IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S OPENING BRIEF

Team D
Counsel for Defendants Below, Appellants

Date Filed: February 5, 2016

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NATURE OF PROCEEDINGS

On May 6, 2015, Appellants, Longpoint Investments Trust and Alexis Large Cap Equity Fund LP ("Longpoint and Alexis"), brought action against Appellee, Prelix Therapeutics, Inc. ("Prelix"), seeking appraisal for their shares of Prelix stock as permitted by the appraisal remedy, Del. Code Ann. tit., 8, § 262(e)(2015-16). As a result, Prelix moved for summary judgment on the ground that Longpoint and Alexis were not entitled to appraisal.

On January 13, 2016, Chancellor Mosley of the Delaware Court of Chancery held that Appellants were not entitled to appraisal of their Prelix shares. On January 15, 2016, Appellants filed a Notice of Appeal in the Delaware Supreme Court seeking reversal of the summary judgment motion.

SUMMARY OF ARGUMENT

1. First, this Court should reverse the order for summary judgment, and grant Appellants appraisal rights because under the Delaware General Corporate Law ("DGCL"), shares of stock held in fungible bulk do not need to be traced to specific votes during a corporate a merger. DGCL as well as prior Delaware court holdings have intentionally omitted the adoption of share-tracing requirements from Section 262. Furthermore, share-tracing requirements would impose an impossible and unreasonable undertaking contrary to the intent of the appraisal remedy.

2. Second, this Court should reverse the order for summary judgment and grant appraisal rights to Appellant's shares because the DTC, Cede

& Co., continuously held the shares through the effective date of the corporate merger as required by Section 262(a). Prelix argues that additional DTCs Cudd & Co. and Mac & Co. assumed ownership of shares from Cede & Co. However, Longpoint and Alexis show this change in ownership is effectively moot and therefore does not break the chain of ownership as required by the DGCL Continuous Holder Requirement. As a result, Prelix shares owned by Longpoint and Alexis rightfully qualify for appraisal under Section 262(a).

STATEMENT OF FACTS

Longpoint and Alexis jointly owned approximately 5.4% of the roughly 49 million outstanding shares of Prelix common stock, as of April 16, 2015. On this date, Prelix was acquired through a merger (between who? Add that here) by a subsidiary of Radius Health Systems Corp. ("Radius"). This merger encountered significant pushback, causing delays in completion. As a consequence Longpoint and Alexis exercised their rights to appraisal under Section 262 of the Delaware General Corporation Law ("Section 262"), and through Cede & Co. as nominee, filed a formally valid and timely demand for appraisal of their shares.

Longpoint and Alexis' shares were deposited in the Depository Trust Company ("DTC") under the name Cede & Co. as required by federal law. On January 23, 2015, the shares held in the name of Cede & Co. were delivered to J.P. Morgan Chase and Bank of New York Mellon. These banks, refuse to hold certificates in the name of Cede & Co. for legitimate business reasons. Instead, they require certificates that are uniquely numbered and named under the nominees, Cudd & Co. and Mac

& Co., respectively. It is important to note, however: (1) It is undisputed that Longpoint and Alexis were not aware that these shares were transferred, but (2) even though shares were registered in the name of Cudd & Co. and Mac & Co., Longpoint and Alexis remained the beneficial owners of the shares. It is also conceded that Longpoint and Alexis did not and could not have voted in favor of the merger due to the fact they did not acquire Prelix shares until after the record date of merger. On April 16, 2015, Radius acquired Prelix with just over 53% approval.

ARGUMENT

I. SHARES OF STOCK HELD IN FUNGIBLE BULK DO NOT NEED TO BE TRACED TO SPECIFIC VOTES IN ORDER TO EXCERCISE APPRAISAL RIGHTS UNDER SECTION 262(a).

A. Question Presented

Whether under Section 262 of the Delaware General Corporate Law, a beneficial owner, who acquires shares after the record date, must prove that each of its specific shares for which it seeks appraisal were not voted in favor of the merger.

B. Scope of Review

This Court reviews an appeal of summary judgment from the Court of Chancery under a *de novo* standard of review. *Arnold v. Soc'y for Sav. Bancorp*, 650 A.2d 1270, 1276 (Del. 1994).

