IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE APPRAISAL OF DELL, INC. : Consolidated
: C.A. No. 9322-VCL

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Chancery Courtroom No. 12B
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Friday, March 18, 2016
10:59 a.m.

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BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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ORAL ARGUMENT ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

CHANCERY COURT REPORTERS
New Castle County Courthouse
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THE COURT: Good morning, everyone. Welcome back. I see all familiar faces.

Mr. Hendershot, good morning. To give you-all a sense, although I suspect you have anticipated this, I don't plan to let this go any longer than 12:30.

MR. HENDERSHOT: Understood, Your Honor.

This is the time set by the Court on the crossing motions for judgment as to shares that were voted in favor of the transaction.

One housekeeping item before we get there. Your Honor may remember, back in May, Mr. Martin, the pro se claimant who appeared at the entitlement hearing, Your Honor instructed us to work with him to resolve some of his issues. I think we have done that.

There are two exhibits that I point out for the record -- they are JX 1215 and 1216 -- that are some letters from me. We offered to facilitate for him a call with the American Stock Transfer Company. He wound up not taking us up on that. But I think what we gave him resolved the issue. So I note that for the record.

THE COURT: All right. So I don't have to worry about him at this point?

MR. HENDERSHOT: I believe that's right. But he's not here, so I don't want to speak too much on him.

THE COURT: Okay.

MR. HENDERSHOT: On the merits, Your Honor, in plain, simple English, there is no debate that the shares we are talking about today were voted in favor of the merger by the stockholder of record, Cede & Co. And the issue today is whether the Court is required by the text of the statute, by binding precedent, or by some other consideration to ignore that fact and, instead, view the vote through what I would say is an artificial and constricted lens that would have the consequence of enabling street-name holders, in virtually every case, to get appraisal in reliance on the votes of other people instead of the votes that they direct their nominee to make.

I view this motion as an opportunity for the Court to impose some needed realism on a statute that, as the Court recognized in the continuous ownership decision, is often a little bit lacking in the strange world of appraisal.

THE COURT: But am I the guy that's allowed to do that in the face of the precedent that's out there?

MR. HENDERSHOT: In this case, I think Your Honor is absolutely the guy who is allowed to do that, and I think it's required that the Court do that.

Before I get into facts and precedents, you know, the sort of overarching picture is our friends have this argument that the particular votes attributable to particular share positions are not traceable from the records of Dell and, for that reason, the Court shouldn't look at matters extrinsic to the records of Dell.

And it is true that to the extent our friends' clients didn't admit their votes in SEC filings, which I think 28 million out of the 31-plus million shares at issue here there is such an admission, we did have to track down proof of their votes via third-party subpoena practice.

We don't think that contention is well taken. The fact that the system works the way it does is driven by a number of policy considerations. There is no shortage of commentary on how confusing and

complicated and kludged together the proxy voting system is, no shortage of commentary about ways potentially to improve it; but it's just a fact that the system we have allows many investors, including petitioners here, to submit voting instructions in a way that don't generate a record for the issuer that associates a particular share position with a particular beneficial owner and a particular vote.

That's not universally the case, by the way. Retail investors who use the telephone voting system or who send in a paper voting instruction form do generate such a record. And there are lots of them; it's just not everyone.

So we have a system that doesn't give any one party all the keys needed to figure out whose shares are voted which way in realtime, but an audit trail can be reconstructed after the fact. T. Rowe reconstructed one when they wanted to know if their own SEC filings were correct, and we did essentially the same thing.

The case law, starting with Salt Dome, about requiring the issuer to look exclusively at its stock list as evidence of stockholder status doesn't, in my view, have any logical application to the

separate issue of determining whether the stockholder of record has or hasn't complied with the voting requirement. And there's certainly no general principle that I am aware of that an issuer is limited to its own records in evaluating a stockholder's entitlement to appraisal, nor is there such a limitation, as I understand it, on the Court.

As to the facts, I think they are largely undisputed. Our recitation in our papers came almost entirely from the interrogatory responses from our friends' clients.

I'm happy to field questions, but at a very high level, we have SEC filings, JX 825 through 833 inclusive, admitting that about 28 million of the shares at issue here were voted in favor of the merger.

As a side note, there is one Form N-PX that didn't make it onto the trial exhibit list, I think purely due to oversight. It's Mr. Allen's Deposition Exhibit No. 32. It has to do with petitioners' 13 and 39, the John Hancock Funds II - Science & Tech Fund. It looks exactly the same as all the rest. It says that they voted for the merger. There are further admissions in the interrogatory

responses. Those are JX 901 through 904 inclusive.

THE COURT: Are those omitted exhibits your only evidence as to how Hancock voted? Do you have other things?

MR. HENDERSHOT: We certainly have Mr. Pasfield's affidavit. That's JX 906, which is the one correlating the control numbers with the votes.

I believe we also have -- I don't recall exactly how John Hancock framed their interrogatory responses, but they did make interrogatory responses. That's JX 902. That covers that fund as well as several others.

I think there is -- really, there's no dispute at all that the voting instructions, as distinct from the votes themselves, that went from ISS to Broadridge and then were incorporated in an aggregated way on Broadridge's client proxies were to vote petitioners' shares in favor. That's just not in dispute.

I don't think we have any dispute about the structure of the system. There are sort of two streams of proxy authority. There's one from the record holder and then there's one from the beneficial owner. One is the legal authorization to vote. The

other is how to vote. That's just the way the system works.

And the key link is those Broadridge control numbers that are in Mr. Pasfield's affidavit. Again, that's JX 906. And that is the way T. Rowe figured out -- those control numbers are the way T. Rowe figured out both how to vote their shares in realtime and then a year later to find out whether their SEC filings were, in fact, correct. They had recourse to those control numbers to figure out how those positions associated with those control numbers were voted. And that's pretty much what we've done as well. T. Rowe's investigation is JXs 838, 841, 843, 844, and 845. I don't think any of this is really contested factually. There is no claim that we don't have the right control numbers or that Broadridge's records are corrupted or the SEC filing is wrong. They haven't been amended or corrected.

So I think the case that is most closely on point and that comes very close to governing this issue in its entirety is the Reynolds Metals case from the early 1960s. As far as I have been able to find, that is the only decision applying the voting requirement in the statute where there is

actual evidence about how particular share positions underlying a nominee record position were voted, as opposed to an absence of evidence and arguments about proof and burdens of proof, presumptions, and that sort of thing.

THE COURT: I guess what I would ask you on that, and you are probably right, but isn't that because Olivetti basically said "We're not going to look at this stuff anymore," and so you didn't have any post-Reynolds cases because Olivetti ruled that inquiry out of bounds?

MR. HENDERSHOT: I don't think that's right. Olivetti was a short-form merger case. There was no vote. And there is actually, I think -- I was going to get to this a little later on, but the claim that Olivetti overruled the Reynolds holding is dictum. There is one paragraph in Olivetti that makes very clear what the Court viewed as the holding of Reynolds, which it viewed as good, and what it viewed as dictum. We go through it in our papers. It's at page 685 of Volume 217 A.2d.

The holding of Reynolds, which the Supreme Court in Olivetti said was fine, was 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.

And then the piece that was dictum was if the corporation questioned whether the broker was acting as agent for another in demanding payment, it could inquire into the facts, and that the burden was on it to do so, and so on.

It's very clearly laid out in the Supreme Court's decision in Olivetti which one of those is holding and which is dictum.

Just as a side note, the Union Illinois decision from 2003 I think assumed implicitly that Reynolds remained good law. I'm not sure why it wouldn't be.

The distinction between Reynolds and then the later trio of cases that our friends rely on, Transkaryotic, BMC Software, and Ancestry.com, is that the latter three cases are all about shares acquired after the record date. In all three of those cases, the pitch was these shares were acquired after the record date. Somebody else, not the petitioner, had the right to determine how they would be voted. And that vote ought to be, said the respondent in the

case, attributed to the petitioner. That's the contention that was rejected. You can think of it as rejecting it on the basis that, "Well, we don't know who that person is."

