**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| PRELIX THERAPEUTICS, INC., A DELAWARE CORPORATION, | : | No. 31, 2016 |
| Plaintiff Below, Appellants, | : | |
| v. | : | |
| LONGPOINT INVESTMENTS TRUST AND ALEXIS LARGE CAP EQUITY FUND L.P., | : | |
| Defendant Below Appellee. | : | |

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**APPELLEE'S REPLY BRIEF**

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Filed by Team A,
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Appellee
Dated: February 5, 2016

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## NATURE OF PROCEEDINGS

On February 17, 2015, the merger of Radius Health Systems Corp. ("Radius") with Prelix Therapeutics, Inc. ("Prelix") was approved by a majority of Prelix shareholders. In reaction to the merger negotiations, Cede & Co. ("Cede"), on behalf of shareholders Longpoint Investments Trust ("Longpoint") and Alexis Large Cap Equity Fund LP ("Alexis"), demanded appraisal of the shares in compliance with the Delaware General Corporation Law, Title 8, Section 262 ("DGCL") ("Section 262"). The merger occurred on April 16, 2015, and at this time the shares were not registered to Longpoint or Alexis but instead were registered to Cudd & Co. and Mac & Co. For this reason, Prelix believed Longpoint and Alexis were not entitled to appraisal. On May 6, 2015, Longpoint and Alexis filed suit against Prelix to have their demand for appraisal enforced. Prelix moved for summary judgement because Longpoint and Alexis were not entitled to appraisal. The court below granted summary judgement in favor of Prelix on January 13, 2016. Longpoint and Alexis submitted notice of appeal to this Honorable Court on January 15, 2016.

## SUMMARY OF ARGUMENT

I. The Court of Chancery erred in its finding that Longpoint and Alexis were not required by law to establish their shares had not been voted in favor of the merger, nor consented thereto. Although the Court of Chancery relied on *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 67586 (Del. Ch. 2015), and *In re Appraisal of Acestry.Com*, 2015 WL 66825 (Del. Ch. 2015), in reaching their decision, the instant case is distinguishable because Longpoint and Alexis purchased their shares of Prelix stock before date of record. This Court must affirm the decision of the Court of Chancery to prevent erroneous and duplicative shareholder voting during the merger proceedings.

II. The Court of Chancery was correct in granting Prelix's motion for summary judgement because Longpoint and Alexis are prohibited from demanding appraisal of their Prelix shares because they failed to follow the continuous shareholder requirement of Section 262(a). When Longpoint and Alexis' shares were transferred from Cede to Cudd & Co. and Mac & Co., Cede ceased to be the shareholder of record. Because Longpoint and Alexis were not the continuous shareholders of record, they cannot perfect their demands for appraisal. It is essential that this Court uphold the decision of the Court of Chancery to prevent an undue burden from falling on corporations when they are not at fault.

## STATEMENT OF FACTS

On October 15, 2014, Radius announced its proposed acquisition of Prelix at a price of $14.50 per share. Op. at 2. This price was in excess of the prior trading price for Prelix on the NASDAQ Global Select Market. Op. at 2. Any claims arising out of alleged breach of fiduciary duties that arose from this transaction have been dismissed. Op. at 2. Dismissal of the breach of fiduciary duty claims was proper because on December 18, 2014, the merger agreement was amended and the acquisition price increased by $0.50 to $15.00 per share of Prelix stock. Op. at 2. Although the acquisition price per share recently increased, Cede, on behalf of Longpoint and Alexis, filed demands for appraisal of their shares on January 13, 2015, in compliance with Section 262(d)(1). Op. at 3. A meeting set for January 14, 2015 was adjourned to February 17, 2015, and the merger was approved by a majority of the owners of outstanding Prelix shares on that date. Op. at 2-3.

Soon after Cede. Filed appraisal demands on behalf of the Longpoint and Alexis, Depository Trust Company ("DTC") issued uniquely numbered certificates to Cede on January 23, 2015. Op. at 3. These unique certificates were delivered to J.P. Morgan Chase and Bank of New York Mellon, the custodial banks. Next, Cede reissued the certificates to two nominees of the custodial banks, Cudd & Co. and Mac & Co. Op. at 3. This reissuance took place on February 5, 2015, and as a result Prelix's transfer agent issued the new certificates in the name of Cudd & Co. and Mac & Co.  Op. at 3.

