EFiled: Jul 01 2016 05:32PM EDT
Transaction ID 59223794
Case No. 9322-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

THE MAGNETAR FUNDS' MEMORANDUM IN OPPOSITION TO PETITIONER MORGAN STANLEY DEFINED CONTRIBUTION MASTER TRUST'S MOTION FOR AN AWARD OF FEES AND EXPENSES PURSUANT TO 8 *DEL. C.* SECTION 262(J)

Petitioners Magnetar Capital Master Fund Ltd, Magnetar Global Event Driven Master Fund Ltd, Spectrum Opportunities Master Fund Ltd, and Blackwell Partners LLC (collectively, the "Magnetar Funds"), by and through their undersigned attorneys in C.A. No. 9322-VCL (the "Dell Appraisal"), hereby submit this memorandum in opposition to Petitioner Morgan Stanley Defined Contribution Master Trust's Motion For An Award Of Fees And Expenses Pursuant To 8 Del. C. Section 262(j) (the "Fee & Expense Petition").

The Magnetar Funds join in and incorporate by reference the factual and legal arguments set forth in the Global Continuum Petitioners' Response that we understand is being submitted with the Court today as well. This submission presents those arguments unique to the Magnetar Funds, as follows:

BACKGROUND

1. The Magnetar Funds believe that the Fee & Expense Petition cannot be finally adjudicated absent the production of the documents and information requested by their discovery requests, which are the subject of a pending motion to

compel that has been fully briefed with the Court. There is critical information not before the Court – such as (i) whether the T. Rowe Petitioners are responsible for the reimbursement of expenses under their engagement letter with Lead Counsel, and (ii) whether the recent lump sum settlement on behalf of all disqualified T. Rowe stock gives rise to an obligation on the part of those stockholders to pay fees – that prohibits the Magnetar Funds (and the Court) from being fully able to react to the Fee & Expense Petition. Putting aside the fact that the Magnetar Funds should not be forced to accept Lead Counsel's say-so as to what its engagement letter provides, the best evidence of what the T. Rowe Petitioners' obligations are under the engagement letter is the engagement letter itself.

2. In addition, Lead Counsel has represented that it would voluntarily provide the Magnetar Funds with access to the complete backup of all expenses incurred during the prosecution of the case, although such information -- which was also called for by the Discovery Requests -- has not been provided as well. Unless and until such information is made available, the Magnetar Funds (and the Court) are impeded in their ability to fully and properly respond to Lead Counsel's Fee & Expense Petition, as all expenses attributable solely or principally to the entitlement issue should not be borne by any Non-G&E Petitioner. Indeed, it is Lead Counsel that bears the burden of proving the reasonableness of its expenses, and absent further proof than the two-page summary sheet attached to their Fee &

Expense Petition, they have simply not come forward with sufficient evidence to justify their $4 million expense tab.

3. Moreover, notwithstanding the fact that Lead Counsel's engagement letter with the T. Rowe Petitioners may or may not include a provision that relieves the T. Rowe Petitioners from any obligation to reimburse expenses if there is no recovery above the merger price, if such a clause does exist it was Lead Counsel who took the risk of advancement and non-recovery, not the Non-G&E Petitioners who never entered into a contract with Lead Counsel.

4. Furthermore, the Magnetar Funds attempted repeatedly to address with Lead Counsel the fact that the risk to its clients' entitlement to proceed warranted reaching an understanding on expense allocation well before trial and long before the expenses had been incurred. Thus, by a July 23, 2015 letter (annexed hereto as Exhibit A), counsel for the Magnetar Funds repeated its earlier request that Lead Counsel facilitate an agreement among dissenting shareholders for a fair and reasonable allocation of costs and expenses, cautioning that if the entitlement issue were decided against the T. Rowe Petitioners, the Magnetar Funds might be left to bear a disproportionate share of the expenses. The Magnetar Funds further warned that the expenses borne to date (which as of that time Lead Counsel had advised were approximately $2-3 million) might have been appropriate in magnitude relative to the 30 million shares held by the T. Rowe

Petitioners, but they were disproportionate to the Magnetar Funds who held less than 4 million shares. Despite the Magnetar Funds having raised this issue, Lead Counsel did not address the issue at that time.

5. The Magnetar Funds continued to raise this issue with Lead Counsel, both by telephone and in writing, and in their counsel's August 10, 2015 letter (annexed hereto as Exhibit B) once again expressed their concern to Lead Counsel that each petitioner should bear and pay for its proportionate share of expenses incurred until such time as the dissenter may be determined to be ineligible to proceed. As that August 10, 2015 letter reflects, Lead Counsel had stated in an earlier telephone call that it believed the issue to be premature and declined to take it up with its clients or otherwise address the issue at that time.

