COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Re: *In re: Appraisal of Transkaryotic Therapies, Inc.*
Civil Action No. 1554-CC

Dear Counsel:

For the reasons set forth below, after carefully considering counsel's arguments, I deny respondents' motion for partial summary judgment.

I. NATURE AND STAGE OF THE PROCEEDINGS

This action for statutory appraisal under 8 *Del. C.* § 262 arose from the July 27, 2005 merger of Transkaryotic Therapies, Inc. ("TKT") with and into a wholly-owned subsidiary of Shire Pharmaceuticals Group plc ("Shire"). Between August

10, 2005 and November 23, 2005, five petitions for appraisal of 10,972,650 shares of TKT were filed in this Court on behalf of twelve different beneficial shareholders (the "Petitioners") of TKT. This Court consolidated the several actions by Orders dated November 21 and December 28, 2005, and discovery began on December 11, 2006. On April 6, 2006, TKT filed this motion for partial summary judgment.

II. BACKGROUND FACTS

TKT was a biopharmaceutical company focused on researching, developing, and commercializing treatments for rare diseases resulting from protein deficiencies. On April 21, 2005, TKT announced a definitive merger agreement with Shire under which Shire would acquire TKT. Shire agreed to pay $37 per share, representing a 44% premium over the average TKT closing share price for the four weeks before the announcement. The record date was set for June 10, 2005 and TKT held a meeting of stockholders on July 27, 2005. At that meeting, 52% of stockholders approved the merger.

As of the record date (June 10, 2005), nominal petitioner, Cede & Co., was the record holder of 29,720,074 shares of TKT. Cede voted 12,882,000 shares in favor of the merger, 9,888,663 against it, and abstained or did not vote 6,949,411 shares in connection with the merger. On the record date, petitioners were beneficial owners of 2,901,433 of the 10,972,650 shares for which petitioners now seek appraisal. Petitioners purchased the remaining 8,071,217 (10,972,650 - 2,901,433 = 8,071,217) shares (the "disputed shares") after the record date but before the effective date of the merger. Petitioners seek appraisal as to all the shares they own.

III. CONTENTIONS

The motion before me boils down to one issue: whether under 8 *Del. C.* § 262 a beneficial owner, who acquires shares after the record date, must prove that each of its specific shares for which it seeks appraisal was not voted in favor of the merger?

TKT argues that a shareholder seeking appraisal bears the burden of proving compliance with the prerequisites of § 262. Where a petitioner cannot demonstrate such compliance, this Court will disqualify that petitioner's shares from the appraisal proceeding. TKT concedes that the term shareholder, under § 262, refers only to the record holder. TKT contends, however, that the record owner acts only as an agent to the beneficial owner. Thus, a purchasing beneficial owner takes subject to the actions and inactions of the previous beneficial owner. If the previous beneficial owner voted stock in favor of the merger, the current beneficial owner may not seek appraisal for those shares. If the previous beneficial owner voted against the merger, the current owner may seek appraisal for those shares. If no record exists as to how the previous beneficial owner voted, then this Court must not allow appraisal since the petitioner would not have complied with its burden under § 262.

Petitioners cannot establish that the disputed shares were not voted in favor of the merger. Additionally, TKT submits that petitioners cannot rely on Cede's negative votes[1] because there is no proof that those specific shares are the shares that petitioners hold. Thus, petitioners are not entitled to appraisal of the disputed shares as a matter of law according to TKT.

Petitioners respond that TKT's argument is contrary to the express provisions of the statute, is inconsistent with established precedent, and makes no sense in light of modern securities practice. TKT's analysis, petitioners argue, incorrectly places the burden on the beneficial holder, a party with no official appraisal rights under § 262. Neither statute nor case law supports or justifies such a requirement. Instead, petitioners contend that Delaware law contradicts TKT's contentions. Section 262 makes clear that the record holder must comply with the appraisal statute. Further, a corporation must rely on its record to determine who holds rights as a stockholder, including appraisal rights. As such, where the record owner (in this case, Cede) has proven compliance, Delaware law requires nothing more, argues petitioners.

Petitioners also attack TKT's argument as inconsistent with modern securities practice. That is, TKT incorrectly assumes that Cede's aggregate share vote on the TKT merger may be traced to "specific shares" attributable to specific beneficial owners. That assumption, however, is incorrect. According to petitioners, most securities issued by domestic companies listed on the NYSE and on the Nasdaq are "on deposit" with central securities depositories, such as the Depository Trust Company ("DTC"). Securities deposited at DTC as part of its book-entry system are generally registered in the name of DTC's nominee, Cede &

[1] It is undisputed that Cede was record owner of 16,838,074 shares that can be counted as "no votes" for appraisal purposes. Shares not voted or for which Cede abstained from voting are included in no votes for § 262 purposes. Thus, Cede's 9,888,663 no votes, together with its abstentions for 6,949,411 shares equals 16,838,074 TKT shares "eligible" for an appraisal demand.

