

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MILTON APPLEBAUM,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 19342
)	
AVAYA, INC., JEFFREY A. HARRIS,)	
FRANKLIN A. THOMAS, HENRY B.)	
SCHACHT, DANIEL C. STANZIONE,)	
MARK LESLIE, DONALD K.)	
PETERSON, and PATRICIA F. RUSSO,)	
)	
Defendants.)	

MEMORANDUM OPINION

Submitted: April 29, 2002

Decided: June 27, 2002

Corrected: July 1, 2002

Ronald A. Brown, Jr., Esquire, Paul A. Fioravanti, Jr., Esquire, PRICKETT, JONES & ELLIOTT, P.A., Wilmington, Delaware, and Arthur T. Susman, Esquire, SUSMAN & WATKINS, Chicago, Illinois, *Attorneys for Plaintiff.*

Jesse A. Finkelstein, Esquire, Daniel A. Dreisbach, Esquire, Zoe Forrester, Esquire, RICHARDS, LAYTON & FINGER, Wilmington, Delaware, and Paul J. DiMaio, Esquire, AVAYA, INC., Basking Ridge, New Jersey, *Attorneys for Defendants.*

LAMB, Vice Chancellor.

Before the court are cross motions for summary judgment in a lawsuit to enjoin a Delaware corporation from executing a reverse/forward stock split intended to cash out shareholders below a certain ownership level. For the reasons that follow summary judgment is granted for the defendants.

I.

Avaya, Inc. (“Avaya” or the “Company”) is a provider of communications systems and software for enterprises, including businesses, government agencies, and other organizations. Avaya became a public corporation as the result of its September 30, 2000 spin-off from Lucent Technologies, Inc. (“Lucent”) in which each holder of Lucent common stock received one share of Avaya common stock for every twelve shares of Lucent stock owned. Because Lucent was itself very widely owned as a result of its having been spun off earlier by AT&T, Avaya is one of the most widely held stocks listed on the New York Stock Exchange (“NYSE”). Avaya has approximately 3.3 million holders of its common stock (“Common Stock”), holding, on average, fewer than 90 shares. Approximately 868,000 registered shareholders of Avaya stock own fewer than 30 shares, 919,000 own fewer than 40 shares, and 947,000 own fewer than 50 shares. Moreover,

any procedures they may need to follow in order to get the same treatment as registered shareholders.

According to Avaya, the Proposed Transaction promises significant benefits to the small holders who will be cashed out. Avaya's common stock has recently traded in a range of \$4.15 to \$7 per share. Thus, for someone holding fewer than the Minimum Number of shares, the transaction cost of selling his or her Common Stock would consume a large portion of the total value of those shares. The Reverse/Forward Split will provide a cost-effective way for holders of fewer than the Minimum Number of shares to cash out their small investment in Avaya because the Company will pay all the associated transaction costs. The Proposed Transaction thus allows small holders to achieve what otherwise would be impossible—a sale of their positions at market price.

Avaya also points out that any stockholder wishing to maintain a continuing interest in the Company easily may do so. Stockholders have advance notice of the Proposed Transaction by virtue of the Proxy Statement and will have advance notice of its effective date through a public announcement and a posting on Avaya's web site. As a result, everyone owning fewer than the Minimum Number of shares will have the opportunity to

measure of “fair value” the imposition of a similar premium is necessary in this case.

This argument ignores the fundamental difference between the circumstances leading to an appraisal under Section 262 and the factual predicate of the transaction at issue here. The cases dealing with control premiums in the context of appraisal actions all tacitly assume that the shares in question are no longer available for purchase in that same marketplace by the person whose shares are being appraised. Otherwise, the award of a premium over market would constitute an unwarranted windfall, since the stockholder could repurchase shares subject to the appraisal in the market without paying any premium. For that reason, the court is unpersuaded that the authority cited by the plaintiff supports a conclusion that, in the circumstances of this case, market price is not “fair value” for the purposes of Section 155(2).

The court also rejects the plaintiffs statutory construction argument that the phrase “fair value” as used in Section 155(2) must be given the same meaning as in Section 262, an argument advanced in order to invoke the appraisal-derived rule that market value cannot be the sole determinant of