

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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**Appellee's Reply Brief**

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Team K  
Attorneys for Appellee  
February 5, 2016

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### NATURE OF PROCEEDINGS

On May 6, 2015, pursuant to Title 8, section 262 of the Delaware Code ("Section 262") petitioners below-appellants, Longpoint Investments Trust and Alexis Large Cap Equity ("Appellants"), filed a written petition for appraisal in the Court of Chancery of the State of Delaware, in and for New Castle County ("Court of Chancery"). (Mem. Op. at 4.) The demand for appraisal was for stock the Appellants owned in Prelix Therapeutics, Inc. ("Appellee"). (Mem. Op. at 1, 4.) Appellants sought appraisal of their stock as a result of merger between Appellee and Radius Health Systems Corp. ("Radius"). (Mem. Op. at 1.)

On November 24, 2015, in response to the Appellant's petition for appraisal the Appellee filed a motion for summary judgment in the Court of Chancery asserting the Appellants did not adequately follow Section 262 and thus were precluded from exercising any appraisal rights. (Mem. Op. at 1, 4.)

On January 13, 2016, the Court of Chancery granted Appellee's motion for summary judgment. (Mem. Op. at 8.) The Court of Chancery ruled Appellants violated Section 262(a) by not continuously holding their stock through the date of the merger and such a violation precluded them from appraisal rights. (Mem. Op. at 2.) However, the Court of Chancery held that the Appellants satisfied Section 262's requirement that the Appellants prove their shares were not voted in favor of the merger.

On January 15, 2016, Appellants appealed the Court of Chancery's decision to this Court. (Notice of Appeal).

### **SUMMARY OF ARGUMENT**

Section 262 provides minority stockholders with appraisal rights when the stockholders are forced into a merger they did not vote in favor of. Examining Section 262 as a whole demonstrates that it implicitly contains a requirement that for stockholders to be entitled to appraisal rights they must prove their shares were not voted in favor of the merger by the stockholder as of the record date (a "share-tracing requirement"). Such an interpretation comports with the legislature's intent to make appraisal rights available only to dissenting minority shareholders. Additionally, such an interpretation comports with public policy by thwarting appraisal arbitrageurs, which protects remaining stockholders after a merger and protects the integrity of the appraisal process. This Court should strive to apply Section 262 in a way that promotes the legislature's expressed intent and furthers public policy. Accordingly, this Court should hold that in order to be entitled to appraisal stockholders must prove their shares were not voted in favor of the merger by the stockholder as of the record date.

Section 262 also contains a requirement that a stockholder maintain ownership of the shares through the effective date of the merger (a "continuous holder requirement"). The Delaware courts have consistently applied the plain language statutory definition of "stockholder" to determine whether a stockholder has satisfied the continuous holder requirement. In applying the statutory definition, the Delaware Courts have determined that "stockholder" refers to "the holder of record of stock in a corporation," which is the name that

holds legal title on the stock certificate. Using the statutory definition for "stockholder" honors the legislature's intention to provide clarity, predictability, and guidance for stockholders hoping to exercise their statutory right to appraisal. Thus, if a departure from the statutory definition is to occur the legislature is the proper avenue to clarify what that departure should be. Finally, using the statutory definition of "shareholder" promotes public policy by thwarting the efforts of opportunist appraisal arbitrageurs. Thus, this Court should follow the lead of other Delaware courts by providing deference to the legislature and promoting public policy through applying the strict statutory definition of "stockholder."

Accordingly, this Court should uphold the Court of Chancery's decision to grant the Appellee's motion for summary judgment.

### **STATEMENT OF FACTS**

On October 15, 2014, the proposed acquisition of Appellee by Radius was announced. (Mem. Op. at 2.) The proposed acquisition price was \$14.50 per share. (Mem. Op. at 2.) Eventually the price settled at \$15.00 per share. (Mem. Op. at 2.)

The Appellee's stockholder meeting to vote on the Radius merger was originally scheduled for January 14, 2015, but was adjourned until February 17, 2015. (Mem. Op. at 2.) At the February 17, 2015 meeting Appellee's stockholders approved the merger with 53% of outstanding shares voting in favor of the merger. (Mem. Op. at 3.)

Appellants did not vote on the merger approval because they purchased their stock after the December 4, 2015 record date for determining entitlement to vote on the merger. (Mem. Op. at 3.) Additionally, Appellants are unable to prove who the previous owners of their shares were or whether their shares were voted in favor of the merger. (Mem. Op. at 5.) On January 13, 2015, the Appellants submitted their written demands for appraisal despite their inability to prove how their shares were voted. (Mem. Op. at 3.)

