IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S ANSWERING BRIEF

Filed by Team M
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NATURE OF THE PROCEEDINGS

Appellants Longpoint Investments Trust ("Longpoint") and Alexis Large Cap Equity Fund LP ("Alexis"), Petitioners below, brought suit in the Court of Chancery to exercise the rights of dissenting stockholders under Section 262 of the Delaware General Corporation Law ("§ 262") with respect to the April 16, 2015 acquisition of Prelix Therapeutics, Inc. ("Prelix"), Respondents below, by Radius Health Systems Corp. (Mem. Op. 1). As a result of the acquisition, appraisal rights were available to Prelix stockholders under § 262. Appellants filed this action on May 6, 2015; they filed their petitions for appraisal in their own names as permitted by § 262(e). (Mem. Op. 4).

Chancellor Mosley granted summary judgment for Appellee on January 13, 2016. The Court of Chancery held that because Appellants' shares were transferred from the holder of record at the time of the demand to a custodial bank nominee before the merger was consummated, Appellants are precluded from seeking appraisal under § 262(a). Appellants filed a notice of appeal on January 15, 2016. (Mem. Op. at 5).

Appellee requests that this Court affirm in part and reverse in part the Court of Chancery's order dismissing Appellants' petition for appraisal and find that § 262 precludes Appellants from seeking appraisal.

Summary of the Argument

1. Denied. This Court should deny Appellants' petition for appraisal because the holder of record did not continuously hold the shares of stock through the date of the merger as required to perfect appraisal rights under § 262(a). Because Appellants' shares of stock in Prelix were transferred from one holder of record, Cede & Co., to separate and distinct holder-nominees prior to the date of the merger, Appellants cannot perfect appraisal rights and their petition must be dismissed.

2. Denied. This Court should also deny Appellants' petition for appraisal as a matter of law and policy because they have failed to show that their shares were not voted for the merger. The plain language and purpose of § 262 requires the party seeking appraisal to affirmatively show their shares have not been voted for the applicable merger. Appellants' interpretation of § 262 creates the absurd result that a beneficial owner could seek appraisal of shares that may have been voted *for* the merger by a previous or unrelated owner; this outcome cannot stand. Finally, public policy demands that § 262 be read to narrow, not expand, the practice of "appraisal arbitrage"--a practice which perverts the very purpose of dissenters' rights, increases transaction costs for corporations which may be to the detriment of stockholders, and runs counter to this Court's commitment to judicial economy.

Counterstatement of Facts

The present appeal of the Court of Chancery's grant of summary judgment in favor of Prelix arises out of Prelix's acquisition by Radius Health Systems, completed April 16, 2015. (Mem. Op. at 1). The proposed acquisition was announced on October 15, 2014 at a price of $14.50 a share; this price represented a modest premium over the pre-announcement trading price. (Mem. Op. at 2). The record date to determine entitlement to vote was December 4, 2014. (Mem. Op. at 3). Prelix then amended that price on December 18, 2014, increasing it from $14.50 a share to $15.00. (*Id.*).

After the date of record for determining entitlement to vote on the merger and before the date on which the price was increased, Petitioners acquired approximately 5.4% of the roughly forty-nine million outstanding shares of Prelix common stock. (Mem. Op. at 1, 3). On January 13, 2015, Cede & Co., the holder of record and depository nominee at that time, delivered formally valid and timely written demands for appraisal of Petitioners' shares on their behalf; Petitioners' shares were held by Cede & Co. in fungible bulk. (Mem. Op. at 1,3,5). It is uncontested that Petitioners never instructed the holder of record to vote their shares for the merger. (Mem. Op. at 5). Indeed, Petitioners neither bought the shares in time to establish voting rights nor acquired proxies from prior owners of the shares to obtain that right.

Depository Trust Company ("DTC") then moved the "appropriate amount of shares" from its "FAST Account" and delivered them to J.P.

Morgan Chase and Bank of New York Mellon, the DTC participants and custodial firms holding Longpoint's and Alexis' Prelix shares, respectively, on their behalf. (Mem. Op. at 3). In doing so, DTC directed Prelix's transfer agent "to issue uniquely numbered certificates representing those shares." (*Id.*). Those certificates were issued in Cede & Co.'s name on January 23, 2015, and then endorsed by Cede & Co. on February 5, 2015 so the shares could be reissued in the names of the nominees for J.P Morgan Chase and Bank of New York Mellon: Cudd & Co. and Mac & Co., respectively; this re-titling was completed on February 5, 2015. (*Id.*).

Petitioners were unaware of the changes in record ownership at the time and did not actively bring about the changes. (Mem. Op. at 4). In summation, the result of these changes was that the holder of record that made the appraisal demand on which Petitioners filed the present action, Cede & Co., was no longer the holder of record when the merger was consummated on April 16, 2015. (*Id.*).

