

IN THE SUPREME COURT  
OF THE STATE OF DELAWARE

---

LONGPOINT INVESTMENTS TRUST and	:	
ALEXIS LARGE CAP EQUITY FUND LP,	:	
	:	
Plaintiffs Below,	:	
Appellants,	:	No. 31, 2016
	:	
v.	:	Court Below:
	:	
PRELIX THERAPEUTICS, INC.,	:	Court of Chancery
a Delaware corporation,	:	of the State of Delaware
	:	
Defendants Below,	:	C.A. No. 10342-CM
Appellee.	:	

---

Appellant's Opening Brief

---

Team B  
Counsel for Appellants

February 5, 2016

## TABLE OF CONTENTS

TABLE OF CITATIONS.....	ii
NATURE OF PROCEEDING.....	1
SUMMARY OF ARGUMENT.....	2
STATEMENT OF FACTS.....	2
ARGUMENT.....	5
I. THIS COURT SHOULD FIND THAT APPELLANTS PERFECTED THEIR APPRAISAL RIGHTS AND ARE ENTITLED TO JUDICIAL APPRAISAL OF THEIR SHARES UNDER SECTION 262 OF THE DELAWARE GENERAL CORPORATIONS LAW .....	5
A. Questions Presented.....	5
B. Scope of Review.....	5
C. Merits of Argument.....	6
1. This Court Should Overturn The Chancery Court's Ruling that Appellants did not Continuously Hold Their Shares as required by Section 262 of the DGCL .....	7
i. The Development of Share Immobilization by the SEC .....	8
ii. Consistent with Federal Law, Custodial Banks Should be Considered Record Holders for Appraisal Purposes .....	10
iii. J.P. Morgan Chase and the Bank of New York Mellon Should be Considered Record Holders in this Appraisal Action.....	14
2. The Chancery Court Correctly Held that the Appellants were Not Required to Establish their Shares were not Voted in Favor of the Merger .....	17
Conclusion.....	19

## TABLE OF CITATIONS

### Cases

<i>Ala. By-Products Corp. v. Cede &amp; Co. ex rel. Shearson Lehman Bros.</i> ,	
657 A.2d 254 (Del. 1995) .....	9, 12
<i>Engel v. Magnavox Co.</i> , No. 4896, 1976 Del. Ch. LEXIS 165 (Del. Ch.	
Apr. 21, 1976) .....	7
<i>Enstar Corp. v. Senouf</i> , 535 A.2d 1351 (Del. 1987) .....	13
<i>In re Appraisal of Ancestry.com, Inc.</i> , 2015 Del. Ch. LEXIS *2 (Del.	
Ch. Jan. 5, 2015) .....	12
<i>In Re Appraisal of Dell, Inc.</i> , 2015 Del. Ch. LEXIS 184 (2015) ...	passim
<i>In re Appraisal of Transkaryotic Therapies, Inc.</i> , Civil Action No.	
1554-CC, 2007 Del. Ch. LEXIS 57, *10 (Ch. May 2, 2007) .....	18, 19
<i>Kahn v. Kolberg Kravis Roberts &amp; Co., L.P.</i> , 23 A.3d 831 (Del. 2011) ..	5
<i>Merion Capital LP v. BMC Software, Inc.</i> , No. 8900-VCG, 2015 Del. Ch.	
LEXIS *3 (Ch. Jan. 5, 2015) .....	6, 17, 18

### Statutes

17 C.F.R. 240.14(a)-13 .....	14
17 C.F.R. 240.17Ad-8(b) .....	14
8 Del. C. § 262(a) .....	6
Del. Ch. Ct. R. 56(c) .....	5

## **NATURE OF PROCEEDING**

Appellants, Plaintiffs below, brought this action seeking appraisal of their shares in the Appellee corporation, Defendant below. Appellee moved for summary judgment, arguing that Appellants were not entitled to appraisal because they did not satisfy the requirements of Section 262 of the Delaware General Corporations Law. Specifically, Appellee argued that Appellants: (1) failed to establish that their shares were not voted in favor of the merger; and (2) did not continuously hold their shares through the effective date of the merger.

With respect to Appellee's first argument, Chancellor Judge ruled in favor of Appellants, holding that inability to show their shares were not voted in favor of the merger did not preclude Appellants from seeking appraisal. However, Chancellor Judge granted summary judgment with respect to Appellee's second argument, holding that, due to an administrative transfer of title of Appellants' shares, the holder of record changed, and thus Appellants' did not satisfy the Continuous Holder Requirement of Section 262(a).

