

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LONGPOINT INVESTMENTS TRUST and	:	
ALEXIS LARGE CAP EQUITY FUND LP,	:	
Petitioners below,	:	
Appellants,	:	
	:	
v.	:	No. 31, 2016
	:	
PRELIX THERAPUTICS, INC.,	:	Court Below: The
	:	Court of Chancery of
Respondent below,	:	the State of Delaware
Appellee.	:	C.A. No. 10342-CM

Appellee's Reply Brief

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NATURE OF PROCEEDINGS

On May 6, 2015, appellant-plaintiff below Longpoint Investment Trust and Alexis Large Capital equity fund, LP ("Longpoint") brought this action Pursuant to 8 Del. C. § 262 in the Court of Chancery of the State of Delaware in and for New Castle against appellees-defendant below Prelix Therapeutics, Inc. ("Prelix"). (Mem. Op. at 4.) Prelix moved for summary judgment dismissing the petition, claiming Longpoint are not entitled to appraisal. (Id.) The Chancery Court granted Prelix's summary judgment because the record holder of the shares in question did not continually hold the shares through the effective date of the merger. (Mem. Op. at 5-6.)

The Chancery Court heard arguments and granted Prelix's motion for summary judgment on January 13, 2016. (Mem. Op. at 1, 10.) Longpoint filed a Notice of Appeal from Interlocutory Order of the Court of Chancery on January 15, 2016. (Ntc. of Appeal).

SUMMARY OF THE ARGUMENT

This court should affirm the Chancery Court's order granting a motion for summary judgment on the contested ground that neither the beneficial owner nor the record holder perfected the right to appraisal. To do so, Appellants need to prove that their shares were not voted in favor of the merger. The numerous interpretations' of the word "record holder" and the legislative purpose of the appraisal statute supports reading § 262 holistically. Not requiring the Appellants to participate in bringing Cede & Co. into compliance with the statute, allows them to evade the requirements of § 262 and achieve appraisal without perfecting their standing. Even if this Court disagrees with the previous interpretation, and relies on the case law the Chancery Court provides, Appellants still do not have a right to appraisal, because Cede & Co. failed to present that the number of shares for which Appellants seek appraisal is not more than the aggregate number of shares voted in favor of the merger. Therefore, summary judgment should be confirmed.

This Court should also affirm the Chancery Court's order because the Chancery Court correctly determined that the Stockholders did not continuously hold the shares through the date of the merger, as required by § 262(a). The Court has continuously stated that whether the equitable owner continuously holds the stock is immaterial, rather the only entity that is material is the record holder. Because the record holder did not continuously hold the shares they cannot ask for appraisal under § 262(a).

STATEMENT OF FACTS

On October 15, 2014, Radius Health Systems Corp ("Radius") proposed the acquisition of Prelix, a publicly traded Delaware corporation, for \$14.50 for each of Prelix's 49 million outstanding shares of common stock. (Mem. Op. at 1-2). After the December 4, 2014, record date to determine who was entitled to vote on the merger, but before December 18, 2014, Longpoint acquired 5.6% of the available Prelix shares. (Mem. Op. 3). On December 18, 2014, Radius and Prelix revised their merger agreement to increase the acquisition price to \$15.00 per Prelix share. (Mem. Op. at 2). Shortly after the revised merger agreement Prelix shareholders were scheduled to vote on the merger. (Id.)

Despite the increase in share price, Prelix delivered written demands for appraisal of their shares on January 13, 2015, in conformity with Section 262(d)(1). (Id.) However, the meeting was rescheduled from January 14, 2015 to February 17, 2015. (Id.)

Cede & Co. made the appraisal demand on behalf of Longpoint, because the shares were registered with Cede & Co at that time. (Id.) The Depository Trust Company ("DTC") then moved an appropriate number of shares from its "Fast" account. (Id.) DTC completed the move by directing Prelix's transfer agent to issue uniquely identified certificates to represent the shares in question. (Id.) Prelix's transfer agent issued those certificates, in the name of Cede & Co, on January 23, 2015. (Id.) Those certificates were then delivered to J.P. Morgan Chase and Bank of New York Mellon, the DTC participants holding the Prelix shares on behalf of Longpoint. (Mem. Op. at 3).

