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Case No. 9322-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE APPRAISAL OF DELL, INC. :
: Consol. C.A. No. 9322-VCL
: Public Version Filed May 21, 2018

THE MAGNETAR FUNDS'
OPPOSITION TO G&E'S EMERGENCY
MOTION FOR ENTRY OF CHARGING LIEN

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") hereby oppose Grant & Eisenhoffer, P.A.'s ("G&E") Emergency Motion for Entry of Charging Lien (the "Motion").

1. On October 29, 2013, Dell completed the relevant going-private merger (the "Merger").

2. Holders of more than 38,000,000 shares served demands for appraisal from the Merger price of $13.75 per share.

3. Holders of 36,704,337 of the shares demanding appraisal filed 13 appraisal petitions. 87% of those 36,704,337 shares -- or 32,012,405 total shares (approximately $440 million in Merger consideration) – directly engaged G&E. 30,730,930 of those shares were held by petitioners affiliated with T. Rowe Price (the "T. Rowe Shares") and constituted nearly 80% of the initial appraisal class.

4. Shares held by the Magnetar Funds constituted only 10.5% of the initial appraisal class (3,865,820 shares), representing approximately $53 million in Merger consideration.

5. On April 10, 2014, the Court entered a Consolidation Order appointing G&E as "Lead Counsel.

6. G&E represented T. Rowe (and its other direct clients) on a contingency fee basis, and agreed to advance expenses on their behalf, with a conditional right to reimbursement of "all out of pocket expenses." (Exhibit A). The engagement letter provided that "[e]xpenses will be deducted from the Client's portion of the recovery on a per share basis" and that the Client would "owe ***no fees*** and ***no reimbursement of expenses***" if G&E could not secure a recovery above the $13.75 Dell merger consideration. (*Id.*) (emphasis added) The engagement letter further provided that "[a]ny award of interest will follow principle [*sic*]. Thus, there is ***no fee*** on any interest that is attributable to the first $13.75 of any appraisal award." (*Id.*) (emphasis added). As G&E put it in August 30, 2016 reply brief (p. 5): "G&E's retainer does not permit it to charge appraisal action expenses to [T. Rowe], because [T. Rowe] did not obtain a recovery in the appraisal action against which such expenses could be charged."

7. In early May 2015, it was revealed that T. Rowe -- through its holder of record -- voted its shares in favor of the Merger. G&E had known about this issue

for months but failed to disclose it to the Magnetar Funds or the Court. Instead, the Magnetar Funds learned about this landscape-shifting information through the press and Dell's letter to the Court. On July 30, 2015, following discovery, Dell moved for partial summary judgment against T. Rowe based on its failure to dissent. T. Rowe's revelation immediately imperiled the appraisal rights of the 30,730,930 T. Rowe Shares (approximately 83% of the class).[1] Nonetheless, faced with challenges to G&E's status as lead counsel, G&E and Dell agreed to postpone adjudication of the failure to dissent motion until after trial.

8. The Magnetar Funds repeatedly attempted to address the fallout caused by T. Rowe's entitlement debacle by approaching G&E about the allocation of expenses if the T. Rowe Shares were disqualified. (Exhibits B & C). G&E refused to engage, but assured the Magnetar Funds that it would not seek to assess expenses against non-G&E petitioners if such expenses were too high relative to any uplift awarded as fair value.

9. On October 5, 2015, G&E commenced trial on behalf of the then-extant appraisal class, which at that date comprised 36,236,660 shares.

10. After trial, on May 11, 2016, the Court found that T. Rowe's 30,730,930 shares were not entitled to appraisal. This decision reduced the appraisal

[1] In a series of rulings the Court dismissed additional shares from the appraisal class.

class to just 5,505,730 appraisal-eligible shares. The Magnetar Funds became the largest single remaining group of petitioners.

