

Dell Appraisal Case Focuses on Intrinsic Value and Proxy Plumbing

Arguments addressing analysis of “fair value”

Responsibility for proxy voting

Recent court filings of legal briefs in the Dell appraisal proceedings may have relevance beyond that case to the broader interests of Forum participants concerned with applications of “value investor” principles of analysis as a foundation for long term capital commitments, and also to the interests some of you have been concerned about “proxy plumbing” improvements to support your ownership rights.

Arguments addressing analysis of “fair value”

The following briefs were filed during the past few weeks by counsel for the petitioning stockholders demanding appraisal rights and by Dell as respondent, concluding the submissions of post-trial valuation arguments initiated last month:¹

- [January 25, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Petitioners' Post-Trial Answering Brief](#) (69 pages, 638 KB, in [PDF](#) format)
- [February 15, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Respondent Dell Inc.'s Post-Trial Answering Brief](#) (68 pages, 697 KB, in [PDF](#) format)

Notably, counsel for the appraisal claimants has now shifted the primary focus in its January 25 Answering Brief – in “Argument I. The Merger Price Does Not Represent the Fair Value of Dell as a Going Concern” (pages 4-13, PDF pp. 15-24) – to the distinction between marketplace pricing of securities and a company’s intrinsic value, as recognized by both value investors and Delaware law,² and as encouraged by Forum research.³ This view of valuation is then supported with both facts and logic to show that since the buyers neither planned nor implemented any changes in the company to increase its intrinsic value, the only way they could have justified the transaction was to “acquire the company at a price below the intrinsic value and thereafter sell the asset a time when the intrinsic value can be realized.” (Petitioners’ Answering Brief page 9, PDF p. 20.)

The subsequent Dell Answering Brief argues that market pricing should be considered a determination of intrinsic value, and that there is no reason to believe that management buyouts are likely to be priced at less than intrinsic value.⁴

¹ See the [January 6, 2016 Forum Report: Dell’s Expert Arguments Supporting “Widely Divergent” Appraisal Value](#); other legal briefs and expert reports addressing valuation submitted in the Dell case, including pre-trial as well as post-trial, are available in the “[Appraisal of Fair Value](#)” section of the Forum’s [Dell Valuation Project Reference](#) page.

² For the foundations of Delaware fair value appraisal, see [2009, Lawrence A. Hamermesh of Widener University and Michael Wachter of University of Pennsylvania: "Rationalizing Appraisal Standards in Compulsory Buyouts"](#) and its referenced [2005, Hamermesh and Wachter: "The Fair Value of Cornfields in Delaware Appraisal Laws"](#).

³ For a legal analysis of 20 years of Delaware appraisal decisions prepared for the Forum, see the [September 10, 2013 Forum Report: Court Rules for Appraisal: Fair Value = Intrinsic Value](#).

⁴ For recent research showing that marketplace practices encourage the pricing of private equity buyouts at less than a company’s fair value, see [October 2015 \(draft\), Iman Anabtawi of the UCLA School of Law for publication in UC Davis Law Review: "Predatory Management Buyouts"](#).

Responsibility for proxy voting

While the specific issue of entitlement to appraisal rights in this case requires the fund manager to argue that its voting “discrepancy” has no legal relevance,⁵ most investors will be pleased that the evidence presented in the following briefs shows that the service providers responsible for processing proxies have in fact developed very effective practices to assure the reliable execution and reporting of specific shareholder voting instructions:

- [January 8, 2016, *In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Certain Petitioners' Motion for Summary Judgment Regarding Entitlement to Appraisal; Brief in Support of Motion and in Opposition to Respondent's Motion for Summary Judgment, with Exhibits* \(382 pages, 36.9 MB, in PDF format\) \[Note: 1,554 pages of exhibits designated by counsel as "Confidential and Filed Under Seal" have been deleted.\]](#)
- [February 8, 2016 \(public version filed February 15, 2016\), *In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): 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* \(49 pages, 370 KB, in PDF format\)](#)

Legal arguments about the relevance of the vote in fact rely heavily upon a 2007 court decision that based satisfaction of voting requirements on shares of stock that at the time could be viewed only as being held and voted in a “fungible bulk.”⁶ Since that time, the SEC had encouraged improvements in a 2010 “concept release,” presented by Dell as the sole exhibit to its Reply Brief (Exhibit A), and a 2011 University of Delaware “Roundtable”⁷ presented recommendations to establish “end to end confirmation” of specific voting actions. The marketplace responses by Broadridge, Depository Trust, and other Roundtable participants can be seen in the evidence of the current briefs as reliably transmitting authorized votes, including mistaken ones, of specific stock holdings, and in the process establishing sound records for confirming and reporting those votes. It should be noted that the current processes for administration of voting also seem to allow accommodation of whatever disclosure policies may be established to respect voting privacy.⁸

Your questions and comments will be welcomed.

GL – February 16, 2016

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⁵ See [May 18, 2015 USA Today: "Dell moves to boot T. Rowe from appraisal case"](#).

⁶ See [In re: Appraisal of Transkaryotic Therapies, Inc. \(De. Ch. May 2, 2007\)](#).

⁷ See [August 17, 2011, Weinberg Center for Corporate Governance at the University of Delaware: "Report of Roundtable on Proxy Governance: Recommendations for Providing End-to-End Vote Confirmation"](#).

⁸ See, for example, [May 23, 2013 Wall Street Journal | MoneyBeat: "J.P. Morgan Vote Confusion Prompts a Call for New Rules"](#).