C. Merits of Argument

A finding contrary to the Court of Chancery on the first issue is inconsistent with both the well-established plain language of the statute and judicial precedent. Section 262 does not impose additional requirements on a beneficial owner of stock and it is silent regarding share-tracing requirements. Beneficial owners of stock, are not

precluded from seeking appraisal for their shares, so long as the record holder properly perfects its right to demand appraisal in accordance with Section 262(a). Prelix suggests this clear and unambiguous statute contains implied elements. This suggestion is blatantly incorrect. Therefore, this Court should uphold the Court of Chancery's finding that Longpoint and Alexis are not precluded from seeking appraisal.

1. Share-Tracing Requirements Have Been Explicitly Rejected by the Delaware General Assembly.

a. History and Black-Letter Law Suggest Share-Tracing is Intentionally Omitted.

Share-tracing requirements have been explicitly omitted from the DGCL Section 262. The requirements set forth in this appraisal statute are unambiguously listed. *See* Del. Code Ann. tit., 8, § 262(a) (2015-16). Section 262(a) states that the Court of Chancery shall grant appraisal rights to:

> Any stockholder of a corporation of [Delaware] 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... 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…

Id. Once that stockholder has perfected the right to appraisal, it is entitled to trial on the company's fair valuation of the stock. Del. Code Ann. tit., 8, § 262 (d)(1). The requirements are clearly identified and noticeably absent from Section 262 is any requirement regarding tracing specific shares back to how they were voted in a merger. *See* Del. Code Ann. tit., 8, § 262(a). However, where a statute

is unambiguous, the court must look to its plain language. *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 115, 160 (Del. Ch. 2013). Additionally, Delaware law has well established that the court may not impose language upon a statute where it has clearly been excluded. *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982). It is evident that Prelix is suggesting this Court go beyond its role.

Even if this Court finds Section 262 ambiguous, an examination of legislative history further demonstrates the intentional omission of the share-tracing requirement asserted. If a statute is ambiguous, courts must construe it in a way to promote its apparent purpose. *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999). The appraisal remedy is, and always has been, "entirely a creature of statute." *Alabama By-Products Corp. v. Cede & Co. ex rel. Shearson Lehman Bros.*, 657 A.2d 254, 258 (Del. 1995). The statue was designed as a means to compensate stockholders after the elimination of the common-law requirement that mergers could only occur with a unanimous vote. *See Id.* In particular, the intended purpose of the statute is to provide a remedy for dissenting shareholders to seek judicial determination of the fair value of their shares. *Id.*

The original appraisal statute has undergone many amendments since its creation, but each has aligned with Section 262's core purpose. *Merion Capital LP v. BMC Software, Inc.*, 2015 Del. Ch. LEXIS 3, *1 (Del. Ch.). The most notable amendment occurred following the decision of *In re Appraisal of Transkaryotic Therapies, Inc.*, 2007 Del. Ch. LEXIS 57 (Del. Ch.), when the General Assembly amended

Section 262. Tailing the *Transkaryotic* decision, the General Assembly actively chose to leave the standing requirements of Section 262(a) untouched. *BMC Software, Inc.*, 2015 Del. Ch. LEXIS 3, at *18, n.41. Rather, the amendment only reiterated the lack of requirements placed on a beneficial owner seeking appraisal. *In re Appraisal of Ancestry.com, Inc.*, 2015 Del. Ch. LEXIS 2, *23 (Del. Ch.). While a beneficial owner plays no role in perfecting a right to demand appraisal, it may now, however, file a petition in its own name. *Id.*

Both the plain language of the statute and legislative history indisputably suggest the legislature explicitly excluded the share-tracing requirement suggested by Prelix. It is beyond the role of this Court to impose the requirement suggested here.

b. Courts Continuously Reject Arguments that Share-Tracing Requirements Are Implied.

Prelix is not the first to raise this logically impossible suggestion. The argument that a beneficial owner must satisfy a share-tracing requirement has been addressed, and undeniably rejected, by other courts. The Court of Chancery recognized two recent cases, *BMC Software* and *Ancestry.com*, that have rejected imposing a share-tracing requirement in Section 262. (R. at 1.) Of the two, the facts of *Ancestry.com* are the most parallel to the issue here. In *Ancestry.com*, the court ruled that "Section 262 imposes no requirement that a stockholder [who seeks appraisal for shares purchased after the record date] must demonstrate that previous owners also refrained from voting in favor" of the merger. *Ancestry.com*, 2015 Del. Ch. LEXIS 2, at * 21. Respondent, Ancestry.com, asserted that petitioner, whose shares were held of record by Cede & Co., needed to prove how its specific shares

were voted in order to seek appraisal. *Id.* However, the court concluded that assertion was baseless, stating: "*Transkaryotic* teaches that, for stock held in fungible bulk, the record holder must have refrained from voting a number of shares sufficient to cover the demand." *Id*. at *22.