Appellants filed a notice of appeal on January 15, 2016. Appellants' request that this Court reverse the Court of Chancery's Order granting summary judgment and find that Appellants did satisfy the Continuous Holder requirement of Section 262.

## **SUMMARY OF ARGUMENT**

This Court should find that the Appellants' Custodial Banks, J.P. Morgan and Bank of New York Mellon, are record holders for this appraisal action. A ruling that only Cede & Co., the holder of legal title, can be considered a record holder in appraisal actions will and has led to many beneficial holders losing their appraisal rights as a result of procedural aspects of the share immobilization system established by the Securities and Exchange Commission. The Continuous Holder requirement of Section 262 should be expanded to recognize custodial banks as record holders, as is done under federal law.

Furthermore, this Court should find, as the Chancery Court did, that the Appellants are not required to prove that each of their shares were not voted in favor of the merger. The plain language of Section 262 requires that, in order to obtain appraisal, the shareholder cannot vote its shares in favor of a merger. However, there is no share tracing requirement under Delaware law. In this case, the beneficial holder, Cede & Co., held enough shares in fungible bulk that were not voted in favor of the merger for Appellants to be entitled to appraisal on the shares they acquired.

## **STATEMENT OF FACTS**

Radius Health Systems Corp. ("Radius") announced a proposed acquisition of Prelix Therapeutics, Inc. ("Prelix") on October 15, 2014. (R. at 1-2.) At the time of the announcement, the proposed price for the purchase was \$14.50 per share. (*Id.* at 2.) The acquisition

price was increased to \$15.00 per share after several suits for breach of fiduciary duty were filed against the Prelix directors. (*Id.*)

The meeting for Prelix stockholders to vote on the merger was originally scheduled for January 14, 2015, but was moved to February 17, 2015 due to difficulty in obtaining stockholder approval. (*Id.*) At the stockholder meeting on February 17, 2015, 53% of the outstanding shares voted in favor the transaction. (*Id.* at 3.) The merger occurred on April 16, 2015 (*Id.* at 4.) At the time of the merger, Appellants Longpoint Investments Trust ("Longpoint") and Alexis Large Cap Equity Fund LP ("Alexis") together owned approximately 5.4% of the approximately 49 million outstanding shares of common stock of Prelix. (*Id.* at 1.)

The record date for determining entitlement to vote on the merger was December 4, 2014. (*Id.* at 3.) Longpoint and Alexis acquired their shares of Prelix after December 4, 2014, but before the increased price of \$15.00 per share was announced on December 18, 2014. (*Id.*) Cede & Co. - the depository nominee in whose name the shares were registered - delivered written demands for appraisal on behalf of Appellants on January 13, 2015. (*Id.*)

After the Appellants demanded appraisal, the Depository Trust Company ("DTC") moved the appropriate number of shares from its Fast Automated Securities ("FAST") Account by directing Prelix's transfer agent to issue paper stock certificates representing those shares. (*Id.*) These certificates were issued in the name of Cede & Co., the depository nominee of DTC, on January 23, 2015. (*Id.*) Those certificates were then delivered to J.P. Morgan Chase and The Bank of

New York Mellon, the custodial banks which held the shares on behalf of Longpoint and Alexis, respectively. (*Id.*) Because of internal accounting procedural requirements, J.P. Morgan Chase and the Bank of New York Mellon instructed Cede & Co. to endorse the share certificates so they could be reissued in the names of Cudd & Co. and Mac & Co., the nominees for J.P. Morgan Chase and the Bank of New York Mellon, respectively. (*Id.*) This endorsement occurred on February 5, 2015. (*Id.*) It is undisputed that Appellants were unaware of this change in record ownership that occurred on February 5, 2015. (*Id.*)

Appellants brought the present action in the Court of Chancery for New Castle County on May 6, 2015 in their own names as allowed by Section 262(e) of the Delaware General Corporation Law ("DGCL"). (*Id.* at 4.) The petition disclosed that the shares were not registered in the name of Cede & Co., but were registered in the names of Cudd & Co. and Mac & Co. on behalf of Appellants' custodial firms J.P. Morgan Chase and the Bank of New York Mellon. (*Id.*)

Prelix moved for Summary Judgment, claiming that neither of the Appellants were entitled to appraisal because Appellants failed to establish that their shares were not voted in favor of the merger and because Appellants did not meet the continuous holder requirement under section 262(a) of the DGCL. (*Id.* at 1, 4.) The Chancery court noted that the Appellants need not prove that their shares were not voted in favor of the merger, however, it held that the Appellants were not entitled to seek appraisal because the stocks were not continuously held by one record holder. (*Id.* at 5-6.) This appeal followed.

