IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE APPRAISAL OF ANCESTRY.COM, INC.	) Consolidated) C.A. No. 8173-VCG	PUBLIC VERSION E-FILED: MAY 16, 2014

OPENING BRIEF IN SUPPORT OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AS TO MERION CAPITAL L.P.

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PRELIMINARY STATEMENT

This is an appraisal case in which petitioner Merion Capital L.P. ("Merion") seeks to exercise dissenters' rights with respect to the December 2012 acquisition of Ancestry.com Inc. ("Ancestry") by Permira Advisors ("Permira").

It is long settled that a Delaware appraisal petitioner, like Merion in this case, must come forth with evidence demonstrating its compliance with the statutory requirements before it is entitled to a judicial appraisal of its shares. It is equally well settled that when appraisal rights are premised on a merger, as in this case, the statute permits appraisal of only those shares that were not voted in favor of the merger.

For the reasons set out below, Merion cannot satisfy its burden to show that the shares it seeks to have appraised were not voted in favor of the merger. Merion acquired all its shares of Ancestry stock after the record date on the merger vote. It acquired no proxy to control the vote of the shares it obtained. And while, in recognition of the statute's requirements, Merion pleaded in its Verified Petition that "[n]one of [its] Shares were voted in favor of the Merger," Merion's corporate representative testified that Merion actually has no idea how any of its shares were voted. Merion has thus acknowledged that it has no evidence that could permit it to meet its burden to show that it holds shares not voted in favor of the merger.

In the absence of this evidence, Merion may not proceed under the present appraisal statute. In 2007, the General Assembly amended § 262(e) to permit beneficial owners (like Merion) to petition for appraisal in their own name, and not through their record holder (which was usually Cede & Co.). Merion brought this appraisal action pursuant to the amended version of § 262(e). The statute as amended permits Merion to bring its own petition, but it does nothing to excuse Merion from the obligation that has always attached to every Delaware appraisal petitioner to show that the shares it seeks to have appraised were not voted in favor of the merger. This burden is grounded in the words, structure and purpose of the appraisal statute, and Merion indisputably cannot meet it.

Nothing in this Court's decision in *In re Transkaryotic Therapies, Inc.* is to the contrary. *Transkaryotic* was decided before the statute was amended. Chancellor Chandler confronted there a different statute and a different legal question. The defendants in *Transkaryotic* asked for summary judgment because some beneficial owners of Transkaryotic stock could not show that their shares were not voted in favor of the merger. But, as the Court emphasized, the petitioner in that case was Cede, the record holder of the appraised stock. Indeed, under the version of § 262 then in effect, *only* Cede as the record holder could petition the Court for appraisal. The *Transkaryotic* court permitted the appraisal to proceed, because, in its view, only Cede's actions were relevant under the statute as it then

existed, and because it was undisputed that Cede—the petitioner before the Court—sought appraisal of shares that were not voted in favor of the merger.

The logic of *Transkaryotic* supports summary judgment here. Just like Cede in *Transkaryotic*, the petitioner here—Merion—must demonstrate that the shares it seeks to have appraised were not voted in favor of the merger. This Merion cannot do, and its petition should accordingly be dismissed. The only interpretive alternative is to permit a petition on behalf of shares voted in favor of the merger. This interpretation is contrary to the plain language of § 262, which limits appraisal to "shares not voted in favor of the merger." It is contrary to the purpose and policy of the statute, which is designed to provide only a limited right to minority dissenters who are cashed out of their shares. And it leads to absurd results, including the possibility that a majority of shares—indeed, all shares—could be subject to judicial appraisal, notwithstanding that appraisal is a minority remedy for shares not voted in favor of the merger.

This is not a permissible statutory construction. Like every statute, § 262 as amended must be interpreted to give effect to all of its provisions and its remedial purpose. As set out below, that principle requires the conclusion that only shares not voted in favor of a merger are eligible for appraisal and that beneficial and record holders alike must show that the shares they seek to have appraised were not voted in favor of the merger. Summary judgment should be granted.

BACKGROUND

A. The Merger

Ancestry is a Delaware corporation headquartered in Provo, Utah. It is the world's largest online family history resource.[1] The company maintains an extensive online collection of digitized historical records, and it operates several subscription-based websites, including "ancestry.com," which help people discover, preserve and share their family history.[2]

On October 22, 2012, Ancestry announced that it had agreed to be acquired by Permira, a private equity firm, for $32 per share in cash, or approximately $1.6 billion. The merger consideration represented a 41% premium to Ancestry's unaffected share price.[3]

The Permira transaction was the result of a widely publicized, nine-month sales process in which Ancestry and its financial advisors contacted seventeen potential merger partners, including six strategic buyers and eleven financial sponsors. The final $32 sale price was the highest price that the winning bidder was willing to pay—$2 per share higher than any other bidder.