As a result of these transactions, Cede was not the actual the record holder of Longpoint and Alexis’ shares when the merger took place on April 16, 2015. Longpoint and Alexis had no knowledge of such changes. Op. at 4. The record holder on the day of the merger was not Longpoint and Alexis or Cede, who previously demanded appraisal for Longpoint and Alexis’ shares. Op. at 4. The actual record holder of the Prelix shares on the date of the merger was Cudd & Co. and Mac & Co. Op. at 4. On May 6, 2015, Longpoint and Alexis filed suit against Prelix to have their appraisal demands under Section 262 enforced by the court. Op. at 4. The court below concluded Longpoint and Alexis were not entitled to appraisal and granted summary judgement in favor of Prelix. Op. at 6.

## ARGUMENT

### I. THE COURT OF CHANCERY ERRED BY NOT REQUIRING LONGPOINT AND ALEXIS TO PROVIDE EVIDENCE THAT THEIR SHARES WERE NOT VOTED IN FAVOR OF THE MERGER, NOR CONSENTED THERETO.

#### A. QUESTION PRESENTED

Whether Longpoint and Alexis are prohibited from exercising their appraisal rights as a result of their failure to establish that their shares were not voted in favor of the merger, as required by the Section 262(a).

#### B. SCOPE OF REVIEW

The standard of review for cases arising under Section 262 traditionally grants the Court of Chancery a "high level of deference" by the Supreme Court of Delaware. *Gonsalves v. Straight Arrow Publishers, Inc.*, 701 A.2d 357, 360 (Del. 1997), citing *In re Appraisal of Shell Oil Co.,* 607 A.2d 1213, 1219 (Del. 1992). However, as a result of the substantial changes over the years, and recent amendments to Section 262, the Supreme Court of Delaware has stated that when the Court of Chancery's interest award involves a question of law, such award will be subject to *de novo* review. *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 42 (Del. 2005).

#### C. MERITS OF THE ARGUMENT

Longpoint and Alexis failed to meet the requirements of DGCL, Title 8, Section 213 ("Section 213") therefore they must establish their shares were not voted in favor of the merger, nor consented thereto because there is no decisive record date.

An initial record date of December 4, 2014, was set by Radius, Prelix, and the Radius acquisition subsidiary. Op. at 3. However, the date of the shareholders' vote on the merger was adjourned from January 14, 2015, to February 17, 2015. Op. at 2. February 17, 2015 is seventy-four days after the record date in violation of the Section 213 that states the "record date shall not precede the date upon which the resolution fixing the record date is adopted by the board of directors, and which record date shall not be more than sixty nor less than ten days before the date of such meeting."

The next logical date for this Court to consider as the record date is December 18, 2015. Op. at 3. This is the date the announcement regarding the $0.50 per share increase in the merger price took place. Op. at 3. Radius and Prelix negotiated an increased merger price because of widely reported difficulties in achieving the required shareholder approval. Op. at 2. The Court of Chancery correctly decided in, *In re MONY Group, Inc. Shareholder Litig.*, 853 A. 2d 661, 672 (Del. Ch. 2004), to allow alterations to the record date for the specific purpose of approval of the merger. In *MONY,* the Court of Chancery stated that MONY's Board properly changed the record date to increase the likelihood of a favorable vote. *Id*. By applying *MONY* to the case at hand, December 18, 2014, would be an acceptable alteration for the record date; however, it does not comply with Section 213. December 18, 2014 is actually sixty-one days before February 17, 2015, and thus is in violation of the sixty day requirement in Section 213. The Court of Chancery was clear in *McKesson Corp. v. Derdiger*, 793 A.2d 285, 392-393 (Del. Ch. 2002), that sixty-one days separating the record date from the date of the meeting invalidates the record date because the statute's goal is to prevent the list of shareholders eligible to vote at the shareholder meeting from being "stale." Section 213 ensures an accurate representation of those who still have an ownership stake in the company.

As a result of the failure to explicitly meet the requirements set forth in Section 213(a), the statute states that:

> a determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; provided, however, that the board of directors may fix a new record date for determination of stockholders entitled to vote at the adjourned meeting, and in such case shall also fix the record date for stockholders entitled to notice of such adjourned meeting.