11. On May 31, 2016, the Court appraised Dell at $17.62 per share-- a $3.87 per-share premium over the Merger consideration (the "Valuation Opinion").[2]

12. Notwithstanding the Magnetar Funds' position as the largest remaining petitioners, G&E continued to run the case without seeking their input on its positions, and declined to keep the Magnetar Funds apprised of developments in the case. At the same time, G&E continued to represent the interests of T. Rowe and negotiated a settlement pursuant to which T. Rowe received $28,000,000 of interest that it would not have otherwise received. Although G&E had assured the Magnetar Funds and the Court that it would advise the Magnetar Funds of any settlement discussions (9/28/15 Tr. at 11), the Magnetar Funds learned about this settlement (effective June 29, 2016) only through a July 5, 2016 Form 8-K.

13. On June 2, 2016, G&E's sole remaining direct client filed a fee and expense petition on behalf of G&E to have the remaining 5.5 million shares in the case: (a) reimburse G&E's expenses; and (b) contribute their ratable portion of G&E's fees.

[2] Had the T. Rowe Shares qualified for appraisal, that premium would have been nearly $119 million, entitling G&E to a fee of more than $20 million from T. Rowe alone.

14. G&E sought a fee award of $3,964,125.60, premised on extending the formula set forth in its contingency fee agreement with T. Rowe to the uplift awarded to the other petitioners. The Magnetar Funds did not oppose this portion of the petition.

15. More egregiously, however, G&E attempted to foist the full $4,007,462.08 in expenses that had been incurred on behalf of a much larger appraisal class (including G&E's T. Rowe clients) on the remaining appraisal class.[3] The Magnetar Funds opposed this portion of the petition.

16. On June 6, 2016, the Magnetar Funds identified a possible computational error in the Valuation Opinion. While they were deliberating internally over how to raise it with the Court, G&E filed its own motion to alter or amend the Opinion without soliciting the Magnetar Funds' input or advising that it intended to file such a motion.

17. On October 17, 2016, the Court granted G&E's fee and expense petition extending G&E's contractual contingency fee structure to non-signatories and refusing to reduce the expenses payable by the remaining petitioners in light of T.

[3] G&E originally demanded reimbursement for $4,035,787.18 in expenses. After the Magnetar Funds challenged the amount sought, G&E reduced its demand to $4,007,462.08 by purporting to remove expenses incurred in connection with T. Rowe's entitlement issues.

Rowe's involvement in and direction of the case through trial. (the "Expense and Fees Decision")

18. On December 14, 2017, the Delaware Supreme Court issued its opinion reversing and remanding both the Valuation Opinion and the Expense and Fee Decision. (the "Appeal Opinion")

19. The Supreme Court found that the trial court's "allocation [of Expenses in the Expense and Fee Decision] was inequitable and cannot stand" and noted that "the trial court surely had the capacity to craft a reasonable and equitable solution – one that takes into account T. Rowe's relationship with Lead Counsel, their control of the litigation, and the reciprocal benefits they obtained as a result." (Appeal Opinion at 81)

20. The Supreme Court declined to dictate the precise manner in which the Expense allocation should be reduced but it noted that the trial court "must make a reasoned and sizeable reduction to those awarded against the shares entitled to appraisal to account for the fair share T. Rowe should have borne, but that Lead Counsel failed to seek from it. To the extent Lead Counsel wished to cut T. Rowe a break, it should not have done so against the other petitioners to whom it owed a fiduciary duty as Lead Counsel." (*Id.* at 81)

21. The Supreme Court further took the extraordinary step of granting, *sua sponte*, the Magnetar Funds "leave to seek a reasonable fee from the other petitioners

who benefit from its efforts to reduce the expense award against the shares entitled to appraisal." (*Id.* at 81) G&E's overreaching was not lost on the Supreme Court.

22. On May 8, 2018, the Magnetar Funds and Dell finalized a Settlement Agreement pursuant to which Dell agreed to pay $13.75 per share plus interest at the statutory rate -- a merger-price-plus-interest payout, with no premium or uplift. Dell informed the Court of this development later that evening.

