

Preserving the Benefits of a Model Appraisal Rights Case

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The Dell appraisal case that has been widely viewed a model of how investors can realize fair value now appears to be developing into an example of what can go wrong. Last week there was a flurry of twelve court filings, including four on the pre-holiday Friday, about how much money should be given to everyone other than the investors who are eligible for appraisal rights.¹

Controversy has been focused on the fee application of Grant & Eisenhofer (“G&E”), the firm that was appointed Lead Counsel. They are asking the court for an order that would make the eligible appraisal claimants responsible for paying the firm’s proposed charges, with no charges to the firm’s direct clients that were found to be ineligible for appraisal rights. The amount of G&E’s proposed legal fees and expenses is \$7,999,912.78, or approximately \$1.45 per share if charged only to the 5,505,730 eligible shares, and not to the firm’s ineligible clients.²

¹ The records below for filings during the week of June 5 to July 1, 2016 are posted in the “[Motions concerning legal services](#)” and “[Settlement with former petitioners](#)” sections of the reference page for the Forum’s Dell project, but do not include an exchange of letters between the court and an investor in a T Rowe Price fund that had failed to establish eligibility:

1. [June 27, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Court of Chancery Judicial Action Form: T/C Hearing Regarding Proposed Settlement](#) (1 page, 36 KB, in [PDF](#) format)
2. [June 27, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Magnetar Funds' Reply Memorandum in Further Support of Their Renewed Motion for Appointment as Co-Lead Petitioners and for Appointment of Their Choice of Co-Lead Counsel](#) (9 pages, 284 KB, in [PDF](#) format)
3. [June 29, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Petitioners' Opposition to the Magnetar Funds' Motion to Compel Discovery](#) (5 pages, 384 KB, in [PDF](#) format)
4. [June 29, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Magnetar Funds' letter to Court Regarding Secret Settlement](#) (4 pages, 108 KB, in [PDF](#) format)
5. [June 29, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Dell letter to Court with Form of Proposed Order Approving Settlement](#) (4 pages, 349 KB, in [PDF](#) format)
6. [June 29, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Order Approving Settlement](#) (4 pages, 208 KB, in [PDF](#) format)
7. [June 30, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Letter of Stuart M. Grant, Grant & Eisenhofer, to Court Responding to Magnetar Funds' letter to Court Regarding Secret Settlement](#) (5 pages, 140 KB, in [PDF](#) format)
8. [June 30, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Magnetar Funds' Reply Memorandum in Further Support of Their Motion to Compel Discovery Relating to Lead Counsel's Fee Petition](#) (7 pages, 285 KB, in [PDF](#) format)
9. [July 1, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Letter of Stuart M. Grant of Grant & Eisenhofer to Court Responding to Magnetar Funds' Reply in Support of Motion to Compel Discovery](#) (3 pages, 81 KB, in [PDF](#) format)
10. [July 1, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Global Continuum Petitioners' Brief and Exhibits in Opposition to Motion for Lead Counsel's Fees](#) (51 pages, 1.1 MB, in [PDF](#) format)
11. [July 1, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Global Continuum and Magnetar Funds' Motion to Extend Fee Petition Briefing Schedule](#) (8 pages, 306 KB, in [PDF](#) format)
12. [July 1, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Magnetar Funds' Memorandum and Exhibits in Opposition to Motion for Lead Counsel's Fees](#) (18 pages, 490 KB, in [PDF](#) format)

² See [June 2, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Petitioner's Motion for an Award of Attorneys' Fees and Reimbursement of Expenses Pursuant to 8 Del. C. § 262\(j\)](#) (11 pages, 155 KB, in [PDF](#) format).

Bearing some responsibility for having supported the appointment of G&E as Lead Counsel, I feel compelled now to seek your views – those of you who relied upon Forum support in the Dell case as well as those of you with interests in future applications of appraisal rights – regarding the issues summarized below.