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1 Ex. 1 (Ancestry.com Inc. Schedule 14A Definitive Proxy Statement (Nov. 30, 2012) ("Proxy Statement")) at 1. Citations of "Ex. __" refer to the Exhibits attached to the Transmittal Affidavit of James G. Stanco, Esq., filed contemporaneously herewith.

2 Ex. 2 (Ancestry.com Inc. Annual Report on Form 10-K (Feb. 17, 2012) at 4.

3 Ex. 3 at 1.

On November 30, 2012, Ancestry filed its definitive proxy statement notifying stockholders that the vote on the merger would take place on December 27, 2012 and that the record date for that meeting would be November 30, 2012.[4] At the December 27, 2012 special meeting, Ancestry's stockholders overwhelmingly approved the proposed merger. Of the 43,365,172 shares of common stock outstanding,[5] 32,408,727 shares, or approximately 75%, were voted in favor of the merger.[6] Most of the 10,956,445 shares not voted in favor of the merger were not voted at all. Only 326,054 shares were voted against the merger (or approximately 0.7% of the outstanding shares), and 71,289 shares abstained.[7] The day after the vote, the merger was completed.[8]

Upon the announcement of the merger, several stockholders filed class action lawsuits in this Court, alleging breaches of fiduciary duty by Ancestry's directors and others relating to the sales process and merger. Then-Chancellor Strine dismissed the stockholders' claims in their entirety.[9] The Court ruled that, even assuming as true the well-pleaded allegations in the complaint, the process

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4 Proxy Statement at 2, 64.

5 *Id.*

6 Ex. 4 (Ancestry.com Inc. Form 8-K (Dec. 27, 2012)).

7 *Id.*

8 Ex. 5 (Ancestry.com Inc. Form 8-K (Dec. 28, 2012)).

9 Ex. 6 (*In re Ancestry.com Inc. Shareholder Litigation*, Consol. C.A. No. 7988-CS, at 97 (Sept. 27, 2013) (TRANSCRIPT)).

conducted by Ancestry and its advisors was "a logical sales process," free from any conflicts of interest, with "an open door to a range of people," including the "parties that everyone believed were the most likely candidates to be interested in acquiring Ancestry."[10]

B. Merion's Investment Strategy

Merion Capital L.P. is a hedge fund with its principal place of business in Radnor, PA.[11] In its Verified Petition for Appraisal, Merion states that it is the beneficial owner of 1,255,000 shares of Ancestry stock, and that Cede & Co. ("Cede"), nominee of the Depository Trust Company ("DTC"), is the holder of record of all such shares.[12]

Merion practices an investment strategy known as "appraisal arbitrage."[13] This strategy involves "buy[ing] stock in takeover targets after a deal is announced

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10 *Id.* at 79-82, 90.

11 Ex. 7.

12 Ex. 8 (Verified Petition for Appraisal filed by Merion Capital L.P. (Jan. 3, 2013) ("Merion Petition")) at ¶¶ 2, 6. Cede was the record holder of 29,417,801 shares as of the November 30, 2012 record date. Ex. 9 at p. 1. Of that total, approximately two-thirds were voted in favor of the merger, a fraction of 1 percent were voted against the merger, and the balance were not voted, on behalf of the beneficial owners. *See* Ex. 23 at p. 2 (setting forth vote totals on "Proposal #001" on behalf of such "[b]eneficial" owners).

13 *See* Ex. 10 (Deposition of Samuel I. Johnson (Feb. 21, 2014) ("Johnson Dep.")) at 76:21-78:20, 80:15-81:24, 171:9-12; Ex. 11 (Bloomberg, *Dell Value Dispute Spotlights Rise in Appraisal Arbitrage*, Oct. 3, 2013) at 1.

and then seek[ing] a higher valuation from the chancery court."[14] Merion is considered a "leader in the area," and appraisal proceedings are the backbone of its business model.[15]

In 2013, Merion made three investments, acquiring shares in BMC Software, Dole Foods, and Lender Processing Services. It sought appraisal in connection with each investment. Likewise, in 2012, Merion made investments in Healthspring, Deltek, and Ancestry, and it sought appraisal in connection with each investment. Merion has also sought appraisal in connection with investments in Airvana (2010), 3M Cogent (2011), and Emergency Medical Services (2011).[16] At his deposition, Merion's corporate representative could not recall an investment made by Merion for which the fund did not file an appraisal petition.[17]

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[14] Ex. 11 at 1-2; *see also* Ex. 12 (The Wall Street Journal, *Dole Food Deal Passes By Slim Margin As Hedge Funds Seek Appraisal*, Oct. 31, 2013) at 2.

[15] Ex. 13 (The Deal Pipeline, *Safe Harbor: Delaware's Growth Industry*, Nov. 8, 2013) at 2.