For internal policy reasons, J.P. Morgan Chase and Bank of New York Mellon then instructed Cede & Co. to endorse and reissue the shares in question so they can be reissued in the names of Cudd & Co. and Mac & Co., as nominees for J.P. Morgan Chase and Bank of New York Mellon, respectively. (Id.) Cede & Co. completed the endorsement on February 5, 2015, thereby no longer being the holder of record for the shares in question. (Id.) On February 17, 2015, the merger between Radius and Prelix was approved with over 53% of the outstanding shares voting in favor of the transaction.

While the petitions were unaware of the change in ownership, the fact remains that Cede & Co. was not the holder of record when the merger occurred on April 16, 2015. (Mem. Op. at 4).

ARGUMENT

In order to be entitled to an appraisal a stockholder must (a) hold shares of stock on the date of the making of demand, (b) continuously hold such shares through the effective date of the merger, and (c) not have voted in favor of the merger. Appellant's stockholders failed to continuously hold such shares through the date of the merger, because though Cede & Co made demand, by the time the merger occurred, the stocks were held by Cudd & Co and Mac & Co. Additionally, the record holders failed to establish that they had not voted in favor of the merger.

I. APPELLANTS WERE PROPERLY DENIED APPRAISAL BECAUSE THEY FAILED TO COMPLY WITH THE VOTING REQUIREMENTS OF THE APPRAISAL STATUTE.

A. QUESTION PRESENTED

1. Whether beneficial owners of stock should be able to receive appraisal despite not complying with the voting requirements of § 262?
2. Whether beneficial owners of stock have standing for appraisal, when the record holder fails to establish that the aggregate shares for which it demands appraisal have not been voted in favor of merger?

B. STANDARD OF REVIEW

Parties can only be granted summary judgment when there is no issue of material fact and the moving party is entitled to judgment as a matter of law. The court views facts in the light most favorable to

the non-moving party and the moving party has the burden of demonstrating that there is no genuine issue of material fact. *Elite Cleaning Co. v. Capel*, No. Civ. A 690-N, 2006 WL 3393480 (Del. Ch. Nov. 20, 2006). Summary judgment is reviewed de novo as to both facts and law. *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 190 (Del. 2009). The court reviews the entire record and other evidence in a light most favorable to the nonmoving party, drawing its own conclusions to determine if there is an issue of fact that warrants a trial on its merits. *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 844 (Del. 1987).

C. MERITS OF THE ARGUMENT

1. Appellants did not adhere to the voting requirements of section 262 and upholding the Chancery Court's interpretation of section 262 would neglect the purpose of the statute to protect dissenting stockholders.

Appellants do not have standing for appraisal, because they have failed to establish that their stocks held by Cede & Co., had not been voted in favor of the merger. While under § 262(a) Cede & Co. is listed as the entity that must not have voted in favor of the merger, to properly adhere to the appraisal statute, Appellants must show that their shares were not voted in favor of the merger. A holistic reading of section 262, current case law and honoring the legislative purpose of the appraisal statute support this interpretation.

A court must give statutory language its ordinary and common meaning. *Dewey Beach Enters, Inc. v. Bd. Of Adjustment of Dewey Beach* 1 A.3d 305,307 (Del. 2010). The court must also try to uphold the

statute as the legislature intended it and in the case of multiple reasonable interpretations of a statute, view it as a whole to avoid mischievous results. *Zambrana v. State*, 118 A.3d 773, 776 (Del. 2015). Delaware Annotate Code § 262(a) states that to be entitled to appraisal, a stockholder must show that they have not voted in favor of the merger. 8 *Del. C. § 262(a)*. A stockholder is the holder of legal title to shares of stock. *In re Appraisal of Ancestry.com, Inc.*, No. 8173-VCG, 2015 WL 399726 (Del. Ch. Jan. 30, 2015). The legislative purpose of the appraisal statute is to provide relief to dissenting shareholders on the grounds of inadequacy of the asking price. *Cede & Co. v. Technicolor, Inc.*, 684 A.2d 289, 296 (1995).

