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.	:	

NOTICE OF APPEAL

To: David E. Friedlander, Esquire
Slate, Potter, Morris, & Richards, LLP
One Layton Square, Suite 1300
P. O. Box 1348
Wilmington, Delaware 19899

PLEASE TAKE NOTICE that Longpoint Investments Trust and Alexis Large Cap Equity Fund LP, petitioners below-appellants, do hereby appeal 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, in case number 10342-CM in that court, granting respondent below-appellee's motion for summary judgment. A copy of the decision sought to be reviewed is attached hereto.

The name and address of the attorney below for appellee is David E. Friedlander, Esquire, Slate, Potter, Morris, & Richards, LLP, One Layton Square, Suite 1300, P. O. Box 1348, Wilmington, Delaware 19899. The party against whom the appeal is taken is Prelix Therapeutics, Inc.

In accordance with Rules 7(c)(6) and 9(e)(ii), attorneys for appellants have determined that no further transcript of the proceedings below need be ordered because all such transcripts have been prepared and filed in the court below.

Dated: January 15, 2016

Myron T. Collins, Jr., Esquire, DE #314
Collins & Proctor, P.A.

Wilmington, Delaware 19801
Attorneys for Petitioners Below-Appellants

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LONGPOINT INVESTMENTS TRUST and ALEXIS LARGE CAP EQUITY FUND LP,	:	
Petitioners,	:	
v.	:	C.A. No. 10342-CM
PRELIX THERAPEUTICS, INC., a Delaware corporation,	:	
Respondent.	:	

MEMORANDUM OPINION

Date Submitted: November 24, 2015
Date Decided: January 13, 2016

Myron T. Collins, Jr., Esquire, Catherine G. Voss, Esquire, and Kurt M. Ross, Esquire, of Collins & Proctor, P.A., Wilmington, Delaware, Attorneys for Petitioners.

David E. Friedlander, Esquire, Jennifer C. Foster, Esquire, and Martin S. Grant, Esquire, of Slate, Potter, Morris, & Richards, LLP, Wilmington, Delaware, Attorneys for Respondent.

MOSLEY, Chancellor

Petitioners Longpoint Investments Trust ("Longpoint") and Alexis Large Cap Equity Fund LP ("Alexis") together owned approximately 5.4% of the approximately 49 million outstanding shares of common stock of respondent Prelix Therapeutics, Inc. ("Prelix") as of April 16, 2015, the date on which Prelix was acquired by Radius Health Systems Corp. ("Radius") through a merger with an acquisition subsidiary of Radius. Appraisal rights under Section 262 of the Delaware General Corporation Law ("Section 262") were available to stockholders of Prelix as a result of the merger, and, through Cede & Co., the holder of record of their shares, both Longpoint and Alexis filed formally valid and timely written demands for appraisal. For the two reasons discussed below, however, Prelix contends that neither Longpoint nor Alexis is entitled to an appraisal of their shares.

Briefly, Prelix argues that:

1. Both Longpoint and Alexis, which acquired their Prelix shares after the record date for the determination of stockholders to vote on the merger, have failed to establish that their shares were not voted in favor of the merger, as required by Section 262(a); and

2. The shares owned by Longpoint and Alexis, although initially held in the name of Cede & Co. as stockholder of record, were transferred of record before the date of the merger to nominees of J.P. Morgan Chase and Bank of New York Mellon, the custodial brokers for the shares in question, and thus the stockholder did not continuously hold the shares through the date of the merger as required by Section 262(a).

For the reasons set forth below, this Court's decisions in *Merion Capital LP v. BMC Software, Inc.*,[1] and *In re Appraisal of Ancestry.com*[2] preclude Prelix's first argument. I also

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[1] 2015 Del. Ch. LEXIS 3 (Del. Ch. Jan. 5, 2015).
[2] 2015 Del. Ch. LEXIS 2 (Del. Ch. Jan. 5, 2015).

conclude, however, that this Court's decision in *In re Appraisal of Dell Inc*.[3] compels acceptance of Prelix's second argument, and I therefore dismiss the petition in this matter.

Factual and Procedural Background

When Radius' proposed acquisition of Prelix was announced on October 15, 2014, the market's reception was anything but warm. The then proposed price, $14.50 per share, included only a relatively modest premium over the pre-announcement price ($12.75) at which the shares had been trading on the NASDAQ Global Select Market. Within days of the announcement, multiple lawsuits were filed, including several in this Court, asserting that the Radius acquisition was the result of a breach of the Prelix directors' fiduciary duties. The complaints in those actions questioned the integrity of the process by which Prelix was sold, focusing particularly on the fact that Prelix's investment banker, Center Court Advisors LP, had regularly served as adviser to Radius in its previous acquisitions and was supplying financing to Radius for its bid for Prelix.

None of the claims of breach of fiduciary duty by the Prelix directors, however, is directly relevant to the issues presently before the Court. Those claims have now been settled and the litigation dismissed, based largely on the fact that on December 18, 2014, Radius, Prelix, and the Radius acquisition subsidiary revised their merger agreement to increase the acquisition price to $15.00 per Prelix share. Nevertheless, the Radius merger still remained relatively unpopular with the Prelix stockholders. The meeting of Prelix stockholders to vote on the merger, originally noticed for January 14, 2015, was adjourned to February 17, 2015, due to what was widely reported as difficulties in achieving the required stockholder approval. And when the stockholder

[3] 2015 Del. Ch. LEXIS 184 (Del. Ch. July 13, 2015).

meeting was ultimately convened on February 17, the merger was approved with just over 53% of the outstanding shares voting in favor of the transaction.

