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Case No. 9322-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: APPRAISAL OF DELL INC.) Consol. C.A. No. 9322-VCL

RESPONDENT DELL INC.'S OPPOSITION TO CERTAIN PETITIONERS' MOTION FOR AN EQUITABLE AWARD OF INTEREST

Respondent Dell Inc. ("Dell" or "Respondent"), by and through its undersigned counsel, hereby submits this Opposition to Certain Petitioners' Motion for an Equitable Award of Interest (the "Motion") dated May 18, 2016.

INTRODUCTION

1. As set forth herein, the Court should deny Moving Petitioners'[1] request to brief the issue of prejudgment interest. There is no basis to put the Court or Dell through such an exercise. Moving Petitioners did not perfect their appraisal rights and have no right whatsoever to receive prejudgment interest on their shares. Through their Motion, Moving Petitioners attempt to reargue elements of the Court's May 11, 2016 Opinion and July 30, 2015 Memorandum Opinion, yet they lack any credible statutory, contractual or equitable basis to do so. Section 262 of the Delaware General Corporation Law simply does not authorize prejudgment interest for claimants who are determined to not be entitled to appraisal, and the merger agreement expressly provided that stockholders not entitled to appraisal are due merger consideration without interest. Moreover,

[1] "Moving Petitioners" shall have the meaning defined in the Motion.

awarding prejudgment interest to Moving Petitioners would not further any equitable considerations and, in fact, would be highly inequitable to Dell in the circumstances of this action. Moving Petitioners' Motion should be denied.

ARGUMENT

A. The Moving Petitioners Have No Statutory or Contractual Entitlement to An Award of Interest.

2. Moving Petitioners ignore that in Delaware, appraisal is "entirely a creature of statute," *Kaye v. Pantone, Inc.*, 395 A.2d 369, 374 (Del. Ch. 1978), and 8 *Del. C.* § 262 only authorizes an award of prejudgment interest on shares that are entitled to the appraisal remedy. Specifically, Section 262(h) provides that the Court "shall determine the fair value of the shares," and that unless the Court determines otherwise for good cause shown, "interest from the effective date of the merger through the date of payment of the judgment shall be" paid. Relying on Section 262(h), in *Neal v. Alabama By-Products Corp.*, 1988 WL 105754 (Del. Ch. Oct. 11, 1988), the Court of Chancery rejected an argument for prejudgment interest similar to that advanced by Moving Petitioners.

3. In *Alabama By-Products*, certain demands for appraisal were determined to not comply with Section 262(a) because they were not made by or on behalf of the record holder. 1988 WL 105754, at *1. The petitioner nevertheless sought interest on the merger consideration from the date of merger for the shares covered by these invalid demands. *Id.* at *5. The Court of Chancery

concluded that Section 262(h) does not permit an award of interest on shares not entitled to appraisal: "[a]ppraisal rights are governed by statute and § 262 does authorize an award of interest to those who perfect their appraisal rights. 8 *Del. C.* § 262(h). The statute does not authorize the award of interest in other circumstances such as those presented here." *Id.*; *see also* 2 Edward P. Welch et al., *Folk on the Delaware General Corporation Law* § 262.11, at 9-261 (6th ed. 2016) ("Interest is only paid to those who have perfected their appraisal rights."); 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 9.45, at 9-181 (3d ed. 2016) (interpreting *Alabama By-Products*) ("An appraisal claimant only becomes entitled to interest after properly perfecting appraisal rights and pursuing an appraisal claim. A claimant who seeks appraisal and then has its claim disallowed is not entitled to interest on the merger consideration from the date of the merger.").

4. Neither do Moving Petitioners have any contractual entitlement to an award of prejudgment interest. Pursuant to the Merger Agreement, "[e]ach Share, other than Excluded Shares, Company Restricted Shares and Dissenting Shares,[2]

[2] "Dissenting Shares" are those which were not voted in favor of the merger and which properly exercised appraisal rights in compliance with Section 262. *See* JX 349 § 2.1(d). The Merger Agreement provides that "[i]f, after the Effective Time [of the merger], any such holder fails to perfect or effectively withdraws or loses such right [to appraisal], such Dissenting Shares shall thereupon cease to be Dissenting Shares, including for purposes of Section 2.1 (a), and shall be deemed

issued and outstanding immediately prior to the Effective Time shall be converted automatically into the right to receive $13.65 in cash, *without interest* (the 'Merger Consideration')." JX 349 (Agreement and Plan of Merger) § 2.1(a) (emphasis added). The Moving Petitioners are thus entitled to receive Merger Consideration upon surrender of their stock certificates and a duly executed letter of transmittal. *Id.* § 2.2(b)(ii). "*No interest* will be paid or accrued on any amount payable upon due surrender of [stock] [c]ertificates." *Id.* (emphasis added). All Dell stockholders, including Moving Petitioners, were put on notice by the Proxy Statement that, under the Merger Agreement, they were entitled to receive $13.75 in cash, without interest, unless they properly exercised (and did not lose or withdraw) appraisal rights under Section 262. *See* JX 654 (August 14, 2013 Dell Inc. Schedule 14A) at 12. Accordingly, Moving Petitioners lack any statutory or contractual right to prejudgment interest.