It is not a denial of the beneficial owners rights to require him to establish his right and pursue his remedy through the nominee of his own selection. *Reynolds Metal Company v. Colonial Realty Corporation* 190 A.2d 752, 755 (1963). The record owner may be but a nominal owner and technically a trustee for the holder of the certificate, but legally he is still a stockholder and may be treated as the owner. *Salt Dome Oil Corp. v. Schenck*, 41 A.2d 583, 585 (Del. Ch. 1945). A record holder is not one entity on it's own, but instead an agent for each beneficial owner whose stock he holds. *Reynolds Metal Co.*, 190 A.2d at 755 (1963).

A plain reading of § 262(a) shows that in order to achieve standing for appraisal, a stockholder must prove that they have not voted in favor of the merger. Under Delaware case law, the stockholder is the record holder of the Appellants stock, which in this case is Cede & Co. To read § 262(a) as only requiring Cede & Co. to establish

standing for appraisal insinuates that the beneficial owners of the stock, Appellants, have no responsibility to fulfill the statutes requirements in pursuit of the appraisal they seek. *Reynolds* shows that this is not the case. The beneficial owners should be required to establish their right to appraisal and pursue their right to appraisal, through Cede & Co., if they so wish. However, the Chancery Court, citing *Ancestry* and *BMC*, allows Appellants to evade the requirements of § 262, holding that because the Appellants acquired their stock after the record date, they obviously did not vote in favor of the merger and further are not required to trace the voting records of the shares they acquired. While Appellants are not explicitly required to share trace, compliance with the statute is required if they want to achieve standing for appraisal. Whether through Cede & Co., or on their own, the Appellants are not exempt from proving that their shares abstained or opposed the merger.

The Chancery Court, reached its conclusion that the beneficial owners essentially had no obligation to fulfill the requirements of § 262, stating that the section imposed no requirement for stockholders to share trace. The conflicting interpretation of "stockholders" the Chancery Court introduces in this case creates confusion. The Chancery Court, cites *Ancestry* and *BMC*, both of which show that Cede & Co. is required to fulfill the standing for appraisal. On the other hand, the Chancery Court expresses preference for a different interpretation of the term "stockholder of record" without going into detail on what this would entail. *Reynolds* and *Salt Dome* also contrast with each other on this issue. In *Reynolds*, the Court found

that a record holder is not one entity, but instead an agent for each beneficial owner whose stock he holds. *Reynolds Metal Company*, 190 A.2d at 755 (1963). Understanding this, it follows that beneficial owners like Longpoint, should be required to establish their right for appraisal through their chosen nominee Cede & Co. Cede & Co. represents them as one entity and other beneficial owners as another entity. In *Salt Dome*, however the Court implies that Cede & Co. the holder of record is the only one who can claim and perfect appraisal rights. *Salt Dome Oil Corp. v. Schenck*, 41 A.2d 583, 585 (Del. Ch. 1945).

The confusion the case law and court decisions present in defining who a stockholder is and what his obligations are makes clear that the appraisal statute is ambiguous on its own and must be understood by reading § 262 in totality, not just with a focus on § 262(a). § 262(e) essentially indicates how a beneficial owner can request appraisal on those shares not voted in favor of a merger. Looking at § 262(a) in conjunction with § 262(e), shares not voted in favor of the merger are those entitled to appraisal. Additionally, it shows that the beneficial owner is involved in the appraisal process.

Neither Cede & Co. nor Appellants perfected the right to appraisal, because they failed to prove that the shares held by Appellants abstained or opposed the merger. The Chancery Court found that as the Appellants shares were held in fungible bulk, they were naturally unable to ascertain how the shares were voted. Share tracing however, is not the only way to comply with the statute. The Appellants could

have either acquired the shares before the record date or secured proxies.

Looking at § 262(a) as only requiring Cede & Co. to establish that it has not voted in favor of the merger negates the legislative purpose of the appraisal statute, which is to protect dissenting shareholders. The Chancery Court stated that since the Appellants acquired the shares after the record date, they did not vote in favor of the merger. This means that they cannot be qualified as dissenting shareholders and given all the protections due to that class. The legislature intended to protect dissenting shareholders, not those shareholders who were lucky enough to timely purchase their shares. In order to honor the purpose of the statute, the Appellants must show that they are part of the protected class of dissenting shareholders. They are unable to show that they are dissenting shareholders, without establishing that the shares for which they demand appraisal have not been voted in favor of the merger.

