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

APPELLEE'S ANSWERING BRIEF

Team Q
Attorney's For Appellee
February 5, 2016

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Law Review Articles

Other Authorities

NATURE OF PROCEEDING

Longpoint Investment Trust and Alexis Large Cap Equity Fund, LP, Appellants, Petitioners below, brought action in the Court of Chancery on May 6, 2015 against Prelix Therapeutics, Inc., Appellee, Respondent below, seeking an appraisal of their shares of Prelix stock. Appellee moved for summary judgment on the grounds that Appellants were not entitled to an appraisal because the stockholder of Appellants, Cede & Co., had not continuously held the shares through the date of the merger between Prelix and Radius Health Systems Corp. as required by 8 Del. C. § 262(a). Appellee also moved for summary judgment on the grounds that Appellants had failed to establish that their shares were not used to vote in favor of merger.

Chancellor Mosley granted the motion for dismissal on January 13, 2016 on the grounds that the shares of Appellants had not been continuously held. The chancellor did not grant the motion on the grounds that appellants had failed to establish that their shares were not used to vote in favor of the merger. Appellants filed a notice of appeal on January 15, 2016 and this Court accepted the appeal.

Appellee requests that this Court affirm the order of the Chancery Court that granted summary judgment by holding that there is no entitlement to an appraisal of stock in a merger when the "holder of record of stock" has transferred the stock. Appellee also requests that this Court overrule the Chancery Court and find that in order to be entitled to an appraisal, stockholders must establish that their shares were not used to vote in favor of the merger.

SUMMARY OF ARGUMENT

Petitioners Longpoint Investment Trust and Alexis Large Cap Equity Fund, LP assert unperfected appraisal rights and cannot demonstrate perfection thereof. Therefore, respondent Prelix was entitled to summary judgment.

The person seeking to exercise appraisal rights "has the burden of showing that he is a stockholder within the statutory meaning, and that he has satisfied the conditions required of him for the perfection of that right." In re Northeastern Water Co., 38 A.2d 918, 920–21 (Del. Ch. 1944); see also Carl M. Loeb, Rhoades & Co. v. Hilton Hotels Corp., 222 A.2d 789, 793 (Del. 1966). "Summary judgment may be granted if there are no material issues of fact in dispute and the moving party is entitled to judgment as a matter of law." Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 241 (Del. 2009).

Following the merger or consolidation of a Delaware corporation, 8 Del. C. § 262(a) grants any stockholder of that corporation entitlement to an appraisal of the fair value of their shares. However, that stockholder must perfect that appraisal right. This is a three step process: A stockholder seeking appraisal must demonstrate that it (1) owned shares on the date that it demanded appraisal thereof, (2) continued to hold the shares through the effective date of the merger, and (3) did not vote the shares in favor of, or consent to, the merger or consolidation, all in compliance with § 262(d). 8 Del. C. § 262(a). See Reynolds Metals Co. v. Colonial Realty Corp., 190 A.2d 752, 754 (Del. 1963).

I. Steps (1) and (2) are inextricably linked: A stockholder cannot demonstrate that it "continuously held" the shares through the merger if it cannot demonstrate that it owned the shares up to the date of appraisal. Simply put, the Petitioners Longpoint and Alexis were the beneficial owners – but not the stockholders. Because the "stockholder," within the statutory meaning of the term, changed between the date of demand (where the stockholder was Cede & Co.) and the date of the merger (where the stockholders became Mac & Co. and Cudd & Co.), Petitioners Longpoint and Alexis cannot meet their burden in demonstrating compliance with the appraisal statute. Therefore, Respondent Prelix was entitled to summary judgment, as was held by the Court of Chancery.

II. Separately, Prelix is entitled to summary judgment on step (3): the stockholders – Mac & Co. and Cudd & Co.- cannot demonstrate that they did not vote their shares in favor of or fail to consent to the merger. The Court of Chancery gave Longpoint and Alexis ample opportunity to develop the record before ruling on the motion for summary judgment. The record reflects no evidence of them meeting their statutory burden. Therefore, Prelix was entitled to summary judgment despite the findings of the Court of Chancery.