The stockholder meeting to vote on the merger took place on February 17, 2015 after being delayed from its originally scheduled date of January 14, 2015. (Mem. Op. at 2). The merger was approved with over 53% of outstanding shares voted in favor of the acquisition. (Mem. Op. at 3). No other stockholders submitted demands for appraisal with respect to Radius' acquisition of Prelix. (Mem. Op. at 4). On May 6, 2015, Petitioners brought the present action; Petitioners filed their petitions for appraisal in their own names and did not have the holder of record file on their behalf. (Mem. Op. 4)

ARGUMENT

I. THIS COURT SHOULD DISMISS APPELLANTS' PETITION FOR APPRAISAL BECAUSE APPELANTS FAILED TO COMPORT WITH THE EXPRESS TERMS OF § 262, WHICH REQURES THAT ONE HOLDER OF RECORD CONTINUOUSLY HOLD THE SHARES FROM THE DATE OF THE APPRAISAL DEMAND TO THE EFFECTIVE DATE OF THE MERGER.

A. Question Presented

Whether shares held by one holder of record at the time of the appraisal demand and then re-titled in the names of the custodial bank's nominee prior to the effective date of the merger can be properly eligible for appraisal under § 262[1] which requires that the holder of record at the time of demand "continuously hold" the shares through the effective date of the merger.

B. Scope of Review

The Court of Chancery's decision granting summary judgment is subject to de novo review. *Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del. 1994). This Court must review the entire record and treat "all facts in a light most favorable to the non-moving party." *Stroud v.* Grace, 606 A.2d at 81. This Court may draw its own factual conclusions "if the trial court's rulings are clearly wrong," and "examine all legal issues to determine whether the trial court 'erred'" in applying the law. *Id.* (citing *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1142 (Del. 1990). The more deferential "abuse of discretion" standard is not appropriate in this case because it has not proceeded to a determination of fair value; the issues present

[1] DEL. CODE. ANN. tit.8 § 262(a), (d)(1), and (e) are reproduced in the attached Appendix.

before this Court are of standing to bring a petition for appraisal. *See Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 34 (Del. 2005).

C. Merits of the Argument

1. Application of the Plain Meaning Canon of Statutory Interpretation Dictates Strict Compliance with §262.

This Court has recognized the primacy of enforcing the plain meaning of the statutory language itself. *See LeVan v. Independence Mall, Inc.*, 950 A. 2d 929, 933 (Del. 2007). In *Doroshow, Pasquale, Krawitz & Bhava v. Nanticoke Mem'l Hosp., Inc.*, this Court asserted that "[i]f the statute is unambiguous, then there is no room for judicial interpretation and 'the plain meaning of the statutory language controls.'" 36 A. 3d 336, 342-43 (Del. 2012) (citing *Eliason v. Englehart*, 733 A. 2d 944, 946 (Del. 1999)).

A statute may be ambiguous for either of two reasons: (1) if the statute is "susceptible of two reasonable interpretations," and (2) if "a literal reading of the statute's terms 'would lead to an unreasonable or absurd result not contemplated by the legislature.'" *CML V, LLC v. Bax*, 28 A. 3d 1037, 1040 (Del. 2011) (citing *LeVan*, 950 A. 2d at 933).

a. In Order to Perfect Appraisal Rights, § 262 Unambiguously Requires that the Holder of Record that Makes the Appraisal Demand, Itself a Specific Entity, Must Continuously Hold the Shares for Which it Demands Appraisal Until the Merger is Consummated.

Section 262 is clear and unambiguous. Pertinent to the continuous holder requirement at issue, the statute requires "[a]ny stockholder who holds shares of stock on the date of the making of a demand" seeking appraisal rights to "*continuously* [hold] such shares through

the effective date of the merger . . .” DEL. CODE ANN. tit. 8 § 262(a) (2015) (emphasis added). For the purpose of determining a continuous holder of the shares, the statute defines “stockholder” as “a holder of record in a corporation.” *Id*. Thus, per the plain meaning, only the holder of record may demand appraisal rights and that same record holder must continuously hold the shares from the time of the demand for appraisal was made through the effective date of the merger. The holder of record, here Cede & Co., is its own definitive entity under the statute, and this Court cannot “look through” Cede & Co. to some other entity as Appellants argue.

Section 262 cannot be ambiguous because §262 is not subject to two reasonable interpretations. The sentence structure of the statute is simple, clear, and deliberate. For the purpose of determining which entity must “continuously” hold the shares, the key definition, “stockholder,” is clearly defined within the statute itself: “holders of record.” DEL. CODE ANN. tit. 8 § 262(a).

Examination of the use of “holder of record” elsewhere in Delaware corporate law demonstrates the plain and self-descriptive meaning of the term as used in § 262. Section 220 defines “stockholder” for the purposes of §220 as “a holder of record of stock in a stock corporation, or a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person.” DEL. CODE ANN. tit. 8 § 220(a)(1).

