

DELAWARE CORPORATE LAW BULLETIN

Delaware Chancery Disqualifies Lead Petitioners in Dell Appraisal Who Inadvertently Voted “FOR” Management Buyout

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*In so ruling, Vice Chancellor Laster distinguishes “Appraisal Arbitrage
Decisions” based on evidence before him in Dell*

| | |
|--|-----|
| INTRODUCTION | 280 |
| I. COMPLEXITIES OF MODERN PUBLIC EQUITY MARKETS | 281 |
| A. <i>Stockholder Voting</i> | 283 |
| B. <i>Demanding Appraisal</i> | 286 |
| II. T. ROWE REACTS TO THE BUYOUT | 287 |
| III. VICE CHANCELLOR LASTER’S LEGAL ANALYSIS..... | 289 |
| A. <i>The Appraisal Arbitrage Decisions</i> | 289 |
| 1. <i>Transkaryotic</i> | 289 |
| 2. <i>BMC</i> | 290 |
| 3. <i>Ancestry</i> | 291 |
| B. <i>Distinguishing the Appraisal Arbitrage Decisions</i> | 292 |
| C. <i>Rejecting T. Rowe Petitioners’ Other Arguments</i> | 293 |
| CONCLUSION..... | 294 |

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INTRODUCTION

The Delaware General Corporation Law (“DGCL”) allows holders of a majority of the outstanding shares of a corporation to approve the terms of a merger over the objection of minority stockholders.¹ To ameliorate the impact of “majority rules,” section 262 of the DGCL (“section 262”) gives target company stockholders who do not vote in favor of a merger² the right to object to the terms of the transaction and seek a judicial appraisal of the fair value of their shares.³ Corporate law commentators historically criticized the seldom-used appraisal remedy as procedurally cumbersome.⁴ Despite the procedural burdens, however, the percentage of mergers challenged by appraisal has recently skyrocketed—more than tripling since 2004.⁵ Some attribute this increase to the emergence of appraisal arbitrageurs—hedge funds that pursue appraisal solely as an investment vehicle.⁶ But a good argument can be made it was the controversial “Appraisal Arbitrage Decisions” (defined below) that supercharged the appraisal arbitrage strategy.⁷ These decisions held that, for purposes of section 262, an arbitrageur who purchases shares on the open market after the record date for voting on a merger need not prove whether the previous owner of those shares voted in favor of the merger.⁸

In 2013, Michael Dell and his private equity partner Silver Lake Management led a management buyout of Dell Inc. Structured as a cash-out merger, the buyout “gave rise to appraisal rights” for Dell stockholders not satisfied with the \$13.75 per share buyout price.⁹ In line with the recent trend, the merger attracted a significant number of section 262 demands, including from the eventual lead petitioners in the appraisal proceeding, several funds (collectively, the “T. Rowe

1. DEL. CODE ANN. Tit. 8, § 251(c) (2013).

2. Other than a merger in which the target’s publicly traded shares are exchanged solely for the buyer’s publicly traded shares. See Tit. 8, § 262(b)(1) (2013).

3. DEL. CODE ANN. Tit. 8, § 262(b) (2013).

4. See Minor Myers & Charles Korsmo, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U.L. REV. 1551 (2014–2015) (discussing “the procedural burdens of preserving and asserting an appraisal remedy”).

5. For an empirical analysis on increased appraisal litigation, see *id.*

6. For additional analyses of the appraisal arbitrage strategy, see, e.g., *id.* and Stanley Onyeador, *The Chancery Bank of Delaware: Appraisal Arbitrageurs Expose Need to Further Reform Defective Appraisal Statute*, 69 VAND. L. REV. (forthcoming January 2016).

7. See *infra* Section III.A.

8. See *infra* Section III.A.

9. *In re Appraisal of Dell Inc.*, 143 A.3d 20, at 21 (Del. Ch. 2016).

Petitioners”) sponsored or managed by giant mutual fund T. Rowe Price (“T. Rowe”).

Like the great majority of institutional investors, the T. Rowe Petitioners did not own Dell shares in their own names but rather through a “daisy chain” ending with record holder Cede & Co. (“Cede”), the nominee of the Depository Trust Company (“DTC”).¹⁰ Considering the Delaware courts’ liberal interpretation of petitioner standing under the Appraisal Arbitrage Decisions,¹¹ one could have assumed that the T. Rowe Petitioners would easily perfect appraisal rights. But the T. Rowe back office committed a \$194 million gaffe that shockingly resulted in a denial of appraisal rights for their 30 million Dell shares.¹² In the words of Vice Chancellor J. Travis Laster in *In re Appraisal of Dell Inc.*, “Although T. Rowe opposed the Merger, its voting system generated instructions to vote the T. Rowe Petitioners’ shares in favor of it The T. Rowe Petitioners’ shares do not qualify for appraisal. Judgment is entered against them.”¹³ Notably, holding T. Rowe Petitioners’ shares ineligible for appraisal greatly diminished the impact of the Vice Chancellor’s eventual twenty-eight percent premium award in the Dell valuation proceeding.¹⁴

To fully appreciate this breakdown in T. Rowe’s “voting system,” one must understand the structure and mechanics of share ownership and voting in the modern public equity markets and how they interrelate with section 262. The next Section seeks to provide this understanding.

