

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LONGPOINT INVESTMENTS TRUST and	:	
ALEXIS LARGE CAP EQUITY FUND LP,	:	
	:	No. 162, 2015
Appellants,	:	
	:	Court Below:
v.	:	
	:	Court of Chancery
PRELIX THERAPEUTICS, INC.,	:	of the State of Delaware
a Delaware corporation,	:	
	:	C.A. No.10342-CM
Appellee.	:	

Appellants' Opening Brief

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NATURE OF PROCEEDINGS

This is an appeal by Longpoint Investments Trust ("Longpoint") and Alexis Large Cap Equity Fund LP ("Alexis"), petitioners below-appellants, to the Supreme Court of the State of Delaware from the order of the Court of Chancery, in and for New Castle County, by Chancellor Renee Mosley, dated January 13, 2016, granting Prelix's, respondent below-appellee, motion for summary judgment. Mem. Op. at 4. The Court of Chancery granted this order in response to a petition filed by Longpoint and Alexis on May 6, 2015, against Prelix for the purpose of obtaining an appraisal of the fair value of their Prelix shares. *Id.* Prelix moved for summary judgment dismissing the petition in this matter on November 24, 2015. *Id.*

Based on precedent, Chancellor Mosley precluded Prelix's first argument regarding the inability of Longpoint and Alexis to establish their shares were not voted in favor of the merger. Mem. Op. at 1. In the second argument, Prelix argued that Longpoint and Alexis were not entitled to appraisal because the stockholder of record for their shares did not continuously hold the shares through the effective date of the merger. Mem. Op. at 1-2. Chancellor Mosley granted Prelix's motion for summary judgment on January 13, 2016, based on Prelix's second argument. Mem. Op. at 2. Therefore, Longpoint and Alexis's petition for appraisal was dismissed. Mem. Op. at 6.

Longpoint and Alexis filed a notice of appeal of Court of Chancery's Order granting Prelix's motion for summary judgment with this Court on January 15, 2015. (Ntc. Of Appeal). This is Longpoint and Alexis's opening brief.

SUMMARY OF ARGUMENT

I. This Court should affirm the Court of Chancery's decision to preclude Prelix's first argument that a beneficial owner is required to prove that shares acquired after the record date of merger were not voted in favor of the merger by the previous owner. The Court of Chancery's finding should be upheld for two primary reasons. First, the language of Section 262(a) imposes no burden on beneficial owners to prove the previous voting history of its newly acquired shares. Lastly, DTC's practice of holding shares in fungible bulk renders the claimed share-tracing requirement an impossibility.

II. This Court should, however, reverse the Court of Chancery's order granting Prelix's motion for summary judgment. Longpoint and Alexis are entitled to appraisal of their Prelix shares for three reasons. First, the appraisal statute does not require satisfaction of the Continuous Holder Requirement in order to perfect appraisal rights. Second, the decision to punish Longpoint and Alexis for the unrequested actions of a federally mandated third party, the Depository Trust Company ("DTC"), is contrary to the equitable principles upon which the appraisal remedy is based. Lastly, the Delaware courts' outdated interpretation of the term "Stockholder of Record" should be revised to mirror the federal definition of "Record Holder."

STATEMENT OF FACTS

Longpoint and Alexis acquired shares of Prelix common stock after December 4, 2014, the record date for determining entitlement to vote on the merger, but before the December 18, 2014, announcement of the \$0.50 per share increase in the merger price. Mem. Op. at 3. The combined shares acquired by Longpoint and Alexis totaled approximately 5.4% of the approximately 49 million outstanding shares as of the April 16, 2015, merger. Mem. Op. at 1. On January 13, 2015, prior to the scheduled January 14, 2015, shareholder vote on the merger (which was adjourned to February 17, 2015), Cede, the record holder of Prelix's shares and nominee of DTC, asserted appraisal rights with respect to the shares beneficially owned by Longpoint and Alexis, in conformity with Section 262(d)(1). *Id.*