Similar to *Ancestry.com*, as beneficial owners, Longpoint & Alexis purchased their shares after the record date, but before the merger.(R. at 3.) Additionally, Longpoint and Aleis' shares were also held in fungible bulk by a depository, as required. *Id*. Holding shares in fungible bulk cannot be avoided, which requires this Court to also find that a share-tracing requirement is not necessary and instead look to the aggregate Prelix shares held in depositories. A look at the numbers has demonstrated that the *Transkaryotic* conclusion has been satisfied here. Prelix does not dispute that Longpoint and Alexis held 5.4% of outstanding Prelix shares. (R. at 1.) It is also undisputed that 47% of those outstanding shares were either voted against, abstained, or did not vote in favor of the merger. (R. at 3.)

Delaware law has established that the actions of a beneficial owner are irrelevant because they have no right to demand appraisal. *See DiRienzo v. Steel Partners Holdings L.P.*, 2009 Del. Ch. LEXIS 205, *8 (Del. Ch.). It is also established that *only* "stockholders must strictly comply" with Section 262 in order to demand appraisal. *Id.* (emphasis added). That said, there can be no dispute that a record holder has an absolute right to demand appraisal under Section 262 once that right has been perfected. Del. Code Ann. tit., 8, §§ 262(a), (d); *see also, Kaye v. Pantone, Inc.*, 395 A.2d 269, 375 (Del. Ch.

1978). It is uncontested that Longpoint and Alexis are beneficial owners, not record holders. (R. at 4.) Longpoint and Alexis concede that, as a beneficial owners petitioning appraisal, they carry the burden of persuading this Court that the requirements of Section 262 have been satisfied. *DiRienzo*, 2009 Del. Ch. LEXIS 205, *22. Based on the undisputed facts of the record, Longpoint and Alexis have satisfied their burden of persuasion. Therefore, Longpoint and Alexis clearly demonstrate that a share-tracing requirement is absent from Section 262, permitting them to demand appraisal.

2. An excessive burden is placed on beneficial owners of Delaware stock under Prelix's interpretation of DGCL Section 262(a).

Prelix's first argument should be rejected when considering that the very nature of the modern securities trading system is such that identifying the movement of a single share of stock is impossible. Contrary to popular opinion, publicly traded companies do not maintain a detailed database indicating the corresponding owner to specific share's. George S. Geis, *An Appraisal Puzzle*, 105 Nw. U.L. Rev. 1635, 1636 (2011). In an attempt to overcome the inefficient and labor-intensive certificate-based system of securities trading, Congress passed the Securities Acts Amendments of 1975; essentially putting an end to the physical transfer of securities. *In re Appraisal of Dell Inc.*, 2015 Del. Ch. LEXIS 184, *16 (Del. Ch.) (citing 15 U.S.C. § 78q-1(e)). In order to keep up with the volume and speed of the ever-increasing trading levels, the depository system emerged. *Id.*

Today, publicly traded securities are issued and held in central securities depositories established by the federal government, such as the Depository Trust Company ("DTC"). *Id.* "A publicly traded corporation cannot avoid going through DTC." *Id.* at * 19. Securities deposited in the DTC are registered in the name of a nominee, often under Cede & Co., qualifying the nominee as record holder pursuant to Section 262(a). *Transkaryotic Therapies, Inc.*, 2007 Del. Ch. LEXIS 57 (Del. Ch.); Del. Code Ann. tit., 8, § 262(a).

Yet, the impossibility of specific identification occurs once the the depository places the securities in "fungible bulk." When in fungible bulk, "no DTC participant, no customer of any participant... and no investor who might ultimately have a beneficial interest...has any ownership rights to *any particular share* of stock reflected on a certificate." *Transkaryotic Therapies, Inc.*, 2007 Del. Ch. LEXIS 57, at *9 (Del. Ch.) (emphasis added). Acknowledging that only actions of the record holder are relevant when perfecting a right to demand appraisal, the court in *Traskaryotic* elaborated by stating that it is the "pro-rata portion" of the depository's *aggregate* holdings that must satisfy the "not voted in favor of the merger" requirement. *Id.* at *6, *13 (emphasis added).

