EFiled: Feb 15 2016 10:48PM EST
Transaction ID 58577105
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 Feb. 15, 2016

RESPONDENT DELL INC.'S REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT, AND OPPOSING PETITIONERS' CROSS-MOTION, AS TO PETITIONERS WHO VOTED IN FAVOR OF THE MERGER

Gregory P. Williams (No. 2168)
John D. Hendershot (No. 4178)
Susan M. Hannigan (No. 5342)
Andrew J. Peach (No. 5789)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Tel.: (302) 651-7700

Attorneys for Respondent Dell Inc.

OF COUNSEL:

ALSTON & BIRD LLP
John L. Latham
Susan E. Hurd
1201 West Peachtree Street, Northwest
Atlanta, Georgia 30309
Tel.: (404) 881-7000

-and-

ALSTON & BIRD LLP
Gidon M. Caine
1950 University Avenue, 5th Floor
East Palo Alto, California 94303
Tel.: (650) 838-2000

-and-

ALSTON & BIRD LLP
Charles W. Cox
333 South Hope Street
Los Angeles, California 90071
Tel. (213) 576-1000

Dated: February 8, 2016

TABLE OF CONTENTS

TABLE OF EXHIBITS TO OPENING BRIEF

The following table lists the exhibits submitted with 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, Transaction ID No. 57633640, on July 30, 2015, with their corresponding numbers on the joint trial exhibit list.

Exhibit	JX	Description
1	906	Affidavit of Charles Pasfield of Broadridge Financial Solutions, Inc., including Exhibit 1 thereto (DELLVOT00000937-940)
2		Under Seal Brief in Support of Respondent's Motion for Partial Summary Judgment as to Entitlement Issues (Docket Item No. 146, Transaction ID No. 56433605)
3	592	Appraisal Demand of Petitioner NMSF, Inc. (ENT00000721) (Ent. Br. Ex. 3-A)
4	593	Appraisal Demand of Petitioner Manulife (MAN00000002) (Ent. Br. Ex. 8-A)
5	594	Appraisal Demand of Petitioner T. Rowe Price Funds SICAV Large Cap Value Equity Fund, (ENT00000727) (Ent. Br. Ex. 6-A)
6	690	Cede & Co. Omnibus Proxy (DELLVOT00000627-67)

7	43	Master Services Agreement between Broadridge and State Street Bank and Trust Co. (SSBT000231-284)
8	5	Custody Agreement between T. Rowe Price Funds SICAV and Chase Manhattan Bank Luxembourg S.A. (TRP00015807-37)
9	6	Domestic Custody Agreement between Northwestern Mutual Series Fund, Inc. and The Chase Manhattan Bank (NW00000112-28)
10	901	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.")
11	902	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.")
12	903	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.")

13	9004	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.")
14	246	Proxy Service Addendum to Master Service Agreement between T. Rowe Price Associates, Inc. and Institutional Shareholder Services Inc. (TRP00015758-69)
15	8	ISS Custom Voting Agent Service Agreement between T. Rowe Price Associates, Inc. and T. Rowe Price International, Inc. and Institutional Shareholder Services Inc. (TRP00017140-54)
16	604	Email chain between ISS and T. Rowe Price employees, July 16 and July 18, 2013 (TRP00015953)
17	688	Email and spreadsheet attachment between ISS and T. Rowe Price employees, September 6, 2013 (ISS_001756-57)
18	905	State Street Bank and Trust Co.'s Responses and Objections to Subpoena (DELLVOT00000934-36)
19	778	Petition for Appraisal in C.A. No. 9322-VCL

20	689	Spreadsheet produced by State Street Bank & Trust, described by State Street as "An excerpt of a spreadsheet containing information that State Street provided to ISS on September 6, 2013 providing ISS with the opposition and management control numbers (SSBT000230)
21	785	Petition for Appraisal in C.A. No. 9350-VCL
22	605	Broadridge Client Proxy Votes for July 18, 2013 Meeting (DELLVOT00000368-451)
23	694	Broadridge Client Proxy Votes for September 12, 2013 Meeting (DELLVOT00000055-139)
24	695	Final Report of the Inspectors of Election for September 12, 2013 Special Meeting of Stockholders (DELLVOT00000281-83)
25	714	Email chain between T. Rowe Price and ISS employees, October 7, 2013 (ISS_001322-25)
26	830	SEC Form N-PX for the T. Rowe Price Equity Income Fund, Inc. (Allen Deposition Ex. 24)
27	831	Form N-PX for T. Rowe Price Equity Series, Inc. (Allen Deposition Ex. 25)
28	832	Form N-PX for T. Rowe Price Institutional Equity Funds, Inc. (Allen Deposition Ex. 26)
29	833	Form N-PX for T. Rowe Price Science and Technology Fund, Inc. (Allen Deposition Ex. 27)

30	829	Form N-PX for Northwestern Mutual Series Fund, Inc. (Allen Deposition Ex. 28)
31	825	Form N-PX for the John Hancock Variable Insurance Trust–Science &Technology Trust (Allen Deposition Ex. 29)
32	826	Form N-PX for John Hancock Funds II–Equity Income Fund (Allen Deposition Ex. 30)
33	827	Form N-PX for John Hancock Variable Insurance Trust–Equity Income Trust (Allen Deposition Ex. 31)
34	828	Form N-PX for John Hancock Funds II–Spectrum Income Fund (Allen Deposition Ex. 33)
35	696	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 (Allen Deposition Ex. 23)
36	838	Email chain between T. Rowe Price and ISS employees, October 28, 2014 (ISS_000050-55)
37	843	Email chain among ISS employees, November 4 - November 7, 2014 (ISS_001952-62)
38	841	Email chain among ISS employees, November 4, 2014 (ISS_002134-39)

39	844	Email chain between T. Rowe Price and State Street employees, November 4 - November 10, 2014, including attached spreadsheet listing account numbers, ballot control numbers and votes (TRP00017962-68)
40	893	Appendix A to Common Trust Fund and Pension Custody Agreement/Appendix B to Trust Accounting Agreement between T. Rowe Price Trust Co. and Bank of New York Mellon, listing account number for Petitioner TRPTC Milliken Stock Fund Value (MIL00000005-06)
41	845	Email chain between T. Rowe Price and ISS employees, November 3 - November 10, 2014 (ISS_002327-35)
42	667	Email chain between T. Rowe Price and ISS employees, August 22 - August 23, 2013 (ISS_000968-69)
43	645	Excerpt from Dell Inc. Aug. 2013 Proxy Statement

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

The question presented by the pending motions is whether Cede & Co. ("Cede") -- the nominee stockholder of record who held all of the Subject Petitioners' shares -- voted those shares in favor of the Merger. The answer to that question is yes, and as a result those Petitioners' claims must be dismissed. Dell's Motion should be granted and the Subject Petitioners' Cross-Motion denied.