Radius and Prelix failed to fix a new record date when they adjourned to February 17, 2015. However, this Court should find the true record date is the close of business on January 12, 2015. This date is not arbitrary, rather it is based on a different portion of Section 213(a) that states, "if no record date is fixed by the board of directors . . . [it] shall be at the close of business of the day next preceding the day on which notice is given." Notice of the adjournment of the January 14, 2015, meeting was given that day to the shareholders. Op. at 2. This Court should find that January 12, 2015, is the appropriate record date because it satisfies all timeliness requirements set forth in Section 213, is in the best interest of equity and fairness, and provides an accurate list of the current shareholders in the company.

Setting the record date to January 12, 2015, requires Longpoint and Alexis to prove their shares had not voted for the merger at the February 17, 2015, meeting of the shareholders. The Court of Chancery does not require that Longpoint and Alexis prove their shares were not voted in favor of the merger, nor consented thereto, because they were not believed to be the holders of record. On the contrary, Longpoint and Alexis acquired their shares between December 4, 2014, and December 18, 2014, and held their shares until January 13, 2015 as evidenced by the written demands for appraisal of their shares in conformity with Section 262(d)(1). Op. at 2-3. Section 262(d)(1) plainly states, one must be the holder of the stock on the day they demand appraisal. Because Longpoint and Alexis were holders of record, and on January 12, 2015, (the record date) as evidenced above, they had the opportunity to vote at the shareholders meeting on February 17, 2015. As such, in order to comply with Section 262(a) Longpoint and Alexis must prove their shares have not voted in favor of the merger, nor consented thereto, in order to demand appraisal. Although Longpoint and Alexis did not vote in favor of the merger, they did not in fact have control of their shares on the date of the shareholder meeting which in and of itself prevents Longpoint and Alexis from seeking appraisal.

1. **The Court of Chancery relied on case law that is distinguishable from the instant case and incorrectly held that Longpoint and Alexis were not shareholders of record.**

The Court of Chancery decided Longpoint and Alexis did not have the burden to prove they did not vote for the merger because the court believed they were not the record owners of the stock. On the Contrary, Longpoint and Alexis were the record holders because the record date was in fact January 12, 2015 instead of December 4, 2014, or December 18, 2014. However, their shares were held in fungible bulk by Cede and then transferred to custodial firms J.P. Morgan Chase and Bank of New York Mellon. Op. at 3. There is no evidence to prove that those shares were not voted in favor of the merger, nor consented thereto.

The court in *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 67586 (Del. Ch. 2015), addressed the difficulty of tracing votes to specific shares due to the realities of modern securities practices. The court in *BMC Software* rejected the notion that if a share is acquired after the record date, then the acquiring entity has no burden to prove, "that each share it seeks to have appraised was not voted by any previous owner in favor of the merger." *Id.* at 3. In the case at hand, the record date was after the acquisition of the shares because of the adjournment of the meeting and the failure to satisfy the requirements set forth in Section 213. As a result, the Court of Chancery's basis for its decision is improper.

The court in *In re Appraisal of Ancestry.Com, Inc.*, 2015 WL 66825 (Del. Ch. 2015), reiterated that a shareholder or beneficial owner does not have to prove that they owned an aggregate number of shares not voted in favor of the merger, nor consented thereto. *Id*. at 4. *Ancestry.Com* deals with an entity that was not a record holder of stock, and was not required under Section 262 to trace their shares votes. *Id*. The Court of Chancery in the instant case used this logic to find that Longpoint and Alexis were not required under Section 262 to demonstrate their shares had not been voted for in favor of the merger, nor consented thereto. However, as seen above, this finding is incorrect because the dates on which the Court of Chancery bases its findings do not meet Section 213 requirements. When the proper rules are utilized, the record date is in fact January 12, 2015, and makes Longpoint and Alexis the shareholders of record. *Ancestry.Com* does provide guidance for when the holders of record are seeking appraisal when the court stated that, "a plain reading of [Section 262(a)] discloses that, for standing purposes, it remains the record holder who must not have voted the shares for which it seeks appraisal." *Id*. at 1. Although the case at issue is similar to *Ancestry.Com* it is not persuasive because Longpoint and Alexis are holders of record.