I. COMPLEXITIES OF MODERN PUBLIC EQUITY MARKETS

Modern publicly traded corporations contract out maintenance of their stock transfer records to institutional transfer agents.¹⁵ But today, with institutional stockholders owning more than two-thirds of the common stock of publicly traded corporations,¹⁶ their shares are

10. *Id.*

11. *See infra* Section III.A.

12. *See infra* Part II.

13. *Dell*, 143 A.3d 20, at 22–23.

14. *See generally In re Appraisal of Dell, Inc.*, No. 9322–VCL, 2016 WL 3186538 (Del. Ch. May 31, 2016).

15. *See, e.g., In re Appraisal of Dell Inc.*, 2015 WL 4313206, C.A. No. 9322–VCL, at *9 (Del. Ch. July 13, 2015) (“Virtually all public corporations have outsourced the maintaining of the stock ledger to a transfer agent.”).

16. *See, e.g.,* Luis A. Aguilar, Commissioner, Sec. & Exch. Comm’n, Institutional Investors: Power and Responsibility, Address at Georgia State University Workshop (Apr. 19, 2013), available at <https://www.sec.gov/News/Speech/Detail/Speech/1365171515808> [<https://perma.cc/X23C-8RCZ>] (“[T]he proportion of U.S. public equities managed by institutions

held in the names of nominees having no economic interest in those shares. Thus, the names of those with the economic interest in a corporation's common stock generally do not appear on the stock transfer records maintained by the transfer agent.¹⁷ Further, not even the names of these nominees are typically listed on the stock transfer records. Rather one ultimate nominee, Cede, appears on transfer agents' stock records as the record owner of a vast majority of the outstanding shares of common stock of nearly every publicly traded corporation.¹⁸

This phenomenon originated in the late 1960s/early 1970s when increased trading volume in the U.S. securities markets made traditional paper-based stock trading impracticable.¹⁹ To remedy what was then characterized as a "paperwork crisis," in 1975 the Securities and Exchange Commission "adopted a national policy of share immobilization."²⁰ DTC eventually emerged as the only domestic depository with whom custodial banks and brokers ("participants") deposit shares for their clients (i.e., funds such as T. Rowe).²¹ Cede, as DTC's nominee, holds these shares "on [participants'] behalf in fungible bulk," which means the shares are issued in Cede's name, making Cede the "record holder" ("Delaware Record Holder Level" in Figure 1 below).²² Cede tracks participants' shares via the DTC Fast Automated Securities Transfer account ("FAST Account"), an electronic book entry system that "track[s] the number of shares of stock that each participant holds."²³

DTC participants ("Custodian Level" in Figure 1 below) are custodial banks and dealers (such as, in the case of Dell shares owned by the T. Rowe Petitioners, State Street Bank & Trust Company ("State Street")) that contract with mutual funds and other institutional investors to facilitate and track trading of their clients' shareholdings

has risen steadily over the past six decades, from about seven or eight percent of market capitalization in 1950, to about sixty-seven percent in 2010.").

17. See, e.g., *Dell*, 2015 WL 4313206, at *6 ("Because of the federal policy of share immobilization, it is now Cede—not the ultimate beneficial owner and not the DTC-participant banks and brokers—that appears on the stock ledger of a Delaware corporation.").

18. See, e.g., *id.* at *4 (citing John C. Wilcos, John J. Purcell III, & Hye-Won Choi, "Street Name" Registration & The Proxy Solicitation Process, in A PRACTICAL GUIDE TO SEC PROXY AND COMPENSATION RULES 10-3 (Amy Goodman et al. eds., 4th ed. 2007 & Supp. 2008)) ("The vast majority of publicly traded shares in the United States are registered . . . in the name of "Cede & Co.," the name used by The Depository Trust Company ("DTC").").

19. See, e.g., *id.* at *4-7.

20. *Id.* at *1.