Petitioners Longpoint and Alexis acquired their shares of Prelix after the December 4, 2014 record date for determining entitlement to vote on the merger, but before the December 18 announcement of the $0.50 per share increase in the merger price.[4] Despite that increase, however, petitioners delivered written demands for appraisal of their shares, in conformity with Section 262(d)(1), on January 13, 2015. Those demands were made on petitioners' behalf by Cede & Co., the depository nominee in whose name the shares were registered at the time.

What happened next followed the pattern of events described in *Dell*:[5] shortly after submitting the petitioners' demands for appraisal, Depository Trust Company (""DTC") moved the appropriate number of shares from its "FAST" account (Fast Automated Securities Account) by directing Prelix's transfer agent to issue uniquely numbered certificates representing those shares. That issuance of certificates, in the name of Cede & Co., occurred on January 23, 2015, and the new certificates were delivered to J.P. Morgan Chase and Bank of New York Mellon, the Depository Trust Company participants holding the Prelix shares on behalf of Longpoint and Alexis, respectively. For the reasons described in *Dell*, those firms instructed Cede & Co. to endorse the share certificates 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, respectively. That endorsement occurred on February 5, 2015, and Prelix's transfer agent that day issued new certificates, representing petitioners' shares, in the names of those new nominees. Thus, the

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[4] As a result, and given that shares registered in the name of Cede & Co. are held in fungible bulk, it is impossible to attribute to petitioners' shares any voting behavior – for, against, or abstaining – by persons holding shares as of the record date that preceded petitioners' acquisition of Prelix shares.

[5] The record in this matter does not reflect whether, following this Court's July 13, 2015 decision in *Dell*, those involved in the administration of the street name registration system have taken steps to avoid the transfers of record ownership that resulted in rejection of appraisal demands in that case and, now, in this one as well. In any event, the actions relevant to this case occurred before July 13, 2015.

maker of the demands for appraisal on which this case is premised – Cede & Co. – was no longer the holder of record of petitioners' shares by the time the merger occurred on April 16, 2015. It is undisputed, however, that petitioners were unaware of the changes in record ownership that occurred on February 5, 2015, and that they played no role in bringing about those changes.

Petitioners brought this action on May 6, 2015. As permitted by Section 262(e), they filed their petitions in their own names. Their petitions candidly disclosed, however, that their shares were registered in the names of Cudd & Co. and Mac & Co. on behalf of petitioners' custodial firms J.P. Morgan Chase and Bank of New York Mellon – and not in the name of Cede & Co., in whose name the shares were registered at the time petitioners submitted their written demands for appraisal. No other demands for appraisal were submitted with respect to the Prelix/Radius merger. Respondent Prelix has moved for summary judgment dismissing the petition in this matter, claiming that neither Longpoint nor Alexis is entitled to appraisal.

Legal Analysis

The legal issues in this case have previously been aired extensively and decided definitively, at least in this Court; and given the doctrine of *stare decisis*,[6] any departure from this Court's prior opinions on the relevant issues must come from the Delaware Supreme Court. Accordingly, the analysis of the legal issues presented here will be very brief.

In *BMC Software*, this Court rejected the assertion that a person who acquires shares after the record date "bears the burden of proving that each share it seeks to have appraised was not voted by any previous owner in favor of the merger."[7] As this Court concluded in that case, "the

[6] *State v. Barnes*, 116 A.3d 883, 884 n.2 (Del. 2015) (*quoting Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (*stare decisis* is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process").

[7] 2015 Del. Ch. LEXIS 3, *9.

unambiguous language of the statute does not give rise to any such share-tracing requirement."[8] Likewise in *Ancestry*, this Court ruled that "Section 262 imposes no requirement that a stockholder [who seeks appraisal for shares purchased after the record date] must demonstrate that previous owners also refrained from voting in favor" of the merger.[9] In the present case, it is conceded that petitioners did not vote their shares in favor of the merger (indeed, they could not have done so, not having acquired the shares until after the record date for determining entitlement to vote on the merger). Accordingly, petitioners' inability to prove that their shares (if the term "their" makes sense with respect to shares held in fungible bulk) were not voted by some previous owner or owners in favor of the merger does not preclude them from seeking appraisal.

The facts concerning record ownership of petitioners' shares, however, do preclude them from seeking appraisal. In *Dell*, this Court granted the respondent's motion for summary judgment based on the same circumstances presented here: namely, the fact that petitioners' shares, held of record by Cede & Co. when petitioners' demands for appraisal were submitted, were subsequently – but before the merger – re-titled in the names of the custodial banks' nominees. Although this Court expressed a preference for a different interpretation of the term "stockholder of record" – one that would include the custodial banks and brokers like J.P. Morgan Chase and Bank of New York Mellon – this Court also acknowledged that "only the Delaware Supreme Court can change how our case law interprets the Record Holder Requirement."[10] Thus, this Court necessarily accepts and applies the determination of law articulated in *Dell*, and concludes that petitioners are not entitled to appraisal of their shares because the stockholder of record of those shares "on the date of the making of a demand

[8] *Id.*, *21.
[9] 2015 Del. Ch. LEXIS 2, *3.
[10] 2015 Del. Ch. LEXIS 184, *78.

pursuant to subsection (d) of [Section 262] with respect to such shares, [did not] continuously hold[] such shares through the effective date of the merger," as required by Section 262(a).

Conclusion

For the foregoing reasons, petitioners are not entitled to appraisal with respect to their Prelix shares, and their petition for appraisal is hereby dismissed.

IT IS SO ORDERED.

_______s/ Renée Mosley __________________
Chancellor