

IN THE SUPREME COURT OF
THE STATE OF DELAWARE

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

Appellants' Opening Brief

Filed by Team F
Counsel for Appellants

Filed February 5, 2016

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NATURE OF PROCEEDINGS

On May 6, 2015, the Appellants (Petitioners below) brought an action in the Delaware Court of Chancery, seeking appraisal of their stock pursuant to Section 262 of the Delaware General Corporate Law ("DGCL"). Chancellor Mosley granted the Appellee's (Respondent below) motion for summary judgment on January 13, 2016. The Appellants filed their notice of appeal with this Court on January 15, 2016.

SUMMARY OF ARGUMENT

1. Section 262 does not require tracing of shares previously voted, regarding a merger, in order to perfect appraisal rights. Whether Section 262 requires a "tracing of shares" has been repeatedly rejected by Delaware courts; as such, the Appellee's arguments do not establish a case for overruling precedent. In addition, requiring a tracing of shares ignores a literal reading of Section 262 and the existing statutory obligations for record holders. Therefore, because appraisal rights are a narrow remedy under Delaware law, this Court should not impose additional obligations on minority stockholders. Finally, neither the beneficial owners' ability to bring suit nor the hypothetical abuse of appraisal rights necessitate judicial rulemaking in this area.

2. The Appellants' shares were continuously held through the effective date of the merger pursuant to Section 262 because the depository level is not considered a "holder of record." First, the ordinary meaning of the language in Section 262 requires that a holder of record actually hold something, which the depository level fails to satisfy. Second, if Section 262 is ambiguous, the definition of holder of record does not include the depository level because that interpretation is inconsistent with the DGCL, Section 262's legislative purpose, and thus, the overall legislative intent. Third, holder of record should not be interpreted to include the depository level because such an interpretation would produce an absurd result.

STATEMENT OF FACTS

On October 15, 2014, a proposed merger was announced, causing a tepid market response, where a subsidiary of Radius Health Systems Corporation ("Radius") would acquire the Appellee, Prelix Therapeutics, Inc. ("Prelix").¹ Op. 2. Then, the proposed acquisition price increased from \$14.50 to \$15.00 per Prelix share—only \$2.25 over the pre-announcement price. Op. 2. After the record date for merger-voting eligibility, the Appellants, Longpoint Investments Trust ("Longpoint") and Alexis Large Cap Equity Fund LP ("Alexis"), acquired 5.4% of Prelix stock—held in fungible bulk in the name of Cede & Co. ("Cede"), the Depository Trust Company's ("DTC") nominee. Op. 1, 3. Accordingly, Longpoint and Alexis could not vote on the merger. Op. 3.

Cede then made appraisal demands (the only demands for this merger) on behalf of Longpoint and Alexis, pursuant to Section 262. Op. 3-4. As a result of their demands, unique stock certificates were printed from the Fast Automated Securities Account and then delivered to J.P. Morgan Chase ("Chase") and Bank of New York Mellon ("BONY"), the holders of Longpoint's and Alexis' stock certificates. Op. 3. Unbeknownst to Longpoint and Alexis, the certificates were reissued in the name of Chase's and BONY's nominees: Cudd & Co. ("Cudd") and Mac & Co. ("Mac"). Op. 3. A 53% majority approved the merger, effective April 16, 2015. Op. 3-4. Pursuant to the appraisal demand, the Court of Chancery held a hearing but then granted Prelix's motion for summary judgment. Op. 6. This appeal followed.

¹Multiple lawsuits were filed, unrelated to this appeal, claiming the Prelix directors breached their fiduciary duties. Op. 2.

ARGUMENT

The case before this Court will determine the scope of future appraisal rights pursuant to Section 262 of the DGCL. See 8 Del. C. § 262 (2013). Specifically, in order to be entitled to an appraisal under Section 262(a), a stockholder must (1) hold, and continue to hold until the effective date of the merger, shares of stock on the date the appraisal is requested; (2) conform to the procedural requirements prescribed in subsection (d); and (3) not have voted in favor of the merger. Id. § 262(a).

Here, it is undisputed that the Appellants' appraisal rights were perfected pursuant to the requirements of subsection (d). See Op. 1. Further, it is undisputed that the Appellants were the beneficial owners of the shares in question, which were managed by the Appellants' respective custodial banks on the date of their appraisal request and continuing through the effective date of the merger. Op. 1, 3. Finally, it is undisputed that enough shares were voted against the merger to cover the shares in question here, thus fulfilling the requirement that stockholders seeking appraisal must not have voted in favor of the merger. Op. 1, 3; see Reynolds Metals Co. v. Colonial Realty Corp., 190 A.2d 752, 756 (Del. 1963) (holding that a broker could split share votes and still demand appraisal).