Co. ("Cede"), making DTC's nominee the registered owner or record holder of these securities. The securities deposited as a part of this system are held in an undifferentiated manner known as "fungible bulk," which means that no DTC participant, no customer of any participant (such as an intermediary bank or broker), and no investor who might ultimately have a beneficial interest in securities registered to Cede, has any ownership rights to any particular share of stock reflected on a certificate held by Cede. Rather, DTC's participants have an electronic book-entry position representing securities held in their DTC accounts. That book-entry position represents a participant's pro-rata portion of Cede's aggregate holding in a given security. Transfers of those positions (through trading in public stock markets) are effected by electronic book-entry adjustments to the accounts of the affected participants, and are cleared and settled with trades among all other such participants through DTC's settlement system, including on a continuous net settlement basis. Thus, petitioners contend that although it may be possible for an issuer or its agents to determine the total number of merger-related votes and appraisal demands ultimately attributable to the shares of Transkaryotic Therapies, Inc. common stock held by Cede in fungible bulk, the nature of the system is such that none of those votes or demands were ever related to "specific shares" or "blocks of shares."

IV. ANALYSIS

A. Rule 56: Motion for Summary Judgment

The standard for reviewing a Court of Chancery Rule 56 motion for summary judgment is well-settled. Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[2] Justice demands that the Court view the facts in the "light most favorable to the nonmoving party, and the moving party has the burden of demonstrating that there is no material question of fact."[3] The nonmoving party, however, "may not rest upon mere allegations or denials of [the] pleading, but … must set forth specific facts showing that there is a genuine issue for trial."[4] Moreover, the Court may award summary judgment to the nonmoving party when the undisputed material

[2] *Korn v. New Castle County*, 2005 Del. Ch. LEXIS 25, at *13 (Feb. 14, 2005).
[3] *Elite Cleaning Co. v. Walter Capel and Artesian Water Co.*, 2006 Del. Ch. LEXIS 105, at *8 (June 2, 2006).
[4] *Id.*

facts of record show that the other party is clearly entitled to such relief.[5] Respondents sufficiently show that no genuine issue of material fact exists regarding compliance with § 262(a). Respondents fail to show, however, that they are entitled to judgment as a matter of law.

B. 8 Del. C. § 262

Historically, all major corporate decisions required unanimous shareholder consent. This requirement created a veto power and allowed even a single shareholder to obstruct corporate action. In order to prevent nuisance blocking, the Legislature enacted statutes permitting fundamental corporate changes without unanimous shareholder consent. Concurrently, the Legislature created appraisal rights in an effort to compensate minority holders for the loss of the veto power and to give dissenters the right to demand fair value of shares.[6] Thus, the primary purpose of § 262 is to protect the contractual rights of shareholders who object to a merger[7] and to fully compensate shareholders for any loss they may suffer as a result of a merger.[8]

This limited legislative remedy provides a dissenting shareholder with an absolute right to the judicially determined fair value of its shareholdings.[9] The right, however, is available only to a shareholder who, as defined in the DGCL, is a "holder of record of stock in a stock corporation."[10] Further, the record holder bears the ultimate burden of establishing its right to appraisal.[11] The record holder must make written demand for appraisal before the vote, continuously hold such shares through the effective date of the merger, and neither vote in favor of the merger nor consent to it in writing pursuant to 8 *Del. C.* § 228.[12] Although

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[5] *See Cont'l Ins. Co. v. Rutledge & Co.*, 2000 Del. Ch. LEXIS 40, at *2, *3-4 & *6 n.3 (Feb. 15, 2000) ("Chancery Court Rule 56 gives that court the inherent authority to grant summary judgment *sua sponte* against a party seeking summary judgment … when the 'state of the record is such that the non-moving party is clearly entitled to such relief.'") (quoting *Stroud v. Grace*, 606 A.2d 75, 81 (Del. 1992)).

[6] R. Franklin Balotti & Jesse A. Finkelstein, Del. Law of Corp. and Bus. Org., § 9.42 (3rd ed. Supp. 2005).

[7] *Root v. York Corp.*, 39 A.2d 780 (Del. Ch. 1944).

[8] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983).

[9] 8 *Del. C.* § 262(a).

[10] *Id.*

[11] *Schneyer v. Shenandoah Oil Corp.*, 316 A.2d 570, 573 (Del. Ch. 1974).

[12] 8 *Del. C.* § 262(a).

compliance with the statutory formalities has been strictly enforced,[13] a record holder has an absolute right to proceed under § 262 once the record holder complies with its requirements.[14] No other person or entity, however, may demand appraisal pursuant to § 262.[15]

The question presented in this case can be stated thusly: Must a beneficial shareholder, who purchased shares *after* the record date but before the merger vote, prove, by documentation, that each newly acquired share (*i.e.*, after the record date) is a share not voted in favor of the merger by the *previous* beneficial shareholder? The answer seems simple. No. Under the literal terms of the statutory text and under longstanding Delaware Supreme Court precedent, only a record holder, as defined in the DGCL, may claim and perfect appraisal rights. Thus, it necessarily follows that the record holder's actions determine perfection of the right to seek appraisal.