I think the best way to look at that issue, quite frankly, is all of those cases are about the law of agency ultimately. None of them are decided expressly on that ground. But the way it makes sense is, you know, think of a block of shares that belongs to A on the record date and then changes hands and belongs to B on the date of the meeting. You could argue that when Cede votes those shares at the meeting, it is voting B's shares, B the owner on the date of the meeting. On the other hand, it's following the instructions of A, the record date holder, in doing so. Should you attribute the vote that Cede casts as to B's shares to B when B is the appraisal petitioner?

Well, you might if A and B are the same person or if they are related to each other. I mean, imagine if I am the holder of record and then I transfer my shares to Hendershot Appraisal Co. LLC, or there is some other coordinated conduct there, a negotiated sale.

But if not, if the shares just change hands in the open market, potentially with many other beneficial owners in-between, then does it really make sense to say that Cede, in voting the shares that belong to B on the date of the meeting, is actually acting as B's agent in doing so and not as really agent for A?

THE COURT: I read these cases as actually rejecting the agency theory. And it seemed to me that, going back to Reynolds, what these cases actually are doing is rejecting precisely the argument that was made by the company in the after-acquired shares cases. And it was that, no, we don't look at the agency relationship because we treat the stockholder of record as the principal. So this agency argument is essentially just a nonstarter in the first place.

Now, why don't the cases hold that?

MR. HENDERSHOT: Well, they certainly don't hold it in the case of shares that don't change hands after the record date, which is our case. They don't say it. They don't --

THE COURT: You are saying they don't hold that with respect to shares. Because that's

really the question that we're asking, is what happens to shares that don't change hands after the record date.

And what your system does is it creates this weird situation where people who trade are actually better situated than people who hold. So the people whose shares don't trade hands after the record date, for whatever reason, essentially just because we have the fortuitousness of being able to look at it, we are going to treat Cede as an agent for them and look behind what Cede does. But for anybody else, we are stopped, or for the people who trade, I guess just because of agnosticism, we're going to just stop at Cede.

I mean, isn't that exactly the opposite of what I would think your side would want? I mean, I would think that your side would want to benefit holders over traders. And --

MR. HENDERSHOT: I think that -- as a matter of what we might want for policy reasons, we are -- we are sort of foreclosed by the Interstate Bakeries case, the one back in the '80s that held you can buy after the deal is announced.

THE COURT: Right.

MR. HENDERSHOT: The legislature has put a specific continuous ownership requirement in there. It is you have got to hold when you make a demand and then continuously through the effective date. It's not before the deal is announced. It's not before the record date. It's before you make your demand, and then continuously.

If the legislature wants to change that, they can change it. You know, they have set up that problem. It's not ideal, from my perspective, as a matter of policy, but that's what the legislature has done. It's been held that that's what they have done for 25 years now. They haven't seen fit to change it yet. I don't know what to say about that.

I do think, however, that a careful reading of the Supreme Court's decision in Reynolds does confront several of these sorts of arguments. You know, the Supreme Court does take issue -- or it was confronted, anyway, with the idea that you can't look past the nominee broker position taken as a whole because, well, one share in their name is pretty much the same as another, so it doesn't make any sense to look at these shares being voted for and these shares being voted against. They rejected that.

They also confronted the argument that the votes were not listed as being on behalf of specific clients. So they were voted in this aggregated way, as they are here. And that means that you shouldn't look past the broker and recognize that you have got one client who wants appraisal and another one who wants to vote yes and take the merger consideration. The Supreme Court rejected that as well.

Neither of those holdings was touched by Olivetti, I don't think. Actually, Chancellor Seitz's opinion in the Olivetti case, which was affirmed on appeal, says expressly that Reynolds was really about the right to inquire whether the stockholder had met the statutory prerequisites. In Reynolds, as in this case, the voting requirement. It's not about this issue of what constitutes a proper demand for payment and whether you have to show that there is authorized agency happening in order to have a proper demand for payment. That was the actual holding of Olivetti, which, again, it was a short form case, it wasn't about voting.

But I think the important points from the sort of policy and overriding or overarching

perspective is both the Supreme Court, Chief Justice Southerland's opinion and also, I believe it was, Vice Chancellor Short in Reynolds very expressly advocated a realistic approach to construing the voting requirement. They both refer to the realities of modern-day securities practice.

Chief Justice Southerland's opinion says and emphasizes that really what's going on here is we have beneficial owners who are trying to vindicate their rights through the nominee of their choice. And you could quibble about whether you really have a choice about Cede being your nominee today, but you certainly have a choice as among State Street or JPMorgan or hundreds of other potential banks and brokers. That's what's going on. That's the approach in the context of the voting requirement that the Supreme Court advocated in Reynolds. And I think there is no good reason to think that that's not still the law of Delaware.

I think, also, we have to read the voting requirement in 262 in parallel with Article 8 of the UCC. You know, they are both part of the Delaware Code. They do espouse this agency theory. I mean, Cede and other securities intermediaries are

obliged to exercise these votes if and as directed by their respective entitlement holders. That creates the chain of proxies. And that's what agency is. It's a mutual manifestation between A and B that A will act on B's behalf and subject to B's control with respect to a particular matter. That's just what it is.

So I think it's in the statute, even if there is some question, based on Olivetti, as to whether Reynolds remains good law, which I really don't think there is. It's really sort of a common law agency issue.

And from a policy perspective, you know, the ultimate holding that our friends are asking you to make here is it is okay for a beneficial owner, somebody who holds in street name, to direct that his shares be voted yes, to actually have them voted yes, he can publish in the *New York Times*, he can admit in open court "I voted my shares yes. I told my nominee to vote my shares yes," and he can still have appraisal, as long as it happens per accidens that Cede holds enough shares on behalf of other people that aren't voted in favor.

That's very much like the Sutter

Opportunity case. That's highjacking somebody else's voting rights. We don't think that makes sense. It's really an abuse of the English language if that's our law.

THE COURT: So if you shift it and viewed this as a voting case and we were looking at how shares voted and there was an argument by -- I have trouble thinking about how it would work. But someone comes in and says, "Hey, look. Really, the vote for the merger wasn't delivered, because we can show you that T. Rowe actually gave instructions to vote no."

Wouldn't I be precluded from looking behind Cede's vote for that type of purpose?

MR. HENDERSHOT: If we were in a --

THE COURT: We are essentially in a 225.

MR. HENDERSHOT: We are in a 225.

THE COURT: And there was a question about whether the merger approval had been validly given, that type of thing. Wouldn't --

MR. HENDERSHOT: I think you would be bound, in that case, to recognize the proxy that was in the inspector's hand at the time of the -- at the

time of the vote when the polls close.

THE COURT: Yes.

MR. HENDERSHOT: Rather than looking behind it to see their intent. I mean, that is a -- that is not purely a function of what the inspector is allowed to look at. But even this Court, exercising its equitable discretion, recognizes that we have a need for finality and we have a need for certainty, and those are policy justifications for the rule that the facially valid proxy that's in the inspector's hands when the polls close is the one that counts.

THE COURT: I mean, isn't that the same type of thing? If you had some mistake and T. Rowe had gone out to the world saying, you know, "We voted one way," et cetera, et cetera, but, in fact, I had the Cede vote, whatever the numbers were, wouldn't we all be stuck with that and wouldn't that create the exact same incongruity that we have in this situation?

MR. HENDERSHOT: I'm not sure what incongruity the Court is referring to. I think we would be stuck with it.

THE COURT: Yes. But wouldn't you have a situation where the vote could have gone one

way by mistake, we would have the injustice of a Cede total that didn't necessarily match up with how the stockholder actually voted, and nobody would be able to do anything about it because we wouldn't look behind the record holder?