Therefore, the Appellants were entitled to an appraisal by the Court of Chancery, a grant of summary judgment was inappropriate, and such a grant should be reversed.

I. THIS COURT SHOULD HOLD THAT SECTION 262 OF THE DGCL DOES NOT REQUIRE THE TRACING OF SHARES PREVIOUSLY VOTED, REGARDING A MERGER, TO PERFECT APPRAISAL RIGHTS.

A. QUESTION PRESENTED

Whether Section 262 of the DGCL requires stockholders who purchase shares previously voted by another stockholder to prove that those shares were not voted in favor of the merger.

B. SCOPE OF REVIEW

On appeal from a grant of summary judgment, this Court reviews the record to ensure the findings of the Court of Chancery are clearly supported. In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 48 (Del. 2006). In addition, this Court looks to see that the conclusions drawn from such findings are "orderly and logical" and will not draw its own conclusion from those facts unless "the trial court's findings are clearly wrong and justice so requires." Id. In contrast, legal conclusions are reviewed de novo. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1385 (Del. 1995).

C. MERITS OF ARGUMENT

- i. The Appellee's arguments do not establish a case for overruling precedent; therefore its argument should fail.

"The doctrine of stare decisis finds ready application in Delaware corporate law," and it "operates to fix a specific legal result to facts in a pending case based on a judicial precedent directed to identical or similar facts in a previous case in the same court or one higher in the judicial hierarchy." Account v. Hilton Hotels Corp., 780 A.2d 245, 248 (Del. 2001) (italics omitted). As this Court has made clear, once precedent is set, because it promotes stability and continuity in the law, it should only be overruled for

"urgent reasons" and where "clear error" has occurred. Id. (stating that stockholder rights plans were settled Delaware law). The Appellee has not raised a credible argument for imposing additional requirements on beneficial owners in order to perfect appraisal rights under these facts, and its argument relying on a priori reasoning is inapposite here. Therefore, this Court should not disturb precedent or establish new procedures regarding stockholder appraisal rights under Section 262.

1. Delaware courts have rejected that Section 262 requires a tracing of shares.

This Court has rejected the tracing of shares, and therefore the requirements of Section 262(a) have been met. Specifically, this Court has long held that the non-registered holder of stock is entitled to appraisal rights under Section 262 even when the registered holder has voted some portion of its shares—held on behalf of the beneficial owner—in favor of a merger. Reynolds Metals Co., 190 A.2d at 755-56 (holding that broker voting "yes" and "no" on behalf of customers did not preclude appraisal demand). In Reynolds Metals Co., involving a broker who voted shares both for and against a merger in almost equal proportion, this Court rejected the corporate defendant's argument that stock in a fungible account under "street name" could not qualify as having been voted against a merger. Id. Specifically, this Court noted that the "[d]efendant [was] really repeating in another form its contention that a vote by a broker of one share in favor of the merger disqualifies all the other shares from appraisal," and this Court rejected such a conclusion as "not an appealing one." Id. at 754, 756. Further, the Court of Chancery in 2007 in In re Appraisal of

Transkaryotic Therapies, Inc. concluded that where the record holder of a fungible group of shares held in street name voted "no" on a merger, assuming all other statutory requirements were met, appraisal rights under Section 262 were available. 2007 WL 1378345, at *4 (Del. Ch.).

Here, it is undisputed that the Appellants owned 5.4% of the Appellee's shares of stock and that the merger was approved by only 53% of the outstanding shares. Op. 1, 3. In addition, DTC (through its nominee Cede) holds approximately 75% of the shares in publicly-traded companies. See In re Appraisal of Dell Inc., 2015 WL 4313206, at *6 (Del. Ch.). Given these facts, it can be safely inferred that Cede voted a sufficient amount of shares against the merger. As such, the Appellants' holder of record met the requirements under Section 262(a) as illustrated by prior case law. Op. 1, 3-4. Therefore, because the tracing of shares has never been imposed by this Court, the Appellee's argument is without legal foundation, and there is no urgent reason for this Court to create such a requirement.

2. Requiring a tracing of shares ignores a literal reading of Section 262 and the existing statutory obligations of record holders.

