IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ROAM-TEL PARTNERS,	)	
	)	
Petitioner,	)	
	)	
v.	)	C.A. 5745-VCS
	)	
AT&T MOBILITY WIRELESS OPERATIONS HOLDINGS INC.,	)	
	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Date Submitted: November 30, 2010
Date Decided: December 17, 2010

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STRINE, Vice Chancellor.

I. Introduction

This opinion addresses petitioner Roam-Tel Partners' motion[1] to determine the members of the appraisal class filed in connection with an appraisal action brought under 8 *Del. C.* § 262. The appraisal action arises from a short-form merger in which the controlling stockholder of St. Cloud Cellular Telephone Company, Inc. — AT&T Mobility Wireless Operations Holdings Inc. — cashed out St. Cloud's minority stockholders. Of the 15 minority stockholders seeking to prosecute the appraisal action, AT&T Mobility objects to the inclusion of only one, ARAP Partners. Its central argument against the inclusion of ARAP Partners is that a minority stockholder who loses its shares in a short-form merger who tenders its shares in exchange for a check representing the merger consideration irrevocably waives its statutory right to an appraisal, regardless if that stockholder, as ARAP did, promptly revoked its tender, returned the uncashed check, and demanded appraisal within the statutorily prescribed 20 day election period provided for in 8 *Del. C.* § 262(d)(2).

I reject AT&T Mobility's argument as an oversimplification of waiver law and inconsistent with the policy purpose served by the appraisal statute. In a case, as here, where a minority stockholder perfects its right to an appraisal within the statutory election period and does not accept the merger consideration in the sense that it does not exercise dominion over that merger consideration, that stockholder is entitled to participate in an appraisal action notwithstanding the fact that it made a previous, but

[1] For purposes of clarity, although the appraisal action and motion were filed by Roam-Tel Partners, I will refer to it as ARAP because its arguments in favor of its motion are pressed on ARAP's behalf.

promptly revoked, waiver of such right to an appraisal. Absent actual or other prejudice to the surviving corporation, the appraisal statute is best implemented by giving stockholders the full 20 days to decide whether to demand appraisal.

II. Factual Background

St. Cloud is a Delaware corporation that operated a cellular telephone system in central Minnesota. Effective on July 15, 2010, St. Cloud's parent company, AT&T Mobility, implemented a short-form merger under 8 *Del. C.* §§ 228 and 253 with AT&T Mobility as the surviving Delaware corporation.

As required by 8 *Del. C.* § 262(d)(2), AT&T Mobility sent a notice to St. Cloud's minority stockholders on July 22, 2010 (the "Notice") summarizing the transaction and informing them of their right to demand appraisal within 20 days of the mailing of the Notice, or by August 11, 2010. The Notice instructed those stockholders who decided not to opt for appraisal to fill out an attached letter of transmittal (the "Letter of Transmittal") and submit it, along with the stock certificates to be surrendered in exchange for the merger consideration, to AT&T Mobility. The Letter of Transmittal required that the minority stockholder list the stock certificates he owned and was surrendering, or in the event that the stockholder had lost a certificate, fill out and submit a corresponding affidavit of lost stock certificate.

As noted, AT&T Mobility disputes only one stockholder's right to an appraisal, ARAP Partners. Thus, I will now outline the facts pertinent to ARAP's appraisal demand.

ARAP owned 5,154 St. Cloud shares before the merger. After receiving the Notice, ARAP telephoned Joanne Todaro, the point person at AT&T Mobility designated in the Notice, and requested contact information for the other St. Cloud minority stockholders, including the minority stockholders' representative on St. Cloud's board of directors. ARAP claims that the reason it did so was in order for it to find out which other minority stockholders were contemplating an appraisal action, as well as their thoughts on the fairness of the merger price. Todaro denied that request on behalf of AT&T Mobility. Because of this denial, ARAP says that it "felt it had no alternative but to submit the [Letter of Transmittal] and accept the merger consideration set by [AT&T Mobility]."[2]

To that end, on July 30, 2010, ARAP filled out the Letter of Transmittal and submitted it along with its stock certificate to AT&T Mobility.[3] Following receipt of ARAP's Letter of Transmittal and stock certificate, AT&T Mobility cancelled the certificate and mailed ARAP a check on August 5, representing the merger consideration for its stock, in the amount of $307,642.26.

"[D]uring the first week of August[, 2010]," ARAP was contacted by Bruce Stone of Roam-Tel Partners, the St. Cloud minority stockholders' representative on the St. Cloud board.[4] Stone told ARAP that a group of St. Cloud stockholders were planning to file an appraisal action. On that basis, ARAP mailed a letter to AT&T Mobility on

[2] Roy Aff. ¶ 4.
[3] ARAP was the record owner of two stock certificates, each in the amount of 2,577 shares. But, ARAP lost one of those certificates and filled out and returned the affidavit of lost stock certificate.
[4] Pet. Br. ¶ 8; Roy Aff. ¶ 5.

August 9, 2010 — two days before the August 11, 2010 deadline for making a timely appraisal demand —[5] informing AT&T Mobility of ARAP's demand for an appraisal. Two days later, on August 11, ARAP sent via overnight mail the uncashed check for the merger consideration back to AT&T Mobility. AT&T Mobility replied by letter on August 12, informing ARAP of its position that in light of the Letter of Transmittal executed by ARAP, ARAP's "election to receive the Merger Consideration instead of pursuing [its] appraisal rights is . . . final and effective and may not be rescinded or revoked."[6]

Roam-Tel Partners filed the appraisal action in this court on August 18 seeking an appraisal of its shares in St. Cloud under 8 *Del. C.* § 262. Roam-Tel Partners then filed its motion to determine the members of the appraisal class on September 21, urging the inclusion of ARAP in that class.

III. Legal Analysis

The facts are not in dispute. Instead, the resolution of ARAP's motion comes down to a pure question of law: whether a stockholder who has lost its stockholder status in a short-form merger and, within the 20 day statutorily prescribed period to demand an appraisal, elects to receive the merger consideration in lieu of demanding an appraisal may nonetheless change its mind, return the uncashed and unnegotiated check for the merger consideration to the surviving corporation, and make a demand for an appraisal

[5] What counts for purposes of a timely demand made under 8 *Del. C.* § 262(d)(2) is the date on which the demand is mailed by the minority stockholder. *Schenley Indus., Inc. v. Curtis*, 152 A.2d 300, 302 (Del. 1959); *see also* 2 DAVID A. DREXLER ET AL., DELAWARE CORPORATION LAW AND PRACTICE § 36.04 (2009) ("DREXLER").

[6] Resp. Br. Ex. E (Letter from AT&T Mobility to ARAP (August 12, 2010)).

within the same 20 day statutory election period. In considering this issue, I may put aside any argument that AT&T Mobility was prejudiced by ARAP's behavior: at oral argument AT&T Mobility's counsel admitted that AT&T Mobility suffered no prejudice from ARAP's course of conduct other than that the appraisal class would be larger and it would have to defend on the merits.[7]

This is a novel question. Section 262(d)(2) of the DGCL requires that in a short-form merger, any minority stockholder who desires appraisal must submit a written demand to the surviving corporation within 20 days after the mailing of a statutorily required notice. The statute does not, however, indicate whether a stockholder may change her mind during that 20 day period. To resolve this issue, I will briefly outline each party's argument. I will then address those arguments in light of the statutory scheme and the various policies undergirding it.