2. **If this Court allows Longpoint and Alexis to seek appraisal for their shares without requiring proof the shares had not voted in favor of the merger, nor consented thereto, then this Court will open the door for others to do the same, which will cause many shares to be both voted in favor of the merger and able to seek appraisal.**

If this court determines the record date is in fact December 4, 2014, and that the date does not violate Section 213, then the court must consider the policy concerns highlighted in both *BMC Software* and *Ancestry.Com.* Both cases reference concerns that, "shares acquired after the record date, not voted in favor of the merger by the acquirer may nonetheless have been so voted by the seller, leading hypothetically, to the number of shares for which appraisal is sought, [to exceed] the number voted for the merger." *BMC Software, Inc.*, 2015 WL 77586, 7. Though the General Assembly did not explicitly impose additional standing for appraisal petitioners, by requiring those seeking appraisal to have neither voted in favor of the merger nor consented thereto, the General Assembly attempted to prevent the duplication of rights of shareholders. Section 262(a). More specifically, this Court has a duty to prevent the duplication of rights amongst shareholders in order to maintain consistency across the determinations of appraisal rights.

If this Court finds that tracing each shares vote on the merger is too difficult because of the constant exchange of ownership, then this court must consider other solutions. One solution is to require those seeking appraisal rights whose shares are held in fungible bulk, similar to Longpoint and Alexis, to show that the bulk had enough shares that did not vote in favor of the merger to meet their respective ownership. Though their particular shares may have not voted in favor of the merger, at least there is less likelihood of duplicating the rights of shareholders by allowing them to both support the merger and seek their appraisal rights. If this Court finds that this solution is proper, then Longpoint and Alexis have a duty to prove their shares have not been voted in favor or consented to the merger. If they are unable to provide such proof, then they should not be granted appraisal on their shares.

## II. THE COURT OF CHANCERY CORRECTLY DENIED APPRAISAL WITH RESPECT TO LONGPOINT AND ALEXIS' SHARES BECAUSE LONGPOINT AND ALEXIS FAILED TO COMPLY WITH SECTION 262(A)'S CONTINUOUS SHAREHOLDER REQUIREMENT.

### A. QUESTION PRESENTED

Whether Longpoint and Alexis, as beneficial owners of shares in Prelix, are prohibited from exercising their appraisal rights due to an administrative transfer of their shares before the date of the merger from Cede to J.P Morgan and Bank of New York Mellon, the custodial brokers for their shares, thus violating the continuous shareholder requirement listed in Section 262(a).

**B. SCOPE OF REVIEW**

The Delaware Supreme Court does not give deference to a trial court's legal conclusions. *SI Mgmt. L.P. v. Winiger*, 707 A.2d 37, 40 (Del. 1998). This Court has held the "Court of Chancery's legal conclusions are subject to de novo review." *Lawson v. Meconi*, 897 A.2d 740, 743 (Del. 2006). Because the issue at hand involves assessing the interpretation of the statutory shareholder requirement, a question of law, *de novo* is the appropriate standard of review.

**C. MERITS OF THE ARGUMENT**

Longpoint and Alexis' shares were re-titled to the names of the custodial banks' nominees, Cudd & Co. and Mac and Co., therefore there was not one continuous "stockholder of record" through the effective date of the merger. Courts must adhere to a strict interpretation of Section 262(a), which requires continuous ownership of shares by all shareholders seeking appraisal rights from the date of demand to the effective date of the merger. The Chancery Court has ruled that although the beneficial owners of the shares remained the same, the change of record holder from Cede to the shareholders' respective banks is not consistent with the appraisal requirements listed in Section 262(a).

The continuous shareholder requirement is important and necessary because it provides an equitable system that treats both shareholders and corporations fairly in appraisal proceedings. The requirement provides the corporation with order and certainty in appraisal proceedings, and prevents any potential gamesmanship by the shareholder. Furthermore, a corporation should not be required to satisfy a shareholder's invalid demands, especially when the corporation has committed no fault.

