IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE APPRAISAL OF DELL, INC.	)	Consolidated
	)	C.A. No. 9322-VCL

THE MAGNETAR FUNDS' CROSS-MOTION FOR APPOINTMENT AS CO-LEAD PETITIONERS AND FOR APPOINTMENT OF THEIR CHOICE OF CO-LEAD COUNSEL

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"), by and through their undersigned attorneys in C.A. No. 9322-VCL (the "Dell Appraisal"), hereby cross move pursuant to this Court's April 10, 2014 Consolidation Order (the "Consolidation Order") for an Order directing that they be appointed as co-lead petitioners and that their selected counsel, Lowenstein Sandler LLP ("Lowenstein Sandler"), along with their Delaware counsel Proctor Heyman Enerio LLP ("Proctor Heyman"), be appointed as co-lead counsel, to serve jointly with the current Lead Counsel. The grounds for this motion are as follows:

I. BACKGROUND

1. The Magnetar Funds are holders, collectively, of 3,865,820 shares of common stock issued by Dell, Inc. ("Dell" or "the Company"). On October 29, 2013, Michael Dell, the Company's founder, Chairman and Chief Executive Officer, together with the private equity firm Silver Lake Partners, took the

Company private (the "Take Private Transaction"). Under the terms of the Take Private Transaction, each share of Dell common stock, other than those shares for which appraisal was demanded, was cancelled and converted into the right to receive $13.75 in cash. The Magnetar Funds dissented from the Take Private Transaction, voting "No" to it. On January 15, 2015, the Magnetar Funds filed a Verified Petitioner for Appraisal. The Magnetar Funds have perfected their appraisal rights and are seeking a determination of the fair value of their Dell shares pursuant to Section 262(a).

2. This Court found that T. Rowe Price Equity Income Fund ("T. Rowe Price") and several affiliated funds and retirement plans were the largest petitioners and thus appointed those funds and plans to be lead plaintiffs. Furthermore, pursuant to this Court's April 10, 2014 Consolidation Order, Grant & Eisenhofer, P.A. ("G&E"), which was the counsel of choice for T. Rowe Price, was appointed Lead Counsel in the Dell Appraisal. Pursuant to this Court's Consolidation Order, G&E was appointed Lead Counsel in the Dell Appraisal for the specific purpose of prosecuting the Dell Appraisal on behalf of all petitioning Dell shareholders, including the Magnetar Funds (collectively, "the Appraisal Class"). One of the predicates for the appointment of T. Rowe Price as lead plaintiff, as provided by the very first paragraph of that Order, is that the various appraisal actions filed against Dell "each involve common questions of law or fact, and justice can be

administered more effectively as among the parties without a multiplicity of suits." Consolidation Order Par. 1. This predicate on which the Lead Counsel appointment was based no longer appears to be valid.

3. As a threshold matter, T. Rowe Price failed to disclose to the Magnetar Funds that it had first come to discover on or about October 2014 (and possibly earlier, in October 2013) that its shares had been voted in favor of the merger and undertook an investigation with ISS[1] at that point in time to further explore the issue. The failure to disclose to the Magnetar Funds its discovery and investigation alone demonstrates T. Rowe Price's conflict of interest with the Magnetar Funds and the other Non-G&E Claimants, which caused harm to the Magnetar Funds in respect of their strategic considerations. Thus, for instance, the Magnetar Funds would have had a different overall strategy if they had been aware of T. Rowe Price's October 2014 discovery. Likewise, to the extent that T. Rowe Price and Dell have undertaken settlement discussions, the Magnetar Funds would have had a starkly different reaction and calculus with respect to any such negotiation if they had been aware of T. Rowe Price having allegedly voted in favor of the merger. Based on its alleged vote, its internal investigation and its failure to disclose as much to the Magnetar Funds and the other Non-G&E

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in Dell's moving brief.

Claimants, T. Rowe Price is simply not a typical claimant and not suited to be lead petitioner.

4. On July 30, 2015, Dell moved for partial summary judgment as to petitioners who voted in favor of the merger. *See* Dkt. No. 57633321. Those petitioners, defined in the Consolidation order as the "G&E Claimants", constituted the vast majority of those stockholders who retained G&E. The G&E Claimants collectively hold approximately 31 million shares of Dell, or greater than 80% of the shares seeking appraisal and $400 million in merger consideration, although approximately one million of those shares have been dismissed as ineligible to proceed based on the Court's July 13, 2015 Memorandum Opinion.

