IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S REPLY BRIEF

Team I
Attorneys for Appellee
February 5, 2016

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NATURE OF PROCEEDINGS

On November 24, 2015, respondent below-appellee, Prelix Therapeutics, Inc. ("Prelix)" filed a motion for summary judgment in the Court of Chancery of the State of Delaware in and for New Castle County against petitioners below-appellants Longpoint Investments Trust ("Longpoint") and Alexis Large Cap Equity Fund LP ("Alexis") on two grounds. Prelix alleged that neither Longpoint nor Alexis were entitled to appraisal rights under Section 262 of the Delaware General Corporation Law ("DGCL")on two grounds. First, appellants failed to demonstrate that the shares they acquired post stockholder vote approving the merger were not voted in favour of the merger initially, as required by Section 262(a) of the DGCL. And second, while the initial demands were made on petitioner's' behalf by Cede & Co., they were ultimately reissued in the names of Cudd & Co. and Mac & Co., the nominees for J.P. Morgan Chase ("Chase") and Bank of New York Mellon (BNYM), respectively. Those nominees held Prelix shares on behalf of Longpoint and Alexis. This transfer of shares from the name of Cede & Co., to the nominees of Chase and BNYM disrupted the continuous chain of holding of the shares through the date of the merger as required by Section 262(a). (Mem. Op. at 1).

Although declining to preclude appraisal rights based on how previous owner(s) may have voted, the chancery court agreed with appellee's second argument and dismissed appellant's petition. Delaware law, according to the court, considers re-titling certificates representing the shares as a change in the Record Holder Requirement when done after the making of the demand for appraisal but

before the effective date of the merger, as required by Section 262(a).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, 5). Appellants, Longpoint and Alexis, appeal from the order of the Court of Chancery, in and for new Castle County, by Chancellor Renee Mosley to the Supreme Court of the State of Delaware in case number 10342-CM. Ntc. Of Appeal.

SUMMARY OF ARGUMENT

Longpoint and Alexis have not proven that the shares they petitioned for appraisal were not previously voted in favor of the merger transaction. For this reason, appraisal should be denied pursuant to Section 262(a) of the Delaware General Corporation Law. Section 262 should be read as a whole so that Section 262(a), read in light of Subsection (e), places a burden on the beneficial owner to prove that the shares petitioned for appraisal were not voted in favor of the merger. A reading of Section 262 that would not impose a share-tracing requirement on the beneficial owner of shares results in an absurd result not intended by the General Assembly.

Longponts and Alexis are not entitled to appraisal rights because they failed to adhere to the continuous holder requirement expounded in DGCL 262(a)(2). Under Delaware case law, it is paramount that an appraisal seeker adheres to the four standing requirements created by DGCL 262. This is so because the right to appraisal is absolute. The procedures laid out by the statue are unambiguous and clear, therefore following them would not impose a hardship on appraisal seekers.

However, allowing a transparency requirement as appellants request would create such a hardship. It would expound the level of paperwork necessary to keep track of all holders of stock, and allow appraisal arbitrageurs to gain leverage after the record date for a merger has passed.

STATEMENT OF FACTS

On October 15, 2014, Radius Health Systems Corp. ("Radius") announced its proposed merger acquisition of respondent corporation, Prelix Therapeutics, Inc. ("Prelix"), for $14.50 per share. (Mem. Op. at 2). The meeting of Prelix stockholders to vote on the proposed merger was originally noticed for January 14, 2015 (although it was later adjourned to February 17, 2015), and the record date for determining shareholders' entitlement to vote on the merger was set for December 4, 2014. (Mem. Op. at 3). Multiple lawsuits, now all settled and their litigation dismissed, were filed in connection to the proposed merger on the basis of breach of fiduciary duty on the part of Prelix directors. The following dismissal and settlement of those claims was the result of Radius, Prelix and the Radius acquisition subsidiary restructuring the merger agreement on December 18, 2015 to increase the acquisition price to $15.00 per Prelix share. Despite this increase, the Radius merger remained relatively unpopular with the Prelix stockholders.

Petitioners Longpoint and Alexis acquired their shares of Prelix after the December 4, 2014 record date for determining entitlement to vote on the merger, but before the December 18th announcement of the $0.50 per share increase in the merger price. (Mem. Op. at 3). Despite

the increase, Petitioners sought appraisal of their shares. At the time, Petitioners' shares were registered under Cede & Co., Depository Trust Company's ("DTC") nominee. Because Petitioners were not the registered owners of their shares, a demand for appraisal of their shares had to be made by Cede & Co. on their behalf pursuant to DGCL Section 262(a). On January 13, 2015, in conformity with Section 262(d)(1), petitioners delivered those demands.