Appellants' demands were made by Cede & Co., their depository nominee. (Mem. Op. at 3.) The Appellants shares at the time of their written demand were in the name of Cede & Co. (Mem. Op. at 3.) Before the effective date of the merger on April 16, 2015, Cede & Co. was no longer the holder of Appellants' shares. (Mem. Op. at 3.) Instead, on February 5, 2015, the Appellants' shares were reissued in the names of Cudd & Co. and Mac & Co. on behalf of Appellants' custodial firms, J.P. Morgan Chase and Bank of New York Mellon. (Memo. Op. at 3.)

## ARGUMENT

### **I. THE APPELLANTS CANNOT SATISFY SECTION 262'S REQUIREMENT THAT A STOCKHOLDER SEEKING APPRAISAL OF SHARES ACQUIRED AFTER THE RECORD DATE MUST DEMONSTRATE THOSE SHARES WERE NOT VOTED IN FAVOR OF THE MERGER BY THE STOCKHOLDER AS OF THE RECORD DATE.**

#### **A. QUESTION PRESENTED**

Whether Section 262 contains a share-tracing requirement when Section 262 explicitly mentions stockholders as of the record date and specifically states that appraisal is only available for shares that are not voted in favor of the merger or consolidation.

#### **B. SCOPE OF REVIEW**

This Court reviews a decision granting summary judgment *de novo*. *Arnold v. Society for Savings Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del. 1994). "Statutory interpretation presents a question of law that [this Court] review[s] *de novo*." *Doroshov, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc.*, 36 A.3d 336, 342 (Del. 2012).

#### **C. MERITS OF ARGUMENT**

##### **i. The Canons of Statutory Interpretation Demonstrate That Section 262 Requires a Stockholder Seeking Appraisal of Shares Acquired After the Record Date to Demonstrate Those Shares Were Not Voted in Favor of the Merger by the Stockholder as of the Record Date.**

"A statute will be considered ambiguous when it is reasonably susceptible of different conclusions or interpretations." *Newtowne Village Service Corp. v. Newtowne Road Development Co., Inc.*, 772 A.2d 172, 175 (Del. 2001). Here, Section 262 does not explicitly address how the appraisal process functions when stockholder purchases shares after the record date and this lack of clarity has led to competing interpretations. Section 262(a) provides:

Any stockholder . . . who has otherwise complied with subsection (d) of this section and who has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228 of this title shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares . . . .

This phrase from Section 262(a) can be interpreted to require the stockholder who is demanding appraisal to demonstrate that he or she individually did not vote in favor of the merger. Conversely, the phrase can be interpreted to require the stockholder who is demanding appraisal to satisfy a share-tracing requirement. See *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 67586, \*4 (Del. Ch.) (noting the two competing interpretations). Therefore, Section 262 is ambiguous because it is subjected to two reasonable interpretations. See *Newtowne*, 772 A.2d at 175.

Further, “[a]mbiguity may also be found if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature.” *Id.* Reading Section 262 without a share-tracing requirement could potentially lead to an absurd result of allowing appraisal for the entirety of the corporation’s shares, including shares voted in favor of merger.<sup>1</sup> A stockholder could buy the entirety of a corporation’s shares after the record date and subsequently seek appraisal. Thus, shares voted in favor of the merger would become eligible for appraisal. Because the legislature intended for Section 262 to be a remedy for minority shareholders<sup>2</sup> it can be inferred that any result in which a share voted with the majority is

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<sup>1</sup> See generally *Merion*, 2015 WL 67586 at \*4 (noting the possibility that the entirety of a corporation’s shares may be bought after a record date and subsequently those shares would be eligible for appraisal).

<sup>2</sup> *Weinberger v. UOP, Inc.*, 457 A.2d 701, 703-04 (Del. 1983).

eligible for appraisal was not contemplated by the legislature. Thus, the portion of Section 262(a) requiring proof that a stockholder who is seeking appraisal did not vote in favor of a merger is ambiguous because it can potentially produce results the legislature did not contemplate. See *Newtowne*, 772 A.2d at 175.

The canons of statutory interpretation can help this Court properly analyze and apply ambiguous statutory sections. *Id.* Specifically, statutory sections should not be read in isolation, but rather should be read in connection with the statute as a whole. See *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999). Additionally, an ambiguous statutory section should be interpreted in a way that honors legislative intent. See *Newtowne*, 772 A.2d at 175. Finally, an ambiguous statutory section should be construed in a way that comports with public policy. See *Sternberg v. Nanticoke Memorial Hosp., Inc.*, 62 A.3d 1212, 1217 (Del. 2013). Applying these canons of statutory interpretation to Section 262 demonstrates that Section 262 contains a share-tracing requirement.