B. The Moving Petitioners Have No Equitable Basis To Seek An Award of Interest.

5. Although they have no statutory or contractual entitlement to receive prejudgment interest on their shares, Moving Petitioners nevertheless contend, without citation, that they should receive an equitable award of interest because they "sought appraisal rights in good faith." Motion ¶ 4. As recognized by the

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to have been converted into, at the Effective Time, the right to receive the Merger Consideration as provided for in Section 2.1(a)." *Id.*

Court of Chancery in *Alabama By-Products*, however, equitable considerations do not weigh in favor of granting prejudgment interest where stockholders fail to perfect their statutory appraisal rights. *See* 1988 WL 105754, at *5 (citation and internal quotation marks omitted) ("Equity, as a general rule, follows the law. In other words, this Court will recognize and give effect to all legal rules in their proper sphere."); *cf. Huff Fund Inv. P'ship v. CKx, Inc.*, 2014 WL 545958, at *3 (Del. Ch. Feb. 12, 2014) ("[W]here the General Assembly has provided a specific standard governing interest awards, such a statutory directive must trump [equitable] considerations"), *aff'd*, 2015 WL 631586 (Del. Feb. 12, 2015) (TABLE).

6. Moreover, in the present case, equity demands that Moving Petitioners' request for an award of interest on shares dismissed in the May 11, 2016 Opinion and July 30, 2015 Memorandum Opinion be denied. This Court found in its May 11, 2016 Opinion that eight of the T. Rowe Petitioners[3] filed public Form N-PX disclosures in August 2014 stating that they had voted "for" the merger. May 11, 2016 Opinion at 22. Throughout October and November 2014, T. Rowe personnel investigated this issue. *See id.* at 22-25. Email correspondence in that timeframe proves that T. Rowe personnel were informed that ISS had provided Broadridge with instructions to vote the T. Rowe Petitioners' shares in

[3] "T. Rowe Petitioners" shall have the meaning defined in the Court's May 11, 2016 Opinion.

favor of the merger, and that Broadridge had, in fact, voted the T. Rowe Petitioners' shares in that manner. *See id.*

7. Despite being armed with knowledge directly relevant to a core issue in this appraisal proceeding -- and in direct conflict with their Verified Petitions stating that the T. Rowe Petitioners did not vote in favor of the transaction -- the T. Rowe Petitioners never disclosed this information to Dell or the Court. Where plaintiffs pursue litigation knowing that allegations which form a central premise of their complaint are inaccurate, the Court has previously shifted costs to compensate defendants for expenses incurred by the lack of candor. *See Beck v. Atlantic Coast PLC*, 868 A.2d 840, 842-44 (Del. Ch. 2005). Allowing prejudgment interest would thus have the perverse effect of *rewarding* the T. Rowe Petitioners for their lack of forthrightness in the conduct of this litigation.

8. Additionally, that Dell has had the use of Moving Petitioners' Merger Consideration funds for over two and a half years (Motion ¶ 5) does not supply an equitable basis to award prejudgment interest to Moving Petitioners. Dell has retained this portion of the Merger Consideration only as a consequence of *Moving Petitioners'* choice. *See Smith v. Shell Petroleum, Inc.*, 1990 WL 186446, at *3 (Del. Ch. Nov. 26, 1990) ("Under the Delaware appraisal statute, 8 *Del. C.* § 262, a shareholder deciding to seek an appraisal . . . forgoes the use of his money while the appraisal action is pending."); *see also Gilliland v. Motorola, Inc.*, 873 A.2d

305, 312 (Del. Ch. 2005) (citation and internal quotation marks omitted) (stating that the most significant risk faced by a stockholder seeking appraisal is that it "must forego all of the transactional consideration and essentially place [its] investment in limbo until the appraisal action is resolved"). The T. Rowe Petitioners were aware before they filed suit that they would not receive interest if for any reason they were found not to be entitled to appraisal. *See supra* ¶ 4. Once the T. Rowe Petitioners knew they voted in favor of the transaction, they made the additional calculated decision to continue with litigation despite the significant risk that they would ultimately be determined to not have appraisal rights.