Shortly after submitting the petitioners' demands for appraisal, DTC moved the appropriate number of shares from its "FAST" account (Fast Automated Securities Account) by directing Prelix's transfer agent to issue uniquely numbered certificates representing those shares. That issuance of certificates, in the name of Cede & Co., occurred on January 23, 2015, and the new certificates were delivered to J.P Morgan Chase and Bank of New York Mellon, the DTC participants holding the Prelix shares on behalf of Longpoint and Alexis, respectively. For insurance requirements and other business reasons, those firms instructed Cede & Co. to endorse the certificates so that they could be reissued in the names of Cudd & Co. and Mac & Co., nominees for J.P. Morgan Chase and Bank of New York Mellon, respectively. The endorsement occurred on February 5, 2015; that day, Prelix's transfer agent issued new certificates representing petitioners' shares in the names of those nominees. As a result, the maker of the demands for appraisal on which this case is premised - Cede & Co. - was no longer the holder of record of petitioners' shares by the time the merger occurred on April 16, 2015. Although it is undisputed that petitioners were unaware of the changes in record

ownership that occurred on February 5, 2015, and that they played no role in bringing about those changes, their May 6, 2015 petitions candidly disclosed that their shares were registered in the names of Cudd & Co. and Mac & Co. on behalf of Chase and BNYM - and not in the name of Cede & Co., in whose name the shares were registered at the time petitioners submitted their written demands for appraisal. Mem. Op. at 4. No other demands for appraisal were submitted with respect to the Prelix/Radius merger.

ARGUMENT

I. BECAUSE LONGPOINT AND ALEXIS HAVE NOT PROVEN THAT THE SHARES THEY PETITIONED FOR APPRAISAL WERE NOT PREVIOUSLY VOTED IN FAVOR OF THE MERGER TRANSACTION, APPRAISAL SHOULD BE DENIED PURSUANT TO SECTION 262(A) OF THE DELAWARE GENERAL CORPORATION LAW.

A. Question Presented

Whether a beneficial owner seeking appraisal of shares acquired after the record date for determining entitlement to vote on a merger but before the vote occurs must prove that the shares he seeks to appraise have not previously been voted in favor of the merger pursuant to Sections 262(a) and (e) of the Delaware General Corporation Law ("DGCL").

B. Scope of Review

A trial court's decision on a grant of summary judgment is subject to a de novo standard of review on appeal. *AeroGlobal Capital Management, LLC v. Cirrus Indus., Inc.,* 871 A.2d 428 (Del. 2005). Summary judgment is appropriate when the moving party demonstrates that "there are no issues of material fact in dispute and the moving

party is entitled to judgment as a matter of law." Del. Ch. Ct. R. 56(c). Here, it is conceded that Longpoint and Alexis themselves could not have voted in favor of the merger since the shares they petitioned for appraisal were acquired after the record date for determining entitlement to vote on the merger. Mem. Op. at 5. Left to be determined is whether, as a matter of law, Longpoint and Alexis have met the statutory requirements of Section 262(a) despite proffering no evidence that previous holders of the shares did not vote in favor of the merger.

C. Merits of the Argument

The right to an appraisal in a merger proceeding is entirely a creature of statute. *Loeb v. Schenley Indus., Inc*,. 285 A.2d 829 (Del. Ch. 1971); *Kaye v. Pantone, Inc.*, 395 A.2d 369 (Del. Ch. 1978). Through Section 262 of the Delaware General Corporation Law, the Delaware General Assembly grants minority stockholders in a merger transaction the right to appraise their shares so long as certain standing requirements are satisfied. In order to perfect the appraisal remedy according to the plain language of Section 262(a), a petitioner needs to demonstrate that the *record holder* of the stock for which appraisal is sought: (1) held those shares on the date it made a statutorily compliant demand for appraisal on the corporation; (2) continuously held those shares through the effective date of the merger; (3) has otherwise complied with subsection (d) of the statute concerning the form and timeliness of the appraisal demand; and (4) has not voted in favor of or consented to the merger with regard to those shares. Del. Code Ann. tit. 8, § 262(a) (2013). Importantly, the

appraisal statute states that "[a]s used in this section, the word 'stockholder' means a holder of record of stock in a corporation[.]" *Id*. Therefore, the burden is traditionally on record holders to establish their right to appraisal by proving compliance with each of these requirements. *Schneyer v. Shenandoah Oil Corp.*, 316 A.2d 570 (Del. Ch. 1974).

The General Assembly has not amended the definition of "stockholder" to include a beneficial owner. As a result, appraisal rights provided, or duties assigned, to a "stockholder" of shares in a corporation continues to belong solely to the record holder. However, a Chancery Court opinion in 2007 (discussed next) led the General Assembly to amend Section 262(e) in order to extend certain rights to beneficial owners. Del. Code Ann. tit. 8, § 262(e) (2013). These rights, in turn, impose duties on beneficial owners relating to the execution of those rights.