This definition confirms the self-descriptive nature of the term. Additionally, the definition distinguishes between holders of record

and beneficial owners. While both are stockholders for purposes of §220, the definition lists the terms separately because the terms are distinct. Finally, in distinguishing holders of record from beneficial owners, the statute does not conflate a "voting trust" or a "nominee" with a holder of record such that one can not "look through" the holder of record to some other "voting trust," "nominee," or "beneficial owner" as a continuous holder of shares. By its definition, there can only be one holder of record. Here, Cede & Co., was the holder of record when the demand was made, and therefore under § 262, Cede & Co. must be the holder of record when the merger is consummated, having continuously held the shares, in order for appraisal rights to be perfected.

What matters under § 262 is not the identity of the holder of record, but that the holder of record remains the same. Another party, such as a nominee or beneficial owner could have become the holder of record, made the demand itself, and continuously held the shares through the effective date of the merger. *See generally BMC Software Inc.*, No. CV 8900-VCG, 2015 WL 67586, at *1 (Del. Ch. Jan. 5, 2015). But that is not the case that Appellants' present and therefore there is only one reasonable interpretation of the term "holders of record."

b. A Plain Reading of § 262 Described Herein Does Not Create an Absurd result, but Rather Lends Itself Toward Order and Certainty.

Applying the plain meaning of §262(a) does not cause an absurd result. Rather, application of the plain meaning of §262(a) results in "order and certainty." *See Salt Dome Oil Corporation v. Schenck*, 41 A.

2d 583, 589 (Del. 1945). Section 262 establishes a strict procedure for stockholders and companies to follow relating to appraisal rights. The statute is clear and unambiguous on its face and clear and unambiguous in its operation if the parties abide by the statute's rules; the statute operates as the legislature intended. *See Enstar Corp. v. Senouf,* 535 A. 2d 1351, 1352 (Del. 1987).

Where the language in a statute is unambiguous, "there is no room for judicial interpretation and 'the plain meaning of the statutory language controls." *Doroshow*, 36 A. 3d at 342-43. The language in the statute is unambiguous under a plain reading. Further, neither of the two factors which could render a statute ambiguous under this Court's jurisprudence—that the statute is susceptible to two reasonable interpretations and that the plain meaning would cause an absurd result—apply. Thus, the statute is unambiguous and therefore there is "no room for judicial interpretation." *Id*.

Application of the plain meaning of §262(a) to the facts of the case yields a clear and unambiguous result. The Continuous Holder requirement in §262(a) dictates that the holder of record must make the appraisal demand on the share and also that the same holder of record must continuously hold such shares through the effective date of the merger or consolidation. DEL. CODE ANN. tit. 8, §262(a). Here, the holder of record who made the appraisal demand, Cede & Co., re-titled the shares to the nominees of the beneficial owners, resulting in a change of the holder of record from Cede & Co. to the nominees of the beneficial owners. Thus, the holder of record who made the

appraisal demand, Cede and Co., did not continuously hold the shares until the effective date of the merger or consolidation. Thus, the appraisal demand fails as a matter of law.

Finally, appraisal rights are a statutory remedy; therefore, determination of the availability of an appraisal right is a legal and not an equitable question. *In re Appraisal of Dell, Inc.*, 2015 WL 4313206, *15 (Del. Ch. 2015) (citing *Salt Dome* 41 A. 2d at 587). Application of the statutory rules, not appeals to equity, govern the availability of appraisal rights. Even if the re-titling of the shares was "inadvertent," the parties are still held to the same strict statutory standard. *Alabama By-Products Corp. v. Cede & Co. on Behalf of Shearson Lehman Bros. Inc.*, 657 A. 2d 254, 261 (Del. 1995). Here, the appellants violated the express terms of §262(a) and therefore are not entitled to appraisal rights.

2. Extensive Precedent in This Court Demands Strict Compliance With the Statutory Language of § 262.

Section 262 of the Delaware General Corporate Law specifies the procedure through which a party may seek appraisal rights. *See* DEL. CODE ANN. tit. 8, § 262. The procedure detailed in § 262 is the only means through which a party may achieve appraisal rights under Delaware law. *Alabama By-Products*, 657 A. 2d at 258.

This Court has repeatedly held that stockholders must strictly comply with the requirements of § 262. Where a clear and unambiguous procedure exists, such as in § 262, stockholders are bound to abide by it. In *Salt Dome Oil Corp. v. Schenck*, this Court strictly applied the statutory language of the predecessor to § 262. *Salt Dome*, 41 A. 2d

583 at 589. Addressing the "open question" of who is a stockholder under the appraisal rights statute, this Court held that only a holder of record was a stockholder. *Id.* at 589. The beneficial owners were not stockholders under the statute, they could not bring the appraisal demand even if they physically owned the shares. *Id.* Accordingly, this strict compliance dictates that only Cede & Co, the holder of record that made the appraisal demand, can be the "holder of record" that must continuously hold the shares through the effective date of the merger.