In addition to the fact that there is no tracing of shares requirement, a quick reading of Section 262(a) does not give rise to obligations, on behalf of the beneficial owners, separate from the holder of record in order to perfect appraisal rights under the Statute. That is, even if there were a tracing requirement, it would be on the holder of record. In re Ancestry.Com, Inc., 2015 WL 66825, at *8 (Del. Ch.) (holding that nothing changed the "longstanding

requirement" that the record holder perfect appraisal rights on behalf of beneficial owners).

Specifically, the Appellee has argued that it is the duty of the Appellants, the beneficial owners of the shares in question, to show that their shares were not voted for the merger. Op. 1. However, Section 262(a) imposes an obligation on the holder of record to fulfill the requirements of the Statute, not the beneficial owner. See 8 Del. C. § 262. But more importantly, this Court has rejected corporations' attempts to impose additional requirements so that an appraisal right may be perfected. See Olivetti Underwood Corp. v. Jacques Coe & Co., 217 A.2d 683, 686 (Del. 1966) (rejecting assertions that a beneficial owner who acts through a nominee must show the nominee has authority to act on behalf of the beneficial owner). Similarly, "[T]he relationship between, and the rights and obligations of, a registered stockholder and his beneficial owner are not relevant issues in a proceeding of this kind." Id. at 687; In re Appraisal of Transkaryotic Therapies, Inc., 2007 WL 1378345, at *4 (citing Olivetti Underwood Corp., 217 A.2d at 687). Thus, when evaluating appraisal rights under Section 262(a), it is only the actions of the record holder that are relevant. In re Appraisal of Transkaryotic Therapies, Inc., 2007 WL 1378345, at *4.

Here, the holder of record filed "formally valid and timely written demands for appraisal." Op. 1. There are requirements prescribed in Section 262; the holder of record fulfilled those requirements. Thus, the Appellee's arguments are a blatant attempt to impose additional impediments on the Appellants and frustrate the

exercise of a valid statutory right by a minority stockholder. As such, these arguments should be rejected.

Consequently, nothing in the Appellee's arguments point to an issue of urgency or clear error such that this Court should overrule its precedent and that of the Court of Chancery.

- ii. Because appraisal rights are a narrow remedy under Delaware law, this Court should not impose additional obligations on minority stockholders.

Appraisal rights are but one method of curtailing directorial ineptitude or misconduct, yet they are a valuable shield in the arsenal. Given the strict requirements prescribed in Section 262, and the somewhat narrow circumstances under which appraisal rights are available, this Court should not write further hurdles into the DGCL over which minority stockholders must jump to protect their interests.

First, appraisal rights are a discrete creation of the Delaware legislature. In re Ancestry.Com, Inc., 2015 WL 66825, at *4. Therefore, any restrictions should comport with legislative intent. See In re Krafft-Murphy Co., 82 A.3d 696, 702 (Del. 2013). The legislature gave appraisal rights to minority stockholders because, in the creation of merger statutes, the legislature "took away from the individual stockholder, the power to defeat [certain mergers] and in return offered him compensation in money if he elected to sever his connection with the corporation." Salt Dome Oil Corp. v. Schenck, 41 A.2d 583, 587 (Del. 1945).

This Court has long recognized appraisal rights as an integral part of the relationship between majority and minority stockholders. Specifically, this Court has reaffirmed the right of appraisal for

minority stockholders in exchange for the elimination of other judicial doctrines. See Weinberger v. UOP, Inc., 457 A.2d 701, 714-15 (Del. 1983) (discarding business purpose rule in favor of renewed right of appraisal coupled with fairness test). Moreover, the availability of the appraisal remedy has been the basis for denying further relief in Delaware Courts. See In re Cogent, Inc. S'holder Litig., 7 A.3d 487, 516 (Del. Ch. 2010) (denial of injunctive relief); La. Mun. Police Emps.' Ret. Sys. v. Crawford, 918 A.2d 1172, 1192 (Del. Ch. 2007) (denial of broad preliminary injunction). Appraisal rights have also been noted for the ability to protect minority stockholders where concurrent claims of a board's breach of fiduciary duties have failed or were foreclosed. See In re MFW S'holders Litig., 67 A.3d 496, 535 (Del. Ch. 2013) aff'd sub nom. Kahn v. M & F Worldwide Corp., 88 A.3d 635, 654 (Del. 2014) (discussing appraisal rights in conjunction with an application of business judgment rule); In re Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 645 n.88 (Del. Ch. 2005) (detailing cases where appraisal awards were higher even where fiduciaries were acting in good faith).