In *In re Appraisal of Transkaryotic Therapies, Inc.*, the court held that "[u]nder the literal terms of the statutory text and under longstanding Delaware Supreme Court precedent, *only a record holder*, as defined in the DGCL, *may claim* and perfect appraisal rights." 2007 Del. Ch. LEXIS 57, *10-11 (emphasis added). The General Assembly subsequently amended subsection (e) to allow a beneficial owner to (1) request information regarding the aggregate of objecting shares for purposes of assessing the cost to litigate an appraisal action, and (2) to grant a beneficial owner the right to file a petition for appraisal in his own name. *In re Appraisal of Ancestry.com*, 2015 Del. Ch. LEXIS 2, *17. It is precisely the application of subsection (e) to

the rest of Section 262 upon which Respondent's first argument rests: while the amended language of subsection (e) enhances beneficial owners' rights to petition for appraisal, it also imposes a burden on the beneficial owners to prove that those shares were not previously voted in favor of the merger pursuant to subsection (a) (the "share-tracing requirement").

1. Section 262(a), read in light of Subsection (e), places a burden on the beneficial owner to prove that the shares petitioned for appraisal were not voted in favor of the merger.

Subsection (e) begins by stating that "any stockholder who has complied with subsections (a) and (d) of this section . . . and who is otherwise entitled to appraisal rights" may commence an appraisal proceeding. Del. Code Ann. tit. 8, § 262(e) (2013). Stated differently, no appraisal proceeding may commence unless the holder of record has complied with requirements previously stated in (a) and (d). The subsection ends by stating that "[n]otwithstanding subsection (a) of this section, a person who is the beneficial owner of such stock . . . may, in such person's own name, file a petition or request from the corporation the statement described in this subsection." *Id*. If a beneficial owner chooses to commence an appraisal proceeding, he must ensure that the record owner of the shares complied with subsections (a) and (d). Therefore, the beneficial owner is required to prove that the shares he owns were not voted in favor of the merger before he acquired them.

a. The Court of Chancery's reliance on the plain language Section 262(a) is incomplete.

In two recent cases, *Merion Capital LP v. BMC Software* and *In re Appraisal of Ancestry.com.*, the Court of Chancery rejected respondent corporations' arguments that Section 262(e) as amended imposes a burden on beneficial owners to prove compliance with the voting requirements outlined in subsection (a). 2015 Del. Ch. LEXIS 3; 2015 Del. Ch. LEXIS 2. In so doing, the Court of Chancery held that subsection (a) is "clear and unambiguous," and that the plain language of Section 262(a) does not call for an independent share-tracing requirement on beneficial owners. *In re Appraisal of Ancestry.com*, 2015 Del. Ch. LEXIS at *21 (quoting *In re Krafft-Murphy Co., Inc.*, 62 A.3d 94 (Del. Ch. 2013)).

b. In light of the General Assembly's amendment to Section 262(e), the statute's interpretation is ambiguous with respect to requirements in subsection (a) as applied to beneficial owners who file petitions for appraisal.

While it is true that Section 262(a) assigns the burden of proving compliance with voting behavior to the record holder and not the beneficial owner, the Court of Chancery calls for an interpretation that excuses a certain category of petitioners (beneficial owners) from adhering to the same standing requirements expected of petitioners who are holders of record, causing ambiguity in the statute's interpretation in light of subsection (e) which this Court must resolve.[1] *E.g.*, *Ancestry.com*, 2015 Del. Ch. LEXIS 2. Additionally, the Court of Chancery states that "a statute is

[1] *See Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc.*, 36 A.3d 336, 342-43 (Del. 2012) ("At the outset, a court must determine whether the provision in question is ambiguous. . . . If it is ambiguous, we consider the statute as a whole, rather than in parts, and we read each section in light of all others to produce a harmonious whole.")

ambiguous . . . if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature." *In re Krafft-Murphy Co., Inc.*, 62 A.3d 94, 100 (Del. Ch. 2013). As Respondent's second argument will explain, even if this Court finds agrees with the Court of Chancery that subsection (a) is not ambiguous because its plain language does not impose a share-tracing requirement on beneficial owners, this Court must still read a share-tracing requirement through subsection (e) in order to quell the increasing prevalence of "appraisal arbitrage," an absurd result of this statute's current interpretation.

2. A reading of Section 262 that would not impose a share-tracing requirement on the beneficial owner of shares results in an absurd result not intended by the General Assembly.

a. A history of the appraisal statute provides the lens through which to interpret DGCL § 262.