There is no doubt that Cede voted the Subject Petitioners' shares in favor of the Merger. Several of the Subject Petitioners made SEC filings admitting that they voted their shares in favor the Merger, and they have never withdrawn or modified those filings. OB 19 n.20; AB 26; TRP Rog. Resp. No. 10. Petitioners do not dispute this. In addition, Dell has conclusively established that:

- Cede gave an omnibus proxy in favor of numerous participants and the relevant participants gave instructions via Broadridge to vote the Subject Petitioners' shares in favor of the Merger. OB 15-18.
- The Subject Petitioners' agents gave instructions, utilizing the unique control numbers assigned by Broadridge, to vote their shares on the Company's proxy card. OB 15-18.
- Broadridge's records confirm that the instructions given to the human proxies, and implemented ministerially by them, were to vote the Subject Petitioners' shares in favor of the Merger. *Id.*

The Subject Petitioners' response is to ask the Court to ignore the facts and instead to consider Cede's actions exclusively as an aggregate and not as the agent for numerous separate beneficial owners. In other words, Petitioners ask the Court to presume conclusively, and contrary to the undisputed evidence, that their shares were among the millions held on behalf of other investors that Cede did not vote in favor of the Merger. That would be an unprecedented decision that would functionally eliminate the statutory requirement to refrain from voting for the transaction from the appraisal statute in the public-company context.

Alternatively, the Subject Petitioners ask the Court to excuse their nominee's votes in favor of the Merger on their behalf on the alleged ground that those votes arose from a computer glitch, rather than from deliberate tactical conduct. AB 20-26. Yet even if true, accident and negligence present no grounds for disregarding express statutory requirements. OB at 43-47.

Equally meritless is the Petitioners' suggestion that the result would be different had this matter been prosecuted in Cede's name, rather than in the names of the real parties in interest. *See* AB 38-39. Regardless of the name on the caption, Section 262 requires the record holder to refrain from voting the shares as to which appraisal is sought in favor of the merger. The record holder failed to meet that requirement as to the shares at issue here, and for that reason the request to amend the petitions to substitute Cede as nominal petitioner should be denied.

REPLY STATEMENT OF FACTS

The parties' prior submissions confirm that the facts relevant to the pending cross-motions are undisputed. *Compare* AB 18-26 *with* OB 3-26; TRP Rog. Resp. Nos. 2, 10.

A. The Shares at Issue Were Voted in Favor of the Merger.

There is no dispute that, beginning in late July 2013 and continuously through the effective date of the Merger, the Subject Petitioners' shares were held in an identifiable manner and not as part of an "undifferentiated fungible bulk," AB at 35. Cede's demands for appraisal separately identify each of the Subject Petitioners and the number of shares covered by each demand. *See* OB at 3-4 & n.4, 33 n.28, Exs. 2-5. Petitioners' shares were withdrawn from Cede's electronic book-entry system (the FAST account) and stock certificates representing all or nearly all the shares were issued in July 2013. OB 33 n. 28, Ex. 42 (ISS_000968), TRP Rog. Resp. No. 19, Non-TRP Rog. Resp. No. 19. Petitioners' shares were not, therefore, held as part of a fungible bulk at the time of the Meeting, and Petitioners do not claim otherwise.

There is also no dispute that a series of proxies connects Cede with the Subject Petitioners. Cede gave an omnibus proxy in favor of its participants. The relevant participants gave powers of attorney to Broadridge. Broadridge, via its multiple client proxies, gave proxies to the individuals who attended the Meeting

and submitted ballots. *See* OB 4-6; AB 9-13. The Subject Petitioners, not Cede, had discretion to determine how their shares would be voted. Cede, as the holder of record, did nothing more than place the actual owners of shares (or their designees) in a position to exercise voting rights, as Cede and other securities intermediaries are required by law to do. *See* 6 *Del. C.* § 8-506; OB at 4, 29 n.25. Cede -- like Broadridge, State Street and the Subject Petitioners' brokers -- acted as the Petitioners' intermediary and agent.[1]

Nor is there any serious dispute that the votes cast on the Subject Petitioners' behalf are traceable and auditable. T. Rowe contracted with ISS for voting services that would meet a specified standard of accuracy, with certain adverse financial consequences in the event ISS's performance fell short. OB Ex. 14 (TRP00015758 at TRP00015768). The fact that ISS's compensation depended in part on accuracy presupposes that accuracy was measurable. Moreover, there is no question that the share positions at issue received unique control numbers assigned by Broadridge.[2] Those control numbers enabled T. Rowe and ISS to determine in

[1] "A proxy relationship is 'a particular sort of agency' where the [beneficial] stockholder is the principal and the proxy agent is just that, an agent to vote the shares." *State of Wis. Inv. Bd. v. Peerless Sys. Corp.*, 2000 WL 1805376, at *14 (Del. Ch. Dec. 4, 2000) (quoting *Duffy v. Loft, Inc.*, 151 A. 223, 227 (Del. Ch. 1930), *aff'd*, 152 A. 849 (Del. 1930)).

[2] Petitioners' positions actually received two separate control numbers, one enabling them to appoint the Company's proxy committee to cast their votes and the other enabling the proxies of the competing group (*i.e.*, the Icahn /

the Autumn of 2014 that the Subject Petitioners' shares had, in fact, been voted in favor of the Merger. OB at 23-25; Ex. 38 (ISS_002134).

There is also no dispute that the control numbers associated with the Subject Petitioners' voting instructions have been identified. Broadridge's records reflect that the instructions it passed along as to those shares were to vote the Subject Petitioners' shares in favor of the Merger. Those instructions were implemented ministerially at the Meeting. In short, the unquestioned reality is that the Subject Petitioners' shares were voted in favor of the Merger.

B. The Record Confirms That T. Rowe Could Have Prevented the Subject Petitioners' Shares From Being Voted in Favor of the Merger, But Failed to Do So.

The Subject Petitioners do not dispute that their vote in favor of the Merger was the result of their claimed original instructions being invalidated and replaced with instructions in accord with T. Rowe's default voting policy, which was to vote with management's recommendations on mergers. *See* AB 19 ("Meeting Records are automatically populated in line with T. Rowe's default policy to provide instructions to vote in accordance with T. Rowe's standard voting guidelines."), 21. Petitioners characterize this event as a "computer glitch," AB 18, but T. Rowe's internal proxy group was aware of the existence of a problem before the

---

Southeastern group, represented by D.F. King) to vote on their behalf. *See* OB Ex. 20. They chose to use the former set of control numbers.

Meeting. Given their own interrogatory response (*see* TRP Rog. Resp. No. 2), the Subject Petitioners do not and cannot dispute that T. Rowe's proxy group knew about the "missing ballots" issue for many of their shares in the three weeks before the Meeting. *See* OB at 12 & n.10; *see also* OB Ex. 17. T. Rowe's interrogatory responses state that, as of the time of the Meeting in September 2013, "T. Rowe Price did not have a clear understanding as to whether ISS had received all of the replacement ballots." TRP Rog. Resp. No. 2.