MR. HENDERSHOT: Well, I'm not sure it's really a function of nobody looking behind the record holder. We would have the same issue if I were -- if I am a stockholder, in that situation, I am the record holder, I fill out a proxy card, and I forget to mark the "against" box, I just sign it, and that gives the proxy committee authority to vote "yes." And I come back in and I say, "Well, wait a minute, Chancellor. I meant to vote 'no.' I mean, I was out there banging the drums in the *New York Times*," or whatever. I think I would lose that. I think the answer would be, "Well, tough luck. You gave a proxy that, on its face, counted for, and you are stuck with that."

It's not -- the issue here is the vote. It's not the shareholders' intent. It's not the beneficial owners' intent. It's not anybody's intent. It's how the shares are voted. That's the test in the statute. That's the test in the 225 case,

as well. It's not about anybody's intent. You know, this is not Florida 2000. We are not going to go look at hanging chads.

THE COURT: What would I be able to look at in the 225 case? Would I be able to look back at the chain of voting instructions, and things like that, that you brought to light here? At what level would I stop the inquiry?

MR. HENDERSHOT: I think all -- I think anything is admissible if it's probative of a relevant issue. I mean, that's the default presumption under the rules of evidence. So I don't know that I would really think of it in terms of what the Court is allowed to look at.

I think that, for purposes of what counts under 225, you know, mistake is probably a bad example, but imagine there is inequitable vote buying, or that's the claim. In that sort of situation, you would certainly be able to listen to testimony. "Did you sell your vote? Did you not? What did you get for it? Was it inequitable?" You would certainly be able to look at that. You would be able to look at people's e-mail files as to the back and forth about how I acquired the vote. I think that happens with

some frequency where that's the situation.

Where it's specifically about the mistake, I think you run into the countervailing policies in favor of certainty and finality. And, you know, we just can't have a situation or we can't have a system where every merger vote or every other vote that the stockholders take is potentially subject to a 225 case if somebody can gin up, you know, five stockholders with a big chunk to come in and say, "Oh, wait a minute. I didn't really mean it. It was a mistake. It was a mistake," and then the Court has to adjudicate that. Maybe the Court believes that evidence; maybe not. But you can't have a situation -- or you can't have a system that runs efficiently that admits those sorts of disputes.

THE COURT: Yes; I guess that's where I'm tripping up a little bit.

So if we were in this situation of 225 and decide that, you know, the vote came out the way they wanted it, wouldn't they just say, "Hey, look. You've got to stop at the Broadridge aggregate totals. You can't look back any further than that to see how the individual shares would make up the totals, the individual holders that make up the totals voted. You

are just stuck with the aggregate totals"?

MR. HENDERSHOT: I don't think that's right at all.

THE COURT: That's what I'm asking.

MR. HENDERSHOT: I don't think that's correct. I think that if you imagine -- you know, let's go back to vote buying. If we had a merger that was approved by a vote of 52 percent of the outstanding, and some holder of 5 percent of the outstanding had voted yes, and we then had a claim that those votes had been inequitably bought, would the Court be stopped at evaluating that fiduciary claim on the basis that, well, the Broadridge totals say what they say? I can't imagine that would be the case.

THE COURT: What about if it were just, as you put it, an intent-based thing, where the one stockholder is coming in saying, "Well, I meant to vote in favor instead of voting against," or something like that? At what level would I be able to look, in terms of delving in? Would I be stuck with the aggregates, or could I go back a level and look at how the individual shares broke?

MR. HENDERSHOT: I think you could go

back and look at it for the purpose of confirming that those shares were counted as voting in favor. I think you could certainly delve back if there were an issue about that.

THE COURT: Because I guess what I'm trying to --

MR. HENDERSHOT: If the claim is simply it's a mistake, though, then I think the answer to that is that's not relevant. And, I mean, it's the same thing here. Our friends say, "This was all a mistake." And the answer is, "So what? Your votes were still voted in favor."

So I'm having trouble squaring the it-was-a-mistake claim with something that would be more clearly an equitable claim for overturning a vote such as vote buying.

THE COURT: I understand. And my questions aren't very precise.

The big-picture issue that I'm struggling with is I feel like when we are doing 225s, not related to overlying breach of fiduciary duty issues, but just the counts, objections, et cetera -- did the inspectors get it right? Is there something more? -- you are very limited in what you can look

at.

MR. HENDERSHOT: The inspectors have a ministerial role. They are limited by statute to what they can look at, sure.

THE COURT: And even when the Court gets in, there are some competing cases to say how much you can look, but I feel like it's relatively constrained.

And it seems to me that -- or I'm curious whether why, when figuring out voting for the voting requirement in the appraisal statute, why one wouldn't be similarly constrained. And it would seem to me to be a little odd if, as to the actual vote itself, one wasn't able to conduct a free-wheeling inquiry going back into, you know, people's e-mails -- and, again, not for an equitable claim, but just for how shares were voted -- one couldn't conduct this free-wheeling inquiry that would go back into e-mails and what people did when and how many times they changed their computer instructions, and that type of stuff. But that you could do that type of thing for appraisal.

And that's what I'm struggling with, and I'm seeing some disconnect between the level of

inquiry that you-all seem to have conducted here and suggest that should be legitimate and what I at least have the understanding is the much more limited type of approach that one takes when doing these things in a 225.

MR. HENDERSHOT: I'm not sure I can give you a full answer to that, but one thing I would suggest is in the 225 case, it is very rare, I think, that how a particular beneficial owner voted is actually relevant.

If your question is did the stockholders vote to approve this merger or not, then the question is, out of the outstanding shares entitled to vote, did a majority of them vote yes? It doesn't really matter whether it's T. Rowe that did it or Hendershot that did it or somebody else. All you are doing is figuring out how many shares are outstanding and entitled to vote, how many voted yes, is one greater than 50 percent plus one or the other, that's it. Doesn't matter -- there is no reason to go back and find out whether T. Rowe in particular voted yes or not, in the 225 case, where it's not an equitable claim but, rather, simply a what is the right outcome of this vote. That would be my initial

thought on it.

THE COURT: And I think that's the right thought. And you then ask -- or at least I ask myself. I don't know if anyone else asks themselves this. But I then ask myself, why is that? And I think the answer is because we stop at the stockholder of record. So when I then port that into figuring out voting requirement and voting behavior for appraisal, I agree with you that the consequence is odd. But there seems to be a parallelism that as to there, too, I would just stop with the stockholder of record.

Is there some other reason that you can think of as to why one doesn't go back and look at how the beneficial owner voted in that 225 context other than this rule that we stop at the stockholder of record?

MR. HENDERSHOT: Well, I think relevance is the other reason. I think where it doesn't matter who the stockholders are, only how many and whether you meet the statutory or charter standard, whatever it may be, then there's no reason to do it.

If it were -- I mean, let's imagine a situation where you have a charter provision that says

"In order to" -- "In order to approve a certain kind of transaction, you must have not only a majority of the outstanding shares voting in favor, but you must also have a majority of the shares beneficially owned by Hendershot and his affiliates." And it's part of the stockholder agreement manifested in the charter.

In a 225 case like that, if there is a dispute about who my affiliates are and then there is a dispute about whether the shares -- you know, we all -- all of my affiliates hold through their brokerage houses, so they are all registered in the name of Cede & Co. If there is a dispute about whether Hendershot's affiliate Williams voted in favor of the deal, and you couldn't find Williams so you can't get him to come testify, I think you would do exactly this sort of examination. And if you can get Williams to come testify, then that also is something from outside the record or outside the evidence of how the stockholder of record voted, if Williams comes and swears up and down "I voted yes" or "I voted no," whatever it is.

THE COURT: I think that's a great example. I have to think about how that works, but I think it's a very insightful parallel.