At common law, mergers could only be consummated upon the unanimous favorable vote of a company's stockholders. *In re Appraisal of Ancestry.com, Inc.*, 2015 Del. Ch. LEXIS 2. The unanimity requirement created in stockholders a veto power that "made it possible for an arbitrary minority to establish a nuisance value for its shares by refusal to cooperate." *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 535, n.6 (1941). When the DGCL was enacted in 1899, the General Assembly provided for consolidation or merger by less-than-unanimous vote of the stockholders. *Id.* Because the statute's effect was to remove a minority shareholder of his right to object to a merger, Delaware cases have consistently maintained that the primary

purpose of Section 262 is to protect the contractual rights of minority stockholders that existed at common law by replacing the stockholder's veto power with a means of withdrawing from the company at a judicially determined price. *See Rool v. York Corp.*, 28 Del. Ch. 203, 39 A.2d 780 (1944); *Salomon Bros. v. Interstate Bakeries Corp.*, 576 A.2d 650 (Del. Ch. 1989). An interpretation of Section 262 that allows for an abuse of this fundamental protection for purposes of making a profit must be avoided.

The Court of Chancery states that "a statute is ambiguous [] if . . . a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature." *In re Krafft-Murphy Co., Inc.*, 62 A.3d 94, 100 (Del. Ch. 2013). The rise of what is known as "appraisal arbitrage" is an absurd result that will persist if no obligation on beneficial owners to determine how the shares they acquire after the record date is imposed before a petition for appraisal is granted.

Appraisal arbitrage is an investment strategy in which entities like brokerage firms buy shares of a company after plans for a merger transaction are publicly announced and after the record date for determining entitlement to vote on the transaction is set. *See generally Merion Capital LP v. BMC Software, Inc.*, 2015 Del. Ch. LEXIS 3 (an appraisal arbitrageur "seeks to capitalize on what it perceives to be an undervalued transaction"). Because these entities, such as Petitioners in this case, acquire their shares after the record date is set, it is not possible for them to vote their shares for or against the merger. Mem. Op. at 5. Taking advantage of what the Court

of Chancery has perceived as an inability to track the voting behavior of shares, however, these appraisal arbitrageurs can petition their shares for appraisal regardless of whether a previous beneficial owner voted in favor or against the merger. *See generally In re Appraisal of Transkaryotic Therapies, Inc.*, 2007 Del. Ch. LEXIS 57 (discussing the nature of shares held in fungible bulk and a corresponding inability to attribute any previous votes to specific shares).

It is concerning, as raised by the respondent in *BMC Software*, that an interpretation of Section 262 which does not impose a "share-tracing requirement" may result in more shares being petitioned for appraisal than there were shares voted in favor of the merger – a logical impossibility if a majority of votes is needed to approve a merger. 2015 Del. Ch. LEXIS 3, *16. Apart from this mishap on a theoretical basis, there is also a beneficial economic consequence available exclusively to shareholders in the position of appraisal arbitrageurs which results in inequitable treatment to all other shareholders.[2]

b. A more equitable resolution is within the power of the judiciary to provide.

While it is not the responsibility of this Court to create new legislation, it is within this Court's power to provide a ruling that would eliminate the rise of appraisal arbitrage and its abuse of a statute whose primary purpose is to protect objecting stockholders to

[2] For a more in depth discussion of the economic advantages offered to appraisal arbitrageurs, see Gaurav Jetley and Xinyu Ji, *Appraisal Arbitrage – Is There a Delaware Advantage?*, Harvard Law Sch. Forum on Corp. Governance and Financial Regulation (July 27, 2015), http://corpgov.law.harvard.edu/2015/07/27/ appraisal-arbitrage-is-there-a-delaware-advantage/

a merger. For example, if this Court adopted a regime that would deny appraisal rights to shares purchased after the record date, investors still could accumulate large appraisal-eligible stakes between the time of a deal's announcement and the record date and shareholders' rights to appraisal as granted by the statute would not be infringed. *See Salomon Bros. Inc. v. Interstate Bakeries Corp.*, 576 A.2d 650, 654 (Del. Ch. 1989) (finding "nothing inequitable about an investor purchasing stock in a company after a merger has been announced with the thought that, if the merger is consummated on the announced terms, the investor may seek appraisal"). *In re Appraisal of Dell Inc.*, 2015 Del. LEXIS 184, *73. Even if such a solution would not completely eliminate the appraisal arbitrage industry, it would at least create an equal footing among shareholders hoping to profit from a merger transaction. Assuming all shareholders are entitled to equal treatment, there seems to be little economic or legal merit in giving appraisal arbitrageurs privileges that are not granted to others.

II. THE COURT OF CHANCERY PROPERLY GRANTED SUMMARY JUDGMENT FOR PRELIX CONCLUDING THAT LONGPOINT AND ALEXIS ARE NOT ENTITLED TO APPRAISAL OF THEIR SHARES BECAUSE THEY FAILED TO MEET THE REQUIREMETNS OF DGCL § 262(A) AND TRIED TO INITIATE A PROCESS FOR APPRAISAL INVALID UNDER DELAWARE LAW

A. QUESTION PRESENTED

Whether DGCL § 262 is properly understood as allowing unknown and numerous parties to stand in the shoes of the record holder when the chain of continuity is broken between the time of demand and effective date of the merger, contrary to longstanding Delaware Supreme Court precedent and plain meaning of the appraisal statute.