It is not just stockholders who must adhere strictly to the statute's requirements. Strict compliance applies "even-handedly, not as a one-way street." *Berger v. Pubco Corp.*, 976 A. 2d 132, 144 (Del. 2009). Likewise, "neither [the company nor the stockholder] gets the benefit of doubt under a more lenient rule" but rather both are held to the strict compliance standard. *Dell*, 2015 WL 4313206 at *10. While practices regarding the holding of shares changed from the time of *Salt Dome* to that of *Enstar* and *Alabama By-Products*, this Court's insistence on strict compliance with the statutory text remained the same. *See In re Appraisal of Dell Inc.*, 2015 WL 4313206 at *1-2 (discussing the creation of the Depository Trust Company and Cede & Co.).

Even errors made by a nominee without the knowledge of the beneficial owner may be sufficient to preclude appraisal rights. *Enstar*, 535 A. 2d at 1355. This Court in *Enstar* held that even such a technical error as bringing the appraisal demand in the name of a

party other than the stockholder of record precluded appraisal as the demand did not strictly comply with the explicit terms of § 262. *Id.* at 1355.

This Court requires strict compliance with § 262 in all circumstances, even for involuntary or inadvertent acts. *Alabama By-Products*, 657 A. 2d at 261. Like in *Enstar*, the plaintiff's lack of fault was irrelevant to the court's holding. *Id.* at 261, 267. As in *Enstar*, this Court "[held] that strict compliance with Section 262 is necessary." *Id.* at 267.

Altering the strict compliance regime governing § 262, established by the statute and continuously upheld by this Court, is a matter best left to the legislature. As this Court has stated, "[i]f the policy or wisdom of a particular law is questioned as unreasonable or unjust, then only the elected representative of the people may amend or repeal it." *Delaware Solid Waste Auth. v. News-Journal Co.*, 480 A. 2d 628, 634 (Del. 1984) (citing *Public Service Commission v. Wilmington Suburban Water Corp.*, 467 A. 2d 446, 451 (Del. 1983)). Even if this Court were to disagree with the plain language of § 262 and extensive precedent and find the strict compliance regime of the statute unwise, deference to the elected representatives of the people is the proper remedy.

3. Appellants Failed to Perfect Appraisal Rights Under the Plain Terms of § 262 Because Their Holder Of Record at the Time the Demand Was Made Did Not "Continuously Hold" The Shares.

Appellants did not perfect appraisal rights and therefore protections afforded by § 262(k) and *Alabama By-Products* cannot apply.

See Alabama By-Products, 657 A. 2d at 259. Section 262(d) governs the perfection of appraisal rights, and all of the requirements demand strict compliance. *See* DEL. CODE ANN. tit. 8, § 262(d).

Appellants will argue that they have successfully perfected their appraisal rights and that under *Alabama By-Products* a perfected appraisal right cannot be withdrawn--intentionally or unintentionally--unless one of the explicit conditions of § 262(k) is met. *See* DEL. CODE ANN. tit. 8 § 262(k) (2015). Appellants will contend that since none of the explicit conditions of § 262(k) are met in this case, the inadvertent re-titling of their shares does not constitute forfeiture of their appraisal rights.

Far from strict compliance, the only step towards perfection completed by the Appellants prior to the re-titling was the making of the appraisal demand itself; because of the re-titling, Appellants are in clear violation of the Continuous Holder Requirement because the merger had not yet closed at the time of the re-titling. (Mem. Op. at 3). *See Dell*, 2015 WL 4313206 at *10.

In the present case, the demand for appraisal was submitted on January 13, 2015, the shares were transferred from Cede & Co. and re-titled to Cudd & Co. and Mac & Co. on February 5, 2015, and the effective date of the merger was April 16, 2015. Clearly, the holder of record that made the appraisal demand was no longer the holder of record on the effective date of the merger. Accordingly, Appellants cannot perfect appraisal rights and the protections Appellants seek under *Alabama By-Products* do not apply.

II. THIS COURT SHOULD DISMISS APPELLANTS' PETITION FOR APPRAISAL BECAUSE BOTH PARTIES HAVE FAILED TO SHOW THAT THE SHARES OF STOCK FOR WHICH THEY SEEK APPRAISAL WERE NOT VOTED FOR THE MERGER AS REQUIRED BY § 262.

A. Question Presented:

Whether a beneficial owner that directly petitions for appraisal rights under § 262(e) must show that that their shares were not voted for the merger in order to to have standing to pursue appraisal, a right historically provided to those minority dissenting shareholders seeking a fair valuation of their shares.

