

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

**RESPONDENT DELL INC.’S RESPONSE TO
PETITIONER CAVAN’S MOTION TO
CLARIFY AND ENFORCE ORDER APPROVING SETTLEMENT**

Respondent Dell Inc. (“Dell,” the “Company” or “Respondent”), by and through its undersigned counsel, responds to the motion (the “Motion”) filed by Petitioner Cavan Partners LP (“Cavan”) on October 14, 2016, for “clarification and enforcement” of the June 29, 2016, order approving settlement between Dell and the “Settling Petitioners,”¹ (Trans. ID 59210594) (the “Order”), as follows:

¹ The Settling Petitioners are T. Rowe Price Equity Income Fund, Inc. (Verified List No. 1), T. Rowe Price Science and Technology Fund, Inc. (Verified List No. 2), John Hancock Variable Insurance Trust - Equity Income Trust (Verified List No. 5), John Hancock Funds II - Equity Income Fund (Verified List No. 7), T. Rowe Price Equity Income Trust, a sub-trust of T. Rowe Price Institutional Common Trust Fund (Verified List No. 9), T. Rowe Price Institutional Equity Funds, Inc., on behalf of T. Rowe Price Institutional Large Cap Value Fund (Verified List No. 10), John Hancock Funds II - Science & Technology Fund (Verified List Nos. 13 & 39), T. Rowe Price Equity Income Series, Inc., on behalf of T. Rowe Price Equity Income Portfolio (Verified List No. 15), John Hancock Variable Insurance Trust - Science & Technology Trust (Verified List No. 18), Northwestern Mutual Series Fund, Inc. Equity Income Portfolio (Verified List No. 21), T. Rowe Price U.S. Equities Trust (Verified List Nos. 23 & 24), Prudential Retirement Insurance and Annuity Co., on behalf of Separate Account SA-5T2 (Verified List No. 26), T. Rowe Price Funds SICAV US Large Cap Value Equity Fund (Verified List No. 27), Manulife US Large Cap Value Equity Fund (Verified List No. 29), John Hancock Funds II - Spectrum Income Fund (Verified List No. 42), Tyco International Retirement Savings and Investment Plan Master Trust (Verified List No. 43), the Milliken Retirement Plan (Verified List No. 44), The

1. As required by 8 *Del. C.* § 262(k) and as reflected in the Order, Dell obtained the Court’s approval to settle this action with the Settling Petitioners. The Court had previously disqualified the Settling Petitioners from receiving the appraisal remedy and denied their application for an “equitable award of interest.”² In the Order, the Court expressly “determined that on the facts presented, there was no risk that the Settling Petitioners were abandoning the prosecution of the action to the detriment of the other [appraisal] class members. The Court further determined that Dell did not have to extend the same offer to appraisal claimants other than the Settling Petitioners and that lead counsel did not have to provide notice of the settlement to appraisal claimants other than the Settling Petitioners.” Order ¶ 2 (internal quotations and citations omitted). However, the Court did require “that the parties promptly inform counsel to the other appraisal claimants who have participated actively in this proceeding about the conference and the Settlement Agreement.” Order ¶ 3. Dell’s counsel advised counsel for the Magnetar petitioners of the settlement by telephone on June 27, shortly after the teleconference with the Court; Magnetar’s counsel declined to participate in the settlement on the same terms as the Settling Petitioners.

Bureau of National Affairs, Inc. (Verified List No. 45), and Curtiss-Wright Corp. Retirement Plan (Verified List No. 50).

² The Settling Petitioners moved on May 18, 2016, for an equitable award of interest. Trans. ID 59029392. Dell opposed the motion on May 23, 2016. Trans. ID 59043091. On May 31, 2016, the Court entered an order denying the motion for equitable interest. Trans. ID 59072456.