B. SCOPE OF REVIEW

Summary judgment is appropriate when the moving party meets two conditions - "there are no issues of material fact in dispute" and it is "entitled to judgment as a matter of law." Del. Ch. Ct. R. 56. As the record holder of shares appellants are trying to appraise, Cede & Co. delivered demands for appraisal to Prelix. However, as appellants "candidly disclosed" in the appraisal petition they filed with the Delaware Chancery Court on May 6, 2015 said shares went through a re-titling before the effective date of the merger. Delaware law deems appraisal rights lost if any one of four standing requirements is broken between the date of the demand and effective date of the merger. One such standing requirement is that of the continuous record holder, which was breached when J.P. Morgan Chase and Bank of New York Mellon ("BONY"), custodians of appellants' funds, instructed Cede & Co., to reissue the share certificates in the names of their nominees, Cudd & Co., and Mac & Co., respectively. Mem. Op. at 4. No genuine material facts remain in dispute, and the outcome of this case turns on one question: As a matter of law, did Longpoint and Alexis meet the statutory requirements of DGCL §262.

C. MERITS OF THE ARGUMENT

1. Appraisal is a "creature of statute"[3]

Appraisal rights are a creation of the legislature, and not judge made law *See In re Appraisal of Ancestry.com, Inc.*, 2015 Del. Ch. LEXIS 2, at *11 (Ch. Jan. 5, 2015). In modernity, the right to

[3] Kaye v. Pantone, Inc., 395 A2d 369, 374 (Del. Ch. 1978)

appraisal is set out in 8 Del. C. 262 of the Delaware General Corporation Law (DGCL). First conceived in 1899 as a response to protecting dissenters in a merger or combination transaction from conversion of their property rights[4], DGCL §262 maintains that purpose by keeping the right to appraisal absolute[5] when it is perfected. Given this right's absolute nature, Delaware case law is clear that "the procedural requirements of the appraisal state be strictly construed" *See Weinstein v. Dolco Packaging Corp.*, C.A. No. 15000, 1997 Del. Ch. LEXIS 34, at *10 (Ch. Mar. 11, 1997). As so, it is the burden of the appraisal seeker—Longpoint and Alexis—to demonstrate compliance with the statutory prerequisites enumerated in subsection (a) of DGCL § 262 *See In re Hilton Hotels Corp.*, 42 Del. Ch. 206 (1965*), see also Lichtman v. Rocognition Equip., Inc.*, 295 A.2d 771 (Del. Ch. 1972); *Schneyer v. Shenandoah Oil Corp.*, 316 A.2d 570 (Del. Ch. 1974); *Kaye v. Pantone, Inc.*, 395 A.2d 369 (Del. Ch. 1978) ("Since the stockholders are given an absolute right to proceed under the statute, proof that they have complied with its requirements is enough to establish their right to an appraisal"). Longpoint and Alexis failed to comply with the standing requirements, and therefore lost the affirmative right of appraisal.

a. Defining "stockholder"

The right to appraisal of stock under DGCL § 262(a) is available to any stockholder of a corporation in compliance with four standing requirements: 1) it holds the shares for which it seeks appraisal on

[4] *Francis I. duPont* & Co., 343 A.2d 629, 634; see also
[5] *Felder v. Anderson, Clayton & Co.*, 159 A.2d 278 (1960); *Kaye v. Pantone, Inc.*, 395 A.2d 369 (Del. Ch. 1978).

the date on which it made the demand; 2) it continuously holds those shares through the effective date of the merger; 3) it otherwise complies with the form and timing of the appraisal demand outlined in Section 262(d); and 4) it does not vote in favor of or consent to the merger with regard to those shares. 8 Del. C. § 262(a). The statute then proceeds to clarify that a stockholder is the "holder of record of stock" in a corporation. *Id*. It is up to the stockholder to make a demand onto the corporation clarifying intention of exercising appraisal rights. 8 Del. C. § 262(d). And it is this same stockholder that must remain the record holder from the date of demand until the effective date of the merger, as per the continuous record holder requirement of DGCL 262(a)(2). The stockholder is referenced 58 times by the statutory text of DGCL 262, placing it in the position of controlling the appraisal proceeding. Only once is the beneficial owner mentioned, and only to provide an alternate source of filing of the appraisal petition. 8 Del. C. § 262(e).

b. The right of appraisal and its procedural safeguards under DGCL 262 are clear and unambiguous