#### **1. Section 262 Must Be Read as a Whole.**

"An ambiguous statute should be construed 'in a way that will promote its apparent purpose and harmonize it with other statutes' within the statutory scheme." *LeVan v. Indep. Mall, Inc.*, 940 A.2d 929, 933 (Del. 2007) (quoting *Eliason* 733 A.2d at 946); see also *In re Ancestry.Com, Inc.*, 2015 WL 66825 at \* 7 (Del. Ch.) ("If a statute is ambiguous . . . courts should consider the statute as a whole, rather than in parts, and read each section in light of all others to produce a harmonious whole.") (internal citations omitted). Additionally,

statutes must be read to "give effect to the whole statute, and leave no part superfluous." *Keeler v. Harford Mut. Ins. Co.*, 672 A.2d 1012, 1016 (Del. 1996).

Stockholders that "neither voted in favor of the merger or consolidation nor consented thereto in writing" are entitled to appraisal. Delaware Code Ann. tit. 8, § 262(a). Appellants read this phrase from Section 262(a) in isolation to contend that it only requires stockholders seeking appraisal to merely demonstrate that the present stockholder did not personally vote in favor of or consent to the merger. Thus, allowing stockholders who acquire shares after the record date to seek appraisal of shares regardless of how the shares were ultimately voted in the merger. However, this interpretation of Section 262(a) is incorrect. Reading Section 262 as a whole demonstrates that stockholders seeking appraisal must comply with a share-tracing requirement.

Section 262(d)(1), a statutory section that must be satisfied for a stockholder to be entitled to appraisal, requires that a corporation notify "each stockholder of each constituent corporation who has complied with this subsection and has not voted in favor of or consented to the merger or consolidation . . . ." Additionally, Section 262(d)(1) provides that the "stockholder[] who was such on the record date for notice of such meeting" will be notified that appraisal rights are available. Section 262(d)(1) further explains how such stockholders<sup>3</sup> go about demanding their right to appraisal. Thus, Section 262(d)(1) anticipates compliance solely by the stockholder as

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<sup>3</sup> Namely, "stockholders who [were] such on the record date . . . ." § 262(d)(1).

of the record date. In other words, Section 262(d)(1) explicitly requires that the stockholder on the record date did not vote in favor of the merger. Accordingly, for a stockholder who purchased shares after the record date to seek appraisal, the stockholder must demonstrate that the stockholder as of the record date complied with Section 262(d)(1).

If Section 262 only required stockholders seeking appraisal to prove that they individually did not vote in favor of the merger, the statutory sections would have stated "shares not voted in favor of the merger by the stockholder at the time of the meeting" or language similar thereto. However, Section 262 explicitly mentions the "stockholder[] who was such on the record date for notice of such meeting" § 262(d)(1).

Section 262(a) directly requires compliance with Section 262(d)(1). Accordingly, to satisfy Section 262(a), a stockholder who purchased shares after the record date must prove that the stockholder on the record date did not vote in favor of the merger. In other words, the stockholder must comply with a share-tracing requirement.

## **2. Section 262 Must Be Read to Honor Legislative Intent.**

"The goal of statutory construction is to determine and give effect to legislative intent." *LeVan*, 940 A.2d at 932. It is well settled that the legislature created Section 262 to be a remedy for *minority shareholders* faced with a merger they are opposed to. See *Weinberger v. UOP, Inc.*, 457 A.2d 701, 703-04 (Del. 1983); see also *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1142 (Del. 1989) ("Under Delaware law the sole remedy available to minority shareholders in a

cash-out merger . . . is an appraisal under 8 Del. C. § 262"); *Stauffer v. Standard Brands, Inc.*, 178 A.2d 311, 314 (Del. Ch. 1962) *aff'd*, 187 A.2d 78 (Del. 1962) (stating "an exclusive remedy is evident, for it was obviously the intention of the Legislature that disputes as to the value of shares of minority stockholders should be settled by an appraisal proceeding.").

The legislature's intention for Section 262 to serve exclusively minority shareholders is further demonstrated through Section 262(e)'s language. Section 262(e) explicitly mentions appraisal only of "*shares not voted in favor of the merger.*" § 262(e) (emphasis added). Thus, by its operation, Section 262(e) demonstrates the legislature's intent to limit appraisal to only minority shareholders.