2. Cavan was aware of the hearing and the settlement no later than mid-day on June 28, 2016. *See* Lutin Aff., Ex. 1. The transcript of the June 27 hearing was available on July 12, 2016. Trans. ID 59264897. Cavan has been expressly offered the opportunity to settle for the same \$14.63 per share that the Settling Petitioners accepted, and has declined to do so. *See* Lutin Aff., Ex. 6. Cavan's Motion does not seek to accept a settlement on those terms. Instead, Cavan implicitly invites the Court to modify retroactively its approval of the dismissal of the Settling Petitioners and to order Dell to offer to settle with other petitioners and claimants, potentially on different terms. No basis in 8 *Del. C.* § 262 or in equity exists for that request.

3. The central premise of Cavan's Motion is that the terms of agreement between Dell and the Settling Petitioners were a trade of approximately 88 cents per share for a waiver of appeal rights. Motion at 7. Cavan acknowledges that different petitioners and claimants have different potential arguments on appeal, but asserts that this "difference does not matter," because all petitioners and claimants have the ability to seek "similar" relief from the Supreme Court, "a higher award than that which the Court awarded to each claimant based on the law and the facts." Motion at 10-11.

4. Appraisal litigation does not work that way, any more than any other litigation does. The numerous claimants and petitioners in this matter are

differently situated with respect to appellate rights, and different potential arguments on appeal have different values.

5. The Settling Petitioners had (and have released through the settlement approved by the Court) two potential appeal issues that neither Cavan nor any other petitioner or claimant has, to wit, (1) the claim that the Court erred in its May 11, 2016, opinion, which disqualified certain petitioners from the appraisal remedy based on their shares having been voted in favor of the merger,³ and (2) the claim that the Court erred in its May 31, 2016, order denying the Settling Petitioners an “equitable award of interest.” Those potential contentions on appeal have a different value than those belonging to petitioners or claimants who may contend that the continuous ownership decision was incorrect, or that their disqualification on other grounds (such as untimely demand, failure to make a demand signed by a

³ As Cavan’s Motion notes, several of the Settling Petitioners had been disqualified previously based on failure of their nominee stockholder of record to maintain record ownership continuously from the time of demand through the completion date of the merger. However, as Dell’s papers on the voting issue pointed out, all five of those petitioners also had shares that had been voted in favor of the merger. *See* Respondent Dell Inc.’s Brief in Support of Motion for Partial Summary Judgment as to Petitioners Who Voted in Favor of the Merger, filed July 30, 2015, Trans. ID 57633321, at 1 n.1 (identifying petitioners whose shares were voted in favor of the merger), 3-4 n.3 (noting that petitioners identified on the Verified List as Nos. 21, 27, 29, 44 and 50 had been disqualified previously, but that the record nevertheless reflected that their shares had been voted in favor of the merger). The Court’s decision on the voting issue had no need to, and did not, discuss the petitioners who had previously been disqualified on that basis. However, if petitioners were to succeed on appeal on the continuous ownership issue but not on the voting issue, those petitioners would still be barred from the appraisal remedy.

stockholder of record, sale of shares before the merger or acceptance of the merger consideration) was incorrect, or that the Court's valuation decision was too low. The Settling Petitioners were subject to unique defenses and were uniquely situated.

6. The Court possesses, and in this case exercised, the discretion under the statute to condition dismissal of an appraisal claim as to any petitioner on "such terms as the Court deems just." 8 *Del. C.* § 262(k). Cavan's Motion essentially asks the Court, more than three months after the fact, to revisit the terms on which it approved dismissal of the Settling Petitioners.

7. The Court in June did not condition its approval of dismissal of the action as to the Settling Petitioners on extension to other claimants of an offer to settle for 88 cents per share in exchange for a waiver of appellate rights.⁴ Compare Motion at 8. Indeed, the Court did not even condition its approval on an extension of an offer to other claimants and petitioners to settle for the approximately \$14.63