The language of DGCL 262 is not ambiguous and does not call for a judicial reinterpretation of who qualifies as a stockholder. While it is true that the Delaware judiciary is the first line of defense to "corporate law controversies",[6] as Vice Chancellor Glasscock strongly emphasizes in *In Re Appraisal of Ancestry*, there is no ambiguity in

[6] *In re Appraisal of Dell Inc.,* 2015 Del. Ch. LEXIS 184, at *36-40 n.9 (Ch. July 13, 2015) (citing Omari Scott Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U. Rich. L. Rev. 1129, 1159 (2008)

the meaning of stockholder under Delaware law. In fact, interpreting a statute for ambiguity is reasonable only on two grounds—if several reasonable interpretations exist or if a literal meaning would lead to an "absurd result not contemplated by the legislature".[7] After analyzing how subsections of DGCL § 262 interact, Vice Chancellor Glassock found that the appraisal procedures set out statutorily identified roles for the stockholder and carved out space for the beneficial owner. There was no ambiguity and the statute, therefore, ought be construed in its plain meaning *In re Appraisal of Ancestry.com, Inc.*, 2015 Del. Ch. LEXIS 2, at *19 (Ch. Jan. 5, 2015). In contrast, Vice Chancellor Laster in *In re Appraisal of Dell* finds that the statute lacks a definition for who can be a stockholder. *In re Appraisal of Dell Inc.*, 2015 Del. Ch. LEXIS 184, at *24 (Ch. July 13, 2015). It therefore becomes a "quintessential issue of statutory interpretation appropriate for the judiciary to address". *In re Appraisal of Dell Inc.*, 2015 Del. Ch. LEXIS 184, at *36 (Ch. July 13, 2015). And address in a manner inclusive of the DTC participant list, which would allow for a measure of transparency that appellants Longpoint and Alexis are seeking. Such a list shows the custodial banks and brokers holding shares in fungible bulk. However, Delaware courts have, as Vice Chancellor Laster himself outlines refused to legislate in this arena precisely because they see the statute at issue as clear, unambiguous and in the hands of the General Assembly

[7] at 19 quoting *n re Krafft—Murphy Co., Inc.*, 62 A.3d 94, 100 (Del. Ch. 2013),

to amend[8]. Additionally, the Delaware Supreme Court in *Crown Emak Partners, LLC v. Kurz*, (992 A.2d 377, 398 (Del. 2010)) has entertained Vice Chancellor Laster's proposed reformed reading of DGCL 262 and characterized such a discussion as "*obiter dictum*" that was "without precedential effect." *Dell* at *36. Therefore, the citation by Chancellor Mosley in the opinion below in this matter to language in *Dell*, in which Vice Chancellor Laster shifts the interpretive burden from the General Assembly to the Supreme Court of Delaware, is inconsistent with Delaware law because it not the proper forum. And the lower court's holding that it "necessarily accepts and applies the determination of law articulated in *Dell*" is limited to recognizing that the power to alter the requirements for appraisal are vested with the General Assembly, and that a break in the continuous holder requirement bars entitlement to appraisal. Mem.Op.at 5; *Dell* at 78

The certificates representing the shares of Longpoint and Alexis were re-issued striking Cede & Co as the record holder in favor of Cudd & Co., and Mac & Co., the nominees for J.P. Morgan Chase and BONY, respectively. Mem. Op. at). Appellant's lack of knowledge as to the February 5, 2015 transfer is undisputed, but irrelevant[9] given the standard policies of their voluntarily chosen nominees and the time

[8] *Schenck v. Salt Dome Oi*l Corp., 34 A.2d 249 (Del. Ch. 1943); In re Appraisal of Enstar Corp. (Enstar I), 1986 Del. Ch. LEXIS 518 (Del. Ch. July 17, 1986; *In re Appraisal of Transkaryotic Therapies, Inc.*, 2007 Del. Ch. LEXIS 57 (Del. Ch. May 2, 2007)

[9] See *In re Appraisal of Dell Inc.*, 2015 Del. Ch. LEXIS 184, at *30 (Ch. July 13, 2015) ("under current law, ownership changes driven by DTC's role in the depository system are regarded as voluntary transfers")

frame during which appellants chose to purchase outstanding shares of Prelix common stock. To the former, internal policies of JP Morgan and BONY, "do not permit them to hold paper certificates unless the shares are titled in the names of their own nominees." *Dell* at *22. Violating the continuous record holder requirement was therefore inevitable and part of the voluntary relationship appellants agreed to when assigning those two institutions as their respective funds' custodians. To the latter – the time frame of initiated appraisal seeking procedures - appellants executed their purchase orders after the record date determining voting rights and during the ongoing settlement of fiduciary duty claims that lead to the December 18, 2015 $0.50 per share increase in the merger price. Mem. Op at 2-3. Then, on January 13, 2015, a day before the original vote of the stockholders on the merger, appellants directed Cede & Co., to deliver written demands for appraisal as per DGCL § 262(d)(1). *Id*. The vote on the merger was however postponed to February 17, 2015, at which time appellants' shares had already been retitled in the name of two new stockholders 12-days prior. Under the plain meaning of DGCL 262, the actions of the record holder alone control in determining entitlement to appraisal rights. The procedures followed by appellants did not perfect the appraisal rights as required.

