IN THE SUPREME COURT OF THE STATE OF DELAWARE

LONGPOINT INVESTMENT TRUST and
ALEXIS LARGE CAP EQUITY LP,

Appellants,

v. Case No. 10342-CM

PRELIX THERAPEUTICS, INC.,
a Delaware corporation,

Appellee.

APPELLEE'S REPLY BRIEF

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NATURE OF PROCEEDINGS

This action is brought pursuant to 8 Del. C. §262, arising from an acquisition on April 16, 2015 of Prelix Therapeutics, Inc. ("Prelix") by Radius Health Systems Corp. ("Radius"), for $15.00 per share in cash. (Mem. Op. at 1). On May 6, 2015, in the Court of Chancery, Appellants (Long Point and Alexis) brought suit seeking appraisal of their Prelix shares. (Mem. Op. at 4). On January 13, 2016, Chancellor Mosley granted appellee's (Prelix) motion for summary judgment ruling that Long Point and Alexis were not entitled to appraisal with respect to their Prelix shares. (Mem. Op. at 6). On January 15, 2016 Appellants filed a timely notice of appeal seeking relief from the interlocutory order. (Ntc. of Appeal). This is Prelix's opening brief.

SUMMARY OF THE ARGUMENT

I. Although the chancery court declined to rule on the issue, Longpoint and Alexis failed to establish whether or not their shares did not consent or vote in favor of the merger. Under the plain meaning and legislative intent of Section 262, stockholders of record of shares are only entitled to appraisal rights with respect to shares they own that did not vote in favor of the merger. Furthermore, under the statutory framework of section 262, stockholders have the burden of proof to establish that they complied with the requirements of the appraisal statute. Thus, the chancery court's refusal was improper, and this issue should be reviewed *de novo.*

II. This Court should affirm the chancery court's order granting Prelix's motion for summary judgment. Under the plain language of Section 262(a), the stockholder of record of shares, must continuously held those shares through the effective date of the merger. Prelix should not bear the risk of Longpoint and Alexis's choice in having their shares held in street name. The voluntary transfer of share certificates at the depository level is a risk that is properly born by Longpoint and Alexis. Furthermore, requiring Delaware corporations to track share transfers outside their own stock ledgers, would create an unnecessary burden on the corporations.

Statement of Facts

Prelix Therapeutics, Inc. ("Prelix") is a publicly traded company that had been trading on the NASDAQ Global Select Market. Mem. Op. at 2. On October 15, 2014 Radius Health Systems Corp ("Radius") proposed acquisition of Prelix. Mem. Op. at 2.

Petitioners Longpoint Investments Trust ("Longpoint") and Alexis Large Cap Equity Fund LP ("Alexis") acquired their shares of Prelix after the December 4, 2014 record date for determining entitlement to vote on the merger. Mem. Op. at 3. Together, Longpoint and Alexis owned approximately 5.4% of the approximately 49 million outstanding shares of Prelix. Mem. Op. at 2-3. After an initial announcement of a proposed price, $14.50 per share, Radius and Prelix revised their merger agreement to increase the acquisition price to $15.00, per share. Mem. Op. at 2-3. On January 13, 2015 Longpoint and Alexis, unhappy with the merger price, delivered written demands in conformity with Section 262(d)(1) for appraisal of their shares. Mem. Op. at 3. Cede & Co., as stockholder of record, made the demands on behalf of Longpoint and Alexis. Mem. Op. at 3.

After Longpoint and Alexis made demands for appraisal of their shares, Depository Trust Company ("DTC") moved a corresponding number of shares out of their "FAST" account (Fast Automated Securities Account) by directing Prelix's transfer agent to issue uniquely numbered certificates representing those shares. Mem. Op. at 3. These events occurred on January 23, 2015, and the new certificates were

delivered to J.P. Morgan Chase and Bank of New York Mellon the DTC participants for Longpoint and Alexis. Mem. Op. at 3.

J.P. Morgan Chase and Bank of New York Mellon's policies do not permit them to hold paper certificates in the names of their own nominees. Mem. Op. at 3. Both firms instructed Cede & Co. to endorse the shares so that they could be reissued in the names of Cudd & Co. and Mac & Co, as nominees for J.P. Morgan Chase and Bank of New York Mellon. Mem. Op. at 3. That endorsement occurred on February 5, 2015 and Prelix's transfers agent that issued new certificates in the names of the new nominees. Mem. Op. at 3. Thus, the maker of appraisal demands, Cede & Co., was no longer the holder of record by the time the merger completed on April 16, 2015 as required by Section 262(a). Mem. Op. at 3-4.