21. *Id.*

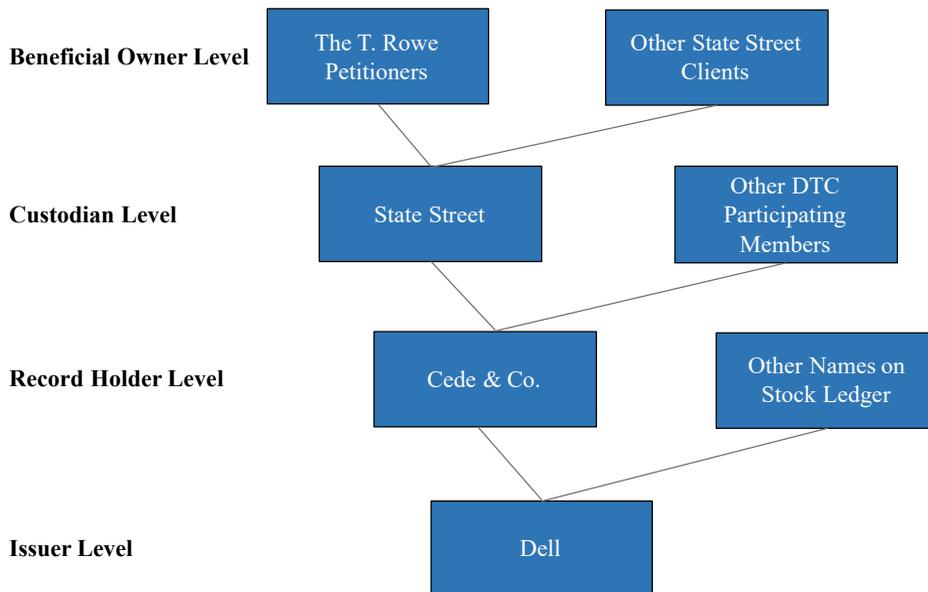
22. *Id.*

23. *Id.* at *3.

held in Cede's name.²⁴ Funds like the T. Rowe Petitioners, who "own[] their shares in street name through their custodial banks," are the "beneficial owners."²⁵

In summary, "DTC holds the shares on behalf of banks and brokers [in the name of its nominee Cede], which in turn hold on behalf of their clients (who are the underlying beneficial owners . . .)." ²⁶ Figure 1 below illustrates how the T. Rowe Petitioners held their Dell shares:²⁷

FIGURE 1: STRUCTURE OF T. ROWE'S OWNERSHIP IN DELL



Thus, as the record holder, it is Cede's job to (i) vote shares on behalf of, and in accordance with instructions received from, the real parties in interest, the beneficial owners, and (ii) when called upon to do so, demand appraisal under section 262(a).²⁸

A. Stockholder Voting

The complex beneficial ownership structure described in Figure 1 above in turn has created significant complexities in the voting of publicly traded shares. As "one of the largest institutional investors in

24. *Id.*

25. *Id.* at *7.

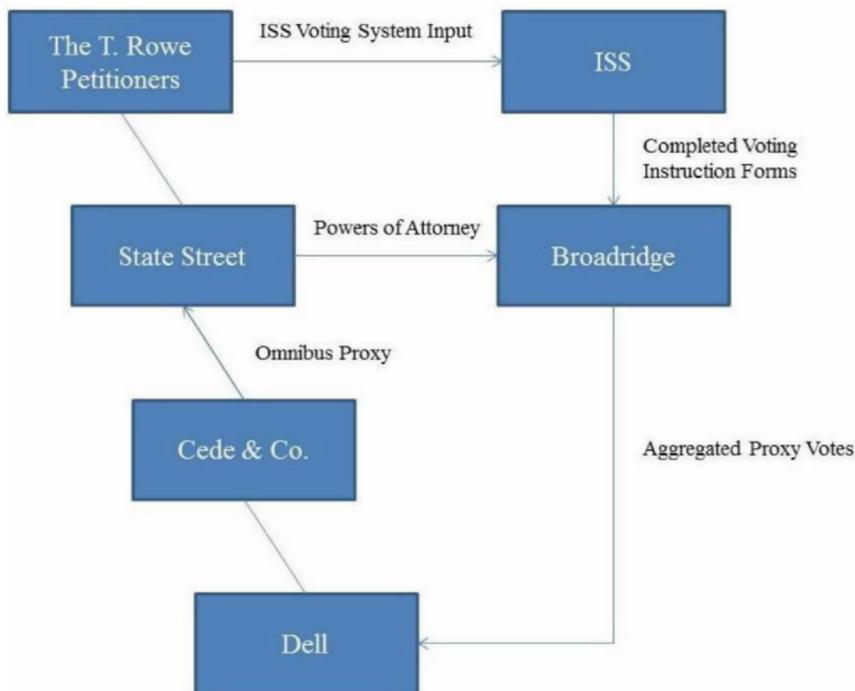
26. *Id.* at *4.

27. *See generally In re Appraisal of Dell Inc.*, 143 A.3d 20, 25 (Del. Ch. 2016).

