IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

PETITIONERS' OPPOSITION TO THE MAGNETAR FUNDS' MOTION TO COMPEL DISCOVERY

Grant & Eisenhofer P.A. ("G&E"), on its own behalf and on behalf of the T. Rowe Price Petitioners[1] (collectively with G&E, "Petitioners"), hereby opposes the Motion to Compel Discovery ("Motion to Compel") filed by Magnetar Capital Master Fund Ltd., Magnetar Global Event Driven Master Fund Ltd., Spectrum Opportunities Fund Ltd, and Blackwell Partners LLC (collectively, "Magnetar").

1. On June 20, 2016, Magnetar served G&E and the T. Rowe Price Petitioners with a series of discovery requests. Although Magnetar asserts that these requests relate to Petitioner's Motion for an Award of Attorneys' Fees and Reimbursement of Expenses Pursuant to 8 *Del. C.* § 262(j) (the "Fee Application") (Transaction ID 59081925), the vast majority of the requests are wholly irrelevant

[1] For the purposes of this Opposition, "T. Rowe Price Petitioners" will have the meaning provided in footnote 1 to the Motion to Compel. Where reference is made only to T. Rowe Price Associates, Inc., the term "TRP" will be used. Magnetar also uses the term "G&E Claimant" in its Motion to Compel, without defining it. Petitioners presume Magnetar would ascribe to that term the meaning provided in the April 10, 2014 Consolidation Order. Notwithstanding footnote 2 to the Motion to Compel, G&E Claimants includes Geoffrey Stern, who, along with Morgan Stanley Defined Contribution Master Trust, remains a member of the appraisal class.

to that Application. For that reason, Petitioners rightfully declined to respond to the requests, with the exception of turning over the backup for the expenses sought in the Fee Application.

2. In the spring of 2014, when Petitioners moved for the selection of G&E as Lead Counsel for the Appraisal Class, Magnetar opposed the motion. The Court held a teleconference on April 10, 2014, to discuss the request and, in particular, provisions relating to fees and expenses. Before Petitioners fully embarked on the rigorous work of prosecuting the appraisal litigation, the Court—rejecting a proposal that each stockholder pay its own costs and fees—ruled that fees and expenses would be apportioned pro rata. As the Court noted, Section 262(j) "actually addresses this issue." Section 262(j) makes clear that

> Upon application of a stockholder, the Court may order all or a portion the expenses incurred by any stockholder in connection with the appraisal proceeding, including, without limitation, reasonable attorney's fees and the fees and expenses of experts, to be charged *pro rata against all of the shares entitled to an appraisal.*

8 *Del. C.* § 262(j) (emphasis added).

3. After diligent prosecution of this litigation for more than two years, G&E obtained an order finding that the fair value of shares of Dell Inc. at the time of the merger was $17.62—***28% higher*** than the $13.75 merger consideration. The Fee Application requests reimbursement of $4,035,787.17 in out-of-pocket expenses, and $3,964.125.60 in attorneys' fees, apportioned pro rata from the

shares held by members of the appraisal class. As the Fee Application discusses, the attorneys' fees are calculated based on the terms of G&E's retention agreement with the T. Rowe Price Petitioners, an arrangement that is highly favorable to members of the appraisal class.[2]

4. Magnetar served Petitioners with discovery requests on June 9, 2016. The vast majority of the requests are wholly irrelevant to the Fee Application. Moreover, a large number of them seek documents protected by the attorney-client privilege. Petitioners therefore rightfully declined to provide responses to the majority of the requests. Petitioners did agree, however, to provide backup for all of the expenses for which it seeks reimbursement.

5. Magnetar responded with the Motion to Compel. In filing its motion, however, it has failed to meet its burden of demonstrating the relevance of the evidence it seeks. *See Minieri v. Bennett*, 2012 WL 5951514, at *2 & n.4 (Del. Ch. Nov. 29, 2012) (noting that the burden is on the person seeking discovery to establish its relevance). This is particularly true where there is no legal entitlement to discovery.

[2] The fee arrangement calls for 15% on the first $2 uplift over the $13.75 deal price and 17% on the additional $1.87 over $15.75, with interest following principal. Seeking an award based on these terms offers the appraisal class a ***41% discount*** to G&E's lodestar of $7,776,899.00.