23. On May 9, 2018, the Court held a status conference on the remand proceedings. Notwithstanding Mr. Grant's musings about maneuverings behind his back at the conference, the Magnetar Funds were not obligated to inform him of their discussions. Indeed, at an earlier hearing in this action Mr. Grant noted that the Magnetar Funds were free to settle on their own, independently of lead counsel:

> I don't know if Mr. Hecht knows Mr. Hendershot. I'd be happy to introduce the two of them. If he wants to settle for his clients, this is not a class action…. If he wants to talk to Mr. Hendershot – [to Mr. Hecht] that's the gentleman sitting at the table right behind you – and wants to settle his case, more power to him…. If Mr. Hecht wants to settle his case, he should talk to Mr. Hendershot and let's get that piece out of the way. I'm not stopping him from settling his case.

(9/28/15 Tr. at 10-11 & 17).

24. On May 9, 2018, Mr. Grant called Mr. Hecht and asked him what the terms of the settlement with Dell provided and asked that Mr. Hecht get back to him in the next day or two.

25. Without waiting for a response or further notice to the Magnetar Funds, G&E filed the Motion later that evening.

ARGUMENT

26. Delaware law recognizes attorney charging liens, but such a lien is not available here.

27. G&E's self-styled "Emergency Motion" effectively seeks preliminary injunctive relief in aid of a future fee and expense award based on a yet to be determined valuation. G&E is thus seeking a preliminary order regarding amounts it *claims* that it will seek at a later date. There is clearly no "emergency." In these circumstances, G&E must make the showing necessary for any injunctive relief: (a) a demonstration of a probability of success on the merits; and (b) a showing of irreparable harm. *See Eby v. Schrock Family Corp.*, 1996 WL 422331, at *2 (Del. Ch. July 12, 1996). G&E has not made this showing.

28. G&E has not demonstrated that it is entitled to the requested charging lien. First, 8 *Del. C.* 262(j) permits "a stockholder" – not a law firm – to apply for an order for apportionment of fees and expenses against the appraisal class. G&E is

not a stockholder and does not have standing to make a fee and expense application under the statute.

29. Second, "black-letter law on charging liens suggests that a fee agreement between the attorney and the client is a prerequisite" to the granting of a charging lien. *Zutrau v. Jansing*, 2014 WL 7013578, at *2 (Del. Ch. Dec. 8, 2014), *aff'd*, 123 A.3d 938 (Del. 2015) (citing 7A C.J.S. Attorney & Client § 446 ("In order to give rise to a lien, a valid and enforceable contract for a fee must exist. Accordingly, when an attorney's fee agreement is unlawful, the attorney has no lien for services performed pursuant to that agreement.") (footnote omitted); 7 Am.Jur.2d Attorneys at Law § 317 (West 2014) ("It is necessary to the existence of the lien that there be a valid contract for fees, either express or implied, entered into between the attorney and the client.")). There is no such agreement between G&E and the Magnetar Funds. Moreover, no fee award has been entered since the Supreme Court's reversal and remand of the Court's prior Valuation Opinion and G&E has not identified any cases supporting a charging lien anticipating a future fee petition or under quasi-contractual theory. Similarly, to the extent that fee awards could be warranted under the "fund in court" doctrine, there is no such fund in court created here, where nothing more than the Merger price plus statutory interest was recovered. Accordingly, no charging lien is available to G&E.

30. Third, in its engagement letters with direct clients, G&E accepted the risk of non-recovery in exchange for a healthy premium if it was successful. (Exhibit A). G&E advanced a fee petition extending its contractual contingency fee arrangement to non-signatories. The Court accepted G&E's arguments. That contingency fee arrangement specifically provided that "If there is no recovery above the $13.75 merger consideration, [the client] will owe no fees and no reimbursement of expenses." (*Id.*). G&E cannot now reverse course and seek to recover its fees on a new theory. To alter the agreed-upon risk calculus in the fee arrangement would "eliminat[e] the risk that serves as the rationale for awarding fees" to G&E in the first place. *Chappaqua Family Tr. v. MGM/UA Commc'ns Co.*, 1997 WL 33173285, at *2 (Del. Ch. July 10, 1997). Having freely entered into such a fee arrangement, G&E clearly knew that there was a risk that it would receive nothing. G&E should be held to its bargain. And under the bargain that G&E struck with its clients -- and asked this Court to impose on non-signatories to its contingency fee arrangement when it was beneficial to G&E -- G&E is not entitled to attorneys' fees on the settlement between Dell and the Magnetar Funds for merely $13.75 per share plus statutory interest.