After submitting Longpoint and Alexis's demands for appraisal, DTC moved the appropriate number of shares from its Fast Automated Securities Account ("FAST account") by instructing Prelix's transfer agent to issue physical, uniquely numbered stock certificates for these shares in the name of Cede. Mem. Op. at 3. On January 23, 2015, Prelix's transfer agent completed this transfer. *Id.* The certificates were delivered to DTC participants holding the Prelix shares on behalf of Longpoint and Alexis, J.P Morgan Chase and Bank of New York Mellon, respectively. *Id.* J.P Morgan Chase and Bank of New York Mellon, however, require that physical certificates be registered in the name of their own nominee. *Id.*

On February 5, 2015, Cede endorsed the paper certificates. Mem. Op. at 3. That same day, Prelix's transfer agent issued new

certificates representing Longpoint and Alexis's shares in the names of Cudd & Co. and Mac & Co., the nominees for J.P. Morgan Chase and Bank of New York Mellon, respectively. *Id.* Thus, Cudd & Co. and Mac & Co. replaced Cede as the record holder of Longpoint and Alexis's shares. Mem. Op. at 4. However, the February 5, 2015, changes in record ownership occurred without the knowledge of Longpoint and Alexis, who did not have any role in facilitating the transfer. *Id.*

After the merger closed on April 16, 2015, both Longpoint and Alexis filed timely petitions with the Court of Chancery to seek appraisal of their shares. Mem. Op. at 4. While the petitions were filed in their own names in accordance with Section 262(e), Longpoint and Alexis disclosed that their shares were now registered in the names of Cudd & Co. and Mac & Co. rather than in the name of Cede. *Id.* Subsequently, Prelix moved to dismiss Longpoint and Alexis's appraisal demands by claiming that neither Longpoint nor Alexis was entitled to appraisal. *Id.*

ARGUMENT

- I. LONGPOINT AND ALEXIS ARE NOT REQUIRED TO PROVE THAT THEIR SHARES WERE NOT VOTED IN FAVOR OF THE MERGER BECAUSE SECTION 262(a) IMPOSES NO SUCH REQUIREMENT, COURTS OF THIS STATE HAVE NEVER RECOGNIZED THIS KIND OF BURDEN ON BENEFICIAL OWNERS BECAUSE IT IS THE STOCKHOLDER'S ACTIONS THAT ARE RELEVANT TO AN APPRAISAL PROCEEDING, AND SUCH SHARE-TRACING IS NOT POSSIBLE.

A. Question Presented

Under Section 262(a), are beneficial owners, who purchase their shares after the record date for determining stockholder vote on the merger, required to prove their shares had not been previously voted in favor of the merger in order to be eligible for appraisal?

B. Scope of Review

This Court reviews motions to dismiss and motions for summary judgment *de novo*. *Ramirez v. Murdick*, 948 A.2d 395, 399 (Del. 2008). When interpreting an unambiguous statute, the Court gives deference to the legislature. *In re Krafft-Murphy Co., Inc.*, 82 A.3d 696, 702 (Del. 2013). When statutes are found to be ambiguous, the Court must employ appropriate measures to determine legislative intent. *Id.*

C. Merits of the Argument

This Court should affirm the Court of Chancery's decision to preclude Prelix's first argument that a beneficial owner is required to prove that shares acquired after the record date had not been voted in favor of the merger by the previous owner, because Section 262(a) places no such burden on beneficial owners. Delaware courts have never recognized this kind of burden, and shares of stock held in fungible bulk cannot be traced to specific votes in a merger proceeding. *In re Appraisal of Transkaryotic*, 2007 Del. Ch. LEXIS 57, at *2 (Del. Ch.).