MR. HENDERSHOT: I mean, I guess the other thing -- the other thing I would point out is we do have a statute here. I mean, the statute says you can't have the remedy if your stockholder of record votes yes. That's what we're really trying to apply. It's not -- 225 is a valid parallel, and certainly we think the Sutter case is a great parallel for it. But we are trying to apply what 262 says, and I do think the leading authority on that is Reynolds. That's my pitch on it, anyway.

THE COURT: Okay.

MR. HENDERSHOT: Let me move to the equitable argument. I will speak briefly about it.

You know, simply as a legal matter, our friends' contention that Dell knew how T. Rowe was trying to vote and, therefore, should be barred from enforcing the voting requirement, that can't work. You know, we have plenty of people who meant to turn in timely demands. They are out. We have plenty of people who meant to turn in demands signed by Cede. They are out. Moreover, it's not that simple factually. T. Rowe had a default voting policy. Their own interrogatory responses say it. This wasn't some untraceable computer bug. It was an effort by T.

Rowe's chosen vendor, ISS, to implement T. Rowe's usual desires, manifested in the default voting policy, which just so happened, in this case, as our friends say, to conflict with the T. Rowe fund manager's actual desires in this case.

And there is a lot in the record showing that T. Rowe could have avoided this problem. They had four months between the time the deal was announced and the original record date, and then even more time before the record date that wound up actually counting. They could have done any number of things to stop their shares from being voted via ISS or being voted via Broadridge. They could have reregistered them in the names of the funds and kept the certificates in a vault somewhere, for example.

THE COURT: Well, then they would have had another problem.

MR. GRANT: Exactly.

MR. HENDERSHOT: There are any number of things they could have done.

THE COURT: What could they have done, though, and not lost their appraisal rights?

MR. HENDERSHOT: If they had reregistered the shares in their own name before they

made their demands, then they don't have a continuous ownership problem. Whether they have regulatory issues or something like that, maybe they do. I don't know. That's not before us.

But one thing, you know, they got some advantages from doing it the way they did it. They retained the flexibility to trade. There is a list of trades at JX 723 that these folks did. There was, I think, active consideration going on during this entire period about "How many shares do we want to have in our portfolio of Dell? Do we want to increase our position? Do we want to decrease our position?" It was a very interesting memo -- it's cited in our papers -- JX 445. It's an investment research memo by T. Rowe's 30(b)(6) witness, Mr. Allen. It's from April of 2013, discusses how he thought about valuation, discussed how you might look at Dell as an arbitrage play, discusses reducing exposure to Dell in the funds that Mr. Allen managed. Very interesting read.

So they did get some advantages, and that comes with the burden that if they can't or fail to control their nominee's vote the way they wanted to, they are stuck with it. That's my position,

anyway.

We also have some very interesting facts about people failing to catch this glitch. You know, we did cite JXs 688 and 89, an e-mail chain from six days before the vote. T. Rowe knew that there was an issue -- and, again, this is in their own interrogatory responses as well -- they knew there was an issue about missing ballots. They reached out to find the control numbers to make sure they could vote these shares. And there's a high degree of overlap between the shares at issue here and the shares reflected in that e-mail exchange. They got the control numbers back from State Street same day. And then, despite knowing that there was an issue of missing ballots and getting the control numbers, they still wound up voting in favor of the deal.

And then there's the very interesting fact that we pointed out in our papers that the head of their proxy department says, according to the interrogatory responses, before each of the three convene-and-adjourn meetings, she logged in and she checked and she made sure that ISS's system had the right vote to vote against the merger. And then when the actual meeting came around, it doesn't say that.

Does that mean she didn't do it? Does it mean she logged in and changed the vote for some reason? Well, we don't have a record on that. But it's interesting that she checked three times, and then the last time didn't, or we don't know what happened.

The bottom line is T. Rowe and ISS knew there was an issue. People relatively high up within T. Rowe and ISS knew there was an issue, and the issue went unfixed.

And as for what Dell knew, we didn't know what they were doing. I mean, it's very much an inexact sort of science. Our proxy solicitor was trying to keep track of who was voting what way. Yes, we thought T. Rowe was voting no. There were several meetings between the special committee and T. Rowe people and between Mr. Dell and T. Rowe people. As far as I can tell, the tenor of those meetings was always that T. Rowe thought the deal was underpriced and they were going to vote no and they were going to seek appraisal.

They weren't locked into that. They could have decided to change their minds at the last minute. They could have decided to take the merger consideration, even if they voted no. They had all

that flexibility that the statute gives appraisal petitioners.

So we didn't know it. We had a very strong reason to suspect that T. Rowe was voting no, but we didn't know it. And ultimately, what we knew doesn't matter. Appraisal is a legal remedy; it's not decided with reference to what people knew or what people intended.

Finally, let me speak very briefly about the law-of-the-case argument and substitution of parties. We don't think law of the case has anything to do with it. This is not an issue the Court was called upon to decide in the continuous ownership decision. Really, if it did, then page 50 of the same opinion says appraisal is available only for shares that aren't voted in favor of the merger, quoting Vice Chancellor Glasscock's Ancestry decision.

Well, if they have got law of the case, we have got law of the case. It's a wash, and we ought to do the right thing here.

And as for substitution of parties, I don't know that there is any basis to put Cede in. Cede is not the real party in interest. Rule 17 says that's who is supposed to be the named party.

Frankly, if Cede voted these shares in favor of the deal, it doesn't matter whose name is on the captions. Cede can't have appraisal for them any more than the petitioners can.

That's all I have this morning, Your Honor, unless you have questions you would like me to try to take a stab at.

THE COURT: So petitioner isn't required to bring appraisal in the beneficial holder's name. It was something, I think, done just more as a convenience so we didn't have all these cases called Cede vs. so and so.

If Cede had brought this under the sort of old-school scenario, would you be able to look behind Cede to do the types of things you are doing now, or would you just be stuck with the fact that Cede had enough shares to seek appraisal for the number it was asking for?

MR. HENDERSHOT: I think what I would be telling the Court, and I am telling the Court, is if you look at the demands that Cede made, every single one of them is Cede & Co., holder of record of X number of shares, which are held for the account of JPMorgan, our participant, is informed by JPMorgan

that they are held for the beneficial ownership account of John Smith. We demand appraisal as to those shares. Multiplied by 250 times, or however many we had at the outset of this case. That's who Cede demanded appraisal on behalf of.

If Cede were the nominal petitioner, I think we would be doing exactly the same thing. I don't think it would change in the slightest. Because I would be saying to the Court, "This demand as to the T. Rowe Price Science & Technology Fund" -- just to take an example -- "is not a valid demand because those shares represented on that demand were voted in favor of the merger by Cede & Co."

THE COURT: So would there be any difficulty with Cede just revising its demands going forward so it just said "Cede demands appraisal for 1,000 shares," period, stop? They don't have to include that language in there, do they?

MR. HENDERSHOT: I don't think our statute requires that. I do think, however, that it's a heavily regulated business. I think their UCC obligations might require them to make clear that they are acting for a particular entitlement holder, and it would certainly be an administrative nightmare if

all we got was --

THE COURT: Or it would be really simple.

MR. HENDERSHOT: Well, maybe.

THE COURT: I'm just curious. Given the case law that's out there, would we then just all be stuck with Cede as a litigant?

MR. HENDERSHOT: Yes; I think we would -- I think we would make every effort to avoid being stuck in that way. I think what we would have to say is, "Unless you tell us, you, Cede, tell us whose shares these are, what certificates these are representing. Who is the beneficial owner? What positions are these? Who are we supposed to pay?"