1. **Section 262 and Delaware precedent require affirmation of the Chancery Court's decision.**

In order for a shareholder to perfect his appraisal rights under Section 262, they must meet all four requirements provided in subsection (a). Appraisal issues are assessed under the clear and plain meaning of the statute and must strictly interpret the language. *Alabama By-Products Corp. v. Cede & Co. on Behalf of Shearson Lehman Bros.*, 657 A.2d 254, 263 (Del. 1995). By applying this strict interpretation, this Court will find Longpoint and Alexis did not perfect their appraisal demands. Lower courts find this conclusion to be true in persuasive holdings addressing the same issue. *In re Appraisal of Dell Inc.*, 2015 WL 2091445 (Del. Ch. 2015). Even if this Court disagrees with the outcome of the issue at hand, this Court has already established precedent such that overturning the lower court's decision in this manner would amount to an abuse of power by the judiciary.

   a. **The strict interpretation of Section 262 is clear in defining the continuous shareholder requirement.**

When addressing appraisal rights, this Court is required, "to adhere to the plainest meaning of the statute, absent strong evidence of a contrary legislative intent." *Nelson v. Frank E. Best, Inc.*, 768 A.2d 473, 479 (Del. Ch. 2000). Courts cannot analyze appraisal issues with a lenient interpretation of the statute. A strict interpretation must be applied to the facts at hand in each case and, "[b]y exacting strict compliance . . . the appraisal statute ensure[s] the expedient and certain appraisal of stock." *Alabama By-Products*, 657 A.2d 254, 263.

The continuous shareholder requirement of Section 262(a) says that a shareholder must hold the shares of stock from the date the appraisal demand is made until the effective date of the merger, in order to be entitled to an appraisal of shares. The statute also defines the word "stockholder" in this section means "a holder of record of stock in a corporation." 8 Del. C. § 213 (a). Section 262(a) plainly states that the record holder must continuously hold the shares in order to be eligible to exercise his appraisal rights. This Court "enforces the statutory requirements strictly, absent a showing of extraordinary circumstances." *Cede & Co. v. MedPointe Healthcare*, 2004 WL 2093967, 22 (Del. Ch. 2004). The Court will not find any extraordinary circumstances here and thus should continue to enforce the statute as it reads, meaning that if the record holder of a stock changes at any point between the time the appraisal demand is made and the merger has occurred, the holder's appraisal demand is void.

**b. Longpoint and Alexis' actions violated the clear meaning of Section 262(a) by re-titling the shares.**

While the Longpoint and Alexis may have continuously been the beneficial owners of the shares, they did not continuously hold them from the date the demand was made on January 13, 2015, through the merger date on April 16, 2015. When the appraisal demand was made, Cede was the holder of record, thus in order for the shares to be appraised, Cede needed to still be the record holder on April 16. Longpoint and Alexis' actions were inconsistent with Section 262(a)'s requirements for entitlement of appraisal.

Section 262(a) provides the requirements a shareholder must meet to be entitled to an appraisal by the Court of Chancery. One could not rationalize placing heavier weight on the other requirements listed by Section 262(a) because he does not agree with the outcome. There is no legitimate reason to give the continuous shareholder requirement less weight than the other requirements in 262(a), and thus it must be adhered to just as much as the requirement that the shareholder not vote in favor of the merger, nor consent thereto. The Legislature incorporated all requirements of Section 262(a) for specific purposes, and the plain language cannot be read so that any one requirement is more determinative of a shareholder's rights than the others. A shareholder must comply with all of requirements of Section 262(a) to "perfect" his appraisal rights. Longpoint and Alexis cannot legitimately claim they have satisfied all four requirements.

**c. Delaware Courts have established precedent that supports the strict interpretation of Section 262(a).**

Delaware Court precedent has taken great efforts to make clear that, in order to demand appraisal rights, one must be the shareholder of record, not merely the beneficial owner. The "beneficial owner of shares has no right to demand appraisal under Section 262. To be entitled to appraisal, the beneficial owner must ensure that the record holder of his or her shares makes the demand. This requirement has been strictly enforced by Delaware courts." Balotti and Finkelstein, Del. Law of Corps. & Bus. Orgs., 3d Ed. § 9.43[B] (citation omitted). In multiple other instances, Delaware courts have concurred with this Chancery court opinion.[1]

**i. Vice Chancellor Laster's opinion in *In re Appraisal of Dell Inc.* represents the simplicity of the statute, even to those who disagree with its interpretation.**

Delaware Chancery Courts faced a nearly identical situation in *In re Appraisal of Dell Inc.*, 2015 WL 2091445. In that case, the court also had to determine whether it should permit appraisal of the beneficial owners' shares, even though the shares changed record holders, unbeknownst to the beneficial owners, and thus did not meet the requirements of Section 262(a). Vice Chancellor held in favor of the corporation, finding under the plain meaning of the law, the shareholders were not entitled to appraisal.