Reading § 262(a) on it's face, if Cede & Co. is unable to show that as Appellants agent, it did not vote in favor of the merger, the Appellants should be denied standing for appraisal. The beneficial owners are, however, not completely helpless from adhering to the statute. Just as a beneficial owner can request demand, as per *Reynolds* and a holistic reading of the appraisal statute, they should also be required to bring the record holder in compliance with the statute. Interpreting § 262(a) as requiring beneficial owners to establish that the shares for which they demand appraisal have not been voted in favor of the merger honors the purpose of the statute.

Interpreting § 262 in the way the Chancery Court does it, essentially allows Appellants to evade the requirements of the appraisal statute and have standing for appraisal, without establishing that they did not vote in favor of the merger.

Longpoint as beneficial owners are relevant to the appraisal process. In order to comply with the appraisal statute's requirements, they must show either on their own or through their agent Cede & Co. that the shares for which they demand appraisal have not been voted in favor of the merger.

2. Under the Chancery Court's ruling, the Appellants do not have standing for appraisal, because Cede & Co. did not prove that the quantity of shares voted in favor of the merger were equal to or greater than the quantity of shares for which appraisal is sought.

Even if the Court finds that the beneficial owner is under no obligation to on it's own or through it's agent show that it's individual shares were not voted in favor of the merger, under the case law the Chancery Court relied on, Cede & Co. is still required to show that the aggregate numbers of shares demanded were not voted in favor of the merger.

Record holders bear the ultimate burden of establishing their right to appraisal. *In re Appraisal of Transkaryotic Therapies, Inc.*, No. 1554-CC, 2007 WL 137 8345 (Del. Ch. May 2, 2007). The corporation should not be involved in clashes between non-registered and registered holders of shares. It should be able to look at the corporate books as the sole evidence of who is a stockholder.

Olivetti Underwood Corp. v. Jacques Coe v. Co., 217 A.2d 683, 686 (Del. 1966).

To achieve standing for appraisal the focus is not on how individual shares were voted, but instead on how the actual record holder of the shares voted. *Merion Capital LP v. BMC Software, Inc.*, C.A. No. 8900-VCG, 2015 WL 67586 (Del. Ch. Jan. 5, 2015). The stockholder must have sufficient shares not voted in favor of the merger to cover the number of shares for which the shareholder seeks appraisal. Essentially, the record holder does not need to share trace, but must only show that the number of shares that it did not vote in favor the merger is equal to or greater than the number of shares for which it perfected appraisal on behalf of petitioning beneficial owners. *In re Appraisal of Ancestry.com, Inc.*, No. 8173-VCG, 2015 WL 399726 (Del. Ch. Jan. 30, 2015).

If the record holder fails to perfect the right to appraisal, the problem is between the registered stockholder and beneficial owner. The corporation should not be blamed for the failure of a nominee or broker to correctly perfect appraisal rights for a beneficial owner. *Enstar Corp. v. Senouf* 553 A.2d 1351, 1354 (1987).

Only record holders actions are relevant for appraisal. *In re Appraisal of Transkaryotic Therapies, Inc.*, at *13. In *Transkaryotic*, the record holder, Cede & Co. held 29,720,074 shares of stock in a biopharmaceutical company. *Transkaryotic*, 2007 WL 1378345, at *2. At the time of merger Cede & Co. voted 12,882,000 shares in favor of the merger and 16, 838,074 votes were counted as no votes. *Id.* The beneficial owner sought appraisal for 10,972,650 shares, some of which

were held before the record date and others of which were acquired after the record date. *Id.* The petitioners in this case, wanted the beneficial owner to prove that those shares acquired after the record date had not been voted in favor of the merger. The court found that the beneficial owners actions were of no consequence. *Id.* at *13. Cede & Co. had voted enough shares against the merger to properly perfect the right as to all of the shares the beneficial owner sought appraisal for. *Id.*

Unlike the beneficial owners in *Transkaryotic*, Appellants do not have standing for appraisal. Just because there is no share-tracing requirement, does not mean Appellants are automatically able to seek appraisal. As required by *Transkaryotic*, Cede & Co., has failed to prove or present any evidence showing that the number of shares for which demand is requested does not exceed the number of shares it voted in favor of the merger. Under the case law that the Chancery Court relied on, in order for Appellants to properly bring appraisal, Cede & Co. must fulfill this requirement. Not being able to fulfill this requirement precludes Appellants from bringing appraisal.