STATEMENT OF FACTS

On October 15th, 2014 Radius Health Systems Corp. announced its planned acquisition of Prelix Therapeutics, Inc. (a publicly traded Delaware corporation) by merger with an acquisition subsidiary. Op. at 1. Its initial offering price was first rejected by the market, causing Radius to raise its offering price to $15.00 per share (above its then market price of $12.75). Op. at 2. It set the record date for determining entitlement to vote on the merger to December 4, 2014. Op. at 3.

Petitioners Longpoint Investment Trust and Alexis Large Cap Equity Fund, LP each purchased shares in Prelix after the record date. Op. at 3. As beneficial owners of the shares, the shares were actually owned by the statutory stockholder Cede & Company. Presumably at Longpoint's and Alexis's direction, Cede & Co. delivered written demand for the appraisal of the number of shares beneficially held on their behalf. Id. It is unclear from the record whether Cede & Co. or any other stockholder delivered demand for appraisal of any other shares before the vote.[1]

After Cede & Co. delivered demand for appraisal and before the final vote on the merger, a chain of events took place causing a

[1] Chancellor Mosley stated "[n]o other demands for appraisal were submitted with respect to the Prelix/Radius merger." Op. at 4. The multiple subjects of the paragraph (the petitioners bringing suit and admitting different stockholder of record at time of written demand) and the imprecise wording of "submit" does not make clear whether the Chancellor referred to submission to the Court of Chancery (i.e. a petition for appraisal) or to submission to Prelix in conformity with § 262(d). The ambiguity is furthered by the small margin by which the merger passed, suggesting significant shareholder disagreement with the price offered per share.

change in the holder of record of the shares owned for Longpoint's and Alexis's benefits. The Depositary Trust Company (DTC) issued uniquely numbered certificates representing the petitioners' shares. These certificates listed Cede & Co. as the holder of record. Op. at 3. The certificates were then delivered to Longpoint's and Alexis's respective banks. On the petitioners' behalf, the banks directed Cede & Co. to endorse the certificates; this allowed the DTC to reissue the certificates in the names of the petitioners' banks' respective nominees, Cudd & Co. and Mac & Co, on February 5th, 2015. Id. Neither Longpoint nor Alexis contests the fact of or the timing of the change in the holder of record. Op. at 4.

The shareholder vote took place on February 17th. Op. at 3. Respondent Prelix stipulated that the holder of record of the petitioners' shares at the time of the shareholder vote – Cudd and Mac – did not vote the shares in favor of or consent to the merger (and were in fact unable to). Op. at 5. But the Court of Chancery determined that, as a matter of fact, neither Longpoint nor Alexis could "prove that their shares . . . were not voted by some previous owner or owners [i.e. Cede & Co.] in favor of the merger." Op. at 5. The merger passed with just over 53% of outstanding shares voting in favor. Op. at 3. The merger was effected on April 16th, when Cede & Co. was not the holder of record of Longpoint's or Alexis's shares.

Pursuant to Del. C. §262(e), petitioners filed suit as beneficial owners of their shares on May 6th, 2015. Op. at 4. Prelix moved for summary judgment on two separate theories contesting Longpoint's and Alexis's perfection of their appraisal rights. Op. at 1. The Court of

Chancery denied one theory but granted the motion on the second, discussed infra. Id.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY FOUND THAT THERE IS NO ENTITLEMENT TO AN APPRAISAL BECAUSE THE "STOCKHOLDER OF RECORD" DID NOT "CONTINUOUSLY HOLD" THE PRELIX SHARES UNTIL THE DATE OF MERGER.

A. Question Presented

Is a beneficial owner entitled to statutory appraisal where the "stockholder" (i.e. holder of record) did not "continuously hold" the stock from the date of the demand for appraisal until the date that the corporate merger was complete?

B. Scope of Review

The standard of review on appeal of a decision on summary judgment is *de novo*. Pike Creek Chiropractic Ctr. v. Robinson, 637 A.2d 418 (Del. 1994).

C. Merits of the Argument

Cede & Co., the "stockholder" that demanded the appraisal of Prelix shares, did not "continuously hold" the shares of stock from the date of demand until the merger, and thus Appellants are not entitled to have the Prelix shares appraised by the Court of Chancery.