When two or more Delaware corporations merge into one, dissenting stockholders are entitled to petition for appraisal rights if they meet the requirements of the appraisal statute. 8 Del. C. § 262. The right of appraisal is an equitable remedy initially created to compensate dissenting shareholders for their loss of interest in a corporation following a merger or consolidation. *Alabama By-Products Corp. v. Cede & Co. ex. Rel. Shearson Lehman Bros.*, 657 A.2d 254, 258 (Del. 1995). To understand why Prelix's argument pertaining to voting is ill-founded, it is important to understand how and why the majority of stock in public companies is actually held by Cede, as nominee for DTC, on behalf of the ultimate beneficial owners. *In re Appraisal of Ancestry.com, Inc.*, 2015 Del. Ch. LEXIS 2, *2 (Del. Ch.).

At the request of Congress, DTC was created in 1973 by the Securities and Exchange Commission ("SEC") as a solution to rectify the paper crisis of the 1960's. *In re Appraisal of Dell Inc.*, 2015 Del. Ch. LEXIS 184, *3 (Del. Ch.). DTC is the only domestic depository institution and has over 800 participating brokerage firms and banks. *Id.* at *4. DTC employs a system of share immobilization to transfer shares electronically through its nominee, Cede. *Dell*, 2015 Del. Ch. LEXIS 184, at *4. This system of share immobilization has significantly increased trading by eliminating the need to transfer paper certificates. *Id.* at *16.

Banks and brokers utilize DTC to hold their shares in "fungible bulk." *Dell*, 2015 Del. Ch. LEXIS 184, *3. Essentially, "fungible bulk" means that no participant has any ownership rights or claim to a particular share of stock held by DTC. *Ancestry.com*, 2015 Del. Ch.

LEXIS 2, *16. Participants instead own a proportional interest in DTC's total amount of the relevant issuer's stock, and these beneficial holders have legal entitlement to obtain a paper certificate representing securities held in their DTC account. *Id.* However, because shares are kept in fungible bulk, DTC does not maintain records that identify the ultimate beneficial owner of individual shares. *In re Appraisal of Transkaryotic*, 2007 Del. Ch. LEXIS 57, at *2. The Court of Chancery correctly precluded Prelix's first argument by finding that the inability of Longpoint and Alexis to prove that their shares were not voted by a previous owner in favor of the merger does not preclude them from seeking appraisal. Mem. Op. at 1-2.

1. Section 262(a) imposes no burden on beneficial owners to prove specific shares held in "street name" were not voted in favor of a merger before pursuing appraisal.

Section 262(a) imposes no requirement on a beneficial owner, who acquires stock after the record date, to prove that the specific shares it holds were not voted in favor of the merger. 8 Del. C. § 262(a). The voting requirement that must be met to receive appraisal is found in Section 262(a) of Delaware General Corporation Law (DGCL). 8 Del. C. § 251(c). This section requires a stockholder of a corporation not to vote in favor of a merger or consolidation, or otherwise consent to the action in writing. 8 Del. C. § 262(a). Stockholder, as defined in Section 262(a), refers to the holder of record of stock in a corporation and not to the beneficial owner. *Id.*

Absent from the unambiguous requirements of Section 262(a) is any language that requires a beneficial owner seeking appraisal of shares

to prove that the shares were not voted in favor of the merger by the previous stockholder. *Merion Capital LP v. BMC Software, Inc.*, 2015 Del. Ch. LEXIS 3, *4 (Del. Ch). The Court of Chancery, through *In re Transkaryotic*, specifically addressed and rejected the contention that a petitioner seeking appraisal lacks merit if it cannot prove the shares it beneficially owned were not voted in favor of the merger. 2007 Del. Ch. LEXIS 57 at *3. The court reasoned that the literal terms of the statute do not mention the beneficial owner, and certainly not any duty owed by the beneficial owner in an appraisal action. *Id.*