[16] Johnson Dep. 17:10-18:2, 25:25-28:20; *see* Ex. 14 (Docket Sheet, *Merion Capital L.P.* v. *Deltek Inc.*, C.A. No. 7974-VCN).

[17] Johnson Dep. 5:18-21, 28:21-24.

C. Merion's Purchases of Ancestry Stock

As of the October 22 merger announcement, Merion did not own any shares of Ancestry stock. Soon after the announcement, Merion began considering an investment in Ancestry, viewing it from the start as an appraisal candidate.[18]

On October 30, 2012, Merion's portfolio manager, Samuel Johnson, received a Bloomberg alert that Ancestry had filed its preliminary proxy,[19] which described, among other things, the background to the merger and the basis for the fairness opinion rendered by Ancestry's financial advisor. And as early as November 9, Merion had put together a detailed valuation of Ancestry based on these and other public filings.[20]

On November 30, 2012, Johnson received a Bloomberg alert that Ancestry had filed its definitive proxy,[21] which notified Merion of the December 27, 2012 meeting date and November 30, 2012 record date for that meeting.[22]

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18 Johnson Dep. 60:11-62:14.

19 Ex. 15 at MER0003446. The Bloomberg alert's "note" field included one word: "appraisal!" *Id.* Johnson testified that he put the word appraisal "into this alert specifically" because there was "a possibility of exiting this investment . . . through the appraisal statute in Delaware." Johnson Dep. 62:7-19.

20 Johnson Dep. 132:2-134:22.

21 Ex. 16 at MER0003198.

22 *See* Proxy Statement at 2, 64 ("The holders of record of Common Stock as of the close of business on November 30, 2012, the record date for determination of stockholders entitled to notice of and to vote at the special meeting, are entitled

As of the record date, however, Merion still did not own any shares of Ancestry stock. Merion first bought Ancestry shares on December 4, four days after the record date, and made most of its purchases between December 12 and December 17. Merion made these post-record-date purchases intending to seek appraisal of those shares.[23] The following chart lists all of Merion's transactions in Ancestry stock:[24]

Trade Date	Settle Date	Price	Quantity
12/17/2012	12/20/2012	31.8922	105,100
12/14/2012	12/19/2012	31.8839	50,000
12/14/2012	12/19/2012	31.8575	300,000
12/13/2012	12/18/2012	31.8644	350,000
12/13/2012	12/18/2012	31.8600	25,000
12/13/2012	12/18/2012	31.8711	25,000
12/13/2012	12/18/2012	31.8660	100,000
12/12/2012	12/17/2012	31.8500	25,000
12/12/2012	12/17/2012	31.8586	25,000
12/11/2012	12/14/2012	31.8553	109,900
12/10/2012	12/13/2012	31.8258	30,000
12/07/2012	12/12/2012	31.8354	60,000
12/05/2012	12/10/2012	31.7944	40,000

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to receive notice of and to vote at the special meeting."); Johnson Dep. 37:13-39:1, 52:13-15.

[23] Johnson Dep. 54:18-56:8, 66:14-67:7, 70:10-71:5, 171:9-12. Indeed, Merion purchased 1,005,100 of its 1,255,000 shares in Ancestry *after* it communicated to its broker that it "will be exercising appraisal rights for the upcoming merger involving Ancestry.com." Ex. 17 at MER0003055; Johnson Dep. 65:5-66:21. The same e-mail communication attached a draft appraisal demand letter to be signed by a partner at Cede, the record owner. The only part of the draft appraisal demand letter in "brackets" to be filled in was the "# of shares." Ex. 17 at MER0003056.

[24] Ex. 18 at MER0000032; Johnson Dep. 31:7-21.

12/04/2012	12/07/2012	31.7560	10,000
Total:			1,255,000

All of these purchases were made on the open market. Merion does not know who the counterparties to its transactions were.[25]

Merion thus acquired all 1,255,000 of its shares after the November 30, 2012 record date.[26] Merion did not acquire from prior owners any proxies to vote its shares in connection with the merger. Nor did Merion secure revocation of earlier proxies that may have been granted by parties who owned shares as of the record date.[27] Merion therefore did not vote any of its shares at the special meeting or instruct anyone to vote or not vote those shares on its behalf.[28] Having purchased its shares after the record date and without a proxy, Merion understood that it would have no control over whether its shares were voted in favor of the merger.[29] Merion does not know from whom it bought its shares and does not know whether

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25 Ex. 19 (Petitioner's Supplemental Responses and Objections to Respondent's First Set of Interrogatories (Response No. 1)); Johnson Dep. 43:14-25.

