts without actual authority in taking these actions. However, the agent may act with apparent authority as defined in § 2.03 when a third party has notice of the principal's objectives and the situation in which the principal has placed the agent and is unaware of the agent's belief.

e. Agent's reasonable understanding of principal's manifestation. An agent does not have actual authority to do an act if the agent does not reasonably believe that the principal has consented to its commission. Whether an agent's belief is reasonable is determined from the viewpoint of a reasonable person in the agent's situation under all of the circumstances of which the agent has notice. Lack of actual authority is established by showing either that the agent did not believe, or could not reasonably have believed, that the principal's grant of actual authority encompassed the act in question. This standard requires that the agent's belief be reasonable, an objective standard, and that the agent actually hold the belief, a subjective standard.

Illustration:
Illustration:

4. P, a photographer, employs A as a business manager. P authorizes A to endorse and deposit checks P receives from publishers of photographs taken by P. Based on P's statements to A, A believes A's authority is limited to endorsing and depositing checks and does not include entering into agreements that bind P in other respects. A endorses and deposits a check from T, a magazine publisher, made payable to P. Printed on the back of the check is a legend: "Endorsement constitutes a release of all claims." It is beyond the scope of A's actual authority to release claims that P has against T.

The context in which principal and agent interact, including the nature of the principal's business or the principal's personal situation, frames the reasonableness of an agent's understanding of the principal's objectives. An agent's actual authority encompasses acts necessary to accomplish the end the principal has directed that the agent achieve. In exigent circumstances not known to the principal, the agent may reasonably believe that the principal would wish the agent to act beyond the specifics detailed by the principal.

Illustrations:
Illustrations:

5. P Corporation employs A as the Facilities Manager at an amusement park owned by P Corporation. A reports to B, P Corporation's Vice President for Leisure Activities. B directs A to arrange for the reseeding of the badly deteriorated lawn adjacent to the park's entrance. B also directs A to complete the reseeding by the end of the week. A purchases grass seed and directs groundskeepers to schedule time for reseeding. A then learns that the park location is in the path of a forecasted hurricane. A has actual authority to postpone the reseeding.

6. Same facts as Illustration 5, except weather conditions do not interrupt the reseeding. A knows that the lawn could be reseeded either at much higher cost to achieve turf conditions suitable for a golf course, or at lower cost to achieve conditions that are visually attractive but not suitable for use as a golf course. Absent other manifestations from B, or other knowledge of P Corporation's practices, A lacks actual authority to reseed to achieve the golf-course standard. In light of the use P Corporation will make of the lawn, it is not reasonable for A to believe that P Corporation's objectives require that the lawn be usable as a golf course.

Factors relevant to the reasonableness of an agent's understanding of the principal's manifestation include the fiduciary character of the agent's relationship with the principal and the agent's inability to react to the principal's unexpressed interests or wishes. An agent's fiduciary position obliges the agent to act loyally to serve the principal's interests and objectives that the agent knows or should know. See § 8.01. The relevant interests and objectives are those with respect to the agency and do not encompass other objectives or interests that a principal may have. A principal's situation, if known to an agent at the time the agent acts, may affect the agent's authority to do a particular act. Additionally, the principal may revoke or limit authority subsequent to granting it. An agent's understanding at the time the agent acts is controlling. If an agent knows that the principal's reason for previously authorizing the agent to do an act is no longer operative, the agent does not have actual authority to do the act. An agent's actual authority is not affected by changes in the principal's situation that are not known to the agent. See § 3.07(2) and (4) and § 3.08(1) and (3) for the impact on actual authority of a principal's death, cessation of existence, suspension of powers, or loss of capacity.

Illustrations:
Illustrations:

7. The directors of P Corporation approve a plan to upgrade a plant that is suitable for the manufacture of one product line. P Corporation's Executive Vice President tells M, the plant manager, to contract with an engineering firm for a redesign of the production process that must precede the upgrade work. After adopting the resolution, the directors abandon the upgrade plan and so notify the Executive Vice President. No one tells M, who on behalf of P Corporation enters into a contract with T, an engineering firm, to do the redesign. P Corporation is bound by the contract. M had actual authority to make the contract.

8. Same facts as Illustration 7, except that M reads in the newspaper that P Corporation's directors have discontinued the sole product line manufactured in the plant. M no longer has actual authority to make the contract with T. M may have apparent authority as defined in § 2.03 if T reasonably believes M has authority to make the contract. T's belief will not be reasonable if T is also aware that the product line has been discontinued.

9. Same facts as Illustration 7, except that the upgrade plan depends on using a particular building technology. M is aware of this fact. After the directors adopt the resolution and M is directed to contract for the redesign work, M learns that regulatory restrictions will prevent P Corporation from using the particular technology on which the plan depends. M no longer has actual authority to make the contract with T. M may have apparent authority as defined in § 2.03 if T reasonably believes that M has authority to make the contract.

10. Same facts as Illustration 7, except that P Corporation's Chief Financial Officer tells M that the upgrade plans have been abandoned. M no longer has actual authority even though M does not report to the Chief Financial Officer.

The nature of actual authority means that the relevant inquiry always focuses on the time the agent acts. In Illustrations 8, 9, and 10, the temporal focus, which is the time the agent acts, is not the time of the principal's initial manifestation to the agent. An alternative formulation, which would reach the same outcomes on these Illustrations, is to say that M had actual authority but that subsequent developments terminated it. This formulation unnecessarily adds two elements, the initial presence of authority and its subsequent termination, to the determinative inquiry, which is the reasonableness of M's belief at the time of determining the action to take. For a further discussion of this point, see § 3.06, Comment *b*.

An agent's understanding of the principal's interests and objectives is an element of the agent's reasonable interpretation of the principal's conduct. If a literal interpretation of a principal's communication to the agent would authorize an act inconsistent with the principal's interests or objectives known to the agent, it is open to question whether the agent's literal interpretation is reasonable.

Illustration:
Illustration:

11. P, a toy designer, employs A as an agent to present P's designs to toy manufacturers. P says to A, “Before you show the design, sign whatever forms the manufacturer requires.” A knows that P's practice is to retain all copyright and other intellectual-property interests in P's designs. It may not be reasonable for A to interpret P's instruction to authorize A to sign a form that assigns or releases all of P's interests in the design to T, a toy manufacturer. If T, an important presence in the industry, always demands that such a release be executed, when feasible A should contact P for further instructions. When not feasible, it is a question of fact whether A acted reasonably in signing the form presented by T. A has apparent authority as defined in § 2.03 only if based on P's conduct it is reasonable for T to believe that A has authority to sign the form.

Interactions between principal and agent do not occur in a vacuum. Prior dealings between them are relevant to the reasonableness of the agent's understanding of the principal's manifestation. If a principal and an agent share an idiosyncratic understanding of what is meant by the principal's manifestation, that understanding controls the scope of the agent's actual

authority, not the understanding that a reasonable person would have. Unlike a party dealing at arm's length with another, the focus for an agent is interpreting the principal's manifestations so as to further the principal's objectives.

Illustrations:
Illustrations:

12. P, who owns a number of residential rental properties, retains A to manage them. P directs A, “Install smoke detectors in each room.” Based on A's prior dealings with P, A knows that by “each room,” P means “each room in which the housing code requires a smoke detector.” A also knows that P views compliance with the housing code as a business necessity. A's actual authority to install smoke detectors is limited to rooms in which the housing code requires their installation.

13. Same facts as Illustration 12, except that after P's directive to A, the housing code is amended to require the installation of smoke detectors in hallways as well as rooms. A has actual authority to install smoke detectors in hallways as well as rooms.

In determining whether an agent's action reflected a reasonable understanding of the principal's manifestations of consent, it is relevant whether the principal knew of prior similar actions by the agent and acquiesced in them.

Illustration:
Illustration:

14. Same facts as Illustration 12, except that P knows that, given the same directive in the past, A has installed smoke detectors in all rooms. P has not objected or complained. A has actual authority to install smoke detectors in all rooms.

The context in which principal and agent interact will often include customs and usages that are particular to a type of business or a geographic locale. A person carrying on business has reason to know of such customs and usages and thus has notice of them as defined in § 1.04(4). If an agent has notice that the principal does not know of a custom or usage, the agent is not authorized to act in accordance with it if doing so would result in a transaction different from that which the agent has notice is desired by the principal.

