IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

BRIEF FOR THE APPELLEE

Team O,
Co-counsels for appellee

Dated: February 4, 2016

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NATURE OF PROCEEDINGS

Petitioner-appellants, Longpoint Investments Trust ("Longpoint") and Alexis Large Cap Equity Fund LP ("Alexis"), brought an action in the Delaware Court of Chancery seeking judicial appraisal of their stock of respondent-appellee, Prelix Therapeutics Inc. ("Prelix"). Prelix moved for summary judgment, asserting that because neither Longpoint nor Alexis met the requirements of the appraisal rights statute, the petition should be dismissed as a matter of law. On January 13, 2016, Chancellor Mosley granted Prelix's motion for summary judgment. Longpoint and Alexis timely appealed to this Court.

SUMMARY OF ARGUMENT

As appraisal arbitrageurs, Longpoint and Alexis are sophisticated stock traders whose investment strategy entirely relies upon the appraisal rights statute. They, however, failed to meet two statutory requirements of that appraisal rights statute.

First, neither Longpoint nor Alexis can show their shares were in fact voted against the merger. The plain language of the appraisal rights statute shows that only dissenting stockholders are entitled to appraisal. Petitioners who seek the benefits of the appraisal rights statute have the burden to demonstrate that they are entitled to its benefit. Without such a burden, there would be no reason for an appraisal arbitrageur to actually vote against a merger because an arbitrageur needs the merger to be approved in order for its investment strategy to succeed. It is undisputed that Longpoint and Alexis cannot show that their shares were actually voted against the

merger. Therefore, appellants cannot show they are entitled to the benefits of the appraisal rights statute.

Second, the legal titles of appellants' shares were not held continuously during the statutorily relevant time period. The statute requires that a stockholder continuously hold shares through the merger to assert appraisal rights. Further, the law defines stockholder as the holder of record and not the beneficial owners, Longpoint and Alexis, nor the Depository Trust Company ("DTC"). This definition has been used in Delaware for more than seven decades. The mere fact that appellants' shares were retitled without their knowledge does not compel this Court to reverse seventy years of precedent. To the contrary, appellants assumed such risk when they voluntarily chose to indirectly hold stock. Therefore, the undisputed fact that Longpoint and Alexis's shares were retitled before the merger means they cannot assert appraisal rights.

As sophisticated investors whose entire strategy depends upon the appraisal rights statute, Longpoint and Alexis cannot excuse their failure to meet its requirements. For these reasons, neither appellant may assert appraisal rights as a matter of law, and summary judgment was appropriate to dismiss their petition.

STATEMENT OF FACTS

Prelix is a Delaware corporation who primarily deals in therapeutic health. *Longpoint v. Prelix*, C.A. No. 10342-CM, slip op. at 1 (Del. Ch. Jan. 13, 2016). On October 15, 2014, Radius Health Systems Corp. ("Radius"), through an acquisition subsidiary, proposed a merger with Prelix. *Id.* at 2. This proposed merger would result in

the complete acquisition of Prelix by Radius at an initial price of $14.50 per share. *Id.* In compliance with Delaware General Corporation Law ("DGCL"), Radius and Prelix began preparing for the merger. *Id.* As part of this process, Prelix and Radius set December 4, 2014, as the record date for determining which shareholders would be entitled to vote on the merger. *Id.* at 3. As a result, in accordance with DGCL, if a shareholder wished to cast a vote either for or against the merger, that shareholder was required to own its shares on December 4, 2014. *Id.*

Two weeks later, on December 18, 2014, Radius and Prelix revised their merger agreement to increase the acquisition price to $15.00 per share. *Id.* At an unspecified point between December 4, 2014, and December 18, 2014, Longpoint and Alexis purchased approximately 5.4% of Prelix's approximately 49 million outstanding shares. *Id.* at 1, 3. Due to the timing of this share purchase, it is clear that Longpoint and Alexis are involved in the legal practice commonly referred to as appraisal arbitrage. In accordance with appraisal arbitrage practices, on January 13, 2015, Longpoint and Alexis delivered written demands for appraisal of their shares. *Id.* at 3. The next day, January 14, 2015, Prelix shareholders held their first meeting in order to vote on the merger. *Id.* at 2. Because Longpoint and Alexis did not own their shares as of December 4, 2014, the record date, Longpoint and Alexis were unable to cast their own votes. *Id.* at 3 n.4. During the first shareholder meeting, Prelix failed to obtain a majority of the votes needed to pass the merger. *Id.* at 2. As a result, the shareholder meeting was adjourned until February 17, 2015. *Id.*