A. The Parties' Arguments

ARAP's argument in favor of its inclusion in the appraisal class is straightforward. First, it posits that under 8 *Del. C.* § 262(d)(2), in order to perfect the right to an appraisal after a short-form merger, a minority stockholder need only make a written demand within 20 days of the mailing of the Notice. Because ARAP timely made a demand for an appraisal, ARAP argues that it has followed the letter of the law and has thus perfected its right to an appraisal. Moreover, ARAP argues that even if it initially opted to receive the merger consideration, it was free to change its mind, promptly return the uncashed

[7] Tr. at 26-27 (Counsel for AT&T Mobility).

check for the merger consideration, and make a demand for an appraisal so long as it did so within the prescribed 20 day window.

In support of its position, ARAP contends that its initial decision to accept the merger consideration is "analogous to submitting a written consent" or a proxy, both of which are freely revocable at any time before the action authorized in the written consent or by proxy becomes effective.[8] And, because AT&T Mobility denied ARAP the contact information of the other St. Cloud minority stockholders — including the minority stockholders' representative on St. Cloud's board — when attempting to determine whether ARAP should pursue an appraisal action or not, ARAP argues that its "decision to accept the merger consideration was uninformed and therefore revocable."[9]

Finally, citing a case from the North Dakota Supreme Court,[10] ARAP argues that even if a decision to accept the merger consideration is always irrevocable, ARAP never accepted the merger consideration because it never cashed the check. ARAP also argues that ARAP's execution of the Letter of Transmittal, contrary to AT&T Mobility's argument discussed below, did not constitute a binding contract that obligated ARAP to forgo the appraisal process because appraisal is a statutory right. AT&T Mobility, therefore, did not "offer" ARAP anything to give rise to an enforceable contract, it was obligated by law to grant ARAP its appraisal rights under 8 *Del. C.* § 262.

In support of its contrary contention that ARAP may not seek appraisal, AT&T Mobility offers three principal arguments.

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[8] Pet. Br. ¶ 18.
[9] Pet. Br. ¶ 19.
[10] *Midwest Fed. Sav. and Loan Assoc. of Minot v. Kouba*, 335 N.W.2d 780 (N.D. 1983).

First, AT&T Mobility argues that the executed Letter of Transmittal constitutes a "binding and enforceable contract."[11] According to AT&T Mobility, it made an "offer — it would either buy ARAP's shares for $59.67 per share or ARAP could seek appraisal."[12] "ARAP accepted that offer," says AT&T Mobility, "by signing the Letter of Transmittal — and thereby expressly agreeing to accept the Merger Consideration in lieu of its appraisal rights — and tendering its certificates."[13] Thus, argues AT&T Mobility, ARAP "expressly agreed to accept the Merger Consideration and give up its right to an appraisal," and cannot rescind that acceptance without breaching the contract.[14]

Second, argues AT&T Mobility, because ARAP surrendered its stock certificate to AT&T Mobility, ARAP held no stock in St. Cloud when it made its demand by the letter dated August 9 and thus was statutorily ineligible to seek appraisal because it no longer possessed its stock certificate. AT&T Mobility focuses on the language in 8 *Del. C.* § 262(a) which affords appraisal rights to "[a]ny stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d)" to support its argument that because ARAP's stock certificates were "physically in the hands of AT&T Mobility" and ARAP had received in exchange the merger consideration, ARAP no longer "held" shares and therefore was not able to make a demand for appraisal.[15]

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[11] Resp. Br. ¶ 11.
[12] *Id.*
[13] *Id.*
[14] Resp. Br. ¶ 12.
[15] *Id.* (quoting 8 *Del. C.* § 262(a)); Tr. at 11-13 (Counsel for AT&T Mobility).

Finally, AT&T Mobility, based on its reading of the cases *LeCompte v. Oakbrook Consolidated, Inc.*, *In re Engle v. Magnavox Co.* and *Abraham and Co. v. Olivetti Corp.*,[16] argues that because ARAP "surrendered its stock certificates . . . and received the Merger Consideration" in conjunction with its executed Letter of Transmittal, ARAP "waived its appraisal rights."[17] In support of that claim, AT&T Mobility points to the first page of the Notice sent to ARAP that advised it that "[*u*]*nless you intend to exercise your appraisal rights* . . . , please complete and send the Letter of Transmittal . . . to [AT&T Mobility] . . . ."[18] AT&T Mobility also points to the language in the Letter of Transmittal itself where it indicates that "[b]y execution hereof, the undersigned . . . hereby elects to receive the Merger Consideration *in lieu of a demand for an appraisal of the fair value of the Shares* pursuant to Section 262 of the DGCL."[19] Not only did ARAP complete the Letter of Transmittal and send its stock certificate to AT&T Mobility, it also received the check for $307,642.26 representing the merger consideration for ARAP's stock. AT&T Mobility says it is irrelevant that ARAP did not cash the check; ARAP surrendered its shares in exchange for the merger consideration and was thereafter barred from pursuing appraisal.

Before considering these competing arguments, I describe the statutory scheme under which appraisal rights in the short-form merger context are perfected.

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[16] *LeCompte v. Oakbrook Consol., Inc.*, 1986 WL 2827 (Del. Ch. Mar. 7, 1986); *In re Engle v. Magnavox Co.*, 1976 WL 2449 (Del. Ch. Apr. 21, 1976); *Abraham and Co. v. Olivetti Underwood Corp.*, 204 A.2d 740 (Del. 1964), *aff'd sub nom. Olivetti Underwood Corp. v. Jacques Coe & Co.*, 217 A.2d 683 (Del. 1966).
[17] Resp. Br. ¶ 8.
[18] Resp. Br. Ex. A (Notice) at 1 (emphasis added).
[19] Resp. Br. Ex. A (Letter of Transmittal) (emphasis added).

B. Perfecting The Right To An Appraisal In The Short-Form Merger Context

Under 8 *Del. C.* § 253, a parent corporation holding at least 90% of a subsidiary corporation's shares can eliminate the minority stockholders "without notice, vote, or other traditional indicia of procedural fairness."[20] Absent fraud or illegality, a dissenting minority stockholder's exclusive remedy is a statutory appraisal under 8 *Del. C.* § 262.[21] A minority stockholder's right to an appraisal is a "statutory right . . . given the shareholder as compensation for the abrogation of the common law rule that a single shareholder could block a merger."[22]

But our Supreme Court has said that "the right to an appraisal is a narrow statutory right,"[23] and "dissenting stockholders must comply strictly with section 262 in making their demand for an appraisal."[24] The statutory scheme set forth in 8 *Del. C.* § 262

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[20] *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242, 243 (Del. 2001).
[21] *Id.* at 248.
[22] *Francis I. DuPont & Co. v. Universal City Studios*, 343 A.2d 629, 634 (Del. Ch. 1975). The ability, at common law, for a minority stockholder to block the consummation of a merger led to the enactment of statutes that permitted fundamental corporate changes upon a majority vote. *Schenley Indus. v. Curtis*, 152 A.2d 300, 301 (Del. 1959). Appraisal rights were then given to dissenting minority stockholders as a "*quid pro quo* for the minority's loss of its veto power." *In re Shore*, 67 A.D.2d 526, 532 (N.Y. App. Div. 1979); *see also Alabama By-Products Corp. v. Cede & Co.*, 657 A.2d 254, 258 (Del. 1995) (citing *Schenley*, 152 A.2d at 301; *Salt Dome Oil Corp. v. Schenck*, 41 A.2d 583, 587 (Del. 1945)). Some distinguished commentators have questioned whether appraisal statutes, like Delaware's, continue to serve their original purpose of providing liquidity to dissenting minority stockholders who wished to exit the surviving corporate enterprise following a merger in light of private planners' ability to circumvent the statute by cleverly structuring transactions. *See, e.g.*, Robert B. Thompson, *The Case for Iterative Statutory Reform: Appraisal and the Model Act* 8-11, 13 (Georgetown Public Law and Legal Theory Research Paper No.10-65, 2010), *available at* http://ssrn.com/abstract=1702293 (observing the decline in the traditional liquidity function of appraisal statutes and opining that their primary current utility is to protect minority stockholders from mergers potentially tainted by self-dealing or other softer conflicts).
[23] *Applebaum v. Avaya, Inc.*, 812 A.2d 880, 893 (Del. 2002).
[24] *Gilliland v. Motorola, Inc.*, 873 A.2d 305, 310 (Del. Ch. 2005) (citing *Nelson v. Frank E. Best, Inc.*, 768 A.2d 473, 479 (Del. Ch. 2000)).

requires that the minority stockholder seeking to invoke appraisal perfect its right by following the "orderly method" contained in our statute.[25] To that end, § 262(d)(2) outlines the procedure by which minority stockholders in a short-form merger consummated under 8 *Del. C.* § 253 may perfect their statutory right to an appraisal.

