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IN THE SUPREME COURT OF THE STATE OF DELAWARE

A&R LOGISTICS HOLDINGS, INC., Defendant/Counterclaimant Below, Appellant, v. FdG LOGISTICS LLC, Plaintiff/Counterclaim-Defendant Below, Appellee, and FdG ASSOCIATES LP, DAVID S. GELLMAN, JAMES E. BEDEKER, CYNTHIA M. BRANKIN, STEVEN R. BRANTLEY, NORMAN C. BUCK, JOHN P. CISZEK, ROBERT N. DOTSON, PAUL GARBER, MICHAEL J. HOGAN, JEREMY K. LOHRENS, ANDREW J. MANTEY, JEFFREY J. O'CONNOR, BRIAN R. REICHERT, LEEANNE RICE, STEPHEN W. ROBINSON, PAUL D. SWEEDEN and RICHARD THOMPSON, Additional Counterclaim-Defendants Below, Appellees.	§	No. 117, 2016 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 9706-CB

JOINT ANSWERING BRIEF OF APPELLEES JAMES E. BEDEKER, CYNTHIA M. BRANKIN, NORMAN C. BUCK, JOHN P. CISZEK, ROBERT N. DOTSON, PAUL GARBER, ANDREW J. MANTEY, JEFFREY J. O'CONNOR, BRIAN R. REICHERT AND PAUL D. SWEEDEN

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NATURE OF THE PROCEEDINGS

This appeal arises from Counterclaimant-Appellant A&R Logistics Holdings, Inc.'s acquisition of the business of A&R Logistics in a $200 million, private-equity merger (the "Merger") documented by an Agreement and Plan of Merger executed on December 18, 2012 (the "Merger Agreement"). In the Merger, A&R's securityholders exchanged their shares of corporate stock or options for the right to receive a portion of the Merger consideration.

The Counterclaim at issue on appeal was brought by A&R against the securityholders[1] in the Court of Chancery and, as amended, alleged various causes of action arising from the Merger, including (i) indemnification under the Merger Agreement, (ii) fraud under the Delaware Securities Act, (iii) common law fraud, and (iv) rescission of the Merger based on unilateral mistake. Following substantial dispositive motion practice, the trial court issued an Opinion ("Op."), dismissing A&R's Delaware Securities Act and rescission claims pursuant to Court of Chancery

[1] This Joint Answering Brief is submitted on behalf of Securityholders and Counterclaim-Defendants James E. Bedeker, Cynthia M. Brankin, Norman C. Buck, John P. Ciszek, Robert N. Dotson, Paul Garber, Andrew J. Mantey, Jeffrey J. O'Connor, Brian R. Reichert and Paul D. Sweeden (together, the "Individual Appellees"), each of whom were former employees of A&R and held a small percentage of stock or options in the company prior to the Merger. Counterclaim-Defendants FdG Logistics LLC (the majority stockholder of A&R prior to the Merger), FdG Associates LP and David S. Gellman have also submitted an Answering Brief.

Rule 12(b)(6). This Brief addresses only A&R's appeal of the trial court's dismissal of A&R's Delaware Securities Act claim.[2]

The Delaware Securities Act "creates a blue sky law regulating the sale of [sic] trading of securities in Delaware" and was enacted "to prevent the public from being victimized by unscrupulous or overreaching broker-dealers, investment advisers or agents in the context of selling securities or giving investment advice." 59 Del. Laws, ch. 208, at 47 (1973);[3] 6 *Del. C.* § 73-101(b). In dismissing A&R's claim under the Delaware Securities Act, the trial court correctly held that the Act applies only in matters where there is a sufficient physical nexus between the challenged transaction and the state of Delaware. Op. 15. While A&R conceded that none of the parties to the Merger resided, conducted business, or negotiated the transaction in Delaware, it argued that the generic choice-of-law provision in the Merger Agreement, nonetheless, mandated the application of the Delaware Securities Act to this non-Delaware transaction. The trial court properly rejected this argument, reasoning that the application of the Delaware Securities Act to

[2] The trial court's decision granting the Motion for Summary Judgment, which A&R also appeals, is addressed in the Answering Brief of Appellee FdG Logistics, in its capacity as the Securityholders' Representative on this issue. A&R waived its appeal of the trial court's dismissal of its claim for rescission based on unilateral mistake by failing to address that issue in its Opening Brief. Del. Supr. Ct. R. 14(b)(vi)(A)(3).