26 Ex. 18 at MER0000032; Johnson Dep. 38:14-18.

27 Johnson Dep. 39:2-8, 73:11-20. *See also* John C. Wilcox et al., *"Street Name" Registration & the Proxy Solicitation Process* § 11-05[A] (Ex. 20) ("The post-record date purchaser, however, is *not* the legal owner as of the record date and is not permitted to vote this stock directly even if no vote or proxy is ultimately presented by the record owner. To overcome this problem, purchasers who wish to vote the shares require, as a condition of the purchase, that sellers execute irrevocable proxies in favor of the purchaser.").

28 Johnson Dep. 35:25-37:7.

29 *Id.* at 38:19-39:8.

the sellers were the record-date holders of the shares, much less how the record-date holders voted or instructed their nominees to vote on their behalf.[30]

Merion nevertheless represented in its Verified Petition that "None of the Petitioner's Shares were voted in favor of the Merger."[31] Merion has failed to produce any evidence to support that statement,[32] and concedes that it has no such evidence.[33] Merion's corporate representative testified that Merion does not know whether the shares it beneficially owned were voted in favor of the merger.[34] Asked why Merion verified a petition in this Court swearing without knowledge that none of its shares were voted in favor of the merger, Merion's corporate representative testified that the allegation is "boilerplate" that is "filed by every appraisal petitioner in Delaware."[35] Merion had no factual basis for its sworn statement that none of its shares were voted in favor of the merger. What is clear is that Merion has no idea how the 1,255,000 shares it purchased were voted.

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30 *Id.* at 41:8-20.

31 Merion Petition at ¶ 7.

32 Ex. 21 (requesting confirmation that "Merion did not have any documents, communications, or other information in its possession that supports the statement in the Petition that 'None of the Petitioner's Shares were voted in favor of the Merger.'").

33 Ex. 22.

34 Johnson Dep. 41:8-20.

35 Johnson Dep. 42:20-43:8.

D. Nature and Stage of Proceedings

On January 3, 2013, beneficial owners of Ancestry stock filed two verified petitions for appraisal pursuant to § 262(e) of the General Corporation Law. Merion sought appraisal of 1,255,000 shares. *Merion Capital, L.P.* v. *Ancestry.com, Inc.*, C.A. No. 8173-VCG. Merlin Partners LP ("Merlin") and The Ancora Merger Arbitrage Fund, LP ("Ancora"), two hedge funds affiliated with each other, each sought appraisal of 80,000 shares, 160,000 shares in total. *Merlin Partners LP* v. *Ancestry.com, Inc.*, C.A. No. 8175-VCG.

On January 29, 2013, Ancestry timely answered the petitions and filed, as required under § 262(f), a verified list of stockholders who submitted demands for appraisal. By order dated June 24, 2013, the Court consolidated these actions into a single proceeding, *In re Appraisal of Ancestry.com, Inc.*, C.A. No. 8173-VCG. The parties have completed fact discovery, and trial is set for June 17, 2014. Ancestry now moves for summary judgment solely as to Merion's petition. As set forth below, Merion is not entitled to appraisal because Merion cannot meet its burden to show that the shares it seeks to have appraised were not voted in favor of the merger.

ARGUMENT

Under Court of Chancery Rule 56, summary judgment should be granted where the moving party demonstrates that "there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law." *O'Neil* v. *Town of Middletown*, 2006 WL 205071, at *6 (Del. Ch. Jan. 18, 2006). "If the movant puts in the record facts which, if undenied, entitle him to summary judgment, the burden shifts to the defending party to dispute the facts by affidavit or proof of similar weight." *Am. Legacy Found.* v. *Lorillard Tobacco Co.*, 886 A.2d 1, 18 (Del. Ch. 2005) (citations and internal quotation marks omitted).

I. MERION CANNOT MEET ITS BURDEN OF SHOWING COMPLIANCE WITH THE APPRAISAL STATUTE.

Summary judgment against Merion is warranted here because, given the undisputed facts in the record, Merion cannot carry its burden to show compliance with the appraisal statute. Delaware law is clear that a stockholder may seek to appraise only shares that were not voted in favor of the subject merger. *See* Point I.A, *infra*. This rule applies equally to record holders and beneficial owners, like Merion, who petition the Court pursuant to § 262(e) as amended in 2007. *See* Point I.B, *infra*. Merion cannot meet this burden, as the record evidence makes clear, *see* Point I.C, *infra*, and this Court's ruling in *In re Transkaryotic* does not compel or even support a different result, *see* Point I.D, *infra*. Accordingly, the motion should be granted.

A. Because only shares not voted in favor of the merger may be appraised, only holders of such shares may seek appraisal.