As an initial matter, 8 *Del. C.* § 262(d)(2) provides that "within 10 days [after the merger's effective date], [the surviving corporation] shall notify each of the holders of any class or series of stock . . . who are entitled to appraisal rights of the approval of the merger or consolidation and that appraisal rights are available . . . ."[26] Upon receipt of that notice, a minority stockholder "entitled to appraisal rights may, within 20 days after the date of mailing of such notice, demand in writing from the surviving or resulting corporation the appraisal of such holder's shares."[27] Only a record owner of stock may perfect appraisal rights by making a demand.[28]

Once the right to an appraisal has been perfected by making demand in accordance with 8 *Del. C.* § 262(d)(2), "any stockholder who has complied with subsections (a) and (d) of [§ 262] may commence an appraisal proceeding by filing a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders."[29] Thus, a dissenting minority stockholder who makes a timely demand may, in effect, opt in to an appraisal proceeding filed by another minority stockholder who has also made a

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[25] *Alabama By-Products*, 657 A.2d at 258.
[26] 8 *Del. C.* § 262(d)(2).
[27] *Id.*
[28] 8 *Del. C.* § 262(a) ("[T]he word 'stockholder' means a holder of record of stock in a stock corporation . . . ."); *ENSTAR Corp. v. Senouf*, 535 A.2d 1351, 1352 (Del. 1987); 2 DREXLER § 36.04.
[29] 8 *Del. C.* § 262(e).

timely demand before the filing of the petition.[30] But, perfecting the right to appraisal does not bestow any immediate financial advantage on the demanding stockholder. Indeed, minority stockholders seeking appraisal receive no remuneration at all for their shares for the duration of the appraisal proceeding, are forced to bear the costs of prosecuting the appraisal that often lasts for several years,[31] and shoulder the risk that the court determines a fair value below the merger price.[32] Furthermore, the ability of a stockholder who has perfected his right to an appraisal to withdraw his demand and instead opt to receive the merger consideration is not absolute. Before a petition for an appraisal is filed, a minority stockholder who has made a demand for appraisal may withdraw such demand by delivering to the surviving corporation within 60 days of the merger's effective date a written instrument to that effect.[33] After that 60 day period, the minority stockholder may only withdraw her demand with the surviving corporation's

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[30] *Alabama By-Products*, 657 A.2d at 261 n.10; *see also Kay v. Pantone, Inc.*, 395 A.2d 369 (Del. Ch. 1978) (holding that once an appraisal action has been commenced, all stockholders who have made a timely demand are entitled to participate in that action).

[31] Randall Thomas, *Revising the Delaware Appraisal Statute*, 3 DEL. L. REV. 1, 22 (2000) (observing that the average appraisal proceeding lasts about two years).

[32] *See In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 645 n.88 (Del. Ch. 2005) (noting the risk that stockholders in an appraisal action may receive less than the merger consideration and observing the significant costs that must be shared by a relatively small group of dissenting stockholders); *Andra v. Blount*, 772 A.2d 183, 194 (Del. Ch. 2000) (noting that appraisal litigation costs must typically be borne by a relatively small group of plaintiff stockholders); *see also* Peter V. Letsou & Steven M. Haas, *The Dilemma That Should Never Have Been: Minority Freeze Outs In Delaware*, 61 BUS. LAW. 25, 32 n.42 (2005) (noting that stockholders must bear the cost of the appraisal proceeding and the risk of receiving less than the merger price, and the fact that stockholders do not receive any payment until the judicial proceeding is over, "which could be years or even decades after the transaction."). To alleviate these burdens, some scholars, and the Model Business Corporation Act, have advocated for reform that would require the surviving corporation to pay stockholders seeking appraisal the full merger consideration for their shares upon perfection of appraisal rights. Thomas, 3 DEL. L. REV. at 29; MODEL BUS. CORP. ACT § 13.24 (2009).

[33] 8 *Del. C.* § 262(k).

written approval.[34] After an appraisal petition has been filed, although a minority stockholder may still exercise her right to withdraw her demand for an appraisal and accept the merger consideration within the 60 day period following the merger's effective date notwithstanding the filing of an appraisal petition, any withdrawal after that 60 day period requires, in addition to the corporation's consent,[35] the approval of this court.[36]

In light of this statutory scheme, I now address AT&T Mobility's arguments against the inclusion of ARAP in the appraisal class.

C. AT&T Mobility's Argument That ARAP Was Contractually Obligated To Renounce Appraisal Fails Because AT&T Mobility Was Statutorily Obligated To Give ARAP A Choice Of Seeking Appraisal Or Accepting The Merger Consideration

I first address AT&T Mobility's argument that an enforceable contract was entered into when ARAP signed the Letter of Transmittal and sent its stock certificate to AT&T Mobility. In order to form a valid contract there must be an offer, an acceptance of that offer, and consideration.[37] "[A] promise to do what one is legally obligated to do . . . is not valid consideration."[38] In a short-form merger under 8 *Del. C.* § 253, every minority stockholder has the statutory right to demand an appraisal so long as she does so

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[34] *Id.*

[35] *Salomon Bros., Inc. v. Interstate Brands Corp.*, 1991 WL 131866, at *1-2 (Del. Ch. July 12, 1991) (denying dismissal in pending appraisal action where surviving corporation refused to consent despite the fact that the surviving corporation previously had objected to the stockholder's entitlement to an appraisal).

[36] 8 *Del. C.* § 262(k). In the event that no appraisal petition is filed within 120 days of the effective date of the merger, a minority stockholder's right to an appraisal ceases, regardless of whether she perfected that right in accordance with § 262. *Id.*

[37] 1 WILLISTON ON CONTRACTS § 4:3 (4th ed. 2010).