B. Scope of Review

As noted *supra*, the Court of Chancery's decision granting summary judgment is subject to de novo review. *Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del. 1994). This Court must treat the facts in a light most favorable to the non-moving party, and may draw its own factual conclusions "if the trial court's rulings are clearly wrong," and "examine all legal issues to determine whether the trial court 'erred'" in applying the law. *Id.* (citing *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1142 (Del. 1990).

C. Merits of the Argument

The Court of Chancery erred when it held that as a matter of law, beneficial owners that petition for appraisal of their shares of stock do not have to prove that those shares were not voted in favor of a merger in order to perfect their right to appraisal under Del. C. § 262. *See In re Appraisal of Ancestry.com, Inc.*, No. CV 8173-VCG, 2015 WL 66825, at *1 (Del. Ch. Jan. 5, 2015); *Merion Capital LP v. BMC Software, Inc.*, No. CV 8900-VCG, 2015 WL 67586, at *1 (Del. Ch. Jan.

5, 2015). Instead, § 262 as amended in 2007 demands that where the beneficial owner of shares of stock sues for appraisal in their own name without naming the holder of record in the suit, the beneficial owner must show that the shares of stock for which they seek appraisal were not voted in favor of the merger. DEL. CODE ANN. tit. 8 § 262(e) (2015). The plain meaning of this statute and the purpose of the appraisal statute taken as a whole necessitate this conclusion.

1. The Ordinary Meaning of § 262 Demands that a Beneficial Owner that Petitions for Appraisal in Its Own Name under § 262(e) as Amended Must Show that Their Shares Were Not Voted For the Merger.

The Court must apply a statute according to its "ordinary, common meaning." *Dewey Beach Enters, Inc. v. Bd. of Adjustment of Dewey Beach*, 1 A.3d 305, 307 (Del. 2010). Additionally, Delaware's appraisal statute, § 262, must be read "as a whole, rather than in parts" in order to produce a "harmonious" body of law. *In re Krafft-Murphy Co.*, 82 A.3d 696, 702 (Del. 2013). Section 262(a) sets out the preliminary eligibility requirements to perfect appraisal rights: a "stockholder" must not have voted the applicable shares "in favor of the merger." DEL. CODE ANN. tit. 8 § 262(a) (2015). Furthermore, § 262(e) provides that only those "shares not voted in favor of the merger" are eligible for appraisal. DEL. CODE ANN. tit. 8 § 262(e). Finally, § 262(e) was amended in 2007 to allow beneficial owners to petition directly for appraisal, rather than having the holder record petition on their behalf. *In re Ancestry.com, Inc.*, 2015 WL 66825, at *1.

A "stockholder" is defined under § 262(a) as the "holder of record" and was the only party entitled to perfect and seek appraisal before § 262 was amended following the *Transkaryotic* case. *See In re Appraisal of Transkaryotic Therapies, Inc.*, No. CIV.A. 1554-CC, 2007 WL 1378345, at *3 (Del. Ch. May 2, 2007) (where the Court of Chancery held that the actions of beneficial owners are "irrelevant in appraisal matters" because only the holder of record "may claim and perfect appraisal rights;" and further held that appraisal may be perfected where the holder of record has voted some shares in favor of the merger, as long as it holds enough shares *not* voted for the merger and thus available for appraisal). Section 262(e) provides that "any stockholder who has complied with subsections (a) . . . and who is otherwise entitled to appraisal rights, may commence an appraisal . . . by filing a petition . . ." DEL. CODE ANN. tit. 8 § 262(e). Section 262(e) as amended additionally provides that "notwithstanding subsection (a) of this section, a person who is the *beneficial owner* of shares of such stock held . . . by a nominee *on behalf of such person* may . . . file a petition" for appraisal of those shares. DEL. CODE ANN. tit. 8 § 262(e).

The Court of Chancery, in their reasoning in *Ancestry.com, Inc.* and *BMC Software, Inc.* looked to *In re Transkaryotic Therapies, Inc.* to support its erroneous claim that under § 262, only a record holder may claim and perfect appraisal rights, and thus that "it necessarily follows that [only] the record holder's actions [can] determine perfection of the right to seek appraisal." *In re Ancestry.Com, Inc.*,

2015 WL 66825 at *5. When *Transkaryotic* was decided, only the holder of record had the right to petition for appraisal, and accordingly, the plaintiff seeking appraisal rights was Cede & Co., the holder of record--not the beneficial owner. *In re Appraisal of Transkaryotic Therapies, Inc.*, 2007 WL 1378345 *1.

Indeed, Judge Chandler concluded the *Transkaryotic* opinion by stating that "§ 262, as currently drafted, dictates [that] . . . [o]nly the record holder possesses and may perfect appraisal rights. The statute simply does not allow consideration of the beneficial owner in this context. The Legislature, not this Court, possesses the power to modify § 262 . . ." *Id.* at *5. Less than a year later, the Legislature did amend § 262 to extend the right to petition for appraisal, and thus the responsibility to perfect it, to beneficial owners.