## **ARGUMENT**

### **I. THIS COURT SHOULD FIND THAT APPELLANTS PERFECTED THEIR APPRAISAL RIGHTS AND ARE ENTITLED TO JUDICIAL APPRAISAL OF THEIR SHARES UNDER SECTION 262 OF THE DELAWARE GENERAL CORPORATIONS LAW.**

#### **A. Questions Presented**

1. Whether the definition of "record holder" for purposes of appraisal should be expanded to include custodial banks, as well as the holders of legal title, to comport with federal law. By virtue of this, whether the Court of Chancery's finding that Appellants did not continuously hold their shares through the date of the merger, which occurred due to an administrative transfer of title to the nominees of the custodial banks for the shares in question, should be overturned and Appellants should be entitled to appraisal.

2. Whether the Court of Chancery correctly found that Appellants' Longpoint and Alexis, which acquired their Prelix shares after the record date for the determination of stockholders to vote on the merger, had no need to establish that their shares were not voted in favor of the merger, as required by Section 262(a).

#### **B. Scope of Review**

Summary Judgment appropriate when the moving party demonstrates "there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law." Del. Ch. Ct. R. 56(c). An appellate court's review of summary judgment and a "trial judge's legal conclusions" are de novo. *Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831, 836, 841-42 (Del. 2011)



### C. Merits of Argument

The requirements for appraisal of stock are listed in section 262 of the Delaware General Corporations Law. Section 262(a) states:

Any 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) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, who has otherwise complied with subsection (d) of this section and who has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228 of this title shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock.

8 Del. C. § 262(a). Thus, "in order for a petitioner to perfect the appraisal remedy according to the plain language of Section 262(a), the petitioner need only show that the record holder of the stock for which appraisal is sought: (1) held those shares on the date it made a statutorily compliant demand for appraisal on the corporation; (2) continuously held those shares through the effective date of the merger; (3) otherwise complied with subsection (d) of the statute, concerning the form and timeliness of the appraisal demand; and (4) has not voted in favor of or consented to the merger with regard to those shares." *Merion Capital LP v. BMC Software, Inc.*, No. 8900-VCG, 2015 Del. Ch. LEXIS \*3, \*11 (Ch. Jan. 5, 2015).

Section 262 permits "any stockholder of a corporation" who meets these requirements to initiate a proceeding by which the "fair value of the shares" will be determined by the judiciary. *In Re Appraisal of Dell, Inc.*, 2015 Del. Ch. LEXIS 184, \*4 (2015). Under the statute, the term stockholder means "a holder of record of stock in a corporation." *Id.* Although Section 262 does not explicitly define what "holder of

record" means, nor does any other provision of the DGCL, Delaware law has often held that "only the person appearing on the corporate records as the owner of stock in the corporation may qualify for an appraisal." *Dell*, 2015 Del. Ch. LEXIS at \*24-25; quoting *Engel v. Magnavox Co.*, No. 4896, 1976 Del. Ch. LEXIS 165, \*1 (Del. Ch. Apr. 21, 1976).

Neither party contends that Appellants did not hold the shares in question on the date it made demand or that their demand was not statutorily compliant. Appellants acquired their shares of Prelix before December 18, 2015 and a formally valid demand was made on January 13, 2015 by Cede & Co. on behalf of Appellants. (R. at 3.) Additionally, neither party contends that Appellants did not otherwise comply with Section 262(d), concerning the form and timeliness of the appraisal demand. The only two issues on appeal are whether Appellants continuously held those shares through the effective date of the merger and whether Appellants voted in favor of or consented to the merger with regard to those shares.