On January 23, 2015, in response to Longpoint and Alexis's demand for appraisal, Longpoint and Alexis's appraisal seeking shares were removed from DTC's Fast Automated Securities account, thereby specifically identifying and separating Longpoint and Alexis's appraisal seeking shares from the remainder of the shares held in fungible bulk. *Id.* at 3. After being separated from the fungible bulk, Prelix's transfer agent issued uniquely numbered certificates to specifically represent the shares held by Longpoint and Alexis. *Id.* Prelix's transfer agent completed this task immediately on January 23, 2015, by issuing the certificated shares in the name of Cede & Co. to J.P. Morgan Chase and Bank of New York Mellon to be held on behalf of Longpoint and Alexis, respectively. *Id.* On February 5, 2015, following instructions provided by J.P. Morgan Chase and Bank of New York Mellon, Cede & Co. reissued the share certificates in the name of Cudd & Co. and Mac & Co. *Id.*

On February 17, 2015, Prelix shareholders convened for a second time to vote on the merger. *Id.* This time, the merger was approved with a 53% majority vote. *Id.* On April 16, 2015, Prelix was acquired by Radius at $15.00 per share. *Id.* at 4. On May 6, 2015, Longpoint and Alexis brought this action against Prelix seeking appraisal of the shares they purchased in December 2014, after the record date. *Id.*

ARGUMENT

Alexis and Longpoint purchased into minority positions only to assert appraisal rights. Empirical research shows this practice, known as appraisal arbitrage, has greatly increased in Delaware since 2011 and is practiced by an "increasingly specialized and sophisticated"

group of arbitrageurs. Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U.L. REV. 1551, 1572 (2015). Despite their sophistication, however, appellants here did not meet the affirmative requirements clearly established by the very appraisal rights statute their arbitrage depends upon. *See* Del. Code Ann. tit. 8, § 262 ("DGCL § 262"). Now, appellants ask this Court grant them the benefits of a statute they failed to follow.

Under the DGCL, appraisal rights are available only to stockholders who 1) can show that their shares were not "voted in favor of the merger" ("Dissenting Requirement") and 2) who held such shares "on the date of making a demand" for appraisal right, and then "continuously h[eld] such shares through the effective date of the merger." ("Continuous Holder Requirement"). *Id.* § 262(a). These requirements show the General Assembly carved out appraisal rights as a compromise between stockholders who disagree whether to accept a merger offer. *See Alabama By-Products Corp. v. Cede & Co. on behalf of Shearson Lehman Bros.*, 657 A.2d 254, 258 (Del. 1995).

Prior to the appraisal rights solution, a merger offer had to be accepted unanimously. *Id.* In lieu of granting minority stockholders tremendous leverage with a potent veto power, the General Assembly allowed mergers to go forward without unanimity while "allowing *dissenting stockholders* to receive judicially-determined fair value for their stock." *In re Appraisal of Ancestry.com, Inc.*, 2015 WL 66825 at *15 (Del. Ch.) (emphasis added). Both the Dissenting Requirement and Continuous Holder Requirement are in place to ensure that

"dissenting stockholders," and no one else, receive the benefit of this legislative bargain.

Despite their ability to meet these requirements, appellants failed to follow the law. Yet, they now ask this Court to overlook the statute's requirement. To preserve the integrity of the appraisal rights statute, this Court should 1) hold that the Dissenting Requirement creates a burden for appraisal petitioners to show their shares were not voted in favor of a merger and 2) hold that the Continuous Holder Requirement requires that petitioners, to assert appraisal rights, must have shares that had been held by the same legal title owner from the demand of appraisal through the merger. With these holdings, the Court should affirm the grant of summary judgment dismissing Longpoint and Alexis's appraisal action.

I. THE COURT OF CHANCERY IMPROPERLY HELD THAT SECTION 262(a) DOES NOT REQUIRE LONGPOINT AND ALEXIS, AS DISSENTING SHAREHOLDERS, TO ESTABLISH THAT THEIR SHARES WERE NOT VOTED IN FAVOR OF THE MERGER AS A PREREQUISITE TO ASSERTING THEIR APPRAISAL RIGHTS.

A. Question Presented

Whether the court below erred in holding that Section 262(a) does not require Longpoint and Alexis to establish, either through its holders of record or otherwise, that their appraisal seeking shares were not voted in favor of the merger.