I mean, we had this a hundred times in this case. We got demands from clients, all of Oppenheimer and Co. I have no idea why. But Oppenheimer and Co. delivered us a hundred-plus demands from people who then turned their shares in, sent us letters of transmittal and said, "Please pay me the merger consideration." And we had the devil of a time trying to figure out, well, should we pay these people? I mean, it's within 60 days, so I guess they can withdraw if they want, if they give us a letter of

transmittal that says "We withdraw our appraisal demands. Give us the money." Okay. Write them a check. Fine.

If you don't even know who these people are, you then get a letter of transmittal, you could easily wind up in the situation of, okay, I have got 10 million shares outstanding on appraisal demands that have never been withdrawn, and I have paid everybody except for 2 million shares. And then Mr. Grant has got a client with 2 million shares who is seeking appraisal. Well, who are these other 8 million people?

It gives us a huge paperwork hassle. It probably, I suspect, would violate some UCC requirements. And I am sure whoever writes the regulations on Cede & Co. -- I presume it's the SEC -- would not like that very much. And I would assume the Court would want to get to the bottom of it as well.

THE COURT: Yes, I was thinking about what the next steps would be. And because your rule disadvantages holders relative to traders, it would seem to me that there would be some response. And that struck me as one possible thing that those participants of the world in large funds who hold and

like to seek appraisal might do, is to go to Cede and just say, "Look, don't mention us anymore." You know, and the company could pay you the money and you can handle distribution, but keep us out of it. Just go in as record holder. Don't ID anything. Which, again --

MR. HENDERSHOT: I mean --

THE COURT: It would seem to me it would make it worse rather than better.

MR. HENDERSHOT: I think so. And I would think the Court could police against that. I think the Court would have to say, in that situation, "Look, a timely demand is not the only requirement. You also have to prove you didn't vote in favor."

THE COURT: But if we stop at the holder of record, isn't that, like, actually the ideal? Isn't that sort of almost the Delaware ideal? Like, we are completely blind to anything beyond the stockholder-of-record status. It is like the best of all worlds.

MR. HENDERSHOT: I mean, I think the ideal is in Rule 1 of our court rules. We are supposed to be getting to the just, speedy, and inexpensive resolution of every case. We are supposed

to be vindicating the rights of -- I mean, as the Supreme Court put it in Reynolds, there is a beneficial owner under here who is trying to vindicate his rights through the nominee of his choice or through the nominee that the regulations have stuck on him. And that's who we are trying to either protect or see if he is not actually entitled to it.

I have got to think there would be a remedy there, but I've also got to think that that's not a scenario that Cede is really likely to countenance happening, because then they have all sorts of issues. What happens if you wind up with 3 million shares that are demanded and not withdrawn and then we get appraisal litigation as to 5 million? There are only 3 million that haven't been paid. Okay. Who wins? And this is sort of the mirror image of the issue that's been raised in Transkaryotic and BMC and Ancestry. What happens if there is an over-demand? And the answer in all those cases has been, "Well, that's not this case." Not yet. Well, it's going to be one of these days. And if Cede does that, then it's going to be case number one, probably.

THE COURT: Yes. I mean, it actually struck me, you would have a situation there where Cede

would be policing that, because they couldn't demand more than what they had. So if they were the one that was making the demands opaquely, it would almost effectively cap it.

MR. HENDERSHOT: Right. Then they would have to have an internal record anyway so that they would know who to give the proceeds of the appraisal case to.

THE COURT: I mean, for them, it might even be a new business model. Right? You actually wouldn't even have to have any beneficial owner at the time.

MR. HENDERSHOT: I wish you wouldn't give Mr. Grant ideas, but yeah.

THE COURT: It would be like renting shares, borrowing shares. You would borrow Cede's position for purpose of appraisal. You actually wouldn't have to trade.

MR. HENDERSHOT: Right.

THE COURT: Which would have, obviously, problems of its own.

All right. Well, thank you. Let me hear from your friends.

MR. HENDERSHOT: Thank you, Your

Honor.

MR. GRANT: Good morning, Your Honor.

THE COURT: Good morning.

MR. GRANT: So 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. The relationship between the rights and obligations of a registered stockholder and his beneficial owner are not relevant issues in a proceeding of this kind.

Now, Dell "... seeks to examine the relationships between Cede (the record holder) and certain ... beneficial holders in order to determine the existence of appraisal rights. But the Supreme Court has already decided 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 .... [B]ecause the actions of the beneficial holders are irrelevant in

appraisal matters, the inquiry ends here."

Now, just one thing, Your Honor. Those weren't my words. Those were Chancellor Chandler's words in Transkaryotic. And other than replacing the name of the respondent with Dell, they were exactly his words. And while that seems right on point, let me approach it a slightly different way.

Dell "... 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-a-vis beneficial owners; and, in so doing, in the best interests of all stockholders, [Dell] should avoid becoming involved in the expensive and time-consuming trial of such collateral issues in merger appraisal proceedings."

It makes total sense to me, but -- you guessed it -- weren't my words either. That was the Delaware Supreme Court in Olivetti, which immediately after speaking those words then overruled Reynolds and said "We're not looking at that."

So the idea that Mr. Hendershot says, "Well, you know, they were overruling something else." No; that's what they said. They specifically warned

and said corporations, in this case Dell, should avoid becoming involved in the expensive and time-consuming trial of such collateral issues in merger appraisal proceedings.

Okay. So you have the Supreme Court directly on point. You have Chancery directly on point. What about legal scholars? What do they say? And this time I won't tell you that -- hide that they are my words. These are legal scholars.

Dell asked the Court "... to look past the actions of the record holder (Cede) to the relationship among Cede, the beneficial owners ... and the intermediaries between them (including the custodian banks). That is an inquiry that the Court traditionally has declined to undertake," citing Olivetti and Transkaryotic. And who was the noted legal scholar there? John Hendershot in his successful winning argument in this case in his entitlement reply brief at page 23.

THE COURT: At least he's calling you scholarly.

MR. GRANT: I do better. If we follow the teachings from these legal sages and look at the actions from the record holder, it is undisputed that

Cede properly perfected petitioners' appraisal rights and has more shares voted against the merger than are seeking appraisal.

Section 262(a) defines stockholder as the holder of record, and it's the holder of record who must comply with the voting requirement. It's also undisputed that Cede is the holder of record and that the shares at issue, more are voted either against or abstaining from the merger than seek appraisal. And Dell concedes this at the pretrial order, paragraph 63.

That should be it. That should end the entire inquiry. But I do continue on because, actually, of the Court's opinion in the prior entitlement hearing. Because under that, the Court said, "Look, I am limited. I can only look at what I'm allowed to look at." And I think Your Honor was indicating that to Mr. Hendershot, and I think that really does end it.

But the Court invited the Supreme Court to go down a path. So I want to go down that path with you in case I ever have to do it a second time. Because the Court said, "Maybe we should use a more nuanced approach," which you articulate in the

entitlement hearing. But even under that more nuanced approach, petitioners are still entitled to the appraisal.

So, as you recall, Dell previously asked the Court to dismiss certain petitioners from this action because the record holder of their stock changed without their knowledge or consent.

And the Court held that Dell was right, and you said that under controlling precedent, and treating Cede & Co. as the holder of record and applying the continuous holder requirement strictly, Dell's motion must be granted. That was your opinion at page 5.

Then Your Honor explained, by contrast, meaning this is what I have to do, but this is what I would really like to do if I was writing on a clean slate, by contrast, if the focus were to move beyond Cede, it should be possible to develop a more nuanced jurisprudence. And Your Honor explained that if he was writing on a clean slate, you would suggest that one look through Cede & Co. to all its member banks as separate entities, and that doing so would reflect the realities of the modern market rather than our current rule of not being able to go past Cede &

Co. And Your Honor also noted that it might also be possible to use voter instruction forms for other purposes, such as confirming whether or not particular shares held by an appraisal claimant on the record date were voted in favor of the merger.