Second, appraisal is a narrowly tailored remedy for the protection of stockholders, and it does not lend itself to abuse—only about 17% of mergers in 2013 attracted appraisal petitions. TAKEOVER DEFENSE: MERGERS AND ACQUISITIONS, Appraisal and Quasi-Appraisal Rights and Remedies § 14.10 (2016). Similarly, in order to perfect appraisal rights, a stockholder must comply with specific and strict procedural requirements. See 8 Del. C. § 262(d). This Court has noted that Delaware case law is “replete with examples where dissenting minority

shareholders that failed to comply strictly with certain technical requirements of the appraisal statute, were held to have lost their entitlement to an appraisal.” Berger v. Pubco Corp., 976 A.2d 132, 144 (Del. 2009).

Here, given the statutory origins behind appraisal rights in Delaware, and this Court’s acknowledgment of that history, the imposition of additional requirements under these facts would erode the rights of minority stockholders. Appraisal rights are especially necessary where, as here, allegations of a fiduciary breach surround a merger. Op. 2. Further, given that the market reception to this merger was tepid, this case is ideal for appraisal. See Op. 2. That is, there is a genuine disagreement as to the valuation of the corporation. See, e.g., Merion Capital LP v. BMC Software, Inc., 2015 WL 67586, at *4 (Del. Ch.) (detailing history of appraisal statute and the purpose of the remedy). Furthermore, given the stringent requirements of Section 262, as evidenced by case law and the Appellee’s second argument in this case, this Court need not impose additional requirements on minority stockholders, especially where even existing requirements may result in the loss of appraisal rights due to changes of which the beneficial owners had no knowledge. See Op. 1, 4.

- iii. Neither the beneficial owners’ ability to bring suit nor the hypothetical abuse of appraisal rights necessitate additional protections for majority stockholders from this Court.

Finally, litigants have raised two arguments before the Court of Chancery that merit attention. First, in In re Ancestry.Com, Inc., the corporation argued that because the legislature amended Section 262(e) in 2007 allowing beneficial owners to bring their own petitions for

appraisal, such a right comes with an implied duty for the petitioner to comply with the requirements previously restricted to the holder of record. 2015 WL 66825, *6-7. The Court of Chancery rejected this argument. Id. at *8. Moreover, this Court has made clear that “where a provision is expressly included in one section of a statute, but is omitted from another, it is reasonable to assume that the Legislature was aware of the omission and intended it,” and that Delaware “courts may not engraft upon a statute language which has been clearly excluded therefrom by the Legislature.” Giuricich v. Emtrol Corp., 449 A.2d 232, 238 (Del. 1982).

Second, the corporation in In re Ancestry.Com, Inc. also argued that allowing record holders to cover any appraisal demands, simply by ensuring that each demand’s sum total of shares does not exceed the total shares voted in favor of the merger, could result in appraisal claims exceeding the total “no” votes on a merger. See 2015 WL 66825, at *7. Again, the Court of Chancery rejected that argument as “a theoretical problem which is not present in the case” and found that “for stock held in fungible bulk the record holder must have refrained from voting a number of shares sufficient to cover the [appraisal] demand.” Id. at *7-8. Similarly, as this Court has said, “Courts in this country generally, and in Delaware in particular, decline to exercise jurisdiction over cases in which a controversy has not yet matured to a point where judicial action is appropriate.” Stroud v. Milliken Enterprises, Inc., 552 A.2d 476, 480 (Del. 1989). In addition, on the one hand, this Court has held that “[s]ince the primary object of statutory construction is to reach a result in

conformity with legislative policy, once that policy is determined [it] need only test the construction by the rules of reasonableness and conformity with that policy." In re Adoption of Swanson, 623 A.2d 1095, 1099 (Del. 1993). On the other hand, "[This Court] ha[s] long held that [Delaware] courts do not sit as a superlegislature to eviscerate proper legislative enactments." Id.

In the instant case, the Appellee is attempting to conjure up the specter of abuse to convince this Court to cut off a genuine dispute about the valuation of a corporation. Their argument, like the argument in In re Ancestry.Com, Inc., that an obligation exists on behalf of the Appellants that is not listed in Section 262, is pure conjecture. Even more incorporeal is the notion that the specific voting behavior of shares in a fungible bulk must be accounted for. This type of argument has been rejected by the Court of Chancery, no mischief has been identified in the record for such an argument, and the strongest argument for such a rule should be dismissed as an invitation to decide a hypothetical question. While 47% of the outstanding shares were eligible for appraisal, the Appellants' demand represents only 5.4% of the total shares and the sole appraisal request. Op. 4. Such reforms, given the Appellee's hypothetical and far reaching claims, if needed at all, must be addressed by the legislature—the appropriate body for this type of rulemaking. For the foregoing reasons, this Court should reject inserting additional requirements into Section 262.

