

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
PRELIX THERAPEUTICS, INC.,	:	of the State of Delaware
a Delaware corporation,	:	
	:	C.A. No. 10342-CM
Respondent Below,	:	
Appellee	:	

APPELLANTS' OPENING BRIEF

Team H
Attorneys for Appellants
February 5, 2016

Table of Contents

TABLE OF CITATIONS..... iv

NATURE OF PROCEEDINGS..... 1

SUMMARY OF ARGUMENT..... 2

STATEMENT OF FACTS..... 5

ARGUMENT..... 7

 I. SECTION 262(A) DOES NOT REQUIRE LONGPOINT OR ALEXIS TO PROVE
 THAT THEIR SHARES WERE NOT VOTED IN FAVOR OF THE MERGER
 PRIOR TO THE DATE ON WHICH THEY ACQUIRED THESE SHARES 7

 A. Question Presented 7

 B. Scope of Review 7

 C. Merits of Argument..... 8

 1. The plain language of Sections 262(a) and 262(e)
 demonstrates that the Delaware General Legislature
 did not intend that a beneficial owner that purchased
 its shares after the record date would have to prove
 that these shares were not already voted in favor of
 the merger 8

 a. The requirements of Section 262(a) apply to
 record holders, not beneficial owners 8

 b. Section 262(a) does not require record holders
 to trace the histories of their individual
 shares 9

 c. Section 262 also does not contain a requirement
 for share-tracing for beneficial owners 11

 d. Section 262(e) allowed beneficial owners, whose
 record holders had sufficient shares that were
 not voted in favor of the merger, to file a
 petition for appraisal rights but did not
 require them to trace their shares 12

 2. Public policy arguments favoring share-tracing are
 inapposite to the judicial review of this case 14

 II. DELAWARE LAW SHOULD DETERMINE APPRAISAL RIGHTS FOR STOCK
 SHARES WITH REFERENCE TO THEIR BENEFICIAL OWNERS 16

 A. Question Presented..... 16

B. Scope of Review.....	16
C. Merits of Argument.....	17
1. Section 262(e) would be largely futile if beneficial owners were beholden to the activities of their record holders	17
a. The Chancery Court has failed to properly address the interests at stake for beneficial owners	17
b. The purpose of the continuous ownership requirement comports with the actions of beneficial owners seeking appraisal through Section 262(e)	20
2. Granting beneficial owners appraisal rights would strengthen the operation of the securities markets	21
a. Applying the methodology of Dell improperly incentivizes appraisal arbitrage	21
b. Clarity of economic ownership of securities would be enhanced by applying DTC look-through ..	23
CONCLUSION.....	24

Table of Citations

DELAWARE SUPREME COURT CASES	PAGE (S)
<u>AeroGlobal Capital Mgmt., LLC v. Cirrus Indus.</u> 871 A.2d 428 (Del. 2005)	7
<u>Alabama By-Products Corp. v. Cede & Co.</u> 657 A.2d 254 (Del. 1995)	19, 20
<u>Alexander Indus., Inc. v. Hill</u> 211 A.2d 917 (Del. 1965)	16
<u>Brunswick Corp. v. Bowl-Mor Co.</u> 297 A.2d 67 (Del. 1972)	17
<u>Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.</u> 794 A.2d 1141 (Del. 2002)	7
<u>Delmarva Power & Light Co. v. City of Seaford</u> 575 A.2d 1089 (Del. 1990)	17
<u>Dutra de Amorim v. Norment</u> 460 A.2d 511 (Del. 1983)	17
<u>Fiduciary Trust Co. v. Fiduciary Trust Co.</u> 445 A.2d 927 (Del. 1982)	17
<u>Gilbert v. El Paso Co.</u> 575 A.2d 1131 (Del. 1990)	17
<u>Pike Creek Chiropractic Ctr. v. Robinson</u> 637 A.2d 418 (Del. 1994)	17
<u>Vanaman v. Milford Memorial Hosp.</u> 272 A.2d 718 (Del. 2010)	16

DELAWARE CHANCERY COURT CASES	PAGE (S)
<u>In re Ancestry.com</u> No. 8173-VCG, 2015 Del. Ch. LEXIS 2 (Del. Ch. Jan. 5, 2015)	8, 12, 13, 14
<u>In re Dell Inc.</u> No. 9322-VCL, 2015 Del. Ch. LEXIS 184 (Del. Ch. July 13, 2015) ..	Passim

