

Proceeding Without Resolving Conflicting Interests in Dell Appraisal

At a hearing yesterday, the Delaware Court of Chancery denied the Magnetar Funds' motion to give them control of Dell appraisal case. The court also decided to proceed with the trial of valuation next week, on October 5, according to the December 16, 2014 scheduling order that had been established before the voting "discrepancy" issues of lead counsel's primary clients were revealed,¹ without first determining whether those clients are entitled to appraisal.

According to the hearing, this will be the first time the Delaware Chancery Court has proceeded with an appraisal valuation before determining the entitlement of petitioners. All of the petitioners not represented by counsel for T Rowe Price had supported resolving the entitlement issues before proceeding, even if they did not support Magnetar's proposed control of the case, to eliminate conflicts of interest one way or another.² However, the court decided that it could rely upon the personal integrity of lead counsel's senior partner to diligently represent the interests of the unchallenged claimants rather than his firm's primary clients, and that a disruption of the trial schedule was therefore unjustified.³

Please let me know if you have any questions about your interests in the Dell case.

GL – September 29, 2015

Gary Lutin
Chairman, The Shareholder Forum
575 Madison Avenue, New York, New York 10022
Tel: 212-605-0335
Email: gl@shareholderforum.com

¹ See [May 3, 2015 USA Today: "Money manager hits awkward snag in Dell buyout case"](#); see also [May 18, 2015 USA Today: "Dell moves to boot T. Rowe from appraisal case"](#) and the subsequent [July 30, 2015 \(public version of brief filed August 6, 2015\), In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Respondent Motion for Partial Summary Judgment as to Petitioners Who Voted in Favor of the Merger](#).

² See [September 16, 2015 Forum Report: Progress of Proposal to Revise Management of Dell Appraisal Case](#).

³ See [September 28, 2015, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Oral Argument on Magnetar Funds' Motion for Appointment as Co-Lead Petitioners and Rulings of the Court](#).

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. 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Monday, September 28, 2015
2:00 p.m.

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

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ORAL ARGUMENT ON CROSS-MOTION FOR APPOINTMENT AS
CO-LEAD PETITIONERS and RULINGS OF THE COURT

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0523

1 APPEARANCES:

2 STUART M. GRANT, ESQ.
3 MICHAEL J. BARRY, ESQ.
4 Grant & Eisenhofer, P.A.
5 for Lead Petitioners

6 SAMUEL T. HIRZEL II, ESQ.
7 Proctor Heyman & Enerio LLP
8 -and-

9 STEVEN M. HECHT, ESQ.
10 of the New York Bar
11 Lowenstein Sandler PC
12 for Petitioners Magnetar Capital Master Fund
13 Ltd, Magnetar Global Event Driven Master Fund
14 Ltd, Spectrum Opportunities Master Fund Ltd,
15 and Blackwell Partners LLC

16 JEREMY D. ANDERSON, ESQ.
17 Fish & Richardson P.C.
18 for Petitioner Cavan Partners LP

19 JOHN D. HENDERSHOT, ESQ.
20 Richards, Layton & Finger, P.A.
21 for Respondent Dell Inc.

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1 THE COURT: Welcome, everyone.

2 ALL COUNSEL: Good afternoon, Your
3 Honor.

4 MR. HIRZEL: Your Honor, Sam Hirzel.
5 Today I'm here on behalf of the Magnetar Funds. We
6 also submitted a short letter on behalf of Global
7 Continuum and Blackwell Partners. With Your Honor's
8 permission, Mr. Hecht will make the presentation
9 today.

10 THE COURT: That's fine.

11 MR. HECHT: Thank you, Your Honor.
12 Good afternoon.

13 THE COURT: Good afternoon.

14 MR. HECHT: Steve Hecht for the
15 Magnetar Funds. So, Your Honor, we find ourselves in
16 the unenviable position of having to burden Your Honor
17 and all counsel here with the motion that we've put
18 before Your Honor. But we thought we had no choice,
19 both with respect to timing and with respect to the
20 substance of what we're requesting.

21 And to be clear, Your Honor -- and I'm
22 aware that Your Honor's familiar with the papers -- we
23 are not -- we are looking to minimize any disruption
24 with respect to the relief we're seeking. We do not

1 want the G&E firm to go away. And this is really not
2 about the lawyers, after all.

3 Let's look at the clients. There's a
4 question about the entitlement of the lead petitioners
5 to some 30-plus million shares that they are in
6 possession of that may ultimately be found not to be
7 entitled to proceed. If they are not entitled to
8 proceed, the Magnetar Funds are the next largest
9 stakeholder, and under the Hurd factors, that gives
10 them as great an economic stake as any party would
11 have after the T. Rowe claimants.

12 So that's why we're here. We had
13 always been hopeful we could work cooperatively under
14 the consolidation order and not have to burden Your
15 Honor or disturb G&E with the prosecution of the case,
16 but we're here today because we feel we just had no
17 alternative.

18 There was an argument raised in the
19 Cavan submission that we found interesting, that I'll
20 underscore. If there's a question about -- look, no
21 one is here to question the ability and the
22 wherewithal of the lead counsel. But when it comes to
23 the lead petitioners, the shareholders themselves,
24 they have, as a theoretical matter, they have a

1 conflict insofar as they are subject to losing
2 entitlement and they're looking over their shoulder at
3 their own investors. There's an inference in the Dell
4 summary judgment motion that they acted negligently or
5 improperly in some way in handling the voting of the
6 Dell shares. And if they're looking back over their
7 shoulder worrying about their exposure to their own
8 investors, they actually have what I'll call a
9 perverse incentive to minimize, not maximize, the
10 recovery in the appraisal class.