The Delaware General Assembly ("DGA") amended the appraisal statute after *Transkaryotic* was decided. *Merion Capital LP*, 2015 Del. Ch. LEXIS 3 at *26-27. This amendment granted beneficial owners more rights rather than placing any burdens upon them. *Id.* The DGA did not include a share-tracing requirement. *Merion Capital LP*, 2015 Del. Ch. LEXIS 3 at *26-27; *In re Appraisal Ancestry.com*, 2015 Del. Ch. LEXIS 2 at *18. Moreover, there is no evidence DGA intended to imply either a share-tracing requirement or additional requirements on appraisal arbitrageurs. *Merion Capital LP*, 2015 Del. Ch. LEXIS 3 at *26-27. Courts of Delaware have refused to find a share-tracing requirement in interpreting Section 262's unambiguous language. *Id.* at *6-7. Essentially, the 2007 amendment to Section 262 was intended to broaden, not limit, access to appraisal. *Id.* at *7.

Section 262 permits the existence of appraisal arbitrage by allowing investors to petition for appraisal of shares purchased after a merger is announced, thereby capitalizing on perceived undervalued

transactions. *In re Appraisal of Transkaryotic*, 2007 Del. Ch. LEXIS 57, at *5. Accordingly, when appraisal arbitrageurs acquire their shares after the record date, which makes them ineligible to vote on the merger, the appraisal arbitrageurs have met the requirement of not voting their shares in favor of the merger. *Id.*

Appraisal eligibility is and always has been based solely on the actions of the record holder. *Olivetti Underwood Corp. v. Jacques Coe & Co.*, 217 A.2d 683, 686 (Del. 1966). Further, Section 262 only requires the shareholder, not the beneficial owner, to prove that he did not vote shares in favor of the merger. *Merion Capital LP*, 2015 Del. Ch. LEXIS 3 at *7. In essence, the beneficial owner's actions are irrelevant to an appraisal proceeding. *Olivetti Underwood Corp.*, 217 A.2d at 686.

Here, Section 262 imposes no requirement upon Longpoint and Alexis to demonstrate that each share they seek to have appraised is a share that was never voted in favor of the merger by any owner. Mem. Op. at 5. The unambiguous language of Section 262 refers to what must be proven by the shareholder, which is Cede and not Longpoint and Alexis. Mem. Op. at 1. While Longpoint and Alexis could be classified as appraisal arbitrageurs, because they acquired their shares after the announcement of the merger, this makes no difference even looking beyond the unambiguous language of the statute. Mem. Op. at 1, 5. Nothing indicates that the DGA ever intended to impose additional burdens on Longpoint and Alexis as appraisal arbitrageurs. Mem. Op. at 5.

It is conceded that Longpoint and Alexis could not have voted their shares in favor of the merger because they did not acquire their shares until after the record date. Mem. Op. at 5. Longpoint and Alexis's inability to vote on the merger equates to complete satisfaction of the statute's voting requirement. *Id.* Further, the actions of Longpoint and Alexis, as beneficial owners, are irrelevant to appraisal proceedings, because the statute's plain language makes relevant only a record holder's actions. Mem. Op. at 1.

2. The share-tracing that Prelix argues is a prerequisite for Longpoint and Alexis to receive appraisal is impossible to obtain.

Share immobilization makes the share-tracing demanded by Prelix impossible. Shares remain completely anonymous while they are held and traded through DTC's electronic book-entry system. *In re Appraisal of Transkaryotic*, 2007 Del. Ch. LEXIS 57, at *2 (Del. Ch.). Consequently, it is impossible to trace how a beneficial owner's particular shares were voted in a merger proceeding because all shares are held in fungible bulk. *In re Appraisal of Ancestry.com*, 2015 Del. Ch. LEXIS 2, at *16. Today, the majority of banks and brokers outsource the distribution of proxy materials and the process of collecting and organizing clients' voting instructions to a company called Broadridge. *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 382 (Del. 2010). Once Broadridge tallies the total number of shares that are to be voted for and against the merger, these totals are submitted to DTC who votes according to the proportions of the aggregate votes. *Id.* Votes are taken, but without recording how each shareholder voted. *Id.*