Additionally, the Chancery Court stated that the Appellants did not vote in favor of the merger, because they acquired their shares after the record date. The beneficial owners actions are irrelevant to perfecting appraisal. The Court expresses a preference for an interpretation of stockholder of record that includes more than just actual stockholder of record. The case law the Chancery Court relies upon shows that the preferred definition of stockholder in Delaware is the person whose name is on the corporate books. That person is Cede

& Co. Accordingly, Cede & Co.'s voting for or against the merger is of relevance to this action and should have been presented.

The inability of Cede & Co. to fulfill the requirements of § 262(a) on behalf of Appellants should not affect Prelix. Corporations would lack efficiency if they were required to reconcile each action between record holder and beneficial owner. Cede & Co. has failed to comply with the appraisal statute, accordingly Appellants must be denied appraisal.

Cede & Co. has not brought forward any evidence to show that the aggregate number of shares Appellants seek demand for are less than the shares that Cede & Co. voted in favor of the merger. Cede & Co. has not fulfilled the requirements of § 262(a); therefore Appellants do not have standing for appraisal.

II. THE COURT PROPERLY DENIED APPELLANTS REQUEST FOR APPRAISAL, BECAUSE THE STOCKHOLDERS DID NOT CONTINUOUSLY HOLD THE SHARES THROUGH THE DATE OF THE MERGER.

A. QUESTION PRESENTED

1. Whether Under DGCL 262(a) Continuous Holder Requirement, does a stockholder continuously hold their shares when the record holder changes?
2. Whether Looking Through the Record Holder's name to the Beneficiary Owner of stock would be a better rule?
3. Whether the Court is best equip to alter the definition of the "holder of record"?

B. STANDARD OF REVIEW

The Court reviews summary judgment motions de novo for both facts and law. *Motorola, Inc. v. Amkor Tech., Inc.*, 849 A.2d 931, 935 (Del. 2004). Summary judgment may be granted when there is no issue of material fact and the moving party is entitled to judgment as a matter of law. *Transkaryotic*, 2007 WL 1378345, at *3. The facts must be viewed in the light most favorable to the non-moving party and the moving party has the burden of demonstrating that there is no genuine issue of material fact. *Elite Cleaning*, 2006 WL 3393480 at *8.

C. MERITS OF THE ARGUMENT

1. According to the established definition of the "holder of record", the Appellants did not continuously hold their shares through the date of the merger.

The Court should affirm the Chancery Court's decision because the Appellants did not continuously hold their shares through the date of the merger. First, the record holder, not the beneficial owner, must continuously hold their shares through the effective date of the merger. Second, the DCGL is supposed to be strictly construed, which means that only the record holder is considered the shareholder for appraisal purposes.

- a. The Record Holder, not the beneficial owner, must continuously hold their shares through the effective date of the merger.

The Court should affirm the Chancery Court's decision because the Record Holder did not continuously hold their shares through the

effective date of the merger. Under DGCL 262(a), a record holder must “continuously holds such shares through the effective date of the merger”. 8 Del. C. §262(a). The Record holder bears the burden of proving they meet all the appraisal requirements of DCGL § 262. *Transkaryotic*, 2007 WL 1378345, at *1.

The law is settled that “The record holder must ... continuously hold such shares through the effective date of the merger”. *Id.* at *3. In *Nelson* and *Dell*, the court concedes the original appraisal demand was invalid because the shares were not continuously held when the shares were transferred from Cede & Co. to the beneficial owner. *Nelson v. Frank E. Best Inc.*, 768 A.2d 473, 477 (Del. Ch. 2000); *In re Appraisal of Dell Inc.*, No. CV 9322-VCL, 2015 WL 4313206, at *9 (Del. Ch. July 13, 2015), as revised (July 30, 2015). For appraisal actions, only the registered stockholder, not the beneficial owner, is considered the stockholder of record. *Salt Dome*, 41 A.2d at 585.