[3] The full text of the legislation resulting in the Delaware Securities Act, 59 Del. Laws, ch. 208 (1973), is attached hereto as Exhibit A.

conduct occurring outside Delaware's borders "not only would be inconsistent with the legislative intent of the [Act]...but also would implicate issues of federal preemption." Op. 21 and n.39. Nor would, as the trial court observed, this application be consistent with the legislative intent of 6 *Del. C.* § 2708, the enabling statute on which A&R relies in claiming that a choice-of-law provision is sufficient to import the Delaware Securities Act, and *every* other provision of Delaware statutory law, into the commercial relationship of contracting parties. Op. 20.

On appeal, A&R offers no response to the "unreasonable," "absurd," and "bizarre" real-world consequences recognized in the trial court's Opinion, were the court to, as A&R insisted, import wholesale every provision of Delaware statutory law into the Merger Agreement simply by virtue of the inclusion of a generic Delaware choice-of-law provision. Op. 20-21.

But, as the trial court reasoned, the same conclusion—that A&R cannot state a claim under the Act—is reached even if the trial court accepted A&R's premise that the choice-of-law provision imported the Delaware Securities Act into the Merger Agreement. As the court explained, "if one assumes that a generic Delaware choice-of-law provision encompassed the Delaware Securities Act, it is reasonable to assume that the parties…intended to incorporate the Act 'as is,' which would include the jurisdictional limitations inherent in the Act." Op. 16. The Merger could not satisfy those jurisdictional limitations because no part of the transaction took

place in Delaware. Having considered all sides of the issue on appeal, the trial court correctly concluded that A&R could never state a cause of action under the Delaware Securities Act. For these reasons, the Opinion should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The Merger Agreement included a generic Delaware choice-of-law provision, which did not expressly, or by implication, incorporate the Delaware Securities Act. Nor could it, as such an incorporation would force Delaware to regulate commerce wholly outside its borders and implicate issues of federal preemption. Under this Court's precedent, there is "a presumption that a law is not intended to apply outside the territorial jurisdiction of the State in which it is enacted…and that principle is applicable to a Blue Sky Law." *Singer v. Magnavox Co.*, 380 A.2d 969, 981 (Del. 1977), *overruled on other grounds by Weinberger v. UOP, Inc.*, 457 A.2d 701, 715 (Del. 1983). The Delaware General Assembly confirmed this presumption in consciously expressing its intent in enacting the Delaware Securities Act: "This Bill creates a blue sky law regulating the sale of [sic] trading of securities *in Delaware*." 59 Del. Laws, ch. 208, at 47 (1973) (emphasis added). The legislature's intent is also reinforced by the plain language of the statutory provisions, which are applicable only to sales of securities "in this State." In the same way, the General Assembly expressed a specific intent in enacting Section 2708, which was "to supersede all Delaware *common law* limitations on the enforceability of Delaware choice of law provisions," but not to import, wholesale, every provision of Delaware *statutory law* into the commercial relationship of contracting parties, which would, indeed, lead to absurd results. 69

Del. Laws, ch. 127, § 1 (1993). Application of these statutes, as the legislature intended, does not create any of the uncertainty claimed by A&R, as its argument presupposes that the court must make a "choice of law" where none is required. Finally, the result is not inequitable, as A&R still may seek damages for any alleged fraud under its common law fraud claim.

2. Denied. The Court of Chancery properly granted FdG Logistics, LLC's Motion for Summary Judgment with respect to the 2012 Tax Refund (defined below) for the reasons stated in the trial court's Opinion, including the undisputed facts of record and the plain language of the Merger Agreement, which expressly states that pre-closing tax refunds are the "property" of the Securityholders and are to be paid to their representative "promptly" after receipt. The Individual Appellees join in Section II of the Argument in the Answering Brief of Appellee FdG Logistics, LLC, as the Securityholders' Representative with respect to this issue on appeal.