6. Magnetar seeks evidence regarding Petitioners' fees and expenses because it apparently believes (1) that G&E's expenses should be paid by the T. Rowe Price Petitioners who were found not to be members of the appraisal class, and (2) that the attorneys' fees are somehow unreasonable.[3]

7. Magnetar's assertion that shareholders who were found not to be members of the appraisal class and who therefore are not entitled to the benefits of the appraisal action should pay for the expenses of that litigation is flatly refuted by the plain language of Section 262(j). Section 262(j) makes clear fees and expenses are "to be charged *pro rata against all of the shares entitled to an appraisal.*" 8 *Del. C.* § 262(j) (emphasis added). For that reason, the Court's Consolidation Order provides, "As contemplated by 8 Del. C. § 262(j), at an appropriate stage of the proceeding, G&E may seek to have its fees and expenses charged *pro rata* against the value of all the shares entitled to an appraisal." Consolidation Order at ¶ 11.

[3] Magnetar apparently believes the Fee Application should be denied because it hired its own counsel. Motion to Compel at 3 ("[P]recisely because the Magnetar Funds had concerns about Lead Counsel's alignment, they felt the need to hire and compensate their own additional co-counsel in this matter."). That Magnetar decided to hire its own counsel is entirely beside the point. *Cf. Smith v. Fidelity Mgmt & Research Co.*, 2014 WL 1599935 (Del. Ch. Apr. 16, 2014) (rejecting the proposition that a party that hires its own counsel is not responsible to pay a portion of class counsel's fee). That was a choice it need not have undertaken, as G&E delivered the same 28% recovery for all members of the appraisal class—a result from which Magnetar benefits and to which its counsel made no substantive contribution.

8. It is not clear where Magnetar would want the Court to draw the line if its position were adopted. On May 13, 2015, more than 100 shareholders were excluded from the appraisal class because they tendered their shares in exchange for the merger consideration, and more than two dozen were excluded because their demands were not signed by the record owner—should they be required to pay a portion of the expenses for the litigation from which they did not benefit? On June 27, 2014—just months after this case began—the Court dismissed nine shareholders because they had withdrawn their demands—should they too be taxed with costs? If expenses are to be shared by investors who were found not to be members of the appraisal class and who therefore do not benefit from the appraisal award,[4] there is no delimiting principle that saves Magnetar's position from the realm of the absurd.

9. Magnetar's assertion that the fees sought by G&E are somehow improper is also baseless. While Magnetar complains that the Fee Application seeks to hold them to "a contingency fee arrangement to which they did not agree, with counsel that they specifically rejected," Magnetar ignores that the statute expressly permits this by authorizing fees and expenses to be chargeable pro rata to ***all*** members of the appraisal class, not just those who have retained lead counsel.

[4] The petitioners represented by G&E who were ruled not to be entitled to appraisal have entered a settlement in return for a substantially reduced interest payment. That is not a benefit of the appraisal action nor are any of the expenses incurred in the appraisal proceeding related to this settlement.

If anything, the Fee Application allows Magnetar to free ride off the terms of a generous agreement that G&E offered to the T. Rowe Price Petitioners based on the large size of their Dell stake.[5] Under these circumstances, Magnetar's failure to cite any supporting authority for its request for discovery on this ground speaks volumes.

10. Aside from these bogus justifications for its discovery requests—that shareholders who are excluded from the appraisal class should contribute to expenses, and that the calculation of G&E's fees was somehow improper—Magnetar provides no demonstration of the relevance of its discovery requests. Many of these requests clearly have nothing to do with the Fee Application. For example, Magnetar seeks communications with non-G&E claimants concerning tax issues implicated in the valuation.[6] Magnetar makes the bizarre suggestion that such a request relates to whether G&E "acted in the best interests of all petitioners or predominantly its direct clients."[7] First, there is absolutely no basis to suggest that G&E acted other than in the best interests of the appraisal class at all times.[8]

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[5] If Magnetar would prefer to pay on a quantum meruit basis based on G&E's $7.7 million lodestar instead, G&E has no objection.

[6] Interrogatory No. 15.

[7] Motion to Compel at 12(h).