6. In particular, Lead Counsel represented at that time that it had not yet decided how much of the expenses it would seek to allocate to the Non-G&E Petitioners, such as the Magnetar Funds, and that it would make that determination once it was able to gauge just how much the expenses would cost each shareholder relative to the amount of any recovery. Lead Counsel assured the Magnetar Funds that it would not seek to assess expenses against the Non-G&E Petitioners if such expenses were too high relative to the amount ultimately recovered. By way of example, Lead Counsel stated that if the Court's fair-value determination resulted in an uplift of only $2.50 per share above the merger price, then $0.50 in expenses

per share would be "unreasonable;" if, however, the Court's valuation decision resulted in a bump of $12.50 per share, then an assessment of expenses $0.50 per share would be reasonable. It was for this reason that Lead Counsel believed the issue to be premature, and it was on the strength of this representation from Lead Counsel that the Magnetar Funds decided not to proceed with motion practice on that issue at that time.

7. However, notwithstanding Lead Counsel's assurance that it would not seek to "unreasonably" assess the entirety of its expenses against the Non-G&E Petitioners in the event that the T. Rowe Petitioners were disqualified from the case, this is precisely what Lead Counsel is now attempting to do. Based on the very example Lead Counsel used in July 2015, the ultimate Court award of $3.87 above the merger price falls much closer to the $2.50 bump than the $12.50 bump in the example; by its own example, Lead Counsel's current attempt to assess ***$0.733*** per share in expenses is simply "unreasonable." And this is especially so now that the T. Rowe Petitioners have enjoyed a substantial settlement recovery notwithstanding their disqualification.

8. Lead Counsel now attempts to convince the Court to award expenses based a false dichotomy between a win-at-all-costs, sky-is-the-limit approach or a budget-constrained "K-Mart Blue Light Special" strategy, as Lead Counsel urged in its (unauthorized) sur-reply filed earlier today. This misses the point entirely;

the key to assessing the reasonableness of expenses is determining whether the costs were right-sized in proportion to the number of shares at stake in the case. Determining what is reasonable under the circumstances does not require resort to the hyperbolic binary choices Lead Counsel has presented. The Magnetar Funds do not agree that Lead Counsel had only two choices – to either write a blank check or pinch pennies – but believe that practical reality and economic necessity should be the basis on which to assess the expense claim. And this is precisely what Lead Counsel indicated to the Magnetar Funds that it would do back in July and August 2015, when the Magnetar Funds sought assurance on this issue, even though Lead Counsel has now apparently abandoned any practical approach to its expense allocation demand.

9. The Court's June 29, 2016 order approving the settlement between Dell and the T. Rowe Petitioners' disqualified shares (the "Settlement Order") also warrants a steep downward adjustment to the Fee & Expense Petition. The Settlement Order provided for a substantial recovery by the T. Rowe Petitioners, in the amount of approximately $25 million as reported by the Wall Street Journal. Notwithstanding Lead Counsel's attempt to characterize the settlement as somehow resulting only from the entitlement, the T. Rowe Petitioners benefitted substantially from the valuation ruling and should not be permitted to escape their

obligation to pay expenses as a result of their having obtained clear benefits form Lead Counsel's representation.

DISCUSSION

10. With respect to the fee component of Fee & Expense Petition, the Magnetar Funds do not challenge the computation by which Lead Counsel arrived at its fee demand. Rather, the Magnetar Funds are willing to contribute toward that fee demand, but only after they are credited with offsets for having been required to engage their own counsel to look after their interests. Thus, for the reasons set forth in the Global Continuum Petitioner's Response and based on the authority cited therein, the Magnetar Funds needed their own counsel to address the very issue raised by this Fee & Expense Petition – namely, whether Lead Counsel should be permitted to offload the full brunt of its expenses on the surviving petitioners notwithstanding their relatively small make-up of the shareholder population that comprised this case. The Magnetar Funds thus needed their own counsel to protect their interests, while the T. Rowe Petitioners already had their own counsel – which was also Lead Counsel for the appraisal class -- acting in their best interests. Simply because the T. Rowe Petitioners did not need incremental counsel as did the Magnetar Funds does not mean that the Magnetar Funds should be forced to pay twice for legal representation.