And you said it may be possible. So I want to talk about that. Because even if you take the approach that you had suggested and look through Cede & Co. to its member banks, you could not tell how the petitioners' shares were voted by Cede & Co. Because let's look at the actual votes that were received by the inspector of elections. And it is attached to the affidavit of Charles Pasfield from Broadridge.

Now, there are two Pasfield affidavits. I think Mr. Hendershot made reference to one of them. This is a later one, if I could hand up copies to the Court.

THE COURT: Okay.

MR. GRANT: And if we take a look -- it's attached here -- I think if we go to the actual proxy that was sent in, I think it's the Bates ending in 2689.

THE COURT: Okay.

MR. GRANT: And you will see that --

and this is typical. I mean, there's lots of others. You will see it's actually segregated by bank, by participant bank. So you can see that there are a number of State Street entries, and it tells you the State Street clients, or those who -- where State Street is the member bank, they voted a certain amount for and a certain amount against and a certain amount abstained.

What you can't tell from that -- well, what you can tell is you look and see how they are submitted by the DTC member bank. So all of State Street's clients are aggregated. They are voted in undifferentiated bulk, both by Cede & Co., but then when you get down to the member bank level, they continue to be voted in undifferentiated bulk. And it's beyond dispute that State Street has more votes against or abstaining from the merger than the amount of shares that sought appraisal.

So even if you looked at State Street and said, "We're going to go beyond DTC, Cede & Co.," which is what Your Honor suggested in the last one, say "We're going to look at State Street," you still can't tell how the State Street clients instructed State Street to vote. And as the record owner, or

even if you look down at each of the constituent banks as record owners, appraisal would still be appropriate.

So in adhering to your nuanced approach and looking at each of the DTC member banks separate and apart from DTC or Cede & Co., petitioners are still entitled to appraisal.

Now, what the respondents seek here is not the nuanced approach that Your Honor referenced in the entitlement opinion. Respondents seek to go beyond the DTC member banks and get into the relationships between those banks and ISS, between those banks and Broadridge, between those banks and the customers of the custodial banks, and potentially between the clients of the customers of the custodial banks. Because, you know, you have to go not only to T. Rowe, but you might have to go through T. Rowe to John Hancock or others like that. That's not nuanced; that is a full deepwater dive into the proxy plumbing. And, Your Honor, nobody comes out smelling good after diving into the plumbing.

And we understand that Dell might think this is not fair. I really get that. There are a lot of times I have stood in front of the Court and

said "I just don't think it's fair." In fact, we made the same argument in the entitlement hearing. But we know from Alabama By-Products that the appraisal statute is to be strictly construed, and we also know that Berger vs. Pubco teaches us that "The appraisal statute should be construed evenhandedly, not as a one-way street."

So for all these reasons, and particularly the ones articulated so well by Mr. Hendershot in the entitlement hearing, respondents' motion for summary judgment just has to be denied. You can't keep getting down to those levels. And the Supreme Court tells you that, said in this type of proceeding in appraisals, we don't want you getting involved in all the relationships. Because it's not one or two relationships. It keeps going and going and going.

The record holder met the obligations here, and petitioners have to be allowed to pursue their appraisal.

THE COURT: So I hear where you're coming from. And this is the problem that I labor under in this area. And I guess where I have the most cognitive dissidence here is if I adhere to what I

think is your stronger reading of Olivetti and these other cases, haven't I gotten to "the classic statutory absurd result," where a party who admittedly voted in favor, because of this history of levels of incrustation on the stockholder-of-record requirement, gets to pursue appraisal? And if there's anything that would be absurd, wouldn't it be interpreting the statute to permit something that, at least by its text, it doesn't permit?

MR. GRANT: No.

THE COURT: Help me with that, because that's really where I'm struggling.

MR. GRANT: A couple things. First, it's real easy, because Your Honor doesn't have to go into the dive. It's real simple. The Supremes said "Don't do it." The Supremes looked at them and said, "You shouldn't even -- in good corporate governance, you shouldn't be even asking the Court to do it." So just don't do it.

So it seems just easier to say "Olivetti says I can't look forward to it, you know, and, therefore, they move forward." You know, I know Your Honor is -- likes to see how the law develops, wants to be part of that. But this one is real easy,

and say, "You know what? If there's a problem, the road to Dover is there. Head on down, fellows, because I've been given really strict instructions not to bother."

So I don't think we need to get into that discussion, but I am happy to get into that discussion with you because -- but, as I said, I don't think it's necessary to go into.

And that is the question. Where do we stop? Because what my friends representing Dell want you to say is this is some nefarious thing that happened where they said "What we're really going to do is vote for the deal so that we're really sure that the deal is going to go through, but what we really want to do is actually get appraisal, and all that." And we know that's not the facts here. And that's undisputed.

So the question is, if you're going to start to say, "Well, I'm going to look beyond the record holder and I'm going to look beyond the participating banks, and then I'm going to follow it through and I'm going to get into all the plumbing," the question is, why do you do that?

And I think the answer is, if one were

to have a rule of law to say we really want to get in there, is because we really want those who are intended to -- now we're getting into the equitable argument. Those who are really intended to have appraisal, who did it right, and all that stuff, get it. And those who are trying to manipulate the system don't get it.

And clearly, here, T. Rowe was not manipulating the system. In fact, when this was raised externally to them, it was a shock to them. And they were public in -- and Mr. Hendershot, I mean, came as -- and I appreciate his candor. Came as close as he could to saying, "Yeah, we knew they were voting against it." They were out there publicly. They were making statements. They were rallying others. Everything here was their intent to vote against it. And he even said, "Yeah, there are memos from T. Rowe saying this thing is undervalued. We should seek our appraisal rights," and all that stuff. And that's what they certainly intended to do.

So just like, well, what are we going to do in the case, if and when it ever happens, that there are more appraisals sought than there are votes either abstaining or against the deal, well, we will

cross that bridge when we get there. What are we ever going to do when we have someone who is actually trying to manipulate the system and trying to vote yes, which, in this case, was irrelevant anyway. This deal passed by a lot of votes. So it's not like they were the swing vote and really made it happen.

So if we are trying to do justice, which is what I often stand up here and talk about, but Mr. Hendershot now cites Rule 1 that he wants justice, justice here is implementing the intent of the parties, which was certainly to vote against this and to seek appraisal. And no one was trying to do anything untoward towards it.

So, you know, he wants you to stop sort of halfway or three-quarters of the way. I think you've got to stop at Cede & Co. I then say, well, if the Court wants the more nuanced approach that he talked about that he would put in, then go one step to the DTC member banks. But it took you there and we still win there.

Now, Mr. Hendershot says, "I want to take you two or three steps farther now. And I want to take you to Broadridge, and then I want to take you to ISS, and then I want to take you to T. Rowe, and

then maybe I also want to take you to John Hancock." But he needs to stop really before he gets to T. Rowe and John Hancock, because if you start looking at, well, what are they trying to do and what did they make clear? The answer is they wanted to vote no.

And by the way, what does Dell tell them? He says, you know, three times they checked their votes for -- because, remember, this was the fourth vote, was the one that counted. Well, why is it the fourth vote that counted? Because they kept adjourning the meetings and changing the record date and having new meetings and all that stuff. So it was the fourth vote. The first three times they did check. By the way, the fourth time, the proxy went out and said, "Hey, if you voted, don't worry about it. Your vote still carries over to this next one."

Now, look, in an ideal world, would I have preferred that they went back and checked again so we didn't have this whole issue? Yeah, I really would have loved that. But, you know, if we're going back all the way to see what's going on and we're starting to think about equitable things, it is not inequitable to let T. Rowe move forward. They had notice of who sought appraisal. They had notice that

T. Rowe was opposed to this deal. T. Rowe's votes did not swing the deal one way or another. You know, it's not like, okay, well, without their votes, this deal wouldn't have passed so we don't approve it.