Petitioners brought this action on May 6, 2015. (Mem. Op. at 4). Petitioners admit that their shares were registered in the name of Cede & Co. when they submitted their written demands, and in the names of Cudd & Co. and Mac & Co. at the time of the merger. (Mem. Op. at 4). Prelix has moved for summary judgment dismissing the petition in this matter, claiming that neither Longpoint not Alexis is entitled to appraisal. (Mem. Op. at 9-10)

Argument

I. WHILE THE CHANCERY COURT DECLINED TO RULE ON THE ISSUE, LONGPOINT AND ALEXIS ARE REQUIRED TO ESTABLISH THAT THEIR SHARES WERE NOT VOTED IN FAVOR OF THE MERGER.

A. Question Presented

Whether stockholders of record of shares are only entitled to appraisal rights with respect to shares they own that did not vote in favor of the merger.

B. Standard of Review

Summary judgment is appropriate where the moving party demonstrates that "there are no issues of material fact in dispute before the Court and the moving party is entitled to judgment as a matter of law". Del. Ct. Ch. R. 56(c).

Both parties agree that no genuine issue of material fact exists. Mem. Op. at 4. The only issue that remains, and one that respondents fail to show, is that they are entitled to judgment as a matter of law. Mem. Op. at 4. The Supreme Court of Delaware also reviews statutory interpretations by the trial court *de novo*. *In re Krafft-Murphy Co. Inc.*, 82 A.3d 696, 702 (Del. 2013).

C. Merits of Argument

1. The underlying purpose and plain language of §262 confirm that petitioners may only seek appraisal for shares not voted in favor of the merger.

Historically, in Delaware and other states, a single stockholder could prevent a merger. *Reynolds Metals Co. v. Colonial Realty Corp.*, 190 A.2d 752, 755 (Del. Ch. 1963). Unanimous consent of a corporation's stockholders was necessary for a merger to be completed.

Id. Subsequently, the Delaware General Assembly amended the law to its current state allowing a majority of shareholders to override an objection. *Id.* Therefore, the right of appraisal was intended to provide dissenting shareholders a remedy for the loss of a common-law right. Id. at 755. As the Court has previously stated, "the Legislature created appraisal rights in an effort to compensate minority holders for the loss of the veto power and to give dissenters the right to demand fair value of shares." *In re Appraisal of Transkaryotic Therapies, Inc.* 2007 WL 1378345 at *3 (Del. Ch. May 2, 2007).

Awarding Alexis and Longpoint appraisal rights, without establishing whether or not their shares voted against the merger, would fail to reflect the remedy's origin and purpose. Id. Alexis and Longpoint bought into the merger in full knowledge of the acquisition price. Mem. Op. at 3. Allowing shareholders to demand an appraisal remedy, which was originally offered to protect those who dissent from a merger, would frustrate the appraisal statute, and award arbitrageurs instead of protecting objecting shareholders.

Consistent with the origin and purpose of section 262, the plain language specifically illustrates that only shares that did not vote in favor of the merger are eligible for appraisal. Section 262(a) and (e) should be read as a whole, rather than its parts. *In re Krafft-Murphy Co.*, 82 A.3d 696 at 702. Section 262(a) states that that a stockholder is entitled to appraisal only if it "has neither voted in favor of the merger or consolidation nor consented thereto in writing." 8 Del. C. § 262(a). Additionally, section 262(e) states that

only "shares not voted in favor of the merger or consolidation" are entitled to appraisal. Id. § 262(e). A harmonious interpretation of this statute cannot be produced unless this Court concludes that only those who did not vote in favor of the merger may pursue appraisal.

Accepting Alexis and Longpoint's interpretation may lead to unintended consequences. If a shareholder need only illustrate that it did not vote in favor of the merger, it is possible that a majority of a corporation's outstanding shares would seek appraisal. Allowance of such an absurd interpretation could lead to an absurd result. *Cordero v. Gulfstream Dev. Corp.,* 56 A.3d 1030, 1035-36 (Del. 2012).

2. Beneficial owners who exercise their rights for appraisal, just like record holders, have the burden to show that their shares were not voted in favor of the merger.

