

Delaware Court of Chancery Clarifies Appraisal Rights of Beneficial Owners Acquiring Shares Post-Record Date

The Delaware Court of Chancery has ruled that, for purposes of perfecting appraisal rights, a beneficial owner of stock, held of record by a nominee, that acquires its interest after the record date set for a merger need not establish whether and how such shares may have been voted at the direction of a prior beneficial owner. *In re Appraisal of Transkaryotic Therapies, Inc.*, C.A. No. 1554-CC (Del. Ch. May 2, 2007). The Court clarified that, under the appraisal statute, Section 262 (the “Statute”), the focus is on the “holder of record,” and that it is the record owner’s actions alone that determine perfection of the right to appraisal. The decision may result in an increase in the number of appraisal actions filed by hedge and other investment funds, which often purchase shares following the announcement of a deal.

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On April 21, 2005, Transkaryotic Therapies, Inc. (“TKT”), a biopharmaceutical company, announced that it had signed a definitive agreement with Shire Pharmaceuticals Group plc (“Shire”), a U.K.-based pharmaceutical company, pursuant to which Shire would acquire TKT by merger. Under the terms of the merger agreement, Shire was to pay \$37 in cash for each share of TKT common stock. A June 10, 2005 record date was set by TKT in connection with the merger. At a July 27, 2005 special meeting of TKT stockholders, the record holders of approximately 52 percent of TKT’s outstanding common stock approved the merger, and the merger became effective that day.

On the merger date, petitioners were the beneficial owners of approximately 11 million shares of TKT common stock for which record holder Cede & Co. (“Cede”), as nominee of the Depository Trust Company, demanded appraisal. As of the record date, however, petitioners beneficially owned only approximately 2.9 million TKT shares. Thus, of the 11 million shares for which appraisal rights were asserted, petitioners acquired the beneficial ownership of approximately 8 million after the record date.

Cede was the record holder of all shares beneficially owned by petitioners at all relevant times. On the record date, Cede was the holder of record of nearly 30 million shares of TKT stock. Approximately 13 million of those shares were voted by Cede as record holder in

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favor of the merger. The remaining 17 million shares owned of record by Cede were voted against, abstained, or were not voted in connection with the merger. Thus, the number of shares not voted in favor of the merger exceeded the number of shares for which Cede demanded appraisal.

TKT challenged the entitlement to appraisal of all shares acquired after the record date. TKT argued that, unless each petitioner could demonstrate that the “specific shares” acquired post-record date were not voted in favor of the merger by or at the direction of the prior beneficial owner, shares so acquired were not eligible for appraisal.

In rejecting TKT’s entitlement challenge, the Court noted that by Statute the right to appraisal is available only to a “holder of record of stock in a stock corporation,” with the record holder possessing “an absolute right to proceed under [the Statute] once the record holder complies with its requirements.” The Court held that a beneficial owner who purchases shares *after* the record date but before a merger vote need not “prove, by documentation, that each newly acquired share ... is a share not voted in favor of the merger by the *previous* beneficial shareholder.” Rather, the Court held, it is the record holder’s actions that determine the perfection of appraisal rights.

Noting that it was uncontested that all of the “disputed” shares were held of record by Cede and that Cede otherwise perfected appraisal rights as to all shares beneficially owned by petitioners, the Court held: “[B]ecause the actions of the beneficial holders are irrelevant in appraisal matters, the inquiry ends here.”

In denying TKT’s entitlement challenge, the Court expressly acknowledged TKT’s argument that the ruling could “encourage appraisal litigation by arbitrageurs who buy into appraisal suits by free-riding on Cede’s votes on behalf of other beneficial holders.” Neither accepting nor rejecting this policy-based concern, the Court stated only that, “to the extent that this concern has validity, relief more properly lies with the legislature.”

This update was prepared for our clients and friends by **Arthur L. Dent**. For more information on this case or other recent developments in Delaware law, please contact Mr. Dent (302-984-6034 or adent@potteranderson.com) or any member of our **Corporate Counseling** or **Corporate Litigation** Groups.