Longpoint and Alexis are incapable of proving their particular shares were voted for or against the merger by the previous record holder because shares are held in fungible bulk without any mechanism relating specific shares to any beneficial owner. Mem. Op. at 5. Regardless, Longpoint and Alexis have no duty to prove how previous stockholders voted. *Id.* As mentioned above, Longpoint and Alexis's shares were purchased after the merger was announced, thus precluding them from the voting process. *Id.* In conclusion, Longpoint and Alexis's inability to prove their shares were not voted in favor of the merger does not preclude them from seeking appraisal. *Id.* This Court should affirm the decision of the Court of Chancery and determine that Prelix's first argument should be precluded.

II. THE COURT OF CHANCERY'S GRANT OF SUMMARY JUDGMENT IS IMPROPER BECAUSE PETITIONERS ARE ENTITLED TO APPRAISAL OF THEIR PRELIX SHARES ACCORDING TO SECTION 262 OF THE DELAWARE CODE, AS A MATTER OF EQUITY IN ACCORDANCE WITH BOTH THE EQUITABLE PURPOSE OF APPRAISAL AND THE OUTDATED DEFINITION OF THE TERM "HOLDER OF RECORD" USED BY DELAWARE COURTS.

A. QUESTION PRESENTED

Whether actions of a third party should, based on the Continuous Holder Requirement, prevent a beneficial owner from receiving appraisal rights?

B. SCOPE OF REVIEW

This court reviews motions to dismiss and motions for summary judgment de novo. *Ramirez v. Murdick*, 948 A.2d 395, 399 (Del. 2008). Summary judgment is appropriate where the filings of the parties and facts of the case show there is no genuine issue of material fact and, therefore, the moving party is entitled to judgment as a matter of law. *Korn v. New Castle County*, 2005 Del. Ch. LEXIS 25, at *13 (Del. Ch.).

C. MERITS OF ARGUMENT

Longpoint and Alexis, having properly perfected appraisal rights according to Section 262 of DGCL, are entitled to appraisal rights, despite the Court of Chancery's misguided, unequitable, and outdated understanding of the Continuous Holder Requirement. Appraisal rights were created by the legislature to protect actual investors with a financial stake in the corporation. *Kaye v. Pantone, Inc.*, 395 A.2d 369, 373 (Del. Ch. 1977) (stating that an appraisal is a method for compensating a dissenting shareholder for the involuntary taking of *his property*) (emphasis added). Beneficial owners have the option to

register shares in their own names and thus become the record holder and the legally recognized shareholder. *In re Appraisal of Dell Inc.*, 2015 Del. Ch. LEXIS 184, *10 (Del. Ch.). However, due to modern security practices, the vast majority of publicly traded shares are registered in the name of DTC's nominee, Cede, which becomes the registered shareholder. *Id.* at *14. Consequently, the legally recognized shareholder is not the entity having the ultimate financial interest in the company. *Id.* at *1. However, the beneficial owner remains the party with the financial interest in the corporation regardless of whether or not this party is legally recognized as the shareholder. David Brooks, Comment, *Depository Trust Company and the Omnibus Proxy: Shareholder Voting in the Era of Share Immobilization*, 56 S. Tex. L. Rev. 205, 206 (2014).

Summary judgment granted by the Court of Chancery should be reversed and the appraisal rights of Longpoint and Alexis should be granted for three reasons. First, the statutory interpretation used by the Court of Chancery is incorrect, and the language of the statute itself is contradictory on its face. Second, depriving Longpoint and Alexis of appraisal rights because of unsolicited actions of a third party fails to conform to the equitable principles on which appraisal was based. Finally, Delaware case law, although appropriate before the emergence of share immobilization and DTC, does not adequately address the issues presently before the Court as well as those that will arise in the future.

1. Longpoint and Alexis are entitled to appraisal of their shares because they perfected their right to appraisal in accordance with 8 Del. C. § 262.