Further, even though T. Rowe had the ability to check ISS's Proxy Exchange system to ensure that T. Rowe's voting instructions were carried over correctly, and T. Rowe personnel had in fact checked the instructions several times in advance of the earlier dates on which the stockholders' meeting was convened and adjourned, T. Rowe does not claim that anyone thought to or did check again in the days leading up to the Meeting.[3] OB at 12; *cf.* AB 21-23. Similarly, despite numerous communications between T. Rowe and ISS about voting the Subject Petitioners' shares, OB Exs. 36-39, and despite T. Rowe's public opposition to the

[3] Although Petitioners' recitation of facts refers repeatedly, AB 5-6, 23, to language in the Company's August 14, 2013 proxy statement to the effect that investors who had already voted by proxy would be "considered to have voted" unless they revoked or changed their proxies, Petitioners do not claim that they relied on this language, nor do they claim that this language excuses Cede's votes in favor of the Merger on their behalf. *See* OB 40-42.

Merger, the instructions actually sent to Broadridge and implemented by the human proxies at the Meeting were to vote in favor of the Merger.[4]

C. The Record Confirms That Cede Voted the Subject Petitioners' Shares in Favor of the Merger

Petitioners have obtained and submitted affidavits from Larry Tu and Janet Wright (the two individuals appointed as Dell's proxy committee for the Meeting), Creighton Dunlop (the inspector of election, affiliated with IVS Associates, Inc.) and Charles Pasfield of Broadridge, who previously submitted an affidavit in connection with Dell's original motion.[5] *See* AB 7 n.4, 11 n.15, 14. Petitioners offer these materials in support of the claim that the documents submitted at the Meeting did not specifically identify how Cede voted their shares, and that those

---

[4] Petitioners' papers suggest that there is some doubt as to which set of T. Rowe voting instructions were passed on to Broadridge -- the original instructions to vote against the Merger or the later, allegedly pre-populated, instructions to vote in favor of it. AB 27. Broadridge's records, however, conclusively resolve that question and demonstrate that the instructions passed on by Broadridge were to vote the Subject Petitioners' shares in favor of the Merger. *See* OB 15-18. Petitioners never squarely contend otherwise.

[5] Petitioners characterize Mr. Pasfield's second affidavit as saying that "IVS … combines all instructions provided by DTC Participants (through Broadridge or through any other means) and votes in bulk all shares that are owned of record by Cede & Co." AB 20. That is not what the cited paragraph in Mr. Pasfield's affidavit says, and it is not accurate. IVS, the independent inspector of election, did not cast any votes and Mr. Pasfield's affidavit does not say otherwise. Nor does Mr. Pasfield's affidavit say that anyone "votes in bulk." The Broadridge multiple client proxies -- which are referenced in Mr. Pasfield's affidavit as the "Aggregated Voting Instructions," *see* Pasfield Aff. ¶¶ 4, 8; OB Ex. 23 (same documents), reflect voting instructions broken down separately for each DTC participant.

individuals did not know how Cede voted their shares. But these affidavits do not change the undisputed fact that the Subject Petitioners' shares were voted in favor of the Merger, whether the human proxies and the independent inspector knew that or not.

Mr. Pasfield's second affidavit explains that the Broadridge control numbers, which link the Subject Petitioners' positions with the votes Cede cast as to those positions, were transmitted to the beneficial owners and their intermediaries, but not to Dell or its proxy solicitor. AB at 12, 33-34. That is true, and for good reason. The control number is both a unique identifier for a particular share position and a security authentication code enabling the owner of that position (or the owner's designee) to instruct how the shares are to be voted. *See* OB 13 n.11. Sharing the control number with anyone other than the owner of that position (and the owner's agents and intermediaries) would compromise Broadridge's ability to verify that instructions to vote a particular position were properly authorized.

Petitioners contend that, because the human proxies and the inspector had no way of knowing from the Broadridge proxy cards how specific beneficial owners' shares were to be voted, there is therefore no way of linking the voting instructions on those proxy cards with specific beneficial owners and their voting instructions. AB at 12-13 & n.19. That is an unwarranted inference, and one for which

Petitioners offer no support. On the contrary, it is a well-known feature of the proxy voting system that issuers may not know (or may not be able to confirm from their own records) how particular beneficial owners' shares are voted.[6]

Petitioners' argument is not a factual claim that the Court cannot determine how their shares were voted, but rather an unsupported contention that the Court should not make that determination based on information outside the Company's own records. Cede voted the Subject Petitioners' shares in favor of the Merger. The Subject Petitioners found out in 2014 that Cede had done so. The Court can make the same determination based on much of the same information, and the Court should do so.

---

[6] *See, e.g.*, Concept Release on the U.S. Proxy System, Exchange Act Release No. 34-62495, at 39 (relevant excerpts attached hereto as Exhibit A) ("The inability to confirm voting information is caused in part because no one individual participant in the voting process . . . possesses all the information necessary to confirm whether a particular beneficial owner's vote has been timely received and accurately recorded."). One potential solution to this problem proposed by the SEC's concept draft was that "all participants in the voting chain [might] grant to issuers, or their transfer agents or vote tabulators, access to certain information relating to voting records, for the limited purpose of enabling a shareholder or securities intermediary to confirm how a particular shareholder's shares were voted [and] [t]o protect the identities of objecting beneficial owners . . . [by] assign[ing] each beneficial owner a unique identifying code, which could then be used to create an audit trail from beneficial owner to proxy service provider to transfer agent / vote tabulator." *Id.* at 40. Although the SEC has not implemented such a solution, the Broadridge control numbers fulfill an analogous role in this case, as an identifying code enabling the creation of an audit trail.

ARGUMENT

I. CEDE VOTED THE SUBJECT PETITIONERS' SHARES IN FAVOR OF THE MERGER AND THEREFORE DID NOT COMPLY WITH 8 *DEL. C.* § 262(a) AS TO THOSE SHARES.

The parties agree that the stockholder of record -- Cede & Co. -- is the "stockholder" whose voting behavior matters for purposes of evaluating compliance with 8 *Del. C.* § 262(a). *See* OB 27-28, AB 27-28. The Company has never argued that the Petitioners' voting instructions or their other actions relating to voting are dispositive.[7] Rather, what matters is how Cede voted the Subject Petitioners' shares, or put differently, what actions Cede took in its capacity as the Subject Petitioners' securities intermediary and agent. Cede voted these shares in favor of the Merger and did so on the basis of instructions that originated with the Subject Petitioners. That vote must disqualify the Subject Petitioners from the appraisal remedy.

The Subject Petitioners' response is not to deny the facts, but to invite the Court to ignore those facts and the regulatory backdrop behind those facts.[8]

[7] Petitioners' repeated suggestions to the contrary, *see, e.g.,* AB 2, 28, 29, 30, or to the effect that Dell is inviting the Court to disqualify the Subject Petitioners' shares on the basis of their own actions, rather than on the basis of Cede's actions with regard to the Subject Petitioners' shares, are incorrect.