If a principal states the agent's authority in terms that contemplate that the agent will use substantial discretion to determine the particulars, it is ordinarily reasonable for the agent to believe that following usage and custom will be acceptable to the principal. In contrast, if a principal's express statement of authority is highly detailed, it is not reasonable for the agent to believe the principal intended that the agent should follow a custom or usage that is at odds with the terms of the principal's express authorization. When a practice is common in a particular industry, it will be difficult for the principal credibly to claim no notice of it. Cases addressing the relevance of usage and custom reflect some division whether it is necessary to show that the principal had notice of the existence of the customs, usages, or practices at issue. This issue should be treated as an aspect of a broader inquiry into the reasonableness of the agent's belief that the agent had authority.

f. Interpretation by agent. In order to determine with specificity what a principal would wish the agent to do, the agent must interpret the language the principal uses or assess the principal's conduct or the situation in which the principal has placed the agent. An agent's position requires such interpretation regardless of the circumstances under which the principal created actual authority. Thus, interpretation by the agent is necessary whether the agent has received explicit instructions from the principal, has received a general directive, or has been appointed to a position in an organization with delegated powers. The benchmark for interpretation reflects the agent's fiduciary position. If the principal gives imperative instructions using clear and precise language and the instructions do not demand illegal conduct and do not appear to have been issued in error, the agent should follow the instructions even if they conflict with industry usage or custom. A reasonable agent would understand the principal's

choice of precise language, imperatively stated, as an accurate reflection of the principal's wishes. An industry custom or practice contrary to the principal's definite instructions does not excuse the agent's violation of the principal's instructions.

A principal's ability to communicate with an agent is a basic component of the principal's exercise of the right of control. In particular, a principal has the opportunity to state instructions to an agent with clarity and specificity. Moreover, much that underlies the occurrence of the risk that the agent will depart from instructions is within the principal's control. The principal's instructions may be insufficiently clear in their import to enable the agent to discern what acts the principal wishes the agent to do or to refrain from doing. The principal's instructions, albeit clear as far as they go, may be incomplete in some significant respect, or the instructions may reasonably be understood by the agent to authorize the agent to exercise discretion. Moreover, an agent may depart from instructions because the agent interprets the instructions from a perspective that differs in significant respects from the perspective from which the principal would interpret the identical language. Although not all factors that underlie such differences in perspective are always within the principal's control, in significant respects the principal makes decisions that shape the viewpoint from which the agent interprets instructions.

Occasionally, it may be open to doubt what a principal's instructions mean, even when they are interpreted literally. As a result, the agent may interpret them differently from the interpretation the principal would have preferred. The agent's fiduciary duty to the principal obliges the agent to interpret the principal's manifestations so as to infer, in a reasonable manner, what the principal desires to be done in light of facts of which the agent has notice at the time of acting. Within this basic framework, however, it is not surprising that more than one reasonable interpretation of instructions might be possible. Not all agents are equally gifted in their capacity for reasonable interpretation, especially when the instructions themselves are not specific or when the principal has not furnished the agent with a separate instruction that specifies how to resolve doubtful cases.

A principal may take steps that, by reducing ambiguity or other lack of clarity, reduce the risk that the agent's actions will deviate from the principal's wishes, interests, or objectives. Giving an agent a formal written set of instructions reduces the agent's discretion and potential to err in determining what actions to take. A principal may also reduce the risk of deviation by monitoring the agent, for example by requiring prompt checks on the agent's actions by a superior coagent or an external auditor. How an organizational principal structures itself, including titles given to individuals and habitual patterns of interaction among them, may also reduce the risk of deviation by orienting individuals to defined roles and organizationally specified constraints on action.

An organizational principal, like any principal, is at risk of misunderstanding and misinterpretation. Detailed instructions may be so complex that lapses occur because an agent's attentiveness slips. Prolix instructions may cause some agents to decide that certain instructions may be ignored as trivial or as unwittingly imposed obstacles to achieving what the agent perceives to be the principal's overriding objective. An agent is not privileged to disregard instructions unless the agent reasonably believes that the principal wishes the agent to do so. If third parties with whom the agent interacts reasonably believe the agent to be authorized, the doctrine of apparent authority, defined in § 2.03, may apply to protect the third party. It does not protect an agent who departs from instructions. See § 8.09(2) on an agent's duty to comply with all lawful instructions received from the principal.

Interactions among coagents within an organization often involve superior agents giving instructions to junior or subordinate agents. See § 1.04(9). A subordinate agent may realize correctly that the superior agent is not the principal. Whether correctly or mistakenly, the subordinate agent may believe that the principal's interests would best be served by disregarding the superior agent's instructions. Each separate occasion for the communication and interpretation of instruction downward within a sequential chain of agents enhances the likelihood of miscommunication, misunderstanding, and departure from instructions.

A principal may believe when initially giving instructions to the agent that the principal's best interests will be served by investing the agent with a large measure of discretion, a decision later regretted by the principal when reviewing the agent's actual use of discretion. Regardless of any later regret, the principal is bound by the agent's acts so long as the agent's interpretation was reasonable.

Illustrations:
Illustrations:

15. A is the manager of a retail clothing store owned by P, who owns several such stores. P authorizes store managers to buy, from vendors specified by P, inventory of items specified by P for their stores up to limits specified in dollar amount. P identifies “men's dress shirts” as an inventory type that A has authority to buy. A knows that by “dress shirts” P means “shirts suitable for wearing with a tuxedo.” A does not have actual authority to buy dress shirts not suitable for tuxedo wear.

16. Same facts as Illustration 15, except that P ascribes no unusual meaning to “men's dress shirts” that is known to A. P provides A with no directions as to the color assortment of shirts. At the time A places the order, a particular color is fashionable and A orders many shirts in that color, believing that the fashion will continue. The shirts fail to sell. A had actual authority to buy the shirts.

17. Same facts as Illustration 16, except that A believes P has set the dollar limit at an unnecessarily low level. A also believes that the limit will result in an inadequate range of selections for P's customers. A purchases men's dress shirts in a quantity that exceeds the dollar limit set by P. A does not have actual authority to exceed P's limit.

18. Same facts as Illustration 17, except that A purchases shirts in a quantity exceeding the limit set by P because A does not notice the limit, failing carefully to read the written statement that A received from P. A lacks actual authority to buy beyond the limit.

19. P Corporation, a financial firm, employs A as a trader in financial instruments on P Corporation's own account. P Corporation imposes no express limits on the type of financial instrument in which A may take trading positions. Additionally, P Corporation awards bonuses to A based on the overall profitability of the portfolio that A manages. A commits P Corporation to a series of risky and unusual investments that result in a substantial loss sustained by the portfolio as a whole. A had actual authority to make the risky and unusual investments. P Corporation imposed no explicit limits on A, and P Corporation's prior treatment of A's investment decisions would not give A a basis for inferring a limit.

An agent who knowingly contravenes or exceeds the principal's instructions may believe that to do so best serves the principal's interests. The agent may believe that circumstances have changed since the initial instructions and that, were the principal to reconsider the matter, different instructions would be given. Unless it is reasonable for the agent to believe that the principal wishes the agent to construe the instructions in light of changed circumstances, the agent lacks actual authority to violate instructions.

Illustrations:
Illustrations:

20. P retains A, directing A to buy Blackacre but to offer no more than $250,000. A then learns that Blackacre has increased substantially in value and, if purchased for $300,000, would represent a bargain. As A knows, it is financially feasible for P to pay $300,000 for Blackacre. A does not have actual authority to offer more than $250,000 for Blackacre.

21. Same facts as Illustration 20, except that Blackacre is to be sold at an auction in which the successful bidder will be required to deposit a check in an amount equal to 10 percent of the bid. P gives A a blank check to use in making the deposit. A does not have actual authority to bid more than $250,000 for Blackacre.

22. Same facts as Illustration 20, except that P owns and operates a golf course on land that almost entirely surrounds Blackacre. A has notice of P's long-term business plan to enhance the aesthetic and athletic qualities of the course

and thereby make it more profitable. At the auction of Blackacre, A learns for the first time that there will be one other bidder, B. A also learns that B's plan for using Blackacre is to construct a cement factory on it. A is unable to contact P to relay this information and receive further instructions. A succeeds in purchasing Blackacre for P by bidding $260,000. A acted with actual authority.

In Illustration 22, it is reasonable for A to construe P's instructions in light of the changed circumstance that B's bid represents in light of P's business purpose, known to A, and P's financial capability also known to A, to pay more than $250,000 for Blackacre. In contrast, in Illustration 20, no circumstance makes it reasonable for A to exceed P's stated limit.