B. Scope of Review

Summary judgment is appropriate where "there are no material issues of fact in dispute and . . . the moving party is entitled to judgment as a matter of law." *Stoms v. Federated Serv. Ins. Co.*, 125 A.3d 1102, 1105 (Del. 2015); *see also* Del. Ch. R. 56. A grant of summary judgment is reviewed *de novo*. *Id.* Further, it is well settled

that under *de novo* review, this Court owes no deference to the court below when its "decision implicates the statutory construction" of the appraisal rights statute. *Golden Telecom, Inc. v. Glob. GT LP*, 11 A.3d 214, 216-17 (Del. 2010) (citing *M.P.M. Enters., Inc. v. Gilbert*, 731 A.2d 790, 795 (Del. 1999)).

C. Merits of Argument

The court below held that recent decisions within the Court of Chancery preclude Longpoint and Alexis from the burden of proving that their appraisal seeking shares were not voted in favor of the merger. *Longpoint*, C.A. No. 10342-CM, at 1 (citing *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 67586 (Del. Ch.) and *Ancestry.com*, 2015 WL 66825). However, this ruling does not comport with the plain meaning of Section 262(a), its legislative history, or general corporate policy considerations. This Court, therefore, must find that Section 262(a) creates a burden on either the beneficial owner or the holder of record to prove that their appraisal seeking shares were not voted in favor of the merger.

Longpoint and Alexis have failed to establish that their shares were not voted in favor of Prelix's merger with Radius. Section 262(a) provides the legislatively mandated requirements for appraisal seeking shareholders to obtain standing to assert appraisal rights. Among other requirements, the petitioner must establish that its shares were "neither voted in favor of the merger . . . nor consented thereto in writing pursuant to § 228 of this title." DGCL § 262(a). If the other requirements of Section 262 and a dissenting shareholder can establish that its shares were not voted in favor of the merger, only then is

the dissenting shareholder "entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock." *Id.*

1. Basic statutory interpretation of Section 262(a) requires Longpoint and Alexis to establish that their shares were not voted in favor of the merger.

This Court must interpret Section 262(a) to require a dissenting shareholder or its holder of record to prove its shares were not voted in favor of the merger. The Delaware Supreme Court has provided on numerous occasions that "statutory interpretation is an issue of law that [is] review[ed] *de novo*." *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc.*, 36 A.3d 336, 342 (Del. 2012); *see also Golden Telecom, Inc.*, 11 A.3d at 216-217. As a result, this Court must give no deference to the Court of Chancery's statutory interpretations implicated in the decision below.

This Court rules for statutory interpretation are well settled. In construing a statute, a court begins its analysis with a determination of whether a statute is ambiguous. *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011). In determining whether ambiguity exists, a court considers whether the statute "is capable of being reasonably interpreted in two or more different senses." *Id.* Once a statute is deemed ambiguous, this Court has instructed courts to "give the words in the statute their plain meaning." *Id.* If still ambiguous, a court then must "give effect to the whole statute, and leave no part superfluous." *Cordero v. Gulfstream Dev. Corp.*, 56 A.3d 1030, 1035-36 (Del. 2012) (quoting *Nanticoke Mem'l Hosp., Inc.*, 36 A.3d at 343-44).

Section 262(a) is capable of being reasonably interpreted in two or more senses; therefore, it is ambiguous. The ambiguity of Section 262(a) lies in the phrase, "who has neither voted in favor of the merger or consolidation nor consented thereto in writing." This phrase must be deemed ambiguous because it has been reasonably interpreted in multiple ways. Vice Chancellor Glasscock ruled in *Merion Capital* and *Ancestry.com* that Section 262(a) does not create a requirement on anyone to establish that dissenting shares were not voted in favor of the merger. 2015 WL 67586, at *8, 2015 WL 66825, at *8. If Vice Chancellor Glasscock's interpretation of Section 262(a) were correct, then there would be no reason for the Delaware General Assembly to have included those words in the statute.

Meanwhile, Chancellor Chandler's ruling in *Dirienzo v. Steel Partners Holdings L.P.*, explicitly states, "Delaware law places the burden of persuasion on the petitioner stockholder to demonstrate compliance with Section 262." 2009 WL 4652944, at *7 (Del. Ch.). In the case at hand, Longpoint and Alexis are the petitioner stockholders, and they have failed to demonstrate compliance with Section 262(a). Additionally, if this Court would rather find that the holder of record is more appropriately referred to as the petitioner stockholder, compliance with Section 262(a) still has not been shown. Therefore, Vice Chancellor Glasscock and Chancellor Chandler have interpreted Section 262(a) differently. Due to conflicting interpretations, Section 262(a) is ambiguous and requires this Court's final interpretation.

