

Delaware Court of Chancery Rejects Share-Tracing Standing Requirement for Appraisal Petitioners

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The [Delaware Court of Chancery](#) issued companion opinions clarifying Delaware's standing requirements for appraisal petitions under [8 Del. C. § 262](#). In [In re Appraisal of Ancestry.com, Inc.](#), C.A. No. 8173-VGC, 2015 WL 66825 (Del. Ch. Jan. 5, 2015), and [Merion Capital LP v. BMC Software, Inc.](#), C.A. No. 8900-VCG, 2015 WL 67586 (Del. Ch. Jan. 5, 2015), the court denied respondents' motions for summary judgment and refused to read a "share-tracing" requirement into the appraisal statute's standing procedures. These cases clarify that, to perfect appraisal rights, beneficial holders of shares must show that the bulk record holder refrained from voting in favor of the merger at issue more shares than the petitioner seeks to have appraised.

Prior to 2007, Delaware's appraisal statute provided that only the record holder of shares could claim and perfect the right to a court determination of the fair value of its shareholdings in response to a corporate transaction the shareholder opposed. Most publicly listed securities issued by domestic corporations are held by central securities depositories (like a brokerage or bank). These depositories are often the named record holders of the shares, and hold them in an undifferentiated "fungible bulk" for the beneficial holders, which benefit from the privileges of owning the stock. To perfect its appraisal rights, the petitioner must show that the record holder did not vote the shares in question in favor of the merger. But, because these shares are held in fungible bulk, it impossible to link any one vote to any specific share held by the record holder.

In [In re Appraisal of Transkaryotic Therapies, Inc.](#), 2007 WL 1378345 (Del. Ch. May 2, 2007), the Chancery Court held that a beneficial stockholder, who purchases shares after the record date, but before the merger vote, does not need to prove that the previous stockholder had not voted for the merger. Rather, the *Transkaryotic* court reasoned that since only a record holder may claim and perfect appraisal rights, only the record holder's actions determine standing to enforce them. Thus, as long as the record holder held enough shares not voted in favor of the merger to "cover" the beneficial owner's shares, the record holder could assert appraisal rights on the beneficial owner's shares. Shortly after *Transkaryotic*, the Delaware legislature amended the appraisal statute, allowing beneficial owners to file appraisal petitions in their own name. This amendment raised questions about the continuing impact of *Transkaryotic*.

In *Ancestry.com*, Ancestry.com was acquired by a private equity firm in a cash-out merger. The petitioner, Merion Capital LP (“Merion”), was a hedge fund that bought stock in target companies following merger announcements for the purpose of seeking an appraisal — a practice called appraisal arbitrage. Merion purchased shares in Ancestry.com after the record date for the transaction, whose shares were held in fungible bulk by the record owner, Cede & Co. (“Cede”). Merion then brought an action seeking an appraisal. Ancestry.com moved for summary judgment dismissing the action, arguing that Merion, as the named petitioner, must prove that the shares in question — held by Cede as record holder for the benefit of Merion — were not voted in favor of the merger.

The court denied Ancestry.com’s motion. The court noted that according to the plain language of Section 262(a), a petitioner need only show that the *record holder* of the stock for which appraisal is sought “had not voted in favor of or consented to the merger with regard to those shares.” The court reasoned that, consistent with *Transkaryotic*, Merion had shown that Cede had at least as many shares not voted in favor of the merger as the number for which it sought appraisal. The amended appraisal statute did not require beneficial owners to show that their specific shares had not been voted in favor the merger by a previous owner. Further, the court rejected Ancestry.com’s argument that allowing arbitrageurs to assert appraisal rights on shares acquired after the record date could extend appraisal rights to shares that voted for the merger. The court noted that although such a result was possible, and would be contrary to the goals of the legislature, it could not apply a share-tracing requirement that was not found in the statute.

In *BMC Software* the court refused to read a share-tracing requirement into the appraisal statute in a factually similar, but distinct scenario. BMC Software (“BMC”) merged with two private Delaware corporations for the purpose of taking BMC private. Merion determined that the consideration offered in the BMC merger was considerably below fair value and purchased shares of BMC stock, with Cede as the record owner. Normally, to issue demand for appraisal, the beneficial holder will use an intermediary broker to direct the record holder to issue the demand. However, Merion’s broker refused to pass along its demand, citing a policy change within the broker company. As a result, Merion took the necessary steps to have its BMC stock withdrawn from the fungible mass at Cede and registered directly with BMC’s transfer agent, becoming the beneficial owner *and* the record holder. As the record holder, Merion then delivered its formal demand to BMC.

BMC moved for summary judgment, arguing that Merion, as the record holder, had the burden of proving that *each share* it sought to appraise was not voted in favor of the merger by any previous owner. The court rejected BMC’s argument, holding that nothing in the unambiguous language of the appraisal statute called for a share-tracing requirement. The court noted that the 2007 amendments did not alter *Transkaryotic*’s interpretation of the appraisal Statute. The court reasoned that had the legislature intended to include a share-tracing requirement, it would have explicitly written that requirement into subsection (a)’s standing requirements. Because Merion had not voted for the merger, the court held that it satisfied the appraisal statute’s standing requirements. Finally, the court rejected BMC’s policy argument that without a share-tracing requirement the statute could allow a majority of shares to seek appraisal, even though a majority must have voted in favor of the transaction. The court again refused to rewrite an unambiguous statute to address a problem that had not occurred and was not before it.

The decisions in *Ancestry.com* and *BMC Software* confirm that *Transkaryotic*’s holding rejecting a share-tracing requirement survived the 2007 amendments to Delaware’s appraisal statute. Delaware courts continue to require that petitioners, including appraisal arbitragers, to perfect their appraisal rights, merely show that *they* had not voted for the relevant transaction, and will not

consider how the shares' previous owner voted.

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