Longpoint and Alexis perfected their appraisal rights because they satisfied all the requirements of Section 262(d). According to Section 262(d), appraisal rights shall be perfected when a shareholder delivers to the corporation a written demand for appraisal of its shares. 8 Del. C. § 262(d). The demand must meet 3 requirements: (1) it must be delivered before voting on the merger has taken place; (2) it must reasonably inform the corporation of the identity of the shareholder; and (3) it must clearly state the shareholder's intent to seek appraisal. 8 Del. C. § 262(d).

Longpoint and Alexis's demands for appraisal satisfied Section 262(d). The depository nominee and registered shareholder, Cede, made the demand on behalf of Longpoint and Alexis. Mem. Op. at 3. Cede submitted these appraisal demands before voting took place, giving the corporation sufficient notice of Longpoint and Alexis's request for appraisal. Mem. Op. at 1. Therefore, Longpoint and Alexis satisfied the requirements necessary to perfect appraisal rights as explicitly set forth in Section 262(d). Mem. Op. at 1. Longpoint and Alexis's satisfaction of Section 262(d) is undisputed. *Id.*

However, the Court of Chancery held that Longpoint and Alexis are not entitled to appraisal because Cede did not continuously hold the shares from the appraisal demand date through the effective date of the merger, as required by Section 262(a). Mem. Op. at 5. According to Section 262(a), a shareholder who desires to make a demand for appraisal must hold the shares on the date the demand was made, must

continuously hold those shares through the effective date of the merger, and must not have voted in favor of the merger. 8 Del. C. § 262(a).

However, Longpoint and Alexis's satisfaction of Section 262(d) warrants granting of appraisal rights regardless of a transfer that ended the continuous relationship. The Court, when analyzing a statute, must strive to ascertain and put into effect the legislature's intended purpose. *Anderson v. Krafft-Murphy Co.*, 82 A.3d 696, 702 (Del. 2013). In *Freeman v. X-Ray Associates, P.A.*, the Appellee argued that because 18 Del. C. § 6853(e)(1) expressly addressed the intent required to satisfy the statute, it was reasonable to assume that 18 Del. C. § 6853(e)(3) required the same intent, although it was not explicitly stated. 3 A.3d 224, 230 (Del. 2010). This Court found that the language exceptions listed in 18 Del. C. § 6853(e)(1) provided clarification on what the legislature intended with regard to that statute. *Id.* This Court then stated it was reasonable to assume that if § 6853(e)(3) required the same intent as § 6853(e)(1), the legislature would have used express language to convey that requirement. *Id.* The absence of the explicit language led this Court to conclude that the legislature did not intend the excluded language to be considered part of the section. *Id.*

Section 262(d) explicitly states, "Appraisal rights shall be perfected as follows..." 8 Del. C. § 262(d). The rest of Section 262(d) does not mention Section 262(a), neither through contextual reference nor exact quote. *Id.* However, Section 262(d) does contain references to other sections within 262, such as (b) and (c). By contrast, it

does not contain any language related to or referencing a continuous holder requirement. *Id.* The legislature has shown it intended these statutes play a role in the perfection of appraisal rights by referencing other statutes within Section 262(d). *See Id.* If the legislature had intended continuous ownership to be included as a requirement to perfecting appraisal rights, the legislature would have included, or at least referenced, Section 262(a) along with the other mentioned statutes. *See Freeman*, 3 A.3d 224, 230 (Del. 2010). Thus, according to the language within Subsection 262(d) of the statute, perfection of appraisal rights occurs independently of both the Continuous Holder Requirement and other requirements stated in Section 262(a). *Id.*

The shareholder must deliver the appraisal demand before the merger voting takes place in order to perfect appraisal rights. 8 Del. C. § 262(d). However, the shareholder must hold the shares from date of demand through the effective date of the merger in order to satisfy the Continuous Holder Requirement. 8 Del. C. § 262(a). It is impossible for a shareholder to satisfy the Continuous Holder Requirement before perfecting appraisal rights because perfection of appraisal rights through a satisfactory demand commences continuous holding. *See* 8 Del. C. § 262.