5. Dell's motion for partial summary judgment against all petitioners who voted in favor of the merger applies to nearly all of the G&E Claimants' shares,[2] which shares may thus become ineligible for appraisal because their appraisal rights allegedly were not properly perfected. Dell's motion is currently pending before this Court and, if granted, will result in approximately 30 million shares being dismissed from the Dell Appraisal.

[2] Dell clarified that it has not moved against the shares belonging to petitioner Morgan Stanley Defined Contribution Trust (Verified List No. 20), which holds 357,500 Dell shares. Accordingly, it appears that in the event Dell's motion is granted in full, Magnetar's 3,865,820 shares will be the largest single stake held by any petitioner.

6. If the G&E Claimants' shares are found to be ineligible for appraisal, it will mean that the Magnetar Funds will become the largest single stockholder. The Magnetar Funds should accordingly become lead plaintiff; likewise, if the G&E Claimants are no longer the petitioners with the largest stake they should not be lead plaintiffs.

7. The Magnetar Funds' counsel of choice in this matter, Lowenstein Sandler and Proctor Heyman, have been representing them in the Dell Appraisal. As set forth in the affidavit of Steven M. Hecht, Esq. accompanying this motion, Lowenstein Sandler and Proctor Heyman are already up to speed in this case, are familiar with the applicable discovery documents, and have been actively participating in the expert discovery process. Furthermore, the appointment of these firms as co-lead counsel will not cause any delay to the case scheduling order and these firms will be prepared to meet the existing trial calendar in this case on schedule, without delay. Indeed, the relief sought herein is narrowly tailored and cross-movants are not seeking the outright removal of T. Rowe Price as lead petitioner. On the contrary, the Magnetar Funds are striking an appropriate balance to more actively protect their own legitimate interests (which may be at odds with those of T. Rowe Price) while utilizing the experience of T. Rowe Price and its Lead Counsel, which are already fully familiar with the litigation. As counsel to the largest petitioner outside the G&E Petitioner group, Lowenstein

Sandler and Proctor Heyman represent about 65% of the Non-G&E Claimants. In addition, Lowenstein Sandler and Proctor Heyman have substantial experience successfully prosecuting appraisal petitions on behalf of dissenting shareholders. Their adequacy to serve as representative counsel in the Dell Appraisal is unquestionable.

II. DISCUSSION

The G&E Claimants Are No Longer Typical Representative Plaintiffs, And Thus G&E Can No Longer Adequately Represent The Interests Of The Magnetar Funds Or The Remaining Appraisal Class as Sole Counsel

8. Contrary to the first decretal paragraph of the Consolidation Order, it no longer appears to be the case that each of the various appraisal petitions against Dell "involve common questions of law or fact." On the contrary, the G&E Claimants are subject to unique defenses and Lead Counsel is no longer an adequate exclusive representative for the Appraisal Class. T. Rowe Price represented in its verified appraisal petition that it did *not* vote in favor of the transaction, which representation was a predicate to its appointment as lead petitioner and its selection of Lead Counsel, and which representation attested to the typicality of its claims. Dell's motion demonstrates that T. Rowe Price is subject to a unique defense and that their claims are not typical of all claims. Indeed, the undersigned counsel take no position on the merits of Dell's motion but believe that the very issue presented by that motion alone taints the typicality and

adequacy of the G&E Claimants' claims and thus compromises their ability to serve as sole representative petitioners. Moreover, it is timely and not premature to address the relief sought herein at the present time as the bare existence of the unique defense that Dell has interposed against the Subject Petitioners already has had an impact on how T. Rowe Price continues to prosecute this case. Thus, whether the G&E Claimants press forward with the case or seek more immediate resolution are tactical decisions that are necessarily clouded by the unique defense with which they are saddled. Accordingly, this motion should be resolved as soon as practicable, and is not dependent on the outcome or the timing of the resolution of Dell's motion for partial summary judgment; it is the very filing of that motion that necessitates the relief requested herein.

9. The G&E Claimants' claims do not present common questions or law or fact with those stockholders who unambiguously did not vote for the merger, such as the Magnetar Funds. The filing of Dell's July 30, 2015 motion for summary judgment creates a substantial litigation risk not faced by other petitioners that the G&E Claimants' alleged failure to comply with the requirement that they not vote in favor of the merger subjects their shares to the unique defense that those shares are not entitled to appraisal.