So there is no equitable reason whatsoever to deny them the right to appraisal. And if you are going down beyond Cede and if you are going down beyond the member banks in the Court's more nuanced approach, then you are sort of turning the statute from a strict legal right into more of an equitable remedy. And if we're turning it into equitable remedy, then let's really be equitable and do what's right. So I think on either side of that we move forward with appraisal.

THE COURT: I was reading some of these cases lately, and I seem to have left the stack on my desk, so I don't have it in front of me here. But it was one of Vice Chancellor Glasscock's opinions. It was either Ancestry or BMC. And he basically said, you know, "I'm not going to" -- I think, "not going to look at this because it's stockholder of record." But then he went on and said, "And even if I did, there's no evidence that Merion" -- I think it was Merion -- "voted in favor of the

deal," as if it actually was a legitimate inquiry and he might have come out the other way had there been actual evidence or an admission, or something like that.

MR. GRANT: Yes, I read that. I think that was him, you know, making an observation.

THE COURT: So you don't think I should indicate -- because part of what could distinguish this case, one could embrace a system that would say, "Hey, look, we're generally not going to delve into this stuff. But if you have publicly admitted that you vote in favor of the merger, you are stuck. And so while we're not going to go into every mom and pop, or anybody like that, we can't have people essentially announcing that they did something the opposite of what the statute lets you do." And so essentially limit it on its facts to that, which gets you out of the whole opening the door to diving in the plumbing, as you so aptly put it.

MR. GRANT: Well, it doesn't. Because then you have to say, "Well, how did this filing get made?" And there is certainly evidence about that. What actually happens is ISS -- and this is why they had no idea that the votes were cast -- I shouldn't

say the votes. The instructions were. Remember, these aren't votes cast, these are instructions. And I think that's a very big difference, is beneficial holders do not vote, they give instructions.

So, anyway, the way that these SEC filings are made is ISS is sort of the bookkeeper, and ISS says, "Well, I'm going to put together this list of all the instructions that I," ISS, "sent off to Broadridge." And by the way, ISS can't swear how these things were voted; they can just tell you "These are the instructions I sent off to Broadridge."

They then print out a stack of 200 pages with literally hundreds, if not thousands, of entries that says "These were how the votes were transmitted." It then has, you know, like a one page on top that says, you know, "Attached are the votes transmitted," you know, signed by a T. Rowe officer.

Nobody from T. Rowe goes back and checks every one of those things. So, you know, this is why you can't get into that. Because, yes, it is their filing. They did sign it. But if you ask how was it prepared? And are there ever any errors on there? I would think that the idea that there's an error on something that's produced with that many

entries -- so now we're going to go actually have trials on, well, is everything there absolutely correct? Are there any mistakes? How was it put together? Who knew? How did they know?

Your Honor is just -- if you would have a rule like that, you would just be taking on issues that -- you know, this is supposed to be a very focused proceeding, and you are going to wind up having a long argument and a mini trial on all of that. And that's not what's supposed to happen. That's what Olivetti specifically says. "Don't do this. It's not ...."

THE COURT: But doesn't that then again -- and I said this somewhat facetiously. I mean, people are very resourceful in terms of creating business models. Why couldn't this then create a situation where Cede can just say to people, "Hey, look. Pay us a fee and use our name. Vote against. And, you know, however many shares we vote against, we will go in and we will seek appraisal for them"?

MR. GRANT: Not only is that possible -- and I don't want to talk out of school, but I will give you a little inside baseball as we talk about appraisal. Because I remember when Your

Honor was back in private practice, you were on the subcommittee that talked about the appraisal issues.

It's gotten even more interesting as kind of the market has developed. But what about the passive investors, the index holders who, instead of just simply taking the deal, should now probably consider taking 5 or 10 percent, voting no, asking for appraisal, and then saying, as soon as the deal closes, if anyone, you know, wants, we will sell at a 1 percent premium our appraised rights, and you can go run with them. And we have had them the whole time, and we have owned the shares and we have voted, and we will certify and all that stuff. But we make an extra 1 percent on our portfolio that way. Inside baseball, those discussions are going on.

THE COURT: You have got emerging communications.

MR. GRANT: Yeah. So I'm just saying that that's going on. And if you, you know --

THE COURT: But doesn't that suggest that the answer is -- and maybe the answer is just to say "Supreme Court, my hands are tied by your existing precedent." But doesn't that type of problem counsel for departing from this opaque window that doesn't let

us look through to see any of this stuff?

MR. GRANT: No, not at all. First of all, again, you know, not your job. So I really don't think you have a choice. As much as you are interested in this area and as much as you want to do it, it's just it's not your call.

Then the question is, well, is it the Supreme's call? And I would say, no, the kind of changes that are -- that this might entail is not a change that should be done by the Court but is a change that should be done by the legislature. But as Your Honor knows, I'm involved in this also, and if we got to the legislature, one of the things that I would say is, "You know what? I don't see the issue yet. I don't see anyone actually manipulating the system." And this is certainly not one of those things. And for my friends who like to tell me we don't need more regulation, what we need is to allow the market, with people with money on both sides, to sort of figure out what the balance is, I say, you know, you have convinced this Democrat that maybe that Republican laissez-faire attitude works in this case. Because you have seen, I think, you know, the cases that ought to be challenged.

THE COURT: You can stop there. I will take that as progress.

MR. GRANT: Okay. I will leave it at that, Your Honor, unless you have any other questions.

THE COURT: No, I don't. Thank you.

Mr. Hendershot.

MR. HENDERSHOT: Your Honor, I'm mostly against progress and favor reaction myself.

THE COURT: You are a conservative guy. But you have to be thrilled to have Mr. Grant joining the fold in at least one respect.

MR. HENDERSHOT: Possibly, Your Honor. I think, perhaps, that might not be my favorite example.

A couple of things. You know, the requirement at least to object has been in the General Corporation Law appraisal statute since the very beginning. It goes all the way back to 1899. The requirement not to vote in favor goes all the way back to 1943. Before that it was you have to object. There's actually the Arden Farms case, which is about a deal from 1940. The inability to object was treated as disqualifying voting trust certificate holders from appraisal. So, really, the requirement not to vote in

favor was comprehended in the "you must object."

You know, this is not something ancillary. This is the core of the statute. You cannot have both consenting to the statute and -- excuse me. Consenting to the merger and an appraisal of your shares. It is not about intent or relationships, or anything like it. It is about how the shares were voted. Or in the pre-1943 era, it is about whether it's a valid objection, which it can't be if you are voting in favor of the deal.

Now, the interesting thing about the tension between the Salt Dome rule and Reynolds that my friends are pointing to is both decisions in Reynolds, both this Court's decision and the Supreme Court's decision, talk about Salt Dome at considerable length. If they thought -- if the Supreme Court in Reynolds thought, or if Vice Chancellor Short thought that what was done in Reynolds was inconsistent with the rule from Salt Dome that you have to look only at the record holder, those decisions should have manifested that belief. They don't.

You know, I've already talked about I don't believe Olivetti overrules Reynolds. It talks about certain pieces of Reynolds being dictum, and

they are not the pieces we are relying on. The Union Illinois case from 2003 treats Reynolds as good law. I think it is. I don't see Olivetti as overruling it. And, again, Olivetti was a short form case. It was not about voting; it was about what constitutes a valid demand for payment. That's in the pre-1976 era, where you have to have first an objection, which can be kind of informal; and then you have to have a formal demand for payment. And it was about can you have a formal demand for payment made by an agent for a stockholder of record without the agent proving his agency. And the answer to that question was, yes, if it's a facially valid demand from the stockholder of record, that's fine. And we are not going to delve into whether that's validly authorized or anything else. That's the holding of Olivetti.