**1. This Court Should Overturn The Chancery Court's ruling that Appellants did not Continuously Hold Their Shares as required by Section 262 of the DGCL.**

We request that this Court overturn the Chancery Court's ruling that Appellants did not continuously hold their shares and therefore were not entitled to appraisal under Section 262 of the DGCL. A ruling by this Court that custodial banks fall within the definition of record holder would make Delaware law consistent with federal law, and

the procedural requirements that accompany the share immobilization system established by the SEC.

#### **i. The Development of Share Immobilization by the SEC**

The Depository Trust Company ("DTC") was the federal government's response to the Wall Street paperwork crisis that took place in the 1960's and 1970's. *Dell*, 2015 Del. Ch. LEXIS at \*3. This crisis substantially increased the burden on brokerage firms to maintain complete documentation of stock trading with solely paper certificates. *Id.* In response, Congress directed the Securities and Exchange Commission (SEC) to study this issue, after which the SEC formally adopted a national policy referred to as "share immobilization". *Id.* at \*3, \*13-14.

Implementing a "share immobilization" policy led to the creation of DTC to serve as the domestic depository. *Id.* at \*3. DTC holds shares in fungible bulk, on behalf of its participating members, which means that shares are not issued in the name of those members, but rather in the name of DTC's own nominee, Cede & Co. *Id.* at \*3-4. Currently, over 800 custodial banks are participating members and an estimated 75% of shares in publicly traded companies are held through DTC. *Id.* at \*3, \*15. As a result, Cede & Co. is commonly the largest holder of record on most publicly traded companies' stock ledgers. *Id.* at \*16.

Before share immobilization was put into effect, custodial banks held shares through their own nominees, which required new paper stock certificates to be issued frequently any time shares were

traded. *Id.* Under share immobilization, however, new certificates are no longer required because legal title simply remains with Cede & Co. *Id.* DTC also utilizes an electronic book entry system referred to as the "FAST Account", which tracks the number of shares held by each DTC participant. *Id.* While share immobilization helped to simplify the trading process and alleviate the paperwork crisis, it also led to some complication with regard to appraisal rights - in particular, the Continuous Holder requirement under DGCL Section 262. *Id.* at \*4-5.

After the implementation of share immobilization, a common dispute with regard to appraisal involved the DTC's policy of surrendering shares held in fungible bulk for merger consideration and distributing them to its participants. *Id.* at \*5. Many corporations argued appraisal rights were lost due to this process. *Id.* This issue was partially resolved by the Delaware Supreme Court in *Alabama By-Products*, which "impos[ed] upon the corporation the responsibility of overseeing the surrender of shares after a merger." *Ala. By-Products Corp. v. Cede & Co. ex rel. Shearson Lehman Bros.*, 657 A.2d 254, 263 (Del. 1995). In response to this holding, the DTC changed its procedures with respect to surrendering shares. *Dell, Inc.*, 2015 Del. Ch. LEXIS at \*6.

Under the new procedure, when Cede & Co. makes a demand for appraisal, DTC removes those shares from the fungible bulk documented in the FAST Account. *Id.* at \*6-7. This is done by requesting a paper stock certificate be issued by the corporation's transfer agent for the number of shares held by the beneficial owner that is seeking appraisal. *Id.* at \* 7. This paper stock certificate is issued in Cede

& Co.'s name, as the holder of record, and is merely evidence of ownership of shares of stock, not the actual shares themselves. *Id.* at \*7-8, \*25-26. However, when paper stock certificates are issued in Cede & Co.'s name, DTC procedures do not allow it to act as a custodian for those certificates on behalf of participants. *Id.* at \*21. As such, DTC participants have two options: (1) either pay for a vault at the DTC where paper stock certificates can be stored; or (2) have the paper stock certificates delivered to them for safekeeping. *Id.*

Some custodial banks, such as J.P. Morgan Chase and the Bank of New York Mellon, do not pay for vaults at DTC, so paper stock certificates are delivered to them when a beneficial owner has sought appraisal. *Id.* at \*21. However, internal procedures differ among custodial banks with regard to the storage of paper stock certificates. *Id.* For example, J.P. Morgan Chase and the Bank of New York Mellon each have internal policies that do not allow the storage of paper stock certificates unless they are titled in the name of the bank's own nominee. *Id.* at \*22. Thus, the banks must instruct Cede & Co. to authorize the shares to be re-titled in the names of their own nominee. *Id.*

**ii. Consistent with Federal Law, Custodial Banks Should be Considered Record Holders for Appraisal Purposes.**

The re-titling of shares is another common scenario that leads to disputes with respect to appraisal. Most recently, in *Dell, Inc.*, five institutions, referred to as "The Funds", held shares of common stock with Dell, Inc. *Id.* at \*1-2. As is commonly done, The Funds held its

stock through custodial banks, making The Funds merely beneficial owners of the stock, with no legal title in the shares. *Id.* at \*2. Two of the Funds used J.P Morgan Chase as their custodian, while the others used the Bank of New York Mellon. *Id.* at \*9-10. The Funds' stocks were registered in the name of Cede & Co., the nominee of the DTC. *Id.* at \*2.