10. In representative litigation, such as a class suit pursuant to Court of Chancery Rule 23 or an appraisal proceeding, a stockholder whose claim is

meaningfully atypical cannot serve as Lead Plaintiff, and thus is unable to have his choice of counsel be appointed exclusive Lead Counsel.[3] The typicality inquiry, embodied in Rule 23(a)(3), focuses on whether the "legal and factual position of the class representative" is "markedly different from that of the members of the class." *Leon N. Weiner & Associates, Inc. v. Krapf*, 584 A.2d 1220, 1225-26 (Del. 1991) (quoting *Singer v. The Magnavox Co.*, 1226 Del.Ch., C.A. No. 4929, 1978 WL 4651 (Dec. 14, 1978) (Brown, V.C.)). "[A] proposed class representative may not be typical if he is potentially subject to unique defenses not applicable to other class members." *New Jersey Carpenters Pension Fund v. infoGROUP, Inc.*, No. CIV.A. 5334-VCN, 2013 WL 610143, at *3 (Del. Ch. Jan. 17, 2013). This Court's April 10, 2014 Consolidation Order explicitly references and incorporates this well-established law, providing that the various Dell appraisal petitioners should be consolidated under one Lead Plaintiff with one Lead Counsel because those petitions "involve common questions of law or fact."

11. However, contrary to what was assumed as of the time the Consolidation Order was entered on April 10, 2014, the G&E Claimants appear to

[3] The Supreme Court has "long recognized that an appraisal action is a proceeding in the nature of a class suit." *Alabama By-Products Corp. v. Cede & Co.*, 657 A.2d 254, 260 (Del. 1995). Chancellor Bouchard recently confirmed this understanding. *See Mannix v. PlasmaNet, Inc.*, No. 10502-CB, 2015 WL 4455032, at *3 (Del. Ch. July 21, 2015) ("[T]he appraisal proceeding has often been described as a version of a class action, in which all members of the class enjoy the fruits of the class representative's labor . . . .").

be markedly different from the other members of the Appraisal Class. Specifically, they are factually unique because they allegedly voted most if not all of their shares in favor of the Take Private Transaction. This singular fact subjects nearly all of the G&E Claimants' shares to the risk of dismissal from the Dell Appraisal. This Court has previously held that the "spectre" of a unique standing defense is sufficient to disqualify a stockholder from serving as class representative. *See Dieter v. Prime Computer, Inc.*, 681 A.2d 1068, 1072-73 (Del. Ch. 1996) (rejecting request to serve as lead plaintiff on typicality grounds). There is indeed such a "spectre" here, as reflected by Dell's unique standing defense to the G&E Claimants' appraisal claim.

12. Given the G&E Claimants' apparent lack of typicality, Magnetar needs to be able to share in the control of these proceedings, which heretofore it has not been able to do. Delaware law does not allow a Lead Counsel to prosecute an action independent of a satisfactory lead plaintiff. Under the analogous *Hirt* analysis, by which this Court determines which among competing plaintiffs should be appointed lead -- and have their attendant lawyers be appointed lead counsel -- plaintiff and lawyer are scrutinized hand in hand. *See Hirt v. U.S. Timberlands Serv. Co. LLC*, No. CIV.A. 19575, 2002 WL 1558342 (Del. Ch. July 3, 2002). Indeed, in *In* re *Del Monte Foods Co. Shareholders Litigation*, this Court explained that both the proposed lead plaintiff and its choice of lead counsel were

inappropriate where the lead plaintiff was subject to "unique defenses" and "divergent interests" *See* No. 6027-VCL, 2010 WL 5550677, at *6-8 (Del. Ch. Dec. 30, 2010).

13. In sum, the G&E Claimants who allegedly voted in favor of the merger and selected their own their counsel may have a markedly different appetite and strategy for prosecuting this appraisal action and for assessing any settlement offer than do the Non-G&E Claimants. In the event that the G&E Claimants are dismissed from this action, Magnetar will be the largest shareholder and should be entitled to direct the litigation strategy for this case, which until this time they have not been in a position to do. Equity also demands that G&E can no longer serve as exclusive Lead Counsel here. G&E takes direction from the G&E Claimants, whose appetite for litigation may well have changed. To date, the Magnetar Funds have not had the opportunity or ability to instruct or direct Lead Counsel on matters of litigation strategy.

14. Unlike G&E, Lowenstein Sandler's and Proctor Heyman's stake in the Dell Appraisal will remain the same before and after Dell's summary judgment motion is decided, and in the event that approximately thirty million shares represented by G&E were to be dismissed from the Dell Appraisal, the Magnetar Funds will hold the largest Dell position of any petitioner in this proceeding, and it can and should direct the prosecution of this action.