In this Court's determinative interpretation of Section 262(a), this Court should find that the plain language provides that a dissenting shareholder is entitled to an appraisal as long as the shareholder "has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228." DGCL § 262(a). It appears Vice Chancellor Glasscock's misinterpretation stems from the difference between the holder of record and the beneficial owner of a share. Under Delaware law the holder of record must preserve standing to assert appraisal rights on behalf of the beneficial holder of stock and enforce those rights through appraisal litigation. *Alabama By-Products*, 657 A.2d at 263. However, the 2007 amendments broadened the right to bring an appraisal action. Now, a beneficial owner may initiate appraisal litigation as long as it can show compliance with Section 262(a). DGCL § 262(e). As a result, this Court must find that the plain language of Section 262(a) requires the petitioning party, whether it be the holder of record or beneficial owner, demonstrate that the requirements of Section 262(a) were met.

Additionally, if this Court were to uphold the lower court's ruling, the dissenting shareholder language of Section 262(a) would be superfluous. Left alone, the lower court's decisions have gutted the requirement to vote against the merger. As mentioned above, the original purpose of appraisal rights was to provide some sort of relief for dissenting shareholders in exchange for the dissenting shareholder's loss of veto power. With no burden, petitioner has no reason to have voted against the merger in the first place. Therefore, an arbitrageur could significantly profit despite never taking a

stance as a dissenting shareholder. The holdings below have rendered the language at issue superfluous. This Court, therefore, must clarify that Section 262(a) requires petitioners to demonstrate their shares were voted against the merger.

Reviewing Section 262(a) *de novo*, this Court must hold neither Longpoint, Alexis, nor their holders of record have satisfactorily demonstrated that their appraisal seeking shares were not voted in favor of the merger.

2. Neither Longpoint, Alexis, nor their holders of record have met their burden of proving that Longpoint and Alexis's shares were not voted in favor of the merger.

Longpoint and Alexis have failed to demonstrate compliance with Section 262(a). It is well understood that appraisal rights are "entirely a creature of statute." *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1186 (Del. 1988) (internal quotation omitted). Under Delaware Law, the burden to show compliance with Section 262 lies with the stockholder. *Dirienzo*, 2009 WL 4652944, at *8; *see also Carl M. Loeb, Rhoades & Co. v. Hilton Hotels Corp.*, 222 A.2d 789, 793 (Del. 1966) (holding that the appraisal petitioners had "the burden of proving compliance with each of the [Section 262] prerequisites"), *Konfirst v. Willow CSN Inc.*, 2006 WL 3803469, at *2 (Del. Ch.) ("in order to partake in [appraisal rights], strict compliance with the precise statutory standards is essential").

Longpoint and Alexis have failed to demonstrate that their shares were not voted in favor of the merger. As mentioned, December 4, 2014, was the record date for determining which shareholders would be entitled to vote on the Prelix/Radius merger. Longpoint and Alexis did

not purchase their shares until after the record date. As a result, Longpoint and Alexis were not entitled to vote their newly purchased shares against the merger. Additionally, Longpoint and Alexis failed to elicit proxies regarding the merger or even take the necessary steps to ensure the previous owners voted their new shares against the merger. Consequently, Longpoint and Alexis have failed to demonstrate that they, in fact, qualify for the protections Section 262(a) was created to provide. Absent any evidence showing Longpoint and Alexis were truly dissenting shareholders, Section 262(a) prevents them from asserting appraisal rights.

There are a number of ways Longpoint and Alexis could have demonstrated compliance with the voting requirements of Section 262(a). Longpoint and Alexis could have solicited voting proxies from the previous owners of stock. Longpoint and Alexis could have sought out sellers who would allow them to purchase shares under the condition that the shares were voted against the merger. Or, Longpoint and Alexis could have purchased their shares prior to the record date and exercised complete control over each share's voting capabilities. The bottom line is: Longpoint and Alexis failed to take even minimal steps to demonstrate compliance with the voting requirements. Now, appellants come to this Court hoping their blunder will be excused, all at a significant and unnecessary cost to Prelix. Because Longpoint and Alexis failed to take these steps, they must not be allowed to sidestep the requirements explicitly imposed by the General Assembly and seek protection under the appraisal statute.

In the event this Court finds that the burden of compliance with Section 262(a) lies instead with the holders of record, Longpoint and Alexis's holders of record cannot show that Longpoint and Alexis's shares were not voted in favor of the merger. The facts of this case show that when the merger first came to a vote on January 14, 2015, Prelix failed to acquire the necessary shares to approve the merger. Nonetheless, on February 17, 2015, when voted on a second time, the merger passed with 53% approval. Meanwhile, Longpoint and Alexis owned 5.4% of the approximately 49 million shares. Without a specific showing of dissenting votes or proxies to prove the same, there is no possible way to know how Longpoint and Alexis's shares were voted during the January 14, 2015 meeting. Similarly, without a specific showing of dissenting votes or proxies to prove the same, there is no possible way to know how Longpoint and Alexis's shares were voted during the February 17, 2015 meeting. As a result, Longpoint and Alexis's holders of record cannot prove that Longpoint and Alexis's shares complied with the requirements of Section 262(a) by not voting in favor of the merger.