STATEMENT OF FACTS

The facts as stated in the trial court's Opinion, which were taken from A&R's Verified Amended Counterclaim, supply the factual background for this appeal.

A. The Parties

Counterclaim-Plaintiff A&R Logistics Holdings, Inc. is a Delaware corporation, presently headquartered in Louisville, Kentucky and, prior to the Merger, headquartered in Morris, Illinois. Op. 3, 22. It is the holding company for A&R Logistics, Inc., a trucking company located in the Midwest, which, at the time of the Merger, was a leading provider of dry bulk transportation and logistics solutions, serving the plastics, chemical, and food industries in North America. Op. 3. Consistent with the trial court's Opinion, this brief refers to A&R as it existed before the Merger as "Old A&R" and to the surviving entity as "A&R" or "Buyer."

Counterclaim-Defendant FdG Associates LP ("FdG Associates"), through FdG Logistics, LLC ("FdG Logistics") and related entities, was the majority stockholder of Old A&R at the time of the Merger, owning approximately 62.15% of its stock. *Id*. Counterclaim-Defendant David Gellman was the founder and a manager of FdG Associates and also was a director and a Vice President and Secretary of Old A&R. Op. 4.

The sixteen additional counterclaim-defendants were minority stockholders or option holders of Old A&R at the time of the Merger and were employed, at

certain points in time, by Old A&R in varying capacities. Op. 3-4. As in the trial court's Opinion, this brief uses the term "Securityholders" to refer collectively to FdG Associates, FdG Logistics, and the individual counterclaim-defendants.

B. The Challenged Merger

In 2012, Old A&R engaged in an auction process to sell the company to interested bidders. This process ultimately led to a private equity firm, Mason Wells, forming a subsidiary corporation, A&R Merger Corp., which entered into the Merger Agreement with Old A&R. Op. 8.

The transaction was negotiated on the buy side by Mason Wells, a private equity firm based in Milwaukee, Wisconsin, and on the sell side by FdG Logistics, as majority stockholder, based in New York City. Op. 22. No negotiations concerning the Merger took place in Delaware and none of the alleged actions giving rise to this proceeding occurred in Delaware. *Id.*

The Merger closed on December 18, 2012, the same day the Merger Agreement was signed. Op. 8. A&R was the surviving corporation following the Merger. By virtue of the Merger, Old A&R's capital stock was cancelled and converted into the Securityholders' right to receive a pro rata share of the Merger consideration. *Id.*

Typical of transactions of this nature, Old A&R made certain representations and warranties concerning its business, as qualified by the Merger Agreement.

Op. 8. As a condition to receiving their share of the Merger consideration, the Securityholders, the majority of whom were Illinois residents and not parties to the Merger Agreement, were required to sign a Letter of Transmittal in which they agreed to limited indemnification of the Buyer against a breach of the representations and warranties Old A&R made in the Merger Agreement. *Id.* The Securityholders were obligated to escrow a portion of the Merger consideration as recourse if A&R became entitled to indemnity. Op. 9.

The Merger Agreement also addressed how A&R, as the surviving company, would treat tax refunds for pre-closing periods received after the closing. In particular, A&R was required to prepare and timely file tax returns for pre-closing periods and to pay the tax refunds for those pre-closing periods to the Securityholders, as their "property," promptly upon receipt. *Id.*

C. FdG's Verified Complaint

Following the closing of the Merger, A&R received pre-closing tax refunds totaling $2,080,650 (the "2012 Tax Refund"), but refused to turn over the refunds to the Securityholders. Op. 11-12. FdG Logistics, LLC, which the Merger Agreement named the Securityholders' Representative for purposes of certain post-closing activities, filed a Verified Complaint for breach of the Merger Agreement arising from A&R's refusal to remit the 2012 Tax Refund to the Securityholders. Op. 12.