15. Accordingly, the interests of the Appraisal Class -- including the Magnetar Funds and any shares held by the G&E Claimants that may survive Dell's pending motion for partial summary judgment -- will be best served by this Court appointing co-Lead Counsel to assist G&E in prosecuting this action moving forward and ensure that Magnetar's directions are implemented. In order to provide such assistance, the Magnetar Funds must have the ability to, among other things, (i) meaningfully interact with expert and fact witnesses; (ii) receive timely access to all discovery and other documents in the file; (iii) meaningfully participate in any future depositions; and (iv) be immediately informed of and participate in any settlement discussions. Indeed, the Magnetar Funds understand that settlement discussions may be underway and they have not been invited in participate in any such conversations and have not been solicited for their opinion of the case or their settlement calculus.

16. The Magnetar Funds, as holders of nearly four million Dell shares which are not subject to dismissal, hereby propose that their choice of Lowenstein Sandler and Proctor Heyman be appointed for that task. Furthermore, the Magnetar Funds reserve all rights in respect of any proposed allocation of fees and expenses as may be brought pursuant to 8 Del. C. § 262(j).

WHEREFORE, the Magnetar Funds respectfully request that this Court grant their motion and enter an Order directing that they be appointed as co-lead petitioners, and that their selected counsel, Lowenstein Sandler LLP, along with their Delaware co-counsel Proctor Heyman Enerio LLP, be appointed as co-lead counsel, to serve jointly with the current Lead Counsel.

PROCTOR HEYMAN ENERIO LLP

/s/ Samuel T. Hirzel, II
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Dated: August 19, 2015

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE APPRAISAL OF DELL, INC.	)	Consolidated
	)	C.A. No. 9322-VCL

ORDER GRANTING THE MAGNETAR FUNDS' CROSS-MOTION FOR APPOINTMENT AS CO-LEAD PETITIONERS AND FOR APPOINTMENT OF THEIR CHOICE OF CO-LEAD COUNSEL

AND NOW, this _____ day of _____, 2015, this Court having considered The Magnetar Funds' Cross-Motion for Appointment as Co-Lead Petitioners and for Appointment of their Choice of Co-Lead Counsel (the "Motion"),

IT IS HEREBY ORDERED that the Motion is GRANTED.

_____
Vice Chancellor

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE APPRAISAL OF DELL, INC.	)	Consolidated
	)	C.A. No. 9322-VCL

AFFIDAVIT OF STEVEN M. HECHT, ESQ.

STATE OF NEW JERSEY)
) ss:
COUNTY OF BERGEN)

The undersigned, Steven M. Hecht, Esq., being duly sworn, deposes and says:

1. I am a partner at Lowenstein Sandler LLP ("Lowenstein Sandler") and, along with Proctor Heyman Enerio LLP ("Proctor Heyman"), serve as counsel to 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").

2. Proctor Heyman has been involved in this action on behalf of certain petitioners since its inception.

3. Lowenstein Sandler has followed this action closely since its first engagement in this case in May, 2015. On June 18, 2015, Lawrence M. Rolnick and I were admitted *pro hac vice* to represent the Magnetar Funds and substituted for Greenberg Traurig LLP as counsel to the Magnetar Funds. Among other

things, we have reviewed the file and discovery record, we are familiar with the expert reports, we are actively participating in the expert discovery process, and I personally attended the deposition of Stephen Shay and conducted a brief examination of that witness. In addition, I have reported on this matter on my Appraisal Rights Blog. Our appointment as co-lead counsel will not cause any delay to the case scheduling order and we are prepared to meet the existing trial calendar in this case on schedule, without delay.

4. Our firm has previously brought and defended appraisal actions successfully, and we were engaged by the Magnetar Funds based on such experience and expertise.

Steven M. Hecht

SWORN TO AND SUBSCRIBED before me
this 19th day of August, 2015

Notary Public

Signature Notary Only
SCHUKZHI SODO
Notary Public
State of New Jersey
My Commission Expires Dec. 20, 2018

CERTIFICATE OF SERVICE

Samuel T. Hirzel, II, hereby certifies that on August 19, 2015, copies of the foregoing *Magnetar Funds' Cross-Motion for Appointment as Co-Lead Petitioners and for Appointment of their Choice of Co-Lead Counsel* were served electronically upon the following counsel:

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Samuel T. Hirzel, II, hereby certifies that on August 19, 2015, copies of the foregoing *Affidavit of Steven M. Hecht, Esq.* were served electronically upon the following counsel:

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