The Appellants' assertion that Section 262 does not have a share-tracing requirement directly contravenes the legislature's intent. The Appellants' interpretation disregards Section 262(e)'s language and expands Section 262 to become more than a remedy for minority shareholders forced into a merger. If this Court holds that Section 262 does not contain a share-tracing requirement there is potential that shares that were voted in favor of the merger could be appraised. For example, a majority shareholder could sell his or her shares to a third party after the record date but before the meeting and then vote in favor of the merger at the meeting. Subsequently, the third party, knowing full well the shares were voted in favor of the merger, could seek appraisal on the grounds that they themselves did not vote in favor of the merger. In essence, if the third party and the majority shareholder were running an appraisal arbitrageur business together a

majority shareholder could potentially profit from the appraisal of the shares he or she used to vote in favor of the merger, even though the majority stockholder could not have sought appraisal alone. Such a result does not comport with the legislative intent that Section 262 is solely to be a remedy for minority shareholders forced into a merger. See *Weinberger*, 457 A.2d at 703-04.

Further, Section 262(d)(1) expressly applies to a "stockholder[] who was such on the record date for notice of such meeting." It is telling that Section 262(d)(1) expressly refers to the "stockholder[] who was such on the record date for notice of such meeting" because it demonstrates that the legislature specifically intended for Section 262 to pertain only to stockholders on the record date. See *In re Kraft-Murphy Co., Inc.*, 82 A.3d 696, 702 (Del. 2013) ("Courts also should ascribe a purpose to the General Assembly's use of statutory language, and avoid construing it as surplusage, if reasonably possible.").

Section 262(d)(1)'s language would be superfluous if Section 262 is read to allow compliance by any stockholder, including those who purchase shares after the record date. Additionally, the legislature never expressly states in Section 262(d)(1) that a stockholder who purchases shares after the record date can satisfy the statutory requirements. Thus, this Court should be careful not to read language into the statute that was not expressly put there by the legislature. *Farrow v. State*, 258 A.2d 276, 277 (Del. 1969) (stating "we should not read something into the statute which, on its face, is not there.").

Section 262(d)(1)'s language coupled with the legislature's intent demonstrates that Section 262 contains a share-tracing requirement.

The Appellants will contend that the Appellee's fear of appraisal being available for the entirety of a corporation's shares has already been addressed and dismissed by Delaware courts. However, the scenario has never been specifically addressed. Rather, in *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 67586, \*7, (Del. Ch.), the Delaware Court of Chancery stated that "it may be true that the plain language of Section 262 does not adequately serve all the purposes of that statute." The court recognized that Section 262's plain language potentially allows for the appraisal the entirety of a corporation's shares. *Id.* However, the *Merion* court chose not to address that specific situation because it was not the situation before it. *See id.* Although the scenario feared by the *Merion* court is not directly in front of this Court, this Court has the power to ensure this absurd result does not arise in front of any court. Accordingly, because this Court should read Section 262 in a way that promotes legislative intent and avoids patent absurdity,<sup>4</sup> this Court should read Section 262 to contain a share-tracing requirement.

### **3. Section 262 Must Be Read to Promote Public Policy.**

This Court may consider public policy factors when interpreting ambiguous statutory sections. *See State Farm Mutual Automobile Insurance Co. v. Kelly*, 126 A.3d 631, 635 (Del. 2015).

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<sup>4</sup> *Doroshov*, 36 A.3d at 343.

A share-tracing requirement promotes public policy by protecting the appraisal process from appraisal arbitrageurs. The *Merion* court recognized that “[i]t is possible that appraisal arbitrage itself leads to unwholesome litigation.” *Merion*, 2015 WL 67586 at \*7. The same concern was recognized years earlier in *In re Transkaryotic Therapies, Inc.*, 2007 WL 1378345, \*5 (Del. Ch.).<sup>5</sup> However, those courts did not have the authority that this Court does to prevent individuals from exploiting the appraisal process. Experts have noted that appraisal arbitrage is a growing problem, especially in the state of Delaware.<sup>6</sup>

Appraisal arbitrage can result in a corporation’s remaining shareholders having new management thrust on them after the merger.<sup>7</sup> For example, it is reasonably likely that an arbitrageur could buy a majority stake in a corporation after the record date and implement new management before the vote on merger in attempt to increase the corporation’s fair market value.<sup>8</sup> Subsequently, the arbitrageur could seek appraisal for his or her shares even if the shares were ultimately voted in favor of the merger.<sup>9</sup> Such a scenario would result in the arbitrageur inflating the fair market value of the corporation,

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<sup>5</sup> The *Transkaryotic* court recognized the concern in appraisal arbitrage but deferred to the legislature to come up with a solution. *Transkaryotic*, 2007 WL 1378345 at \*5.