28. *See infra* text accompanying note 41.

the United States” frequently “called upon to submit voting instructions at a large number of stockholder meetings,” T. Rowe and, in turn, its custodian State Street, outsource these functions to several intermediaries who have emerged to deal with the “administrative headache[s]” inherent in this “Byzantine” construct, as illustrated in Figure 2 below:²⁹

FIGURE 2: T. ROWE PETITIONERS’ VOTING STRUCTURE



The transfer of voting power and the related administrative responsibilities were executed as follows:

1. *Cede transfers voting authority to State Street:* Although Cede was the record holder of the T. Rowe Petitioners’ Dell shares under state law, its role was neither to make voting decisions nor actually vote the shares. Instead, Cede must “transfer its state-law voting rights” to the custodian for the shares, State Street, by “execut[ing] an omnibus proxy in [State Street’s] favor.”³⁰

29. See *Dell*, 143 A.3d 20 at 22–32.

30. *Id.* at 29.

2. *State Street outsources voting responsibilities to Broadridge:* Under its arrangements with T. Rowe, State Street was “obligated to provide [T. Rowe Petitioners] with proxy cards or voting instruction forms and carry out any instructions it receive[d]” in connection with the Dell merger.³¹ State Street in turn had a “standing [contractual] arrangement” granting Broadridge Financial Solutions, Inc. (“Broadridge”) power of attorney to execute these and other “voting-related functions,” including keeping a “record of all voting instructions received from [T. Rowe Petitioners] verbally or electronically.”³² The power of attorney “limited this broad grant of authority” to “executing proxies ‘only in accordance with the voting instructions of [State Street] or [T. Rowe Petitioners].’”³³ As such, “Broadridge ended up with the legal authority to vote the shares held of record by Cede on behalf of the T. Rowe Petitioners for which State Street was custodian.”³⁴

3. *T. Rowe outsources to ISS the submission of voting instruction to Broadridge:* Institutional Shareholder Services Inc. (“ISS”) is the most well-known of several proxy advisory firms who have taken a prominent role in recent years advising institutional stockholders how to vote their shares on the large variety of matters that come before stockholder meetings of publicly-traded corporations. ISS’s menu of services also includes some back office functions. T. Rowe “entered into an agreement with ISS under which ISS provides a range of voting-related services,” including notifying T. Rowe about upcoming stockholder meetings, providing voting recommendations, and, most important, transmitting the T. Rowe Petitioners’ voting instructions with respect to their shares (including Dell shares) to Broadridge and “documenting how its shares were voted.”³⁵

In summary, T. Rowe submits its voting instructions via the ISS Voting System; the ISS Voting System transmits those voting instructions to Broadridge; and Broadridge, under its power of attorney from State

31. *Id.*

32. *Id.* at 29–30.

33. *Id.* at 30.

34. *Id.* at 31.

35. *Id.* at 25.

Street, executes the voting instructions for State Street, who was granted state-law voting power by Cede's omnibus proxy.³⁶

B. Demanding Appraisal

Assertion of appraisal rights is another stockholder function that has become more complex in the modern public equity markets. Section 262(a) affords appraisal rights to

Any stockholder of a corporation of this State [1] who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, [2] who continuously holds such shares through the effective date of the merger or consolidation, [3] who has otherwise complied with subsection (d) of this section and [4] who has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228 of this title.³⁷

Section 262(a)'s requirement that the stockholder not have voted in favor of the merger is commonly referred to as the "Dissenter Requirement."³⁸ "Stockholder" refers to the holder of shares identified in the official ownership records of a corporation maintained by its transfer agent (the "Record Holder Requirement").³⁹ As discussed earlier, especially in the case of widely held public corporations, the holder of record of shares on the transfer agent's books ("record holder") usually is not the owner of the economic interest in the shares ("beneficial owner"). Rather, Cede, as DTC's nominee, is generally the record holder of disparate investors' undifferentiated shares held in "fungible bulk."⁴⁰ To accommodate this reality, the Delaware legislature created a path for beneficial owners to perfect appraisal rights in paragraph (e) of section 262:

"Notwithstanding subsection (a) of this section, a person who is the beneficial owner of shares of such stock held . . . by a nominee on behalf of such person may, in such person's own name, file a petition or request from the corporation the statement described in this subsection."⁴¹

Thus, a beneficial owner may pursue appraisal by directing its record holder to perfect appraisal rights on its behalf under subsections (a) and (d).

36. See generally *id.* at 25–36.

37. *Id.* at 13 (citing DEL. CODE ANN. Tit. 8, § 262(a) (2013)) (enumeration in original).