11 It sounds counterintuitive, it sounds
12 strange, but that theoretical possibility is what
13 troubles our clients possibly most of all, in thinking
14 that they're not -- there's some difference between
15 how they view the case and what they expect and what
16 the T. Rowe petitioners might be thinking of. And
17 again, looking purely at the status of the parties,
18 putting aside the lawyers, that's what troubles them
19 possibly the most.

20 To a degree, I have to express some
21 discomfort in standing here pressing the motion. On
22 the train ride down, I kept thinking of the
23 presidential primaries where people in one party are
24 taking shots at each other and making arguments, and

1 this is all to the delight and for the consumption of
2 the other party. We don't want to be doing that. We
3 don't want to be disruptive. We're in one boat here,
4 all of us in the front of the room. And it's because,
5 though, we have concerns about how this ship will be
6 steered. Again, not because of any lack of abilities
7 on the part of lead petitioner, but given the position
8 the petitioners themselves are in is why we press the
9 motion.

10 You'll see -- Your Honor has in the
11 papers before him some examples of substantive issues.
12 I don't want to go too down in the weeds and really
13 trot that out. They're rehearsed in the papers.
14 There are other issues, I think none of which really
15 merit attention.

16 But if I can raise one substantive
17 issue that's another great concern for our clients,
18 that is a settlement process and a settlement
19 dialogue. We are very fearful that even if there's no
20 discussion under way today, there may be a discussion
21 initiated later today -- literally later today or
22 tomorrow, or later this week -- sometime prior to or
23 during the start of the trial. That concerns us,
24 because we're out of the room. The G&E claimants are

1 the only ones in the room. We're not even aware of
2 the discussion going on. And given the purported
3 conflict I just discussed, there's a scenario where --
4 a very real scenario -- where the incentives for the
5 lead petitioner are very different in responding to a
6 settlement overture than what our clients would view
7 as a good settlement overture or not.

8 And whether or not there's resolution
9 of a settlement discussion, we just need to know if
10 there is one, and we want to be in the room. And our
11 biggest concern to date is being out of the room.

12 So I don't wish to burden Your Honor
13 further. That's our set of concerns.

14 THE COURT: Okay. Thank you.

15 MR. GRANT: Good afternoon, Your
16 Honor. I thought it was great that Mr. Hecht
17 mentioned the political primaries. I was smiling at
18 that, because I thought about one going back, I guess
19 it was, about 35 years ago, with the little woman who
20 would come up and say, "Where's the beef," and how
21 Ronald Reagan used that. I think it was Reagan, going
22 back there. Because that's what I'm trying to figure
23 out: Where's the beef?

24 So there is no conflict. And we said

1 in our brief, you know, there is no conflict. And
2 what I got back was, well, you know, there could be a
3 conflict because the appraisal is very strict and you
4 have to go by the rules and -- Your Honor knows where
5 I'm going, because Your Honor knows the statute as
6 well or better than I do. And we've got a quote to
7 the statute that says you're supposed to do the
8 entitlement first. But one of the things, if you're
9 going to practice in Delaware, that you need to do is
10 actually read the entire statute. Which says "Upon
11 application by the surviving or resulting corporation
12 or by any stockholder entitled to participate in the
13 appraisal proceeding, the Court may, in its
14 discretion, proceed to trial upon the appraisal prior
15 to the final determination of the stockholders
16 entitled to an appraisal."

17 So, you know, no doubt that an issue
18 was raised, and it was raised back in May. And they
19 didn't do anything about it. And my friends on the
20 defense side decided they'd move for summary judgment,
21 I think it was in late July. So Mr. Hecht had two and
22 a half months to say, "Hey, what's going on? You
23 know, I don't feel like you guys should be
24 appropriately out there by yourselves." But he

1 doesn't.

2 So the defendants raise this issue.
3 We sit down with the defendants and say, "Look, you
4 know, it's going to require some discovery. It's
5 going to -- other stuff. We've all prepared for
6 trial. No problem." We put this off. So there is no
7 conflict here. Unless you believe that the folks at
8 T. Rowe -- which is what they want you to believe, I
9 guess. This wasn't even raised in the papers. This
10 is a new theory -- that the folks at T. Rowe have an
11 incentive to minimize recovery, and so they're going
12 to tell me -- and this is personal about the
13 lawyers -- to take a dive. Don't put on the best case
14 you can. Don't try to maximize the recovery. But
15 take a dive, because it's possible that you would lose
16 the entitlement hearing several months down the road,
17 and if there's a bigger number obtained, then somehow
18 the damages against you for negligence that they've
19 brought up, or something, will be that.

20 So rather than trying to get the
21 largest possible amount because that would be good for
22 everyone, and it would be good for my clients when we
23 show that we are entitled to it, they think that the
24 client's going to take a dive, and that I would listen

1 to that and take a dive. That's why this has become
2 somewhat personal.

3 THE COURT: So let me ask you about
4 this. That doesn't really make sense to me, but I
5 guess the different concern, that isn't quite as
6 conspiratorial, would be that your folks, the T. Rowe
7 folks, know that there's at least some risk that they
8 might lose on entitlement. And so if they think that
9 there is some risk in that, they're going to discount
10 the case slightly more than somebody who wouldn't view
11 that risk. So if you are having settlement
12 negotiations, your folks might be inclined to take a
13 lower number than your friends, and so there would be
14 a divergence in that regard.