It is often feasible for an agent to contact the principal to inquire what the principal now wishes to be done. In an era of rapid electronic communication, it is often cheap and easy for an agent to inquire before proceeding. The agent's inquiry gives the principal the opportunity to clarify or supplement the prior instructions. However, an agent may believe that it is infeasible to contact the principal for clarification or that the advantage promised by the transaction will be lost if the agent does not conclude it promptly. Unless the agent has a basis reasonably to believe that the principal does not wish to resolve the question, the agent should attempt to contact the principal prior to exercising discretion to disregard prior instructions. If the principal does not respond to the agent's inquiry and viewed objectively the action then taken by the agent reasonably serves the principal's interests as the agent could best discern them, the agent acted with actual authority.

A principal's instructions may not address prior occasions on which the agent has contravened instructions. On prior occasions the principal may have affirmatively approved of the agent's unauthorized act or silently acquiesced in it by failing to voice affirmative disapproval. This history is likely to influence the agent's subsequent interpretation of instructions. If the principal's subsequent instructions do not address the history, the agent may well infer from the principal's silence that the principal will not demand compliance with the instructions to any degree greater than the principal has done in the past. It is a question of fact whether the agent is reasonable in drawing such an inference. It will probably not be reasonable if the principal has recently renewed the instructions or newly emphasized the importance of complying with them.

An agent may believe, whether correctly or erroneously, that the agent knows the principal's best interests better than the principal does. What appears to be hubris on the agent's part may be present when the agent in fact has greater expertise or knowledge than does the principal as to matters within the scope of the agency relationship. Agents are often said to depart from their instructions due to an “excess of zeal.” One explanation for this phenomenon is the agent's belief in a superior understanding of the principal's best interests. Additionally, agents sometimes exhibit an “excess of zeal” because they have information about the principal's situation that differs from the principal's own information and beliefs based upon it. Matters that seem urgent or imperative to the agent may seem less so to the principal, whose knowledge will often be broader in scope and whose time horizon will often extend farther into the future than will the agent's.

The incentive structure embedded in an agent's relationship with the principal may aggravate differences in perspective. Lapses from instructions may well follow if the agent's compensation depends on the volume of transactions concluded by the agent or on their dollar value, or if the agent fears the principal will terminate the agency relationship if the agent does not achieve success. Regardless of the explanation for the lapse, the agent does not have actual authority to disregard instructions unless it is reasonable for the agent to believe that the principal wishes the agent to do so.

Illustrations:
Illustrations:

23. VP, the vice president of P Corporation in charge of P Corporation's information technology, enters into negotiations with T Corporation to buy a new computer system. Before VP begins negotiations with T Corporation, the board of directors of P Corporation authorizes the expenditure of up to $5 million on a new computer system. The CEO of P Corporation then directs VP not to buy a computer system from T Corporation because the CEO has been told by other CEOs that T Corporation's products demand a high level of user sophistication. Believing that the CEO

has underestimated the computer skills of P Corporation's work force, VP enters into a contract with T Corporation to buy a computer system for $4 million. VP did not have actual authority to enter into a transaction specifically forbidden by the CEO.

24. Same facts as Illustration 23, except that VP, additionally, has good reason to believe that the computer system is a bargain at the $4 million price. VP does not have actual authority to contract to buy it.

g. Explicit instructions. A principal may direct an agent to do or refrain from doing a specific act. The agent's fiduciary duty to the principal obliges the agent to interpret the principal's instructions so as to infer, in a reasonable manner, what the principal would wish the agent to do in light of the facts of which the agent has notice at the time of acting.

Although an agent's task of interpretation is often straightforward when given specific instructions, the principal's language does not interpret itself. Circumstances may require the agent to exercise discretion in ascertaining the principal's wishes. Suppose the principal (P), the owner of a menagerie, makes a statement that P believes directs the general manager of the menagerie (A) to buy no more horses. If A enters into an agreement to buy another horse for the menagerie, A did not act with actual authority unless A reasonably believed that P wished the purchase to be made.

Consider the variety of explanations for A's purchase of the horse on P's account despite what appears to be P's direction to the contrary. First, P's statement might not have expressed P's wishes clearly. Perhaps P said, “I'm not into horses anymore,” which is not a categorical statement of an instruction to A. If A sought clarification from P, P might have responded, “What I meant was, buy no more horses.” A's purchase of the additional horse would be unauthorized. A might, however, reasonably believe that no clarification was necessary. Perhaps A believed that P meant to discontinue P's private use of horses, separate from the menagerie business. A's belief is not reasonable, though, in the absence of some reason to ascribe that interpretation to P's statement. A might fail to seek clarification from P if logistics make it difficult or impossible to do so or if P seems too rushed or distracted to explain further. It is a question of fact whether A's failure to seek clarification is reasonable under the circumstances.

Suppose P said to A originally (or in response to A's request for clarification): “Buy no more horses.” This instruction, clear on its face, might nonetheless leave A in doubt in some circumstances. P's language does not itself define the word “horse” and does not eliminate A's need to interpret P's language to determine whether P intends to prohibit A's purchase of a pony or a zebra or toy horses for sale in the menagerie's gift shop. A's interpretation will not be reasonable unless it takes into account A's prior experience with P which is likely to reveal how P uses language when referring to the menagerie.

Moreover, A might wonder how absolutely or unconditionally to interpret P's instruction. Would it contravene the instruction to buy an additional horse after the death of one of the horses on display in the menagerie? Should A understand P to mean that the value of an additional horse, relative to the sale price, is totally irrelevant? Must A pass on the opportunity to buy an especially valuable horse at a very low price? A may believe that P's best interests would be served by ignoring the literal interpretation of P's instruction. Unless A has reason to believe that P wishes A to do so, however, it is not reasonable for A to disregard the instruction rather than contacting P, if feasible, for further clarification.

A might decide to contravene P's instruction if A believes it to be a mistake from the standpoint of the business interest of the menagerie itself. Although A's departure from P's instructions may well be understandable, it is not consistent with A's duty of loyalty, which is owed to P and not to the menagerie itself. A lacks authority to depart from P's instructions to serve A's perception of what is required to further the interests of the menagerie.

Regardless of the breadth or narrowness with which a principal has conveyed authority to the agent, an agent's actual authority extends only to acts that the agent reasonably believes the principal has authorized or wishes the agent to perform. The fiduciary character of the agency relationship shapes the agent's permissible interpretation of authority, disallowing an interpretation that is inconsistent with interests of the principal that the agent knows or should know.

h. Consequences of act for principal. Even if a principal's instructions or grant of authority to an agent leave room for the agent to exercise discretion, the consequences that a particular act will impose on the principal may call into question whether the principal has authorized the agent to do such acts.

Three types of acts should lead a reasonable agent to believe that the principal does not intend to authorize the agent to do the act. First are crimes and torts. If a principal authorizes the agent's commission of a crime or an intentional tort, the principal will be subject to liability for the agent's wrongdoing. See § 7.04. The agent, additionally, will be subject to individual liability. See § 7.01. An agent is under no duty to obey a direction from the principal to commit such an act. See § 8.09(2). The bounds of the law are applicable to all, including principals, whether or not individuals. See Principles of Corporate Governance: Analysis and Recommendations § 2.01 and Comment *g*.

Second, acts that create no prospect of economic advantage for a principal, such as gifts and uncompensated uses of the principal's property, require specific authorization. This is so even if an agent has notice that the principal acts philanthropically as to matters unconnected to the agency. Moreover, if it is normally not reasonable to believe that the principal will benefit from an act, a reasonable agent should not infer that the principal wishes the agent to do the act and therefore should not commit the act unless the principal communicates specifically that the principal wishes the act to be done. Thus, an agent should not infer that the principal wishes gifts to be made from the principal's property from the fact that the principal has authorized the agent to manage the principal's property and has given the agent discretion in making management decisions. For treatment of the authority of an agent to make gifts under a durable power of attorney, see Restatement Third, Property (Wills and Other Donative Transfers) § 8.1, Comment *l*.

Third, some acts that are otherwise legal create legal consequences for a principal that are significant and separate from the transaction specifically directed by the principal. A reasonable agent should consider whether the principal intended to authorize the commission of collateral acts fraught with major legal implications for the principal, such as granting a security interest in the principal's property or executing an instrument confessing judgment. In such circumstances, it would be reasonable for the agent to consider whether a person in the principal's situation, having the principal's interests and objectives, would be likely to anticipate that the agent would commit such a collateral act, given the nature of the principal's specific direction to the agent.