1. Cede & Co. was clearly the original "stockholder" and this court cannot and should not broaden the legal definition.

a. Cede & Co., but not the Appellants, meets the definition of "stockholder."

Cede & Co. was the original "stockholder" when the appraisal demand was made. Appellants were never "stockholders." Section 262(a) of the Delaware General Corporations Law (DGCL) says that a

stockholder is "a holder of record of stock." 8 Del. C. § 262(a). On the date that it demanded the appraisal, Cede & Co. held the Prelix shares on behalf of the Appellants, but under its name alone. Before the Prelix/Radius merger was voted or completed, Cede & Co. endorsed the shares at the direction of Appellant's banks, J. P. Morgan Chase and the Bank of New York Mellon. The shares were then re-issued in the names of the banks' nominees: Cudd & Co. and Mac & Co. Cede & Co. thus lost its status as the "holder of record" while Cudd & Co. and Mac & Co. simultaneously became the new "stockholders." Therefore, although Longpoint and Alexis were beneficial owners of the Prelix stock, at no time were Appellants ever a "holder of record" and were thus never "stockholders."

b. This court cannot alter the General Assembly's explicit definition of "stockholder."

This court must apply the legal definition of "stockholder" as enacted by the General Assembly because this court is not empowered to unilaterally change Delaware law. First, the role of the judiciary under the Delaware Constitution "is to interpret the statutory language that the General Assembly actually adopts, even if unclear and explain […] the legislative intent without rewriting the statute to fit a particular policy position." Taylor v. Diamond State Port Corp., 14 A.3d 536, 542 (Del. 2011). That is, the state constitution does not empower this court to change Section 262(a)'s definition of "stockholder."

Second, only the General Assembly may define who is a "stockholder." The General Assembly designed and promulgated the DGCL

as a comprehensive and carefully crafted statutory scheme, Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377, 398 (Del. 2010). It periodically updates provisions of the DGCL as needed, Id. In fact, the General Assembly just updated Section 262 in 2013. See 2013 Del. Legis. Serv. 72 (West). Because this scheme is so intricate and because the General Assembly has demonstrated a willingness to alter the law as needed, any adjustment to Section 262 must be accomplished through the legislative branch alone. Crown EMAK Partners at 398. As a result, despite the Court of Chancery's previously urging this court to re-write Section 262, In re Appraisal of Dell Inc., No. CV 9322-VCL, 2015 WL 4313206, at *12 (Del. Ch. July 13, 2015), as revised (July 30, 2015), this court cannot re-write the law; it must await action from the legislature. And unless the legislature chooses to act, this court must continue to define "shareholder" to mean only the "holder of record of stock." Any other definition is beyond "the statutory language that the General Assembly actually adopts." Taylor v. Diamond State Port Corp.

c. This court should not alter the definition of "shareholder" because it would significantly increase merger costs.

Adopting the Appellant's definition of stockholder is not only beyond the plain meaning of the statute, but would materially increase the cost of mergers and consolidations. Because of the high number of stock transactions that occur nationwide on a daily basis, share lists are incredibly dynamic and expensive for corporations to maintain. As a result, the Securities and Exchange Act was promulgated "to end the physical movement of securities certificates," 15 U.S.C. § 78q-1, and

immobilize shares. This national policy has allowed the corporate world to outsource and centralize the maintenance of stock ledgers to transfer agents like the Depository Trust Company (DTC). Under the modern system, corporations have been able to spend less because they now track fewer "stockholders."

If this court broadened the definition of "stockholder" to include those who are not "holder[s] of record of stock," it would frustrate the national policy of share immobilization, the Delaware General Assembly's policy facilitating mergers and consolidations, and would force corporate entities to spend significant resources, especially during mergers. Section 262(d)(1) requires corporations proposing a merger to notify its "stockholders" that there will be a meeting to vote on the merger. 8 Del. C. § 262(a). In order to comply, a corporation must have a list of all of its "stockholders" at a particular moment in time. Since the policy of share immobilization was introduced, stockholder notification has greatly simplified: the corporation can rely on large-scale agents like Depository Trust Company. However, if the definition of "stockholder" were expanded, then corporations would need to track non-record holders of stock – the millions of the beneficial owners possibly trading on open securities markets – to comply with the statute. The only way to do this would be to replicated the pre-immobilization system and have each corporation return to maintaining their own share list. In addition, by decentralizing the "stockholder" system, the ability to trace which stockholders voted at the merger vote would also be frustrated. This court should not redefine "stockholder" because it

would force corporations to spend significant resources to change a well-constructed and working system. Such a significant alteration to corporate governance is appropriately left to the legislature.