15 MR. GRANT: Well, yes. But not in the
16 trial. So let's talk about that. First, if -- I
17 don't know if Mr. Hecht knows Mr. Hendershot. I'd be
18 happy to introduce the two of them. If he wants to
19 settle for his clients, this is not a class action.

20 THE COURT: Right.

21 MR. GRANT: This has to be tried
22 together, but even if I was willing to take X, or my
23 clients were willing to take X, I can't drag him
24 along. And if he were willing to take Y, he can't

1 drag my clients along.

2 If he wants to talk to
3 Mr. Hendershot -- that's the gentleman sitting at the
4 table right behind you -- and wants to settle his
5 case, more power to him. We'll continue on with the
6 trial on Monday. And if -- first of all, there are no
7 settlement discussions, but if I got one, I would let
8 Mr. Hecht know. It would only make sense, because I
9 can't drag his clients along and he can't drag mine
10 along. And it would not be irrational, if this could
11 settle for X, for my clients to take a small haircut
12 on X because, obviously, there is a risk, and we might
13 value that differently. And I'd have no problem with
14 that, and that's fine. And I kind of assumed that's
15 why, you know, he made an appearance whenever he did
16 and said, you know, "I'm here, so -- if we talk about
17 settlement discussions."

18 But you can't have two people drive
19 the same bus. And that was extremely frustrating, to
20 all of a sudden see him pop up out of nowhere at a
21 deposition and, after I spend seven hours on what I
22 thought was a very effective deposition -- but Your
23 Honor will have to decide how we turn that into
24 cross-examination -- to start talking about bizarre

1 things that have nothing to do with anything.

2 And my fear is, if he's made cocounsel
3 now -- I mean, bad enough sometimes when I have a
4 co-counsel who, in front of Your Honor, starts having
5 a little pushing contest in front of the podium as to
6 who is going to get the last ten minutes. They
7 haven't been at any of the depositions. They haven't
8 worked with the experts. They haven't done anything.
9 I mean, the idea that all of a sudden they're going
10 to -- one of two things is going to happen: Either
11 they're going to say, "You know what? We don't have
12 any other input. We're not prepared to take
13 witnesses. You go do it." In which case they're
14 superfluous. Or there is going to be a difference,
15 and now, all of a sudden, when I should be busting my
16 hump with all of the witnesses, we have -- and we
17 have, I think, 13 witnesses in four days -- instead,
18 I'm going to be arguing with them over whether we
19 should cross-examine this way or that way.

20 It's -- it's just ridiculous. There
21 should be no doubt in the Court's mind that we are
22 going to try to maximize the recovery at trial. I've
23 got 30 years of showing that. The idea that I will
24 take a dive for some hypothetical thing that could

1 happen -- assuming that I would lose in the second
2 round -- and, therefore -- you know, my clients are
3 fiduciaries. I'm a fiduciary. It's not happening.
4 And the idea that we're having this fight, one, it's
5 unseemly and, two, it's really hurting the people that
6 it's supposed to be helping, because it's sucking time
7 out from trial preparation.

8 THE COURT: Well, let's talk about
9 that briefly. The good Chancellor Allen observed that
10 one of the skills people have is to rationalize as
11 optimal what is personally beneficial. It would be
12 personally beneficial to me to work on a bunch of
13 other things rather than having this trial with
14 you-all. So why shouldn't I solve my problem, and
15 yours and Mr. Hecht's problem, by saying, "Look, guys
16 we really ought to figure this entitlement issue out
17 first. As long as nobody was objecting to it, I was
18 happy to have Dell and Mr. Grant deal with this on the
19 manana track. But now that somebody is objecting,
20 let's take 60 days to figure out the entitlement
21 issue. Let's then take 30 days to figure out whether
22 Hecht or Grant takes over, based on what I decide on
23 the entitlement issue. If I rule in favor of Grant on
24 the entitlement issue, we don't have to deal with

1 that. We can just go forward. And then let's have
2 the trial in February, or something like that." You
3 guys could just put things on ice for a little while.
4 And the advantage of that, while it will be a
5 short-term cost -- the advantage, of course, other
6 than my own selfish interests -- the advantage of that
7 is that there is no possibility, under that regime,
8 that we might have to have the trial twice. Because
9 there wouldn't be a situation where I would, in
10 January, conclude that the Grant folks are out, at
11 which point the Magnetar folks would say, oh, but if
12 we had known this before, we would have had Mr. Hecht
13 do it. We would have done so much better, and we've
14 got to have the trial all over again.

15 So why shouldn't I do that?

16 MR. GRANT: That would entail the
17 Court forgetting what its like to be in private
18 practice; which, unfortunately, sometimes people do.
19 There is a huge amount of work that takes up, from the
20 plaintiffs' side and the defendants' side, to get
21 ready for trial. We have experts who are booked, who
22 have been prepped, who we've spent -- both sides --
23 tens of thousands of dollars on. We have witnesses
24 who have saved their schedules. We have lawyers who

1 have been working intensely for the last several
2 months. And the idea of, well, we'll just take all
3 this and put it on the shelf and, six months from now,
4 pop it back off the shelf and we'll be ready to go, at
5 no extra cost, is not realistic.