38. See, e.g., *id.* at 34.

39. See, e.g., *id.* at 21.

40. E.g., *In re Appraisal of Ancestry.com, Inc.*, No. 8173–VCG, 2015 WL 66825, at *5 (Del. Ch. 2015) (explaining that many publicly traded securities are held in "an undifferentiated manner known as 'fungible bulk'" by "central securities depositories" such as Cede & Co., "making [Cede] the registered owner or record holder"). See *supra* Section I.A for further discussion of this ownership structure.

41. Tit. 8, § 262(e) (2013).

In mid-July 2013, unsatisfied with the \$13.75 per share offered by the Dell buyout group, “T. Rowe caused Cede to send [to Dell] letters demanding appraisal on behalf of the T. Rowe Petitioners.”⁴² Cede’s demand letters generally include “standardized language” that Cede “as the record holder of shares,” “was ‘informed by its Participant’ that a specified number of shares was ‘beneficially owned by’ an identified beneficial owner, characterized as a customer of Participant.”⁴³ Accordingly, “Cede sent a separate demand letter for each T. Rowe Petitioner, which made clear that Cede was seeking appraisal on behalf of a specified block of shares owned by a client of one of its participants.”⁴⁴

Once “a beneficial owner causes Cede to demand appraisal, DTC removes the shares covered by the demand from the fungible bulk tracked in the FAST Account.”⁴⁵ This is accomplished by causing the issuer’s (in this case, Dell’s) transfer agent to “issue a paper stock certificate for the number of shares held by the beneficial owner.”⁴⁶ Because the paper certificate is “issued in Cede’s name,” Cede continues as record holder under section 262.⁴⁷ DTC then either delivers the paper certificate to the beneficial owner’s custodial bank or broker for safekeeping or holds it in DTC’s vault.⁴⁸ Once this occurred, State Street had to “manually enter the T. Rowe Petitioners’ ownership position into Broadridge’s system,” which in turn “generated an internal control number for each position.”⁴⁹

II. T. ROWE REACTS TO THE BUYOUT

Among its many voting-related services, ISS maintains a computerized voting system that notifies its clients, including T. Rowe, about specific proposals balloted for upcoming stockholder meetings.⁵⁰ T. Rowe personnel generally review this meeting record to “determine whether to depart from T. Rowe’s standard voting policies” that are prepopulated in the online system.⁵¹ Notably, T. Rowe’s “default voting

42. *Dell*, 143 A.3d 20 at 24.

43. *Id.*

44. *Id.*

45. *In re Appraisal of Dell Inc.*, No. 9322–VCL, 2015 WL 4313206, at *3 (Del. Ch. July 13, 2015).

46. *Id.*

47. *Id.*

48. *Id.* at *7.

49. *Dell*, 143 A.3d 20 at 30.

50. *Id.* at 25–26.

51. *Id.* at 26.

position was to vote ‘FOR’” a transaction “supported by management.”⁵² Thus, when T. Rowe decided to oppose the Dell buyout, its personnel had to actively change the voting instructions to vote “AGAINST,” which they did for the originally scheduled July 18, 2013 Dell stockholder meeting.⁵³

However, due to the active bidding competition that broke out between the buyout group, on the one hand, and activist investor Carl Icahn and others, on the other hand, Dell convened and then adjourned the July 18th meeting on three separate occasions until the meeting was finally held on September 12th.⁵⁴ As a result, the ISS Voting System created a September Meeting Record to replace the July Meeting Record, effectively deleting T. Rowe’s initial voting instructions “AGAINST” the merger and “pre-populat[ing] the September Meeting Record” with T. Rowe’s default voting policies directing ISS to vote “FOR” the merger.⁵⁵ T. Rowe personnel did not check the status of these voting instructions, which were “conveyed automatically to ISS.”⁵⁶

As per the arrangements between Broadridge and State Street, upon receipt of T. Rowe’s voting instructions from ISS, Broadridge submitted proxies in respect of the T. Rowe Petitioners’ shares instructing Cede to vote the shares “FOR” the merger.⁵⁷ Notably, Broadridge maintains unique control numbers that identified the number of T. Rowe Petitioners’ shares voted in favor of the buyout.⁵⁸ Moreover, “federal law requires that mutual funds [such as T. Rowe] file a Form N-PX disclosing how they voted their securities,” meaning that the T. Rowe Petitioners in fact publicly disclosed their voting instructions.⁵⁹ Thus, there was ample “evidence that the T. Rowe Petitioners shares were voted “FOR” the Merger”⁶⁰—evidence that was central to Vice Chancellor Laster ultimately holding that the T. Rowe Petitioners were *not* entitled to appraisal rights under a strict reading of section 262’s Dissenter Requirement.⁶¹

52. *Id.*

53. *Id.* at 27.

54. *Id.*

55. *Id.* at 28.

56. *Id.*

57. *Id.* at 22.

58. *Id.* at 31.

59. *Id.* at 34.