II. THIS COURT SHOULD REVERSE THE GRANT OF SUMMARY JUDGMENT BECAUSE THE APPELLANTS' SHARES WERE CONTINUOUSLY HELD THROUGH THE EFFECTIVE DATE OF THE MERGER PURSUANT TO SECTION 262.

A. QUESTION PRESENTED

Whether "holder of record" should be interpreted to look past the depository level where stock certificates are reissued from the depository level and the shares have not changed beneficial ownership.

B. SCOPE OF REVIEW

As noted above in Section I(B), this Court reviews the grant of summary judgment de novo. Merrill v. Crothall-Am., Inc., 606 A.2d 96, 99 (Del. 1992). This Court also reviews the interpretation of a statutory provision de novo. In re Krafft-Murphy Co., 82 A.3d at 702.

C. MERITS OF ARGUMENT

A petitioner is entitled to appraisal rights under Section 262 where "any stockholder of a corporation ... continuously holds such shares through the effective date of the merger." 8 DEL. C. § 262(a). The Section defines the word "stockholder" as "a *holder of record* of stock in a corporation." Id. However, Delaware courts have yet to further define holder of record. See, e.g., Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377, 398 (Del. 2010) (declining to determine whether DTC nominees should be the holder of record). Those concepts codified in the DGCL have been described as "the most flexible in the nation." Shintom Co. v. Audiovox Corp., 888 A.2d 225, 227 (Del. 2005). Nonetheless, "[A]s skilled as the drafters of the DGCL are, [Delaware courts] will not pretend that the DGCL is a model of drafting consistency and that there are not ambiguities within it." Jones Apparel Grp., Inc. v. Maxwell Shoe Co., 883 A.2d 837, 845 (Del. Ch.

2004). Because the DGCL is a foundation rather than a conclusion, the courts' role is to interpret the statutory language that the legislature codified. Taylor v. Diamond State Port Corp., 14 A.3d 536, 542 (Del. 2011). Therefore, this Court should take this opportunity to clarify what constitutes holder of record because the task "is a quintessential issue of statutory interpretation appropriate for the judiciary to address." See In re Appraisal of Dell Inc., 2015 WL 4313206, at *12.

- i. The ordinary meaning of Section 262 establishes that holder of record does not include the depository level.

The purpose of statutory construction is "to give a sensible and practical meaning to the statute as a whole in order that it may be applied in future cases without difficulty." Nationwide Mut. Ins. Co. v. Krongold, 318 A.2d 606, 609 (Del. 1974). The first step to ascertain the proper interpretation of holder of record is to determine the literal and ordinary meaning of the plain language. See Coastal Barge Corp. v. Coastal Zone Indus. Control Bd., 492 A.2d 1242, 1246 (Del. 1985). If the statute is unambiguous, courts implement the literal or ordinary meaning of the language. Id. In contrast, if the statute is ambiguous, the second step is to clarify the ambiguous language using tools of statutory construction. Taylor, 14 A.3d at 538.

The dictionary definition provides guidance in determining the unambiguous, ordinary meaning of the language. See, e.g., New Castle Cty. Dep't of Land Use v. Univ. of Del., 842 A.2d 1201, 1207 (Del. 2004). The dictionary definition of "holder" includes a person or

device that "holds something." *Holder Definition*, MERRIAM-WEBSTER.COM, www.merriam-webster.com/dictionary/holder (last visited January 16, 2016). Based on the dictionary definition, the ordinary meaning of the language holder of record is unambiguous and should be interpreted as the person, or entity, that actually "holds something." In order for an entity to be able to be a holder of record, there must actually be something to physically hold. Therefore, the ordinary meaning of holder of record requires looking past the depository level because anytime a certificate is printed in a merger context, the certificate is either relinquished to the custodial bank or stored in a vault leased to and controlled by the custodial bank. In re Appraisal of Dell Inc., 2015 WL 4313206, at *7; Op. 3. Therefore DTC's control of stock begins and ends with the digital notation of ownership. In contrast, a custodial bank (e.g., Chase and BONY in this case) can actually hold a printed stock certificate. See Op. 3 (holding stock certificates on behalf of the Appellants). Because the ordinary meaning requires a person or entity to actually hold something, and because DTC cannot actually hold physical certificates, holder of record should not include the depository level.

- ii. Even if this Court determines that Section 262 is ambiguous, holder of record does not include the depository level because that interpretation is inconsistent with the DGCL, the legislative purpose, and thus the legislative intent of the Statute.