6 THE COURT: Well, there would be some
7 extra cost, certainly. But is that incremental cost
8 outweighed by getting yours and Mr. Hecht's issue
9 resolved beforehand? And that's why --

10 MR. GRANT: It's not even close, Your
11 Honor. I mean, it will be hundreds and hundreds of
12 thousands of dollars of costs, in between lawyers and
13 experts and all that, number one, and at no real
14 benefit. Because, you know, at that point, if my
15 clients are out, Mr. Hecht is going to come in and
16 have to relearn the whole case, use all our work
17 product, do all that, and say, "I'm going to try the
18 case." Or am I supposed to still try the case and
19 have him say, "Well, I just want to look over your
20 shoulder and tell you everything you're doing wrong"?
21 I don't really need that. I'm married.

22 But, you know, where does that leave
23 anyone? I don't get the advantage to any of that. On
24 top of which, there's an ongoing interest cost. I

1 don't know what the Dell folks have to say about that,
2 but it's at 5 3/4. It's compounding quarterly. It's
3 adding up. There's 400 and some-odd million dollars
4 worth of stock. So that is a large cost. And if
5 interest rates go up, as the Fed assures us that
6 they're going to this year, that will be a large cost.

7 THE COURT: See, I would guess that
8 Dell is not complaining about that. Because when
9 people aren't lobbying, they usually like low-cost
10 money.

11 MR. GRANT: Oh --

12 THE COURT: And that's low-cost money.

13 MR. GRANT: -- that may well be true.
14 That may well be true. But, you know, trials, they
15 ripen and they're ready to go. And if they sit on the
16 tree long enough, they rot. And I see no benefit
17 whatsoever to this -- again, you know, what is --
18 there is no conflict. There is no conflict here.
19 And --

20 THE COURT: So let me ask you
21 something else. What about the possibility that if
22 you get knocked out, Mr. Hecht and his crew may settle
23 and I would never even have to deal with this thing?

24 MR. GRANT: Or we could wind up

1 putting on a great case and they say, "You know what?
2 I'm afraid that the number is going to come in in the
3 high 2s and, quite frankly, if you'll take a haircut
4 based on this risk, we could settle the whole thing
5 up." And that works too. Or Your Honor could decide
6 that it was deal price, in which case, I guess we
7 really wouldn't have to have the -- you know, the
8 second part of this. So we can play the what-if game,
9 but the problem with what if is there's different
10 paths, and we don't know what if. So, you know, I'm
11 not sure where any of this gets us.

12 If Mr. Hecht wants to settle his case,
13 he should talk to Mr. Hendershot and let's get that
14 piece out of the way. I'm not stopping him from
15 settling his case. But I am ready to move forward,
16 come Monday morning, and put on the best possible case
17 we can for the highest possible number. And there's
18 nobody who should doubt that. I don't think Mr. Dell
19 doubts it. I don't know why Magnetar does.

20 THE COURT: Mr. Hendershot, can I
21 trouble you?

22 MR. HENDERSHOT: Of course, Your
23 Honor.

24 THE COURT: What are your views as to

1 whether we should continue with this setup as you guys
2 have set it up or whether I should reset so that we
3 can fight this out and then have you-all come back in
4 February?

5 MR. HENDERSHOT: Well, Your Honor, I
6 very much agree with Mr. Grant that we have been
7 cranking hard on this for a long time. We're going to
8 be ready to try the case come Monday morning, through
9 next week. And it would incur a lot of cost on us to
10 postpone it. And I think there is some element of you
11 leave the fruit on the tree long enough and it's going
12 to rot instead of ripening. So we would very strongly
13 prefer to proceed Monday through Thursday of next
14 week, as currently scheduled.

15 THE COURT: All right. Thank you.

16 MR. HENDERSHOT: Okay.

17 THE COURT: Mr. Anderson.

18 MR. ANDERSON: Yes, Your Honor.

19 THE COURT: You submitted something to
20 me. You don't get to lurk in the back. Do you have
21 anything to add to the papers that you submitted?

22 MR. ANDERSON: No, Your Honor. I
23 think I set forth everything in the papers. It was a
24 short submission. At the time the briefs were

1 submitted, we weren't entirely in agreement with
2 Magnetar. We certainly weren't in agreement with the
3 T. Rowe Price funds. We believe there is a conflict
4 here. The statute reads how it reads. It says that
5 the normal sequencing is to have an entitlement
6 hearing first, then to hear about value later. I
7 realize that it also goes on to say what Mr. Grant
8 says, and I realize that the Court has lots of
9 discretion in this.

10 We think there's a conflict. We think
11 the easiest way to solve this conflict is to have the
12 entitlement first, as has always been done in
13 Delaware. I've been involved in appraisal cases. I
14 couldn't find any case where entitlement was decided
15 six months after the fact.

16 THE COURT: But that --

17 MR. ANDERSON: I don't see any reason
18 to diverge from that at this point.

19 THE COURT: Do you agree that
20 basically what I'd have to do, then, is reset the
21 schedule, as I've been talking to these guys?

22 MR. ANDERSON: I agree. That's what
23 the Court would have to do.

24 THE COURT: From your folks'

1 standpoint, how do you analyze that? You've heard
2 Mr. Grant, who regards that as anathema, and
3 Mr. Hendershot, who regards it as undesirable. What's
4 your sense?

5 MR. ANDERSON: My sense, Your Honor,
6 having not been preparing like Mr. Grant's firm has or
7 Mr. Hendershot's client has -- I realize there's a lot
8 of preparation. I have not lost sight of the fact of
9 what it's like to be in trial. My reaction is it's
10 unfortunate, but that's going to be an inconvenience
11 that should be borne here.