[8] As the Court has previously noted, the present system of share immobilization and nominee ownership is in large measure a function of federal regulation. *See In re Appraisal of Dell Inc.*, 2015 WL 4313206, at *22 (Del. Ch. July 30, 2015) ("Under federal law, the corporation whose stockholders would vote

Petitioners contend that case law bars the Court from inquiring into how Cede voted particular positions on behalf of particular beneficial owners, or alternatively that, as the proxies and other materials presented at the Meeting did not break out how Cede voted particular positions on behalf of particular beneficial owners, the Court should not consider Cede's underlying votes. AB 29-34. Neither of these arguments has merit.

Petitioners have identified no case barring the Court from its threshold duty to evaluate how Cede voted the shares it held on behalf of particular investors who owned those shares continuously from the record date through the date of the vote. The cases that appear to adopt a unitary view of Cede's voting behavior under Section 262 all dealt with shares acquired *after* the record date. None involved a showing that the record-date owner of those shares had actually voted the shares in favor of the merger. *See* OB 34-39. In that different factual context – where neither party can demonstrate who beneficially owned the shares on the record date and had the right to instruct how the shares would be voted – one might think of Cede's aggregate record ownership as a unitary "pool." That is, one might grant post-record date purchasers a presumption, in the absence of proof to the contrary,

---

on the merger -- and who could be eligible for appraisal rights -- must go through DTC to identify its custodian banks and brokers for purposes of mailing out proxy materials. *The issuer cannot ignore DTC and pretend that Cede is a single holder of record.*") (emphasis added).

that the shares they acquired after the record date were among those not voted in favor of the transaction and are "appraisal-eligible," assuming Cede held a sufficient number of shares that were not voted in favor of the transaction to "cover" all the demands.[9] But this case is different. There is no question that the Subject Petitioners owned their shares on the August 13, 2013, record date and had the right to instruct how their shares would be voted. A chain of proxies showing that Cede in fact voted the Subject Petitioners' shares in favor of the Merger is before the Court. There is no basis to ignore that evidence in favor of a presumption addressed to different circumstances.

Likewise, the aggregate form in which Cede presented its votes by proxy at the Meeting does not require the Court to pretend that Cede cast a single aggregated vote that has no consequences for particular beneficial owners seeking appraisal of the shares they held through Cede. Cede, as the stockholder of record,

[9] The respondents in *BMC Software* and *Ancestry.com* argued, *inter alia*, that a rule treating Cede's votes as an undifferentiated unit could result in appraisal being sought for more shares than Cede held of record and did not vote in favor of the merger, and that this could result either in appraisal rights being afforded to shares that were voted in favor of the merger, or in difficult problems in determining which petitioners were entitled to the appraisal recovery. *See In re Appraisal of Ancestry.com, Inc.*, 2015 WL 66825 at *8-9 (Del. Ch. Jan. 5, 2015); *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 67586, at *4, *7 (Del. Ch. Jan. 5, 2015). The same point was raised in *Transkaryotic*, though not addressed in the Court's decision. Petitioners' interpretation of the voting requirement presents the same hypothetical problem, but also presents it in concretely in the present case. Here, it is undisputed that the Subject Petitioners seek appraisal of shares that were in fact voted in favor of the Merger.

had the statutory right to vote the Subject Petitioners' shares, *see* 8 *Del. C.* § 212(a), but both Cede and the securities intermediaries between Cede and the Subject Petitioners were obliged to exercise voting rights "with respect to" those shares if directed by their respective entitlement holders. *See* 6 *Del. C.* § 8-506; *cf.* 6 *Del. C.* § 8-509. There is no support in the statutory scheme for the theory that Cede cast an untraceable unitary vote with regard to a mass of shares held in a fungible bulk. Nor is there any support for the view that the form of documentation of Cede's votes should govern over the substance of those votes. Acceptance of Petitioners' position would enable appraisal petitioners to "hijack the ownership rights" of other investors, *see Sutter Opportunity Fund 2 LLC v. Cede & Co.*, 838 A.2d 1123, 1129 (Del. Ch. 2003), and functionally eliminate any requirement that public company investors refrain from voting in favor of a merger as to which they wish to seek appraisal.

A. Cede Voted Shares In Favor Of The Merger That Are Identifiable As Those For Which The Subject Petitioners Seek Appraisal.

The crux of the dispute is an issue of statutory construction: Does the requirement in Section 262(a) that Cede be a "stockholder … who has neither voted in favor of the merger … nor consented thereto in writing" mean that Cede must refrain from voting the Subject Petitioners' shares -- *i.e.*, those shares as to which appraisal is sought -- in favor of the transaction? Or does it mean instead

that Cede must hold a number of shares not voted in favor of the transaction that is at least equal to the number of shares as to which it seeks appraisal, regardless of whether the shares not voted in favor of the transaction belonged to the parties on whose behalf Cede seeks appraisal (and, presumably, regardless of whether Cede held those same shares continuously from the time of demand through the effective date)?[10]

The Court's recent decision in *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 67586, at *3 & n.23 (Del. Ch. Jan. 5, 2015), assumed the former reading. The *BMC Software* Court also stated that an appraisal petitioner must show that the "record holder of the stock for which appraisal is sought … has not voted in favor of or consented to the merger *with regard to those shares*." *Id.* (emphasis added). The Court assumed the same reading in *In re Ancestry.com, Inc., Union Illinois, and Transkaryotic. See Ancestry.com, 2015 WL 66825, at *1 (Del. Ch.* Jan. 5, 2015) (construing the voting prerequisite to mean that "[a] stockholder may seek appraisal *only for shares it has not voted in favor of a merger*") (emphasis added),

[10] Either party's interpretation involves reading some qualifier into the statutory text. As previously noted, OB 28-29 n.24, Section 262(a), if read literally and with the understanding that each stockholder of record must be viewed exclusively as an integral unit, disqualifies any stockholder who votes even a single share in favor of a merger. Based on that reading, Cede, which cast over 800 million votes in favor of the merger, could not obtain appraisal as to *any* shares it held of record. That reading would, however, be inconsistent with decades of practice and the Company does not advocate it. *See Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.*, 847 A.2d 340, 365 (Del. Ch. 2003).

Union Illinois, 847 A.2d at 365 ("It is understood by now that an entity like Cede & Co. that is 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*.") (emphasis added); *In re Appraisal of Transkaryotic Therapies, Inc.*, 2007 WL 1378345, at *4 (Del. Ch. May 2, 2007) (relying on *Union Illinois* to hold that "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*") (emphasis added).