[38] *Rossdeutscher v. Viacom, Inc.*, 768 A.2d 8, 21 (Del. 2001). *See also Goncalves v. Regent Int'l Hotels*, 447 N.E.2d 693, 700 (N.Y. 1983) ("[A] promise to perform an existing legal obligation is not valid consideration to provide a basis for a contract."); 13 WILLISTON ON CONTRACTS § 7:42 (4th ed. 2010) (same).

within the statutorily prescribed 20 day election period. In the alternative, the stockholder can elect not to demand appraisal, and instead surrender her shares and receive the merger consideration. Thus, as ARAP notes, surviving corporations, like AT&T Mobility, do not "offer" the minority stockholders anything by informing them of their statutory rights; they are statutorily obligated to notify and give minority stockholders the chance to demand an appraisal.[39] AT&T Mobility, having effected a short-form merger in which it cashed out the minority stockholders, had the legal obligation to pay each minority stockholder, in the event that such stockholder did not elect an appraisal, the merger consideration as set forth in a board resolution necessary to effect the short-form merger.[40] AT&T Mobility recognized the same in the Notice sent to each St. Cloud minority stockholder where it advised that "[p]ursuant to the terms of the Merger, each Share issued and outstanding immediately prior to the Effective Date . . . was, by virtue of the Merger and without any action on the part of the holder thereof or on the part of [St. Cloud] or Parent, cancelled and converted into the right to receive $59.690 per Share in cash . . . ."[41] Thus, because there was no consideration for ARAP's alleged promise to accept the merger consideration to the exclusion of its making a demand for appraisal, no valid contract was formed.[42]

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[39] 8 *Del. C.* § 262(d)(2).

[40] 8 *Del. C.* § 253(a) ("[T]he resolution of the board of directors of the parent corporation shall state the terms and conditions of the merger, *including the securities, cash, property, or rights to be issued, paid, delivered or granted by the surviving corporation* upon surrender of each share of the subsidiary corporation or corporations not owned by the parent corporation . . . .") (emphasis added).

[41] Resp. Br. Ex. A (Notice) at 1.

[42] Compare this to a situation where something in excess of what a minority stockholder is statutorily entitled to is offered in exchange for the minority stockholder's waiver of his right to

D. AT&T Mobility's Argument That ARAP Lost Standing To Seek Appraisal Because It Turned Over Its Stock Certificate To AT&T Mobility Is Not The Best Way To Read The Appraisal Statute

AT&T Mobility argues for a formalistic reading of our appraisal statute that would preclude a minority stockholder, like ARAP, which has physically surrendered its stock certificate to the surviving corporation from exercising its appraisal right. On the date ARAP made its demand for appraisal, its "stock certificates were physically in the hands of AT&T Mobility."[43] Therefore, posits AT&T Mobility, ARAP could not have complied with the requirement in § 262(a) that a stockholder "hold shares of stock" in St. Cloud on the date it made its demand for an appraisal.[44]

AT&T Mobility's argument overlooks a reality that must be taken into account if the statute is to make sense in all of its applications, including short-form mergers. Section 262(a) defines "stockholder" and "shares of stock." "As used in [§ 262], the word 'stockholder' means a holder of record of stock in a stock corporation."[45] Section 262(a) defines "the words 'stock' and 'share' [to] mean and include what is ordinarily meant by those words . . . ."[46] In ordinary corporate parlance, a "share" is a "unit of stock

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an appraisal. *E.g., Shell Petroleum, Inc. v. Smith*, 606 A.2d 112, 113 ("Under the terms of the short-form merger, Shell's minority stockholders were to receive $58 per share. *However, if a shareholder waived his right to seek an appraisal . . . , he would receive an extra $2 per share.*") (emphasis added). In such a case, an enforceable contract does arise because the waiver is supported by consideration.

[43] Resp. Br. ¶ 14.

[44] *Id.* (quoting 8 *Del. C.* § 262(a)). At oral argument, AT&T Mobility pointed to several other subsections of 8 *Del. C.* § 262 it contends supports its position that physical possession of the stock certificate is necessary on the date a stockholder makes demand for an appraisal. *E.g.*, 8 *Del. C.* §§ 262(d)(1); 262(d)(2); 262(e); 262(f); 262(i).

[45] 8 *Del. C.* § 262(a).

[46] *Id.*

representing *ownership* in a corporation."[47] As of the effective date of the short-form merger, "each [St. Cloud] Share issued and outstanding immediately prior to the Effective Date . . . was by virtue of the Merger . . . cancelled and converted into the right to receive $59.690 per Share in cash."[48] Moreover, "each holder of a certificate formerly representing any of the [St. Cloud] Shares . . . has ceased to have any rights with respect to such Shares, except for the right to surrender such Certificate in exchange for payment of the Merger Consideration."[49] Therefore, as of the effective date of the short-form merger, no minority stockholder held "shares" in the sense of the word's ordinary meaning because those shares were canceled and none of them had an ownership interest in St. Cloud.[50]

Underscoring the reality that none of the minority stockholders seeking appraisal were "stockholders" of St. Cloud after the short-form merger is AT&T Mobility's own admission to that effect: one of the reasons AT&T Mobility denied ARAP's request for information regarding the identity of the other St. Cloud minority stockholders was that

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[47] BLACK'S LAW DICTIONARY 1233 (5th ed. 1979) (emphasis added).
[48] Resp. Br. Ex. A (Notice) at 1.
[49] *Id.*
[50] 8 *Del. C.* § 253(a) ("[T]he resolution . . . shall state the terms and conditions of the merger, including the securities, cash, property, or rights to be issued, paid, delivered or granted by the surviving corporation . . . , *or the cancellation of some or all of such shares*.") (emphasis added); 2 DREXLER § 35.06 (citing *Stauffer v. Standard Brands, Inc.*, 187 A.2d 78, 80 (Del. 1962)) ("[T]he very purpose of [8 *Del. C.* § 253] is to provide the parent corporation with the means of eliminating the minority stockholder's interest in the enterprise."); FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 9.17 (3d ed. 2009) (same).

ARAP had ceased to be a stockholder as of the merger's effective date and had no right to seek books and records under 8 *Del. C.* § 220.[51]

The reality that no one had a stockholder interest in St. Cloud after the short-form merger undermines AT&T Mobility's argument. By AT&T Mobility's reading of our statute, no St. Cloud minority stockholder would be entitled to an appraisal. The only way to make sense of the statute — a statute that expressly provides appraisal rights to minority stockholders in the wake of a short-form merger —[52] is to read the term "stockholder," in a case like this one where the effect of the short-form merger was to cancel immediately the shares of the minority investors, as including those stockholders of record who held shares immediately before the effective date of the short-form merger.[53] That is, the key requirement for purposes of making an appraisal demand is not that a stockholder making a demand physically possesses the stock certificate, but is instead that the stockholder was a record owner of the shares for which he is making an appraisal demand on the last day anyone could have been a record owner of those shares and did not later purport to sell his statutory right to accept the merger consideration or seek appraisal.[54]

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[51] Resp. Br. Ex. A (Notice) at 1; Tr. at 12 (Counsel for AT&T Mobility).
[52] 8 *Del. C.* § 262(a)(3).
[53] *Cf.* 8 *Del. C.* § 262(a)(3) ("In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under § 253 or § 267 of this title is not owned by the parent *immediately prior to the merger*, appraisal rights shall be available for the shares of the subsidiary Delaware corporation.") (emphasis added); 8 *Del. C.* § 262(d)(2).
[54] I do not mean to imply that any such attempt would be permissible.