In re Transkaryotic Therapies, Inc.
No. 1554-CC, 2007 Del. Ch. LEXIS 57 (Del. Ch. May 9, 2007)
..... 2, 11, 12, 14, 15

Kurz v. Holbrook
989 A.2d 140 (Del. Ch. 2010)..... 21

Merion Capital LP v. BMC Software, Inc.
No. 8900-VCG, 2015 Del. Ch. LEXIS 3 (Del. Ch. Jan. 5, 2015) Passim

LEGISLATIVE MATERIALS **PAGE(S)**

8 Del. C. § 262 Passim

Del. Const. art. IV § 11(4)..... 16

OTHER AUTHORITIES **PAGE(S)**

Gaurav Jetley and Xinyu Ji, Appraisal Arbitrage - Is There a Delaware Advantage?
The Bus. Lawyer forthcoming Spring 2016, online version Dec. 28, 2015) available at
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616887..... 21

George S. Geis, An Appraisal Puzzle
105 Nw. U.L. Rev. 1635 (2011) 11

Memorandum Opinion (Op.)..... 18

NATURE OF PROCEEDINGS

Appellants, petitioners below, filed timely petitions for appraisal of their shares of Prelix Therapeutics, Inc. under Section 262(e) of the Delaware General Corporation Law in the Court of Chancery on May 6, 2015. Appellee, respondent below, filed a motion for summary judgment in opposition. Chancellor Renee Mosley granted the motion for summary judgment on January 13, 2016. Appellants filed a timely notice of appeal on January 15, 2016.

Appellants request that this Court reverse the decision of the Chancery Court and deny the respondent's motion for summary judgment. Appellants further ask that their petitions for appraisal of their shares be granted.

SUMMARY OF ARGUMENT

Section 262 (“§ 262”) of the Delaware General Corporation Law does not require beneficial owners to demonstrate that the shares they acquired after the voting record date were not previously voted in favor of the merger. The § 262(a) requirement that shares be continuously held from the record date to the actual event of the merger ought not apply to beneficial shareholders, like these petitioners, for essential policy concerns.

Respondent Prelix first contends that Longpoint and Alexis must prove that their shares were not already voted in favor of the merger. The Chancery Court has consistently held that the § 262(a) requirements that petitioners for appraisal must meet, including the provision that shares that are to be appraised must not have been voted in favor of the merger, are applicable only to record holders, and therefore that beneficial owners are under no obligation to show that their shares were not previously voted in favor of the merger. See *In re Dell Inc.*, No. 9322-VCL, 2015 Del. Ch. LEXIS 184, at *70 (Del. Ch. July 13, 2015) (discussing *In re Transkaryotic Therapies, Inc.*, No. 1554-CC, 2007 Del. Ch. LEXIS 57 (Del. Ch. May 9, 2007)) (“In *Transkaryotic*, [the Chancery] court held that funds who bought shares after the record date for a merger could seek an appraisal for the shares purchased after the record date, without having to show that the shares were not voted in favor of the merger. Subsequent decisions have followed *Transkaryotic*.”). Record holders, an essential device for the efficient operation of the share transfer process, are

the guardians of shares for numerous beneficial owners with a diversity of interests, some of whom may be in favor of the merger and others, like Longpoint and Alexis, strongly opposed. When the Delaware General Legislature made the decision to direct the requirements of § 262(a) at record holders rather than beneficial owners, it understood the need to organize the complex share transfer process. A reading of § 262 in favor of Prelix's first contention would undermine this system.

Regarding Prelix's second contention, the legislative history surrounding the addition of subsection (e) to § 262 demonstrates Delaware's growing appreciation of the importance of granting beneficial owners appraisal rights which they can seek in their own names. Should the legislature not have been concerned with the ability of beneficial owners to seek the appraisal remedy, § 262(e) would not have been enacted, since the addition of subsection (e) makes the continuous holder requirement futile.