In Delaware, the right to an appraisal is "entirely a creature of statute." *Kaye* v. *Pantone, Inc.*, 395 A.2d 369, 374 (Del. Ch. 1978). Appraisal is not available to a petitioner in the absence of proof that the petitioner has complied with the statutory requirements necessary to establish entitlement to the remedy. *Carl M. Loeb, Rhoades & Co.* v. *Hilton Hotels Corp.*, 222 A.2d 789, 793 (Del. 1966); *Kaye*, 395 A.2d at 375.

Those requirements reflect the remedy's origin and purpose. At common law, mergers required the unanimous consent of the corporation's stockholders; even a single stockholder could prevent a merger. *See Chicago Corp.* v. *Munds*, 172 A. 452, 455 (Del. Ch. 1934). "When the law was changed to permit a specified majority to override [an] objection, the right of appraisal was given to the dissenter in compensation for the loss of the common-law right." *Reynolds Metals Co.* v. *Colonial Realty Corp.*, 190 A.2d 752, 755 (Del. 1963). Accordingly, the appraisal remedy has, from its inception, been accorded to only the minority of stockholders who dissent from the majority's determination to enter into a merger transaction. *See, e.g.*, *Francis I. duPont & Co.* v. *Universal City Studios, Inc.*, 343 A.2d 629, 634 (Del. Ch. 1975) (comparing "[t]he power of a stockholder majority to override minority dissenters and remit them to the cash appraisal remedy" to

"the right of eminent domain"); *see also Dirienzo* v. *Steel Partners Holdings L.P.*, 2009 WL 4652944, at *8 (Del. Ch. Dec. 8, 2009) ("Appraisal is a statutory remedy designed to protect minority stockholders . . . .").

In keeping with appraisal's origin and purpose as a minority remedy, only shares not voted in favor of the merger are eligible for appraisal. As set out below, that conclusion is compelled by the plain language of § 262, which must be read "as a whole, rather than in parts" to produce a "harmonious" interpretation. *In re Krafft-Murphy Co.*, 82 A.3d 696, 702 (Del. 2013). Section 262(a) limits the class of stockholders eligible to seek appraisal to those who "neither voted in favor of the merger or consolidation nor consented thereto in writing." 8 Del. C. § 262(a). Section 262(e) provides that only "shares not voted in favor of the merger or consolidation" are eligible for appraisal. *Id.* § 262(e). Reading the provisions together requires the conclusion that only stockholders who did not vote in favor of the merger may pursue appraisal and only in respect of their shares that were not voted in favor of the merger.

No other interpretation gives effect to all of the statute's provisions. Section 262(e) expressly recognizes that only shares not voted in favor of the merger can qualify for appraisal. That subsection entitles stockholders who have perfected their appraisal rights to receive from the surviving corporation "a statement setting forth the aggregate number of shares not voted in favor of the merger or

consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares." 8 Del. C. § 262(e). This provision was added to permit dissenting stockholders "to learn how many shares might qualify for appraisal." *See* 63 Del. Laws ch. 25, § 14, House Bill No. 16, Legislative Synopsis, Commentary on § 262 (Jan. 15, 1981). Thus, under § 262(e), shares of stock "qualify for appraisal" only if, among other things, they are "shares not voted in favor of the merger or consolidation." 8 Del. C. § 262(e). Accordingly, an appraisal petitioner carries the burden of showing not just that it "did not vote in favor of the merger," § 262(a), but also that it seeks appraisal only of "shares not voted in favor of the merger," § 262(e).

Any alternative interpretation that relieves an appraisal petitioner of the burden of showing that the shares it seeks to have appraised were "not voted in favor of the merger" leads to absurd results inconsistent with the statute's text. As § 262(e) makes clear, the number of shares that qualify for appraisal cannot exceed the number of shares not voted in favor of the merger. But if any stockholder who did not vote in favor of the merger is permitted to seek appraisal for the shares it happens to hold at closing without regard to how those shares were voted, then the number of shares that can qualify for appraisal will be greater than the number of shares not voted in favor of the merger. In that case, the statement of shares provided for under § 262(e) will fail to serve its only purpose: showing "how

many shares might qualify for appraisal." Moreover, appraisal would no longer be limited to a minority of shares—a result that contravenes the statute's purpose of providing a minority remedy. Take, for example, a stockholder who purchases shares after the record date without securing proxies or revocation of proxies. As a literal matter, such a stockholder "did not vote in favor of the merger." 8 Del. C. § 262(a). But the stockholder's shares could have been voted in favor of the merger by the record-date holder and likely were. If such a stockholder is eligible to pursue appraisal, without any obligation to show that her shares were not voted in favor of the merger, then the number of shares eligible for appraisal would exceed the number of shares not voted in favor of the merger.[36]