The earliest of these decisions, *Union Illinois*, relied expressly on the decisions of this Court and the Supreme Court in *Colonial Realty Corp. v. Reynolds Metals Co.*, 185 A.2d 754 (Del. Ch. 1962), *aff'd*, 190 A.2d 752 (Del. 1963), which were decided at a time when the statute was differently worded. The facts of *Reynolds Metals* have been discussed previously. OB 28-30. Petitioners attempt to distinguish *Reynolds Metals*, not based on the change to the statutory language in 1976,[11] but by arguing that the Supreme Court's later decision in *Olivetti Underwood Corp. v. Jacques Coe & Co.*, 217 A.2d 683 (Del. 1966), "rejected the exact same language from *Reynolds Metal* [sic] that Dell relies upon

[11] As previously noted, OB 28-29 n.24, counsel for the Company is unaware of any basis to believe that the 1976 amendment was intended to overturn *Reynolds Metals* or to authorize a stockholder to seek appraisal as to shares actually voted in favor of a merger through reliance on negative votes cast as to other shares held by the same stockholder of record. Petitioners have identified no such basis.

here as *obiter dicta*…." AB at 32. That assertion is a misreading of *Olivetti Underwood*.

The Supreme Court in *Olivetti Underwood* characterized the holding of *Reynolds Metals* as follows: "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." *Olivetti Underwood*, 217 A.2d at 685. That holding is the principle on which Dell relies, *i.e.,* that the proper way to view the vote of a nominee record owner who holds for multiple beneficial owners is as a series of votes for the various beneficial owners severally, and not as a single vote for all beneficial owners lumped together indiscriminately.

The *Olivetti Underwood* Court continued, immediately after the foregoing characterization of the holding in *Reynolds Metals*:

> In discussing one of the corporation's contentions, this Court stated [in *Reynolds Metals*] that if the corporation questioned whether the broker was acting as agent for another in demanding 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*.

Id. at 685 (quoting *Reynolds Metals*, 190 A.2d at 755). It was those statements in dicta that the Supreme Court rejected in *Olivetti Underwood*, 217 A.2d at 686. It neither overruled nor disagreed with the principle from *Reynolds Metals* on which the Company relies here – namely, that the votes of a nominee record holder must be viewed as those of an agent acting on behalf of multiple principals separately. *Compare Abraham & Co. v. Olivetti Underwood Corp.*, 204 A.2d 740, 741 (Del. Ch. 1964) (distinguishing *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* OB 35-36 n. 29. What the Supreme Court prohibited was inquiry into a factual issue not germane to statutory compliance -- whether the nominee record holder was properly authorized to demand appraisal on the beneficial owner's behalf -- not inquiry into compliance with an express statutory requirement for appraisal.

Thus, contrary to Petitioners' claims, neither *Olivetti Underwood* nor any other decision has held that an appraisal petitioner may cause its nominee to vote that petitioner's shares in favor of a merger and still comply with the voting requirement because other investors who held through the same nominee beneficially owned shares voted against the merger. Such a ruling would have been impossible in 1966, when the statute expressly required an appraisal petitioner to show that its "shares were not voted in favor of [the] consolidation or

merger." *See Reynolds Metals*, 185 A.2d at 757 (quoting statute). Such a ruling is no more possible today.

As Dell has previously explained, the cases on which Petitioners rely -- *Transkaryotic*, *Ancestry.com*, and *BMC Software* -- endorse a unitary view of Cede's voting behavior only with regard to shares acquired *after* the record date for determining entitlement to vote, and only in the absence of proof as to who owned those shares on the record date and how (if at all) those unknown record-date owners caused those shares to be voted. OB 34-39. Those cases did not deal with Cede's votes on behalf of beneficial owners who owned their shares continuously from the record date through the date of the vote. To the extent these cases treat Cede's vote as an undifferentiated aggregate, they do so only in a specific context that is very different from the present one.

Neither this Court nor the Supreme Court has ever held that this Court must limit itself to inquiring into Cede's votes on an aggregate basis when considering whether an appraisal petitioner, who had the right to vote its shares, has satisfied the voting requirement in Section 262(a). Petitioners' interpretation of the statutory prerequisite is inconsistent with the statutory text, with the Supreme Court's construction of the statute in *Reynolds Metals*, and with common sense.

B. Petitioners Cannot Excuse Non-Compliance Based On The Aggregated Form Of The Proxies Presented At The Meeting.

Petitioners also claim that it is not "possible to identify specific shares that Cede & Co. voted as being owned and voted by Petitioners" because "the votes actually cast by Cede & Co. are undifferentiated[.]" AB 33. Petitioners contend that their voting instructions were "aggregated at the DTC participant level," and, thus, "the notion that T. Rowe 'voted' on the Merger, as a matter of Delaware law, is incorrect." AB 34. This argument confuses several issues.

Contrary to Petitioners' suggestion, it is in fact possible to identify the specific shares that Cede held and voted on behalf of the Petitioners based on instructions ultimately attributable (through a chain of intermediaries) to the Petitioners. *See* 6 *Del. C.* § 8-506 (duty of securities intermediary to exercise voting rights with respect to financial assets, including shares, if directed by entitlement holder). A series of proxies connects Cede, the stockholder of record, with voting instructions given and implemented as to the particular positions beneficially owned by the Subject Petitioners. Those shares were held in certificate form, not as part of an indistinguishable mass, and even if they had not been, there is again no serious dispute that the Broadridge control numbers uniquely connect Petitioners' shares with the votes cast by Cede as to those shares. Indeed, when the Subject Petitioners realized that many of them had made SEC

filings admitting to voting for the Merger, *see* JX 825, JX 826, JX 827, JX 828, JX 829, JX 830, JX 831, JX 832, JX 833, they (and Broadridge, State Street and ISS) relied on those control numbers to determine that the SEC filings were, in fact, correct.

What is not possible, as Petitioners note, is to ascertain *solely* from the ballots, proxies and other materials presented to the inspector of election at the Meeting how Cede voted the Subject Petitioners' shares. *See* AB 33-34. Broadridge's multiple client proxy does not identify the Subject Petitioners, the control numbers associated with their shares or the serial numbers of the certificates representing their shares. Indeed, neither the human proxies (Mr. Tu and Ms. Wright) nor the proxy solicitor (MacKenzie & Co.) nor the inspector of election (IVS Associates) knew at the time of the Meeting, or had any way of knowing at that time, how Cede had been instructed to vote the Petitioners' shares.

However, Petitioners never explain why any of this matters. They do not and cannot explain why the proxies and related materials presented at the Meeting should be the only evidence considered on how Cede voted specifically identifiable positions. Petitioners likewise do not explain why this Court should ignore the evidence demonstrating that Cede actually voted their shares in favor of the Merger. The General Corporation Law limits the materials on which an inspector of election may rely "in determining the validity and counting of proxies and

ballots," 8 *Del. C.* § 231(d), but it imposes no such limitation on the Court, in the appraisal context or elsewhere.