11. In addition, as demonstrated in the pending motion for co-lead status, the Magnetar Funds provided meaningful assistance and advice in respect of the tax issues that ultimately proved to be a substantial component of the valuation uplift. In response to Lead Counsel's initial resistance to engaging a tax expert to more fully take on Respondent's assumptions concerning Dell's tax rate for purposes of the DCF valuation in this case, the Magnetar Funds actively pushed Lead Counsel to engage a tax expert, commented substantially on Respondent's tax expert report and also participated in the deposition of Respondent's tax expert (all the while notwithstanding Lead Counsel's generally dismissive responses to these efforts and its resistance in particular to allowing the Magnetar Funds even to examine that expert on a few discrete subjects). Accordingly, the Magnetar Funds should be credited for the counsel fees they were forced to incur to protect their interests in this matter.

12. With respect to the expense component of the Fee & Expense Petition, the Magnetar Funds object to Lead Counsel's unwarranted attempt to foist its entire expense obligation on the remaining 5.5 million shareholders while excusing the 31 million T. Rowe Petitioners' shares from any participation whatsoever in paying their pro rata share. The Magnetar Funds should not be forced to cover the full weight of Lead Counsel's expenses especially after Lead Counsel failed to right-size its expenses in proportion to the amount of Non-G&E Petitioners' stock

at issue in this case (and precisely as Lead Counsel promised to do during its July-August 2015 communications with the Magnetar Funds' counsel).

13. Accordingly, the Magnetar Funds respectfully request an Order (a) allowing them to deduct from the fee component of the Fee & Expense Petition a full dollar-for-dollar credit for the amount of attorneys' fees they were forced to incur in engaging their own counsel in this case; and (b) recalculating the expense component of the Fee & Expense Petition by (i) reducing those expenses attributable solely to the entitlement issue, and (ii) allocating such net expenses to the full shareholder census, including the T. Rowe Petitioners, on whose behalf Lead Counsel incurred such expenses; the net expenses should thus be allocated based on the amount of net expenses divided by the total number of approximately 36.5 million shares that had been in play in this case through trial (and settlement). In addition, Lead Counsel should not be paid out on any portion of its Fee & Expense Petition unless and until the Magnetar Funds have received the full amount of consideration plus interest to which it is entitled under the Court's fair-value determination pursuant to a final, non-appealable order.

PROCTOR HEYMAN ENERIO LLP

/s/ Samuel T. Hirzel

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Dated: July 1, 2016

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EXHIBIT A

THE MAGNETAR FUNDS' MEMORANDUM IN OPPOSITION TO PETITIONER MORGAN STANLEY DEFINED CONTRIBUTION MASTER TRUST'S MOTION FOR AN AWARD OF FEES AND EXPENSES PURSUANT TO 8 *DEL. C.* SECTION 262(J)

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July 23, 2015

VIA EMAIL AND FIRST-CLASS MAIL

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Re: In re Appraisal of Dell, Inc.

Dear Mr. Grant:

As you know, we represent the Magnetar funds in this proceeding. I am writing to follow up on our request that as lead counsel you facilitate an agreement among dissenting shareholders for a fair and reasonable allocation of costs and expenses. We believe that each dissenting shareholder should bear and pay for its proportionate share of expenses incurred until such time as the dissenting shareholder is determined to be ineligible have their shares appraised.

This issue is becoming ripe now as a number of the funds you represent face challenges with respect to their eligibility. Indeed, nearly a million shares were dismissed from the case last week (the "Dismissed T. Rowe Plaintiffs") over technical issues arising from their record ownership, yet there was no indication that these shares were assessed their proportionate share of the expenses which have been heretofore incurred and advanced. We believe it likely that the voting issue arising in connection with T. Rowe and the question of its continued entitlement to participate in these proceedings will soon be resolved. Although we understand that in your view the issue is unlikely to be resolved agaist T. Rowe, Magnetar is concerned that if it is resolved against T. Rowe, Magnetar might be left to shoulder a disproportionate share of the expenses for the expert witnesses.

During our telephone call last week, you advised me that expenses of between $2 and $3 million have been advanced largely to pay the costs of expert witnesses. However, our client has had no say in the selection of experts or the terms of their engagement or compensation. Indeed, G&E represents over 80% of the shares seeking appraisal (the "Lead Plaintiffs") including more than 30 million shares controlled by T. Rowe Price alone. Accordingly, the expenses incurred to date have been proportionate to the expected potential recovery of the Lead Plaintiffs, whose merger consideration alone is more than $400 million. Moreover, the Lead Plaintiffs have been and continue to receive the benefit of these expenses as they have been incurred in an effort to

advance the Lead Plaintiff's litigation position (whether the case is ultimately settled or litigated to a final decision). In any case, the expenses would clearly disproportionate if borne only by a significantly smaller shareholder group including Magnetar, who has less than 4 million shares. As you know, I emailed you on July 1, 2015 to raise this issue. In our follow-up telephone conversation, you indicated that you were not prepared to address this issue at this time. We continue to believe that failing to address the cost allocation issue at the present time could have a disproportionate impact on Magnetar as well as the other petitioning shareholders outside of your representation. Indeed, if this issue is only first addressed after an adverse ruling to T. Rowe, T. Rowe may well resist efforts to force it to pay its fair share of expenses.