Public policy concerns argue in favor of assessing appraisal rights to the beneficial owners of shares, who reap the economic benefit from them and take on the downside financial risk as well. The *Dell* court's decision, and leading academic research, suggest that by not looking through DTC to the beneficial holders of shares at the time of the merger record date, appraisal arbitrage is encouraged. This allows sophisticated investors to unfairly reduce the risk they take on of deal failure, when contrasted with those holders who held shares at the record date and continued to hold them through the date

of the merger vote. This contradicts the original intention of the appraisal remedy, which aimed at allowing long term but dissenting investors to challenge company valuations at the time of a merger. Applying DTC Look-Through to beneficial owners, when assessing appraisal rights, would strengthen the operation of the securities markets by ensuring that only those who take on the risks of a merger opportunity - by holding shares at the record date - are able to avail themselves of the appraisal remedy for what they might believe will be a higher price. DTC Look-Through is also important for purposes of corporate management and a company's ability to assess who actually owns it. Introducing DTC Look-Through to the process of assessing appraisal rights would align the legislative intent behind Section 262, and especially its subsection (e), with the modern reality of trading markets that operate at a speed inconceivable to DGCL's original drafters.

Therefore, this Court should reverse the decision of the Chancery Court and grant to Longpoint and Alexis their petitions for appraisal.

STATEMENT OF FACTS

Petitioner-appellants Longpoint Investments Trust ("Longpoint") and Alexis Large Cap Equity Fund LP ("Alexis") are appealing Chancellor Renee Mosley of the Court of Chancery's January 13, 2016 decision to grant the motion for summary judgment in favor of respondent-appellee Prelix Therapeutics, Inc. ("Prelix").

Radius Health Systems Corp. ("Radius") acquired Prelix through a merger with Radius's acquisition subsidiary on April 16, 2015. When Radius announced their acquisition proposal on October 15, 2014, they offered \$14.50 per share, a marginal increase from the prior trading price of \$12.75. Radius, Prelix, and the subsidiary agreed to increase the price to \$15.00 in response to several lawsuits that charged the Prelix board of directors with breach of its fiduciary duties.¹ Despite the increase in the stock price, the Prelix stockholders who took their first votes on January 14, 2015 failed to produce the requisite votes to approve the proposed merger until they finally did so on February 17, 2015.

During this voting period, Longpoint and Alexis held a combined 5.4% of Prelix's outstanding common stock. Longpoint and Alexis had purchased their shares in the two weeks between the voting eligibility record date and the decision to adjust the price by \$0.50 per share. Contending that the stock price was still insufficient after the negligible increase, Longpoint and Alexis then claimed their appraisal

¹ These lawsuits alleged that Center Court Advisors had been on both sides of the deal, as a financier of Radius and an advisor to Prelix.

rights under Title 8, Section 262 of the Delaware General Corporation Law. Cede & Co. ("Cede"), who was the depository nominee for their shares, properly made appraisal demands on their behalf on January 13, 2015.

Longpoint and Alexis were never informed of the subsequent activity surrounding their shares during the January to February 2015 voting period. Prelix's transfer agent, under the authority of Cede through the Depository Trust Company ("DTC"), produced certificates for the company's shares and gave them to J.P. Morgan Chase ("J.P. Morgan") and Bank of New York Mellon ("New York Mellon") on January 23rd. As participants in the DTC, J.P. Morgan Chase held Longpoint's shares and New York Mellon held those of Alexis. On February 5th, J.P. Morgan and New York Mellon ordered Cede to permit the reissuance of the shares under "Cudd & Co" ("Cudd") and "Mac & Co," ("Mac") the new nominees for J.P. Morgan and New York Mellon, making Cudd and Mac the record holders and Longpoint and Alexis the beneficial owners. Cede, therefore, was no longer the record holder of the shares when the merger took place on April 16, 2015. All of the actions after February 5th were done without the knowledge or consent of Longpoint and Alexis.

ARGUMENT

I. SECTION 262(A) DOES NOT REQUIRE LONGPOINT OR ALEXIS TO PROVE THAT THEIR SHARES WERE NOT VOTED IN FAVOR OF THE MERGER PRIOR TO THE DATE ON WHICH THEY ACQUIRED THESE SHARES

A. Question Presented

Whether Section 262(a) mandates that shareholders that purchased their shares after the voting record date must first demonstrate that a prior owner did not already vote these shares in favor of a merger before the current owners are able to claim their appraisal rights.