<sup>6</sup> Michael Glasser, *Experts: appraisal arbitrage a major issue for M&A in 2015*, WESTLAW MERGERS AND ACQUISITIONS DAILY BRIEFING, Mar. 19, 2015, 2015 WL 1243193; see also ARTHUR FLEISCHER, JR. ET AL., TAKEOVER DEFENSE: MERGERS AND ACQUISITIONS § 14.10 (7th ed. 2015) (noting that a group of Delaware law firms have “advocate[d] that appraisal rights be denied to anyone who purchases shares of the target company after announcement of a transaction or, at a minimum, after the record date for the vote on the transaction.”).

<sup>7</sup> See Charles R. Korsmo & Minor Myers, Appraisal Arbitrage and the Future of Public Company M&A, 92 Wash. U. L. Rev. 1551, 1598 (2015).

<sup>8</sup> *Id.*

<sup>9</sup> See *id.*

forcing the remaining shareholders to pay an increased price for the arbitrageur's shares, and ultimately thrusting potentially unwanted management onto the remaining shareholders.<sup>10</sup>

Appraisal arbitrage can also damage the entire appraisal process. Appraisal arbitrage is becoming so common that corporations are beginning to factor the arbitrage process into how they value and ultimately bid on a target corporation.<sup>11</sup> As acquiring corporations bid less on target corporations anticipating appraisal arbitrage to occur the value of the existing stockholders' shares lessens.<sup>12</sup> Such a result could thwart the appraisal and merger processes because stockholders would be less motivated to merge with other corporations if the stockholders potentially could be in a worse financial situation after the merger.<sup>13</sup>

A share-tracing requirement substantially limits the ability of appraisal arbitrageurs to exploit the appraisal process by forcing the arbitrageurs "to change their practice and buy their shares much earlier in the process . . . ."<sup>14</sup> Thus, taking away the advantage that arbitrageurs have, which is being able to get involved in the appraisal process late enough that the investment is essentially risk free.<sup>15</sup> Preventing appraisal arbitrage protects stockholders and the integrity of the appraisal process. Thus, as a matter of public policy, this Court should determine that Section 262 contains a share-tracing requirement.

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<sup>10</sup> See *id.*

<sup>11</sup> *Id.* at 1600.

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> Fleischer, *supra* note 6.

<sup>15</sup> *Id.*

**ii. The Appellants Cannot Demonstrate the Shares They Acquired After the Record Date and Seek Appraisal for Were Not Voted in Favor of the Merger.**

As set forth above, the sole permissible interpretation of Section 262 requires stockholders to satisfy a share-tracing requirement in addition to the other statutory requirements. The Appellants have the burden of demonstrating their compliance with Section 262. *Dirienzo v. Steel Partners Holdings L.P.*, 2009 WL 4652944, at \*7 (Del. Ch).

Delaware law recognizes the right of appraisal is a rigid statutory requirement. *Konfirst v. Willow CSN Inc.*, 2006 WL 3803469, at \*2 (Del. Ch.). Moreover, it is essential that stockholders seeking appraisal rights adhere to strict compliance of the precise statutory standards. *Id.*

Here, the Appellants cannot satisfy the share-tracing requirement and no exception to this requirement is available. It is undisputed that the Appellants acquired their shares after the record date and therefore could not vote on the merger. Additionally, the Appellants concede they do not know if their shares were voted in favor or against the merger. Therefore, the Appellants cannot satisfy the burden of demonstrating compliance with Section 262. Accordingly, the Appellants are not entitled to appraisal and the Appellee's motion for summary judgment should be granted.

**II. THE APPELLANTS CANNOT SATISFY SECTION 262'S REQUIREMENT THAT A STOCKHOLDER SEEKING APPRAISAL MUST CONTINUALLY HAVE TITLE TO THE SHARES THROUGH THE EFFECTIVE MERGER DATE.**

**A. QUESTION PRESENTED**

Whether the retitling of stock from Cede and Co. to the custodial banks' nominees before the effective date of the merger constitutes a change in the "stockholder" that violates the continuous holder requirement and bars Appellants from pursuing appraisal?