Your unwillingness to address this issue is problematic and prejudicial to Magnetar. There should be a unity of interest on this issue, as all shareholders enjoy the benefit of the expert engagement until such time as they may be dismissed. Your unwillingness to address this issue creates unnecessary uncertainty and potentially allows the Dismissed T. Rowe Plaintiffs and the remaining Lead Plaintiffs to shirk their responsibility to pay their pro rata share of expenses incurred. We seriously question whether creating an avenue for your original client in this matter, T. Rowe, to shift their expense exposures to another set of dissenting shareholders has materially and adversely impacted your ability to continue to act as a representative of all petitioning shareholders.

We believe that coming to an agreement now, in writing, solves this issue and would not disadvantage anyone. Please let me know if you might be willing to reconsider this issue. We would certainly appreciate your efforts.

Very truly yours,

Lawrence M. Rolnick

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EXHIBIT B

THE MAGNETAR FUNDS' MEMORANDUM IN OPPOSITION TO PETITIONER MORGAN STANLEY DEFINED CONTRIBUTION MASTER TRUST'S MOTION FOR AN AWARD OF FEES AND EXPENSES PURSUANT TO 8 *DEL. C.* SECTION 262(J)

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August 10, 2015

VIA EMAIL AND FIRST-CLASS MAIL

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Re: In re Appraisal of Dell, Inc.

Dear Mr. Grant:

As you know, we represent the Magnetar funds in this proceeding. I am writing to follow up on our July 29, 2015 telephone conversation relating to my preexisting request that as lead counsel you facilitate an agreement among all dissenting shareholders, including T. Rowe Price, for a fair and reasonable allocation of costs and expenses. As I have stated before, we believe that each dissenting shareholder should bear and pay for its proportionate share of expenses incurred until such time as the dissenting shareholder is determined to be ineligible to have their shares appraised.

In our phone call, you stated that you believed the issue to be premature and declined to take it up with your clients or otherwise pursue the issue at this time. You informed me that to date, expert expenses totaled $1.6 million, but that the rebuttal reports and upcoming depositions caused you to expect the total to rise to between $2.5 and $3 million. These funds have been (and will continue to be) advanced by your firm. You also told me that you have not decided how much of the expenses that you will have advanced you will seek to have allocated to shareholders such as Magnetar who did not retain your firm (the "Non-G&E Shareholders"). You said that you would make that determination once you were able to gauge how much the expert expenses would cost each shareholder relative to the amount of any recovery. In particular, you said that you would not seek to assess expert expenses against the Non-G&E Shareholders if such expenses were too high relative to the amount recovered. As an example, you explained that if the "fair value" per share were determined to be only $2.50 per share above the merger price, $0.50 in expenses would be unreasonable, but if the determination was $12.50 per share, $0.50 would be reasonable. Accordingly, for this reason, you told me that you believe the issue to be premature.

Please confirm that my understanding of our discussion is correct as set forth above; I am inclined to recommend to my clients that they not proceed with motion practice on this issue at this time if indeed I have expressed herein your position accurately.

Very truly yours,

Lawrence M. Kolnick

7/23/15
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	)	C.A. No. 9322-VCL

CERTIFICATE OF COMPLIANCE WITH
TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This memorandum complies with the typeface requirement of Ct. Ch. R. 171(d)(4) because it has been prepared in Times New Roman 14-point typeface using Microsoft Office Word 2013.

2. This memorandum complies with the type-volume limitation of Ct. Ch. R. 171(f)(1) because it contains 2,061 words, which were counted by Microsoft Office Word 2013.

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Dated: July 1, 2016

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CERTIFICATE OF SERVICE

Samuel T. Hirzel, II, hereby certifies that on July 1, 2016, copies of the foregoing Magnetar Funds' Memorandum in Opposition to Petitioner Morgan Stanley Defined Contribution Master Trust's Motion for an Award of Fees and Expenses Pursuant to 8 *Del. C.* Section 262(j) were served electronically upon the following counsel:

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