D. A&R's Counterclaim

In response to FdG's Verified Complaint, A&R filed an Answer and Counterclaim on October 7, 2014 against FdG Logistics and named the Securityholders individually as additional counterclaim-defendants. Op. 12. The counterclaim-defendants moved to dismiss the Counterclaim under Court of Chancery Rules 9 and 12(b)(6), raising, among other issues, the application of the Delaware Securities Act to the Merger. A&R elected to amend the Counterclaim on April 10, 2015, though maintaining its claim under the Delaware Securities Act in substantially the same form. As amended, the 596-paragraph Counterclaim asserts causes of action for (i) indemnification under the Merger Agreement, (ii) fraud under the Delaware Securities Act, (iii) common law fraud, and (iv) rescission based on unilateral mistake. *Id.* Each of these claims is premised on Old A&R's alleged breaches of the representations and warranties contained in the Merger Agreement.

E. Procedural History

On May 29, 2015, the Securityholders' Representative moved for summary judgment on its Complaint for the 2012 Tax Refund. Op. 12. On July 10, 2015, those Securityholders appearing and participating in the proceeding moved to dismiss all Counterclaims, other than A&R's indemnification claim, pursuant to Court of Chancery Rule 12(b)(6) for failure to state a claim on which relief can be granted and Rule 9(b) for failure to plead fraud with the requisite particularity. *Id.*

F. The Trial Court's Ruling

Both motions were submitted to the trial court on November 16, 2015, and the trial court issued an Opinion on February 23, 2016. In its Opinion, the trial court granted FdG Logistics' Motion for Summary Judgment with respect to the Tax Refund. The trial court also granted the Securityholders' Motion to Dismiss A&R's claim for fraud under the Delaware Securities Act (Count II) and its claim for rescission based on unilateral mistake (Count IV).

With respect to the Delaware Securities Act, the trial court ruled that the Merger lacked a sufficient nexus to Delaware to trigger the Act's application. In particular, the trial court observed that the primary purpose of the Delaware Securities Act, which is Delaware's "Blue Sky" law, is "to provide a basis for stopping intrastate securities fraud" and the Act "is not intended to apply outside the territorial jurisdiction of the State in which it is enacted." Op. 14-15. Accordingly, the trial court held that the Delaware Securities Act "only applies where there is a sufficient nexus between Delaware and the transaction at issue." Op. 15.

A&R failed to identify any facts establishing the requisite nexus and, instead, relying on 6 *Del. C.* § 2708, argued that the choice-of-law provision in the Merger Agreement was, itself, sufficient to satisfy the nexus requirement. Op. 17. The trial court rejected this argument, noting that Section 2708 was intended "to permit contracting parties to incorporate the law of Delaware, which primarily would

concern its *common law*, to decide questions concerning the interpretation and enforceability of a contract," but was not intended to be a "wholesale importation of every provision of Delaware statutory law into the commercial relationship of contracting parties." Op. 19. Moreover, even "if one assumes that a generic Delaware choice of law provision encompassed the Delaware Securities Act, it is reasonable to assume that the parties (at least absent expressing a contrary intent) intended to incorporate the Act 'as is,' which would include the jurisdictional limitations inherent in the Act." Op. 16.

The trial court observed that construing Section 2708 in the manner A&R suggested would risk "unreasonable," "absurd," and "bizarre" results "contrary to basic principles of statutory construction." Op. 20-21. For these reasons, the trial court dismissed A&R's Delaware Securities Act claim for failure to state a claim upon which relief could be granted. Op. 22.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT THE CHALLENGED MERGER DID NOT TRIGGER THE APPLICATION OF THE DELAWARE SECURITIES ACT.

A. Question Presented

Did the trial court err in concluding that the Merger lacked a sufficient statutory nexus to Delaware to trigger the application of the Delaware Securities Act where the only connection to Delaware asserted by the Buyer was the generic Delaware choice-of-law provision found in the Merger Agreement? B40-47; B171-72; B175-79.