60. *Id.* at 36.

61. *Id.* at 38.

III. VICE CHANCELLOR LASTER'S LEGAL ANALYSIS

Vice Chancellor Laster wasted no time addressing the elephant in the room: the Appraisal Arbitrage Decisions' rejection of a "share-tracing requirement" for shares held of record by Cede. To confirm that "each of the Appraisal Arbitrage Decisions was decided correctly," the Vice Chancellor needed to distinguish those decisions from the facts before him in *Dell*.⁶² To do so, the Vice Chancellor focused on the availability of evidence in *Dell* relative to the "evidentiary vacuum" in the Appraisal Arbitrage Decisions: "[i]n none of the three cases was there evidence showing how [Cede] voted the shares for which appraisal was sought."⁶³ This clearly was not the case in *Dell*.

A. The Appraisal Arbitrage Decisions

To start, Vice Chancellor Laster chronicled the evolution of Delaware's appraisal case law. First, *Reynolds II*⁶⁴ and *Olivetti II*⁶⁵ upheld vote splitting, whereby a "particular record holder could split its position and seek appraisal for part of its shares" without violating the Dissenter Requirement "as long as it had not voted in favor of the merger with regard to the particular shares for which appraisal was sought."⁶⁶ Moreover, these decisions "do not suggest that the court should limit the types of evidence it considers in determining how a record holder voted particular shares."⁶⁷ Thus, by suggesting "implicitly the need for share tracing,"⁶⁸ these decisions set the battleground for *Transkaryotic*, *BMC*, and *Ancestry*—collectively, the "Appraisal Arbitrage Decisions."

1. *Transkaryotic*

In *In re Appraisal of Transkaryotic Therapies, Inc.*, five investment funds purchased Transkaryotic shares on the open market, after the record date for voting on a merger of the target corporation but before the merger's effective date, and sought appraisal.⁶⁹ Cede was at all times the record owner of these shares. Transkaryotic argued that

62. *Id.* at 36.

63. *Id.*

64. *See generally* Colonial Realty Corp. v. Reynolds Metals Co., 190 A.2d 752 (Del. Ch. 1963).

65. *See generally* Abraham & Co. v. Olivetti Underwood Corp., 217 A.2d 688 (Del. Ch. 1966).

66. *Dell*, 143 A.3d 20 at 44.

67. *Id.* at 45.

68. *Id.* at 38.

69. *Id.* at 45 (citing *In re Appraisal of Transkaryotic Therapies, Inc.*, No. Civ.A. 1554-CC, 2007 WL 1378345 (Del. Ch. May 2, 2007)).

the funds were not entitled to appraisal, because they could not prove the shares had not been voted in favor of the merger.⁷⁰ The Court therefore had to determine whether “a beneficial shareholder who purchases shares *after* the record date but before the merger vote, [must] prove, by documentation, that each newly acquired share (i.e., after the record date) is a share not voted in favor of the merger by the *previous* beneficial owner?”⁷¹ According to the *Transkaryotic* Court, “The answer seems simple. No.”⁷² Rather, “only Cede’s actions, as the record holder, are relevant” for purposes of the Dissenter Requirement under section 262.⁷³

While he considered *Transkaryotic*’s holding “straightforward,” Vice Chancellor Laster focused on the evidence—or lack thereof—underlying the decision.⁷⁴ He noted that neither the parties nor the *Transkaryotic* Court cited evidence revealing whether Cede voted the shares in favor of the merger.⁷⁵ Rather than inquiring “whether other readily available documents might show how Cede voted particular shares,” the *Transkaryotic* Court “restrict[ed] its analysis to the documents presented at the meeting of stockholders that showed how Cede voted in the aggregate.”⁷⁶ This effectively “foreclose[d] inquiry into how Cede voted particular blocks of shares,” including those for which the beneficial owners sought appraisal through Cede.⁷⁷

2. BMC

Eight years later, in *Merion Capital LP v. BMC Software, Inc.*, the Chancery Court again addressed share-tracing. Appraisal arbitrageur Merion Capital purchased shares of BMC stock on the open market after the record date for voting on an appraisal-eligible merger.⁷⁸ When “the Merion funds asked their DTC-participant broker to cause Cede to demand appraisal, the broker declined[,] . . . so [t]he Merion funds responded by withdrawing their shares from the FAST Account, having them certificated, and demanding appraisal.”⁷⁹ Thus, unlike the situation in *Transkaryotic* where the funds were only

70. *Id.*

71. *Id.* (citing *In re Appraisal of Transkaryotic Therapies*, 2007 WL 1378345).

72. *Id.*

73. *Id.* at 46.

74. *Id.*

75. *Id.* at 47.

76. *Id.*

77. *Id.*

78. *Id.* at 48.