**B. SCOPE OF REVIEW**

A trial court's decision granting summary judgment is reviewed *de novo*. *Arnold*, 650 A.2d at 1276. Issues of statutory construction and interpretation are also reviewed *de novo* by this Court. *CML V, LLC v. Bax*, 28 A.3d 1037, 1040 (Del. 2011), as corrected (Sept. 6, 2011). On appeal, this Court reviews "whether the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Arnold*, 650 A.2d at 1276 (citing Ct. Ch. R. 56(c).) The Court must affirm the trial court's rulings "unless they represent an error in formulating or applying legal principles." *Id.*

**C. MERITS OF ARGUMENT**

**i. The Delaware Supreme Court Has Exhaustively Reinforced the Plain Language Meaning of "Stockholder" Under Section 262, Which Promotes Certainty in Accordance With the Legislature's Intent.**

An appraisal remedy in Delaware is purely statutory and codified in Section 262. Section 262 is "a limited legislative remedy" that allows "any stockholder of a corporation" who complies with its requirements to initiate a proceeding that will result in the judicial determination of the "fair value of shares." *Alabama By-Products Corp.*

*v. Neal*, 588 A.2d 255, 256 (Del. 1991); §§ 262(a), (h). To qualify for appraisal a stockholder must satisfy the continuous holder requirement. § 262 (a). Section 262(a) defines “stockholder” as a “holder of record of stock in a corporation.” *Id.* Delaware courts have strictly construed this definition consistent with its plain meaning – the holder of record is the name bearing legal title to the stock. See *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 389 (Del. 2010).

Section 262’s plain language should guide this Court in interpreting and applying the “stockholder” definition. *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). “Absent a clearly expressed legislative intention to the contrary, [a statute’s] language must ordinarily be regarded as conclusive.” *Id.* Likewise, “vague notions of a statute’s ‘basic purpose’ are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration.” *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, No. 14-723, slip op. at 661 (S. Ct. Jan. 20, 2016) (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 261 (1993)).

Further, this Court has consistently reinforced the plain language meaning of the “stockholder” definition, including three different times since the enactment of share immobilization in the mid-1970’s.<sup>16</sup> In other words, this Court has consistently held that “stockholder” exclusively refers to the “holder of record of stock in

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<sup>16</sup> See, e.g., *Enstar Corp. v. Senouf*, 535 A.2d 1351, 1355 (Del. 1987); *Alabama By-Products Corp. v. Cede & Co.*, 657 A.2d 254, 255 (Del. 1995); *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 389 (Del. 2010); see also *In re Appraisal of Dell, Inc.*, 2015 WL 4313206, \*9, (Del. Ch.).

a corporation,” without any further interpretation.<sup>17</sup> The plain language interpretation of “stockholder” is consistent with the approach of the Delaware Uniform Commercial Code, which states that a corporation “may treat the registered owner as the person exclusively entitled to vote.” 8 Del. § 8-207(a).

This Court is bound by horizontal *stare decisis* principles and any definitional change must be effectuated by the legislature. See *Account v. Hilton Hotels Corp.*, 780 A.2d 245, 248 (Del. 2001) (“The doctrine of *stare decisis* finds ready application in Delaware corporate law.”); see generally *Howard v. Peninsula United Methodist Homes, Inc.*, 2003 WL 2270467, \*4 (Del. 2003) (noting that statutory change should come from the legislature). When a point of law has been settled it should not be departed from lightly and should only be set aside for “urgent reasons” or upon “clear manifestation of error.” *Account*, 780 A.2d at 248. Likewise, *stare decisis* requires elevated consideration when the issue is one of maintaining statutory interpretation. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007).

Strict appraisal formalities governing the “stockholder” requirement maintain the integrity of the appraisal process. *Ala. By-Prods.*, 657 A.2d at 263. Specifically, Section 262 strictly requires the “holder of record of stock in a corporation” to maintain ownership through the effective date of the merger. § 262. No exception exists within Section 262 for the retitling of stocks from the Cede & Co. to the custodial brokers’ nominees. See *id.*

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<sup>17</sup> In the share immobilization era, typically Cede & Co. is the name that bears legal title on stock certificates.

Exacting strict compliance ensures the "expedient and certain appraisal of stock, *id.*, and promotes "order", "certainty", and the a "sure source of information" in the Delaware General Corporation Law ("DGCL"). *Salt Dome Oil Corp. v. Schenck*, 41 A.2d 583, 589 (Del. Ch. 1945). This Court owes no preferential treatment or leniency to minority shareholders in interpreting the "stockholder" definition for purposes of the continuous holder requirement, as the statute must not be construed as a "one-way street." *Berger v. Pubco Corp.*, 976 A.2d 132, 144 (Del. 2009).