The appraisal remedy is the only remedy available to a minority shareholder that objects to a merger. *Weinberger v. UOP*, 457 A.2d 701, 715 (Del. 1983). In *Weinberger*, this Court also noted that evidence of deliberate corporate waste could give rise to an alternative solution. *Id.* The law of unintended consequences and the more recent decisions by the Court of Chancery, has turned the appraisal remedy into a weapon. *Merion Capital LP v. BMC Software, Inc.,* 2015 WL 67586 at *7 (Del. Ch. May 2, 2007). What was once viewed as a method to protect minority shareholders, is now being exploited by institutional investors and a source of corporate waste. *Transkaryotic,* 2007 WL 1378345 at *3.

It is the stockholder of record that bears the burden in proving it has complied with the appraisal statute. *Id.* Section 262(a)

requires that a stockholder making an appraisal demand hold shares that were not voted in favor of the merger or "consented" to the merger. 8 *Del. Ch.* § 262(a). The General Assembly did not include a share tracing requirement because it was not necessary in light of the plain meaning of the statute. *Merion Capital LP*, 2015 WL 67586 at *7.

In the instant case, both Longpoint and Alexis bear the burden of proving their shares neither consented to, or were voted in favor of the merger. It is undisputed that Longpoint and Alexis acquired the shares for which they seek appraisal sometime after the December 4, 2014 record date for the merger. *Mem. Op.* at 1; *see Transkaryotic*, 2007 WL 1378345 at *5. The burden of proof lies with the stockholder of record to prove it has complied with the statute. *See Id.* at 3. Longpoint and Alexis cannot demonstrate their compliance with the requirements of Section 262, and as a result, are not entitled to an appraisal. *Mem. Op.* at 1.

II. EVEN IF THERE IS NO REQUIREMENT THAT LONGPOINT AND ALEXIS PROVE THEIR SHARES WERE NOT VOTED IN FAVOR OF THE MERGER, THEY DID NOT CONTINUOUSLY HOLD THE SHARES THROUGH THE EFFECTIVE DATE OF THE MERGER AS REQUIRED BY SECTION 262(a).

A. QUESTION PRESENTED

Whether a voluntary transfer at the depository level before the effective date of the merger breaks the continuous holder requirement under Section 262(a).

B. STANDARD OF REVIEW

A summary judgment is appropriate "where there is no genuine issue of fact and that the moving party is entitled to a judgment as a

matter of law." Ct. Ch. R. 56(c). "The Supreme Court of Delaware reviews a trial courts decision to grant summary judgment *de novo*." *In re Krafft-Murphy Co., Inc.* 82 A.3d 696 at 702. The Supreme Court of Delaware also reviews statutory interpretations by the trial court *de novo*. *Id.*

C. MERITS OF ARGUMENT

1. In order to comply with the statute, the stockholder of record must continuously hold its shares seeking appraisal through the effective date of the merger.

The beneficial owner of shares seeking appraisal must ensure that the record holder of shares complies with the statutory requirements established by the Delaware Legislature under Sections 262(a) and (d) to perfect appraisal rights. *In re Ancestry.com, Inc.,* 2015 WL 66825 at *8 (Del. Ch. Jan. 5, 2015). The record holder of the shares makes the demand for appraisal, and the record holder must then continuously hold shares in its name through the effective date of the merger. *Nelson v. Frank E. Best Inc.,* 768 A.2d 473, 477 (Del. Ch. 2000). The Delaware General Corporation Law, and this Court, has defined a stockholder as the holder of record of a corporation's stock. *Salt Dome Oil Corp. v. Schenck*, 41 A.2d 583, 589 (Del. 1945).

Beneficial owners that choose to hold their shares through intermediaries bear the risk that the intermediaries might act against their interests. *Enstar Corp. v. Senouf,* 535 A.2d 1351, 1354 (Del. 1987). *Enstar* involved the perfection of appraisal rights by beneficial owners of stock who held their stock in street name. *Id.* at 1352. The proxy statement sent out by *Enstar* instructed brokers who owned shares as a nominee for beneficial owners must exercise

their appraisal rights for the beneficial owners' stock. *Id.* at 1353. The client bears the burden "to obtain the advantages of record ownership," and "the legal and practical effects of having one's stock registered in street name cannot be visited upon the issuer." *Id.* at 1354. Cede. Co. was the stockholder of record but the demand for appraisal was made by the beneficial owners, and not on behalf of the record holder. *Id.* at 1353. This Court held that "valid demand must be executed by or on behalf of the holder of record." *Id.* at 1356. An issuer should not be responsible for searching anything other than its own record to determine who has proper standing because anything more would lead to "confusion and uncertainty," that the corporation did not cause. *Id.* at 1356.