79. *Id.* (citing *Merion Capital LP v. BMC Software, Inc.*, No. 8900–VCG, 2015 WL 67586, at *3 (Del. Ch. Jan. 5, 2015)).

beneficial owners of their shares, Merion Capital became a holder of record but only after the record date.⁸⁰ But as in *Transkaryotic*, BMC, the target corporation, argued that Merion Capital should “bear[] the burden of proving that *each share* it seeks to have appraised was not voted by any previous owner in favor of the merger.”⁸¹ The *BMC* Court rejected this argument, ruling in favor of Merion Capital’s bid to obtain an appraisal.⁸²

In evaluating *BMC*, Vice Chancellor Laster again focused on evidence availability, stating that “the record evidence before the [*BMC*] court suggested that it would be impossible for an appraisal petitioner who held . . . through Cede . . . to meet the burden that the corporation sought to impose.”⁸³ Put differently, the Vice Chancellor determined that “no one holding through Cede would be able to satisfy the [Dissenter Requirement] for an appraisal,” which “threatened ‘unjust consequences.’”⁸⁴ It therefore was sufficient that “Cede held enough shares that were not voted in favor of the merger to cover the appraisal class.”⁸⁵

3. *Ancestry*

The Chancery Court decided *BMC* and *In re Appraisal of Ancestry.com, Inc.* on the same day, so the outcome of the latter was unsurprising. In *Ancestry*, Merion Capital purchased Ancestry shares in the open market after the record date for voting on its upcoming merger and sought appraisal.⁸⁶ Ancestry’s argument mirrored that of BMC: “petitioner had to demonstrate that the shares for which it sought appraisal had not been voted in favor of the merger by a prior owner.”⁸⁷ And consistent with *BMC*, the *Ancestry* Court rejected this argument, holding that “a petitioner ‘need only show that the number of shares that [Cede] did not vote in favor of the merger is equal to or greater than the number of shares of stock for which it perfected appraisal on behalf of the petitioning owners.’”⁸⁸

80. *Id.*

81. *Id.* (citing *BMC*, 2015 WL 67586, at *3) (emphasis in original).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 49.

86. *Id.* at 50.

87. *Id.*

88. *Id.* (citing *In re Appraisal of Ancestry.com, Inc.*, No. 8173–VCG, 2015 WL 66825, at *6 (Del. Ch. Jan. 5, 2015)).

B. Distinguishing the Appraisal Arbitrage Decisions

While noting that both *BMC* and *Ancestry* contained language that seemingly interpreted section 262(a) as requiring share-tracing, Vice Chancellor Laster defended these decisions as “factual scenario[s] where allocating to the petitioner the burden of showing compliance appeared to eliminate appraisal rights for investors who held through Cede, which was not a viable position.”⁸⁹ More important from the Vice Chancellor’s point of view, the “Appraisal Arbitrage Decisions address[ed] situations in which there was an evidentiary vacuum.”⁹⁰

In essence, the Vice Chancellor viewed *Dell* as a case of first impression: “Delaware courts ha[ve] never confronted a situation in which the evidence showed that Cede in fact voted the shares for which appraisal was sought in favor of the merger giving rise to appraisal rights.”⁹¹ The Vice Chancellor found this distinction not only dispositive, but “necessary to avoid an absurd result” whereby an appraisal petitioner may “give instructions to vote its shares in favor of a merger, have those instructions carried out by the record holder, then nevertheless seek an appraisal for the very same shares”⁹²

Using this evidentiary distinction to reconcile the Appraisal Arbitrage Decisions with his view of the proper outcome in *Dell*, Vice Chancellor Laster created a burden-shifting framework for determining whether a stockholder seeking to perfect appraisal rights satisfies the Dissenter Requirement for their beneficially owned shares held by Cede on the record date:

1. *Initially*, an appraisal petitioner meets the Dissenter Requirement *prima facie* “by showing that there were sufficient shares at Cede that were not voted in favor of the merger to cover the appraisal class,” a showing that is “dispositive” *in the absence of any other evidence*;⁹³
2. *Next*, the “burden shifts to the corporation to show that Cede actually voted shares for which the petitioner seeks appraisal in favor of the merger,” which may be established by “pointing to documents that are publicly available,” or “introduc[ing]

89. *See id.* at 52.

90. *Id.* at 37.