Ambiguity exists if Section 262 is "reasonably susceptible of different conclusions or interpretations." See Coastal Barge Corp., 492 A.2d at 1246. For example, in Taylor, the Court determined that a workers' compensation statute was ambiguous because the word "worked"

could have two reasonable interpretations: (1) work actually performed or (2) being previously employed. 14 A.3d at 540. Accordingly, if the language is ambiguous, Delaware courts will consider the statute in the context of the entire DGCL to produce a harmonious whole. Id. at 538. Then, if reasonably possible, Delaware courts consider the purpose of the particular language. Dewey Beach Enter. v. Bd. of Adjustment of Town of Dewey Beach, 1 A.3d 305, 307-08 (Del. 2010).

In the present matter, the term holder of record is ambiguous. First, holder of record is ambiguous because the language is susceptible to three reasonable interpretations: (1) the party named on the corporate records (usually in the nominee's name); (2) the one who physically holds the stock (the custodial bank), particularly when the stock is reissued as a certificate from the depository level; or (3) the beneficial owner. Under the first interpretation, holder of record could be Cede or Cudd and Mac, depending on the time at issue. See Op. 3. Under the second interpretation, holder of record could be only Chase and BONY. See Op. 3. Under the third interpretation, holder of record could be only the Appellants. See Op. 1. Ultimately, the phrase holder of record is susceptible to multiple, reasonable interpretations and is therefore ambiguous. See Coastal Barge Corp., 492 A.2d at 1246.

1. Holder of record, in Section 262, should see through the depository level because the interpretation must be consistent with the DGCL, which values stockholder protection.

The goal of statutory interpretation is to ascertain the legislature's intent. Taylor, 14 A.3d at 539. Accordingly, the first step in clarifying ambiguous language is to look at the entire DGCL to

determine the legislature's intent for Section 262. Id. at 538. A well-settled rule of statutory construction is the doctrine of in pari materia, which requires that all statutes within the DGCL be read and interpreted as a whole rather than in isolation. Richardson v. Bd. of Cosmetology & Barbering, 69 A.3d 353, 353 (Del. 2013). Thus under this doctrine, the Court should look to other DGCL provisions for guidance when determining the legislative intent.

To begin, the DGCL affords autonomy and protections to stockholders rather than allowing the corporation, or its board of directors, to have ultimate control. See, e.g., Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) ("[A corporation's] shareholders take precedence over any interest possessed by a director ... or [interests] not shared by the stockholders generally."); In re John Q. Hammons Hotels Inc. S'holder Litig., 2009 WL 3165613, at *12 (Del. Ch.) (noting importance of special committee to prevent transaction that is against stockholders' best interest). However, Delaware law also provides restrictions on stockholder rights, which prevent abuse from both stockholders and corporations.

For example, Section 218 permits stock flexibility, allowing the designation of a voting trustee and creation of a voting trust. 8 DEL. C. § 218 (2014). As a way to protect corporations, a voting trust agreement must be in writing and available upon request. Id. § 218(a), (b); see also Appon v. Belle Isle Corp., 46 A.2d 749, 756 (Del. Ch. 1946) ("[T]he state has granted a permissive power to create [voting trusts] in a limited extent."). Similarly, Section 141 provides stockholders the right to review corporate records and vote to remove

directors of the corporation. 8 DEL. C. § 141 (2014). However, these rights are not unlimited; for example, voting to remove a director is only available if permitted by the certificate of incorporation or in instances for cause. Id. § 141(k)(1). Thus, Section 141 is also interpreted to protect stockholders' rights while balancing the rights of corporations. See, e.g., In re MONY Group, Inc. S'holder Litig., 853 A.2d 661, 673-74 (Del. Ch. 2004) ("[G]enerally, shareholders have only two protections ... sell[ing] their stock ... [or voting] to replace incumbent board members." (quoting Blasius Indus. Inc. v. Atlas Corp., 564 A.2d 651, 654 (Del. Ch. 1988))).

In this case Section 262 should be interpreted in the same light as other DGCL provisions—centralized around protecting stockholders. As such, interpreting Section 262 in a similar manner, with the purpose of protecting stockholders and their autonomy, would necessitate an interpretation that makes appraisal rights readily available. See generally 8 DEL. C. § 262. For example, these provisions, detailed above, share similar qualities: they all grant stockholders a particular right, and that right is balanced with codified restrictions simultaneously protecting corporations—for Section 262, the procedural requirements prevent petitioner abuse. Compare 8 DEL. C. § 218 (allowing stockholders to create a voting trust *but only if* it is in writing and available for inspection), and 8 DEL. C. § 141 (granting stockholders the ability to remove directors *but only if* the removal is for cause or through the certificate of incorporation), with 8 DEL. C. § 262 (giving stockholders the right of

appraisal *but only if* the petition is perfected pursuant to subsection (d)).