The Court in election disputes routinely considers evidence that the inspectors are not permitted to consider and takes the view that Cede votes only as an agent for the beneficial owners. *See, e.g.*, *Allison v. Preston*, 651 A.2d 772 (Del. Ch. 1994), *aff'd*, 650 A.2d 646 (Del. 1994); *Commonwealth Assocs. v. Providence Health Care, Inc.*, 641 A.2d 155 (Del. Ch. 1993); *cf.* D.R.E. 401, 402 ("Relevant evidence," defined as evidence "having any tendency to make the existence of any fact that is of consequence … more probable or less probable than it would be without the evidence," is admissible unless otherwise provided by statute or Court rule). Petitioners' theory that the Company is obliged to "confine its inquiry to, and focus on, the list of registered stockholders in determining the validity of appraisal demands," AB 32, makes no sense. The stock list may reveal whether a party making a demand is or is not a stockholder of record, but it will not reveal whether that stockholder has or has not voted in favor of the transaction. The fact that Cede's votes as to over a billion shares were not broken down by position and beneficial owner in the materials submitted to the inspector of election does not mean that Cede's votes are indistinguishable, nor that the Court should pretend that they are.

Moreover, any claim that Cede casts its votes on an undifferentiated basis conflicts with the state and federal statutory scheme governing Cede's actions. Cede is a securities intermediary for purposes of the Uniform Commercial Code. *See* 6 *Del. C.* § 8-102(a)(14)(i). Cede's participant banks and brokers are likewise securities intermediaries. *See* 6 *Del. C.* § 8-102(a)(14)(ii). Cede and the other securities intermediaries are under a duty to exercise rights as to "financial assets," such as shares of stock, *see* 6 *Del. C.* § 8-102(a)(9), if instructed to do so by the entitlement holder. *See* 6 *Del. C.* § 8-506. That duty may be satisfied by placing the entitlement holder in a position to exercise voting rights directly, or by exercising due care to follow the entitlement holder's instruction. *See id.* Federal regulation likewise provides the beneficial owners with the opportunity and means to cause their respective intermediaries (including Cede) to accept and implement the beneficial owners' voting instructions. *See, e.g.*, 17 C.F.R. 240.14a-13.

In short, a chain of obligation exists between Cede and each beneficial owner, requiring Cede and other intermediaries in the chain to follow and implement each beneficial owner's voting instructions (if any). Securities intermediaries owe duties under Article 8 to their respective entitlement holders severally, not to all their entitlement holders in an undifferentiated mass. Just as the Company was not at liberty to "look only at its own records and treat Cede as a single, monolithic owner," *In re Appraisal of Dell*, 2015 WL 4313206, at *7, for

purposes of soliciting proxies to vote in favor of the Merger, the Court should not treat Cede in such a manner when evaluating compliance with the voting requirement in Section 262(a).

The Court previously in this matter has adverted to the desirability of looking to voting instruction forms for the purpose of "confirming whether or not particular shares held by an appraisal claimant on the record date were voted in favor of the merger." *See id.* at *24.[12] No principle of law bars the Court from relying on the evidence before it here to make exactly that inquiry.

Petitioners are attempting to take advantage of the votes other investors caused Cede to cast as to those other investors' shares. The Court has declined to

[12] Petitioners offer that this reference in the Court's decision regarding the continuous ownership issue constituted an adjudication of the present issue, such that the law of the case doctrine should preclude re-litigation of the issue. AB 30-31. That assertion lacks merit, as the cases Petitioners rely upon demonstrate. The law of the case doctrine bars re-litigation of an issue that has been litigated and decided in a procedurally appropriate way in the same case between the same parties. *See, e.g.*, *May v. Bigmar, Inc.*, 838 A.2d 285, 288 n.8 (Del. Ch. 2003), *aff'd*, 854 A.2d 1158 (Del. 2004). The Court has previously ruled on certain petitioners' compliance with the continuous ownership requirement, but it has not yet ruled or had submitted to it the issues related to a different set of petitioners' compliance with a different statutory prerequisite (the voting requirement), or of the evidence the Court may permissibly consider in evaluating compliance with the voting requirement. The law of the case doctrine simply has no application. *See, e.g.*, *New England Power Co. v. F.E.R.C.*, 533 F.3d 55, 59 (5th Cir. 2008) (holding the law of the case doctrine inapplicable where an "examination [of the contested issue] was never undertaken by this court . . . nor would we have purported to decide such a complex question in a single sentence and without the benefit of briefing and argument from the parties").

allow investors who hold through Cede to aggregate their interests together with other street-name investors to satisfy a minimum ownership threshold for purposes of proposing amendments to a limited partnership agreement. *See Sutter*, 838 A.2d at 1128-29. Petitioners here, no less than plaintiffs in *Sutter*, are trying to "hijack the ownership rights" of other investors, *id.* at 1129, and to use those rights to evade a voting requirement that the undisputed evidence shows they cannot meet.

In so doing, Petitioners are inviting the Court to allow investors who hold shares in street name to bypass the voting requirement in Section 262(a) in nearly every future public-company case. Cede will usually hold a great many shares on behalf of numerous investors who elect not to vote in favor of a transaction, but who may not choose to seek appraisal. If Cede has complied with the voting requirement as to the Subject Petitioners' shares in this case, then it may also comply in future cases as to investors who deliberately and for tactical reasons direct that their shares be voted in favor of the transaction. If all that matters is Cede's vote as an aggregated unit, then there is functionally no voting requirement for street name holders. That would be an absurd result and inconsistent with the logic of the Supreme Court's decision in *Reynolds Metals*.

II. PETITIONERS CANNOT EXCUSE NON-COMPLIANCE WITH SECTION 262(a) ON EQUITABLE GROUNDS.

Petitioners claim alternatively that equitable considerations require the Court to excuse their nominee voting their shares in favor of the Merger.[13] AB 35-38. That claim has no merit.

As discussed previously, the Court requires strict compliance with the statutory prerequisites for the appraisal remedy and does not excuse compliance on the basis of mistakes. OB 26, 43-44. Petitioners suggest that their shares were voted in favor of the Merger by "mistakes in the proxy plumbing," AB 36-37, but that "mistake" appears to have occurred between T. Rowe Price and its chosen vendor ISS, in large part as a result of T. Rowe Price's default voting policy and its own employees' failure to ensure that ISS had the correct instructions. In other words, Cede's vote on the Subject Petitioners' behalf was not the result of back-office paperwork that may have been outside Petitioners' knowledge. Rather, it was Petitioners' own employees and their freely selected agents who failed to implement Petitioners' claimed intentions correctly.

[13] Petitioners emphasize that they "never took any ***deliberate, affirmative action*** to vote 'For' the Merger." AB 35 (emphasis in original). That is inaccurate, as T. Rowe had established a default policy of voting in favor of corporate actions proposed by management. The claim also ignores T. Rowe's unexplained (and perhaps deliberate and affirmative) decision not to check ISS's Proxy Exchange system in the days before the Meeting, as had been done previously, to ensure that T. Rowe's voting instructions had been carried over correctly.

