

## Progress of Proposal to Revise Management of Dell Appraisal Case

Based on your comments and on the advice of legal counsel regarding the recently reported concerns about the conflicting duties of lead counsel in the Dell appraisal case,<sup>1</sup> the Cavan petitioner has submitted the following response to Magnetar Capital's motion for their control of the case:

- [September 15, 2015, \*In Re: Appraisal of Dell, Inc.\* \(Consol. C. A. No. 9322-VCL\): Petitioner Cavan Partners Response to Magnetar Funds' Cross-Motion for Appointment as Co-Lead Petitioners, with Exhibit](#) (9 pages, 360 KB, in [PDF](#) format)

Summarizing the response, it supports Magnetar's view of a need for court action to assure appropriate representation of legitimate claimant interests, but requests the court's consideration of alternatives to Magnetar's proposed solution. Cavan specifically suggests that the Court simply resolve the eligibility challenges of T Rowe Price before proceeding further with the trial of valuation issues, according to the statute,<sup>2</sup> so that the existing Lead Counsel will one way or another be relieved of any conflicting duties and be able to devote its expertise and knowledge of the case to the interests of all remaining, legitimate claimants.

If the court decides that the valuation trial should proceed before determining the interests of Lead Counsel's clients, however, the Cavan response asks that the court resolve the concerns about control by some alternative to the Magnetar proposal that would not diminish the rights of all other petitioners to be heard.

The court has suggested scheduling its hearing of the Magnetar motion on either September 25 or 28, and we will of course report developments.

*GL – September 16, 2015*

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<sup>1</sup> See the [August 25, 2015 Forum Report: Response to Proposal for Revised Management of Dell Appraisal Case](#).

<sup>2</sup> See [Delaware General Corporation Law, § 262. Appraisal Rights](#), Section (h): "After the Court determines the stockholders entitled to an appraisal, the appraisal proceeding shall be conducted in accordance with the rules of the Court of Chancery, including any rules specifically governing appraisal proceedings."



Forum to review and report the views of other investors and professionals relating to the issues addressed in the Magnetar Fund's motion. Accordingly, the Shareholder Forum distributed and publicly posted a report on August 20, 2015 seeking comment on the following observations:

- A. ***Interests of petitioners with challenged claims may differ from those of other claimants.*** If there is a significant risk that a petitioner's claim may be ineligible for appraisal rights, and thus entitled only to the offer price without interest accrual, that petitioner's interests may be best served by a rapid resolution of the case without regard to valuation. This interest has become very significant since Dell and T. Rowe Price have established a briefing schedule that does not require the petitioners to file their answering brief until the end of January 2016, rather than the usual month, so that a court determination of eligibility and possible appeals will leave this issue open until long after a valuation.
  
- B. ***The manager of petitioning accounts may be concerned about minimizing liability.*** Assuming investors in the petitioning funds may seek to hold the fund manager responsible for amounts that would have been realized but were lost because the appraisal rights were not effectively established, then the fund manager may have a practical financial interest in minimizing the value of those potential claims. A lower settlement or valuation award, for example, would reduce the amount of the fund manager's possible liabilities to its investors.

Based on comments it received from the August 20 report, the Shareholder Forum distributed and posted a second report, dated August 25, 2015 ("Forum Report"), which is attached hereto as Exhibit A.

2. It is apparent that, unlike the other petitioners, a majority of the G&E Claimants face a significant risk that their shares will be ineligible for appraisal rights, and that the responsible fund managers may be liable to their investors for

any lost appraisal rights and interest accruals.

3. On the same day that the Magnetar Funds filed their motion for appointment as co-lead counsel, Dell and the G&E Claimants filed a stipulated briefing schedule regarding Dell's Motion for Summary Judgment that does not require this Court to determine eligibility issues until several months after the trial on valuation. Therefore, it appears that the G&E Claimants have created a situation in which Lead Counsel would continue to have primary duties to the "class," whose interests may differ from those of their clients.

4. If the challenges to the G&E Claimants' entitlement to appraisal are resolved prior to trial, the sequence that is set forth in the appraisal statute,<sup>3</sup> there would be no need to modify the Consolidation Order or take any other action. Resolving whether the G&E Claimants are eligible for appraisal rights would eliminate the conflicting interests, and thus allow Lead Counsel to devote its expertise and understanding of the case to the benefit of all entitled claimants.