B. Scope of Review

This Court reviews a Chancery Court decision to grant summary judgment *de novo*. See, e.g. *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1152 (Del. 2002). Summary judgment is appropriate only when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus.*, 871 A.2d 428, 443 (2005) (citing Super. Ct. Civ. R. 56(c)). Because both parties agree on the facts of this case, the only issue before this Court is whether, as a matter of law, Alexis and Longpoint have satisfied the requirements of § 262. See *Merion Capital LP v. BMC Software, Inc.*, No. 8900-VCG, 2015 Del. Ch. LEXIS 3, at * 19 (Del. Ch. Jan. 5, 2015)

(where the parties to an analogous appraisal dispute in a summary judgment ruling had agreed upon the facts, "the only issue that remain[ed] [was] whether, as a matter of law, [the petitioner] ha[d] met the statutory requirements of Section 262.").

C. Merits of Argument

1. The plain language of Sections 262(a) and 262(e) demonstrates that the Delaware General Legislature did not intend that a beneficial owner that purchased its shares after the record date would have to prove that these shares were not already voted in favor of the merger

- a. The requirements of Section 262(a) apply to record holders, not beneficial owners

The language of § 262 plainly and unambiguously permits Longpoint and Alexis to claim their appraisal rights, irrespective of the voting history for their respective shares. With regard to the particular question of voting for the merger, § 262(a) grants that "[a]ny stockholder of a corporation of this State. . . who has neither voted in favor of the merger or consolidation nor consented thereto . . . shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock." 8 Del. C. § 262(a). Where a statute does not have plausibly competing meanings, it is unambiguous and therefore must be given its plain meaning. See *In re Ancestry.com*, No. 8173-VCG, 2015 Del. Ch. LEXIS 2, at *21 (Del. Ch.

Jan. 5, 2015) (quoting *In re Kraft–Murphy Co., Inc.*, 62 A.3d 94, 100 (Del. Ch. 2013)) (“[A] statute is ambiguous only if it is reasonably susceptible of different interpretations”). Furthermore, the statute itself defines a “stockholder” as a “holder of record,” in this case Cede and later Cudd and Mac. 8 *Del. C.* § 262(a). Whoever may have held the shares, and what they did with their votes, before DTC transferred the shares to Cudd and Mac for J.P. Morgan and New York Mellon is irrelevant to this case according to the view of the General Legislature as expressed in § 262.

The Chancery Court has found § 262(a) to plainly state that it is the record holders of the stock, in this case Cudd and Mac, who must show that they did not vote the shares for which their beneficial owners are petitioning for appraisal in favor of the merger. *BMC Software*, 2015 Del. Ch. LEXIS 3, at *22 (“[262’s] requirements are directed to the *stockholder*—expressly defined as the *record holder*...whether it has voted the shares it seeks to have appraised in favor of the merger.”).

b. Section 262(a) does not require record holders to trace the histories of their individual shares

The Chancery Court has also rightly pointed to what is omitted from the language of § 262 to support its conclusion that the prior voting history of individual shares does not change the rights of current owners. Namely, § 262 has no requirement that a stockholder exercising their appraisal rights has to trace the activity of their shares’ prior owners. *Id.* at *11 (because “the unambiguous language of

the statute does not give rise to any such share-tracing requirement, and [the beneficial owner] has otherwise complied with the requirements of Section 262, I hold that [the beneficial owner] has perfected its right to appraisal.”).

When Prelix argues that Longpoint and Alexis must prove that their shares were not voted in favor of the merger as required under 262(a), it reads into the statute a demand outside of what the General Legislature actually wrote and beyond what the Chancery Court has interpreted the language to mean. The Chancery Court’s prior rulings that the record holders need only to have sufficient shares to “cover” the amount of shares for which these petitioners are claiming their appraisal rights, and therefore that even record holders do not have to examine the histories of these shares, are the appropriate rebuttal to Prelix’s argument that Longpoint and Alexis must prove that their shares were not previously voted in favor of the merger. See *id.* at *12 (“Noticeably absent from this language, or any language in the statute, is an explicit requirement that the stockholder seeking appraisal prove that the *specific shares* it seeks to have appraised were not voted in favor of the merger.”). Because § 262(a) is concerned with shareholders, and not their shares, and because it makes no mention of Prelix’s alleged requirement that beneficial owners must prove their shares were not voted in favor of the merger, the Chancery Court was correct in its holding that Prelix’s first contention must fail.