2. In accordance with the equitable principles of appraisal, Longpoint and Alexis, as beneficial owners, should not be deprived of appraisal rights based on the uninvited actions of a mandated third party nominee.

Longpoint and Alexis should not be denied financial interests of appraisal of their shares due to Cede's forced existence in the

securities market. Federal and state courts have considered the relationship between the beneficial owner and its nominee as a voluntary relationship. *Enstar Corp. v. Senouf*, 535 A.2d 1351, 1355 (Del. 1987). A beneficial owner is considered to have accepted any complications, risks, or failures resulting from the voluntary relationship. *Id.* Therefore, the corporation is not to be blamed for a nominee's failure to correctly perfect appraisal rights for the beneficial owner. *Id.*

Delaware case law, predating the federal policy of share immobilization, regards the entity appearing on the stock ledger to be the record holder. *Dell*, 2015 Del. Ch. LEXIS 184, at *8. Prior to share immobilization, the stock ledger listed either the beneficial owner or its chosen nominee as the legal shareholder. See *Id.* Delaware courts continue to view any relationship between a beneficial owner and a third party as being voluntary, even after the SEC implemented share immobilization and created the DTC. *Id.* at *8. The courts have declined to distinguish the broker level of ownership, which is a voluntary relationship between beneficial owner and its chosen nominee, from the federally-mandated relationship between the nominee and the DTC. *Id.* Consequently, even after the imposition of the federally-mandated depository system, a beneficial owner is considered to have accepted the risks and failures that result from a relationship involving the DTC due to its status in Delaware courts as a voluntary relationship. See *Enstar Corp.*, 535 A.2d at 1355.

DTC successfully created a system for prompt and accurate clearance of securities transactions. *Dell*, 2015 Del. Ch. LEXIS 184,

*14. However, DTC's new role as the federally-mandated nominee further enlarges the gap between the beneficial owner and its financial interest in the corporation. Brooks, *supra*, at 207. Classifying the federally mandated relationship between DTC and custodial banks as voluntary fails to acknowledge the current realities of the securities industry, and it unfairly disadvantages the beneficial owner. *Id.* Moreover, considering DTC-driven transfers as voluntary only seems to disenfranchise the beneficial owner. *Id.*

Custodial banks deciding to enter into a relationship with DTC should not be considered a voluntary decision. *Dell*, 2015 Del. Ch. LEXIS 184, at *54. The purpose of DTC and share immobilization is to end the physical movement of paper certificates. *Id.* at *16. Participation in DTC is required to achieve this purpose. *See Id.* In the modern securities trading system, share immobilization allows access to faster and more efficient transfer methods. *See Id.*

Refusal to participate would extremely disadvantage either the beneficial owner or its custodial bank by forcing them to operate using paper certificates, a method which is being actively eradicated. *Dell*, 2015 Del. Ch. LEXIS 184, at *16. In 2014, the average daily volume of shares traded, using share immobilization and the DTC, was approximately 1 billion shares. *Id.* The amount of shares either beneficial owners or custodial banks would lose instant access to is enough, on its own, to force participation in the DTC. *See Id.*

Here, Longpoint and Alexis decided to hold their shares in "street name" through their respective nominees, J.P. Morgan Chase and Bank of New York Mellon. Mem. Op. at 3. The voluntary manner of this

relationship is not disputed. *Id.* J.P. Morgan Chase and Bank of New York Mellon, on the other hand, deposited the entrusted shares with DTC because the federal policy of share immobilization essentially left them with no other options. Mem. Op. at 4. Accordingly, this should be considered an involuntary relationship.