91. *Id.*

92. *Id.*

93. *Id.* at 53.

evidence from Broadridge, ISS, and other providers of voting services”;⁹⁴ and

3. *Ultimately*, the petitioner satisfies the Dissenter Requirement if the corporation’s evidence is “not sufficient to demonstrate that Cede actually voted the shares . . . in favor of the merger” but fails to satisfy the Dissenter Requirement “if the corporation demonstrates that Cede actually voted the shares . . . in favor of the merger”⁹⁵

Thus, although “T. Rowe Petitioners established a case *prima facie* sufficient to satisfy the Dissenter Requirement” per (1) above, they did not satisfy the Dissenter Requirement and “therefore do not have appraisal rights” because, per (2) above, “discovery has shown that Cede . . . actually voted the shares of stock for which appraisal was sought in favor of the Merger.”⁹⁶

C. Rejecting T. Rowe Petitioners’ Other Arguments

Despite the evidence of their voting instructions, the T. Rowe Petitioners argued that (1) “they should not lose their appraisal rights because of an inadvertent error”; (2) Dell “should be estopped from treating Broadridge’s later votes . . . as Cede’s actual votes,” because language in the Dell Proxy Statement can be “interpret[ed] as saying that earlier votes would remain effective”; and (3) the voting instructions should not matter because, as noted in the related *Dell Ownership* decision,⁹⁷ the Court is not permitted to “examin[e] any evidence beyond Cede’s aggregate voting totals.”⁹⁸ Vice Chancellor Laster rejected all three arguments.

First, inasmuch as “T. Rowe accepted the risk that ISS might transmit voting instructions inconsistent with T. Rowe’s true

94. *Id.* at 53–54.

95. *Id.* at 56.

96. *Id.* The T. Rowe Petitioners also argued that the Chancery Court could not consider evidence of voting instructions because “under Section 231 of the DGCL, inspectors of election cannot consider evidence such as voting instructions when counting votes at a meeting of stockholders.” *See id.* at 54. The Vice Chancellor rejected this argument because (1) these “same limitations do not necessarily apply in a judicial proceedings,” and (2) “Section 231 does not speak to appraisal rights” and therefore “does not govern the result under [section 262]” per “the ‘bedrock doctrine of independent legal significance.’” *Id.* at 55.

97. *In re Appraisal of Dell Inc.*, No. 9322–VCL, 2015 WL 4313206, at *7 (Del. Ch. July 13, 2015) (denying beneficial owners appraisal rights when their participants retitled paper stock certificates in their own name after Cede demanded appraisal but before the effective date, thereby violating section 262(a)’s “Continuous Holder Requirement”).

98. *Id.* at 57–59.

intentions,” the T. Rowe Petitioners’ “inadvertent error” was irrelevant.⁹⁹ Second, because “under operative principles of law, a later proxy card displaces an earlier and inconsistent card,” the Vice Chancellor explained, “[t]he language in the Proxy Statement places no limitation on the effectiveness of [the] later and inconsistent proxy” submitted by Broadridge.¹⁰⁰ Finally, there “is no inconsistency” between the *Dell Ownership* decision and *Dell*: “[i]n both cases, the actions of the record holder control the outcome under the appraisal statute.”¹⁰¹ While “critical evidence that reveals how the record holder voted its shares [came] from parties other than the record holder” in *Dell* (that is, T. Rowe, ISS, Broadridge, and State Street), “the dispositive analysis operate[d] at the record holder level” in both decisions.¹⁰²

CONCLUSION

Dell demonstrates that, though Delaware courts have been liberal in determining fair value under section 262,¹⁰³ they remain strict in analyzing the procedural aspects of perfecting appraisal rights. Additionally, Vice Chancellor Laster creatively resolved apparent inconsistencies in the Appraisal Arbitrage Decisions by confirming those Decisions do not require share-tracing. Faced with T. Rowe’s attempt to use this share-tracing prohibition to rectify its mistake, the Vice Chancellor distinguished *Dell* on an evidentiary basis. Thus, while an appraisal petitioner need not trace shares to meet the Dissenter Requirement, a target corporation may introduce evidence that traces petitioners’ shares to a vote of those shares in favor of the merger.

Dell has implications both for appraisal petitioners and merging corporations. Obviously, stockholders who intend to dissent from a merger and exercise appraisal rights under section 262 must ensure their shares are not inadvertently voted in favor of the merger. Less obvious, appraisal arbitrageurs and other financial players will likely purchase shares only from disparate investors in the anonymous open market to decrease the chance that those shares could be traced to a vote in favor of the merger. By the same token, appraisal arbitrageurs and others who purchase a large block of shares from a single or few institutional stockholders should conduct sufficient diligence to ensure those shares were not voted in favor of the merger. Similarly, target

99. *Id.* at 57.

100. *Id.* at 58.

101. *Id.* at 59.

102. *Id.*

103. See generally Onyeador, *supra* note 6 (discussing Delaware courts’ tendency to award large premiums in appraisal proceedings).

corporations may pursue discovery more vigorously in an attempt to trace appraisal petitioners' shares to a vote in favor the merger, particularly where the investors outsource voting services to companies like Broadridge and ISS.