c. Section 262 also does not contain a requirement for share-tracing for beneficial owners

It may be argued to the contrary that the § 262 omission of a share-tracing for stockholders does not apply to the beneficial owners of these shares, but this interpretation would overlook the reality of the modern shareholding organizational complex. The Chancery Court has held that the vote of a record holder cannot be assumed to be the conduct of its various individual beneficial owners. *Transkaryotic Therapies*, 2007 Del. Ch. LEXIS 57, at *5 (writing that the respondent "incorrectly assume[d] that [the record holder's] aggregate share vote on the . . . merger may be traced to 'specific shares' attributable to specific beneficial owners"). This is especially true here, where Longpoint and Alexis were unaware not only of how their original record holder Cede distributed its votes, but also were unaware that they had an entirely different record holder as of February 5th. Additionally, the sheer volume of the shares that DTC holds makes it nearly impossible for any individual shares to truly belong to any beneficial owner in particular. See George S. Geis, *An Appraisal Puzzle*, 105 Nw. U.L. Rev. 1635, 1653 (2011) ("If, counterfactually, all shares were identified and tracked through a unique serial number, then it would be easy to look back at how each specifically identified share was actually voted to determine whether it was eligible for appraisal.").

The Chancery Court provided clarity when it emphasized that only the record holder, and not the beneficial owner, was relevant to

determining standing under § 262. *Transkaryotic Therapies*, 2007 Del. Ch. LEXIS 57, at *12 (Del. Ch. May 2, 2007) (“The relationship between, and the rights and obligations of, a registered stockholder and his beneficial owner are not relevant issues in an appraisal proceeding [T]he determinative record regarding compliance with § 262 requirements is that of the record holder.”).

Prelix, therefore, can only use the unknown voting activities of record holders Cudd and Mac against the claims made by Longpoint or Alexis, respectively. Longpoint and Alexis, as the beneficial owners of the stock, are themselves exempt from any scrutiny of the history of their shares. *See Ancestry.com*, 2015 Del. Ch. LEXIS, at *24 (“*Even if* Section 262 did impose the voting/consent prohibition of subsection (a) on a beneficial owner petitioning for appraisal”) (emphasis added). The important distinction between the obligations of the record holder and the beneficial owner are pertinent to a dispute such as this one. The preferences of the beneficial owner petitioning for appraisal are known, but the holder of the shares is an entity without a single mind.

d. Section 262(e) allowed beneficial owners, whose record holders had sufficient shares that were not voted in favor of the merger, to file a petition for appraisal rights but did not require them to trace their shares

The General Legislature added § 262(e) to permit a beneficial owner to petition for its own appraisal rights, where they previously had to go through their record holders. *See Ancestry.com*, 2015 Del.

Ch. LEXIS, at *17-18. While this amendment granted beneficial owners the ability to petition for appraisal, it did nothing to alter their obligations, such as by adding a share-tracing requirement. *Id.* at *27 (“Nothing in [262(e)] suggests that the General Assembly intended to require beneficial owners who made post record-date purchases to show that their specific shares were not voted in favor of the merger.”). In *Merion v. BMC Software*, the Chancery Court explicitly rejected the argument that the addition of 262(e) should be read as the imposition of such a requirement. *BMC Software*, 2015 Del. Ch. LEXIS 3, at *24. (“[262(e)] exists to aid those seeking appraisal by, among other things . . . granting beneficial owners the ability to file appraisal actions. It is antithetical to that intention to interpret the language of subsection (e) to impose, on the statute as a whole, an additional hurdle for appraisal petitioners.) Simply, the General Legislature added § 262(e) to make the appraisal process easier for beneficial owners, not harder.