Delay of payments to eligible appraisal rights claimants

The fight over legal fees appears to be the only open issue that is delaying the court's issuing a final order for the distribution of payments to eligible claimants.³

We should assume that without this diversion the required court order could be issued within a few days. The lawyers on both sides have in fact demonstrated their ability to resolve whatever was required to get such an order within only two days to pay G&E's clients that were determined to be *not* eligible for appraisal rights.⁴

In this context, it has also been noted that G&E has demonstrated their ability to act quickly as Lead Counsel in their numerous filings relating to their fees, including those of the last week as well as their previously referenced fee application that was filed on June 2, 2016, within only two days of the court's May 31 valuation decision⁵ that provided the basis for a fee.

Burdens of payments for legal services

While G&E's proposal to shift the burden of payments from their clients to non-client claimants was clearly inappropriate, it had initially seemed fair to allocate the costs – those that the court finds reasonable – ratably based on all shares that G&E was appointed to serve as Lead Counsel.⁶ Recent observations, though, have raised questions about whether anyone other than the clients that G&E was directly engaged to represent should be required to pay for the firm's services.

These are some of the issues that may justify consideration:

- 1. Whether G&E has effectively served non-client claimants:** Although it has been suggested that the benefits G&E asserts claimants realized from its services as Lead

³ See [June 14, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Dell letter to court](#) (4 pages, 89 KB, in [PDF](#) format); however, also see [June 14, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Magnetar letter to court](#) (4 pages, 128 KB, in [PDF](#) format).

⁴ For the court's summary of the issues it was required to consider, see the [Order](#) listed as [item 6](#) in footnote 1, above.

⁵ See [May 31, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Post-Trial Memorandum Opinion Determining Fair Value](#) (115 pages, 667 KB, in [PDF](#) format).

⁶ See [June 7, 2016, Shareholder Forum letter: Observations provided to counsel for all petitioners relating to interests of investors in reliance upon court for fair allocation of costs without confusion and delays of recent motions](#) (2 pages, 161 KB, in [PDF](#) format), and the adoption of those views in last week's [Global Continuum Petitioners' Brief](#) listed as [item 10](#) in footnote 1, above; note that the number of shares subject to allocation could range from approximately 36 million based on what Lead Counsel asserted they were representing as appraisal claimants at the time of the valuation trial to approximately 38 million as calculated by Global Continuum.

Counsel should be questioned, based on the court's stated rejection of the expert views they presented and reliance instead on what Dell presented for the court's development of its own valuation, this kind of debate is not likely to serve any productive purpose. We should instead simply credit G&E for what appeared to be a genuine effort to support a high valuation.

After the valuation trial, however, once it was determined that most of G&E's direct clients were no longer eligible claimants, it does appear that G&E has devoted efforts to serve those clients in preference to the eligible claimants. The "secret settlement" they negotiated for the benefit of their dismissed clients has raised many questions,⁷ but even if it is assumed that these have no relevance to the eligible claimants it is clear that G&E negotiated a *payment for its ineligible direct clients of \$28 million in excess of what the Court determined was required*⁸ – about \$.88 per share⁹ – and *nothing for eligible claimants* that G&E was assumed to be serving as Lead Counsel.

As indicated in the next point, G&E's design of the fee application itself presents similar issues of addressing the interests of their clients over those of non-client claimants.

- 2. Allocation of payments for services provided as Lead Counsel:** To the extent that services provided by G&E as Lead Counsel for the benefit of appraisal claimants can be identified separately from the services they provided to clients who engaged them directly, it must be decided who should be paying for whatever the court determines to be reasonable charges for those Lead Counsel services.

Assuming even the full G&E proposal of \$7,999,912.78 for purposes of illustration, allocating that amount to the total 36,557,860 shares¹⁰ Lead Counsel was representing through the valuation trial and post-trial briefing would reduce the cost borne by all investors to only \$0.22 per share. This compares with the \$1.45 per share that G&E is seeking by allocating their proposed charges only to the 5,505,730 shares held by remaining eligible claimants, without imposing any of the burden on their clients.