Appellants argue the Court of Chancery's ruling in *In re Appraisal of Transkaryotic Therapies, Inc.* saves them. In that case, the Court of Chancery held that the holder of record meets this requirement simply by showing that enough shares were voted to possibly cover the appraisal seeking shares. *In re Appraisal of Transkaryotic Therapies, Inc.*, 2007 WL 1378345 (Del. Ch.). However, this type of uncertainty does not comport with the burdens explicitly

required by this Court's rulings in *Dirienzo* and *Hilton Hotels Corp.* and systematically provides the potential for an absurd result.

Requiring a petitioner to prove its shares dissented from the merger provides a level of order and certainty that has long been provided by Delaware corporate law. As a result, this Court must find that Longpoint and Alexis have lost their right to an appraisal.

3. Public policy mandates that an appraisal seeking, dissenting shareholder establish that its shares were not voted in favor of the merger.

Prior to the appraisal rights statute, a merger or consolidation required a vote of unanimity. The appraisal rights statute was then drafted to compensate minority shareholders after ridding them of their veto power. This way, the dissenting shareholder would not be forced to continue as an owner of a merged company in which the shareholder does not approve.

With this history in mind, it would pervert the appraisal rights statute to allow an arbitrageur to acquire shares and profit by seeking an appraisal without any evidence the arbitrageur was ever a dissenting shareholder.

The facts of this case exemplify the dangers Delaware corporate law faces if the dissenting shareholder requirement is not enforced as written. Put simply: an appraisal arbitrageur does not succeed unless the merger is approved. A closer look reveals a contradiction because there is no reason for an arbitrageur to actually vote against the merger unless the arbitrageur is required to show proof of such.

The facts in Longpoint and Alexis's case provide such a possibility. The undisputed facts show that Prelix failed to obtain a

majority vote in favor of the merger during the January 14, 2015 meeting. Because the merger did not get approved, Longpoint and Alexis would not have been able to cash out through their appraisal petition. Therefore, it would behoove Longpoint and Alexis to vote their 5.4% interest in favor of the merger. The facts suggest this may have happened at the February 17, 2015 meeting, where Prelix finally obtained a 53% majority vote. Some simple arithmetic shows that Longpoint and Alexis's voting interest, 5.4%, is well within the margin needed to push the merger approval vote from a minority, to a 53% majority.

Furthermore, appellants argue that their dissenting votes are covered by the mere possibility their votes were not voted in favor of the merger. Using the same assumptions, however, one could conclude that appellants could have instructed the previous owners to vote their shares against the merger during the first vote. Then, after seeing that the merger might not be approved without extra help, appellants could have instructed the previous owners to vote in favor of the merger, thus using their 5.4% ownership to push the minority approval, to the 53% majority approval.[1] These dangers, if realized, obliterate the original purpose of providing appraisal rights for a true dissenting shareholder. This Court, therefore, must hold that Delaware corporate policy considerations require a dissenting

[1] Remand would not be necessary to prove these allegations. Rather, the *possibility* of these actions shows why the requirement is important as a matter of law. Further, remand would be futile. Chancellor Mosley found that it would be impossible at this point to "attribute to petitioners' shares any voting behavior." *Longpoint*, C.A. No. 10342-CM, at 3 n.4.

shareholder to prove, pursuant to Section 262(a), that their shares were not voted in favor of the merger.

II. THE COURT OF CHANCERY PROPERLY HELD THAT LONGPOINT AND ALEXIS, WHOSE SHARES OF PRELIX STOCK WERE NOT CONTINUOUSLY HELD FROM THE DATE OF MAKING DEMAND FOR APPRAISAL RIGHTS AND THROUGH THE EFFECTIVE DATE OF THE MERGER, MAY NOT ASSERT APPRAISAL RIGHTS.

A. Question Presented

Whether the Court of Chancery's grant of summary judgment was proper given that Cede was the holder of record for appellant's stock when the demand for appraisal rights was made, but Cede was not the holder of record for those same shares on the effective date of the merger.

B. Scope of Review

Summary judgment is appropriate where "there are no material issues of fact in dispute and . . . the moving party is entitled to judgment as a matter of law." *Stoms*, 125 A.3d at 1105; *see also* Del. Ch. R. 56. A grant of summary judgment is reviewed *de novo*. *Id.* Further, it is well settled that under *de novo* review, this Court owes no deference to the court below when its "decision implicates the statutory construction" of the appraisal rights statute. *Golden Telecom*, 11 A.3d at 216-17.