In *Transkaryotic*, the issue was whether a beneficial shareholder, who purchased shares after the record date, but prior to the merger, was required to provide that each share did not vote in favor of the merger. *Id.* at *10. The court looked at the pro rata distribution of votes made by the record holder, Cede & Co., relative to the shares held in aggregate. *Id.* Concluding that Cede & Co. voted fewer shares

in favor of the merger than the number of shares for which appraisal demand was sought, relative to the aggregate holdings, the court rejected the argument that beneficial owners are precluded from appraisal. *Id.*

Requiring a beneficial owner, to prove their specific shares, which were held in fungible bulk through the merger, were not voted in favor of the merger would create an irrational burden. Looking at the facts and the numbers, it is clear that the conclusion reached in *Transkaryotic* must also be found here. First, Cede & Co. rightfully demanded appraisal on behalf of Longpoint and Alexis by timely submitting a written demand for appraisal. (R. at 3.) Next, as indicated by the record, the record holder held a smaller pro rata proportion of shares for which demand was sought on Appellants' behalf, than the proportion of securities which voted against, abstained, or did not vote for the merger.

When Appellants acquired 5.4% (2,646,000 shares) of Prelix stock, 49 million shares were outstanding. (R. at 1). Considering the nature of modern securities trading, it is reasonable to assume all outstanding shares were held in DTC directed depositories. *See Dell*, 2015 Del. Ch. LEXIS 184, at *19. The merger passed with 47% (23,030,000 shares) of outstanding shares either voting against, abstained, or did not voted in contention with the merger. (R. at 3.) A mathematician is not necessary to prove that the shares voted in favor of the merger exceed the mere 5.4% Longpoint and Alexis seek to have appraised.

II. THE COURT ERRED IN GRANTING PRELIX'S MOTION FOR SUMMARY JUDGMENT BECAUSE CEDE & CO. CONTINUOUSLY HELD THE SHARES THROUGH THE MERGER DATE AS REQUIRED BY SECTION 262(a)

A. Question Presented

The definition of "stockholder" in Section 262(a) is circular and ambiguous. DTC participants should be included in the definition, and as modeled by federal law. The construction of Section 262(a) leaves both appellants and appellees unable to answer an informative question to this case—"Who is the record holder"? The answer to the question is imperative, and the only way to answer the question is to include DTC participants in the definition of record holder. When interpreted correctly, Longpoint and Alexis qualify for appraisal under Section 262, contrary to Prelix's contentions.

B. Scope of Review

This Court reviews the grant of a motion for summary judgment denying appellants the right to appraisal with respect to their Prelix shares. *Longpoint Inv. Trust & Alexis Large Cap Equity Fund LP v. Prelix Therapeutics, Inc.*, C.A. No. 10342-CM, (Del. Ch. 2016). However, this Court gives no deference to the Court of Chancery's legal conclusions. The facial validity of the second question presented in appellant's brief is a novel question of law in Delaware, so it warrants *de novo* review. *Arnold v. Soc'y for Sav. Bancorp*, 650 A.2d 1270, 1276 (Del. 1994).

C. Merits of the Argument

Before reaching the merits of Longpoint and Alexis' second issue (whether the shares were continuously held), this Court must reconcile an important statutory ambiguity, the result of which is determinative

of the case at bar. Under current construction of the statute, the Court of Chancery was incorrect in granting Prelix's motion for summary judgment. As such, this appeal turns on Longpoint and Alexis' ability to show the Court how the ambiguity of 262(a) and correct interpretation of the statute command a result in favor of Longpoint and Alexis.

Next, Prelix contends that Cede & Co., the stockholder, did not continuously hold the shares through the date of the merger as required by Section 262(a). However, if this Court analyzes the question under the rightful lens of federal law, Longpoint and Alexis will prove that they did, in fact, continuously hold their shares as beneficial owners through the date of the merger. Consequently, the Court of Chancery's grant of Prelix's motion for summary judgment should be overturned because Longpoint and Alexis duly qualify for appraisal under Section 262(a).

1. The definition of "stockholder" under DGCL 262(a) should include DTC participants in accordance with 17 CFR 240.14c-1(i).

Delaware Statute Section 262(a) should include DTC participants under the definition of "stockholder" in accordance with its counterpart federal law statute, 17 CFR 240.14c-1(i); otherwise, the Delaware statute is ambiguous. Section 262(a) defines "stockholder" as a "holder of record". Del. Code Ann. tit., 8, § 262(a)(year). This definition is both vague and incongruent with federal law. Longpoint and Alexis use "stockholder" and "record holder" interchangeably for the reminder of the brief, in accordance with the spirit

a. Section 262(a) Cannot be Followed Because Federal Law Supersedes State Law.