Under the statute as amended, beneficial owners may petition for appraisal without naming their holder of record in the suit, and as a record holder must show that the shares for which they seek appraisal were not voted in favor of the merger, so too must a beneficial owner that petitions for appraisal in their own name. *In re Appraisal of Ancestry.com*, 2014 WL 3615898 (Del.Ch.) (Reply Brief in Support of Resp'd Motion for Sum. Jug.). Accordingly, Appellants must prove that the shares of stock held by the holder of record *on behalf of* the beneficial owners must not have been voted in favor of the merger. As an issue of first impression, this Court has the opportunity to right the wrongs of *Ancestry.com, Inc.* and *BMC Software, Inc.*

a. Appellants Must Show that the Shares *Held On Their Behalf* By Their Holder of Record, Cede & Co., Were Not Voted For the Merger.

This Court has long held that a holder of record acts as an agent for each beneficial owner it services separately, not as a single record holder-nominee acting as one agent to many beneficial owners, even though the applicable shares of stock may be held in fungible bulk. *See Reynolds Metals Co. v. Colonial Realty Corp.*, 190 A.2 752, 754, 755 (Del. 1963). In *Reynolds*, this Court held that a nominee may seek appraisal at the request of a beneficial owner that directed the nominee to vote its shares against a merger even where the nominee voted other shares of the same stock *for* the merger at the request of separate and distinct beneficial owners. *Id.* (where the beneficial owner's shares were affirmatively voted "no" on the merger).

In order to square this Court's precedent with the plain language of § 262, a beneficial owner cannot be "divorced" from the shares of stock held by the holder of record *on his behalf*. *In re Ancestry.com, Inc.*, 2014 WL 3615898 (Del.Ch.) (Reply Brief in Supp. of Resp'd Motion for Sum. Jug.). Indeed, the beneficial owner's appraisal rights are tied to those shares of stock held *on his behalf* by the record holder-nominee. Though petitioners can prove that they, as the beneficial owners of those shares subsequent to the record date, never voted the shares for the merger nor voted at all, Appellants must show that the shares held on their behalf were also not voted *for* the merger.

For the reasons above, the Court of Chancery erred when it diverged from the plain meaning of § 262 and prior precedent and held

that only the holder of record's aggregate holdings determine whether there are enough shares of stock not voted for the merger held in fungible bulk to cover a beneficial owner's appraisal request. Under the Court of Chancery's rule, a beneficial owner may perfect appraisal rights as a result of an action by the holder of record taken *on behalf of* a a beneficial owner other than the one that petitions for appraisal. *Id.* As discussed below, this creates an absurd result, but also significantly deviates from the purpose of appraisal rights.

b. At a Minimum, Appellants Must Show That Cede & Co. Held At Least As Many Shares Not Voted For the Merger As The Number of Shares on Which Appellants Seek Appraisal.

If Appellants are not required to show that their shares were not voted for the merger, Appellants must at minimum, per *Ancestry* and *BMC Software, Inc.*, show that their holder of record, Cede & Co., held at least as many shares not voted for the merger as the number for which they seek appraisal. *In re Ancestry.com, Inc.*, 2015 WL 66825, at *1; *BMC Software, Inc.*, 2015 WL 67586, at *5. Under its own precedent prior to the present case, the Court of Chancery has held that a petitioner must show that the holder of record held at least as many shares of the stock in question "not voted in favor of the merger as the number for which it sought appraisal," in order to secure appraisal rights. John Stigi & Alex Kuljis, *Delaware Court of Chancery Rejects Share-Tracing Standing Requirement for Appraisal Petitioners*, CORPORATE & SECURITIES LAWBLOG (Feb. 20, 2015); *In re Ancestry.com, Inc.*, 2015 WL 66825, at *1. In the present case, the Court of Chancery failed to address this element and Appellants have failed to prove it.

In *Ancestry*, the petitioners showed that Cede & Co. had the requisite shares; In *BMC Software, Inc.*, the petitioner was the holder of record itself, not a beneficial owner, but also proved that they held the requisite shares. In *Ancestry*, where the petitioner was the beneficial owner, not the holder of record, the Court of Chancery opined that "in order to perfect the appraisal remedy" according to § 262(a), a petitioner must show 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.*

In re Ancestry.com, Inc., at *4 (emphasis added). The court specifically stated that "Cede must also have had sufficient shares not voted in favor of the merger, per the *Transkaryotic* decision, to cover the number of shares for which [petitioner] sought appraisal." *Id.* at 6. In *Ancestry*, petitioners--the beneficial owners of the shares of stock--showed that their holder of record, Cede & Co., held sufficient shares of stock not voted for the merger to satisfy the appraisal demand. *Id.* at *6; *see also Transkaryotic*, at *4.