C. Merits of Argument

Longpoint and Alexis claim to have standing to assert appraisal rights, despite the fact that their shares had multiple holders of record during the relevant time period. Once legal title changed hands, the shares of stock became ineligible to receive appraisal rights. The grant of summary judgment dismissing Longpoint and Alexis's petition should be affirmed.

1. The plain language of Section 262(a) requires the holder of record of stock be the same at the date of first making demand for appraisal and continuous through the effective date of the merger.

To have standing to assert appraisal rights, a stockholder must show that a certain sequence of events occurred. *See* DGCL § 262. The stockholder must first make a "written demand for appraisal of such stockholder's shares." *Id.* § 262(d). This demand must be made before stockholders vote whether to approve a merger. *Id.* Then, if the merger is approved, a stockholder who "continuously holds such shares through the effective date of the merger" may seek appraisal rights in a judicial proceeding. *Id.* § 262(a). The statute defines a stockholder as the "holder of record of stock." *Id.*

For Delaware corporations, the holder of record of stock is generally Cede & Co., an affiliate of the DTC. *In re Appraisal of Dell, Inc.*, 2015 WL 4313206, at *6 (Del. Ch.). This system, which separates beneficial ownership from legal title, was created in response to a "paperwork crisis on Wall Street during the late 1960s and early 1970s." *Id.* at *1. This system is commonly called "Street Name Registration." Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227, 1237 (2008). Prior to Street Name Registration, stock certificates were sent to each beneficial owner. *Dell*, 2015 WL 4313206, at *1. As trading volume increased, it became nearly impossible to update ledgers and issue certificates fast enough. *Id.* American securities markets choked and sputtered and declared "trading holidays" to wait for the outmoded system to catch up. *Id.* Street Name registration, which has been in place since the 1970s, enables beneficial ownership to be exchanged the amount of

times needed by modern securities markets, while all the while "legal title remains with Cede." *Id.* at *2.

Cede, however, is not the only possible holder of record. Here, Prelix shares were titled under the name of Cede & Co. on January 23, 2015, after which point Longpoint and Alexis, through their intermediaries, ordered Cede to assert appraisal demands. Following this order, Cede relinquished title of those shares on February 5, 2015, and then reissued the shares in the names of Cudd &. Co. and Mac & Co. What happened here also happened in *Dell*: petitioners "remained the beneficial owners. . . . But now there were new [holders of record] on the stock ledger." *Id.* at *3.

To satisfy the Continuous Holder Requirement, the same holder of record must be found at the date of making demand through the effective date of the merger. There is no dispute here that the holder of record was Cede & Co., and then it was not. For that reason, Longpoint and Alexis do not have standing to assert appraisal rights.

2. This Court's long-standing interpretation of "stockholder" compels the conclusion that DTC may not be considered the holder of record.

The statute could not be more clear: "the word 'stockholder' means a holder of record of stock in a corporation." DGCL § 262(a). Thus, "Delaware corporate law thus puts record ownership, rather than beneficial ownership," at the fore. Kahan & Rock, 96 GEO. L.J. at 1233. Indeed, even before the General Assembly codified this definition in 1967, "this Court had consistently defined the term 'stockholder' as a holder of record." *Enstar Corp. v. Senouf*, 535 A.2d 1351, 1354 (Del. 1987). The fundamental principal in ruling that a stockholder is the

holder of record was first articulated in 1945: "The record owner may be but the nominal owner, and, technically, a trustee for the holder of the certificate, but legally he is still a stockholder, and may be treated as the owner." *Salt Dome Oil Corp. v. Schenck*, 41 A.2d 583, 585 (Del. 1945). All told, then, Delaware's appraisal rights have used this definition for more than seventy years, through legislative consideration and numerous judicial reviews of the appraisal rights statute. *Enstar*, 535 A.2d at 1354; *see also Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 396 (Del. 2010).

a. The Court has considered this question and has ruled that DTC is not the holder of record.

As this Court clarified in *Enstar*, the holder of record is not DTC but rather whoever actually holds legal title of the stock. *Enstar*, 535 A.2d at 1354. This was decided more than a decade after the formation of the DTC, by the time the method of stock ownership had become "common practice." *Id.* at 1354 n.2. The Court ruled that a demand for appraisal made by DTC did not meet the statutory requirement, because Cede was the holder of record. *Id.* at 1355.