c. In 2007, the Delaware General Assembly conferred on beneficial owners the right to file appraisal petitions in their own name by amending DGCL §262(e)

A 2007 amendment[10] to DGCL 262(e) allowed beneficial owner(s), like Longpoint and Alexis, to file an appraisal petition in their own name(s) 8 Del. C. § 262(e). Appellants chose this route and filed an appraisal petition on May 6, 2015 for the approximately 5.4 percent, or 2,646,000 shares of Prelix common stock they owned jointly. However, as the court clarified in *In re Appraisal of Ancestry.com, Inc., (*2015 Del. Ch. LEXIS 2, at *22 (Ch. Jan. 5, 2015)), subsections (d) and (e) of DGCL 262 will be read together to allow beneficial owner(s) to file a petition for appraisal, but not to carve out stand ins for the role of "stockholder".[11] Therefore, there is no transparency through which the court can look through the stockholder and see the hierarchy of complicated ownership structures that exist—from nominees to brokers to beneficial owners—and swap them from the time of making of the demand and finalization of the merger. The 2007 amendment did not alter the role of stockholder in perfecting the requirements in § 262(a); it solely allowed the beneficial owner access to filing a petition and acquiring information to the aggregate shares available for appraisal. And, "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. *See Ancestry.com* at *19 (quoting *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982)).

There is no call for this court to develop a new legal "look through" standard for the purposes of facilitating operations of

[10] 56 Del. Laws ch. 145 § 262(e) (2007)

[11] The Ancestry.com court looked at the reasoning laid out in *In re Appraisal of Transkaryotic Therapies, Inc.*, Civil Action No. 1554-CC, 2007 Del. Ch. LEXIS 57 (Ch. May 2, 2007))for this reasoning.

appraisal arbitrageurs. In their individual capacities Longpoint and Alexis acquired 2,646,000 shares in a span of 13 days. Then, less than a month later and despite the $0.50 per share increase in the merger price, appellants moved forward with their plan to perfect their appraisal rights. Mem. Op. at 3. A movement of certificates followed, during which the uniquely numbered certificates issued by Prelix's transfer agent were reissued in the names of two new, unknown to Prelix nominees. Cede & Co. was therefore cut off, as the holder of record of appellants' shares and the continuous record holder requirement of DGCL 262(a) was unfulfilled as of February 5, 2015. More than two months later, on April 16, 2015, the merger became effective. Mem. Op. at 4. But for the purposes of the intra-corporate relationship, Prelix's transfer agent only marked down Cede in the corporate ledger as requesting appraisal rights. Said ledger is outsourced and therefore not available to the corporation. *Dell* at * 25. Its only reference to how many new creditors it will have, i.e., the appraisal seekers come from Cede. Allowing other persons, such as the custodians to stand in the shoes of Cede will only lead to more paperwork—in keeping track of the reissued shares and their transfer from fungible bulk through potentially three additional layers of nominees and custodians, and add to ownership ambiguity.

2. Delaware case law consistently finds that a record holder is not a mendable term that allows for various agents between it and the beneficial owner to step in and take over its functions

The Delaware Supreme Court in *Olivetti Underwood Corp. v. Jacques Coe & Co.* (217 A.2d 683 (Del. 1966)) examined the relationship between a corporation and beneficial holders in the context of appraisal

rights. It found that "there is no recognizable stockowner under § 262 except a registered stockholder." *Id. at 686. Later in In re Appraisal of Transkaryotic Therapies, Inc.,* (2007 Del. Ch. LEXIS 57, at *11-12 (Ch. May 2, 2007)) the court clarified that it is the rights and obligations of this registered stockholder, and not any connection to his beneficial owner that are relevant. *Id*. Meaning, as the *Transkaryotic* Chancery Court found, "the determinative record regarding compliance with § 262 requirements is that of the record holder". *Id.; see also*, Ernest L. Folk, III, *The Delaware General Corporation Law: A Commentary and Analysis* 374 (1972) ("The registered stockholder requirement cuts both ways. Not only is the corporation entitled to look solely to record ownership, but in fact it may ordinarily not inquire into the authority of a registered holder to act for beneficial owners") Therefore, the fact that neither Longpoint nor Alexis were aware of the change of registration in record ownership or on their own acted to bring them about, alters that there was a break in continuity of ownership. Mem. Op. at 4.