Reporter's Notes

*a. Comparison with Restatement Second, Agency.*This section is a consolidated treatment of topics covered in several sections of Restatement Second, Agency, including § 7, Comment *c*, and §§ 33, 34, 35, 36, 39, 43, 44, and 47. Substantive differences are noted where pertinent.

*c. Rationale.*On contractual interpretation, see Restatement Second, Contracts §§ 200-201. Section 201, Comment *c*, states that "the primary search is for a common meaning of the parties, not a meaning imposed on them by the law…. The objective of interpretation in the general law of contracts is to carry out the understanding of the parties rather than to impose obligations on them contrary to their understanding…. " If the parties do not share the same understanding, the result may be that the entire agreement fails or that there is a failure to agree as to a term. Id., Comment *d*. If the failure to agree is localized to a term, there may be a binding contract if the term is inessential or if it can be supplied. See id. § 204.

The distinction between authority and contractual interpretation has been challenged. See H. Edwin Anderson III, Shipbrokers' Authority and Ability to Bind Principals: At the Juncture of Chartering and Agency, 31 J. Mar. L. & Com. 89, 102 (2000) ("[t]here are many problems with applying a reasonableness standard with respect to an agent's actions. For one, the agent is acting for the principal. If the principal makes unreasonable assumptions and contracts with another party based upon those assumptions, the principal will be contractually bound. It should be no different for an agent vested with the principal's authority … the principal is the one who gives authority to the agent at the principal's discretion.") If, however, an agent is unaware that

the principal has made "unreasonable assumptions," and acts inconsistently with them, agency doctrine protects the agent who acts on the basis of a reasonable belief in light of the principal's manifestations.

For the proposition that an agent acts with actual authority although the agent's reasonable interpretation of the principal's manifestation was ultimately erroneous, see Credit Agricole Indosuez v. Muslin Commercial Bank Ltd., [1999] Lloyd's Law Rep. 275, 280 (Ct. App.). See also Harris v. Ray Johnson Constr. Co., 534 S.E.2d 653, 654 (N.C.App.2000) (lawyer reasonably believed client had authorized him to settle case for $2000 although lawyer misunderstood discussion with client, who intended to authorize settlement through which she would net $2000 while lawyer settled for gross amount of $2000 contemplating that client's medical bills and attorney's fees would be deducted from amount).

On an agent's implicit authority to act in an emergency beyond usual or regular authority, see Management Techs., Inc. v. Morris, 961 F.Supp. 640, 648-649 (S.D.N.Y.1997) (finding triable issue of fact on authority of chief executive officer of parent corporation to place U.K. subsidiaries in insolvency proceedings).

*d. Acts necessary or incidental to achieving principal's objectives.*For the basic proposition on an agent's authority to do acts incidental and necessary to accomplishing the principal's objective, see 1 Floyd R. Mechem, A Treatise on the Law of Agency § 715 (2d ed. 1914). The underlying concept has been characterized as one of "medium powers, which are not expressed. By medium powers I mean all the means necessary to be used in order to obtain the accomplishment of the object of the principal power…." Howard v. Baillie, (1796) 2 H. Bl. 618, 619, further discussed in Francis M.B. Reynolds, Bowstead & Reynolds on Agency 102 (17th ed. 2001). Strict construction of an instrument does not preclude establishing an agent's actual authority to do acts necessary and incidental to expressly stated authority. See Estate of O'Neal v. United States, 81 F.Supp.2d 1205, 1225 (N.D.Ala.1999), vacated in part on other grounds, 258 F.3d 1265 (11th Cir.2001) (under Alabama law, "powers of attorney are strictly construed and restricted to those powers expressly granted and those incidental powers that are necessary to effectuate the expressed powers."). Whether an agent's act should be characterized as incidental and necessary often turns on its causal relationship to action expressly authorized by the principal. Compare Castillo v. Case Farms of Ohio, Inc., 96 F.Supp.2d 578, 593 (W.D.Tex.1999) ("giving an agent express authority to undertake a certain act also includes the *implied authority* to do all things proper, usual, and necessary to exercise that express authority"; authority to recruit and hire workers for chicken-processing plant in remote location encompassed authority to resolve housing and transportation issues) (emphasis in original) with Beall Transp. Equip. Co. v. Southern Pac. Transp. Co., 13 P.3d 130 (Or.App.2000), reversed on other grounds, 60 P.3d 530 (Or.2002) (rail-yard manager's general duties, which included arranging isolated sales of small amounts of scrap, did not include incidental authority to sell trailers not owned by his employer). Another focus for inquiry may be the logical relationship between an agent's contested act and action expressly authorized by the principal. See, e.g., CGB Occupational Therapy, Inc. v. RHA Health Servs. Inc., 357 F.3d 375, 386 (3d Cir.2004) (agent who had express authority to terminate contract with service provider had implied authority to recommend termination to principal); ICC v. Holmes Transp., Inc., 983 F.2d 1122, 1129 (1st Cir.1993) (lawyer had implied actual authority to modify escrow agreement as necessary to implement settlement of ICC refund claims; lawyer had express authority to negotiate and execute agreement); North Star Mut. Ins. Co. v. Zurich Ins. Co., 269 F.Supp.2d 1140, 1153 (D.Minn.2003) (insurance broker expressly authorized to submit proposals of insurance to insurer subject to terms and conditions of brokerage agreement did not have implied authority to bind insurer; authority to bind "was neither directly connected with, nor essential to, the carrying out of … duties" expressly authorized). Implied actual authority may also serve as a device to address gaps in the principal's explicit statement of authority. See, e.g., Aquaduct, L.L.C. v. McElhenie, 116 S.W.3d 438, 442-443 (Tex.App.2003) (servicing agent for loan had implied authority to accept final loan payment; although lender's prior directives to agent and debtor did not address how final payment should be made, lender stated no difference between final payment and regular monthly payments to be made to servicing agent). When the connection between an agent's express authority and a particular act is contested, a court may consider the regulatory context in which the agent operates. See New England Acceptance Corp. v. American Mfrs. Mut. Ins. Co., 344 N.E.2d 208, 212-213 (Mass.App.1976), adopted, 368 N.E.2d 1385 (Mass.1977) (noting conflict with resolution in other jurisdictions, court holds that insurance agent has implied authority to arrange for premium financing because state statute applicable to insurance agents and brokers recognizes acceptance of indicia of debt to pay insurance premiums).

Some courts treat an agent's belief as relevant to whether the agent had actual authority as to acts claimed to be incidental or necessary when their necessity or significance could have been doubted by the agent. See Opp v. Wheaton Van Lines, Inc., 231 F.3d 1060, 1065 (7th Cir.2000) (unclear whether shipper's ex-spouse believed he had authority to execute liability release on carrier's liability on bill of lading because record contained no testimony from ex-spouse or from movers who presented liability release to him; ex-spouse may have believed he signed forms simply to confirm that shipper's goods were taken from house); Chilsan Merch. Marine Co. v. M/V K Fortune, 110 F.Supp.2d 492, 497 (E.D.La.2000) (employee of time-charterer who had authority to make inquiries into how to resolve arrest of vessel testified his authority did not extend to settling claim without written instructions from his principal, although court notes that arguably settlement negotiations were necessary or incidental to inquiring into how to resolve arrest; court holds that by endowing employee with actual authority to make inquiry, principal created apparent authority to settle claim). Standard definitions of incidental and necessary authority, however, are formulated in solely objective terms. See, e.g., United States v. Flemmi, 225 F.3d 78, 86 (1st Cir.2000) (test for incidental authority is "not whether such a power might from time to time prove advantageous, but, rather, whether such power usually accompanies, is integral to, or is reasonably necessary for the due performance of the task").

Illustration 3 is based on Union Camp Corp. v. Dyal, 460 F.2d 678, 687-688 (5th Cir.1972).

*e. Agent's reasonable understanding of principal's manifestation.*The formulation of reasonableness is derived from the definition of "negligently" in Model Penal Code § 2.02(2)(d) ("A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.") Although the term "situation" carries an inevitable ambiguity, an actor's specific personal circumstances and idiosyncrasies, such as intelligence and temperament, are not material to this determination. See id., Comment 4. See also id. § 210.3, Comment 3 (formulation for rule of provocation, under which criminal homicide constitutes manslaughter, assesses reasonableness of an explanation or excuse "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be"; test is ultimately objective and permits consideration of events that evince extreme mental or emotional disturbance but not actor's scheme of moral values). See also Restatement Third, Torts: Liability for Physical Harm § 3 (Proposed Final Draft No. 1, 2005) ("A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.").