The beneficial owner still must demonstrate only that the record holder held enough shares that it did not vote in favor of the merger to cover those held for the beneficial owner seeking appraisal. See *Ancestry.com*, 2015 Del. Ch. LEXIS, at *19 (holding that a beneficial owner whose record holder had sufficient shares to cover those for which the beneficial owner sought appraisal had standing). It also requires that the record holder still be the one to actually make the demand. *Id.* at 23. Alexis and Longpoint fulfilled this requirement when Cede made the demands on their behalf on January 13, 2015.

2. Public policy arguments favoring share-tracing are inapposite to the judicial review of this case

As Prelix may contend, it is theoretically possible that many of the shares that a beneficial owner owns were acquired after the record date, even such a high number of them that they would effectively have been necessary for the merger to have been approved. This policy consideration, however, is irrelevant to the role of the courts in evaluating the plain language of a statute. In *Transkaryotic Therapies, Inc.*, where the respondent claimed that the Chancery Court's reading of 262 could be abused by shrewd investors, the court responded that this was outside of the scope of their authority to address. See *Transkaryotic Therapies*, 2007 Del. Ch. LEXIS 57, at *14-15 ("The Legislature, not this Court, possesses the power to modify § 262 to avoid the evil, if it is an evil, that purportedly concerns respondents.").

Even if Alexis and Longpoint were attempting to take advantage of this alleged loophole, ultimately the responsibility lies with the General Legislature, and not this Court. See *BMC Software*, 2015 Del. Ch. LEXIS 3, at *26-27 ("As a member of the judicial branch, it is inappropriate for me to presume to rewrite an unambiguous statute to address a problem that has not occurred, may not occur, and, in any event, is certainly not before me now."). See also *Ancestry.com*, 2015 Del. Ch. LEXIS, at *23 ("Such a concern may of course be addressed by the legislature, but it is insufficient to permit me to look past the unambiguous language of the statute.").

There are also practical concerns that favor the petitioners' position. Record owners like Cede, and presumably Cudd and Mac, are entrusted with the shares of numerous beneficial owners, all of whom have their own opinions on the proposed merger. Notably, the Chancery Court has cited the complexity of the record holder-beneficial owner relationship as a reason for putting the compliance requirements, on the record holder rather than the beneficial owner. See *Transkaryotic Therapies*, 2007 Del. Ch. LEXIS 57, at *12-13 ("The law is unequivocal. A corporation need not and should not delve into the intricacies of the relationship between the record holder and the beneficial holder and, instead, must rely on its records as the sole determinant of membership in the context of appraisal.").

II. DELAWARE LAW SHOULD DETERMINE APPRAISAL RIGHTS FOR STOCK SHARES WITH REFERENCE TO THEIR BENEFICIAL OWNERS

A. Question Presented

Whether this Court should overturn its prior rulings and Delaware case law interpreting the Record Holder Requirement of Section 262 of Delaware General Corporation Law, to allow "look through" of the Depository Trust Company to the holders of beneficial ownership of the stock shares in question, in applying the continuous holding requirement of Section 262 when ascertaining appraisal rights.

B. Scope of Review

This Court has authority to "receive appeals from the Court of Chancery and to determine finally all matters of appeal in the interlocutory or final decrees and other proceedings in Chancery." Del. Const. art. IV, § 11(4).

Regarding motions for summary judgment, in *Vanaman v. Milford Memorial Hosp.*, 272 A.2d 718, 720 (Del. 1970), this Court held that "a summary judgment may be granted only if, on undisputed facts, the moving party establishes that he is entitled to that judgment as a matter of law." This Court must, then, first view the acts in question in a light most favorable to the nonmoving party, here Alexis and Longpoint. *Alexander Indus., Inc. v. Hill*, 211 A.2d 917 (Del. 1965). The Court must then determine if an issue of fact for trial exists which, were it resolved in favor of Alexis and Longpoint, would entitle them to judgment. *Id.* If not, this Court must then proceed to questions of law.

This Court's standard of review is *de novo*. *Pike Creek Chiropractic Ctr. v. Robinson*, 637 A.2d 418 (De. 1994). The Court is particularly empowered to reach its own conclusions where the findings of the trial court arose from deductions, processes of reasoning or logical inferences. *Dutra de Amorim v. Norment*, 460 A.2d 511 (Del. 1983); *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927 (Del. 1982).