Like the record holders in *Dell*, the record holder did not continuously hold their shares through the effective date of the merger. Cede & Co., the original record holder, made an appraisal demand on January 13th, 2015. On February 5th, 2015, the record holder switched from Cede & Co. to Cudd & Co. and Mac & Co. The merger occurred on April 16, 2015, well after the record holder was changed.

The fact that the beneficial owner never changed is immaterial. The material fact is that the record holder changed. Since the record holder did not continuously hold their shares through the effective date of their merger, the Court should affirm the Chancery Court’s summary judgment motion.

- b. The DCGL is supposed to be strictly construed, so that only the record holder is considered the shareholder for appraisal purposes.

The Court should affirm the Chancery Court's decision because the DCGL is supposed to be strictly construed. This Court "has endorsed a principle of strict construction, explaining that '[b]y exacting strict compliance . . . , the appraisal statute ensures the expedient and certain appraisal of stock.'" *Dell*, 2015 WL 4313206, at *10. Similarly, this Court has determined that appraisal proceedings are a legal rather than an equitable proceeding.

The term "holder of record" should be confined to describe the legal owner of stock on the corporate records, as opposed to expanding the term to include the beneficial owners. By applying strict constructions to the terms of the DGCL statutes, companies can predict court's interpretations of the statute. Business can make rational business decision in reliance on the strict construction of the statute. Businesses prefer certainty because it involves less risk in their business decision. By providing more certainty in the Delaware laws, more business will prefer to incorporate and merger in Delaware.

Similarly, this Court has determined that an appraisal action under DGCL 262 is a legal proceeding and not an equitable proceeding. *Dell*, 2015 WL 4313206 at *15 (Citing *Salt Dome*, 41 A.2d at 587) ("the nature of the appraisal remedy, which [The Delaware Supreme Court] regarded as an action at law rather than a proceeding in equity"). Even if the Court believes it would be equitable to provide the equity holder with appraisal rights, the Court may not provide an equitable remedy. The right to an appraisal is a legal right that is granted from

statute. Therefore, it is immaterial that the equitable owner owned the stock through the effective date of the merger. The statutory language only confers appraisal rights to the record holder. Since the DGCL statute is supposed to be read strictly to only give the record holder the right to appraisal, the Court should affirm the Chancery Court's summary judgment motion.

2. Altering the established definition of the "holder of record would cause increased litigation and unnecessary burden on corporations.

The Court should affirm the Chancery Court's decision because an alternative definition of the "holder of record" would lead to increased litigation and unnecessary burden on corporations. Unlike the position advocated by the Chancery Court judge in *Dell*, an alternative definition of the "holder of record" will not create a better judicial rule. *Dell*, 2015 WL 4313206, at *11. First, the issue may be fixed in a simpler way than altering Delaware case law. Second, changing the rule would affect other statutes in the Delaware code than just appraisal rights. Third, an alternative rule would increase the burden on corporations during merger and appraisal proceedings. Fourth, the alternative rule would lead to increased litigation on defining the beneficial owner. Fifth, The Appellants assumed the risk by giving the custodial firms power over their stocks. Sixth, appraisal rights should not be expanded because appraisals are lengthy, costly, and speculative. Lastly, appraisals have increased in the past number of years, so the current rule has not prevented shareholders from enforcing their appraisal rights.

First, the issue may be fixed in a simpler way than altering Delaware case law. The issue could be solved by custodial owners paying for a vault at the DTC for paper stock to be stored. Alternatively, custodial owners could change their policies so they can receive paper stock without changing the record holder name on the stock. While both of these alternative approaches bear some cost on the custodial owners, these alternatives are more efficient than altering the Delaware case law.

