

# Technicalities disqualify Dell stockholders' appraisal rights under 'continuous holder' requirements

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## Facts Decision

On July 13 2015 the Delaware Court of Chancery in *In re Appraisal of Dell Inc*(1) granted summary judgment in favour of Dell, Inc denying appraisal rights to three funds and two retirement plans (collectively, 'the funds') that had acquired Dell shares after the announcement of a going-private transaction because the funds had not met the statutory 'continuous holder' requirement.

### Facts

In February 2013 Dell agreed to a merger in which each publicly held share of Dell common stock would be converted into the right to receive \$13.75 in cash, subject to the statutory appraisal rights of stockholders. After the transaction was announced, the funds engaged in 'appraisal arbitrage' by acquiring shares of Dell stock and subsequently exercising appraisal rights with respect to 922,975 shares. The funds held their shares through custodial banks which deposited the shares with the Depository Trust Company (DTC). The record holder of the shares was DTC's nominee, Cede & Co. After the funds exercised their appraisal rights, in order to avoid inadvertently surrendering the shares in exchange for the merger consideration, DTC had the transfer agent issue physical stock certificates for the funds' shares and then transferred them to the custodial banks.

The custodial banks' policies required that shares held by them be issued to their own nominees, so the transfer agent reissued the stock certificates in the names of the custodial banks' nominees. The funds were not aware (nor had they specifically approved) of the transfers. Because of the transfer, Dell filed a motion seeking summary judgment denying appraisal rights to the funds on the basis that Section 262 of the Delaware General Corporation Law requires a stockholder seeking appraisal to "continuously hold such shares through the effective date of the merger" and that any change in the stockholder of record of the shares from the date of the appraisal petition through the effective date of the merger would cause the stockholder to lose its appraisal rights.

### Decision

In his opinion, Vice Chancellor Laster granted summary judgment for Dell, citing Delaware Supreme Court precedent that required him to strictly interpret the 'continuous holder' statutory requirement, irrespective of the fact that the beneficial owners of the stock in question never changed. It is notable that a significant part of the opinion was devoted to advocating for an approach similar to the one used by the Securities and Exchange Commission, where beneficial owners are considered owners for securities law purposes, even though Laster's decision ultimately found that prior rulings of the Delaware Supreme Court required him to find that a technical transfer of a record holder (even without any beneficial change in ownership) nullified any appraisal rights. Laster noted that his 2010 *Kurz v Holbrook* decision advocated for the Supreme Court to change its approach, but that the court declined and stated that "a legislative cure [was] preferable" to the court's interpreting who is a record holder.

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## **Endnotes**

(1) *In re Appraisal of Dell Inc*, Consol CA No 9322-VCL (Del Ch July 13 2015).

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