12 We have a situation where Mr. Grant's
13 clients knew about this a year ago. Last October it
14 came out. It never came out to the other petitioners
15 in this case, the other shareholders. We never knew
16 about this. We didn't know about this until recently,
17 until the Wall Street Journal picked up an article on
18 this sometime earlier this summer. If that had been
19 the case, if we had known about this back in October,
20 when Mr. Grant apparently knew about this, we wouldn't
21 have been on board with that consolidation order that
22 Your Honor entered into naming Mr. Grant as the lead
23 petitioner. We would have taken different actions at
24 that point.

1 So the fact that this has come out
2 much, much later than it would come out in the normal
3 course of events, it's unfortunate, but that's where
4 we are.

5 THE COURT: But are you proposing now,
6 are your folks proposing to have, for example, your
7 fine firm take over on the plaintiffs' side?

8 MR. ANDERSON: Your Honor, we would
9 join Mr. Hecht's firm and Mr. Hirzel's firm. And yes,
10 we would plan on stepping in and helping out, try the
11 case if necessary.

12 THE COURT: But let's assume that we
13 have the situation where we bring the train to a halt.
14 We reset the train. 60 days from now, I knock out
15 Mr. Grant, and so I need somebody else to step up. So
16 you're telling me that your guys are ready to pay you
17 guys to step up and carry the cudgels?

18 MR. ANDERSON: My firm would be
19 willing to step up and carry this, with the support of
20 Mr. Hecht's firm and Mr. Hirzel's firm.

21 THE COURT: All right. Thank you.

22 MR. GRANT: Your Honor, just so I make
23 sure the Court is not under a misimpression --

24 THE COURT: Come back up to the

1 podium.

2 MR. GRANT: -- not all of my clients
3 have been challenged.

4 THE COURT: No. I do understand that.

5 MR. GRANT: So when we say "knock out
6 Mr. Grant's firm," I'm still around. I'm like Freddy
7 Krueger. You know, I'm not going away anywhere.

8 THE COURT: You just go from being the
9 largest to one of the smaller guys; right?

10 MR. GRANT: Correct. Although one of
11 the smaller ones -- not quite comparable to Magnetar,
12 but in the same neighborhood, as opposed to now we're
13 five or six times --

14 THE COURT: Right now you're 30, and
15 it would take you down to their neighborhood?

16 MR. GRANT: Yes. Below where they
17 are, but their neighborhood.

18 THE COURT: No, no. I understand
19 that.

20 MR. GRANT: Yes.

21 THE COURT: But I could also imagine
22 that if, 60 days from now, I were to knock you out,
23 you might be sufficiently peeved that you would not
24 want to continue.

1 MR. GRANT: There's a good chance.

2 THE COURT: Yeah.

3 MR. GRANT: And then the question is
4 what happens to everyone else? Because I got to tell
5 you, we took every one of these depositions. We
6 prepped the experts. We did everything. And by the
7 way, we funded all of this. And the question is,
8 who's stepping in? Because -- I don't know, maybe
9 they'll be able to do it. It's really hard to try
10 someone else's case.

11 And the other thing is -- let's make
12 another assumption. Let's assume four months, five
13 months, six months from now -- and we're not talking
14 60 days. There's discovery to be done. Then there's
15 briefing to be done. Then there's a hearing. And
16 then Your Honor has 90 days to decide.

17 THE COURT: No. I'd have to set it so
18 that we'd get it done in 60 days. I mean, I'd have to
19 require you guys to deal with it so that we got it
20 done.

21 MR. GRANT: We'd be talking about some
22 really expedited discovery, then, and expedited
23 briefing. I don't know that we have to do that.
24 Presumably we want to get the answer right. Not that

1 we haven't done expedition before, but there wouldn't
2 be a whole lot of reason to do that.

3 But even if we could get it to
4 argument, with all the discovery and all the briefing,
5 in 90 days, and we argued then, Your Honor would still
6 want some time to resolve that. Maybe Your Honor cuts
7 his 90 days down to 30 days. It's still four months.

8 And let's say the resolution is, no,
9 my clients are still in. Who's covering the cost for
10 Dell -- not that I care about that one -- but for Dell
11 and us? Because it's going to be several hundreds of
12 thousands of dollars. Are they going to put up a bond
13 and say, "Here. I'll cover the excess costs"? Or my
14 client is just supposed to eat them?

15 The other question is we can argue
16 about last October, whatever, but in May, both in open
17 court here, when Mr. Williams handed up his letter to
18 you and made a big deal over his accusations --

19 THE COURT: It was supposed to be
20 aggressive discovery, because I remember having a
21 little repartee with that, about how aggressive they
22 were going to be.

23 MR. GRANT: Right.

24 THE COURT: And then was there

1 aggression? It didn't seem to be terribly aggressive.

2 MR. GRANT: They certainly took
3 several months to do discovery. I don't think it was
4 aggressive. But, you know, Mr. Williams was, in his
5 own kind of quiet way, still digging away at things.
6 But they did their discovery and, you know, then they
7 put forward -- they said summary judgment. We said,
8 "Okay. Now we need discovery of all these folks."
9 And they said, "Okay. That makes sense."