In sum, this Court must determine whether under all the circumstances, Prelix was entitled to summary judgment. *Brunswick Corp. v. Bowl-Mor Co.*, 297 A.2d 67, 69 (Del. 1972). See also *Delmarva Power & Light Co. v. City of Seaford*, 575 A.2d 1089 (Del. 1990); *Gilbert v. El Paso Co.*, 575 A.2d 1131 (Del. 1990).

In this case however, where the Chancery court's ruling relied - admittedly reluctantly - on *stare decisis* and this Supreme Court's findings, this Court must review the law and the intent of its drafters, to ascertain whether it should overrule its precedent.

C. Merits of Argument

1. Section 262(e) would be largely futile if beneficial owners were beholden to the activities of their record holders

a. The Chancery Court has failed to properly address the interests at stake for beneficial owners

In seeking their appraisal rights through Section 262(e), Longpoint and Alexis indisputably complied with the requirements in

§§ 262(a) and 262(d)(1), yet their efforts to seek their appraisal rights are challenged here because their record holder, Cede, followed orders from J.P. Morgan and Bank of New York Mellon to reissue the stocks to Cudd and Mac, without any consent or even awareness on the part of the petitioners. See Op. at 3. The court below analyzed these proceedings according to important *stare decisis* principles, yet importantly noted that this Court has the ability to alter the course of the relevant legal issues. Op. at 4 (“[A]ny departure from this Court’s prior opinions on the relevant issues must come from the Delaware Supreme Court.”). Moreover, Chancery recognized that changes in the method of interpretation and application of the statute are needed and that this Court - as opposed to the legislature - must make them. *Dell*, 2015 Del. Ch. LEXIS 184, at *49 (discussing *Schenck v. Salt Dome Oil Corp.*, 27 Del. Ch. 234, 34 A.2d 249 (Del. Ch. 1943)) (quotation marks removed). Chancery’s continued strict interpretation of the continuous holding requirement is grounded in adhering to *stare decisis* and predictability of enforcement. Now, the policy must be revised.

In adhering to an interpretation of strict statutory construction, Chancery has, concededly, previously held that when the record holder has changed between the record date and the merger date, the continuous holder requirement has not been met. *Id.* at *24. The Chancery Court, however, has sidestepped beneficial owners’ concerns regarding record ownership changes, reasoning that because the decision to use depository nominees is a “voluntary” one, a beneficial

owner who does so essentially "assume[s] the risk that the intermediaries might act contrary to [their] interests." *Id.* at *32 (quoting *Alabama By-Products Corp. v. Cede & Co*, 657 A.2d 254, 262 (Del. 1995)) (quotation marks removed).

This characterization of beneficial owners as consenting risk takers ignores the extremely important role of DTC and Cede not only to these owners but also to the foundation of the modern securities markets. Appraisal rights for shares have been statutorily embedded in the Delaware General Corporation Law since 1899. *Id.* at *43. At that time, lacking nearly any form of electronic communication, the question of who owned shares in a Delaware corporation was readily ascertainable. The stock certificates were in physical form and when transferred, acknowledgement of such transfer and of new ownership (and derivation of economic benefit therefrom) was visible to the naked eye on the physical share itself. The drafters of the DGCL did not and could not have anticipated the speed and volume with which shares are traded today.

The federally mandated system of share immobilization, enacted to clear up paperwork hurdles given increased volume of trading in stock shares, effectively compelled Delaware corporations to "outsource one part of the stock ledger - the DTC participant list - to DTC." *Id.* *33. As Chancery noted, "the depository system solved the paperwork crisis" by streamlining how shares were traded. *Id.* at *3-5. It is misguided to place the onus on the beneficial owners to monitor their record holders, as Chancery's opinion in *Dell* would continue to

require. The addition of § 262(e) should be viewed as an ideal compromise of granting beneficial owners new rights while maintaining the same organizational framework through the DTC. Requiring beneficial owners to track changes in their record holder that occur without their knowledge is incompatible with the goals of § 262(e) to expand the authority of beneficial owners.