Petitioners' argument that there is something inequitable about allowing Dell to "look past the identity of the record owner in order to exploit a glitch in the proxy voting process," AB 36-37, is unfounded.[14] Nor is there any merit to Petitioners' suggestion, AB 26-27, that Dell's claimed knowledge of T. Rowe's opposition to the Merger renders the present motion inequitable. An issuer's knowledge of an investor's intent to dissent does not excuse the investor's failure to comply (or to cause its nominee to comply) with the requirements of Section 262(a). *Compare Dirienzo v. Steel P'rs Hldgs., L.P.*, 2009 WL 4652944, at *4 (Del. Ch. Dec. 8, 2009) ("Delaware courts have held appraisal demands to be invalid where they were made by a beneficial owner *even in instances where the identity of the record holder was known by the respondent corporation*.") (emphasis in original) (collecting cases). Dell's claimed knowledge of T. Rowe's intentions is no more relevant than T. Rowe's intentions themselves. *See Salomon Bros. v. Interstate Bakeries Corp.*, 576 A.2d 650, 653 (Del. Ch. 1989) ("[A]ppraisal rights … are not determined by reference to a stockholder's

[14] Petitioners' reliance on *Berger v. Pubco Corp.*, 976 A.2d 132, 144 (Del. 2009), is misplaced. The case is inapposite, as the respondent there had failed to provide the dissenting stockholders with material information. Nothing similar is alleged here. And it makes no sense to suggest that excusing Petitioners from the statutory obligation to stop their nominee record holder from voting their shares in favor of the Merger represents a reciprocal balance against the Court's insistence on strict compliance with other statutory requirements, such as timely demand and continuous ownership.

purpose."). Any contrary rule would introduce improper collateral issues to the appraisal proceeding. *See id.*

Moreover, T. Rowe's intentions with respect to Dell were not as clear or monolithic as Petitioners suggest. Petitioners' Rule 30(b)(6) witness, Kenneth Allen, a fund manager at T. Rowe, confirmed that individual fund and account managers within T. Rowe were free to choose whether to vote the Dell shares for which they were responsible in accord with T. Rowe's default policy or to vote them against the Merger. *See* Allen Dep. (JX 886) at 80:9-82:2, 103:25-110:8. Whether T. Rowe should cause its shares to be voted against the Merger remained a matter of internal discussion at T. Rowe at least as late as August 29. *See* Allen Dep. Ex. 20 / JX 674 ("I continue to think we should vote against the buyout deal (meeting is September 12th) … and attempt to get a higher price via an appraisal case.").[15] Several of the Subject Petitioners' funds both bought and sold Dell shares in the months leading up to the Merger, and one of the options T. Rowe considered was simply accepting the Merger Consideration. *See* Allen Dep. (JX 886) 33:1-35:6; JX 723 (Petitioners' transactions in Dell stock). Dell knew none of this in real time and should not be barred from enforcing the express

[15] *See also* JX 445 (T. Rowe internal research memorandum, April 1, 2013); JX 564 (Kenneth Allen email, June 28, 2013).

requirements of Section 262(a) on the basis of its purported knowledge of T. Rowe's intentions.

III. THE REQUEST TO SUBSTITUTE CEDE AS NOMINAL PETITIONER SHOULD BE DENIED AS FUTILE.

Petitioners finally proffer the alternative argument that they should be permitted to amend their petitions to substitute Cede & Co. as petitioner. AB 28-29, 38-39. That request should be denied as futile, because substituting Cede would not change the result of this motion. For the reasons described above, Cede cannot obtain appraisal of shares it voted in favor of the Merger, any more than it could obtain appraisal of shares as to which it did not deliver a timely demand or which it tendered for the Merger consideration. The Court's analysis of the issue should be exactly the same whether the Subject Petitioners are named parties or whether Cede is. Petitioners offer no support for their claim to the contrary.

CONCLUSION

For the foregoing reasons, those stated in prior briefing and those to be stated at oral argument, judgment should be entered in favor of Dell and against the Subject Petitioners. The Subject Petitioners are not entitled to the appraisal remedy, and should receive only the Merger consideration, without interest.

/s/ Gregory P. Williams

Gregory P. Williams (No. 2168)
John D. Hendershot (No. 4178)
Susan M. Hannigan (No. 5342)
Andrew J. Peach (No. 5789)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Tel.: (302) 651-7700

Attorneys for Respondent Dell Inc.

OF COUNSEL:

ALSTON & BIRD LLP
John L. Latham
Susan E. Hurd
1201 West Peachtree Street, Northwest
Atlanta, Georgia 30309
Tel.: (404) 881-7000

-and-

ALSTON & BIRD LLP
Gidon M. Caine
1950 University Avenue, 5th Floor
East Palo Alto, California 94303
Tel.: (650) 838-2000

-and-

ALSTON & BIRD LLP
Charles W. Cox
333 South Hope Street
Los Angeles, California 90071
Tel. (213) 576-1000

Dated: February 8, 2016

EFiled: Feb 08 2016 06:08PM EST
Transaction ID 58544374
Case No. 9322-VCL

Exhibit A

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240, 270, 274, and 275

[Release Nos. 34-62495; IA-3052; IC-29340; File No. S7-14-10]

RIN 3235-AK43

CONCEPT RELEASE ON THE U.S. PROXY SYSTEM

AGENCY: Securities and Exchange Commission.

ACTION: Concept release; request for comments.

SUMMARY: The Commission is publishing this concept release to solicit comment on various aspects of the U.S. proxy system. It has been many years since we conducted a broad review of the system, and we are aware of industry and investor interest in the Commission's consideration of an update to its rules to promote greater efficiency and transparency in the system and enhance the accuracy and integrity of the shareholder vote. Therefore, we seek comment on the proxy system in general, including the various issues raised in this release involving the U.S. proxy system and certain related matters.

DATES: Comments should be received on or before October 20, 2010.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/concept.shtml);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-14-10 on the subject line; or

- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-14-10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/concept.shtml). Comments are also available for Web site viewing and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Raymond A. Be or Lawrence A. Hamermesh, Division of Corporation Finance, at (202) 551-3500, Susan M. Petersen or Andrew Madar, Division of Trading & Markets, at (202) 551-5777, Holly L. Hunter-Ceci or Brian P. Murphy, Division of Investment Management, at (202) 551-6825, or Joshua White, Division of Risk, Strategy, and Financial Innovation, at (202) 551-6655, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

* * * * *

I. Introduction

Regulation of the proxy solicitation process is one of the original responsibilities that Congress assigned to the Commission in 1934. The Commission has actively monitored the proxy process since receiving this authority and has considered changes when it appeared that the process was not functioning in a manner that adequately protected the interests of investors.[1] In recent years, a number of our proxy-related rulemakings have been spurred by the Internet and other technological advances that enable more efficient communications. For example, we have adopted the "notice and access" model for the delivery of proxy materials,[2] as well as rules to facilitate the use of electronic shareholder forums.[3] Perceived deficiencies in the proxy distribution process have prompted other proxy-related rulemakings, such as rules to reinforce the obligation

---

1 For a history of the Commission's efforts to regulate the proxy process since 1934, see Jill E. Fisch, From Legitimacy to Logic: Reconstructing Proxy Regulation, 46 Vand. L. Rev. 1129 (Oct. 1993).