A majority of the opinion was spent by the Vice Chancellor providing reasons why he disagreed with his own opinion. Vice Chancellor Laster believes the statute no longer accomplishes its original goal since the federal creation of share immobilization laws was enacted. *Id*. at 3. He believed that a corporation should be entitled to "look through" Cede when determining if a stockowner meets the continuous shareholder requirement. *Id*. Vice Chancellor concluded that should the case be appealed, this Court should overturn his decision, but that according to the language of the law, he was forced to find in favor of Dell. *Id*. Despite, his agony in doing so, Laster correctly decided this case, and his opinion, against his wishes,

[1] *See Nothstein v. Software Publ'g Corp.*, 718 A.2d 528 (Del. 1988), *In re Appraisal of ENSTAR Corp.*, 535 A.2d 1351, 1354 (Del. 1987), *Carl M. Loeb, Rhoades & Co. v. Hilton Hotels Corp.*, 222 A.2d 789, 792 (Del. 1966). *Engel v. Magnavox Co.*, C.A. No. 4896 (Del. Ch. 1976), slip op. at 3.

should not be overturned for it is a correct interpretation of the law.

**ii. Reversal of the decision in *In re Appraisal of Dell* would amount to an overreach by the judiciary.**

It would be an overreach by the judiciary to create complexity where simplicity is present. The plain and clear meaning of Section 262(a) is easily decipherable. Should the government decide that the meaning of Section 262(a) is unfavorable, it is the duty of the Legislature to correct the error through the amendment process. The judicial branch cannot unnecessarily complicate the trust meaning of Section 262(a) after having relied on the plain interpretation in the past.

Despite how unfavorably the Court of Chancery feels about the results of this rigid interpretation of the continuous shareholder requirement, this Court is not in the position to re-write legislation. This Court agreed with this position in *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 398 (Del. 2010), when it found, "a legislative cure is preferable . . . Any adjustment[sic] should be accomplished by the General Assembly through a coordinated amendment process."

The Court of Chancery in the case at hand correctly granted summary judgment and Longpoint and Alexis have no argument to overcome the fact that they did not abide by Section 262(a)'s continuous shareholder requirement. There is no dispute on the facts that Longpoint and Alexis' shares were originally held of record by Cede, yet were re-titled so that the custodial banks became record holders for the shares. Prelix should not be held liable for any "consequences or disadvantages [that] may follow” when owners of its stock choose, “to register [their] shares in the name of a nominee.” *Braasch v. Goldschmidt*, 199 A.2d 760, 764 (Del. Ch. 1964). The shareholder is responsible for the risks he may incur upon such an arrangement.

**2. The current continuous shareholder requirement and its interpretation is necessary and proper to protect corporations.**

While Longpoint and Alexis may construe this holding requirement to be harsh, grueling, or unnecessary, the requirement holds significant and redeeming purpose. If the continuous shareholder requirement were not in place, a shareholder could game the system by selling his shares after the appraisal demand was made, and then buy other shares to become the shareholder of record on the effective date. Balotti, *supra* at § 9.43[B].

**a. The statute provides certainty and predictability.**

Delaware has long recognized the importance of the continuous shareholder requirement in appraisal proceedings and has abided by it religiously. The Delaware Supreme Court initially noted the need for this requirement in *Schenck v. Salt Dome Oil Corp.* 41 A.2d 583 (Del. 1945), when it found that “stockholder” was to be construed in a purely legal sense and that a beneficial owner could not seek appraisal. *Id*. at 437. The Court based its logic on the fact that a corporation has the right to rely exclusively on its own records to determine shareholder status. *Id*. at 588. Further the Court called for a heavier emphasis to be placed on certainty and predictability rather than a beneficial owner’s rights in merger affairs. *Id*. at 589. This is particularly important if the corporation receives no benefit for its excess labor.

