CARLTON FIELDS

With Reservations, Delaware Chancery Court Grants Summary Judgment to Dell in Appraisal Action Sparked by Going-Private Merger

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In a cash-out merger or consolidation, qualifying shareholders of a constituent Delaware corporation who do not vote in favor of the transaction may seek a judicial determination of the "fair value of [their] shares" under Section 262 of the Delaware General Corporation Law. In a recent opinion about such appraisal actions, the Delaware Chancery Court strictly construed the statutory requirements for perfecting appraisal rights. But in granting summary judgment to respondent Dell Inc. (Dell), the Chancery Court judge authoring the opinion openly questioned the current wisdom of the Delaware Supreme Court's longstanding interpretation of one of those key requirements. The opinion should be of interest to current and would-be appraisal petitioners and respondents alike. In *In re Appraisal of Dell Inc.* (Del. Ch. Consol. C.A. No. 9322-VCL), five institutional investors sought an appraisal of their share values after Dell announced its going-private merger in 2013. Dell argued in support of summary judgment that the petitioners did not hold their shares continuously through the effective

date of the merger, as required by the Delaware appraisal statute. As a result, Dell urged, the shareholders lost their appraisal rights. Vice Chancellor Laster, in a July 13, 2015 opinion, agreed with Dell that the petitioners had not satisfied the so-called "Continuous Holder Requirement" as currently interpreted by the Delaware Supreme Court. The Vice Chancellor explained that this result was dictated by certain undisputed facts relating to a change in the designation of the nominal record holder of the petitioners' shares after the appraisal demand on Dell, but before the effective date of the merger. To summarize: Following the petitioners' instructions to make the appraisal demands, the petitioners' custodial banks – consistent with their internal procedures – directed Dell's transfer agent to reissue the petitioners' shares in the names of the custodial banks' nominees rather than keep them registered in the name of the nominee of the omnibus depository institution, Depository Trust Company (DTC).[1] So even though the petitioners remained the beneficial owners of the shares and the custodial banks did not change, the nominal legal title holders of the shares did change. These facts, Vice Chancellor Laster held, entitled Dell to summary judgment without any need to entertain the petitioners' substantive request for a determination of the fair value of their Dell shares. Vice Chancellor Laster did not stop there. Rather, he proceeded to spend the majority of his 53-page opinion explaining why a "different approach" to who is deemed to be a "stockholder of record" under Delaware law would be "preferable" to the Delaware Supreme Court's current treatment of the issue. Under Vice Chancellor Laster's suggested approach – which, he observed, is consistent with the federal "look through" approach to record ownership – the custodial banks (as participating DTC members) would be recognized at all times as the shareholders of record, even if the shares were originally titled in the name of DTC's nominee. If that rule were applied, the Vice Chancellor noted, Dell's motion for summary judgment would have been denied because there was no change in share ownership at the custodial bank level. Nevertheless, in recognition of his position in the judicial hierarchy, Vice Chancellor Laster concluded: "This court obviously has no ability to tell the Delaware Supreme Court what to do. This decision has attempted only to present the reasons why one trial judge believes that a different approach would be superior." Only time will tell whether the Delaware Supreme Court decides to revisit these appraisal statute issues with an openness to what Vice Chancellor Laster views as an "interpretation [that] better reflects current reality." ___ [1] By way of further background, DTC is currently the world's largest securities depository and the only domestic depository. DTC's nominee, Cede & Co., is the record holder of the majority of the shares of all publicly traded U.S. companies in accordance with the federally mandated "share immobilization" depository system implemented in the 1970s to facilitate efficient stock trading on the national exchanges. Cede & Co. holds the shares in so-called "fungible bulk" on behalf of DTC's participating members, which include all of the major custodial banks and brokerage firms operating in the United States. DTC's history and related issues associated with the federal depository system are discussed in detail in the *Dell* opinion.

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