⁴ Cavan's suggestion that the written settlement agreement may possibly entitle the Settling Petitioners, not to approximately \$14.63 per share, but to the amount to which the Settling Petitioners have been adjudged entitled, plus approximately 88 cents per share, has no basis. That would be an extraordinarily strange way to construct a settlement agreement. Although the Court may have the power under Section 262(k) to condition a respondent's ability to settle with one set of petitioners for a specific amount on its willingness to settle with another, differently situated set of petitioners for a greater amount, that would be an unusual exercise of the Court's discretion, to say the least. In the event the Court is concerned about the wording of the settlement agreement, Dell is willing to provide the agreement to the Court for *in camera* review, but does not believe that there is any reason to provide that agreement to Cavan or its counsel.

per share that Dell paid to the Settling Petitioners. The discussion on the record at the June 27 teleconference reflects that the Court initially was inclined to direct Dell to offer the same approximately \$14.63 per share to the claimants and petitioners who have *not* been disqualified from the litigation, but decided not to do so based on a determination that those claimants and petitioners would be better off economically even if the valuation decision were reversed on appeal and a new valuation entered at the level advocated by Dell. On the basis of that determination, the Court did not require the settling parties to provide notice of the settlement to anyone other than “counsel to the other appraisal claimants who have participated actively in this proceeding.” Order ¶ 3.

8. As the Court wrote in the Order, the requirement of court approval for a settlement of an appraisal claim “ensures that a shareholder does not settle out of the [appraisal class] at a premium, thereby abandoning prosecution of the action to the detriment of other class members.” Order ¶ 1 (quoting *Ala. By-Products Corp. v. Cede & Co.*, 657 A.2d 254, 260 (Del. 1995)). That rationale simply does not implicate the interests of non-settling claimants and petitioners who have received individualized notice and an opportunity to establish their entitlement to the appraisal remedy and have been determined not to be entitled. Those claimants and petitioners, having been dismissed from the case, are no longer members of the “appraisal class,” notwithstanding their appellate rights once a final judgment is

entered. The Court's focus at the June 27 teleconference on the fairness of dismissal of the Settling Petitioners as to those claimants and petitioners who are entitled to the appraisal remedy, to the exclusion of claimants and petitioners previously dismissed, was appropriate. That is true especially given that the Court has now made a post-trial adjudication of fair value, decided Lead Counsel's motion for an award of fees and expenses, and directed the parties to submit a final order.

9. Cavan's Motion suggests that the Court's June 29 Order is unclear as to "scope ... with regard to non-settling claimants, both eligible and ineligible." Motion at 11. On the contrary, the Order is perfectly clear. The Court did not direct any notice to non-eligible claimants, and directed notice only to counsel for eligible claimants "who have participated actively in this proceeding." Order ¶ 3. That notice was given and those petitioners (unsurprisingly) expressed no desire to participate in the settlement on the same terms.

10. Cavan further suggests that, "[i]f the Court did not intend that every claimant with the right to appeal should receive notice and an offer [to settle on the same terms offered to the Settling Petitioners], it would be useful to clarify that point as well as to address why the three claimants determined ineligible for the same non-continuous ownership reasons as Lead Counsel's clients (and possibly others) do not have rights to the same offer." Motion at 12. Again, Dell does not

believe that any “clarification” is necessary, but notes that the three specifically identified claimants -- identified on the Verified List as Nos. 19, 28 and 37 -- were dismissed on the basis of failure of continuous ownership, but were not subject to Dell’s motion with regard to shares voted in favor of the merger.⁵ In that respect, they are differently situated than the five Settling Petitioners who were first dismissed for failure of continuous ownership, but were also subject to dismissal due to their shares having been voted in favor of the merger.

11. The settlement that the Court approved took a potential appeal of the voting issue off the table, while potentially leaving appeal of the continuous ownership decision alive as to certain claimants. The settlement also took off the table a potential appeal of the Court’s decision to deny an “equitable award of interest” to the Settling Petitioners. The Court was well within its discretion to conclude that approval of the settlement without notice to any claimants other than active participants in the litigation was appropriate. There is no basis to revisit that decision. Cavan’s Motion should be denied.

⁵ In addition, these three claimants surrendered their stock certificates and accepted the merger consideration after the Court issued its decision disqualifying them from the appraisal class.

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