

Chancery's Dell Ruling Gives New Life To Appraisal Actions

By **Matt Chiappardi**

Law360, Wilmington (May 31, 2016, 11:40 PM ET) -- The Delaware Chancery Court's ruling that valued Dell stock at nearly \$4 above the transaction price in its roughly \$25 billion take-private deal throws cold water on any notion that the court would continue to look no further than market price in appraisal actions, a move that experts say encourages shareholders' attorneys to keep bringing such challenges.

On Tuesday, Vice Chancellor J. Travis Laster ruled that the fair value of Dell's stock at the time its take-private deal led by founder and CEO Michael Dell closed in 2013 was actually \$17.62 — 28 percent higher than the \$13.75 transaction price.

In fact, the vice chancellor didn't consider the deal price at all when trying to determine the fair value of Dell, in part because the transaction, rather than being a so-called arm's length deal, was a management-led buyout and the intrinsic worth of a company required a more thorough examination, according to the opinion.

The decision breaks a recent chain of Chancery appraisal opinions, including Vice Chancellor Sam Glasscock III's rulings in Ancestry.com, BMC Software Inc. and CKx Inc., holding deal price to be the fair value, and experts say Vice Chancellor Laster's findings reiterate the Delaware law position that market price does not have to be the ultimate factor in appraisal actions.

"Outside shareholders should be gratified and extremely encouraged by the court's decision to perform traditional valuation techniques to protect them and, when necessary, use its judgment to price a deal higher than the various corporate insiders," said David Graff, co-chair of Anderson Kill PC's corporate and commercial litigation practice group. "The Chancery Court is not going to let itself be constrained by an artificial ceiling set by market participants when it believes there's compelling data."

While there have been appraisal cases in recent years that have been settled for a share value that beats what the deal price was, it was rare to see one that went all the way to trial and didn't hang the valuation on what the market supposedly had spoken for.

Longtime Delaware attorney David J. Margules of Ballard Spahr LLP said that the recent spate of appraisal decisions cutting toward deal price had "put starch in defendants' collars" on the issue, but that anyone who thinks the law has changed regarding what the court should be weighing in these matters should think again.

"The law has always been that deal price is just a data point," Margules said, adding that Vice Chancellor

Laster's decision analyzes the limitation of the concept that deal price is always reflective of fair value.

That notion was beginning to take the gas out of the tank for shareholders looking to have their stock appraised, but the decision in Dell, even though it was very specific to the facts in the case, stopped the idea that the Chancery Court was necessarily going to default to merger price from gaining traction, experts said.

"No one should have read the previous opinions as creating a flat rule that the deal price is the maximum," said Lawrence Hamermesh, professor of corporate and business law at Widener University Delaware Law School. "[Deal price is] a powerful piece, but it's not a presumptive one, let alone a conclusive one."

The key difference between the Dell case and other recent appraisal actions is that the computer giant's take-private transaction was a management-led buyout instead of one completely driven by market forces.

Jed I. Bergman, a partner at Kasowitz Benson Torres & Friedman LLP, trained in on that factor, noting that it could be an indicator that the Chancery Court could be headed toward giving such transactions a second look in appraisal actions, opening a door for shareholders.

"The management-led buyout structure was a key factor behind the decision's departure from recent Chancery cases finding that the deal price was the best indicator of fair value," Bergman said. "The court's analysis, and its decision to give zero weight to the final merger price, suggests that management-led buyout transactions may well face increased scrutiny in appraisal proceedings."

In third-party transactions, deal price can be a good indication of value, but it can become problematic in a scenario like Dell's, said University of Pennsylvania corporate law professor Jill E. Fisch.

"If you've got a robust sale process and an independent buyer, then the deal price that was negotiated in this robust market is a good indication of value," Fisch said. "With something like a management-led buyout, there's a risk of controlling the timing and self-interest. There's a risk the deal is going to be priced opportunistically."

In the Dell instance, Vice Chancellor Laster was careful to note that there appeared to be no breaches of fiduciary duty by Michael Dell or other Dell management, going as far as writing that the deal would "sail through" the Chancery Court if evaluated under that standard.

But he also noted that even though the deal makers did "praiseworthy" things, fiduciary duty claims and appraisal are two separate analyses. Part of the vice chancellor's opinion focused on a disconnect between the market's perception of what the company was worth and what he called its "operational reality."

Dell had shown through the trial that it was in the midst of a transformation, pivoting from a company seen as stuck in the shrinking market for personal computers to one arming itself to respond to disruptions caused by the exploding smartphone and tablet space, the vice chancellor wrote.

Those considerations need to be factored in when determining a company's value, and a fair-value determination can't simply rely on "market fundamentalism," especially when it's driven by a management-led buyout, the opinion states.

Eduard Korsinsky, founding partner of Levi & Korsinsky LLP, said that the vice chancellor was correct to specifically parse out the difference between a fiduciary duty breach analysis and an appraisal in his opinion, quelling fears on the petitioners' side that an adjustment to price could only be achieved if "the specter" of some sort of corporate wrongdoing were raised.

"Vice Chancellor Laster is a very practical individual and understood what was happening, that there was a plan in place that was transformative," Korsinsky said. "He wasn't taking a narrow view. Judges should take these broader views."

Dell is represented by Gregory P. Williams, John D. Hendershot, Susan M. Hannigan and Andrew J. Peach of Richards Layton & Finger PA and John L. Latham, Susan E. Hurd, Gidon M. Caine and Charles W. Cox of Alston & Bird LLP.

The petitioners are represented by Stuart M. Grant, Michael J. Barry, Christine M. Mackintosh, Jennifer A. Williams and Rebecca A. Musarra of Grant & Eisenhofer PA.

The case is In re: Appraisal of Dell Inc., case number 9322, in the Court of Chancery of the State of Delaware.

--Editing by Mark Lebetkin and Philip Shea.

All Content © 2003-2016, Portfolio Media, Inc.