With respect to the hierarchy of laws, this Court should interpret Section 262(a) in light of 17 CFR 240.14c-1(i) for the following reasons. First, share immobilization governs the transfers of stock certificates among the several states, thus triggering the Commerce Clause. "Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation", we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies." *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). *McCulloch* is legendary precedent that has set a foundation this Court should adhere to—the states have no power, through any manner, to control the operations of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government. *Id.* The transfer of share certificates affects interstate commerce, and as such, Delaware needs to defer to federal law and in this case, that means interpreting Section 262(a) in line with 17 CFR 240.14c-1(i) (the next section defines what, exactly, it means to interpret Section 262(a) after the federal statute; this section is simply noting why this Court should accept Longpoint and Alexis' subsequent arguments).

Second, not only is this a Commerce Clause issue, but it also presents a classic conflict of laws problem that invokes the Erie Doctrine. The Erie Doctrine looks at issues between two competing rules arising out of federal versus state laws—here, Section 262(a) versus 17 CFR 240.14c-1(i) (again, the purpose of this section is simply to show why this Court should adhere to federal law before even

reaching the merits of the differences between the two statutes—Longpoint and Alexis will explain the differences throughout the remainder of the brief). Erie Doctrine instructs a court presented with a conflict of laws issue to ask: What is the state rule and what will be the result if applied? Next, what is the federal rule and what will be the result if applied? *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). *Erie* holds that the Rules of Decision Act applies. 28 U.S.C. 1652. The Rules of Decision Act says that, the laws of the several states, *except where the Constitution or treaties of the U.S. or acts of Congress otherwise require or provide* (emphasis added), shall be regarded as rules of decision in civil actions in the courts of the United States. 28 U.S.C. 1652 invokes the Supremacy Clause and accordingly instructs this Court that Delaware law cannot be applied against the federal statute because this is a Commerce Clause issue under Art. III. Longpoint and Alexis will now argue that even though federal law supersedes Delaware here, this Court should still follow federal law because of the flawed statutory construction of Section 262.

b. Delaware Statute Section 262(a) is Circular.

Only the stockholder of record of a corporation has the right to appraisal under Section 262(a). *Engel v. Magnavox Co.*, 1976 Del. Ch. LEXIS 165, 1976 WL 1705, at *1 (Del. Ch.). Together, the Continuous Holder Requirement and the Record Holder Requirement mandate than an appraisal petitioner "continuously hold" the shares for which appraisal is sought as a "holder of record" through the effective date of the merger. Del. Code Ann. tit., 8, § 262(a). Prelix asserts that

the stockholder did not continuously hold the shares through the date of the merger (R. at 1), which leads Longpoint and Alexis to prove that they meet both the Continuous Holder Requirement and the Record Holder Requirement. The Record Holder Requirement cannot be satisfied because of the circular nature of the statutory construction of Section 262(a) as it stands. This circular construction hinders Longpoint and Alexis from rightfully appraising their Prelix shares, and also allows Prelix to incorrectly argue that Longpoint and Alexis are not entitled to appraisal.

Determining the identity of the stockholder is essential for the issue of appraisal rights. Standing alone, Section 262(a) is detrimentally vague. While the statute lays out the necessary elements for appraisal, and "Any *stockholder* of a corporation", is subject to those elements. Del. Code Ann. tit., 8, § 262(a) (emphasis added). Several lines down in subsection (a), "stockholder" is defined as a "holder of record." "Holder of record" is not defined anywhere in Section 262(a) and no other provision of the Delaware General Corporation Law defines what it means to be a "holder of record." *Dell Inc.*, 2015 Del. Ch. LEXIS 184 *1, at *24 (Del. Ch.). While this gap may not be a problem for an uncontested appraisal, it is at the core of why Longpoint and Alexis are in court today—Longpoint and Alexis have an interest in defining exactly who the stockholder/holder of record is.

Textual canons provide that where a statute deals with a technical, specialized subject, courts should adopt the specialized meaning. When there is ambiguity as to the specialized meaning, courts

can look to the common law or legislative intent for meaning of ambiguous terms. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947). *Noscitur a sociis* is a well-known canon of statutory interpretation that means, "as it is known from its associates". *Id.* Light may be shed on the meaning of an ambiguous word by reference to words associated with it. *Id.* As such, since Section 262(a) is unclear as to the definition of stockholder/holder of record, this Court should refer to federal law as it provides both legislative intent and an answer to the gap of the Delaware statute.

c. Federal Law, 17 CFR 240.14c-1(i), correctly defines "Record Holder".