Second, changing the rule would affect other statutes in the Delaware code than just appraisal rights. *19 No. 8 The M & A Law*. NL 1. Both the anti-takeover statute (*8 Del. C. § 203(b)(4)*) and market-out exception (*8 Del. C. § 262(b)(1)*), condition their rules on the number of record stockholders. The Anti-takeover statute is conditioned on "held of record by more than 2,000 stockholders" and the market-out exception is conditioned on "held of record by more than 2,000 holders." (*8 Del. C. §§ 203(b)(4); 262(b)(1)*). The Court should be aware, if the Court alters the definition of the record holder, the new rule will affect the threshold requirements in these statutes also. Changing the definition will lead to uncertainty which will lead to more litigation, and uncertainty for business.

Third, an alternative rule would increase the burden on corporations during merger and appraisal proceedings. Established Delaware law does not impose a duty on corporations to discover the beneficial owners of stock. *Alabama By-Products Corp. v. Cede & Co*, 657 A.2d 254, 262 (Del. 1995) (Citing *In re ENSTAR*, 604 A.2d at 412) ("It is well established that Delaware law does not impose upon the

corporation 'an affirmative duty to 'reasonably' discover the identity of the beneficial owners of shares which were tendered by a nominee in exchange for the merger consideration.'"). By including the beneficial owner in the definition of the record holder, the court will be putting an increased burden on corporations during mergers and appraisal actions. Increasing the steps and the uncertainty for corporations in the merger process will lead to more corporations to incorporate in other jurisdictions. Businesses react to judicial decisions, and will incorporate in the jurisdiction that is most beneficial to them.

Fourth, the alternative rule would lead to increased litigation on defining the beneficial owner. The current definition is a bright line and clear rule for business. The corporations only need to look to their official records to determine who is recorded at the record holder. If courts allow beneficial owners to be considered record holders, then corporations will be confused on who has the legal right to the stock. For example, what if the beneficial owner is a corporation that is owned by multiple shareholders. If the controlling shareholder changes in the corporation, does the beneficial owner change? What if the corporation merges with its parent company that was the controlling shareholder, does the beneficial owner change? As clearly expressed, changing the rule will lead to increased litigation and confusion for corporations on determining who has a right to appraisals. Corporations want bright line rules that will lead to certainty in business transactions. As stated earlier, corporations will incorporate in jurisdictions that

have predictable laws.

Fifth, The Appellants assumed the risk by giving the custodial firms power over their stocks. Beneficial owners bear the risk that custodial firms might accidentally invalidate their appraisal rights. *Dell*, 2015 WL 4313206 at *10 (citing *Ala. By-Prods. Corp.*, 657 A.2d at 262) ("By choosing to hold through intermediaries, the Funds assumed the risk that the intermediaries might 'act contrary to [their] interests.'"); *Id.* (citing *Senouf*, 535 A.2d at 1354-55). ("the risk is placed upon the beneficial owner that a nominee may act contrary to the owner's interests."). While it may seem unjust to punish the Appellants who did not know or request their stock to change record holders, which invalidated their appraisal rights, the Appellants assumed this risk by transferring custodial rights to J.P. Morgan and Bank of New York Mellon.

Sixth, appraisal rights should not be expanded because appraisals are lengthy, costly, and speculative. (*Appraisal Rights, Practical Law Practice Note 8-517-0205*). Appraisal rights are a burden on the court system and should not be expanded beyond the statute rights granted in the Delaware code. First, Appraisals are length. Appraisals can take several months to several years to complete. *Appraisal Rights, Practical Law Practice Note 8-517-0205*. Appraisals clog up the judicial system and prevent other disputes from quick efficient decisions. Corporations should not be tied up in legal disputes for a lengthy amount of time. Judicial decisions should be fast and quick, so corporations can continue in their business enterprise. Second, Appraisals are costly. *Appraisal Rights,*

Practical Law Practice Note 8-517-0205. Costly litigations can put a strain on businesses. Increases in unnecessary costs make a business more inefficient. The increased litigation cost will put firms incorporated in Delaware at an uncompetitive disadvantage. If the costs rise too much, firms may incorporate outside of Delaware. Lastly, appraisals are speculative. *Appraisal Rights, Practical Law Practice Note 8-517-0205*). Courts are not best at determining a corporation's stock value. Courts are better at interpreting statutes, than evaluating business decisions. This is the fundamental reason the court created the Business Judgment Rule. *Cede & Co.*, 634 A.2d at 360 (citing *Mills*, 559 A.2d at 1279; *Unocal Corp. v. Mesa Petroleum Co.*, Del.Supr., 493 A.2d 946, 954 (1985); *Sinclair Oil Corp. v. Levien*, Del.Supr., 280 A.2d 717, 720 (1971); *A.C. Acq. Corp. v. Anderson, Clayton & Co.*, Del.Ch., 519 A.2d 103, 111 (1986).) ("The business judgment rule is an extension of these basic principles. The rule operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation.") The process the courts entertain to determine a corporation's stock value is speculative at best.