Illustration 4 is based on Playboy Enters., Inc. v. Dumas, 960 F.Supp. 710 (S.D.N.Y.1997), aff'd, 159 F.3d 1347 (2d Cir.1998). See also Bayless v. Christie, Manson & Woods Int'l, Inc., 2 F.3d 347, 352 (10th Cir.1993) (agent's actions indicated that agent knew he lacked actual authority to modify consignment agreement to direct that sale proceeds of auction be paid to him, having earlier notified consignee of identity of true owner of painting and identified owner as proper recipient of sale proceeds).

On the limits of permissible interpretation imposed by an agent's fiduciary position, see Knopke v. Knopke, 837 S.W.2d 907, 915 (Mo.App.1992), in which the partnership agreement conferred " 'unqualified authority' " on the general partner "to make all decisions relating to the financial affairs of the partnership." The general partner subsidized an affiliated building-supply company through an inter-company account that accumulated a large unpaid balance in the partnership's favor. The partnership had limited partners who were not shareholders in the supply company. Stated the court, "[s]uch a grant of plenary authority is always subject to the fiduciary obligations of the general partner, who must deal prudently and honestly with the other partners … and must within the bounds of discretion invest surplus partnership funds so as to make a reasonable return."

For the proposition that the scope of an agent's actual authority is not reduced by a limitation that the principal does not communicate to the agent, see Pohl v. United Airlines, Inc., 213 F.3d 336 (7th Cir.2000) (client did not tell lawyer that client believed he was not bound by settlement agreement until he personally signed off on it, despite absence of language in retainer agreement supportive of client's view); Sharp Elecs. Corp. v. Lodgistix, Inc., 772 F.Supp. 540, 544 (D.Kan.1991) (finding issue

of fact as to whether restriction on agent's authority to commit principal to purchase was communicated to agent); Kenney Mfg. Co. v. Starkweather & Shepley, Inc., 643 A.2d 203, 206-207 (R.I.1994) (unexpressed intention of owner of racing boat to obtain rider to cover boat in particular race excluded by insurance policy did not constitute direction to insurance broker to procure coverage, despite history of prior dealings in which coverage procurement was effected in an informal manner).

Illustration 11 is based on FASA Corp. v. Playmates Toys, Inc., 892 F.Supp. 1061 (N.D.Ill.1995). The case does not involve circumstances comparable to the importance of T in the industry, as specified in the Illustration.

On the relevance of acquiescence to establishing actual authority, see In re Focus Media Inc., 387 F.3d 1077, 1083-1084 (9th Cir.2004), cert. denied, … U.S. …, 125 S.Ct. 1674 (2005) (lawyer who represented debtor in bankruptcy proceeding had implied authority to accept service of process on debtor's behalf in related adversary proceeding when, inter alia, debtor did not object to prior service of papers in bankruptcy proceeding care of lawyer); In re Bartoni-Corsi Produce, Inc., 130 F.3d 857, 862 (9th Cir.1997) (bank did not commit conversion although it paid checks without endorsement of named payee; daughters of corporation's sole director had actual authority to endorse checks payable to corporation where director attended meeting with daughters and financial consultant at which plan was formulated requiring deposit into separate account and consented to plan); First Sec. Co. v. Dahl, 560 N.W.2d 327, 331 (Iowa 1997) (corporate secretary had actual authority to execute agreement binding corporation to a restrictive covenant when corporation's directors and other shareholders knew of agreement for many years and never expressed objection); New England Acceptance Corp. v. American Mfrs. Mut. Ins. Co., 344 N.E.2d 208, 213 (Mass.App.1976), adopted, 368 N.E.2d 1385 (Mass.1977) (insurance agents' implied actual authority to accept notes for premium financing based, inter alia, on agents' long-standing practice of so doing to which insurers did not object); Lumber Mart v. Buchanan, 419 P.2d 1002, 1004-1005 (Wash.1966) (finding agent hired to supervise construction of ice rink had actual authority to order materials when principal knew that agent was ordering materials and did not complain). A principal's acquiescence may also be based on interactions within the course of a single transaction. See, e.g., Maharishi School of Vedic Sciences, Inc. v. Connecticut Constitution Assocs. Ltd. P'ship, 799 A.2d 1027, 1032-1033 (Conn.2002) (corporate secretary had implied actual authority to bind corporation to agreement to settle litigation, although corporation did not execute resolution expressly granting such authority to secretary; secretary was directly involved in negotiating language of agreement, functioned as sole channel of communication between corporation and its adversary, and signed agreement without objection from corporation's other officers, who were aware of secretary's actions). An agent's implied actual authority may also be grounded in long-standing practice between the principal and the agent's predecessors when coupled with the principal's failure explicitly to revoke or narrow the agent's express authority. See, e.g., Ruffin v. Temple Church of God in Christ, Inc., 749 A.2d 719, 720-723 (D.C.App.2000) (new pastor had implied authority to retain lawyer to draft new bylaws for church in midst of rift within congregation; predecessor pastor, treated as church's chief executive officer over seven decades, entered into material contracts without approval of board of trustees, and church did not explicitly limit contracting authority of new pastor, conferring what pastor believed to be " 'full authority to run the church' "). Establishing a course of dealing between principal and agent requires showing relevant similarities between past practice and an agent's disputed act. See, e.g., Dark Bay Int'l, Ltd. v. Acquavella Galleries, Inc., 784 N.Y.S.2d 514, 515 (App.Div.2004), leave to appeal denied, 825 N.E.2d 1093 (N.Y.2005) (seller of painting did not act with implied actual authority of gallery, although in previous transactions seller acted as gallery's consignee; invoice from gallery to seller contained terms of sale and did not characterize transaction as a consignment). Prior ratifications by a principal of acts prohibited by the principal may establish the agent's implied actual authority for similar future acts. See United States v. Fulcher, 188 F.Supp.2d 627, 636 (W.D.Va.2002).

The treatment in this Comment of the role of custom and usage departs somewhat from the requirement in Restatement Second, Agency § 36 that the principal have notice that "usages of such a nature may exist." This question is relevant to a broader inquiry into the reasonableness of an agent's interpretation of the principal's expressive conduct toward the agent. Within Restatement Second, Agency, moreover, an agent's implied authority to give usual warranties and make usual representations is not subject to a requirement that the principal be shown to be on notice that it may be usual to give such warranties and make such representations. See id. §§ 56, 63. Some recent cases appear not to require a showing that the principal had notice of the custom or usage. See, e.g., Universal Fire & Cas. Ins. Co. v. Jabin, 16 F.3d 1465 (7th Cir.1994); United Missouri Bank, N.A. v. Beard, 877 S.W.2d 237 (Mo.App.1994); Johnston v. American Cometra, Inc., 837 S.W.2d 711 (Tex.App.1992). For a recent case in

which the court required the showing, see Meretta v. Peach, 491 N.W.2d 278 (Mich.App.1992). In Dominion Terminal Assocs. v. M/V Cape Daisy, 24 F.Supp.2d 532, 535-536 (E.D.Va.1998), the court emphasizes the principal's awareness of the custom but does not address whether such awareness is requisite to authority. See also Old Republic Ins. Co. v. Hansa World Cargo Serv. Inc., 51 F.Supp.2d 457, 472-473 (S.D.N.Y.1999) (custom-house broker retained by commercial importer may be able to show it acted with actual authority in posting surety bonds on basis of standard commercial practice that broker handles arrival and delivery of goods, and posting security for customs duties is usually necessary; relevant also are prior history of parties' dealings and allusion in contract to posting of bonds).

*f. Interpretation by agent.*The Comment explores common reasons for slippage between a principal's intention in stating instructions to an agent and the agent's subsequent conduct. The Comment does not presuppose that the agent's act stems from the agent's own interests or other improper purposes. Comment *g* elaborates on the general reasons for slippage using a concrete example.

The points made in this Comment are consistent with the rules regarding interpretation of instructions in Restatement Second, Agency §§ 33-35, 39, 43-44, and 47. The principal focus of the Comment is explaining an agent's interpretation of the principal's instructions when the principal would view the interpretation as mistaken. Restatement Second, Agency § 44 states that, if the principal's authorization is ambiguous "because of facts of which the agent has no notice, he has authority to act in accordance with what he reasonably believes to be the intent of the principal although this is contrary to the principal's intent…." The starting point for this Comment is that the presence of verbal ambiguity is not the sole occasion for an agent to undertake the interpretation or construction of the principal's instructions.