In addition, this court rejected a similar argument to that of AT&T Mobility's in *Neal v. Alabama By-Products Corp.*[55] In *Neal*, then Vice Chancellor Chandler was confronted with a contention by the surviving corporation in a short-form merger that minority stockholders who had inadvertently tendered their shares for the merger consideration during the pendency of the appraisal proceeding could not thereafter participate in the appraisal award. The surviving corporation argued that because the minority stockholders no longer possessed their stock certificates, "[neither minority stockholder] can surrender [its] [stock] certificates in order to receive the appraised value" as required by the court's appraisal order.[56] In rejecting that argument, Vice Chancellor Chandler observed that "the underlying purpose for requiring stockholders to surrender certificates [under 8 *Del. C.* § 262(i)] is to prove ownership of stock."[57] The issue of ownership, along with the related one as to whether the minority stockholders had previously tendered their stock certificates to the surviving corporation, was "not contested."[58] Therefore, the court concluded that the "purpose of requiring surrender of share certificates [was] met," and ordered the corporation to include the minority stockholders' shares in the appraisal award.[59] Recognizing the policy highlighted in *Neal*, it would seem that the language in § 262(a) that AT&T Mobility claims limits the ability to perfect appraisal rights to only those "stockholders" who hold a physical stock

[55] *Neal v. Alabama By-Products Corp.*, 1993 WL 388372 (Del. Ch. Sept. 22, 1993), *aff'd sub nom. Alabama By-Products Corp. v. Cede & Co.*, 657 A.2d 254 (Del. 1995).
[56] *Neal*, 1993 WL 388372, at *2.
[57] *Id.* at *4.
[58] *Id.* at *5.
[59] *Id.*

certificate is meant only to limit the right of appraisal to those minority stockholders of record who held shares of stock in the subsidiary corporation immediately before the consummation of the short-form merger. Physical possession of stock certificates in the situation presented here, as in *Neal*, where neither record ownership immediately preceding the merger nor the fact that ARAP mailed its certificate to AT&T Mobility is contested, is equally immaterial and does not defeat ARAP's status as a stockholder for appraisal purposes.[60] Likewise, AT&T Mobility's interest in receiving the already–canceled stock certificate and assuring that no mischief is caused by its floating around loosely in commerce was served, not thwarted, by ARAP's mailing of its stock certificate to AT&T Mobility. If AT&T Mobility would prefer that ARAP hold on to the canceled stock certificate until the appraisal proceeding is over, ARAP undoubtedly would do so.

Thus, although our appraisal statute is not a model of drafting clarity on all scores,[61] the policy purposes served by the relevant statutory words are best read as not depriving minority stockholders in the wake of a short-form merger of their statutory right to appraisal on the basis that their shares have been canceled by the surviving corporation or that their stock certificates have previously been physically surrendered to the surviving corporation.

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[60] It bears mention that counsel for Roam-Tel, who is experienced in the prosecution of appraisal actions, said at oral argument that he routinely turns over the stock certificates to the surviving corporation well before the court renders a decision as to the fair value of the stock. Tr. at 40 (Counsel for Roam-Tel).

[61] *See, e.g.*, Thompson, *The Case for Iterative Statutory Reform: Appraisal and the Model Act* at 8-11, 13 (noting that the "dysfunctional nature of appraisal has been compounded because the statutory language is among the most confusing of all corporations statutes" and observing that instead of making sweeping statutory changes to its appraisal statute, "Delaware has relied on its case law in an effort to bring its law current.").

E. AT&T Mobility's Argument That A Stockholder Who Sends In A Waiver Of Appraisal Rights May Not Change Its Mind Within The 20 Day Statutory Election Period When There Is No Prejudice To The Surviving Corporation Would Shorten The Already Brief Statutory Election Period Without Any Corresponding Policy Benefit

In any event, AT&T Mobility's argument that once a minority stockholder turns over his stock certificates to the surviving corporation, he is barred from pursuing an appraisal is largely a reformulation of its third and final argument, which is that ARAP irrevocably waived its statutory right to an appraisal when it signed the Letter of Transmittal and mailed it along with its stock certificate to AT&T Mobility in exchange for the check representing the merger consideration.

In my view, this argument depends on using confusing *equitable* doctrines in an inequitable way; oversimplifies our case law; and cuts against the policies served by 8 *Del. C.* § 262.

1. Waiver And Estoppel: Two Related, Yet Purportedly Distinct Equitable Doctrines

The confusing doctrines are those of waiver and estoppel. These doctrines are related. Although some earlier cases conflated the equitable doctrines of waiver and estoppel,[62] more recent decisions have said that the two doctrines are "not coterminous."[63] "Waiver is the voluntary and intentional relinquishment of a known

[62] *Jones v. Savin*, 96 A. 756, 757 (Del. Super. 1916) (noting the "good deal of confusion in the cases regarding the distinction between estoppel and waiver, and [that] courts sometimes treated them as meaning the same thing, as convertible terms."); DONALD J. WOLFE AND MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 11.02 at 11-14 (2009) ("WOLFE AND PITTENGER").

[63] *St. Jones River Gravel Co. v. Hartford Fire Ins. Co.*, 1980 WL 308672, at *3 (Del. Super. July 7, 1980); *see also Nathan Miller, Inc. v. Northern Ins. Co. of New York*, 42 Del. 523, 527 (Del. Super. 1944) (examining the difference between waiver and estoppel); BLACK'S LAW

right"[64] either conferred by statute or secured by contract.[65] Waiver is a unilateral action and "depends on what one party intended to do, rather than upon what he induced his adversary to do, as in estoppel."[66] Unlike estoppel, waiver "does not necessarily imply that one party to the controversy has been misled to his detriment in reliance on the conduct of the other party."[67] Estoppel depends on what a party caused another to do, and involves an element of reliance.[68] That is, "[t]he doctrine of equitable estoppel arises when, by its conduct, a party intentionally or unintentionally leads another, in reliance on that conduct, to change position to his detriment:"[69]

> [Estoppel] is administered only in favor of one who has been actually misled through the act, admission, silence, or . . . promise of another, *i.e.*, one who has been induced to alter his line of conduct, with respect to the subject matter in controversy, so as to have subjected himself to some liability, he would not otherwise have incurred, or to have foregone some right or remedy which he otherwise would have taken. But where the party has not been so misled . . . leading to the same results as if the acts or silence complained of had not occurred, then no such injury has been sustained as will afford a ground for relief.[70]

DICTIONARY 1417 (5th ed. 1979) ("Terms 'estoppel' and 'waiver' are not synonymous; 'waiver' means the voluntary, intentional relinquishment of a known right, and 'estoppel' rests upon principle that, where anyone has done an act, or made a statement, which would be a fraud upon his part to controvert or impair, because other party has acted upon it in belief that what was done or said was true, conscience and honest dealing require that he not be permitted to repudiate his act or gainsay his statement.").

[64] *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982); WOLFE AND PITTENGER § 11.02 at 11-13.

[65] *Baio v. Commercial Union Ins. Co.*, 410 A.2d 502, 508 (Del. 1979); *see also Components, Inc. v. Western Elec. Co.*, 267 A.2d 579, 582 (Del. 1970).

[66] *Nathan Miller*, 42 Del. at 528.

[67] *Id.*

[68] WOLFE AND PITTENGER § 11.02 at 11-14.

[69] WOLFE AND PITTENGER § 11.01 at 11-2 (citing *Wilson v. American Ins. Co.*, 209 A.2d 902, 903-04 (Del. 1965)).

[70] *Wilds v. Attix*, 4 Del. Ch. 253, 262-63 (1871).

The continuing problem, which I do not attempt to solve in this opinion, is that few actual waiver cases exist where the waiver that was enforced did not result in some change of position on the part of someone receiving the waiver.[71] Where a party waived a right but promptly revokes it without a detriment to the receiving party, courts have generally allowed the party to change her mind.[72] This is, of course, not unexpected given that the doctrines of waiver and estoppel are of equitable origin.[73] In this regard, I note that the venerable Supreme Court decision of *Harleysville Insurance Co. v. Church Insurance Co.* said that a right that is waived is gone forever.[74] But that general proposition, when examined, rests on the relationship of waiver to estoppel and the fact

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[71] I did find this rare case: *Engstrom v. Farmers & Bankers Life Ins. Co.*, 41 N.W.2d 422, 424 (Minn. 1950) (enforcing a life insurance company's waiver of a military service forfeiture provision without identifying any detrimental reliance or change in position by the policy's beneficiary where the company, with knowledge that the insured had served in the military, instructed its bank to pay the beneficiary the full policy benefit but then sought to change its mind before the check was sent to the beneficiary on the ground that "[w]here a party intentionally relinquishes a known right by waiver, he cannot, without consent of his adversary, reclaim it."). But it was far easier to find cases where waivers were upheld because of a clear detriment to the other party, and cases where waivers were allowed to be rescinded because of the absence of such detriment. *See infra* note 77.