The Appellants' assertion that the plain language meaning of "stockholder" no longer promotes order and certainty is misguided. In *In re Appraisal of Dell, Inc.* 2015 WL 4313206 at \*16-17 (Del. Ch.), Vice Chancellor Laster opined, *obiter dictum*, that a legal rule that looks no further than Cede & Co. for holder requirements "masks the implications of beneficial ownership and promotes uncertainty" in the share immobilization era contrary to the legislature's intent. Conversely to *Dell*, upholding a strict construction of the statute affords stockholders the utmost predictability in the appraisal process by providing stockholders notice that in order to perfect their appraisal rights a provision should be put in the contract to ensure the shares' title remains unchanged. Stockholders who fail to negotiate a contract that accounts for their custodial banks' internal policies voluntarily assume the risk that their stock may be retitled. *Ala. By-Prod.*, 657 A.2d at 262. Above all, "vague" notions implying a strict construction promotes uncertainty are "inadequate to overcome the words of its text regarding the *specific* issue under

consideration" when the statute's meaning has been consistently upheld. *Montanile*, No. 14-723, slip op. at 661.

Here, the Appellants are in a situation that is remarkably similar to the stockholders in *Dell*. (Mem. Op. at 3); *Dell*, 2015 WL 4313206 at \*7. Just like in *Dell*, Cede & Co. was the record holder of the Appellants' shares at the time the appraisal petition was filed. (Mem. Op. at 3.) Subsequently, the name changed to the custodial banks' nominees – Cudd & Co. for JP Morgan Chase, and Mac & Co. for Bank of New York Mellon – prior to the effective date of the merger. (*Id.*) This retitling of stock amounts to a change in the "holder of record." The Delaware courts have never looked through Cede & Co to determine that any custodial banks' nominees are holders of record while the shares are titled to Cede & Co. See, e.g. *Enstar Corp. v. Senouf*, 535 A.2d 1351, 1354 (Del. 1987). Likewise, the continuity of beneficial ownership in the appraisal process is immaterial because the stockholders of record have always been the only ones capable of demanding appraisal.<sup>18</sup> Thus, the Appellants cannot satisfy the continuous holder requirement. Accordingly, this Court should affirm the Court of Chancery's grant of the Appellee's motion for summary judgment.

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<sup>18</sup>See *Id.*; see also *Engel v. Magnavox Co.*, 1976 WL 1705 at \*1 (Del. Ch.); *Nelson v. Frank E. Best Inc.*, 768 A.2d 473, 477 (Del. Ch. 2000); *Dirienzo*, 2009 WL 4652944; *Transkaryotic*, 2007 WL 1378345, at \*3.

**ii. Deciding Whether the "Stockholder" Definition "Looks Through" Cede & Co. to the Depository Trust Company's Participants' Nominees Has Been Answered by This Court and Any Reinterpretation Must Come From the Legislature.**

This Court has recently deferred to the legislature on an issue strikingly similar to the current issue before the Court on similar grounds as the Appellee posits. See *Crown*, 992 A.2d at 398. For example, in *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 398 (Del. 2010), the issue was whether the Cede & Co. breakdown is part of the stock ledger under Section 219 was determined to be an issue for the legislature. *Id.* Specifically, the Court stated: (1) a "gratuitous statutory interpretation resolving th[e] issue would not be prudent", (2) "the human failures that occurred. . . are easily avoidable in the future and may be a one-time anomaly that may not again occur", and (3) the DGCL is a "comprehensive and carefully crafted scheme that is periodically reviewed by the assembly." *Id.* The same considerations from *Crown* justify leaving the task of redefining "stockholders" as used in Section 262 to the legislature.

First, altering the plain language interpretation of "stockholder" would not be a prudent exercise of judicial authority. *Id.* Altering the "stockholder" definition would directly impact the total number of stockholders a corporation has, which in turn significantly alters the applications of at least two other sections of the DGCL, namely the anti-takeover exemption requirement under Section 203(b) (4) and the "market-out exception" under Section

262(b)(1).<sup>19</sup> The legislature is vastly better equipped to handle issues that alter other sections of the DGCL; it is not limited in its scope of review and can better interpret and remedy the impact that such a decision would have in the greater context of the statute. See *Crown*, 992 A.2d at 398. Given the legislature's "periodic review" of Section 262 and Section 262's comprehensiveness, this Court should defer to the legislature on the issue of whether "stockholders" should be redefined. *Id.*

Second, the Appellants had the opportunity to avoid the human errors in the present case, especially in light of the notice the *Dell* decision provides to beneficial stockholders and custodial brokers. Delaware law treats ownership changes at the depository level—from Cede & Co. to Mac and Co. and Cudd and Co. in this instance—as strictly voluntary. *Id.*; *Dell*, 2015 WL 4313206 at \*10. The shareholders assume the risk that their intermediaries might "act contrary to [their] interests" and retitle stock in their own name when they choose to hold through those intermediaries. *Ala. By-Prods.*, 657 A.2d at 262; *Dell*, 2015 WL 4313206 at \*10.