Similar to the present case, after Cede & Co. made demand on behalf of the Funds, per procedure, DTC issued paper stock certificates in Cede & Co.'s name for those shares. *Id.* at \*7. However, because J.P. Morgan Chase and the Bank of New York Mellon can only hold paper stock certificates that are issued in the name of their own nominees, they instructed Dell's transfer agent to "record a transfer of the shares to its nominee and issue a certificate in its nominee's name." *Id.* at \*7. Thus, while the beneficial owners and custodians of the shares remained the same, this resulted in a new nominee named on the stock ledger. *Id.* at \*8. The Funds timely filed petitions for appraisal, and disclosed to Dell the re-titling of their shares. *Id.* However, Dell moved for summary judgment, arguing that this transfer broke the continuous chain of title required by DGCL Section 262, and that The Funds were no longer entitled to appraisal of its shares. *Id.* at \*8.

Under Delaware law, which pre-dates the federal policy of share immobilization, the record holder was traditionally the nominee that appeared on the stock ledger. *Id.* at \*8. "It is the record holder - not the beneficial owner - that is subject to the statutory requirements for showing entitlement to appraisal and demonstrating

perfection of appraisal rights under Section 262." *In re Appraisal of Ancestry.com, Inc.*, 2015 Del. Ch. LEXIS \*2, \*8 (Del. Ch. Jan. 5, 2015). This rule has been continuously adhered to in Delaware, despite the adoption of share immobilization and the depository system by the SEC. *Id.* Further, Delaware law has made no distinction between the voluntary "broker level" of ownership and the federally mandated "depository level" of ownership. *Id.* It characterizes participation in the depository system as a choice, and that by so choosing, beneficial owners must assume the risk that "intermediaries might act contrary to their interests." *Id.* at \*32 (internal quotations omitted); *See also Ala. By-Products Corp.*, 657 A.2d at 262.

As the Court in *Dell* had to comply with Delaware as it stands, Cede & Co. was considered the only record holder of The Funds shares. *Dell*, 2015 Del. Ch. LEXIS at \*27-28. So the re-titling of the paper stock certificates before the effective merger date caused record ownership to change, and thus violated the Continuous Holder Requirement under Section 262. *Id.* at \*27-28. Thus, Dell's motion for summary judgment was granted. *Id.* at \*8-9.

Despite this holding, the Chancery Court in *Dell* proposed an alternative method by which to interpret the Continuous Holder requirement of Section 262 - a method that we request this Court adopt in its review of the Appellants' case. This alternative method is based on the procedure under federal law, which permits corporations to look beyond DTC and Cede & Co. to recognize DTC participants as record holders. *Id.* at \*8.

The Court in *Dell* supports the adoption of a new definition of “stockholder of record” for purposes of Delaware law that comports with the definition under federal law. *Id.* at \*33-34. If this rule applied, the outcome of *Dell* would have been different, because no change of ownership would have occurred at the DTC participant level when the re-titling of the paper stock certificates occurred, and the Continuous Holder requirement would have been met. *Id.* at \*34. As detailed by the Court in *Dell*, this definition would “better reflect[] current reality” and recognize that “changes in ownership driven by the role of DTC in the depository system result from the federal policy of share immobilization.” *Id.* at \*34-35.

The federal policy of share immobilization compelled publicly traded Delaware corporations to outsource one part of the stock ledger - the DTC participant list - to DTC, just as Delaware corporations have chosen to outsource other parts of the stock ledger as registered holders. After share immobilization, the same banks and brokers appear on the stock ledger indirectly through DTC and the Cede breakdown. Just as Delaware law treats the outsourced stock ledger as a record of the corporation, albeit one maintained by a third party, Delaware law likewise should treat the outsourced DTC participant list as a record of the corporation, albeit one maintained by DTC.