⁷ See the "[Speculation about what is being settled](#)" section of the [June 29, 2016 Forum Report: Reported Dell Settlement with Former Appraisal Petitioners](#).

⁸ T. Rowe Price was required to disclose the \$28 million amount in an SEC filing; see [July 1, 2016 The Baltimore Sun: "Dell pay-out helps T. Rowe compensate fund investors"](#) and the referenced [July 1, 2016, T. Rowe Price Group, Inc., SEC Form 8-K: Report of \\$28 million settlement reducing previous reserve for losses resulting from the denial of appraisal rights](#) (3 pages, 145 KB, in [PDF](#) format).

⁹ Assumes equal allocations to the 31,975,105 shares in T Rowe Price accounts calculated by the court as dismissed in its two decisions: [July 13, 2015, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Memorandum Opinion](#) (54 pages, 358 KB, in [PDF](#) format) and [May 11, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Opinion Enforcing Dissenter Requirement](#) (70 pages, 625 KB, in [PDF](#) format).

¹⁰ The total of 36,557,860 shares is calculated as the sum of 5,505,730 shares stated to be finally eligible for appraisal claims in the previously cited [June 2, 2016, Petitioner's Motion for an Award of Attorneys' Fees](#) and the court's count of 31,052,130 shares dismissed in its previously cited [May 11, 2016, Opinion Enforcing Dissenter Requirement](#).

3. **Refusals to respect Consolidation Order:** As noted in the current motion papers as well as past Forum communications, G&E had repeatedly refused to follow the requirements of consultation and coordination with all petitioners established in court's Consolidation Order as a condition of the firm's appointment to serve as Lead Counsel. To the extent that G&E has not respected these conditions of the court's Order, it may be appropriate to reduce or eliminate the fees intended to reward services as Lead Counsel.
4. **Questions about whether direct clients are paying for services:** It has been noted that G&E carefully stated in one of its initial responses to discovery demands relating to its fee application that the firm had not and would not be receiving any *expense reimbursements* from T Rowe Price,¹¹ but neither G&E nor T Rowe Price has reported anything about payments for other purposes such as fees for services that may be related directly or indirectly to the appraisal case, or attributable to the separate settlement negotiated for the benefit of ineligible clients.

Responsible management principles would require determining that charges are not being duplicated, or shifted among clients. It is assumed that the information required to review this issue will be provided before the court is asked to make any decisions.

5. **Refusals to explain or document charges:** Although G&E had initially promised to provide relevant documentation of their charges voluntarily, they subsequently refused to do so, either voluntarily or in response to formal discovery demands.¹² If neither claimants nor the court will be able to review conventional supporting records and explanations, it is assumed that the charges cannot be approved.



Please offer your views of these or any other issues you consider relevant to a resolution of the current controversies. This is a case in which the court has so far supported your interests in realizing the fair value of corporate investment, and we should assume that its disposition of the issues relating to legal services will be designed to preserve those interests.

GL – July 6, 2016

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¹¹ See G&E's statement "In addition, G&E confirms that neither T. Rowe Price nor any other person or entity has reimbursed G&E for any of the expenses incurred during the prosecution of this case, nor will anyone do so except through the pending motion" in response to No. 9 on pages 7-8 (PDF pp.9-10) and a similar statement in response to No. 13 on pages 9-10 (PDF pp.11-12) of [June 13, 2016, In Re: Appraisal of Dell, Inc. \(Consol. C. A. No. 9322-VCL\): Grant & Eisenhofer letter and Objections to Magnetar Interrogatories and Requests for Admissions and Documents](#) (35 pages, 1.0 MB, in [PDF](#) format).

¹² See [item 3](#) and [item 9](#) in footnote 1, above.