10 THE COURT: So the issue is that you
11 didn't do your discovery contemporaneously with them
12 doing their discovery?

13 MR. GRANT: Correct. Because we
14 needed to see what they were putting forward. But I
15 guess the question is, to the extent there is this
16 hypothetical conflict that I heard about, why wasn't
17 that hypothetical conflict in May? Because if they
18 came up and said, "Whoa. We just read this in the
19 paper and, quite frankly, we're concerned, because
20 they may be subject to unique defenses. And now, you
21 know, they might be willing to settle cheap," or maybe
22 they aren't willing to settle, or whatever the theory
23 of the moment is.

24 In May they could have brought it in

1 front of Your Honor and Your Honor could have said,
2 "Okay, I want this resolved first. I'm kicking this
3 trial until February." And then there wouldn't have
4 been the cost on both sides. We wouldn't even have
5 necessarily had the expert depositions done or
6 anything. But they sat and waited until experts were
7 done, until everything else was done, and now they
8 come running in, literally a week before trial.

9 You know, you can't sit on rights like
10 that. They knew the moment that that came out in the
11 newspaper. They said, "Wow. There's a conflict."
12 Now, I don't think there's one. But to say, "We had
13 to wait for a motion," I don't think so. If there's a
14 potential conflict, that's when it came up. Sitting
15 on it for three, four months, while we're all getting
16 ready for trial, is -- is inappropriate.

17 THE COURT: I understand where you're
18 coming from.

19 Mr. Hecht, your turn to reply.

20 MR. HECHT: Yes. Thank you, Your
21 Honor.

22 So just two -- I think just two
23 points. The May 8 letter, which we were aware of at
24 the time, advised the Court -- I'm holding it in front

1 of me -- of a development "potentially" affecting the
2 entitlement to proceed. "Potentially." And it's a
3 letter, so we don't know that a motion will be filed.
4 We don't know what the breadth of the motion is like.

5 On July 30, those questions were
6 answered. But if there's a question about timing, we
7 didn't think the strength of a letter to the Court
8 advising of a -- I'm quoting -- "potential" issue was
9 enough to move on formally. We talked to Mr. Grant's
10 firm. We picked up the phone and talked to them.
11 There's things we can do amongst ourselves. But to
12 move the Court for formal relief, we didn't think
13 appropriate until there was a motion filed that we saw
14 in our hands.

15 And if I may, Your Honor, the
16 settlement specter that we're worried about, just to
17 put a very fine point on it, is the following. This
18 is all hypothetical. I have no basis to think this is
19 happening: Let's say the case proceeds next week
20 through Thursday or Friday, and Friday, 5:00, the
21 trial is in, and then a settlement discussion
22 proceeds. And the case settles, after trial. All of
23 T. Rowe may be out of the case. The so-called GE
24 claimants may be out.

1 Now, the rest of us can choose to opt
2 out of the settlement, that much is true. Mr. Grant
3 couldn't muscle us into agreeing to that, but the die
4 is already cast. The trial is already tried. That's
5 the issue. We're not out leading ahead with a
6 settlement overture. I don't have a settlement demand
7 to make. I know Mr. Hendershot. I know his firm very
8 well. I've appeared in this Court side by side with
9 them. We all know each other. I've spoken to him in
10 this case. We don't suffer a lack of communication.
11 My issue is the one I just described.

12 THE COURT: All right. Thank you.

13 MR. HECHT: Thank you, Judge.

14 THE COURT: Anyone else have anything
15 that they would like to contribute to this dialogue?

16 All right. Well, thank you all for
17 coming in. I will tell you, I would dearly love to
18 put this off, given other things on my docket and that
19 type of personal interest, but I don't think I
20 responsibly can. As I say, I would like to
21 rationalize that personally beneficial course of
22 action as optimal, but I don't think I can responsibly
23 do it.

24 I also don't think that there is a

1 conflict presented here regarding the Grant &
2 Eisenhofer firm that requires changing the leadership
3 structure at this time. I've thought about this,
4 recognizing that I think plaintiffs firms are
5 sometimes extremely sensitive to the conflicts of
6 others, or the disclosure failings of others, and yet
7 remarkably sanguine regarding their own ability to
8 proceed, or the lack of need to provide similarly
9 detailed disclosures. It's the old biblical concept
10 of seeing the mote in your neighbor's eye and not the
11 log in your own.

12 To elaborate on that, if you ever
13 compare the disclosures that you-all put out for
14 settlements to the disclosure standard that you demand
15 of corporate fiduciaries, you will see a disconnect as
16 wide as the Grand Canyon. Or if you have ever
17 listened, as I have, to people arguing that they don't
18 have a conflict, when they're representing different
19 constituencies with potentially different interests
20 and profiles, and that it can all proceed as a single
21 class, and compare that with how agitated people get
22 when directors are affiliated with different
23 stockholders, again, there's a degree of sensitivity
24 to conflicts on the part of other fiduciaries and a

1 lack of sensitivity to the potential conflicts on
2 one's own side.

3 So I have approached this attempting
4 to think what someone like Mr. Grant would say if a
5 defendant was in this type of situation, and I still
6 don't think that there is a conflict with respect to
7 the trial. This is like an interest that gives one a
8 conflict as to one course of action but is otherwise
9 value-maximizing. We can think of that in terms of a
10 banker's contingent fee. The contingent fee is a
11 conflict in terms of driving deal closure because the
12 banker only gets paid if the deal closes. Once the
13 decision to sell is made, and as to getting the
14 maximum price, the banker's arrangement is largely
15 value-enhancing. Now, it can still be problematic on
16 the margin, to the extent that the banker does better
17 by not seeking the extra penny and closing the deal.
18 And this is not just true for bankers. It's true of
19 any contingently compensated professional, including
20 quotidian folks like real estate agents.