*Id.* at \*34. Contrary to the holding in *Enstar II*, in which the Court treated the holding of shares through the depository system as an optional choice for investors, the Court in *Dell* noted that while, in theory, investors could choose to opt out of the depository system, “only a few could do so before the system would break down.” *Enstar Corp. v. Senouf*, 535 A.2d 1351, 1355 (Del. 1987); *Dell, Inc.*, 2015 Del. Ch. LEXIS at \*64. Thus, “almost universal participation is a *de facto* requirement” of the system. *Dell*, 2015 Del. Ch. LEXIS at \*64-65.



Additionally, while prior Delaware cases have discussed the potential difficulties a Delaware corporation could face in identifying its stockholders if required to look beyond its own stock ledger, the ease of obtaining a Cede breakdown under federal regulations alleviates this concern. *Id.* at \*67. Because federal law recognizes DTC participants as holders of record, federal regulations make it easy for corporations to obtain the identities of the custodial banks and brokers who hold shares through DTC. *Id.* at \*17-18. Under these regulations, publicly traded companies cannot avoid going through DTC and issuers are required to make "appropriate inquiry" of DTC to identify the custodial banks and brokers who own shares through Cede & Co. 17 C.F.R. 240.14(a)-13. The DTC is then required to "furnish a securities position listing promptly to each issuer whose securities are held in the name of the clearing agency or its nominee." 17 C.F.R. 240.17Ad-8(b). This is referred to as a "Cede breakdown" - which identifies the custodial banks and brokers that hold shares through DTC on a particular date, and the number of shares held. *Dell*, 2015 Del. Ch. LEXIS at \*18. This listing can be obtained in a matter of minutes. *Id.*

**iii. J.P Morgan Chase and the Bank of New York Mellon  
Should be Considered Record Holders in this Appraisal  
Action.**

The facts of this case are almost identical to the facts of *Dell*. Appellants' Longpoint and Alexis owned shares in Prelix Pharmaceuticals, Inc. through DTC, with J.P. Morgan Chase and the Bank of New York Mellon as the custodial banks, respectively. (R. at 3.)

Cede & Co., as the nominee of DTC, was thus the record holder of the appellants' shares. (*Id.*) After appellants' directed Cede & Co. to make a demand for appraisal on January 13, 2015, a similar pattern of events occurred as did in *Dell*. DTC moved the correct number of shares from its FAST account and requested paper stock certificates from Prelix's transfer agent. (*Id.*) These certificates were issued in the name of Cede & Co. and delivered to both J.P. Morgan Chase and the Bank of New York Mellon on January 23, 2015. (*Id.*) As these custodial banks do not pay for storage vaults at the DTC for the certificates, the same internal procedures as described in *Dell* commenced, whereby both banks obtained re-titled certificates in the name of their respective nominees on February 5, 2015. (*Id.*)

This re-titling of the paper stock certificates by J.P. Morgan Chase and Bank of New York Mellon caused a change in the record ownership on Prelix's stock ledger as of the date of the merger. (*Id.* at 3-4.) Under current Delaware law, and the precedent interpreting the meaning of "stockholder of record" within the DGCL, this action disrupted the continuous chain of title in the shares. However, if Delaware law reflected the parallel federal laws that were established after the SEC's implementation of share immobilization, then Delaware corporations could look through DTC and recognize its participants as stockholders of record as well. Therefore, in this case, although the paper stock certificates were re-issued in the name of the respective nominees of J.P. Morgan Chase and the Bank of New York Mellon, share ownership on the DTC participant level remained constant, so no disruption in the continuous chain of ownership would occur.

DTC participants are already tracked through the DTC's FAST accounts, which to some extent, are merely extensions of a corporation's stock ledger. Given the ease at which a corporation can obtain a Cede breakdown, the burden on Delaware corporations to recognize DTC participants as record holders would be negligible. Further, given that participation in the depository system is essential for its success, Delaware Law as it stands could disincentive potential investors from engaging in certain trading practices with Delaware corporations. Federal laws and regulations better reflect this reality by recognizing that regardless of differing internal administrative procedures amongst the vast array of custodial banks, the continuous chain of ownership remains when record ownership at the DTC participant level does not change.