2. Appellees cannot perfect their appraisal rights because no one "stockholder" continuously held the Prelix shares until the date of the merger.

Longpoint and Alexis precluded perfection of their appraisal rights when their agents directed Cede & Co. to not continuously hold the Prelix shares from the date it demanded appraisal through the date of the effective merger.

a. Because only Cede & Co., as the "stockholder" at time of demand, could have "continuously held" the Prelix stock, perfection was precluded when the shares were transferred.

Cede & Co. did not "continuously hold" the Prelix shares and thus the statutory threshold to receive an appraisal cannot be met. In order to be "entitled to an appraisal by the Court of Chancery," the "stockholder" must "continuously hold" the shares from the time that the appraisal is demanded until the date of the merger, 8 Del. C. § 262(a). Cede & Co., as the "stockholder" that delivered the demand for appraisal, is the only party that would have been able to "continuously hold" the Appellant's shares of Prelix through the merger date.

Legal ownership was transferred at the direction of petitioners' banks. Cede & Co.'s endorsement effectuated the reissuance of the shares under another stockholder of record – the bank's nominees. This transfer of the stock broke Cede & Co.'s chain of holding. Section 262(a) requires continuous ownership, and neither Longpoint nor Alexis

can demonstrate perfection thereof.

b. Appellee did not influence any decision that resulted in non-compliance with the continuous holding requirement.

Appellee cannot be blamed for the violation of the continuous holding requirement. Prelix played no role in directing Cede & Co. to endorse the unique certificates, nor the subsequent decision to officially register the shares under the names of the appellant's bank's nominees. J. P. Morgan Chase and the Bank of New York Mellon are two of the largest banks in the world and do not lack resources, information, or legal counsel. The banks chose to have the stocks re-issued under new names instead of simply keeping original stock certificates with the original names and complying with the law. Prelix had no influence on these decisions and cannot be blamed for the consequences.

c. Any dispute that may exist over the loss of appraisal rights is between Appellants and their agents alone.

The Appellant's agents, not Prelix, cost Appellants their claims to an appraisal. Any dispute that may exist is between Appellants and their agents. Longpoint and Alexis acquired their shares of Prelix after the announcement of the acquisition and after the December 4, 2014 record date for determining entitlement to vote on the merger. We can safely assume that they were acting strategically with regard to the impending merger, likely considering the soon to be available right of appraisal. Especially as sophisticate securities actors, they had notice of the statutory requirements and should be held to them.

Longpoint and Alexis chose to purchase and initially keep their

shares with DTC's nominee, Cede & Co. Longpoint and Alexis directed that Cede & Co. deliver their demand for appraisal. Finally, through their agents BNY Mellon and J.P. Morgan, they directed Cede & Co. to endorse their individually numbered certificates and effectuated the reissuance of those certificates in the names of the bank's nominees, Cudd and Mac. Prelix's only role in their appraisal perfection process was to comply with § 262(d) – which they indisputably did. Longpoint and Alexis consented to the actions of their agents and assumed the risk that they would not act in compliance with the law. In the future, they will surely take pain to make sure their agents do not change the stockholder of record after demanding appraisal, or will hire new agents who will competently perfect their appraisal rights. However, this is clearly a dispute between Appellants and their agents, not between Appellants and Appellees.

II. LONGPOINT AND ALEXIS FAILED TO ESTABLISH THAT THEIR SHARES WERE NOT USED TO VOTE IN FAVOR OF THE MERGER.

A. Question Presented

Can a beneficial owner perfect its statutory appraisal rights where it acquires the stock after delivery of demand for appraisal and cannot demonstrate that the holder of record did not vote the shares in favor of or consent them to the merger?