Lastly, appraisals have increased in the past number of years, so the current language has not stopped shareholders from enforcing their appraisal rights. The petitions for appraisals doubled to 11% in 2011, and further increased to 17% in 2013. Timothy W. Gregg, Rebecca L. Butcher, *The Latest Significant Delaware Appraisal Decisions and Potential Effects on Appraisal Litigation*, Bus. L. Today, October 2015, at 1. Since appraisal actions are rising, the definition of the

"holder of record" is not unduly hampering shareholders for petitioning for appraisals.

The Court should affirm the Chancery Court's decision because an alternative definition of the "holder of record" would lead to increased litigation and unnecessary burden on corporations.

3. Even if the court believes the definition of the "holder of record" should be changed, the legislative branch is better equipped to alter the definition.

The Court should affirm the Chancery Court's decision because an alternative definition of the "holder of record" should come from the legislative branch. Even if the Court believes altering the definition of the "holder of record" would be a beneficial idea, the legislative branch is better equipped to alter judicial established interpretations of Delaware statute. *Transkaryotic*, 2007 WL 1378345, at *5 ("The Legislature, not this Court, possesses the power to modify § 262 to avoid the evil, if it is an evil, that purportedly concerns respondents.").

First, the legislative branch has affirmed the court's interpretation of the "holder of record". The Federal legislature issued their immobilization statute in 1975, and the Delaware legislative branch has not altered the Delaware appraisal code since then. *Dell*, 2015 WL 4313206, at *5 ("Congress then passed the Securities Acts Amendments of 1975."); *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 398 (Del. 2010) (a decision that overruled Vice Chancellor Laster's opinion in *Kurz v. Holbrook*, 989 A.2d 140 (Del. Ch. 2010)) ("The DGCL is a comprehensive and carefully crafted

statutory scheme that is periodically reviewed by the General Assembly.”). Since the Delaware legislative branch has not altered the appraisal statute, the legislative branch has affirmed the judicial branch’s interpretation of the statute as correct.

Second, corporations can observe and react to changes in legislation easier than court decision. Corporations can monitor changes in legislation by observing minutes and proposed bills to the Delaware legislative branch. If a corporation opposed proposed legislation, they can lobby and voice their input on the proposed bill. However, corporations have no way to monitor changes in the judiciary branch till after an opinion is written. Corporations like predictability, and abrupt changes in judicial opinions do not promote stability in commerce. *Schenck*, 41 A.2d 583, 583(“a balancing of competing public policies, in which the importance of certainty and predictability prevailed ...”).

Third, corporations have relied on Delaware Supreme Court and Delaware Chancery Court opinions that have repeatedly stated that the legislative branch is the proper branch to modify judicial interpretations of Delaware statute. *Crown EMAKI*, 992 A.2d 377, at 398 (“Moreover, and in any event, a legislative cure is preferable.”); *Transkaryotic*, 2007 WL 1378345, at *5 (“The Legislature, not this Court, possesses the power to modify § 262 to avoid the evil, if it is an evil, that purportedly concerns respondents.”). Corporations have made business decision in reliance that any changes to interpretation would be done by the legislative branch. The Court should not alter the statutory interpretation of the “record of holder” because

corporations have incorporated in Delaware and made other business decision in reliance on these rules.

The Court should affirm the Chancery Court's decision because the legislative branch is preferable to the courts to make altercations to the definition of the "holder of record".

CONCLUSION

For the foregoing reasons, this Court should affirm the Chancery Court's order granting summary judgment, denying Appellants request for an appraisal.

Respectfully submitted,

/s/ Team E

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