5. While resolution of the eligibility issues prior to this Court's trial on valuation would require the Court to reconsider the briefing schedule negotiated by the G&E Claimants and Dell, the stipulated schedule was submitted for court approval on the same day as the filing of the Magnetar Fund's motion for

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<sup>3</sup> Section 262 (h): "After the Court determines the stockholders entitled to an appraisal, the appraisal proceeding shall be conducted in accordance with the rules of the Court of Chancery, including any rules specifically governing appraisal proceedings."

appointment of co-lead counsel. Accordingly, the briefing schedule was not addressed by the Magnetar Funds in their motion, so there has been no opportunity for the interests of the Magnetar Funds or any other petitioner to be heard.

6. If the Court decides that the case should proceed without first resolving the eligibility challenges of Lead Counsel's clients, Cavan respectfully requests that the Court consider an alternative to the Magnetar Fund's proposed modification of the Consolidation Order that does not diminish the rights of other named petitioners to be heard.

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Dated: September 15, 2015

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# EXHIBIT A

## Response to Proposal for Revised Management of Dell Appraisal Case

The comments some of you have offered on the proposals presented in last week's motion by petitioners managed by Magnetar Capital,<sup>1</sup> and on the preliminary summary of the issues they raised,<sup>2</sup> have been very helpful in defining the interests of Dell investors with unchallenged appraisal rights.

We will be asking counsel for the Cavan petitioner to present these interests for the court's consideration, and will appreciate your further comments on the following points and any additional concerns to refine what we report.

1. **Reliance upon counsel representing challenged petitioners:** The lawyers engaged to represent the petitioners managed by T. Rowe Price have a primary duty to serve those client interests. As indicated in the Magnetar motion and previous Forum reports,<sup>3</sup> the recently discovered eligibility issues of the T. Rowe Price petitioners make their interests different from – and possibly opposed to – the interests of claimants with unchallenged appraisal rights. Counsel for the T. Rowe Price petitioners should therefore not be expected to also serve the unchallenged claimants as contemplated in their appointment as “Lead Counsel” prior to the disclosure of conflicting interests.
2. **Proposal of “Co-Lead Counsel” arrangement:** Questions have been raised about the need to create a new “Co-Lead” arrangement rather than simply appoint a substituted Lead Counsel to perform the duties that are defined by the court's existing Consolidation Order. The provisions of that Order already support the active involvement of any petitioner's counsel, so that substitution of a new Lead Counsel would allow counsel for the T. Rowe Price petitioners to participate as much as they could in the role of a newly defined “Co-Lead Counsel.” The simpler form of leadership may also be more efficient, of course, in terms of orderly progress as well as costs.
3. **Proposal to establish “Co-Lead Petitioners,” generally:** Nothing could be found in the existing Consolidation Order, or in the statute establishing appraisal rights,<sup>4</sup> that provides for an official “lead” designation for petitioners. Whether permissible or not, the motion did not explain how the creation of this legal position would benefit the process or the interests of claimants. Many Forum participants, it should be noted, believe they can rely upon Delaware's appraisal of fair value partly because of the well-tested rules for an

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<sup>1</sup> See [August 19, 2015, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): The Magnetar Funds' Cross-Motion for Appointment as Co-Lead Petitioners and for Appointment of Their Choice of Co-Lead Counsel](#).

<sup>2</sup> See the [August 20, 2015 Forum Report: Inviting Comments for Response to Dispute Between Dell Appraisal Petitioners](#).

<sup>3</sup> See the [July 2, 2015 Forum Report: Delays in Management of Dell Appraisal Case](#).

<sup>4</sup> See [Delaware General Corporation Law, § 262. Appraisal Rights](#).

orderly court proceeding that provides rights for all petitioners to be heard. Revisions to allow management of the process like a securities class action would raise concerns about ultimate investor interests in their commitments of long term capital to corporate enterprises.

4. **Consideration of candidate if court establishes “Lead Petitioner” control:** If the court decides to create authority for the proposed “Co-Lead Petitioners” or a single “Lead Petitioner,” it is assumed that any appointment would be subject to determining whether a candidate has any relationships with Dell or its private equity investors, or any direct or derivative interests in Dell’s debt securities. It is also assumed that the court would define a process for participation in a review by other petitioners whose rights would necessarily be conceded to the “Lead Petitioner.”

Simply stated, it appears that the existing Lead Counsel (a) has duties that conflict with the interests of unchallenged claimants and (b) has not been voluntarily providing information as expected of either a Lead Counsel or an officer of the court. We should of course rely upon the court to decide how this can be most effectively resolved, but for the court to do so investors must satisfy their responsibilities to inform the court of their interests.

*GL – August 25, 2015*

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## CERTIFICATE OF SERVICE

I hereby certify that copies of **Petitioner Cavan Partners Response To Magnetar Funds' Cross-Motion For Appointment As Co-Lead Petitioners** with **Exhibit A** were served on counsel below via LexisNexis File & ServeXpress on September 15, 2015:

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