In our case, J.P. Morgan Chase and the Bank of New York Mellon remained the custodial banks, and Longpoint and Alexis remained the beneficial owners, throughout the date of the merger. The change in title of Longpoint and Alexis's shares occurred unbeknownst to them, and due solely to the internal procedures of its custodial banks. (R. at 4.) These internal procedures are initiated due to the procedural function of the share immobilization system as the SEC developed it. Thus, it is inequitable to deny appraisal rights to Appellants, and other minority shareholders like them, due to factors out of their control and which correspond to a system established and regulated by the federal government.

As the Chancery Court noted in this case, "only the Delaware Supreme Court can change how our case law interprets the Record Holder

requirement", and the court had to "necessarily accept[] and appl[y] the determination of law articulated in *Dell*." (R. at 5.) However, we ask that this Court adopt the interpretation of "record holder" articulated in *Dell*, recommending a change in Delaware law to comport with federal law and recognize DTC participants as record holders. We request this Court reconsider its precedent in review of Appellants' case.

**2. The Chancery Court Correctly Held that the Appellants Were Not Required to Establish their Shares were not Voted in Favor of the Merger.**

We ask that this Court uphold the Chancery Court's ruling that the Appellants' need not specifically prove that their shares were not voted in favor of the merger. The Chancery Court in this case noted that in *BMC Software*, the court "rejected the Appellee's position that a person who acquires shares after the record date 'bears the burden of proving that each share it seeks to have appraised was not voted by any previous owner in favor of the merger.'" (*Id.* at 4.) In that case, the court denied summary judgment to a corporation that argued "Section 262 only permit[ed] the appraisal of shares not voted in favor of the merger and that, consequently, Merion, as the record holder, b[ore] the burden of proving that *each share* it s[ought] to have appraised was not voted by any previous owner in favor of the merger." *BMC Software, Inc.*, No. 8900-VCG, 2015 Del. Ch. LEXIS at \*8, \*31.

The court in *BMC* held that for a petitioner to perfect its appraisal rights with regard to consenting to a merger pursuant to

Section 262(a), the shareholder need only show that it "has not voted in favor of or consented to the merger with regard to those shares." *Id.* at \*11. The Court further noted that "noticeably absent from this language, or any language in the statute, is an explicit requirement that the stockholder seeking approval prove that the *specific shares* it seeks to have appraised were not voted in favor of the merger." *Id.* "The statute's requirements are directed to the *stockholder* - expressly defined as the *record holder* - and whether *it* has owned the stock at the appropriate times, whether *it* has made sufficient demand, and whether *it* has voted the shares it seeks to have appraised in favor of the merger." *Id.* at \*22 (Italics original). The court held that the shareholder is "only required to show that it held a quantity of shares it had not voted in favor of the merger equal to or greater than the quantity of shares for which it sought appraisal." *Id.* at \*22-23. The focus is placed on "whether Cede had sufficient shares it had not voted in favor of the merger to satisfy demand, not whether those specific shares were shares Cede had voted in favor of the merger." *Id.* at \*23.

The holding in BMC is consistent with the holding in *In re Appraisal of Transkaryotic Therapies, Inc.* where the court found that "a beneficial shareholder, who purchased shares *after* the record date but before the merger vote" need not "prove, by documentation, that each newly acquired share (i.e., after the record date) is a share not voted in favor of the merger." Civil Action No. 1554-CC, 2007 Del. Ch. LEXIS 57, \*10 (Ch. May 2, 2007). For this purpose the focus remains on the record holder, and "the fact that Cede voted shares in favor and

against the merger does not preclude Cede from petitioning this Court for appraisal of those shares not voted in favor of the merger." *Id.* at \*13.

In the present case, Cede held a sufficient number of shares that were not voted in favor the merger for Appellants' to seek appraisal. Only 53% of the outstanding shares voted in favor of the merger. (R. at 3.) Thus, 47% of the outstanding shares held by Cede were not voted in favor of the merger. The appellants held only 5.4% of the outstanding shares. (R. at 1.) As noted by the *BMC* and *Transkaryotic* courts, appellants' need only prove that Cede held sufficient shares not voted in favor of the merger. Clearly, in this case there was sufficient outstanding stock that was not voted in favor the merger for Appellants' to seek appraisal. Thus, Appellants' are entitled to appraisal.

#### **CONCLUSION**

For the foregoing reasons, this Court should reverse the Court of Chancery's order granting summary judgment to Appellee, Defendant-  
below.