In the same way, appraisal rights protect dissenting stockholders' interest by affording them a remedy. If holder of record is deemed to include the depository level, the definition will limit stockholders' access to appraisal rights because for every appraisal demand DTC will print the unique stock certificate, which will violate the requirement that shares be continuously held by the holder of record. See, e.g., Op. 4. As a result, Section 262 should be interpreted to further the purpose of protecting stockholders, consistent with an interpretation similar to that of Sections 141 and 218. That is, holder of record should see through the depository level as the "holder."

2. The legislative intent and purpose behind Section 262 is to protect dissenting stockholders, and therefore holder of record should be interpreted to further such purpose.

The next step is for the Court to consider the legislative purpose for the language in Section 262. Dewey Beach Enter., 1 A.3d at 307-08. The purpose of a statute's language can help to establish the overall legislative intent, which is the ultimate goal for statutory interpretation. Rubick v. Security Instrument Corp., 766 A.2d 15, 19 (Del. 2000). The fundamental rule of determining the purpose of a law is to identify "the mischief intended to be abated and finding the remedy intended to be afforded." Heffernan v. Chester-Cambridge Bank & Trust Co., 91 A. 385, 399 (Del. 1914).

First, the legislative history is instructive as to both legislative intent and purpose. The "mischief" the legislature sought

to remedy, with Section 262, was the loss of value incurred by a dissenting stockholder following a merger. See Salt Dome Oil Corp., 41 A.2d at 587. Over the years, Section 262 has been expanded to include other types of corporations, a broader range of applicable mergers, and thus a larger pool of potential petitioners. Compare 8 DEL. C. § 262 (2009) (effective August 1, 2009 until July 31, 2010) (allowing appraisal rights for mergers or consolidations pursuant to Sections 251(g), 252, 254, 257, 258, 263, and 264), with 8 DEL. C. § 262 (2013) (effective currently) (further extending appraisal rights to mergers or consolidations pursuant to Sections 255 and 256).

In addition, a committee report provides a purpose clause for an amendment made to Section 262 in 2013. See 2013 DE S.B. 47 (May 15, 2013). The amendment added stockholders from public benefit corporations as potential petitioners for Section 262, and the report establishes that the Delaware legislature continues to expand the remedy to encompass increasing numbers of entities. Id. (“Increasing interest in public benefit corporations necessitates their inclusion in the Code.”). Thus, the legislature amended Section 262 to remedy (appraisal rights) this mischief (inadequate stock compensation), including additional merger transactions. See 8 DEL. C. § 262 (2013). These additions establish the legislature’s intent to continue to expand the remedy’s availability and application to petitioners.

Similarly, an amendment from 1967 is also instructive. Leading up to the 1960s, all stock was held as physical, printed certificates.²

² James S. Rogers, Policy Perspectives on Revised U.C.C. Article 8, CLA LAW REV. 1432, 1442 (1996) (noting the paper crisis).

The amendment to Section 262 added the definition of "stockholder" for the purposes of appraisal rights. Ch. 50, 56 Del. Laws 151 (1967). At this point, the federally mandated depository level³ was nonexistent, and therefore the beneficial owner or the custodial bank was the only available holder of record to oversee stock.⁴ Even after the implementation of the electronic depository system in the 1970s, the legislature never amended Section 262 to further clarify the definition of "stockholder." See 8 DEL. C. § 262(a). Consequently, the legislature's silence and failure to subsequently amend Section 262 should instruct this Court because "inaction may well constitute acquiescence and be indicative of the legislative intent." Watson v. Burgan, 610 A.2d 1364, 1368 (Del. 1992). Therefore, this Court should adopt the interpretation of the original amendment to which the legislature acquiesced. Thus, holder of record cannot include the depository level. Consequently, this interpretation also furthers the purpose of curing the mischief that the legislature sought to remedy.

Therefore, the purpose of the statutory expansion is to provide a more readily available remedy. The mischief to dissenting stockholders is mitigated by the remedy of an appraisal. The prior versions of Section 262, the committee report, and the history of the depository

³ Federal law is instructive. See 15 U.S.C. § 78(c)(23)(A) (2012) (defining "clearing agency" as "security depository ... in connection with a system for the central handling of securities"); 17 C.F.R. § 240.14c-1(i) (2015) (defining "record holder" as "any broker, ... bank, association or other entity that ... holds securities"). That is, the depository level is not considered a record holder. See Kurz v. Holbrook, 989 A.2d 140, 175 (Del. Ch. 2010) (reversed on other grounds) ("[T]reating the banks and brokers ... as record holders should enhance the legitimacy of [Delaware] law.").

