

Corporate and Chancery

In re Appraisal of Transkaryotic Therapies, Inc.: Delaware Court of Chancery Clarifies Standing Requirements to Bring an Appraisal Action

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SECTION 262 OF THE Delaware General Corporation Law (“DGCL”) provides a procedure for shareholders who dissent from a merger asserting the inadequacy of the offering price with a remedy by receiving the fair value of their shares after a judicial determination.¹ There are various technical requirements a shareholder must satisfy to obtain an appraisal. For instance, where the underlying merger is submitted to a stockholder vote, the stockholder must make a pre-merger appraisal demand on the corporation and abstain from voting in favor of the merger to perfect appraisal rights.² The decision this month by Chancellor William B. Chandler III in *In re Appraisal of Transkaryotic Therapies, Inc.*, C.A. No. 1554-CC (Del. Ch. May 2, 2007) addressed whether “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?”³

This appraisal action arose from the merger of Transkaryotic Therapies, Inc. (“TKT”) with and into Shire Pharmaceuticals plc (“Shire”).⁴ The merger was announced on April 22, 2005 – with Shire agreeing to pay a 44% premium over the average closing price for TKT’s stock for the four weeks before the announcement.⁵ The record date was set for June 10, 2005 and a majority of the TKT stockholders approved the merger on July 27, 2005.⁶ A central securities certificate depository, Cede & Co. (“Cede”), the holder of record of 29.7 million shares of the stock beneficially owned by petitioners as well as other third parties, voted approximately 12.8 million shares in favor of the merger and voted against or abstained with about 16.8 million shares.⁷ As of the record date, petitioners held approximately 2.9 million shares of TKT, and subsequently purchased about 8.1 million shares after the record date but before the effective date of the merger.⁸ Petitioners sought appraisal as to all of the shares they own.⁹ TKT, however, moved for summary judgment, arguing that petitioners are not entitled to an appraisal of their shares acquired after the record date because they cannot establish that those shares were not among those voted by Cede in favor of the merger.¹⁰

The Chancellor framed the issue as: “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?”¹¹ The Chancellor answered that question as follows:

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.

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Only the record holder possesses and may perfect appraisal rights. The statute simply does not allow consideration of the beneficial owner in this context.¹²

The Delaware Supreme Court precedent relied on by the Chancellor was *Olivetti Underwood Corp. v. Jacques Coe & Co.*,¹³ a case where that court considered whether a corporation had “the 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, registered in its name, to seek the appraisal.”¹⁴ There the Delaware Supreme Court held that “corporations ought . . . to . . . look to the corporate books as the sole evidence of membership,” finding that the only recognizable stockholder for purposes of Section 262 is the “registered stockholder.”¹⁵

It is worth noting the Chancellor’s comments with respect to a policy argument raised by TKT; that is, the Chancellor’s “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 objecting shareholders.’”¹⁶ The Chancellor responded that, to the extent this concern has validity, it is for the Delaware legislature to address.¹⁷ Professor Lawrence Hamermesh, a well-respected authority on Delaware corporate law, responded to this policy concern:

Accordingly, there should ordinarily be no incentive for arbitrageurs to use the appraisal remedy “as an investment tool,” since those who seek appraisal under Delaware law have to refrain from receiving even the merger price itself until the conclusion of the appraisal proceeding. Of course, if the valuation standard were instead to award an amount that would

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have been paid in some hypothetical acquisition (on the theory that the actual sale process was somehow flawed), arbitrageurs might become much more patient with the deferred payment aspect of the appraisal remedy, and may increasingly resort to appraisal demands as a source of leverage in connection with corporate acquisitions.¹⁸

Only time will tell whether there will be an increase in appraisal suits as a result of this decision, and whether the Delaware General Assembly will take action to curb such litigation.

This summary was prepared by **Cathy L. Reese, Esq.** and **Brian M. Rostocki, Esq.**

ENDNOTES

¹ *Alabama By-Prods. Corp. v. Neal*, 588 A.2d 255, 256 (Del. 1991).

² DEL. CODE ANN. tit. 8, § 262(d)(1) (2007).

³ *In re Appraisal of Transkaryotic Therapies, Inc.*, C.A. No. 1554-CC, slip op. at 2 (Del. Ch. May 2, 2007).

⁴ *Id.* at 1-2.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 3.

¹¹ *Id.* at 6.

¹² *Id.* at 6, 8.

¹³ 217 A.2d 683 (Del. 1996).

¹⁴ *Id.* at 684.

¹⁵ *Id.* at 686.

¹⁶ *Id.* at 7-8.

¹⁷ *Id.* at 8.

¹⁸ Lawrence Hamermesh, *Chancery Rules on Appraisal Rights for Shares Acquired After the Record Date for Merger Votes*, available at <http://blogs.law.harvard.edu/corp-gov/2007/05/08/chancery-rules-on-appraisal-rights-for-shares-acquired-after-the-record-date-for-merger-votes/#more-114>.

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