This Court should interpret the definition of "stockholder" under Section 262(a) as Title 17, Chapter II of the Code of Federal Regulations defines it. The Securities and Exchange Commission ("SEC") defines "record holder" as, "any broker, dealer, voting trustee, bank, association or other entity that exercises fiduciary powers which holds securities of record in nominee name or otherwise or as a participant in a clearing agency registered pursuant to section 17A of the Act." 17 CFR 240.14c-1(i). This definition is much more detailed and descriptive than Delaware's statute. More importantly, however, the statute includes the DTC as a "record holder". *Id.* Section 262(a) does not include clearing agencies in its definition of "stockholder". Del. Code Ann. tit., 8, § 262(a).

The inconsistency between the Delaware Statute and Federal law needs to be reconciled because DTC's inclusion in the definition of

"stockholder" is dispositive to Longpoint and Alexis' second argument. Longpoint and Alexis will argue the effect of interpreting the Delaware statute under Federal law subsequently under point two. However, Longpoint and Alexis will first demonstrate why this Court should defer to the SEC's interpretation of stockholder.

The transfer of securities used to be an extremely complicated, ineffective, and labor-intensive process under the traditional certificate-based system. *Dell*, 2015 Del. Ch. LEXIS 184, at *11 (Del. Ch.). Physical certificates had to be delivered from the seller to the buyer each time securities were traded. *Id.* In the case of registered securities, each certificate had to be given to the issuer or its transfer agent for registration of transfer. *Id.* at *11-12. By the late 1960s, the rise in trading rendered the certificate system obsolete. *Id.*

Congress responded to this crisis by passing the Securities Investor Protection Act of 1970, which directed the SEC to study the practices leading to the growing crisis in securities transfer. *Id.* at *13 (*see* 15 U.S.C. § 78kkk(g)). Consequently, the SEC recommended adoption of the depository system, and in turn, the federal policy of share immobilization was created. *Id.* at *13-14. Today, DTC is the world's largest securities depository and the only domestic depository. Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 Geo. L. J. 1227, 1238 n.50 (2008).

The history of share immobilization is rich with evidence showing how pivotal the SEC was in the creation of this new process. "Congress called for a more efficient process for comparison, clearing, and

settlement in a national market system" and thus, the SEC created and implemented the DTC through share immobilization. Egon Guttman, *Transfer of Securities: State and Federal Interaction*, 12 Cardozo L. Rev. 437, 440 (1990). Since the Delaware statute is unclear, it is only logical to defer to federal law—both because in the hierarchy of laws, federal law supersedes state law and also because the SEC is the ultimate expert on this whole issue.

Another argument in support of deferring to the federal law definition of "record holder" is that federal law usually acts as a floor, not a ceiling. If the "floor" includes DTC participants as record holders, then a state statute providing for less is effectively unconstitutional. It is a well-known principle that states can provide *more* than federal law, but they cannot be more *restrictive* than federal law and not interpreting DTC participants as record holders under Del. Code Ann. tit., 8, § 262(a) is doing just that.

Lastly, and perhaps most convincing to this Court, is Vice Chancellor Laster's personal opinion in *Dell*. Vice Chancellor Laster held, "Were I writing on a blank slate, I would account for the federal policy of share immobilization by interpreting the term "stockholder of record" as used in Section 262(a) to parallel its content under the federal securities laws. In other words, the term "stockholder of record" would include a DTC participant." *Dell*, 2015 Del. Ch. LEXIS 184, at *9. However, Vice Chancellor Laster concluded by saying that Delaware cases have not interpreted the statutory term as such, and that those precedents bind the court. Longpoint and Alexis do not ask this Court to go against precedent with a new

interpretation. Rather, Longpoint and Alexis present to this Court a novel issue created by circular statutory construction. Interpreting this statute in light of federal law does not go against Delaware's traditional interpretation, bur rather, fixes an inherent problem with the statute that has brought petitioners into Court today, and will surely bring more litigants to this Court in the future.

2. Longpoint and Alexis Retain their Appraisal Rights under 262(a) because Their Prelix Shares Were Continuously Held Pursuant to the Continuous Holder Requirement.