The Court of Chancery in *Ancestry.com* (2015 Del. Ch. LEXIS 2 at *15 (Ch. Jan. 5, 2015) points out that Delaware courts consistently refuse to look beyond the record holder's actions, and point out that the plain meaning of the statute directs focus to the actions of the stockholder in determining eligibility to seek appraisal. Additionally, as the Chancery Court in *Transkaryotic* noted, "the record holder bears the ultimate burden of establishing its right to appraisal". *Transkaryotic* at *9 (citing Schneyer v. Shenandoah Oil Corp., 316 A.2d 570, 573 (Del. Ch. 1974); *See also In re Ancestry.com*,

Inc., 2015 Del. Ch. LEXIS 2, 2015 WL 66825, at *8 (Del. Ch. Jan. 5, 2015) (the "record holder—not the beneficial owner—is subject to the statutory requirements for showing entitlement to appraisal and demonstrating perfection of appraisal rights under Sections 262(a) and (d)").

As the record holder, Cede & Co. bore the burden. And as the court found in *Nelson v. Frank E. Best Inc.*, (768 A.2d 473, 477 (Del. Ch. 2000)) and in *Dell*, the action of re-titling that interrupts the linear holder of the certificated shares after the appraisal demand is filed, but before the effective date of the merger is violative of the Continuous Record Holder requirement of DGCL § 262(a). Such failure bars perfection of appraisal rights absolutely.

3. Potentiality of appraisal arbitrage demands consistency in interpreting the record holder's role in in appraisal demand and petition requirements, and constraint on the number of parties whose actions the court is requirement to analyze

Looking through the DTC and recognizing the standing of brokers and their nominees for an appraisal claim will exacerbate the ill effects of appraisal arbitrage[12]. Appraisal arbitrage is the practice of purchasing shares after a favorable merger vote with the sole purpose of filing an appraisal demand. The right to appraisal grew out

[12] See *Merion Capital LP v. BMC Software, Inc.*, No. 8900-VCG, 2015 Del. Ch. LEXIS 3, at *3 (Ch. Jan. 5, 2015) ("Appraisal arbitrage" is a phrase commonly used to denote an investment strategy whereby an investor acquires an equity position in a cash-out merger target with the specific intention of exercising the statutory stockholder appraisal right found in 8 *Del. C.* § 262; in the subsequent appraisal action the court awards the appraisal petitioners what the court determines to be the fair value of the target, which, if the target was undervalued in the transaction, represents a positive return on the arbitrage investor's initial investment.")

of the need to protect dissenting shareholders from illegal property conversion. *See Francis I. duPont* & Co., 343 A.2d 629, 634. By means of the judiciary, the contractual rights of the dissenting stockholder are protected (*Root v. Work Corp.*, 39 A.2d 780 (1940)) and he is compensated for the loss of the common law right to prevent a merger (*Helibrunn v. Sun Chem. Corp.*, 150 A.2d 755 (1959)). Appraisal is also beneficial to the corporations seeking a merger or combination by preventing strike suits or prolonged holdouts by dissenting shareholders. DGCL 262 is the statutory annunciation of these motivations, which are promulgated by the standing requirements of DGCL § 262(a). They are there to streamline a concise and dependable appraisal proceeding so that shareholders are able to get fair value as they transition from shareholder to creditor.[13] In comparison to the shareholders the appraisal statute was created to compensate, Alexis and Longpoint were never the contemplated beneficial owners who are owed protection from inequitable combinations. Appellants never exercised, nor were they eligible to vote for the merger since they purchased the common stock shares post the December 4, 2014 record date. Mem. Op. at 3. Instead, they acted as appraisal arbitrageurs seeking to gain an economic advantage from purchasing Prelix's common stock two weeks prior to a per share price increase and resolution of fiduciary duty suits that predeceased it. Shortly thereafter they directed Cede & Co., to make the appraisal demand. Looking through Cede & Co., instead of stabilizing the appraisal process and

[13] *See Braasch v. Goldschmid*t, 41 Del. Ch. 519, 199 A.2d 760 (1964); *see also Kaye v. Pantone, Inc.*, 395 A.2d 369 (Del. Ch. 1978) (making of the demand makes the stockholder more analogous to a creditor)

guarantying statutory protection to the corporation and dissenting stockholder would bolster leverage actors such as Longpoint and Alexis could gain from acquiring large blocks of shares. Acquiring large block of shares for the sheer purpose of appraisal can make combinations unappealing *See* George S. Geis, *An Appraisal Puzzle*, 105 Nw. U.L. Rev. 1635, 1657 (2011).

CONCLUSION

For the foregoing reasons, this Court should affirm the summary judgment dismissing Longpoint's and Alexis' petition for appraisal and find that appellants failed to meet their burden of satisfying the clear and unambiguous statutory requirements under Delaware law of perfecting an appraisal right. Longpoint and Alexis have not proven that the shares they petitioned for appraisal were not previously voted in favor of the merger transaction.