**b. Vice Chancellor Laster's "see through" theory defeats the purpose of appraisal rights.**

The system should not be amended for those trying to cheat it. The issue arises when prospective shareholders attempt to make a quick buck through appraisal arbitrage. Appraisal rights were intended to protect longstanding shareholders who buy shares of a corporation and do not want to exchange them post-merger. Appraisal rights were not created as a way for arbitrageurs to take advantage of a jump in the share price. If this Court were to require a corporation to "look through" a record holder for each appraisal demand, it would create an undue burden on the corporation to appease "investors" who weren't satisfied with the merger, but wanted to gain an edge in the market. Meanwhile, the true shareholders of the company are harmed because their investment is needlessly spent verifying records while it could be used to help maximize the corporation's profits.

Allowing the "look through" interpretation to stand would open the door to gamesmanship and inappropriate benefits to opportunistic shareholders. To say the issuer, not the beneficial owner bears the risk for nominee non-compliance with Section 262(a) would create opportunity for confusion and tactical behavior.

**c. Appraisal rights were created to give shareholders an alternate option to an impending merger.**

Appraisal rights were created in order to allow fundamental changes such as mergers and acquisitions to occur over the life of a corporation with less than the historically required unanimous vote. While appraisal rights still compensate shareholders for "loss of veto power and [sic] give dissenters the right to exit the corporation and recover the cash value of their shares," these rights also allow corporations to evolve. Balotti, *supra* at § 9.42 (citing *Alabama By-Products Corp. v. Cede & Co.*, 657 A.2d 254, 258 (Del. 1995). A person may not demand appraisal of their share and subsequently sell those shares before the merger without losing their appraisal rights. This includes subsequently acquiring other shares prior to the merger date. A demand is valid only as to shares continuously held after the date of record by the demanding shareholder from the date demand is made until the merger is effective. Lewis S. Black, Jr. & A. Gilchrist Sparks, *The 1987 Amendments to the D.G.C.L.,* at 316 (Oct. 6, 1987).

**i. The burden of paying shareholders a premium through appraisal should not lay with the corporation when it has committed no fault.**

Appraisal rights were created to serve as a remedy to minority shareholders. While disapproving shareholders should have access to a cure for being ousted from their position in the company, superfluous expense should not lie with the corporation. If Delaware tried to rid itself of the continuous shareholder requirement, the effort to verify a beneficial owner's accurate position in the company would fall solely on the shoulders of the corporation. This verification process would come at a substantial cost to the corporation without any benefit. The appraisal process forces corporations to pay for shares at a price higher than was agreed upon in the negotiation process. Forcing corporations to keep current with third party records is unduly burdensome. Frankly, "[a]ny other result would embroil merging corporations in a morass of confusion and uncertainty, none of which was their making." *Enstar Corp. v. Senouf*, 535 A.2d 1351, 1355 (Del.

1987). This is a clear indication from this Court that the benefits this process do not outweigh the burdens on the corporation.

If anyone should be held responsible for the profits missed by arbitrageurs who are denied appraisal rights, it should be brokers or custodial banks that failed to properly manage the beneficial owner's interests. Forcing the corporation look through Cede to determine the underlying shareholder in the case at hand is not a solution. If anything needs to change, it is the banks' and brokers' policies that caused the re-titling of shares in the first place. These entities are knowledgeable and well-versed in securities law. It is difficult to find logic in the theory that the corporation should have to compensate a dissenting shareholder, at a premium, due to the broker's or banker's negligence. As previously stated, the appraisal requirements are clear and settled in Delaware law. The appraisal statute is neither misleading nor difficult to interpret and must be strictly followed. Beneficial owners should not be looking to the corporation for restitution of missed opportunities, but instead to their brokers, the party truly at fault for their breach of duty.

## CONCLUSION

The Court of Chancery correctly granted Prelix's motion for summary judgement because Longpoint and Alexis could provide no evidence that their shares were not voted in favor of the merger, nor consented thereto. Furthermore, Longpoint and Alexis did not comply with Section 262's continuous shareholder requirement. To protect corporations from the dangers of duplicative shareholder voting and appraisal, and to prevent the undue burden on corporations to determine the identity of beneficial shareholder this Court must affirm the Court of Chancery's decision to grant summary judgment in favor of Prelix.

Respectfully submitted,

Team A,

Counsel for Appellee