In the present case, Petitioners Longpoint and Alexis have failed to show that Cede & Co. held at least as many shares not voted for the merger as the number for which they seek appraisal. Accordingly, Appellants have no standing to pursue appraisal at this time. Furthermore, the Court of Chancery failed to address this matter and

thus erred in holding that Appellants' right to appraisal had been perfected under § 262. Said another way, although a beneficial owner may not be responsible for perfecting appraisal rights, their petition for appraisal is invalid if they cannot show that the holder of record did perfect appraisal rights by holding as many or more shares not voted for the merger than those for which a beneficial owner seeks appraisal. On that basis, Appellants have failed to show that appraisal rights were perfected per § 262.

2. The Underlying Purpose of § 262 and Appraisal Rights Requires Appellants to Show That The Shares For Which They Seek Appraisal Were Not Voted For the Merger.

Before appraisal rights were granted to shareholders by the Delaware legislature, all "major corporate decisions" required unanimous consent. *In re Appraisal of Transkaryotic*, 2007 WL 1378345,at *3. The original common-law rule resulted in a single shareholder having veto power over a potential merger. *BMC Software, Inc.*, 2015 WL 67586 at *4. In requiring less than unanimous consent for a merger to proceed, the legislature provided dissenting shareholders an option to seek "judicial determination of the fair value of their shares," and thus provided an avenue for protection of minority stockholders in a system where the majority rules *Id.*

Furthermore, when amended in 2007, the legislature added language to § 262(e) which provided that any stockholder that has complied with §262(a) and (d) is entitled to receive a statement from the surviving corporation that sets forth the "aggregate number of shares not voted

in favor of the merger," and for which appraisal demands have been received, as well as the the number of holders of those shares. DEL. CODE ANN. tit. 8 § 262(e). This implicitly requires shares not voted for the merger to be apportioned to each dissenting or abstaining holder. In this way, the upper limit of appraisable shares is determined, and the petitioner must show that it only seeks appraisal of those shares "not voted in favor of the merger." § 262(e).

This section further supports the conclusion that it was the legislature's intent that only those shares not voted for a merger are available for appraisal. It logically follows that in order to perfect appraisal rights and petition for them, a petitioner must show that their shares have not been voted for the merger. Appellants reading of the statute frustrates the purpose of the legislature in providing appraisal rights to *dissenting* shareholders in the first place.

3. Appellants' and the Court of Chancery's Reading of the Statute Impermissibly Leads To the Absurd Result that More Shares Than Were Not Voted For the Merger Could Be Subject to Appraisal.

Where a statute is unambiguous, its plain meaning controls. *Doroshow, et. al.*, 36 A. 3d 336, 342-43. As argued above, the statute's plain meaning clearly demands that Appellants show that their shares were not voted for the merger. But if this Court were to find that the plain meaning is not clear, Appellant's petition must still be dismissed because their reading of § 262 creates an absurd result not contemplated by the legislature.

A statute may be ambiguous where a "literal reading of the statute's terms would 'lead to an unreasonable or absurd result not

contemplated by the legislature." *Bax*, 28 A. 3d at 1040 (citing *LeVan*, 950 A. 2d at 933). If a petitioner does not need to show that its shares were not voted for the merger, a petitioner could seek appraisal on *more* shares than were not voted for the merger. This result is an absurd and not contemplated by the legislature. Further, shareholders could seek appraisal on shares of stock that were affirmatively voted for the merger if they have no burden to prove otherwise. After all, stockholders that sell their shares after the record date retain the right to do so to vote those shares. Thomas Kirchner, *Merger Arbitrage: How to Profit from Event-Driven Arbitrage* 111. Petitioners' "concession" that they could not have voted for the merger is likewise disingenuous. (Mem. Op. at 5).

It is a perversion of the statute to allow a beneficial owner to petition for appraisal rights where that owner cannot show that its shares were not voted for the merger and thus qualify for appraisal at all. Accordingly, the party seeking appraisal carries the burden of proving that the shares for which it seeks appraisal were not voted for the merger; Petitioners have failed to do so here.

4. By Increasing Transaction Costs, Jeopardizing The Rights of Truly Dissenting Stockholders, and Interfering With This Court's Commitment to Judicial Economy, Appellants' Use of the Appraisal Right is Wholly Against Public Policy.

As a matter of public policy, plaintiffs should be required to show that, at a minimum, the shares for which they seek appraisal were not voted in favor of the merger. The public policy that underlies the statutory scheme of § 262 is the protection of *dissenting* stockholders

seeking the fair value of their shares. As legislative history illustrates, the right to appraisal is meant for those minority stockholders that dissent from the majority in a merger or change of control; it should thusly be safeguarded against abuse. *See BMC Software, Inc.*, 2015 WL 67586 at *4.