The Continuous Holder Requirement requires that shares be continuously held through the effective date of the merger to qualify for appraisal under Section 262(a). Del. Code Ann. tit., 8, § 262(a). Prelix argues that since there was a transfer of ownership between Cede & Co. to Cudd & Co. and Mac & Co., the Continuous Holder Requirement is not satisfied. (R. at 1.) The re-titling of a certificated share after the demand date but before the effective date violates the Continuous Holder Requirement by causing record ownership to change. *Nelson v. Frank E. Best Inc.*, 768 A.2d 473, 477 (Del. Ch. 2000). Longpoint and Alexis concede this requirement and present two arguments in connection with the Continuous Holder Requirement.

First, Longpoint and Alexis argue that Prelix had a duty to notify Longpoint and Alexis of the change in ownership from Cede & Co. to Cudd & Co. and Mac & Co., and that Prelix failed to act accordingly. If the Court accepts the burden argument, then the Court of Chancery's grant of Prelix's summary judgment motion should be reversed. Second, if this Court does not accept that burden on Prelix, Longpoint and Alexis argue that they still meet the Continuous Holder

Requirement according to federal law interpretation of share immobilization. Under federal law, the change in ownership from Cede & Co. to Cudd & Co. and Mac & Co. is peripheral and nonessential, therefore leaving the Continuous Holder Requirement undisturbed.

a. Prelix had a burden to notify Longpoint and Alexis that their shares had changed ownership, and failure to meet that burden should lead this Court to overturn the grant of summary judgment.

A quick walk-through of standard (and here, non-standard) DTC procedures is important. Longpoint and Alexis are the beneficial owners of the Prelix shares at issue—that fact is uncontested. A "beneficial owner" is "any person who, directly or indirectly, through any contract, arrangement, or understanding, other than a revocable proxy, has or shares the power to vote, or to direct the voting of, shares." MBCA § 13.01(ii) (2007). As beneficial owners, Longpoint and Alexis caused Cede & Co. to demand appraisal of their shares. (R. at 3.) When Cede & Co. demands appraisal, DTC removes the shares covered by the demand from the fungible bulk tracked in the FAST Account. *Dell*, 2015 Del. Ch. LEXIS 184, at *6-7. DTC does this by causing the issuer's transfer agent to issue a paper stock certificate for the number of shares held by the beneficial owner. *Id.* at *7. The paper certificate is then issued in Cede & Co.'s name, so the same record holder continues to hold the shares for purposes of the Continuous Holder Requirement. *Id.* Up to this point, DTC has followed all of its normal procedures. What happens next is unique and potentially injurious to Longpoint and Alexis, however.

Once stock certificates were issued in Cede & Co.'s name for Longpoint and Alexis' shares, DTC then contacted J.P. Morgan Chase and Bank of New York Mellon, the DTC participants holding the Prelix shares on behalf of Longpoint and Alexis. (R. at 3.) It is at this stage of the process where a "back-office procedure" kicked in, effectively hurting Longpoint and Alexis' right to appraisal. For various legitimate business reasons (i.e. insurance requirements, recordkeeping for internal audit, mitigating risk of theft, etc.), some banks and brokers only hold stock certificates that are issued in the names of their own nominees. *Dell*, 2015 Del. Ch. LEXIS 184 at *7.

When DTC contacted the custodial banks, each instructed Prelix's transfer agent to issue uniquely numbered certificates representing those shares. (R. at 3.) As a result, Longpoint and Alexis remained the beneficial owners and the custodians (J.P. Morgan and Bank of New York) remained the custodians. However, there were now new nominees on the stock ledger—Cudd & Co. and Mac & Co., respectively. (R. at 3.) Pursuant to this change in ownership, Prelix argues that Longpoint and Alexis do not satisfy the Continuous Holder Requirement under Del. Code Ann. tit., 8, § 262(a).

It is true that a publicly traded corporation cannot avoid going through DTC. *Dell,* 2015 Del. Ch. LEXIS 184, at *19. Additionally true is the acceptance of risk regarding nominee-level transfers. *Id.* at *32. Delaware law currently treats ownership changes driven by the depository system as voluntary transfers, making [the re-titling of shares] a risk that the Funds accepted. *Id.* Longpoint and Alexis concede that by choosing to hold through intermediaries, they assumed

the risk that the intermediaries might "act contrary to [their] interests." *Alabama By-Products Corp. v. Cede & Co. ex rel. Shearson Lehman Bros.*, 657 A.2d 254, 262 (1995)(quoting *Corp. v. Senouf. Del. Supr.*, 535 A.2d 1351, 1354-55 (1987)).