21 But this is the same type of thing
22 that Mr. Grant has. So, yes, he has a potential
23 conflict as to his folks on settlement, because they
24 have a reason to take slightly less to get rid of the

1 entitlement issue. I don't think he has any conflict
2 as to doing his best to beat the tar out of the
3 defendants at trial and get the most money possible
4 from Dell. In fact, you could almost say that he has
5 an enhanced reason to do that, because if he wants to
6 set himself up in a situation where he thinks he might
7 have to take a little haircut because of the
8 entitlement issue, the best possible thing he can do
9 is, again, beat the living tar out of these guys, to
10 set the bar as high as he can, so that when he has to
11 take that discount back, he is not in a
12 too-disadvantaged situation.

13 Where I do think this would be a
14 conflict is if there were settlement prospects, and
15 particularly if there were a non-opt-out class. It
16 isn't a non-opt-out class. So if Mr. Grant and the
17 G&E claimants decide to take a deal that Magnetar and
18 Mr. Anderson's clients believe is suboptimal, Magnetar
19 and Mr. Anderson's folks can, at that point, pick up
20 the litigation cudgels and press on. They will not be
21 bound by anything that Mr. Grant and his folks do.

22 As I suggested, I think that's even
23 the case if we entertain Mr. Hecht's concern and
24 imagine that we try the case next week and, after the

1 last witness is done and I have bid you all adieu,
2 Mr. Grant and Mr. Hendershot go out and meet in the
3 Hotel du Pont bar and toast each other to a trial well
4 fought and begin to discuss settlement, and they
5 advise the Court on Monday morning that a deal has
6 been struck. That deal would have been struck after
7 the case went in. And during the case, to set up that
8 discussion, Mr. Grant has every reason in the world to
9 do as much as he can to make life utterly miserable
10 for Mr. Dell and the people on the respondent's side.

11 So I am not going to change the
12 leadership structure. I am not going to establish a
13 co-lead structure. I don't believe that there's a
14 conflict that relates to the trial. I believe that to
15 the extent there is a conflict relating to settlement,
16 it is one that can be addressed by bringing in the
17 Magnetar folks and Mr. Anderson at that point, and it
18 is further mitigated by the nonmandatory nature of the
19 class. It is effectively an opt-out, in terms of how
20 these things get resolved. So as attractive as it is
21 to me to use this as a basis for resetting the
22 schedule and dealing with other things, we will go
23 forward with the existing structure and schedule.

24 One of the things that my secretary

1 told me was that it would be good if we could use some
2 of this time to chat about next week and whether it is
3 possible to have some witnesses on Friday afternoon,
4 such that we can finish at 3:00 on Tuesday and
5 Thursday. I understand there was discussion about
6 that, and I would like to speak with you about it
7 directly, rather than through the medium of
8 Ms. Williams.

9 MR. GRANT: Yes, Your Honor. The
10 problem is, the two final witnesses both, I think,
11 have issues with Friday. So we're sort of jammed up.

12 THE COURT: So remind me who the two
13 final witnesses are.

14 MR. GRANT: So my rebuttal witness is
15 professor Cornell, and he has to be in trial in
16 Chicago on Friday. So it sort of worked --

17 THE COURT: Who is the other fellow?

18 MR. GRANT: Is Professor Hubbard.

19 THE COURT: And he is yours or
20 Mr. Hendershot's?

21 MR. GRANT: He's Mr. Hendershot's.
22 And what I understood with him was his problem is
23 actually Wednesday afternoon. And the problem, the
24 way the lineup was working, was he was going to

1 testify, because he couldn't do Wednesday afternoon,
2 Thursday morning. And we were trying to fit Hubbard
3 and Cornell, two experts, on Thursday, and it was
4 looking like that might get a little bit jammed.

5 So what we had thought might work was
6 if we could start at 9:00, instead of the traditional
7 9:15, we'd pick up 15 minutes each of the four days,
8 which would be an hour. If we could take 45 minutes
9 for lunch, as opposed to an hour, we'd pick up one
10 other hour. So that would be two hours.

11 And we're trying to find the three
12 hours about finishing early. And the question would
13 become, if we were able to go to 4:45 on Monday and
14 Wednesday, that would be an extra half an hour.
15 Tuesday, I think we could stop at 3:00 without any
16 problem. The question is, is 3:00 the hard stop on
17 Thursday, or could we squeeze 15 minutes to an extra
18 half hour, 3:15 to 3:30? In which case I think we
19 could fit everything in.

20 And I didn't know if the Court was
21 stopping because that's the traditional afternoon
22 break at 3:00 and you didn't want us to come back for
23 just 15 minutes of testimony. But I think the real
24 problem winds up that -- and I've had these

1 discussions with Mr. Williams -- that we're just
2 afraid that Thursday could get jammed.

3 THE COURT: And, look, I know the
4 artful assemblage of the puzzle that goes into this.
5 Can Hubbard go Wednesday morning? Have you guys
6 talked about that?

7 MR. GRANT: So, yes. The answer is we
8 actually thought about it and discussed it. And
9 Mr. Williams said it wasn't his first choice, but he
10 is talking to Hubbard about possibly coming on
11 Wednesday morning, even if we had to interrupt someone
12 else's testimony. I said I have no problem with that.