On an agent's duty to obey precise instructions that the principal has stated imperatively even despite industry practice or custom to the contrary, see Theis v. duPont, Glore Forgan, Inc., 510 P.2d 1212, 1217 (Kan.1973) (commodities broker bought pork-belly contracts contrary to customer's express direction, at time when brokerage firm's employees did not strictly comply with firm's and stock exchange's rules requiring express written consent from customer for commodities trading; customer repudiated unauthorized transaction promptly by closing account). In assessing the reasonableness of an agent's interpretation of instructions received from the principal, a court may also consider applicable regulations and their purpose. See North Fork Bancorporation, Inc. v. Toal, 825 A.2d 860 (Del.Ch.2000), aff'd, 781 A.2d 693 (Del.2001) (shareholders who submitted proxy forms withholding authority to vote in favor of incumbent directors did not withhold all voting authority and thus their shares should be counted as "present"; interpretation necessary to give full effect to SEC adoption of proxy rule 14a-4(b)(2), which was intended to embody "the concept of 'withhold authority to vote for' *as a form of voting*" that confers voting power, not as a null gesture without legal effect) (emphasis in original).

An agent's position as a fiduciary obliges the agent to interpret the principal's manifestations so as to act in accordance with the principal's desires. For a discussion of problems in the interpretation of instructions, see Kent Greenawalt, From the Bottom Up, 82 Cornell L. Rev. 994, 1036 (1997) (a strategy that is an alternative to a simplified view of meaning is "to acknowledge that 'meaning' has many meanings, that a choice of one standard for what counts as 'the meaning' comes down to a question of what will lead to desirable practical choices."). The history of prior dealings between agent and principal shapes the agent's understanding of the principal's desires and thus the agent's interpretation of instructions. A principal's prior acquiescence in unauthorized transactions may lead an agent to infer that the principal will not object to similar unauthorized acts in the future; the agent may, for example, come to believe that the principal does not intend a particular instruction or a type of instruction to be taken seriously. See Peter Tiersma, The Language of Silence, 48 Rutgers L. Rev. 1, 38-40 (1995). Acquiescence is treated as a basis for actual authority in Federal Land Bank v. Sullivan, 430 N.W.2d 700, 701-702 (S.D.1988). One possible explanation for an agent's failure to contact the principal for clarification is that the agent is keen to conclude a transaction and believes delay will sacrifice a promising opportunity. See Melvin A. Eisenberg, An Introduction to Agency and Partnership 15 (2d ed. 1995).

For the proposition that an agent may safely act in light of changed circumstances when the principal fails to respond to the agent's request for instructions, see China Pac. S.A. v. Food Corp. ("The Winson"), [1982] A.C. 939, 961 (H.L.). "*The Winson*" holds that a ship's master is an agent of necessity. In dicta, the court also treats a salvor of cargo as an agent of necessity, when

the salvor incurred expenses necessary to the cargo's preservation after the cargo owner did not respond to the salvor's request for instructions. The practical consequence is that the salvor has a right to be indemnified by the cargo owner, which is the result that would be achieved by treating the salvor's resolution of its predicament as an instance of actual authority. The cargo was sovereign cargo, making actual authority key to holding the governmental principal. "*The Winson*" also recognizes the salvor's right to reimbursement of its expenses when it is impossible to communicate with the cargo owner. See id. at 962. Seven years after the court's decision, an international salvage convention codified the doctrine applicable to salvors. See Convention on Salvage, London, Apr. 20, 1989, IMO Doc. LEG 60/12, reprinted at 20 J. Mar. L. & Com. 589 (1989). However, a ship's master, although the owner's agent, is not an agent for cargo and cannot bind its owner unless contact is impracticable. See Industrie Chimiche Italia Centrale & Cerealfin S.A. v. Alexander G. Tsavliris & Sons Mar. Co. (The "Choko Star"), [1990] 1 Lloyd's L. Rep. 516 (Ct. App.). On the English law of agency and necessity in this context, see Francis M.B. Reynolds, Bowstead & Reynolds on Agency 125-134 (17th ed. 2001); Ian Brown, Authority and Necessity in the Law of Agency, 55 Mod. L. Rev. 414 (1992).

In an earlier maritime case, the principal responded to the agent's request for instructions by expressly refusing to provide any. See Garriock v. Walker, 1 R. 100 (S.C.1873). In *Garriock*, a ship's master sought instructions from the cargo owner's agent whether to enclose the ship's deteriorating cargo of whale heads and blubber in casks to preserve more of its value. Under the terms of carriage, the ship owner would be entitled to the freight only upon the successful completion of the voyage. The cargo owner's agent told the ship's master that no directions would be given in response to the inquiry and that coopering the freight would be at the risk of the ship's owner. The court held that the cargo owner was liable to the ship's owner for the costs of the coopering, on the basis that the cargo owner's response "left the master in a most unfair dilemma, and I think that he was entitled to act to the best of his judgment, and did so act. He put the cargo into the most satisfactory condition he could, carried it to its destination, and it was then sold at a considerable profit." The outcome in *Garriock* is consistent with the principal's duty to indemnify the agent as stated in § 8.14.

Principles of interpretation articulated in the U.C.C. evidence a similar understanding about parties' use of language in ongoing interactions. Under U.C.C. § 1-303(b), a course of dealing—a sequence of previous conduct—may establish "a common basis of understanding" to interpret the parties' expressions and other conduct. Within U.C.C. Article 1, a course of performance would be relevant to establish waiver or modification of any inconsistent term, including an express or written term. U.C.C. § 1-303(f). When a contract involves repeated occasions for performance by either party, and the other party knows the nature of the performance and has opportunity to object to it, the course of performance "is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify" its terms. U.C.C. § 1-303(d).

An early but still influential treatment of interpretation of instructions is in Francis Lieber, Legal and Political Hermeneutics (1839, reprint ed. 1970). Lieber's famous example to demonstrate that language inevitably requires interpretation is a housekeeper's statement to a domestic, " 'fetch some soupmeat,' " id. at 29-30, which Professor Greenawalt's account discusses at greater length. Greenawalt, supra, 82 Cornell L. Rev. at 994. See also William N. Eskridge, Jr., "Fetch Some Soupmeat", 16 Cardozo L. Rev. 2209 (1995). Lieber's account suggests that the need for interpretation is likely to be greater when principals give instructions to senior or superior agents in whom they invest great discretion. Lieber differentiates between one-shot statements of instructions and those intended to govern indefinitely into the future, observing that "[o]rders and directions of a passing nature … are not unfrequently penned in a manner, which admits of and demands interpretation and construction. They are always to be understood with reference to the known and general object of the utterer. In drawing them up, the well-known points are omitted…. Interpretation and construction must, in these cases, go as far as common sense dictates, at the responsibility and peril of the receiver of the order." Id. at 157-158. For example, Napoleon's orders to his chief commanders on the eve of battle "are considered by military men as models of brevity and perspicuity; and yet they make that allowance for free action, which is so indispensable for those, who have to exercise charges of the highest responsibility." Id. at 158. Lieber's work is also the published origin of the practical advice to drafters of constitutions, "Tight will tear; wide will wear," which Lieber reports observing as a motto on the wall of "a humble tailor's shop, in Warwickshire…." See Francis Lieber, Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics, with Remarks on Precedents and

Authorities, 16 Cardozo L. Rev. 2019, 2027 n.12 (reprinting 1880 ed. William G. Hammond). Instructions to agents that are cut on the "wide will wear" pattern gain the advantage of freer range for the agent's judgment, while risking subsequent exercises of discretion and interpretations by the agent that tighter-cut instructions might have precluded.

Illustrations 20 and 21 are based on White v. Thomas, 1991 WL 31212 (Ark.App.1991).

*g. Explicit instructions.*The menagerie example is a variation on an example in the Comment to Restatement Second, Agency § 194.

Case Citations - by Jurisdiction

C.A.7

C.A.7, 2008. Cit. in disc. Sole shareholder of corporation that operated gas station sued oil company, alleging that defendant violated the Petroleum Marketing Practices Act by terminating gas station's franchise without the statutorily required notice and cause. The trial court granted summary judgment for defendant, holding that plaintiff lacked prudential standing because he suffered only an indirect, derivative injury as sole shareholder of corporation, the real party in interest. Affirming, this court held that there was no factual or legal support for plaintiff's position that he was entitled to bring this suit in his own name as agent for corporation as undisclosed principal, since plaintiff failed to show that he had actual authority, and acted on behalf of an undisclosed principal, and that defendant had notice that plaintiff was acting on behalf of an undisclosed principal. Rawoof v. Texor Petroleum Co., Inc., 521 F.3d 750, 758.