B. Scope of Review

The standard of review on appeal of a decision on summary judgment is *de novo*. Pike Creek Chiropractic Ctr. v. Robinson, 637 A.2d 418 (Del. 1994)

C. Merits of the Argument

Neither Longpoint nor Alexis can demonstrate their compliance with the appraisal statute by not voting their shares in favor of or consenting to the Prelix-Radius merger. (1) The appraisal statute affords its remedy only to *dissenting stockholders*. (2) Section 262(e) requires beneficial stock owners seeking appraisal to demonstrate compliance with the appraisal statute *by the stockholder*. (3) Longpoint and Alexis could not demonstrate the stockholder's compliance with the voting requirement. (4) Strict construction of the appraisal statute requires interpretation to preclude Longpoint and Alexis's petition.

1. The appraisal statute affords its remedy only to dissenting stockholders.

Appraisal is "entirely a creature of statute." *Kaye v. Pantone, Inc.*, 395 A.2d 367, 374 (Del. Ch. 1978). At common law, the merger of two corporations required the unanimous consent of both corporations' shareholders. Stephenson v. Commonwealth & S. Corp., 168 A. 211, 213 (Del. 1933); Mason v. Pewabic Mining Co., 133 U.S. 50, 59 (1890). This voting requirement provided an opening for opportunistic shareholder behavior, allowing holdouts to extract greater value from a merger than other shareholders, thus preventing the efficient reorganization of corporations. When the Delaware Legislature made the policy decision to allow corporations to reorganize with greater ease, it recognized that the dissenter was put at risk: A majority could deprive him of property without providing adequate compensation therefore. The right of appraisal was thus created to replace the

common-law right of unanimous consent. Reynolds Metals Co. v. Colonial Realty Corp., 190 A.2d 752, 755. (Del. 1963).

The purpose of the appraisal remedy was not to compensate *any* stockholder with compensation for its shares. Such a broad remedy would essentially allow the corporation to require redemption of its shares at will. The limited purpose was to afford *dissenting* shareholders to the proposed merger or consolidation adequate compensation while still allowing the reorganization to continue. See generally Robert B. Thompson, "Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law.," 84 GEO. L.J. 1, 4. The Delaware Legislature has not changed the law to afford a remedy beyond this purpose.

The plain language of Del. C. § 262(a) is clear: "Any stockholder […] who has neither voted in favor of the merger or consolidation nor consented thereto in writing […] shall be entitled to an appraisal." The Court of Chancery absolved petitioners Longpoint and Alexis of this requirement in error. The *stockholder* – and not the *beneficial owner* – must comply with the statutory requirement.

2. Section 262(e) requires beneficial stockowners seeking appraisal to demonstrate compliance with the appraisal statute by the stockholder.

Section 262(e) permits the beneficial owner of the shares of a merged corporation to file a petition for appraisal of their shares held by the stockholder (i.e. the holder of record, see §262(a)). However, this remedy does not alter the statutory requirements placed on the *stockholder* to comply with §262(a). Longpoint and Alexis, as

beneficial owners of the Prelix shares, must demonstrate the stockholder's compliance with §262 in order to assert appraisal rights.

The person seeking to exercise appraisal rights "has the burden of showing that he is a stockholder within the statutory meaning, and that he has satisfied the conditions required of him for the perfection of that right." In re Northeastern Water Co., 38 A.2d 918, 920–21 (Del. Ch. 1944); see also Carl M. Loeb, Rhoades & Co. v. Hilton Hotels Corp., 222 A.2d 789, 793 (Del. 1966). Before §262 was amended in 2007, only the "holder of record" was eligible to assert appraisal rights in the Court of Chancery, including when acting as agent for the beneficial owner. See 8 Del. C. §§ 262(a), (e) (2006); Bandell v. TC/GP, Inc., 676 A.2d 900 (Del. 1996) (Table). The 2007 amendment to 262(e) did nothing but allow the beneficial owner to petition for appraisal rights in their own name, as beneficial owners. See 76 Del. Laws. Ch. 145, §13 (2007). The subsections of §262 were not amended in concert, nor was an additional amendment enacted allowing a beneficial owner to personally perfect appraisal rights by §262(a).