13 The question is, how long would he be
14 on the stand, to get him back for the meetings that he
15 has that have 30 other people, so it can't be
16 rescheduled on Wednesday? And, I mean, they're even
17 looking into getting him a helicopter to get back to
18 New York on Wednesday afternoon.

19 THE COURT: Good God.

20 MR. GRANT: So the answer is, we are
21 trying to work all those things out.

22 THE COURT: No. So let me ask you
23 again. So you want to start at 9 a.m. each day?

24 MR. GRANT: Yes.

1 THE COURT: Do 45 minutes for lunch?

2 MR. GRANT: Yes.

3 THE COURT: And then go until when?

4 MR. GRANT: 4:45 on Monday.

5 THE COURT: Well, we already go till
6 4:45.

7 MR. GRANT: Well, the question is
8 could we go till 5:00 on Monday and Wednesday?
9 Tuesday's fine with that 3:00 stop. And the question
10 is, if we needed the extra time on Thursday, would it
11 be possible? But again, if they can somehow switch
12 Hubbard to Wednesday, that --

13 THE COURT: Yeah. If Hubbard can
14 switch to Wednesday morning, obviously, that's
15 wonderful and peace will reign and daffodils will
16 bloom and everyone will be happy again.

17 MR. GRANT: Right. And I'm not trying
18 to lay it all on Hubbard. I mean --

19 THE COURT: No, no. I understand.

20 MR. GRANT: Not only do I have
21 Cornell, but also we may wind up taking a piece of the
22 rebuttal case before the defendants finish their case,
23 because Professor Subramanian needs to go Wednesday
24 afternoon.

1 THE COURT: Well, I think we could go
2 till like 3:15 on Thursday. What about
3 Mr. Subramanian, could he come Friday? He's a
4 Hockessin guy. He could come down, he could spend the
5 weekend with his family.

6 MR. GRANT: I don't think that's the
7 problem. I think he can fit in Monday through
8 Wednesday. I think the problem is the two guys -- if
9 Hubbard can switch to Wednesday, then we'll be done
10 with the trial on Thursday.

11 THE COURT: Yeah. I understand.

12 MR. GRANT: The problem is if they're
13 both on Thursday, we're just afraid that someone's
14 going to get jammed up.

15 THE COURT: No. I get that Hubbard
16 moving is the ideal. But I also want to make sure we
17 have a fallback plan in case that doesn't work out.
18 And --

19 MR. GRANT: I think the fallback plan
20 is if we can go to 3:15 on Thursday and cut lunches to
21 45 minutes and start at 9:00, that would do it.

22 THE COURT: Why don't we plan on doing
23 that. So on Monday we'll kick off with that schedule
24 and start at 9 and muddle our way through. And then

1 we'll see how it goes. There is always the
2 possibility that things will go more quickly than you
3 anticipate.

4 MR. GRANT: And we're actually trying
5 to -- the schedule that we sketched out had, even
6 though, when we did the math, I think there was
7 supposed to be -- I forget whether it's 13 hours for
8 each of us or 12 hours for each. I think maybe it was
9 12 hours for each.

10 THE COURT: It would have been 12.

11 MR. GRANT: 12, we both actually were
12 down at about 11 1/2. So it wasn't that we were
13 trying to push to get extra time beyond the 12. So it
14 may do that.

15 On the other hand --

16 THE COURT: No. I understand. And I
17 will try to stay quiet, because often what throws
18 these things off is when I ask questions, and then
19 people look at each other and say, "What do we do with
20 that time? We didn't budget for that time."

21 Mr. Hendershot, Mr. Grant has been
22 talking about scheduling. Do you have anything to add
23 on that?

24 MR. HENDERSHOT: I don't believe so,

1 Your Honor. As he said, the discussions have mainly
2 been with Mr. Williams, who unfortunately is with a
3 witness preparing for the trial today, so he couldn't
4 be here. But the discussion is consistent with what
5 Mr. Williams has told me. If we can proceed on that
6 schedule, that's great.

7 THE COURT: Then let's do this. And
8 we're going to get back together for the pretrial
9 conference anyway, but let's assume that we'll go the
10 9:00 to 5:00 route with a 45-minute lunch on Monday.
11 We'll see where we are. We'll plan to stop early at
12 3:00 on Tuesday, and we'll start at 9:00 and do the 45
13 minute lunch on Tuesday. And then we'll assess. And
14 with any luck, people will have given crisp,
15 responsive answers, particularly on cross-examination,
16 so things will move efficiently and I won't have to
17 yell at anyone, and everyone can look at each other
18 and say, "Wow, we're actually ahead of schedule," in
19 which case it all will be good.

20 MR. GRANT: Your Honor, there are five
21 experts. I hope that happens. But --

22 THE COURT: Five experts.

23 MR. GRANT: Yeah. So it will --

24 THE COURT: All right. Well, I know

1 I've got a ton to read before we get together for the
2 pretrial conference because, as I say, I've been
3 dealing with other stuff, and so I haven't given this
4 the attention that it deserves yet. And in all
5 candor, I'm not looking forward to it. Because as I
6 say, I've got a bunch of other stuff that I would
7 dearly love to be doing. But I will talk to you-all
8 at the pretrial conference.

9 Thank you, everyone, for coming in.

10 (Court adjourned at 2:45 p.m.)

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CERTIFICATE

I, JULIANNE LaBADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 3 through 40, 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 28th day of September, 2015.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public