Appellants urge this Court to disrupt its definition of the past seven decades and construe holder of record to mean the DTC. Appellants rely on the dicta of Vice Chancellor Laster, who criticized Delaware law for "largely ignor[ing]" the DTC innovations. *Dell*, 2015 WL 4313206, at *18. Labeling *Enstar* an "opportunity lost," the Vice Chancellor criticized this Court's "incorrect assumptions about the depository systems." *Id.* at *18, *21. While lamenting that *stare decisis* bound him to hold otherwise, Laster "advocated treating DTC participants as holders of record." *Id.* at *11.

Contrary to Vice Chancellor Laster's protests, this Court has shown a thorough understanding of stock trading and Street Name Registration. *See, e.g.*, *Enstar,* 535 A.2d at 1354 n.2. This Court understands that "it is Cede, not the DTC-participant banks and brokers, that appears on the stock ledger of a Delaware corporation," and thus Cede is the holder of record. *Crown EMAK*, 992 A.2d at 396; *see also Enstar*, 535 A.2d at 1354.

b. Appellants' definition of DTC as a holder of record would render the Continuous Holder Requirement superfluous.

When construing a statute, this Court must "leave no part superfluous." *Cordero*, 56 A.3d at 1035-36. The terms of Vice Chancellor Laster's criticism of the holder of record definition show that defining DTC as a holder of record would render the Continuous Holder Requirement superfluous.

Since the creation of Street Name Registration, "DTC [has] emerged as the *only* domestic depository." *Dell*, 2015 WL 4313206, at *1 (emphasis added). This means that defining DTC as the holder of record would mean that any stock would necessarily meet the Continuous Holder Requirement. Stock could be transferred and retitled an infinite amount of times, and so long as those separate titles all fell under the massive DTC umbrella, those shares could assert appraisal rights. A requirement that every possible petitioner meets is superfluous.

To maintain the integrity of the statute, DTC cannot be considered to satisfy the Continuous Holder Requirement. If shares are retitled after the demand but before the merger, the Continuous Holder Requirement is not met. *Nelson v. Frank E. Best Inc.*, 768 A.2d 473,

477 (Del. Ch. 2000). That is the case here; plainly, appellants failed to meet the statutory requirement.

c. The Court should not disrupt the long-established expectations of the Delaware corporations.

The impressive continuity of Delaware law on this matter is a service to the market. Stockholders and stock traders operate best against a steady and predictable backdrop. *See* Richard J. Agnich & Steven F. Goldstone, *What Business Will Look for in Corporate Law in the Twenty-First Century*, 25 DEL J. CORP. L. 6, 9 (2000). And as this Court has noted, the "DGCL is a comprehensive and carefully crafted statutory scheme that is periodically reviewed by the General Assembly." *Crown EMAK*, 992 A.2d at 398. If there is to be a drastic rejection of seven decades of how the law defines a stockholder, then such an "adjustment to the intricate scheme of [the DGCL] should be accomplished by the General Assembly." *Id.*

Vice Chancellor Laster may be correct that "[f]or purposes of federal law, Cede is not a record holder." *Dell*, 2015 WL 4313206, at *11 (citing 15 U.S.C. § 78c(23)(A)) (emphasis removed). Even if he is correct, that is irrelevant here. The federal regime governs securities exchanges, not the internal mechanics of a corporation. State law governs a corporation's structure and the relationship between corporation and investor. Here, Prelix incorporated in Delaware. Delaware law -- the General Assembly's law, this Court's law -- clearly states that the holder of record for Longpoint and Alexis was Cede & Co., and then changed to Mac & Co. and Cudd & Co.

For these reasons, the Court's long-standing interpretation that the holder of record is not DTC should remain.

3. The voluntary decision by Longpoint and Alexis to use intermediaries as the holders of records carried risk, which the Court has held should not be transferred to the issuing corporation.

The decision to nominate a holder of record carries "attendant risks," namely, that the intermediary not act in compliance with the appraisal rights statute. *Enstar*, 535 A.2d at 1354. Those risks are not borne by the issuing corporation, but rather by the beneficial owner. *Id.* By attempting to redefine DTC as the record holder, Longpoint and Alexis in effect ask this Court to remove that risk. DTC, though convenient and widespread, is merely a go-between for the beneficial owner and the record holder. Even if DTC is widespread, it is not as necessary to stock trading as appellants argue. Rather, Longpoint and Alexis, as "specialized and sophisticated" arbitrageurs whose investment strategy entirely depends upon the appraisal rights statute, *see* Korsmo & Myers, 92 WASH. U.L. REV. at 1572, voluntarily ceded their legal title to an intermediary and now urge this Court to undo the consequences of their decision.