The 2007 amendment to §262(e) allowed beneficial owners to litigate the appraisal of stock for which appraisal is perfected – it did not provide an additional avenue of perfection. Therefore, Longpoint and Alexis are still burdened to demonstrate the stockholder, who is "the holder of record," has complied with §262.

3. Longpoint and Alexis could not demonstrate the stockholder's compliance with the voting requirement.

Cudd & Co. and Mac & Co., the stockholders within the statutory meaning on the term (i.e. the holder of record, see §262(a)) did not meet §262(a)'s requirement that they not vote the shares in favor of the merger or consent thereto. As the Prelix certificates representing the shares were endorsed by Cede & Co. to them after the record date to determine eligibility to vote in the merger, they were ineligible to vote the shares in the merger. Of course, this begets an argument that, as they were ineligible to vote, they were unable to vote in favor of the merger or consent thereto. But this is easily overcome. Longpoint and Alexis could not produce evidence that Cudd and Mac did not vote the shares in favor of the merger nor consent them thereto – they only argued Cudd and Mac were ineligible to vote. Likewise, Longpoint and Alexis could not produce evidence that Cede & Co. did not vote the shares nor that Cede & Co. did not consent those shares thereto – they argued Cudd and Mac were ineligible to vote. Longpoint and Alexis could not even produce evidence that Cede & Co. voted (or failed to vote) any block of "fungible" shares for or against the merger. Longpoint and Alexis failed to present any evidence giving rise to a possibility that they could demonstrate compliance with the dissent requirement. Therefore, Prelix was entitled to summary judgment as a matter of law.

Petitioners could have easily avoided this result. When they acquired their shares after the date of determining eligibility to vote, they could have insisted the shares remain held by the stockholder Cede & Co (or another holder of record). They did not. When they (presumably) directed that Cede & Co. demand appraisal

rights for their shares, they could have insisted the shares remain held by the stockholder Cede & Co. They did not. By acquiring the shares after the date of record and transferring ownership to a different stockholder, Longpoint and Alexis effectively surrendered their appraisal rights.

4. Strict construction of the appraisal statute requires interpretation to preclude Longpoint and Alexis's petition.

The Delaware Supreme Court has traditionally strictly constructed the Delaware appraisal statute. Simkin v. Cole, 32 Del. 271, (1922). In turn, the Court of Chancery has followed suit. See Nelson v. Frank E. Best Inc., 768 A.2d 473, 475 (Del. Ch. 2000) (noting "the strict construction of the appraisal statute [is] required by the Delaware Supreme Court"). There is good judicial and business policy for this choice. "By exacting strict compliance […], the appraisal statute ensures the expedient and certain appraisal of stock." Ala. By-Prods. Corp. v. Cede & Co., 657 A.2d 254, 263 (Del. 1995).

A strict construction of the appraisal statute requires reading §262(a) to be a compounding list of requirements. It provides a three step appraisal perfection process: the stockholder must have (1) owned shares on the date it demanded appraisal thereof, (2) continued to hold the shares through the effective date of the merger, and (3) not voted the shares in favor of, nor consent to, the merger or consolidation, all in compliance with §262(d). See Reynolds Metals Co. v. Colonial Realty Corp., 190 A.2d 752, 754 (Del. 1963). Each factor builds on the previous. One cannot continue to hold the shares from a date it did not own them, and cannot abstain from voting, vote

against, or refrain from consenting to the merger (in any material sense) without continuing to hold the shares through the applicable period.

There is good policy for such construction: by insisting that the stockholder (i.e. holder of record) complete all three requirements, it allows beneficial owners (like Longpoint and Alexis) to freely buy and sell shares in the corporation through the merger while simultaneously ensuring that fully dissenting votes receive appraisal protection. Cede & Co. may demand appraisal on a number of shares before the shareholder vote. Those shares will have some value relative to shares for which no appraisal is demanded. Beneficial owners may freely trade "appraisal demanded" shares, reflecting the market's valuation of the shares after appraisal. This signals to the would-be acquirer what the market believes is the shares' fair price.