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[36] By way of illustration, consider a hypothetical Delaware company that agrees to be acquired. The company has 1000 shares of stock, all of which are held of record by Cede on behalf of beneficial owners. On the instruction of the beneficial owners as of the record date, 800 shares are voted in favor of the merger; 200 are not. The owners of the 200 shares not voted in favor cause Cede to send a letter of dissent to the Company to perfect their appraisal rights. After the record date but before the vote, an appraisal arbitrageur (like Merion in this case) acquires 400 of the shares held of record by Cede with no proxy to vote the shares. The appraisal arbitrageur (again like Merion in this case) then causes Cede to send a letter to the Company dissenting to the merger with respect to those 400 shares. If, under § 262, the appraisal arbitrageur has no obligation to show that the shares it seeks to have appraised were not voted in favor of the merger and may instead bring an appraisal petition in its own name without regard to how its shares were voted (as Merion proposes to do here), then a total of 600 shares—the 400 shares held by the appraisal arbitrageur and the 200 shares held by the beneficial owner whose shares were voted "no"—representing 60% of the voting stock—will be eligible for appraisal, even though the merger was approved by an 80% vote of the stockholders. This result is impermissible because (1) having a majority of shares available for appraisal is inconsistent with the purpose of appraisal to

Indeed, if stockholders who did not vote on the merger at all are permitted to seek appraisal without showing that their shares were not voted in favor of the merger, then *all* outstanding shares are potentially eligible for appraisal, even when a merger is overwhelmingly approved by the voting stockholders. Because there is no bar against selling shares after the record date without a proxy, there is no reason why 100% of shares could not be transferred in such sales to new owners, none of whom would have (or could have) voted on the merger. But a rule that makes the appraisal remedy available to all shares makes no sense given the purpose of the statute, and the words of the statute do not permit it. To the contrary, only "shares not voted in favor of the merger" are eligible for appraisal. 8 Del. C. § 262(e). Thus, a stockholder cannot be entitled to appraisal under § 262 unless it can demonstrate that the shares it seeks to have appraised were not voted in favor of the merger.

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provide a minority remedy for dissenters; and (2) it is inconsistent with the words of § 262(e), which make clear that only shares "not voted in favor of the merger or consolidation" can qualify for appraisal. The statute itself provides the interpretive check against this impermissible result. Reading its provisions together requires that appraisal be limited to shares "not voted in favor of the merger," as § 262(e) expressly recognizes.

B. Beneficial owners who petition the Court for appraisal, just like record holders who do so, must show that the shares for which they seek appraisal were not voted in favor of the merger.

Section 262(e) permits a record holder to file a petition commencing an appraisal proceeding only if the record holder has satisfied all the statutory prerequisites, including the requirement that the petitioner hold shares not voted in favor of the merger. It is the petitioner's burden to prove compliance with that requirement. *See, e.g.*, *Dirienzo*, 2009 WL 4652944, at *7 ("Delaware law places the burden of persuasion on the petitioner stockholder to demonstrate compliance with § 262, not on the respondent company."); *Tabbi* v. *Pollution Control Indus., Inc.*, 508 A.2d 867, 869 (Del. Ch. 1986) ("[T]he party seeking appraisal bears the burden of proving compliance with the requirements of § 262.").

Until § 262 was amended in 2007, *only* record stockholders were eligible to perfect appraisal rights and petition the Court for a judicial appraisal—even when they were acting as agents for beneficial owners. *See* 8 Del. C. §§ 262(a), (e) (2006); *Bandell* v. *TC/GP, Inc.*, 676 A.2d 900 (Del. 1996) (TABLE); *In re Appraisal of Transkaryotic Therapies, Inc.*, 2007 WL 1378345, at *5 (Del. Ch. May 2, 2007) ("Only the record holder possesses and may perfect appraisal rights."). The statute did not refer to beneficial owners at all.

In 2007, the General Assembly amended § 262 to refer to beneficial owners for the first time. *See* 76 Del. Laws ch. 145, § 13 (2007). Before the amendment,

§ 262(e) permitted "stockholder[s]"—defined as record holders—to file an appraisal petition or receive a statement of shares eligible for appraisal only if they had complied with §§ 262(a) and (d)—that is, if they were holders of stock with respect to which appraisal rights had been perfected. Until the 2007 amendment, however, beneficial owners were not permitted to file a petition for appraisal or to receive a statement of appraisal-eligible shares. The 2007 amendment, which added a sentence to the end of § 262(e), extended these rights to beneficial owners. It read as follows:

> Notwithstanding subsection (a) of this section, a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person may, in such person's own name, file a petition or request from the corporation the statement described in this subsection.

The subsections of § 262 pertaining to the perfection of appraisal rights were not amended to refer to beneficial owners.