⁴ See Willa E. Gibson, 30 DEL. J. CORP. L. 819, 849-50 (2005).

level establish the purpose of providing the appraisal remedy to an increasing number of corporate entities, which is furthered by a liberal interpretation in favor of stockholders.

In this case, any interpretation that recognizes the depository level as the holder of record goes directly against the legislative purpose and intent. If the Court defines holder of record as the party whose name is on the corporate records, thus recognizing the depository level, then stockholders' ability to exercise their appraisal rights will be limited, which is against the legislative purpose. For instance, there are very few occasions where a stockholder will not be precluded from appraisal rights once the appraisal demand triggers DTC to print unique, corresponding certificates. See Op. 3, 5-6; see also In re Appraisal of Dell Inc., 2015 WL 4313206, at *7-8. However, ignoring any "transfer" or reissuance from the depository level, in regards to interpreting holder of record, avoids this limitation.

Second, in addition to the legislative history, Delaware courts have interpreted the purpose of Section 262 "as a check against opportunism by a majority shareholder" and has become a protection in an impending merger. In re Ancestry.Com, Inc., 2015 WL 66825, at *4. Further, Delaware courts acknowledge one purpose of Section 262 is that appraisal rights encourage the sale of stock. See In re Appraisal of Dell Inc., 2015 WL 4313206, at *23. Historically, however, appraisal rights have not been used to check opportunism by majority stockholders due to the agency problem (without substantive stock ownership, minority stockholders have little financial incentive to

utilize appraisal rights).⁵ Fortunately, appraisal rights pass with the sale of stock, encouraging a secondary market. In re Appraisal of Dell Inc., 2015 WL 4313206, at *23. Thus, there is a robust appraisal market because stockholders acquiring vast quantities of stock utilize appraisal for profit. Consequently, "appraisal can serve as a bulwark against sloth, negligence, or unconscious bias in the sales process."⁶ Because "[t]he [DGCL] is an enabling statute that provides great flexibility for creating the capital structure of a Delaware corporation," Shintom Co., 888 A.2d at 227, the legislative purpose would best be served with a liberal interpretation of holder of record.

In the present case, the interpretation of holder of record that provides the most protection for minority stockholders is one that looks through the depository level. Such an interpretation will protect dissenting stockholders from a sophisticated corporation, see generally Progressive Intern. Corp. v. E.I. Du Pont de Nemours & Co., 2002 WL 1558382, at *11 (Del. Ch.), and remedy the mischief of inadequate compensation.

- iii. Holder of record should be interpreted to not include the depository level because such an interpretation would produce an absurd result.

Appraisal rights were created to provide dissenting stockholders adequate compensation. See In re Ancestry.Com, Inc., 2015 WL 66825, at *4. "It is an elementary canon of statutory interpretation that a statute should be interpreted in a manner which avoid[s] an absurd or

⁵ Charles R. Korsmo & Minor Myers, Appraisal Arbitrage and the Future of Public Company M&A, 92 WASH. U. L. REV. 1551, 1555-56 (2015).

⁶ Korsmo & Myers, supra note 5, at 1555.

mischievous result.” In re Estate of Tinley, 2002 WL 31112197, at *3 (Del. Ch.) (quoting Lewis v. State, 626 A.2d 1350, 1356 (Del. 1993)).

If the Court determines that the depository level is considered the holder of record, it will lead to an absurd result. Here, like in In re Appraisal of Dell Inc., the valid exercise of appraisal rights triggered a change in the name printed on the certificates (which had to be printed under the name of Cede to protect the corporation) unbeknownst to the beneficial owners. See 2015 WL 4313206, at *7; Op. 3. As a result, in In re Appraisal of Dell Inc., the beneficial owners’ appraisal rights were foreclosed. 2015 WL 4313206, at *7. The same thing is happening here, an absurd result, which cannot be the intention of the legislature. Coastal Barge Corp., 492 A.2d at 1246. Therefore, this Court should interpret holder of record to see through the depository level as to avoid this absurd result and rather adopt an interpretation that furthers the overall legislative intent.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Chancery’s grant of summary judgment because, based on the legal precepts stated above, the Appellee was not entitled to judgment as a matter of law.

Respectfully submitted,

/s/ Team F

Team F, Counsel for
Petitioners-Below, Appellants

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