There is nothing in the statute that says you've got to look at Cede and its votes only as an aggregate. If that's what it means, then nobody gets appraisal, because Cede voted a lot of shares in favor of this deal on the instructions of people not relevant here. Nobody thinks that's the law. It certainly wasn't the law pre-1976. But literally reading the statute, that's what it says. I think any

interpretation we put on the statute today has to square with what the terms of the statute actually are.

Now, my friend handed up the second affidavit of Mr. Pasfield and looked at it in terms of the nuanced approach that the Court advocated in the continuous ownership decision. It's certainly true that State Street had 200-some million shares in its name. That's just a fact. What that does, though, is it creates a different rule for the investor who holds in street name who happens to be the only person who holds through Hendershot's Sunshine Brokerage House. That person might very well be out of luck if you do the nuanced approach and that's the only position in that brokerage house and that position was voted yes; even if it was, as here, apparently, a mistake or not really people's intent, or anything like that.

It also potentially creates a different rule for people who don't vote via the Broadridge omnibus proxy cards. And there are a lot of those. There are people who fill in voting instruction forms. Are we not supposed to look at those? There are people who vote using the telephone voting system. That generates a stack of papers,

which was produced in the litigation. Nobody has relied on it, but it's a stack of papers that says "Here is the control number. Here is the beneficial owner and his address and phone number. Here is how many shares. And here is how he votes." And there's a big stack of them. Do we get to look at that?

Is there a different rule for those folks than for the people who cast their votes via a custodian like State Street Bank and Trust? Maybe. I don't know. It could be an issue for a different case. But it seems like we are treating similarly situated people differently if we go down the road but then stop with the participants in Cede & Co.

THE COURT: Can I ask you something about that, too? Because, again, it does seem to me to be odd, at a different treatment level between this and the colloquially called appraisal arbitrageurs. So appraisal arbitrageurs, there is basically no proof, one way or the other, of how the shares were voted. We know the after-acquiring stockholder didn't vote. But so what? But we know that the party actually who controlled the voting at the time, we don't know who it was or how they voted. So there is basically no proof.

So it seems to me inherent in that is either a policy decision or putting the burden of proof on the respondent rather than the petitioner.

If I port that into here, is that a way to say, "Okay. Those cases kept this issue live, but the respondent couldn't meet its burden of proof for lack of evidence. You guys theoretically, if you have the burden, have met it"? Or how do you view the burden flowing?

MR. HENDERSHOT: I think that the general rule from Hilton Hotels on forward has been that the petitioner has to prove compliance with the prerequisites, and this requirement is no different from the others. That was the pitch we made in Transkaryotic, and Chancellor Chandler wasn't buying it.

THE COURT: Right.

MR. HENDERSHOT: I think the way to -- I think it makes more sense to adopt the agency reading, which, again, none of Transkaryotic, BMC, or Ancestry has rejected expressly, and say "What we're really worried about is if A owns on the record date and B owns on the vote date and there is no coordination between A and B, they don't even know who

the other one is, then it doesn't make sense to attribute Cede's vote of B's shares to B rather than to A because A is the person that gave the instruction." I think that's the sensible way to recognize -- to reconcile all these precedents.

I think you could get to the same position by saying, "Well, really, the voting requirement, the burden of proof is on the respondent, but on everything else it's on the petitioner." That would be kind of strange, and it maybe creates an incentive on the arbitrageurs of the world or on petitioners generally to come up with ways to conceal what they've done instead of having a transparent record.

THE COURT: No; I hear you. Again, I'm trying to rationalize those cases which -- and I understand your agency theory. I really read them as more strongly saying something along the lines of what Mr. Grant is saying, which is basically we don't look behind Cede. And that those positions, those cases didn't create the inherently -- I think inherently absurd situation of somebody saying they voted in favor and yet still seeking appraisal because they weren't confronted with it. They didn't have the

evidence to know.

MR. HENDERSHOT: Right.

THE COURT: So it was okay to say in those cases, "We're just going to look at Cede." But I now have precedence, therefore, that reaffirm this idea that I only look at Cede.

MR. HENDERSHOT: You have precedence that reaffirm that you should look at Cede with regard to shares acquired after the record date. You don't have any precedent, other than Reynolds, about how to deal with shares that are owned continuously from the record date through the date of the vote.

THE COURT: Yes; but why would I distinguish between those two situations, other than it happens to be the factual difference in this case? Why would it make sense to have different regimes as to when I look and when I don't look?

MR. HENDERSHOT: Well, I don't think it's a matter of a different regime about looking and not looking. It comes back, I think, really to the agency problem. If you -- if you have a change of ownership, of beneficial ownership between record date and vote date, then on what principle does it make sense to attribute one person's voting instructions or

vote to the other?

I mean, it might if you have a negotiated sale or Hendershot transfers to Hendershot Appraise Co. LLC. Hendershot votes yes. Hendershot Appraise Co. says, "Give me appraisal." Wait a minute. Hendershot voted yes. Well, totally different people, even though I am the sole member and manager. Well, I think the Court ought to have the equitable discretion to police that, or really the statutory discretion to police that. We are the same person. The one vote ought to be attributed to the other.

And that's consistent, I think, with the way the system has been set up. It has been set up in a way that has multiple layers of agency relationships. And I'm not suggesting that we get into the relationships as such. I'm saying we have to evaluate with regard to the shares, which I think everybody agrees is what the statute is referring to, the shares that are voted in favor can't have appraisal. That's Ancestry, among other cases. And that's what the statute said pre-1976. Nobody thinks the legislature was trying to change that in 1976.

If you can't prove that the shares

weren't voted in favor, then either you shouldn't get appraisal or you should have some sort of burden shifting, like the Court suggested. But in a case where there's proof, undisputed evidence that this block of shares was voted in favor, then I think it's utterly contrary to the meaning and the history and the precedent and the policy of the statute to let those shares have appraisal.

THE COURT: What about Mr. Grant's point that if I string this all the way out and do the type of deep dive, the equities ultimately compel finding that this really was an innocent mistake and that basically what you have to ultimately rely on is some degree of bright-line rule about, "Hey, tough cheese! Appraisal statute is strictly construed."

MR. HENDERSHOT: The appraisal statute says you can't vote for it. You are not going to get the vote rescinded.

THE COURT: If I'm ultimately going to do all this stuff and have a tough cheese rule that goes your way, why do I get into it? Why don't I just start with the tough cheese rule that goes their way?

MR. HENDERSHOT: Because their way is -- it reads the requirement right out of the

statute. It can't be what the legislature meant.

THE COURT: I mean, what do you think about -- Mr. Grant attributes to me some burning desire to weigh in on this. And I find it very attractive to duck this. Why shouldn't I just send you guys to Dover and say, "Hey, look. I'm doing what I'm told. You guys want to get the big bosses to fix it. Get them to fix it for you. I'm just going to follow the precedent."

MR. HENDERSHOT: Your Honor, I think you are being more faithful to precedent by applying the statute and applying Reynolds and saying, "Look, these shares were voted in favor." You know, send us to Dover. That's fine. I'm sure whatever Your Honor decides, there's some risk that we're going to Dover anyway.

THE COURT: That's the beauty of cases like this. I know everybody ends up in Dover. It's one of those things.

MR. HENDERSHOT: That's fair. But all I'm asking you to do is send us to Dover with the right result, which is they voted the shares in favor. Whether they meant to or not, they did. That ought to disqualify them, and that's all there is to it.

THE COURT: All right.

MR. HENDERSHOT: Thank you, Your Honor.

THE COURT: Thank you, both. I appreciate your time very much, and I and my clerks will be thinking about this and your very helpful arguments.

We stand in recess.

(Court adjourned at 12:19 p.m.)

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CERTIFICATE

I, DEBRA A. DONNELLY, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 3 through 74, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 30th day of March, 2016.

/s/ Debra A. Donnelly

Debra A. Donnelly
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter
Delaware Notary Public