The continuous holder requirement required by 8 Del. C. § 262(a) is violated if certificated shares are retitled after demand is made. *Nelson v. Frank E. Best Inc.,* 768 A.2d 473, 477 (Del. Ch. 2000). In *Nelson*, the Mitchell Partners' investment firm was the beneficial owner of the disputed shares. *Id.* at 476. The shares were held at Bear Stearns Securities Corp. and the record holder was Cede Co. *Id.* The Mitchell Partners requested Bear Stearns to transfer the shares to Mitchell Partners' name to facilitate a demand for appraisal. *Id.* The transfer never occurred, so the Mitchell Partners requested Bear Stearns to make the demand on their behalf. *Id.* After the demand was made, Bear Stearns retitled the disputed shares to the Mitchell Partners. *Id.* at 477. This negated Cede's initial demand because Cede would not be the continuous holder of record through the effective date of the merger. *Id.*

In the instant case, Prelix and Longpoint were the beneficial owners of approximately 5.4% of the outstanding shares of stock in Prelix. Mem. Op. at 1. Alexis and Longpoint then instructed Cede to make an appraisal demand on their behalf. Mem. Op. at 3; *see Nelson* 768 A.2d 473 at 476. The next steps are similar to the events in *Nelson*, the disputed shares were transferred to JP Morgan and BONY where they were re-titled in the name of their nominee, Cudd & Co. Mem. Op. at 3; *id.* The violation of § 262(a) occurred when the new certificates were endorsed by Cudd & Co. Mem. Op. at 3. Therefore, both Alexis and Longpoint failed to comply with the statutory requirement to continuously hold the disputed shares through the "effective date of the merger." Mem. Op. at 3; 8 Del. C. 262(a).

Longpoint and Alexis were both the beneficial owners of the disputed shares through their intermediaries (JP Morgan and BONY, respectively) and thus bear the risk if those intermediaries act against their interest. Mem. Op. at 3; see *Enstar Corp.* 535 A.2d 1351 at 1354. The fact that both Longpoint and Alexis were unaware of the actions of their intermediaries is irrelevant because it is a risk both funds bore. Mem. Op. at 4; *see id.* Prelix cannot be blamed for the for the failure of a nominee or broker "to perfect the appraisal rights of the beneficial owner." *See Id.* at 1355.

2. Absent contrary legislative intent, unambiguously written statutes should be given effect to their plain meaning.

Requiring strict compliance with the appraisal statute allows both parties involved a degree of certainty as to how to conduct their affairs. *Ala. By-Prods v. Cede & Co..,* 657 A.2d 254, 263 (Del. 1995).

Corporations incorporate in Delaware because they know the judiciary will strictly adhere to statutory construction and the Delaware General assembly's intent. *Nelson* 768 A.2d 473 at 478; *Eliason v. Englehard*, 733 A.2d 944, 946 (Del. 19990)(stating that if a statute is unambiguous the plain meaning controls). The appraisal statute only recognizes the holder of record, and the Legislature, not the judiciary, possesses the power to modify § 262. *In re Appraisal of Transkaryotic Therapies, Inc.*, 2007 WL 1378345, at *5; *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985)(stating if a statute as a whole is unambiguous, and there is no reasonable doubt as to the meaning of the words used, the Court's role is limited to the application of the literal meaning of the words). The law should be applied fairly, and both minority shareholders and the corporation are required to strictly comply with the appraisal statute. *Berger v. Pubco Corp.*, 976 A.2d 132, 144 (Del. 2009).

If the General Assembly had intended for the continuous holder requirement to apply to the record holder or the beneficial owner of shares, it would have specifically stated that in the statute. *Merion Capital LP* 2015 WL 67586 at *7. The chancery court has attempted to redefine the definition of a stock ledger and record holder in other sections of the DGCL, but this Court quashed those interpretations. *Crown EMAK P'rs, LLC v. Kurz*, 992 A.2d 377, 398 (Del. 2010). Liberal statutory interpretations disparage the DGCL and any changes should be harmonized with coordinated amendments by the General Assembly. *Id.*

CONCLUSION

For the foregoing reasons, this Court should affirm the chancery court's ruling affirming Prelix's motion for summary judgment.