[72] *E.g.*, *Maxfield v. Terry*, 4 Del. Ch. 618, 629-30 (Del. Ch. 1873) (quoting *Stackhouse v. Barnston*, 10 Ves. Jr. 453, 466 (1805, Ch.)) ("A mere waiver signifies nothing more than an expression of intention not to insist upon the right; which in equity will not, without consideration, bar the right any more than, at law, accord without satisfaction would be a plea."); *United States v. Taylor*, 933 F.2d 307, 311 (5th Cir. 1991), *cert. denied*, 502 U.S. 883 (1991) (reversing district court's refusal to allow a criminal defendant to withdraw his waiver of his right to counsel where the withdrawal of that waiver did not cause delay in sentencing or otherwise constitute "mischief" at odds with "the orderly administration of justice").

[73] *See, e.g.*, *Wilmington Materials, Inc. v. Town of Middletown*, 1988 WL 135507, at *7 (Del. Ch. Dec. 16, 1988) ("The estoppel doctrine derives from equity . . . ."); *Kirk v. Hamilton*, 102 U.S. 68, 77 (1880) (observing that the doctrine of equitable estoppel "originated in courts of equity."); WOLFE AND PITTENGER § 11.02 at 11-14 ("[T]he doctrine of waiver derives from equitable principles"); T. Leigh Anenson & Donald O. Mayer, *"Clean Hands" And The CEO: Equity As An Antidote For Excessive Compensation*, 12 U. PA. J. BUS. L. 947, 979-80 (2010) (observing that estoppel and waiver, as "equitable defenses," "originated in equity").

[74] *Harleysville Ins. Co. v. Church Ins. Co.*, 892 A.2d 356, 364 (Del. 2005) (citing *Hanson v. Fidelity Mut. Beneficial Corp.*, 13 A.2d 456, 460 (Del. Super. 1940)).

that when Party A defends his conduct by an allegation that Party B has waived the right he now seeks to enforce, Party A often does so because he has acted in a way inconsistent with the continuing existence of the right that Party B waived, and is placed in a worse position because of it.[75] Thus, a better understanding of the relationship between a waiver and an estoppel, therefore, is that "a waiver can be retracted before the other party has materially changed his position in reliance thereon, [but] [o]nce it is established that an estoppel exists, [the waiver] cannot be revoked."[76] Our courts are in agreement with this construction of the rule, and will look to whether the non-waiving party has been prejudiced by the waiving party's attempt to rescind its prior waiver.[77]

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[75] Indeed, the insurance company in *Harleysville* that sought indemnification for its defense of a property manager in a personal injury suit on the basis that the manager was covered in the first instance by the landowner's insurance policy with another insurance provider did so only after a four day jury trial had ended. *Harleysville*, 892 A.2d at 360. Although not part of the Supreme Court's decision to affirm the trial court's holding that the manager's insurance company had irrevocably waived the landowner's insurance company's obligation to defend the manager, it would seem quite prejudicial to have allowed the manager's insurance company to rescind its waiver and require the landowner's insurance company to indemnify the manager's insurance company for a completed defense over which it had no strategic or financial control. In fact, the landowner's insurance company settled with the personal injury plaintiff before trial. *Id.* at 359.

[76] 31 C.J.S. *Estoppel and Waiver* § 93 (2010). *See also Maxfield*, 4 Del. Ch. at 630 ("The present case goes beyond that of a bare parol waiver . . . . Maxfield's consent, given for the sale of the property to another purchaser, was acted upon. In consequence of it Cleaver and Terry were led to alter their situation, and must suffer prejudice if Maxfield be now permitted to retract his consent to the sale, and to hold the property charged with his equity."); *Brockington v. Grimstead*, 933 A.2d 426, 442 (Md. Ct. Spec. App. 2007) ("Ordinarily, when a party has waived a right and then retracts his waiver, the effect of the retraction is to revive the right, subject to the doctrine of equitable estoppel. . . . In other words, a waiver cannot be revoked when the opposing party has relied upon it and would be prejudiced by the revocation or the revocation would result in an improper manipulation of the judicial process."); *Max 327, Inc. v. City of Portland*, 838 P.2d 631, 633 (Or. Ct. App. 1992) ("A waiver can be retracted at any time before the other party has materially changed position in reliance thereon.").

[77] Courts in Delaware will not allow a waiving party to rescind its waiver if the non-waiving party has relied to her detriment on the waiver or would be prejudiced by its revocation. *See, e.g., Ballenger v. Applied Digital Solutions, Inc.*, 2002 WL 749162, at *8 (Del. Ch. Apr. 24, 2002) ("Applied Digital now attempts to muddy its earlier, clear representation to the court that it

The forgoing discussion raises the question: what does a waiver, by itself, do? To stylize this inquiry in terms of a familiar metaphysical question, if a party waives a right and no one is around to hear it — let alone rely on it — is that party thereafter forever barred from changing his mind and claiming the original right? AT&T Mobility thinks the answer to that question should be yes, and argues that from the moment ARAP put its signature on the Letter of Transmittal, it waived its right to an appraisal forever.[78]

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was waiving arbitration . . . . Applied Digital let the plaintiffs proceed full bore in the federal case without raising the arbitrability issue. It then allowed the plaintiffs to press forward in this case for over a month before retracting its prior waiver of arbitration. In these circumstances, the plaintiffs are sufficiently prejudiced to bar Applied Digital from now changing its mind."); *Dyer v. Osgood*, 1995 WL 788170, at 1 n.1 (Del. Fam. Ct. 1995) ("The Court will not consider the issue of health insurance as Father agrees that he waived it [at trial], and permitting him to rescind the waiver at this time [in his closing brief] would unfairly prejudice Mother."). On the other hand, our courts are willing to allow a waiving party to change her mind in the absence of such detrimental reliance or other prejudice. *See, e.g.*, *Bailey v. State*, 525 A.2d 582, 582 (Del. 1987) ("Even if the defendant's waiver of his right to postconviction relief be viewed as competently made it now appears that defendant realizes, with full knowledge of its consequences, that the waiver was not in his best interests. Finally, it does not appear that the State has changed position or suffered specific prejudice as a result of defendant's attempted withdrawal of the waiver."). In this regard, our courts' approach is consistent with hornbook law on the subject. *See, e.g.*, 31 C.J.S. *Estoppel and Waiver* § 93 (2010); AM. JUR. 2D § 324 ("A party who has made a waiver affecting a portion of the contract not yet performed may retract the waiver by reasonable notification to the other party, unless the retraction would be unjust in view of a material change of position in reliance on the waiver."); 13 WILLISTON ON CONTRACTS § 39:20 (4th ed. 2010) ("Under general principles of contract law, a party who has made a waiver affecting an executory portion of a contract may retract the waiver by notifying the other party that strict performance of any term waived will be required, unless such a retraction would be unjust because of a material change of position made in reliance on the waiver."); RESTATEMENT (SECOND) OF CONTRACTS § 84 cmt. f ("[W]here the requirement of a condition is waived in advance, the promisor may reinstate the requirement by giving notice to the other party before the latter has materially changed his position. Whether delay alone makes reinstatement unjust depends upon the circumstances . . . .").