C.A.9, Bkrtcy.App.

C.A.9, Bkrtcy.App.2011. Com. (d) quot. in disc. Debtor objected to proofs of claim filed by party to master repurchase agreements through which party had sold debtor's loans to buyer, alleging that party failed to show that it had express authority

to file the proofs of claim as buyer's authorized agent. The bankruptcy court held that party had authority to file the proofs of claim. Affirming, this court held that the bankruptcy court did not err when it determined that buyer's express authorization for party to pursue buyer's interests in debtor's case necessarily included an authorization to file the disputed claims. In re Palmdale Hills Property, LLC, 457 B.R. 29, 47.

C.A.10,

C.A.10, 2013. Com. (e) quot. in sup. Retailer of replacement contact lenses brought a claim for service-mark infringement under the Lanham Act against competitor, alleging, among other things, that a third-party marketer hired by competitor, known as an affiliate, had purchased keywords resembling plaintiff's 1800CONTACTS mark and was using the mark in the text of its online ads. The district court granted summary judgment for defendant. Affirming in part, this court held, inter alia, that defendant was not vicariously liable for its affiliate's allegedly infringing actions under agency law, because, even if the affiliate was an agent (or, more precisely, a subagent) of defendant, it lacked actual authority from defendant to include plaintiff's mark in ads for defendant. The court noted that there was undisputed evidence that the affiliate did not believe that defendant authorized him to publish ads displaying plaintiff's mark in his text, and thus the subjective component of actual authority was absent. 1-800 Contacts, Inc. v. Lens.com, Inc., 722 F.3d 1229, 1251.

C.A.11

C.A.11, 2011. Cit. in sup., coms. (d) and (f) cit. in sup. Mexican farm workers hired as guest workers through the Department of Labor's H-2A visa program brought suit under the Fair Labor Standards Act against Georgia onion grower that employed them, alleging that they were entitled to reimbursement from defendant for the fees that employment agencies had charged them. The district court granted summary judgment for defendant. Affirming in part, this court held, inter alia, that, under principles of agency law, defendant was not liable for the fees, because plaintiffs failed to present substantial evidence that defendant provided employment agencies with the authority to collect those fees; defendant never expressly permitted nor acquiesced in the collection of the fees, and the agreement that defendant signed with contractor it employed to facilitate the hiring of plaintiffs made no reference to the collection of fees from workers. Ramos-Barrientos v. Bland, 661 F.3d 587, 600.

C.A.11, 2010. Com. (d) quot. in diss. op. Board of trustees of municipal police and firefighters' retirement system sued pension consultant for breach of the parties' consulting contract. The district court denied defendant's motion to compel arbitration. Reversing and remanding, this court held that board chairman had implied actual authority to bind plaintiff to arbitrate disputes arising under the consulting contract; the express authority that plaintiff had delegated to chairman to execute an account agreement hiring a named investment manager implied the authority to perform the incidental acts of executing other such account agreements, and also implied the authority to execute the agreements' arbitration clause, which required arbitration of all disputes between the parties arising under those and all other agreements. The dissent argued that chairman lacked implied actual authority to amend the preexisting consulting agreement to insert the disputed arbitration provision, since renegotiation of the consulting contract was not incidental or necessary to effectuating the account agreements. Board of Trustees of City of Delray Beach Police and Firefighters Retirement System v. Citigroup Global Markets, Inc., 622 F.3d 1335, 1344.

D.Ariz.

D.Ariz.2008. Com. (c) quot. in disc. Manufacturer of indoor tanning products sued Internet reseller that purchased manufacturer's products from tanning salons and resold them on reseller's websites, alleging, among other things, that defendant caused some of plaintiff's distributors to sell plaintiff's products to defendant, thereby breaching their distributorship agreement with plaintiff. Granting in part defendant's motion for summary judgment, this court rejected plaintiff's argument that even if defendant had never purchased the products directly from a distributor, the salons were acting as plaintiff's agents when they purchased the products from the distributors. The court held that the evidence did not support a finding of actual authority,

because it did not show that plaintiff had the right to control the salons' transactions with distributors, but rather that plaintiff and the salons entered into arms-length transactions. Designer Skin, LLC v. S & L Vitamins, Inc., 560 F.Supp.2d 811, 826.

D.Conn.Bkrtcy.Ct.

D.Conn.Bkrtcy.Ct.2012. Quot. in sup. Judgment creditor brought an adversary proceeding against Chapter 7 debtor, seeking a determination that the judgment debt, which arose from debtor's wife's embezzlements from plaintiff while she was employed by plaintiff, was nondischargeable as a debt obtained by false pretenses, a false representation, or actual fraud. This court ruled that the debt was dischargeable in part and nondischargeable in part, holding that wife's earlier embezzlements, which she kept secret from debtor, were not within the scope of wife's agency in carrying out her accounting function with respect to debtor's business, and thus debtor could not be vicariously liable for those misdeeds by wife on an agency theory. The court further held, however, that wife's subsequent embezzlements were committed with debtor's knowledge and were within either wife's actual or implied authority as debtor's agent; accordingly, wife's fraud with respect to these embezzlements was imputed to debtor on an agency theory, and the judgment debt was nondischargeable to that extent on an "actual fraud" theory. In re Budnick, 469 B.R. 158, 172.

D.D.C.

D.D.C.2007. Cit. in sup. §§ 2.01-2.03. Relator and the United States sued bidders on an Egyptian wastewater project using United States aid agency funds, alleging conspiracy to rig bids and submission of false claims. Denying government's motion to compel production of documents from defendants' expert witnesses, this court rejected government's argument that defendants' counsel accepted service of subpoenas duces tecum for the experts. The court stated that it knew of no authority for the proposition that attorneys who had retained expert witnesses on behalf of their clients became ipso facto agents of those expert witnesses for the purposes of service of process whereby the witnesses delegated to them the right to waive any objection they might have to the subpoenas the lawyers accepted; to determine liability on the principal for the acts of an agent, one looked at what the principal did, and, here, there was no evidence that the witnesses waived their objections. Miller v. Holzmann, 471 F.Supp.2d 119, 121.

M.D.Fla.

M.D.Fla.2009. Cit. in disc. Estate and family of rental-car passenger who died following an accident in which the car's brake system allegedly seized brought action for negligence, strict liability, and breach of warranty against franchisor of rental-car franchisee that provided the car. Granting summary judgment for defendant, this court held, inter alia, that defendant was not vicariously liable for franchisee's provision of the allegedly defective vehicle under theories of agency or respondeat superior. The court reasoned, in part, that a franchisee's mere use of a franchisor's trademarks was insufficient as a matter of law to establish the reliance prong of apparent authority, and nothing in the franchise agreement went beyond a typical franchise relationship such that franchisor participated in directing or managing franchisee's business. Estate of Miller v. Thrifty Rent-A-Car System, Inc., 637 F.Supp.2d 1029, 1037.

D.Mass.

D.Mass.2007. Subsec. (1) quot. in part in sup. After vacationer was allegedly injured when a “flip-flop” sandal that she was wearing broke and caused her to fall while descending a stairway at a resort, she sued, among others, online travel service through which her friend and travel companion purchased the travel tickets and reserved the hotel accommodations. This court granted travel service's motion for summary judgment, holding, inter alia, that plaintiff was bound by the terms of a “click through” liability disclaimer that friend agreed to while conducting the transaction; plaintiff obviously authorized friend as her

agent to go online and book the travel plans, for which she reimbursed friend, and thus friend had actual authority to agree to a disclaimer of liability to accomplish that end. Hofer v. Gap, Inc., 516 F.Supp.2d 161, 175.

S.D.N.Y.

S.D.N.Y.2009. Subsec. (2) cit. in sup., coms. (b) and (e) quot. in sup. Lender sued guarantor, seeking to enforce a guaranty agreement, after it was discovered that the agreement and the underlying loan were part of an alleged fraud scheme perpetrated by certain directors and officers of guarantor. Granting summary judgment for lender, this court held, inter alia, that the guarantee was not unenforceable on the basis that guarantor's agent, who signed the agreement on guarantor's behalf, was aware of or participated in the alleged fraud scheme. The court rejected guarantor's argument that because guarantor's agent was acting in his own interest, adverse to guarantor's, he could not bind guarantor; while this principle would apply to the issue of agent's implied actual authority to sign the agreement, it did not apply to the instant situation, in which guarantor's board had unambiguously conferred express actual authority on agent to execute the agreement. UBS AG, Stamford Branch v. HealthSouth Corp., 645 F.Supp.2d 135, 144, 145.