In *Olivetti Underwood Corp. v. Jacques Coe & Co.*, the Delaware Supreme Court specifically addressed the relationship between a corporation and beneficial holders in the context of an appraisal.[16] It considered whether a respondent corporation had a right to require each broker-petitioner to prove, as a prerequisite to the statutory right of appraisal, that it was duly authorized by the beneficial owner of the stock to seek appraisal. The Court answered by stating that "… there must be order and certainty, and a sure source of information, so that the corporation may know who its members are and with whom it must treat . . . ."[17] Therefore, "corporations ought not be involved in possible misunderstandings or clashes of opinion between non-registered and registered holders of stock."[18] Instead, a corporation "may rightfully look to the corporate books as the sole evidence of membership" because under Delaware law, "there is no recognizable stockowner under § 262 except a registered stockholder."[19] "The relationship between, and the rights and obligations of, a registered stockholder and his

[13] *Lutz v. A.L. Barber Co.*, 340 A.2d 186, 187 (Del. Ch. 1975).
[14] *Kaye v. Pantone, Inc.*, 395 A.2d 369, 372-73 & 75 (Del. Ch. 1978).
[15] *See, e.g., Bandell v. TC/GP, Inc.*, 1996 Del. LEXIS 23 (Jan. 26, 1996); *Enstar Corp. v. Senouf,* 535 A.2d 1351, 1356 (Del. 1987); *Neal v. Ala. By-Prods. Corp.*, 1988 Del. Ch. LEXIS 135, at *2 (Oct. 11, 1988).
[16] 217 A.2d 683 (Del. 1966).
[17] *Olivetti Underwood Corp.*, 217 A.2d at 685 (quoting *Salt Dome Oil Corp. v. Schenck*, 41 A.2d 583 (Del. Ch. 1945)).
[18] *Id.* at 686.
[19] *Olivetti Underwood Corp.*, 217 A.3d at 686.

beneficial owner are not relevant issues in a proceeding of this kind."[20] A beneficial owner must "establish his rights and pursue his remedy through the nominee of his own selection."[21] It follows then that the determinative record regarding compliance with § 262 requirements is that of the record holder.

The issue here mirrors that in *Olivetti Underwood Corp.* Respondent corporation, TKT, seeks to examine relationships between Cede (the record holder) and certain non-registered, beneficial holders in order to determine the existence of appraisal rights. But the Supreme Court has already deemed this relationship to be an improper and impermissible subject of inquiry in the context of an appraisal. The law is unequivocal. A corporation need not and should not delve into the intricacies of the relationship between the record holder and the beneficial holder and, instead, must rely on its records as the sole determinant of membership in the context of appraisal. Thus, following the clear teachings of *Olivetti Underwood Corp.*, I conclude, in the circumstances here, that only Cede's actions, as the record holder, are relevant.

Cede is and has been the record holder of 29,720,074 shares of TKT at all relevant times. "It is understood by now that an entity like Cede & Co. that is a record holder (but not beneficial holder) of a company's shares can vote certain of those shares against a merger, and others in favor, and seek appraisal as to the dissenting shares."[22] Thus, the fact that Cede voted shares in favor and against the merger does not preclude Cede from petitioning this Court for appraisal of those shares not voted in favor of the merger. It is uncontested that Cede voted 12,882,000 shares in favor of the merger and 16,838,074 against, abstained, or not voted in connection with the merger. It is further uncontested that Cede otherwise properly perfected appraisal rights as to all of the 10,972,650 shares that petitioners own and for which appraisal is now sought. Thus, because the actions of the beneficial holders are irrelevant in appraisal matters, the inquiry ends here. Cede, the record holder, properly perfected appraisal rights under § 262. As a result, Cede may exercise appraisal rights for all 10,972,650 contested shares.

Respondents raise one policy concern that deserves mentioning. They argue that this decision will "pervert the goals of the appraisal statute by allowing it to be used as an investment tool for arbitrageurs as opposed to a statutory safety net for

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[20] *Id.* at 687.
[21] *Id.* at 686.
[22] *Union Ill. 1995 Inv. L.P. v. Union Fin. Group, Ltd.*, 847 A.2d 340, 365 (Del. Ch. 2004).

objecting stockholders."[23] That is, the result I reach here may, argue respondents, encourage appraisal litigation initiated by arbitrageurs who buy into appraisal suits by free-riding on Cede's votes on behalf of other beneficial holders—a disfavored outcome.[24] To the extent that this concern has validity, relief more properly lies with the Legislature. Section 262, as currently drafted, dictates the conclusion reached here. Only the record holder possesses and may perfect appraisal rights. The statute simply does not allow consideration of the beneficial owner in this context. The Legislature, not this Court, possesses the power to modify § 262 to avoid the evil, if it is an evil, that purportedly concerns respondents.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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[23] Opening Br. in Supp. of Respondents' Mot. for Partial Summ. J. at 1.

[24] *But cf. Solomon Bros., Inc.* v. *Interstate Bakeries Corp.*, 576 A.2d 650, 652-53 (stating that appraisal rights are not determined by reference to a stockholder's motives or purpose).