[78] Tr. at 17-18 (Counsel for AT&T Mobility) ("I think the waiver . . . occurred at the moment the document was signed."). AT&T Mobility went so far as to argue that even if ARAP had signed the Letter of Transmittal, but then tore it up and did not mail it, ARAP still would have irrevocably waived its appraisal rights. *Id.*

Admittedly, ARAP did more than just sign the Letter of Transmittal. It sent it to AT&T Mobility along with its stock certificate and later received a check for the merger consideration. But even so, AT&T Mobility admitted that it was in no way prejudiced by ARAP's decision to change its mind, promptly return the uncashed check, and make a demand for an appraisal within the 20 day statutory election period.[79] A surviving corporation faces no more tangible consequence when a minority stockholder indicates on day 1 that he waives his right to an appraisal, receives a check representing the merger consideration, but then later makes a demand for an appraisal on day 20 and returns the check uncashed, than when a minority stockholder refrains from any communication with the surviving corporation until the 20th day, on which he makes his demand for an appraisal. At most, in the case of the stockholder who changes his mind, the corporation — a non-human — may suffer (if one anthropomorphizes it) the disappointment of seeing an appraisal class grow, having believed that it faced no risk because that stockholder had earlier indicated a desire to forgo an appraisal. That psychic injury does not amount to the sort of reliance that would justify denying a stockholder the chance to change its mind within the 20 day statutory election period. Of course, had ARAP cashed or further negotiated the check, or had AT&T Mobility initially given ARAP cash

[79] Tr. at 26-27 (counsel for AT&T Mobility).

instead of a check,[80] AT&T Mobility would have a claim that it had relied to its detriment on ARAP's waiver, thereby precluding ARAP from rescinding it.[81]

AT&T Mobility's inability to offer any reason why, as a matter of equity, ARAP should be denied the chance to change its mind, is not surprising. By its terms, 8 *Del. C.* § 262 limits the outer boundaries of detrimental reliance by, or other prejudice to, the surviving corporation. That is, § 262(d)(2) affords minority stockholders at most 20 days following the mailing of the notice of merger to make a demand for an appraisal. This is a short period of time in which an important decision must be made, and § 262 does not confer any authority on the surviving corporation to force the stockholder to make that decision at any time before that 20 day period expires. Nor does § 262 place any affirmative temporal obligation on the surviving corporation to send out the merger consideration to minority stockholders who indicate their desire, within the 20 day period, to receive the merger consideration instead of seeking an appraisal. In fact, the surviving corporation must, regardless of whether it remits a check to a stockholder not seeking appraisal within the 20 day period, set aside sufficient funds to consummate the merger and cash out the remaining minority stockholders at the merger price.[82]

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[80] *Cf. Moore v. Travelers Indem. Ins. Co.*, 408 A.2d 298, 301 (Del. Super. 1979) (citing *Wall v. Mut. Life Ins. Co. of N.Y.*, 467 F.2d 321, 324 (5th Cir. 1972)) ("Absent an agreement to the contrary, delivery of a check and acceptance of it is not payment until the check itself is paid.").

[81] *See LeCompte v. Oakbrook Consol., Inc.*, 1986 WL 2827, at *2 (Del. Ch. Mar. 7, 1986) (denying appraisal rights to a minority stockholder where his shares had been "surrendered for payment" and that "payment . . . was made" when the stockholder's "brokerage account was credited in the amount" equal to the merger consideration); *In re Engle v. Magnavox Co.*, 1976 WL 2449, at *3 (Del. Ch. Apr. 21, 1976) (denying appraisal rights to a minority stockholder where the stockholder had "been paid [the merger consideration] for" his shares).

[82] Moreover, even after the 20 day period has expired, a corporation is not shielded from the possibility that a minority stockholder who has made a demand for appraisal might withdraw her

2. The Appraisal Statute's Public Policy Purpose Is Best Vindicated By Allowing ARAP To Rescind Its Waiver And Timely Perfect Its Statutory Right To An Appraisal

According to AT&T Mobility, our case law, as exemplified by the cases *LeCompte v. Oakbrook Consolidated Industries* and *In re Engel v. Magnavox Co.*, stands for the bright-line rule that any stockholder who submits his shares in exchange for the merger consideration loses its right to an appraisal regardless of the circumstances.[83] But AT&T Mobility oversimplifies these decisions, as is illustrated by the Supreme Court's decision in *Alabama By-Products v. Cede & Co.*, the name by which the *Neal* case was adjudicated by the Supreme Court on appeal.[84]

In that case, a record owner of stock who had perfected its right to an appraisal in the context of a short-form merger inadvertently tendered a portion of its shares held by it on behalf of certain beneficial owners in exchange for the merger consideration well after the 20 day statutory period had expired,[85] and after an appraisal action had already been filed.[86] The surviving corporation, in objecting to the inclusion of the shares attributable to those beneficial holders in an appraisal award higher than the merger price, rested its argument on the rule pressed by AT&T Mobility here: that a minority stockholder "forfeit[s] its right to participate in the appraisal award . . . by tendering [its] shares in

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demand and instead elect to receive the merger consideration. *See supra* notes 33-36 and accompanying text.

[83] *See LeCompte v. Oakbrook Consol., Inc.*, 1986 WL 2827, at *2 (Del. Ch. Mar. 7, 1986); *In re Engle v. Magnavox Co.*, 1976 WL 2449, at *3 (Del. Ch. Apr. 21, 1976).

[84] *Neal v. Alabama By-Products Corp.*, 1993 WL 388372 (Del. Ch. Sept. 22, 1993), *aff'd sub nom. Alabama By-Products Corp. v. Cede & Co.*, 657 A.2d 254 (Del. 1995).

[85] *Alabama By-Products*, 657 A.2d at 256-57.

[86] *Id.* at 255.

exchange for the merger consideration."[87] In support of that contention, the surviving corporation, just like AT&T Mobility, "relie[d], *inter alia*, on two decisions from the Court of Chancery that held that stockholders who surrendered their shares to the surviving corporation could not thereafter participate in an appraisal proceeding," *LeCompte* and *Engle*.[88]

The Supreme Court rejected that argument, distinguishing those cases from what occurred in *Alabama By-Products*. First, the Supreme Court noted that "[f]actually," *LeCompte* involved a minority stockholder who "failed to make a proper and timely demand for appraisal."[89] That is, even though the *LeCompte* court rested its conclusion to dismiss LeCompte's appraisal action exclusively on the fact that the record owner of LeCompte's shares tendered those shares for payment and that payment of the merger was made,[90] the Supreme Court pointed to another, more fundamental defect in LeCompte's attempt to seek an appraisal: LeCompte was a beneficial owner of the stock at issue when only record owners have the authority to demand and perfect appraisal rights under 8 *Del. C.* § 262.[91] The Supreme Court concluded that "[o]bviously, a shareholder *who fails to perfect appraisal rights* and who surrenders his shares for the merger consideration is not entitled to an appraisal. In contemplation of our statutory

[87] *Id.* at 261.
[88] *Id.*
[89] *Id.* at 262.
[90] *LeCompte*, 1986 WL 2827, at *2.
[91] 8 *Del. C.* § 262(a); *ENSTAR Corp. v. Senouf*, 535 A.2d 1351 (Del. 1987); *Carl M. Loeb, Rhoades & Co. v. Hilton Hotels Corp.*, 222 A.2d 789, 792 (Del. 1966); 2 DREXLER § 36.04.