However, this Court has previously held that this assumed risk does not transcend the express terms of the appraisal statute. *Alabama By-Products*, 657 A.2d at 262. This Court held that once appraisal rights are perfected, the corporation, as the official custodian of share ownership records, continues to exercise the responsibility for supervising the surrender of shares for the merger consideration. *Id.* Accordingly, it was Prelix's responsibility to act affirmatively to very the status of the dissenting shareholders (Longpoint and Alexis). *Id.* Prelix did not discharge that duty correctly because Longpoint and Alexis were never aware that Cede & Co. had relinquished ownership of their shares to Cudd & Co. and Mac & Co.

This Court has also held that this burden upon corporations is not particularly onerous in light of the "level of administrative duties which corporations normally undertake in the preparation and execution of a merger." *Id.* at *263. Longpoint and Alexis agree that they assume an inherent risk by holding their shares through intermediaries, but Prelix's reckless behavior towards those shares well surpasses that risk. As such, Longpoint and Alexis should not be penalized for an error they had no chance at preventing and this Court should reverse the lower court's grant of Prelix's motion for summary judgment.

b. Federal law does not see the change in ownership of the shares from Cede & Co. to Cudd & Co. and Mac & Co. as violative of the Continuous Holder Requirement under 262(a).

Longpoint and Alexis still win under the second issue, even if this Court does not accept the burden argument presented above. Under the statutory interpretation issue, Longpoint and Alexis urged the Court to defer to federal law. Longpoint and Alexis ask the Court to do the same here as well.

Under Delaware cases that pre-dated the federal policy of share immobilization, the record holder for purposes of the Delaware General Corporation Law was the person that appeared on the stock ledger. *Dell*, 2015 Del. Ch. LEXIS 184, at *8. After the SEC created the depository system, the Delaware courts adhered to this rule. *Id.* Contrary to federal law, Delaware courts do not distinguish between the "broker level" of ownership and the federally mandated "depository level" of ownership. *Id.*

The relationship between the client and the custodial bank/broker represents the "broker level" of ownership—a voluntary relationship. *Id.* The relationship between DTC and the custodial bank/broker is the "depository level" of ownership—a relationship that is federally mandated. *Id.* at *18 (a publicly traded corporation cannot avoid going through DTC.) By not distinguishing between the two relationships, Delaware fails to recognize the custodial banks/brokers as record holders. Consequently, the change of ownership from Cede & Co. to Cudd & Co. and Mac & Co. breaks the chain of title for purposes of the Continuous Holder Requirement.

However, this Court should follow federal law and distinguish the two relationships. By nature of one being voluntary and the other being federally mandated, they must be distinguished. The voluntary nature of the "broker level" of ownership implies that Longpoint and Alexis were never required to enter into a relationship with J.P. Morgan Chase and Bank of New York Mellon. It is this relationship that gave Longpoint and Alexis' Prelix shares the new names of Cudd & Co. and Mac & Co.—effectively excluding them from appraisal because of the Continuous Holder Requirement under 262(a). Furthermore, had the Prelix shares simply been given to different custodial banks/brokers (i.e. ones that do not insist on holding stock certificates issued in the names of their own nominees), Longpoint and Alexis would not be in this quandary. The fact that the Prelix shares were given to J.P. Morgan Chase and Bank of New York Mellon by DTC was a completely arbitrary decision, which led the shares to be given to new nominees, which reigned an unfavorable effect on Longpoint and Alexis with regards to appraisal. Due to the voluntary and arbitrary disposition of the "broker level" of ownership (perhaps the reason federal law distinguishes between the two), it is only fair that this Court distinguish between the two relationships.

This Court has every motivation here, just as under the statutory interpretation argument, to defer to federal law. Share immobilization and the depository system are products of the federal level and thus, problems at the state level should rightfully look to federal law as a model. This is especially true in light of statutory ambiguity. Federal law looks through Cede & Co. and recognizes the custodial

banks/brokers as record holders, just as before the federal mandate. *Id.* If this Court took a similar approach, Longpoint and Alexis would retain their appraisal rights because ownership by the relevant DTC participants never changed. *Dell*, 2015 Del. Ch. LEXIS 184, at *8-9. Under this analysis, the change in ownership from Cede & Co. to Cudd & Co. and Mac & Co. has no effect on the Continuous Holder Requirement under 262(a) because the custodial banks/brokers are also record holders.

CONCLUSION

For the foregoing reasons this Court should reverse the Court of Chancery's order granting summary judgment against Longpoint and Alexis.

Respectfully Submitted,

Team D,

Counsel for Appellants