This system also assures that the merging corporation is not handing out unperfected appraisal rights. If Cede & Co. acts as stockholder of 100 shares, demands appraisal of 50, and votes 50 against the merger, it has perfected appraisal on those 50 shares. It or the beneficial owners it designates may petition for appraisal in the Court of Chancery with the change in beneficial ownership having no effect on the corporation's duty to fulfill the appraisal statute.

The loose interpretation offered by petitioners and accepted by the Court of Chancery – that the *stockholder* may freely change after appraisal rights without a share-tracing requirement – creates a

Schrödinger's demand for shares.[2] See Merion Capital LP v. BMC Software, Inc., 2015 Del. Ch. LEXIS 3 (Del. Ch. Jan. 5, 2015); In re Appraisal of Ancestry.com, 2 2015 Del. Ch. LEXIS 2 (Del. Ch. Jan. 5, 2015). After appraisal is demanded, both the shares transferred out of the stockholder's ownership and the shares retained by the stockholder would simultaneously be claimed under the same evidence of demand – even if this is mathematically impossible.

As an example, again suppose Cede & Co. was stockholder of 100 shares and (after the date of record determining eligibility to vote on the merger) demanded appraisal of only 50. Cede & Co. then transfers 50 shares to Quantum. Quantum is precluded from voting on the merger; under the Court of Chancery's and petitioner's theory, it has demonstrated its statutory burden to neither vote for nor consent to the merger. But, without a share-tracing requirement, Cede & Co. and Quantum may both attach their 50 shares (100 total) to Cede & Co.'s demand for appraisal of just 50 shares. This interpretation effectively allows market participants to transform the appraisal statute from a protection for minority shareholders into a state-run means for target shareholders to extract additional consideration from the acquirer beyond the market valuation at acquisition. If any

[2] In the Schrödinger's Cat paradox, quantum theory (in which matter can exist in two places simultaneously) is explained in a thought experiment: a cat is trapped in a box with an atom of radioactive matter that is equally likely to decay or not decay in one hour, causing the mechanical death of the cat. Mathematically represented one hour later, within the unopened box the atom is both decayed and not decayed, and so the cat is simultaneously living and dead. *See* Erwin Schrödinger "Die gegenwärtige Situation in der Quantenmechanik (The present situation in quantum mechanics)," Naturwissenschaften 23 (48): 807–812. (November 1935).

beneficial stock owner may bypass the appraisal statute by having the stockholder transfer some shares without share-tracing, the merging corporation would also be completely unable to comply with its §262(d) requirement that it inform any stockholder who has perfected its appraisal rights that the merger or consolidation has become effective.

The Court of Chancery's opinion below, in citing Merion Capital Inc. v. BMC Software, Inc. and In re Appraisal of Ancestry.com, appears to misinterpret the share-tracing requirement. In both cases the same company, Merion Capital (an arbitrager of shares in firms targeted for acquisition and subject to appraisal), acquired shares in a soon-to-be acquired firm. But both are distinguishable from the Radius-Prelix merger. In Ancestry.com, Merion purchased the shares after the record date but left the shares in possession of Cede & Co. as stockholder. 2015 Del. Ch. LEXIS 2, *2. In treating the Cede & Co.'s shares as "fungible bulk," the Court did not act to undermine the statute. So long as Cede & Co. sought appraisal of no more than the number of shares both demanded and not voted in favor of or consented to the merger, all statutory requirements were met and the appraisal remedy was respected as enacted. Not requiring share tracing at the beneficial owner level was justified because it was immaterial to the corporation.

In BMC Software, Merion purchased the shares after the record date, then transferred possession to a new stockholder, then demanded appraisal. 2015 Del. Ch. LEXIS 3, *2. BMC correctly challenged Merion's perfection of its appraisal rights. Merion did not

demonstrate that the stockholder of record did not vote for or consent to the merger. The share-tracing requirement advocated was a *de minimis* burden. All the party in such situation needed to show was an accounting of the stockholder of record's transfers following the record date. Merion was able to separately substantiate their tie to the appraisal demand. But this scenario is not at issue here, and while relevant should not have bound the Court by *stare decisis*. The change of stockholder between demand and voting creates too great a statutory hole to continue.