The Court of Chancery's decision to deny Longpoint and Alexis's appraisal rights strips away the beneficial owners' ability to receive compensation from its financial investment. See Mem. Op. at 5. As a matter of equity upon which the concept of share appraisal is founded, Longpoint and Alexis should be not punished for actions taken by Cede, a mandated nominee. Mem. Op. at 3.

3. The outdated interpretation of the term "stockholder of record" used by Delaware courts should be changed to mirror the federal definition of "record holder."

This Court should replace the outdated interpretation of the term "stockholder of record" with the federal definition of "record holder." Delaware courts base their interpretation of the term "stockholder of record" on cases that do not accurately reflect the realities of modern security practices. *Dell*, 2015 Del. Ch. LEXIS 184, at *34. Decisions regarding the rights of beneficial owners is predicated on the 1945 decision of *Salt Dome v. Schenck*. *Id.* at *50. At the time of the *Salt Dome v. Schneck* decision, corporations only needed to rely on the stock ledger to identify the record holder. See 41 A.3d 583, 586 (Del. 1945).

Despite the significant changes brought forth by DTC's presence, Delaware courts continue to define shareholder based on out-moded case law decided long before the existence of DTC. *Dell*, 2015 Del. Ch.

LEXIS 184, at *50. Delaware's approach results in stockholder lists that are almost entirely comprised of Cede. See *Id.* at *4. The federal system, however, recognized this growing divide between the beneficial owner and the corporation and attempted to remedy it. *Id.* at *17.

The federal approach looks through DTC (and Cede) to the custodial banks and brokers when determining a corporation's record holders. *Dell*, 2015 Del. Ch. LEXIS 184, at *17. The federal legislature defines the term "record holder" as "any broker, dealer, voting trustee, bank, association or other entity that exercises fiduciary powers which holds securities of record in nominee name..." 17 C.F.R. § 240.14c-1(i). Cede is not the record holder, for the purposes of federal law. 15 U.S.C. § 78c(a)(23)(A). Record holders are banks and brokers participating in DTC. *Dell*, 2015 Del. Ch. LEXIS 184, at *33. This statute effectively erased DTC from the ownership chain and narrowed the gap between the beneficial owner and the corporation. *Id.*

This Court should not defer to the legislature to resolve this issue. The Delaware judiciary has a history of taking the lead and addressing corporate law issues whenever they arise. *Dell*, 2015 Del. Ch. LEXIS 184, at *38. Further, this Court has considered DGCL to be more of an enabling statute, open to interpretation, than a comprehensive code. *Id.* at *39. This Court is the leading court on corporate law in the United States and is in the best position to facilitate this change. *Id.* at *38.

Additionally, the Delaware legislature has provided this Court with the opportunity to change the application of the law without

having to change the written language of the statute itself. *See Dell*, 2015 Del. Ch. LEXIS 184, at *24. The legislature has not defined the term "stockholder of record" as found in Section 262 or for that matter any other provision of the DGCL. *Id.* This Court should interpret the term "stockholder of record" to mirror the federal definition of "record holder" as stated in 17 C.F.R. § 240.14c-1(i) and further explained in 15 U.S.C. § 78c(a)(23)(A).

If this Court were to apply the federal interpretation, disenfranchisement of Longpoint and Alexis would be avoided. *See Mem. Op.* at 5. Under the federal interpretation, Longpoint and Alexis are entitled to appraisal rights. *Id.* The record owners for the shares owned by Longpoint and Alexis would be, under the new interpretation, J.P. Morgan Chase and Bank of New York Mellon. *Id.* These record owners continuously owned the shares from the date of the demand through the effective date of the merger, thus satisfying the Continuous Holder Requirement for appraisal. *Id.* Accordingly, Longpoint and Alexis are entitled to appraisal rights, and this Court should reverse the grant of Prelix's motion for summary judgment.

Conclusion

For the foregoing reasons, the Appellants, Longpoint and Alexis, respectfully request that this Court reverse the Court of Chancery's Order granting Prelix's motion for summary judgment.

Respectfully Submitted,

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