- b. The purpose of the continuous ownership requirement comports with the actions of beneficial owners seeking appraisal through Section 262(e)

This Court has recognized that there is nothing inherently necessary about a continuous holding requirement in an appraisal action. Unlike in a derivative suit where the court must adhere to the “fundamental notion that the shareholder maintain a sufficient property interest in the corporation,” the only reason that continuous holding is an issue in an appraisal action is because the General Legislature has decided that it is. See *Alabama By-Products Inc.*, 657 A.2d at 266 (“[T]he continuous stock ownership requirement needed to maintain standing in derivative actions does not apply in the context of an appraisal proceeding. Any nexus between stock ownership and standing is controlled by the statutory scheme.”). In this case, there is nothing besides ambiguous statutory language to support the notion that the record holder cannot change between the record date and the merger date. The beneficial owners’ interest in the corporation remains exactly the same regardless of what entity is the legally defined holder of their shares: they are dissatisfied with the price

at which their shares were valued and as such removed themselves from the merger proceedings.

2. Granting beneficial owners appraisal rights would strengthen the operation of the securities markets

a. Applying the methodology of *Dell* improperly incentivizes appraisal arbitrage

As noted by Chancery in its *Dell* holding, revising the interpretation of § 262 would allow Delaware corporations to “benefit from looking through DTC to the holdings of the participant banks and brokers. Reducing the number of shares available for appraisal arbitrage is one area [of benefit] that springs to mind.” *Kurz v. Holbrook*, 989 A.2d 140, 174 (Del. Ch. 2010) (*re’ved on other grounds*).

The way the system currently operates, arbitrageurs are capable of buying shares in a corporation after an announcement of a merger. They then hold shares through the effective merger date, and seek the appraisal remedy in order to reap what their proprietary research has predicted will be a higher valuation of the company at the time of the effective date. See generally, Gaurav Jetley and Xinyu Ji. *Appraisal Arbitrage - Is There a Delaware Advantage?*, *The Bus. Lawyer*, forthcoming Spring 2016, online version (Dec. 28, 2015) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616887.

Such a perverse scheme undermines the legislative purpose behind the enactment of § 262’s appraisal remedy, which was designed to safeguard the economic rights of dissenting minority shareholders who

did not vote affirmatively for a merger and no longer want to remain owners of the company. Appraisal arbitrageurs utilize their massive resources - those unavailable to average investors - in order to conduct due diligence on prospective investments and determine the likelihood of their receiving a higher appraisal valuation. This results in an unfair playing field for equity investors.

[A]llowing a petitioner to delay [until after the record date] the purchase of shares on which appraisal is sought does in fact favor appraisal arbitrage. ... [B]y delaying their investment in the target's stock until as close to the valuation date (that is, the date on which the transaction closes) as possible, arbitrageurs are able to benefit from better information about the value of the target and, potentially, to avoid taking on a deal with a high risk of failure. One way to rebalance the playing field would be to allow appraisal only on shares acquired prior to the record date.

Appraisal Arbitrage at 54-55. Arbitrageurs should not be able to capitalize on new information that emerges to the market between the record date for share ownership and the effective date of the merger. Only those who beneficially own shares on the record date deserve the potential appraisal remedy.

In this case, as it happened, the issuance of new share certificates in the names of Cudd and Mac did in fact occur before the merger was voted upon, but after the initially scheduled original

January 14, 2015 shareholder vote. Investors who sought exposure to the merger opportunity but whose shares were - unbeknownst to them - reissued in different names should be able to profit from any appraisal arbitrage opportunity if they beneficially owned the shares before the record date. Looking through DTC to determine beneficial ownership would guarantee that only those investors who took on the risk of deal failure, by buying before the shareholder meeting and merger ratification, would be able to profit from potential arbitrage opportunities.

b. Clarity of economic ownership of securities would be enhanced by applying DTC look-through

Drafters of the Delaware General Corporation Law recognized the importance of a corporation's being able to determine who its shareholders are, in an economic sense, since they literally own the company. Share immobilization and the creation of Cede removed the shareholder list as a sure source of information about who is reaping the economic benefits of share ownership. As Chancery recognized in *Dell*, rather than providing clarity about a firm's ownership structure, "a legal rule that looks no further than Cede has the opposite effect. It masks the implications of beneficial ownership and promotes uncertainty." *Dell*, 2015 Del. Ch. LEXIS 184, at *50. Corporations must know who owns their shares - in an economic, not a paperwork sense - in order to act in their best interests and provide them with maximum profit.