[8] Indeed, after the Court issued the valuation opinion, G&E moved to increase the determination of fair value *after* this Court already had determined that almost all of the individual petitioners that retained G&E directly were ineligible to pursue

G&E energetically, diligently, and effectively litigated the valuation issue for the better part of two years—and gained a significant benefit to members of the class. Second, the interests of the G&E Claimants and those of the appraisal class were aligned at all times—after all, G&E believes that the Court should have ruled in favor of the T. Rowe Petitioners on the entitlement issues. Third, what could the tax issues implicated in the valuation possibly have to do with the fees and expenses in prosecuting the action?

11. As to Magnetar's other requests, they all seek information either (1) that G&E has already provided or agreed to provide; or (2) are not at all relevant to the Fee Application. For example, issues concerning the disclosure of the "Entitlement Issue" have nothing to do with the Fee Application.[9] As to whether anyone has paid G&E's expenses or whether G&E had any arrangement with any party concerning the payment of its expenses,[10] G&E has already made plain that the answer is no. G&E was entitled by the statute and by Court order to

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appraisal rights and therefore would not have benefited by any increase in the appraised value.

[9] Motion to Compel at ¶ 12(g). As the Consolidation Order made clear that G&E was solely responsible to the G&E Claimants for issues surrounding entitlement issues (Consolidation Order at ¶ 6), it is curious that Magnetar believes it was entitled to receive updates concerning the T. Rowe Petitioners' statuses. Motion to Compel at ¶ 3 ("Despite G&E's responsibilities as Lead Counsel for all appraisal petitioners, G&E failed to timely disclose the voting issue concerning T. Rowe Price . . . . ").

[10] Motion to Compel at ¶ 12(c).

seek reimbursement of its expenses apportioned pro rata among the appraisal class and that is just what it did.

12. Not only are the discovery responses Magnetar seeks irrelevant, a number of them seek information and documents protected by the attorney-client privilege. For example, Magnetar seeks documents and discovery responses regarding G&E's communications with TRP concerning the "Entitlement Issue." These are clearly protected by the attorney-client privilege. Notwithstanding Magnetar's commentary to the contrary,[11] there is no question that TRP has the right to assert its privilege as to its own communications with G&E—just as any class member would have that right to assert the privilege vis-à-vis other current or former class members.[12] Moreover, as the Consolidation Order made clear, G&E has been responsible for representing the G&E Claimants—and no other parties—as to entitlement issues.[13]

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[11] Motion to Compel at 5 ("Lead Counsel failed to explain, however, how it could withhold information on the basis of attorney-client privilege from an entity that it claimed to have represented as its client (and against which it was assessing its attorney fees.").

[12] *See, e.g.*, *Schaffer v. Litton Loan Servicing, LP*, 2010 WL 9951761, at *2 (C.D. Cal. Oct. 20, 2010) (granting a protective order to lead counsel as to communications with certain class members, notwithstanding that certain non-class members has waived their privilege as to particular issues).

[13] Consolidation Order at ¶ 6 (noting that G&E is responsible only for the entitlement issues of the G&E Claimants, and if a G&E claimant is not entitled to appraisal rights, the claimant is not a member of the appraisal class, and G&E's

13. Despite having served four sets of discovery requests on G&E and the T. Rowe Price Petitioners, and having burdened the parties and the Court with the Motion to Compel, Magnetar has still failed to establish the relevance of any of its discovery requests to the Fee Application—except those seeking backup, which G&E will provide.[14] It is clear that Magnetar had no legitimate purpose to serve these requests and Petitioners rightfully rejected them.

14. For these reasons, Petitioners respectfully request that the Court deny Magnetar's Motion to Compel.

Dated: June 29, 2016

Respectfully submitted,

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obligations to that client are governed by the terms of that client's engagement of G&E).

[14] G&E has already indicated that out of over $4 million in expenses, only slightly above $20,000 in expenses relate to the "Entitlement Issue," and G&E does not seek to charge any of the other petitioners for that expense.

CERTIFICATE OF SERVICE

I, Rebecca A. Musarra, hereby certify that, on June 29, 2016, I caused a copy of the foregoing *Petitioners' Opposition to the Magnetar Funds' Motion to Compel Discovery* to be filed and served upon the following counsel of record via File & Serve*Xpress*:

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