scheme, the shareholder has elected to receive the merger consideration in lieu of an appraisal, and is bound by that election."[92]

Second, the Supreme Court distinguished *Engle* from the situation encountered in *Alabama By-Products*. It noted that the

> shareholders in *Engle* demanded an appraisal and, thereafter, intentionally forwarded their shares to the corporation "under protest." Thus, the shareholders in *Engle* deliberately attempted to hedge their position by seeking appraisal *and* obtaining the merger consideration in the interim. Aside from raising serious equitable considerations, this scenario contravenes the basic principle underlying the appraisal statute that an investor make an election either to accept the merger consideration or to pursue an appraisal of his shares. *See Smith v. Shell Petroleum, Inc.*, Del.Ch. C.A. No. V8395, slip op. at 6-7, 1990 WL 186446, Hartnett V.C. (Nov. 26, 1990). The shareholder cannot attempt to have it both ways. Accordingly, *Engle* is inapposite.[93]

Although the Supreme Court ultimately held that the minority stockholders in *Alabama By-Products* were entitled to appraisal because the Court of Chancery never approved the dismissal of the appraisal action with respect to the inadvertently tendered shares as required by 8 *Del. C.* § 262(k),[94] the Supreme Court's analysis of both the *LeCompte* and *Engle* decisions supports a reading of 8 *Del. C.* § 262(d)(2) that would allow a minority stockholder, like ARAP, who makes an otherwise timely and proper demand for an appraisal following a short-form merger to return promptly an uncashed check for the merger consideration. ARAP had no intention to "hedg[e]" its bets by tendering its shares in order to "obtain[] the merger consideration in the interim" and then make a demand for an appraisal, with the plan, to accept whichever ended up being of

[92] *Alabama By-Products*, 657 A.2d at 262 (emphasis added).
[93] *Id.* (emphasis in original).
[94] *Id.* at 263.

more value.[95] Instead, ARAP promptly returned the uncashed check to AT&T Mobility when it decided, within the 20 day statutory period, to demand an appraisal based on newly discovered information that other minority stockholders were going to file an appraisal action. Moreover, unlike in *LeCompte*, ARAP, a record owner, did perfect its right to an appraisal because it made its demand within the 20 day period. Finally, ARAP's conduct is consistent with the "basic principle underlying the appraisal statute" identified in *Alabama By-Products* in that it, within the statutorily prescribed 20 day period, made "an election either to accept the merger consideration or to pursue an appraisal of [its] shares."[96]

Perhaps most important, in *Alabama By-Products*, the Supreme Court rejected a potent statutory argument, well articulated by Justice Duffy in dissent,[97] that to allow a stockholder who had surrendered its stock certificates and kept the merger consideration for a long time to seek appraisal would conflict with the plain language of 8 *Del. C.* § 262. Here, unlike in *Alabama By-Products*, *LeCompte*, and *Engle*, ARAP did not cash the check, let alone hold on to it for more than a few days. This distinguishes it from those cases, like *Alabama By-Products*, *LeCompte*, and *Engle*, in which the stockholders who tendered their stock certificates actually took the merger consideration in the sense that they exercised dominion over it and then sought to reverse course.

[95] *Id.* at 262.
[96] *Id.*
[97] *Id.* at 368-69 (Duffy, J., dissenting).

3. Letting ARAP Change Its Mind Is Analogous To Letting A Stockholder In A Long-Form Merger Change Its "Yes" Proxy Or Consent To "No" Before The Final Vote

In reaching the determination that ARAP could change its mind in these circumstances, it is helpful, as ARAP suggests, to compare the situation presented by this motion to a different situation where stockholders may have a right to an appraisal — an ordinary long-form merger effected under 8 *Del. C.* § 251. Like minority stockholders in the wake of a short-form merger, stockholders in the context of a long-form merger are afforded a time period in which they must decide whether or not to demand an appraisal of their shares. But, unlike in the context of a short-form merger, stockholders in a long-form merger are typically given far more time than 20 days to make that decision and enjoy far greater access to information regarding the merger.

In order for a dissenting stockholder to perfect his appraisal rights in the case of a long-form merger, he must either vote against the merger or not vote at all, and submit a written demand for appraisal to the corporation before the stockholder vote.[98] Where a stockholder votes by proxy or by written consent, he is not precluded from changing his mind and altering or revoking the proxy or written consent so long as he does so before the date of the actual vote.[99] And, a stockholder who had previously indicated his approval of the proposed merger by way of a proxy or written consent is not precluded from seeking an appraisal, so long as by the date of the actual vote that stockholder's vote

[98] 8 *Del. C.* §§ 262(a); 262(d)(1).

[99] *See Haft v. Haft*, 671 A.2d 413, 416 (Del. Ch. 1995) (quoting 8 *Del. C.* § 212(e)) ("[A] proxy is irrevocable 'if it states that it is irrevocable and if, and only as long as, it is coupled with an interest sufficient in law to support an irrevocable power.'"); *Pabst Brewing Co. v. Jacobs*, 549 F. Supp. 1068, 1074 (D. Del. 1985), *aff'd* 707 F.2d 1392 (3d Cir. 1982) (holding that under Delaware law, a party may revoke his prior written consent).

by proxy or written consent is in the negative, and the stockholder has delivered his written demand for an appraisal to the corporation. In fact, then Vice Chancellor Seitz condoned that sequence of events in *Wisewall v. General Water Works Corp.*.[100] In that case, Vice Chancellor Seitz held that a stockholder who initially had voted by proxy in favor of a proposed long-form merger, but before the actual vote, revoked that proxy and objected to the merger in the same written instrument, had timely and properly perfected his right to an appraisal.[101]

The situation during the 20 day statutory election period in the case of a short-form merger is analogous to the period of time preceding a stockholder vote on a long-form merger. In both cases, the stockholder is given a period of time in which to elect to pursue an appraisal. But, in contrast to the case of a long-form merger, where a stockholder is given the opportunity to make that decision and to change his mind before the stockholder vote on the proposed merger, in the short-form merger context, a minority stockholder is only informed of the merger after it has been effected and only then is asked to decide whether he will seek an appraisal of his shares. The realities that a minority stockholder in a short-form merger receives no advance notice of the merger, has a very limited opportunity to file equitable claims against the merger, has at most 20 days to make a decision to demand an appraisal, and is unilaterally and immediately stripped of his status as a stockholder and the rights attendant to that status should not be ignored here. In the absence of prejudice to the corporation, these factors counsel against

[100] *Wisewall v. General Water Works Corp.*, 66 A.2d 424, 425 (Del. Ch. 1949).
[101] *Id.* at 424-25. At the time *Wisewall* was decided, in 1949, the appraisal statute required, instead of a written demand for an appraisal, "a written objection" to the merger. *Id.* at 424.

truncating an already brief 20 day election period and counsel in favor of allowing stockholders the full 20 days to make a final decision whether to seek appraisal. Indeed, it is likely that the heart palpitations resulting to our "humanized" corporation will be far less during this period than those experienced by corporations when voters in long-form mergers rescind a prior "yes" vote near to the close of voting.

IV. Conclusion

For all the foregoing reasons, I hold that a stockholder who waives its right to an appraisal and is sent the merger consideration may rescind that waiver and perfect its right to an appraisal if: i) the demand is made within the statutory election period; and ii) the minority stockholder does not actually accept the merger consideration in the sense of exercising dominion over the funds.

The motion to determine the members of appraisal class is GRANTED and ARAP shall be included in the appraisal class along with the other petitioners whose status is not contested. IT IS SO ORDERED.