The effect of the amendment was to put beneficial owners on the same footing as record holders with respect to the ability to file in one's own name an appraisal petition and to request a statement of shares eligible for appraisal. While the amendment permits beneficial owners to appear before the Court in their own name and as litigants in their own right, the amendment does not relax any requirement for perfecting appraisal rights. *See Dirienzo*, 2009 WL 4652944, at *4 (granting summary judgment against § 262(e) petitioner for failure to satisfy

statutory requirement that the written appraisal demand be sent by or on behalf of the record owner of the shares).

As amended, § 262(e) permits beneficial owners to file a petition commencing an appraisal proceeding only if they beneficially own "shares of such stock"—that is, shares of stock eligible for appraisal and with respect to which appraisal rights have been perfected. And because (as § 262(e) makes clear) only shares "not voted in favor of the merger" are eligible for appraisal, beneficial owners—just like record owners—carry the burden of showing that the shares they hold and seek to have appraised were "not voted in favor of the merger." By its terms, the amendment does nothing to excuse a petitioner, whether a beneficial owner or a record holder, from carrying that burden. Any interpretation of the statute as amended that would relieve petitioners from carrying that burden if they are only beneficial owners would implausibly discriminate against beneficial owners who also hold of record, a result with no justification in the statute or its policy.

Indeed, the record shows that Merion understood that it bears the burden to show that none of the shares it seeks to have appraised were voted in favor of the merger—it expressly so pleaded in its Verified Petition. Merion Petition ¶ 7. In his deposition, Merion's corporate representative testified that "every appraisal petitioner in Delaware" makes the "boilerplate" allegation that "[n]one of [its]

Shares were voted in favor of the Merger." Johnson Dep. 42:20-43:8. There is a good reason Delaware appraisal petitioners aver to that "boilerplate": under the statute, no Delaware appraisal can proceed unless the petitioner can show that it is true. As set out below, Merion cannot.

C. Merion cannot carry its burden of showing that it seeks appraisal of shares that were not voted in favor of the merger.

Like any other petitioner, Merion bears the burden of showing that the shares for which it seeks an appraisal were not voted in favor of the merger. Because Merion cannot make that showing, summary judgment against Merion is warranted.

It is undisputed that Merion acquired beneficial ownership of the shares for which it seeks appraisal in December 2012, after the record date for the merger vote. It is also undisputed that Merion neither acquired proxies for those shares nor secured revocation of any proxies submitted on behalf of those shares. And because the shares in which Merion acquired a beneficial interest were held as of record by Cede, Merion does not have a claim to a particular set of shares. Rather, Merion has a claim to a particular number of shares, which are only a fraction of the total number of fungible shares held in the account of its broker (a "participant" in DTC), and are an even smaller fraction of the total number of fungible shares

held of record by Cede.[37] And Cede, in accordance with the instructions of the beneficial holders of those shares as of the record date, voted most of the shares it held in favor of the merger. *See supra* note 12. By proceeding as it did, Merion acquired an undifferentiated beneficial interest in a large group of shares that were voted mostly in favor of the merger.

Merion could have avoided this result. Merion could have ensured that it owned a beneficial interest in only those shares held by Cede that were not voted in favor of the merger by (for example) acquiring its shares before the record date and instructing that they not be voted in favor of the merger, or by acquiring proxies, or securing revocation of proxies, for shares it purchased after the record date. By choosing not to take any of these steps, Merion failed to secure beneficial ownership of any shares that it can demonstrate were not voted in favor of the merger. That failure means that Merion is not entitled to petition for appraisal of its shares.

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[37] In particular, Merion acquired a claim to 1,255,000 shares held through the account of its broker, Goldman Sachs Execution and Clearing L.P., a participant in DTC. Ex. 24 at MER0000547; *see also* Wilcox § 11.02[B] (Ex. 20) (describing mechanics of beneficial ownership by participant banks and brokers through DTC). Merion thus acquired an interest of approximately 4% in the more than 29 million shares that Cede held as of the record date. *See* Ex. 9.

D. *Transkaryotic* does not relieve Merion of its burden of showing that it seeks appraisal of shares that were not voted in favor of the merger.

This is not the first case in which this Court has confronted a beneficial owner who is seeking the appraisal of shares that it acquired after the record date without a proxy, and who is therefore unable to show that its shares were not voted in favor of the merger. The Court faced a set of such beneficial owners in *In re Appraisal of Transkaryotic Therapies, Inc.*, 2007 WL 1378345 (Del. Ch. May 2, 2007), an action in which Cede was before the Court as the petitioner (as the statute then required). *Transkaryotic* was decided before the amendment to § 262(e) pursuant to which Merion brings its petition. Nothing in *Transkaryotic* relieves Merion, the petitioner before the Court, of its burden to show that it seeks appraisal of shares that were not voted in favor of the merger.