9. When attempting to exercise appraisal rights, Moving Petitioners necessarily assessed the potential risks and rewards of accepting the Merger Consideration versus pursuing an appraisal action (and thereby not having use of its Merger Consideration for the duration of the litigation). *See Gilliland*, 873 A.2d at 312 ("a minority stockholder [pursuing appraisal] is subject to the surviving company's credit risk"); *Shell Petroleum, Inc.*, 1990 WL 186446, at *3 ("A shareholder seeking an appraisal also faces the risks inherent in such an action-such as, the likely long duration of the appraisal proceeding . . ."). Moving Petitioners chose to pursue an appraisal action, and the fact that they have not achieved the hoped-for outcome does not mean that this Court should step in and award prejudgment interest to compensate Moving Petitioners for a risk (*e.g.*,

foregoing the Merger Consideration in favor of an appraisal action) they willingly took on. Granting Moving Petitioners interest in this action would create a precedent for allowing petitioners to pursue risk-free appraisal, thereby encouraging non-meritorious appraisal litigation.

C. No Further Briefing On, Or Argument Of, This Motion is Warranted.

10. Contrary to Plaintiffs' assertion (Motion ¶ 3), additional briefing and argument of this Motion is not necessary. In the first instance, Moving Petitioners' contention that their purported entitlement to prejudgment interest was not briefed in connection with the cross-summary judgment motions considered by the Court in the May 11, 2016 Opinion is not accurate. Dell's opening and reply briefs posited that the T. Rowe Petitioners were not entitled to prejudgment interest. *See* Respondent Dell Inc.'s Brief in Support of Motion for Partial Summary Judgment as to Petitioners Who Voted in Favor of the Merger (Trans. ID 57633321), at 3 ("[The T. Rowe Petitioners] shares were converted by operation of the merger agreement and of 8 *Del. C.* § 251(b) (5) into the right to receive the merger consideration of $13.75 per share, without interest."); *id.* at 47 (The T. Rowe Petitioners "have not complied with the prerequisites of Section 262(a) and are not entitled to appraisal, but rather are entitled to the Merger Consideration of $13.75 per share, without interest."); Respondent Dell Inc.'s Reply Brief in Support of Motion for Partial Summary Judgment, and Opposing Petitioners'

Cross-Motion, as to Petitioners Who Voted in Favor of the Merger (Trans. ID 58544374), at 28 ("The [T. Rowe] Petitioners are not entitled to the appraisal remedy, and should receive only the Merger consideration, without interest."). The Moving Petitioners never disputed this contention or advanced a competing argument in their cross-motion or at oral argument, and as a result, the Moving Petitioners should not be permitted to argue they are entitled to prejudgment interest at this belated time. *See Wimbledon Fund LP v. SV Special Situations LP*, 2011 WL 378827, at *7 n.44 (Del. Ch. Feb. 4, 2011) ("[G]enerally arguments not raised in a party's briefs are deemed waived because they have not been fairly asserted.").

11. Although not labeled as such, the Motion is essentially a motion for reargument of this Court's July 30, 2015 Memorandum Opinion and May 11, 2016. With respect to the July 30, 2015 Memorandum Opinion, Moving Petitioners presumably recognize that their opportunity to move for reargument has long since passed and any such motion would be denied as untimely. *See* Ct. Ch. R. 59(f) ("A motion for reargument . . . may be served and filed within 5 days after the filing of the Court's opinion or the receipt of the Court's decision"); *Blank v. Belzberg*, 2003 WL 21788086, at *1 (Del. Ch. July 24, 2003) (denying motion for reargument because, among other reasons, "the motion is untimely[] since it was

not filed and served within 5 days of the filing of this court's opinion or its receipt . . .").

12. With regard to the May 11, 2016 Opinion, Moving Petitioners would be precluded from seeking reargument on their purported entitlement to prejudgment interest because of their tactical decision to not address the issue in briefing or in arguing the cross-motions for summary judgment. *See Am. Legacy Found. v. Lorillard Tobacco Co.*, 895 A.2d 874, 877 (Del. Ch. 2005) (noting that defendant had a "full and fair opportunity" to make any arguments it wanted and to choose what it considered to be its most powerful arguments, and "[b]ecause the court addressed [defendant]'s motion for summary judgment in full and ruled against [defendant], a motion for reargument is not a proper device for [defendant] now to advance arguments that it chose not to make . . ."), *aff'd*, 903 A.2d 728 (Del. 2006). In any event, a motion for reargument of this Court's May 11, 2016 Opinion would fail because the Court has not "overlooked a decision or principle of law that would have controlling effect or . . . misapprehended the law or facts so the outcome of the decision would be affected." *Brown v. Wiltbank*, 2012 WL 5503832, at *1 (Del. Ch. Nov. 14, 2012) (citation and internal quotation marks omitted).

CONCLUSION

13. For the foregoing reasons, Respondent respectfully requests that the Court decline to order any further briefing or argument on the Motion, and otherwise deny the Motion in all respects.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 23rd day of May, 2016, true and correct copies of the foregoing were caused to be served on counsel of record at the following address as indicated:

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