Between 2004 and 2010, the number of appraisal actions rose and fell proportionately with the number of mergers in each year. Minor Myers and Charles Korsmo, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 Wash. U. L. Rev. 1551, 1569 (2015). Beginning in 2011, despite a lower overall level of mergers, petitions for appraisal more than doubled. *Id.* In 2013, "[t]he amount of money involved [was] nearly three times the amount involved in any prior year and ten times the 2004 amount." *Id.* at 1571. Curiously, this increase in appraisal petitions does not coincide with increased merger activity. *Id.* Even more telling, over 80% of appraisal petitions filed since 2011 were filed by a "repeat petitioner"--a petitioner that has filed more than one appraisal petition between 2011 and 2015. *Id.*

The stockholders filing these appraisal petitions en masse are not the stockholders § 262 seeks to protect, but rather "sophisticated" professional plaintiffs constantly looking for holes in caselaw through which to make a potentially enormous profit from the relevant corporations and its other stockholders. *Id.* at 1572. Though it is not at issue in the present case, if the Court of Chancery's interpretation of § 262 as it pertains to proving that one's shares were not voted for the merger is allowed to stand, this

Court will create a rule under which a stockholder such as Longpoint or Alexis may be able to seek appraisal on shares they cannot prove were *not* voted for the merger. As a result, they may be able to perfect appraisal on shares of stock that either were voted on the merger by another party, or are shares belonging to another stockholder not voted for the merger and for which only that stockholder should have the right to seek appraisal. Further, it would be possible for stockholders to seek appraisal on more than half the outstanding shares, even if the merger was successful. This use of dissenters' rights perverts the purpose of the appraisal right, and the incredible volume of petitions naturally increases transaction costs for corporations, likely to the detriment of its other stockholders, and runs counter to this Court's commitment to judicial economy.

CONCLUSION

For the foregoing reasons, this Court should affirm in part and reverse in part the Court of Chancery's opinion, and deny Appellants' petition for appraisal.

Respectfully submitted,

/s/ Team M

Team M, Counsel for Defendants - Below, Appellee

February 5, 2015

APPENDIX

DEL. CODE. ANN. tit.8 § 262(a) (West 2015):

(a) Any stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, 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 of stock under the circumstances described in subsections (b) and (c) of this section. As used in this section, the word "stockholder" means a holder of record of stock in a corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words; and the words "depository receipt" mean a receipt or other instrument issued by a depository representing an interest in 1 or more shares, or fractions thereof, solely of stock of a corporation, which stock is deposited with the depository.

DEL. CODE. ANN. tit.8 § 262(d)(1) (West 2015):

(d) Appraisal rights shall be perfected as follows:
(1) If a proposed merger or consolidation for which appraisal rights are provided under this section is to be submitted for approval at a meeting of stockholders, the corporation, not less than 20 days prior to the meeting, shall notify each of its stockholders who was such on the record date for notice of such meeting (or such members who received notice in accordance with § 255(c) of this title) with respect to shares for which appraisal rights are available pursuant to subsection (b) or (c) of this section that appraisal rights are available for any or all of the shares of the constituent corporations, and shall include in such notice a copy of this section and, if 1 of the constituent corporations is a nonstock corporation, a copy of § 114 of this title. Each stockholder electing to demand the appraisal of such stockholder's shares shall deliver to the corporation, before the taking of the vote on the merger or consolidation, a written demand for appraisal of such stockholder's shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such stockholder's shares. A proxy or vote against the merger or consolidation shall not constitute such a demand. A stockholder electing to take such action must do so by a separate written demand as herein provided. Within 10 days after the effective date of such merger or consolidation, the surviving or resulting corporation shall 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 of the date that the merger or consolidation has become effective;

DEL. CODE. ANN. tit.8 § 262(e) (West 2015):

(e) Within 120 days after the effective date of the merger or consolidation, the surviving or resulting corporation or any stockholder who has complied with subsections (a) and (d) of this section hereof and who is otherwise entitled to appraisal rights, may commence an appraisal proceeding by filing a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders. Notwithstanding the foregoing, at any time within 60 days after the effective date of the merger or consolidation, any stockholder who has not commenced an appraisal proceeding or joined that proceeding as a named party shall have the right to withdraw such stockholder's demand for appraisal and to accept the terms offered upon the merger or consolidation. Within 120 days after the effective date of the merger or consolidation, any stockholder who has complied with the requirements of subsections (a) and (d) of this section hereof, upon written request, shall be entitled to receive from the corporation surviving the merger or resulting from the consolidation a statement setting forth the aggregate number of shares not voted in favor of the merger or consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares. Such written statement shall be mailed to the stockholder within 10 days after such stockholder's written request for such a statement is received by the surviving or resulting corporation or within 10 days after expiration of the period for delivery of demands for appraisal under subsection (d) of this section hereof, whichever is later. Notwithstanding subsection (a) of this section, a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person may, in such person's own name, file a petition or request from the corporation the statement described in this subsection.