S.D.N.Y.Bkrtcy.Ct.

S.D.N.Y.Bkrtcy.Ct.2013. Com. (e) cit. in ftn. Official committee of unsecured creditors in the Chapter 11 bankruptcy case of debtor/automobile manufacturer brought an adversary proceeding against administrative agent of secured creditors that had made a $1.5 billion term loan to debtor prepetition, seeking a determination that the loan was unsecured. Granting summary judgment for defendant, this court held, inter alia, that defendant did not grant actual authority to debtor to terminate the term-loan lien when it mistakenly included a termination statement with respect to that lien in a batch of termination statements regarding the liens on an unrelated real-estate financing; neither debtor nor defendant intended, or believed, that their documents would affect anything other than the real-estate-financing liens, and neither thought that defendant had authorized debtor to have them affect anything else. In re Motors Liquidation Co., 486 B.R. 596, 622, 630.

S.D.Ohio

S.D.Ohio, 2009. Quot. in sup. After buyer of “excess” clothing instituted arbitration against reseller, and reseller joined initial vendor as a party to the arbitration, vendor sued arbitrator and buyer, seeking a declaration as to whether there was a valid arbitration agreement between vendor and buyer. Denying summary judgment for vendor, this court held, inter alia, that there was ample evidence in the record that reseller was vendor's agent and had both actual and apparent authority to bind vendor to arbitrate with buyer. As to reseller's actual authority, the court pointed to plain language in the agreements between vendor and reseller establishing an agency relationship in which reseller was authorized to represent vendor in sales of the clothing generally and in sales to buyer specifically. MJR Intern., Inc. v. American Arbitration Ass'n, 596 F.Supp.2d 1090, 1097.

D.Or.

D.Or.2012. Cit. in ftn. Borrowers sued, among others, nominee/agent for residential mortgage lender and its successors, seeking to stop a nonjudicial foreclosure of their home that nominee commenced as the "beneficiary" listed under the deed of trust. Denying in part defendants' motion to dismiss, this court held that, under the Oregon Trust Deed Act, nominee was not the beneficiary of plaintiffs' trust deed, because it did not make the underlying loan to plaintiffs, and the trust deed did not secure it in the event of plaintiffs' default. The court, however, rejected plaintiffs' argument that, because nominee was not the real beneficiary, it lacked the authority to assign the trust deed to noteholder, reasoning that the Act did not forbid an agent such as nominee, when acting with authority and on behalf of its principal, the beneficiary, from making assignments, recording those assignments, appointing a successor trustee, or doing anything else that a beneficiary could do on its own. James v. ReconTrust Co., 845 F.Supp.2d 1145, 1152.

N.D.Tex.

N.D.Tex.2010. Cit. in sup., com. (h) quot. in disc. Former client brought a fraud claim, inter alia, against law firms. Denying defendants' motion to compel arbitration of plaintiff's fraud claim, this court held that defendants, as nonsignatories to the arbitration agreement, were not entitled to enforce the agreement under the doctrine of equitable estoppel on the basis that their current client, a signatory to the agreement, was implicated in plaintiff's fraud claim, and its allegedly tortious conduct was interdependent with theirs. The court reasoned that, under the law of agency, a principal was liable for an intentional tort of his agent only if he authorized or ratified the tort, and, here, there was no allegation that current client authorized defendants' allegedly fraudulent statements. Vinewood Capital, LLC v. Sheppard Mullin Richter & Hampton, LLP, 735 F.Supp.2d 503, 514.

Iowa,

Iowa, 2014. Subsec. (1) quot. in sup. Following estate's sale of decedent's residential real estate over the objections of decedent's common-law wife, who contended that the property was her home, the trial court, on remand, concluded that wife should, at her election, receive either the proceeds from the sale or the real estate itself upon payment to the purchasers of a substantial part of the cost of the improvements made by them. Affirming as modified and remanding, this court held, inter alia, that the purchasers of the real estate were good-faith purchasers at a judicial sale for purposes of the occupying claimants' statute, entitling them to compensation for their improvements. Citing Restatement Third of Agency § 2.02, the court rejected wife's argument that purchaser-husband's stepfather, acting as purchasers' agent, had knowledge destroying purchasers' good faith during the period after the purchase in which they made their improvements, concluding that any agency relationship that might have arisen at that time pertained only to the construction of the improvements. In re Estate of Waterman, 847 N.W.2d 560, 575.

Ky.

Ky.2012. Sec. and com. (h) quot. in sup. Executor of her deceased mother's estate sued owners and operators of the long-term care facility where decedent spent the last several months of her life, alleging that staff's negligence and management's violation of statutes regulating nursing homes resulted in injuries to decedent and in her wrongful death. The trial court denied defendants' motion to dismiss the complaint or to stay the case pending arbitration; the court of appeals reversed. Reversing and remanding, this court held, inter alia, that plaintiff, as decedent's attorney-in-fact, did not have actual authority to execute the arbitration agreement, because the durable power of attorney granted to her by her mother to make property and health-care management decisions did not authorize her to do so; here, where the optional, collateral agreement was not a condition of admission to the nursing home, agreeing to arbitrate was not a "health care" decision. Reversing and remanding, this court held, inter alia, that plaintiff, as decedent's attorney-in-fact, did not have actual authority to execute the arbitration agreement, because the durable power of attorney granted to her by her mother to make property and health-care management decisions did not authorize her to do so; here, where the optional, collateral agreement was not a condition of admission to the nursing home, agreeing to arbitrate was not a "health care" decision. Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 592, 593.

Neb.

Neb.2009. Cit. in ftn. Son, as mother's next of kin and trustee of her estate, sued nursing home in connection with injuries, pain, and suffering allegedly sustained by mother while she was a patient. The trial court granted defendant's motion to compel arbitration pursuant to an arbitration agreement signed by defendant on behalf of mother as part of the paperwork for her admission. Reversing and remanding, this court held that, while mother authorized defendant to sign the required admission papers, his actual authority did not extend to signing the arbitration agreement, because it was not a condition of admission, and defendant was not justified in relying solely on mother's authorization of defendant to sign admission papers as apparent authority to bind her to an arbitration agreement, because nothing in the record suggested that a reasonable person would have

expected an arbitration agreement to be included with admission documents for a nursing home. Koricic v. Beverly Enterprises—Nebraska, Inc., 278 Neb. 713, 718, 773 N.W.2d 145, 150.

Pa.

Pa.2010. Cit. in ftn. Committee of creditors established for corporate debtor brought adversary proceeding against corporation's auditor and auditor's successor, alleging that defendants colluded with debtor's officers to fraudulently misstate debtor's finances. After the district court granted summary judgment for defendants on grounds that officers' fraud was imputed to debtor, because they provided auditor with false financial statements in the first place, the court of appeals certified to this court for review questions of first impression centering on the availability of an imputation-based in pari delicto defense in an auditor-liability scenario. Answering the questions, this court held, inter alia, that, in factual circumstances entailing secretive, collusive conduct of an agent and an auditor, Pennsylvania law rendered imputation unavailable, as the auditor had not proceeded in material good faith. Official Committee of Unsecured Creditors of Allegheny Health Educ. and Research Foundation v. PriceWaterhouseCoopers, LLP, 605 Pa. 269, 989 A.2d 313, 336.

Wash.

Wash.2013. Cit. in ftn., subsec. (1) and coms. (d) and (f) quot. in sup. After an administrative law judge determined that title insurer was not vicariously liable for the illegal marketing practices of its agent—an underwritten title company (UTC) that was authorized to issue title insurance on its behalf, the Office of the Insurance Commissioner (OIC) reversed, and insurer sought judicial review of the OIC's decision. The trial court affirmed, and the court of appeals reversed, concluding that insurer bore no vicarious liability. Reversing and remanding, this court held, inter alia, that insurer was vicariously liable for UTC's acts of unlawful inducement. The court reasoned that, under the doctrine of implied authority, UTC, as a general agent of insurer, could bind insurer through acts necessary to, or customary with, those transactions that insurer authorized; here, unlawful inducements were the norm in the title-insurance industry, insurer took no affirmative steps to stop UTC from engaging in them, and it could not now evade liability by willfully blinding itself to UTC's unlawful marketing practices. Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r, 309 P.3d 372, 380, 381.

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