The Appellants are sophisticated parties who could have negotiated an agreement that would have avoided a change in the "holder of record" at the depository level. Instead, the beneficial owners made the same mistake as the stockholders in *Dell*. *Dell*, 2015 WL 4313206 at \*10. In *Dell*, the beneficial owners' agreements with their respective custodial banks undisputedly permitted the custodial banks to retitle the shares. *Dell*, 2015 WL 4313206 at \*10. The

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<sup>19</sup> Sections 203(b)(4) and 262(b)(1) can be affected by the number of stockholders a corporation has.

stockholders could have reasonably avoided litigation by putting a provision in the contract to ensure the shares' title remained unchanged. Here, Appellants were more than capable of doing the same.

Further, the Appellants failed to take preventative measures to ensure the shares remained titled in their names. The Appellants could have (1) negotiated agreements with their respective custodial banks that had agreements with the Depository Trust Company to maintain a vault of the paper stock in the event of appraisal; (2) used custodial banks whose internal policies did not require a retitling of shares to their own nominees in the event that the custodial brokers take possession of the paper stock in their own vaults; or (3) negotiated some other agreement with their custodial brokers so that a retitling from Cede & Co. to brokers' nominees would not occur in the event of an appraisal.<sup>20</sup>

The Appellant's argument that this Court should take into account the continuity ownership at the beneficiary level is without merit. The continuity of beneficial ownership is immaterial within in the appraisal process; only the stockholders of record are capable of demanding and executing appraisal.<sup>21</sup> Section 262's plain meaning provides "order", "certainty", and a "sure source of information." *Salt Dome*, 41 A.2d at 589. By holding the Appellants to the result

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<sup>20</sup> See *Ramtron and Dell: Chancery Court Provides New Defense Against Appraisal Arbitrageurs*, PRACTICAL LAW (Jul. 16, 2015), <http://us.practicallaw.com/w-000-4688#null>.

<sup>21</sup> See *Nelson*, 768 A.2d at 477 (reasoning that after Cede & Co. transferred record ownership of shares for which appraisal was sought to the appraisal petitioner, Cede & Co.'s demand for appraisal was invalid as violating the continuous holder requirement under 8 Del. C. § 262(a)); *Transkaryotic*, 2007 WL 1378345, at \*3; *Engel*, 1976 WL 1705 at \*1 (reinforcing the concept that "only the person appearing on the corporate records as the owner of stock in the corporation may qualify for an appraisal"); *Dirienzo*, 2009 WL 4652944.

dictated by Section 262's plain language, this Court is promoting the order and certainty the legislature intended.

Finally, the custodial banks' failure to perfect appraisal rights on behalf of the beneficial owners is a dispute that should be handled between the stockholders and their banks, rather than the stockholders and the acquiring corporation. See *Enstar*, 535 A.2d at 1354.

Accordingly, this Court should uphold the Court of Chancery's decision to grant the Appellee's motion for summary judgment.

**iii. The Appraisal Process Was Not Intended to Protect Appraisal Arbitrageurs.**

Appraisal "affords minority shareholders who object to a fundamental transaction the opportunity to exit from the enterprise on terms set by a judge instead of majority shareholders."<sup>22</sup> Here, the Appellants are sophisticated parties who found it lucrative to purchase shares of Prelix – subsequent to the record date for the merger – with the intent of pursuing appraisal for profit. (Mem. Op. at 3.) The Appellants are not minority shareholders who need protection against "opportunism at the hands of controlling stockholders."<sup>23</sup> Rather, the Appellants are the opportunists themselves, using appraisal as a sword, rather than as a protective shield in cohesion with its original intention.

Appraisal arbitrage has given rise to a "hotbed of nuisance claims of dubious social value," and is clogging up this state's judicial resources.<sup>24</sup> A win for the Appellants would not amount to a victory for fairness and justice, but rather a victory for corporate

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<sup>22</sup> Korsmo & Myers, *supra* note 7, at 1558-59.

<sup>23</sup> *Id.* at 1555.

<sup>24</sup> *Id.* at 1553.

extortion and manipulation. Accordingly, this court should uphold the Court of Chancery's decision to grant the Appellee's motion for summary judgment.

#### **CONCLUSION**

For all of the aforementioned reasons the Appellee respectfully request that this Court affirm the Court of Chancery's decision and grant the Appellee's motion for summary judgment. Application of the canons of statutory construction to Section 262 in addition to case law and policy rationales demonstrates that the Appellants have not and cannot satisfy the statutory requirements of Section 262. Accordingly, the Appellants are not entitled to appraisal pursuant to Section 262 and this Court should uphold the Court of Chancery's decision to grant the Appellee's motion for summary judgment.