In *Transkaryotic*, Cede filed an appraisal petition on behalf of several beneficial owners who had bought shares after the record date, apparently without proxies. The surviving corporation moved for summary judgment dismissing the appraisal claims with respect to those shares, arguing that the beneficial owners seeking appraisal could not establish that the beneficial holders as of the record date had not caused their shares to be voted in favor of the merger.

The Court denied the motion. The statute then in force, the Court emphasized, referred to and recognized *only* record holders. In the Court's view,

therefore, the only relevant question was whether Cede, as the record holder and petitioner before the Court, had established a right to appraisal. And it was undisputed that Cede held at least as many shares that had not been voted in favor of the merger as it sought to have appraised. *Id.* at *2 n.1, *5. As Chancellor Chandler explained, "Section 262, *as currently drafted*, dictates the conclusion reached here. Only the record holder possesses and may perfect appraisal rights. The statute simply does not allow consideration of the beneficial owner in this context." *Id.* at *5 (emphasis added); *see also id.* at *4 (describing "Cede" as the party "petitioning this Court for appraisal").

Since *Transkaryotic* was decided, § 262 was amended to not only permit consideration of beneficial owners, but to require it. A beneficial owner may now bring an appraisal action in its own name, without relying on Cede (or some other nominee) to vindicate its rights indirectly. But when a beneficial owner invokes its right to appear before the Court as a petitioner, and to directly seek appraisal of its own shares, the beneficial owner assumes the statutory obligation to show that the shares it seeks to have appraised were not voted in favor of the merger—the same obligation Chancellor Chandler imposed on Cede as the petitioner in *Transkaryotic*. Nothing in the 2007 amendment relieves Merion of that burden here. No Delaware case has excused an appraisal petitioner from showing that the shares it seeks to have appraised were not voted in favor of the merger.

And no case could, consistent with the words, structure, and policy of § 262. To excuse Merion from demonstrating the truth of its own allegation—that "none of [its] Shares were voted in favor of the merger"—would make a muddle of the statute. It would mean that parties could pursue dissenters' rights with respect to shares that were not actually dissenting. It would mean that petitioners who hold of record as well as beneficially bear a litigating burden that petitioners who hold only beneficially do not, creating a discrimination between record and beneficial stockholders without any basis in the statute's text or purpose. And it would mean that a majority of a merging company's shares—indeed, *all* of them—could be subject to appraisal. These results are inconsistent with the words and purpose of the statute.

Moreover, the words and structure of the amended statute make equally clear that a beneficial owner, like Merion, cannot escape its burden to show that the shares it seeks to have appraised were not voted in favor of the merger by causing the record holder, Cede here, to petition for appraisal as its agent. If Cede were to petition for appraisal of shares on Merion's behalf, then Cede would have to show that the shares it holds on Merion's behalf were not voted in favor of the merger.[38] Any other interpretation would mean that Cede (acting on behalf of

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[38] This requirement is not only imposed by the text of the amended § 262, but is also consistent with long-standing controlling precedent. As the Supreme Court has explained, a record holder like Cede who acts as an agent for multiple

purchasers like Merion) and the beneficial owners of shares held of record by Cede who caused their shares not to be voted in favor of the merger (acting on their own account) would be entitled to appraisal of the same pool of shares—the shares Cede holds that were not voted in favor of the merger. But if both are entitled to appraisal of the same pool of shares, the number of shares eligible for appraisal would necessarily exceed the number of shares not voted in favor of the merger. For the reasons explained above, that result cannot be squared with the text and purpose of § 262. Foundational principles of statutory construction thus compel an eminently sensible result: under § 262 as it has been amended, a beneficial owner is not entitled to appraisal of its shares unless the beneficial owner (if it is petitioning in its own name), or the record holder (if the beneficial owner is petitioning through its agent), can show that its shares were not voted in favor of

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beneficial owners is not properly conceived of as a single record holder, but rather as multiple record holders, each an agent for a different beneficial owner. *Reynolds Metal Co.* v. *Colonial Realty Corp.*, 190 A.2d 752, 754, 755 (Del. 1963) (holding that nominee was entitled to pursue appraisal on behalf of beneficial owner Colonial, despite voting for the merger in its capacity as an agent for other stockholders, because "there [are] really two entities in cases such as [this]: [1] Bache & Co., agent for Colonial, and [2] Bache & Co. agent for other customers," and the nominee had complied with the statute "on behalf of Colonial"). Thus, to be entitled to petition for appraisal as agent for a beneficial holder under § 262(e), Cede would be required to prove not merely that it complied with § 262(a) and (d), but that it did so on Merion's behalf. To the extent *Transkaryotic* has any continuing relevance that suggests otherwise, it is incompatible with the text of the statute as amended as well as *Reynolds*.

the merger. Merion cannot make that showing and its petition should accordingly be dismissed.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of Ancestry and dismiss Merion's petition with prejudice.

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CERTIFICATE OF SERVICE

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