Appellants argue that the DTC is the only way to trade stock. The DTC was established to solve a paperwork crisis. However, the argument, based upon a fear of a new paperwork crisis, that the DTC remains the *only* way to hold stock "suffers from one significant weakness: it is not true." David C. Donald, *Heart of Darkness: The Problem at the Core of the U.S. Proxy System and Its Solution*, 6 VA. L. & BUS. REV. 41, 48 (2011). First, current "securities transfers do not involve mountains of paper, and most do not involve any paper." *Id.* Indeed, since 2011, all newly issued stocks listed on the NASDAQ and New York Stock Exchange must be issued electronically and not on

paper. *Id.* at 91 (citing NYSE, Inc., Listed Company Manual §501.00 (2011); NASDAQ, Inc., Listing Rules 5210(c) & 5255(a) (2009)). Second, shareholders have a choice as to how to hold their shares. *See* SECURITIES EXCHANGE COMMISSION, Holding Your Securities—Get the Facts, https://www.sec.gov/investor/pubs/holdsec.htm (last visited Feb. 4, 2016). The SEC has developed a Direct Registration System, an electronic registration system that allows a person to directly register a security on the issuing company's books. Donald, 6 VA. L. & BUS. REV. at 90-91. As the name implies, a person pays a small fee to *directly hold* his or her legal title. This can be done electronically via the Direct Registration System, or a person so inclined can order a paper stock certificate be sent. SECURITIES EXCHANGE COMMISSION, https://www.sec.gov/investor/pubs/holdsec.htm. The person who directly holds the record of her beneficial ownership would therefore be the holder of record. Of course, a person may also chose Street Name Registration and hold shares indirectly; "it is solely [a person's] decision how to hold [his or her] securities." *Id.* Longpoint and Alexis had a choice as to how to hold their shares, and they chose to hold shares indirectly.

Even if Street Name Registration is more common, its ubiquity does not mean it is without risk. Vice Chancellor Laster, while chastising *Enstar* for not understanding Street Name Registration, compares the system to a vaccination. *Dell*, 2015 WL 4313206, at *21. He argues that just as a few can "free ride on the immunity of the group, so too can a small minority of stockholders elect to hold shares directly. But without widespread participation in the

depository system, securities markets would again drown in paperwork." *Id.* First, as discussed above, his fear is likely unfounded. Second, if we accept Laster's analogy, its logical flaw is clear: of course vaccination is advisable, but there are still risks to the individual receiving a vaccine. *See, e.g.*, CENTER FOR DISEASE CONTROL, Possible Side Effects for Vaccines, http://www.cdc.gov/vaccines/vac-gen/side-effects.htm (last visited Feb. 4, 2016). The attendant risks of receiving a vaccine need not dissuade a person. *Id.* Likewise, the attendant risks of using Cede as a holder of record need not dissuade a company. But the risks remain. Here, appellants received the consequence of that risk by losing standing to the appraisal rights statute.

Finally, the ultimate reason that DTC cannot be considered a holder of record is simple: DTC is not the holder of record. A company verifies its stockholders by consulting the holder of record. *See Dell*, 2015 WL 4313206, at *6. While a company can use DTC for this, DTC ultimately verifies stock ownership by checking the "Cede breakdown." *Id.*

Proof of ownership can only be made by legal title. This is the reason that a person's "rights as against the corporation are inchoate only until the . . . issue of a new certificate in his name." *Salt Dome Oil*, 41 A.2d at 585. In a corporation, "[p]ersons associate themselves pursuant to a law, each being entitled to evidence of membership and to certain rights incident to membership." *Id.* at 588. Membership has its privileges, as the saying goes. The two are inextricably linked. Legal title is the precedent condition for a

person to enjoy the rights of being a stockholder. *Id.* Under Street Name Registration, DTC has no evidence of membership, and DTC has no privileges or responsibilities of being a stockholder. *Enstar*, 535 A.2d at 1354.

These "specialized and sophisticated" appellants were aware of Street Name Registration and of Delaware's appraisal rights statute. They voluntarily chose both. They sought the benefits of both. Now they ask this Court to remove the risks and redefine Delaware's understanding of both. The law should not contort itself for their arbitrage. The Court should reaffirm its long-held principals, and continue to define the holder of record as the actual holder of record. Under Street Name Registration, that is Cede & Co., or Mac & Co., or Cudd & Co.

CONCLUSION

For the foregoing reasons, Prelix prays that this Court affirm Chancellor Mosley's grant of summary judgment, and in so doing hold that petitioners seeking to assert appraisal rights have the burden to show 1) that their shares were actually voted against a merger and 2) that legal title was held continuously throughout the statutorily relevant period.

Respectfully submitted,

/s/ Team O

Team O
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