2 17 CFR 240.14a-16; Shareholder Choice Regarding Proxy Materials, Release No. 34-56135 (July 26, 2007) [72 FR 42222] ("Notice and Access Release"); Amendments to Rules Requiring Internet Availability of Proxy Materials, Release No. 33-9108 (Feb. 22, 2010) [75 FR 9074].

3 17 CFR 240.14a-17; Electronic Shareholder Forums, Release No. 34-57172 (Jan. 18, 2008) [73 FR 4450]. These amendments clarified that participation in an electronic shareholder forum that could potentially constitute a solicitation subject to the proxy rules is exempt from most of the proxy rules if all of the conditions to the exemption are satisfied. In addition, the amendments state that a shareholder, issuer, or third party acting on behalf of a shareholder or issuer that establishes, maintains or operates an electronic shareholder forum will not be liable under the federal securities laws for any statement or information provided by another person participating in the forum. The amendments did not provide an exemption from Rule 14a-9 [17 CFR 240.14a-9], which prohibits fraud in connection with the solicitation of proxies.

process in regard to matters other than over-voting or under-voting? If so, what are they, and what steps should we consider in order to address them?

B. Vote Confirmation

1. Background

A number of market participants, including both individual and institutional investors, have raised concerns regarding the inability to confirm whether an investor's shares have been voted in accordance with the investor's instructions. As discussed more fully in Section II, beneficial owners cast their votes through a securities intermediary, which, in turn, uses a proxy service provider to collect and send the votes to the vote tabulator.[88] Beneficial owners, particularly institutional investors, often want or need to confirm that their votes have been timely received by the vote tabulator and accurately recorded. Similarly, securities intermediaries want to be able to confirm to their customers that their votes have been timely received and accurately recorded. Issuers also want to be able to confirm that the votes that they receive from securities intermediaries on behalf of beneficial owners properly reflect the votes of those beneficial owners. We understand that, on occasion, errors have been made when a third party fails to timely submit votes on behalf of its clients.[89]

---

[88] Some securities intermediaries may not have sufficient shares on deposit at DTC to allocate a vote to every share position credited to every customer's account. In those cases, the securities intermediary may have to allocate a specific number of votes to some customers that is fewer than the number of shares credited to those customers' accounts. See Section III.A, above, for a more in-depth discussion of why and how securities intermediaries reconcile and allocate votes to their customers.

[89] See, e.g., Adam Jones, "Riddle of the Missing Unilever Votes Solved," Financial Times, Aug. 15, 2003; "Mum on a Recount," Pensions & Investments, Aug. 10, 2009, available at http://www.pionline.com/article/20090810/PRINTSUB/308109996; Meagan Thompson-Mann, Policy Briefing No. 3—Voting Integrity: Practices for Investors and the Global Proxy Advisory

The inability to confirm voting information is caused in part because no one individual participant in the voting process—neither issuers, transfer agents, vote tabulators, securities intermediaries, nor third party proxy service providers—possesses all of the information necessary to confirm whether a particular beneficial owner's vote has been timely received and accurately recorded. A number of market participants contend that some proxy service providers, transfer agents, or vote tabulators are unwilling or unable to share voting information with each other or with investors and securities intermediaries. There are currently no legal or regulatory requirements that compel these entities to share information with each other in order to allow for vote confirmations.

The inability to confirm that votes have been timely received and accurately recorded creates uncertainty regarding the accuracy and integrity of votes cast at shareholder meetings. At a time when votes on matters presented to shareholders are increasingly meaningful and consequential to all shareholders, this lack of transparency could potentially impair confidence in the proxy system.[90] Because of the inability to ascertain the integrity of the votes cast by beneficial owners, concerns have been raised by investors that it may be difficult to assess the accuracy of the current proxy system as a whole.

Industry, The Millstein Center for Corporate Governance and Performance, Mar. 2, 2009, at 10-11 ("Thompson-Mann Policy Briefing").

[90] The Organisation of Economic Co-operation and Development ("OECD"), consisting primarily of jurisdictions with high income and developed markets, has voiced similar concerns about this lack of transparency in several jurisdictions and recommends addressing it through legal and regulatory changes. Corporate Governance: A Survey of OECD Countries (2004) ("OECD Survey").

2. Potential Regulatory Responses

In the Commission's view, both record owners and beneficial owners should be able to confirm that the votes they cast have been timely received and accurately recorded and included in the tabulation of votes, and issuers should be able to confirm that the votes that they receive from securities intermediaries/proxy advisory firms/proxy service providers on behalf of beneficial owners properly reflect the votes of those beneficial owners. We understand that there may be a number of operational and legal complexities with any proposed solution and that the costs and benefits associated with any options should be carefully weighed.

One possible solution may be for all participants in the voting chain to grant to issuers, or their transfer agents or vote tabulators, access to certain information relating to voting records, for the limited purpose of enabling a shareholder or securities intermediary to confirm how a particular shareholder's shares were voted. To protect the identities of objecting beneficial owners from issuers, a system could assign each beneficial owner a unique identifying code, which could then be used to create an audit trail from beneficial owner to proxy service provider to transfer agent/vote tabulator. Issuers (or their agents, such as transfer agents or vote tabulators) would, in turn, confirm to record owners, beneficial owners, and securities intermediaries upon request that any particular votes cast by them or on their behalf have been received and voted as instructed. This process could be fully automated such that a vote confirmation could be provided by the issuer (or its agent) to the record owner or, in the case of beneficial owners, to the securities intermediary or proxy service provider and sent by email to the beneficial owner.

EFiled: Feb 15 2016 10:48PM EST
Transaction ID 58577105
Case No. 9322-VCL

CERTIFICATE OF SERVICE

I hereby certify that, on the 15th day of February, 2016, true and correct copies of the foregoing were caused to be served on counsel of record at the following address as indicated:

BY E-FILE

Jeremy D. Anderson
Fish & Richardson P.C.
222 Delaware Avenue, 17th Floor
Wilmington, Delaware 19899

Samuel T. Hirzel, II
Melissa N. Donimirski
Proctor Heyman LLP
300 Delaware Avenue, Suite 200
Wilmington, Delaware 19801

Stuart M. Grant
Megan D. McIntyre
Michael J. Barry
Christine M. Mackintosh
Grant & Eisenhofer P.A.
123 Justison Street
Wilmington, Delaware 19801

/s/ Susan M. Hannigan
Susan M. Hannigan (#5342)