31. Fourth, statutory interest is compensatory -- not a benefit that G&E created for the benefit of the Magnetar Funds. It would not serve as a basis for a fee petition even if G&E were entitled to it under its contingency fee agreement with its

contractual clients. The Magnetar Funds have not had the use of their capital since October 2013. The Magnetar Funds, as involuntary clients, should not be in a worse position than G&E's contractual clients in connection with any fee petition.

32. Even if G&E were somehow entitled to a reserve for the Magnetar Funds' pro rata portion of G&E's expenses, G&E's request for a reserve of at least $5 million is far out of proportion to any amount G&E could reasonably expect to recover, especially given the Magnetar Funds' Merger price recovery, without any uplift. First, G&E did not provide any factual support for the amount of the requested lien. The Motion should be rejected on that basis alone. Second, the Magnetar Funds previously objected to G&E'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 Delaware Supreme Court agreed with the Magnetar Fund's position in reversing this Court's prior Expense and Fee Decision, and directed this Court to make a "reasoned and sizeable reduction to those [expenses] awarded against the shares entitled to appraisal to account for the fair share T. Rowe should have borne." Appeal Opinion at 82. Even assuming for the sake of argument that G&E's expenses are now up to $4.2 million, when those expenses are allocated across the 36,236,660 shares that were seeking appraisal at the time of the trial in

this action, it results in expenses of 11.6 cents per share. The Magnetar Funds' *pro rata* share of those expenses for its 3,865,820 shares would thus be $448,066.79.

33. Nor can G&E demonstrate irreparable harm. There is no evidence before the Court that the Magnetar Funds are judgment proof or why they should otherwise be subject to the extraordinary remedy of a charging lien. G&E has not made (and cannot make) any showing that the Magnetar Funds would be unable to satisfy a monetary judgment if the Court were to assess a portion of the expenses against it based on a future expense application – much less that they would be unable to satisfy a monetary judgment of approximately $450,000 when those expenses are allocated across the full appraisal class that G&E represented at trial or as otherwise allocated based on the Delaware Supreme Court's guidance.

34. Had G&E awaited the Magnetar Funds' response before filing the Motion, it would have learned that the Magnetar Funds were prepared to consent to the Court's continuing jurisdiction over them in connection with any valid fee and expense application. Moreover, pursuant to the Delaware Supreme Court's ruling, the Magnetar Funds are entitled to file a fee and expenses petition of their own for their defense of the appraisal class in the face of G&E's earlier overreaching. (Appeal Opinion at 82)

35. The balance of hardships tilts decidedly in favor of the Magnetar Funds. They were forced to accept representation that they did not choose. They were

forced to employ additional counsel of their own to address a very real conflict with G&E's direct clients. Even after they became the largest remaining petitioner in this case, they were not provided the information or opportunity to participate in the case that a client of a law firm should expect. They were held to a contingency fee arrangement that they had rejected when it was presented to them. They were forced to expend substantial fees to protect their interest and to counter G&E's repeated overreaching to advance the interest of T. Rowe and G&E. They were accused publicly -- by counsel owing them fiduciary duties -- of stabbing that counsel in the back by settling without his knowledge – when he had previously admitted on the record that they were free to do so. They are now forced to respond to yet another attempted overreaching by G&E when there is no suggestion that they could not or would not pay any expenses that the Court elects to assess against them.

36. The Motion should be denied.

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