B. Standard and Scope of Review

This Court reviews a trial court's decision on a motion to dismiss *de novo*. *Allstaff, Inc. v. Wilmington Trust Co.*, 2011 WL 780757, at *3 (Del. Mar. 7, 2011). If the issue on appeal raises a question of statutory interpretation, the question is also reviewed *de novo*. *Id.*

C. Merits of Argument

1. The Trial Court Properly Dismissed A&R's Delaware Securities Act Claim Because there Was Not a Sufficient Physical Nexus Between the Merger and Delaware.

a. The Delaware Securities Act Requires that there be a Sufficient Physical Nexus Between the Challenged Transaction and Delaware.

The Delaware Securities Act applies only in matters where there is a sufficient physical nexus between the challenged transaction and the state of Delaware. That

territorial requirement is mandated not only by the Act itself, but also by the legislature's specified intent in enacting the Delaware Securities Act and this Court's sound interpretation of the Act.

The Delaware Securities Act, which went into effect on July 1, 1973, is Delaware's Blue Sky law. *Singer*, 380 A.2d at 981; *see also* 59 Del. Laws, ch. 208, at 47 (1973) (Exhibit A hereto). Like many other Blue Sky laws, the Delaware Securities Act is modeled after the Uniform Securities Act. *Blinder, Robinson & Co., Inc. v. Bruton*, 552 A.2d 466, 475 (Del. 1989). As the trial court noted, Op. 15-16 n.23, "the draftsmen of the Uniform Act consciously elected to limit the scope of the Uniform Act to those transactions which took part at least partially within a state." 12 Joseph C. Long, *Blue Sky Law* § 4:2 (2015).

Delaware's General Assembly endorsed that limitation when it enacted the Delaware Securities Act. In particular, the Summary of Intent accompanying the legislation that resulted in the Delaware Securities Act clarifies that the Act is "a blue sky law regulating the sale of [sic] trading of securities *in Delaware*." *See* 59 Del. Laws, ch. 208, at 47 (1973) (emphasis added) (Exhibit A hereto).

Although the Delaware Securities Act did not adopt wholesale the territorial restrictions contained in Section 414 of the Uniform Securities Act,[4] the General

[4] *See, e.g.*, Unif. Sec. Act § 414(c) (1956) ("For the purpose of this section, an offer to sell or to buy is made in this state, whether or not either party is then present in this state, when the offer (1) originates from this state or (2) is directed by the offeror

Assembly's specified intent that the Act regulate only the sale of securities "in Delaware" is reinforced by the Act's plain language. Specifically, the Act repeatedly uses the phrase "in this State" to limit the Act's reach to security transactions that occur, at least partially, in Delaware. *See, e.g.*, 6 *Del. C.* § 73-202 ("It is unlawful for any person to offer or sell any security in this State unless…."); 6 *Del. C.* § 73-205(b) ("Every registration statement shall specify the amount of securities to be offered in this State…."); 6 *Del. C.* § 73-302(k) ("The Director may suspend the investment advisory activities in this State of any federal covered adviser...."); 6 *Del. C.* § 73-301(a) ("It is unlawful for any person to transact business in this State as a broker-dealer or agent unless….").

Implicit in the Delaware Securities Act is a recognition that the Act cannot be applied to transactions occurring wholly outside of Delaware's borders. As this Court explained when it first considered the scope of the Delaware Securities Act in *Singer v. Magnavox Co.*, there is "a presumption that a law is not intended to apply outside the territorial jurisdiction of the State in which it is enacted...and that principle is applicable to a Blue Sky Law." 380 A.2d at 981. Applying the Act to conduct occurring beyond Delaware's borders "not only would be inconsistent with

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to this state and received at the place to which it is directed (or at any post office in this state in the case of a mailed offer).").

the legislative intent of the Delaware Securities Act as discussed in *Singer*, but also would implicate issues of federal preemption." Op. 21 and n.39.

In particular, such an application would constitute a violation of the Commerce Clause, potentially invalidating the entire Act as unconstitutional, because Delaware would be regulating commerce wholly outside its state. *See, e.g.*, *Edgar v. MITE Corp.*, 457 U.S. 624, 641-43 (1982) (invalidating Illinois law "purport[ing] to regulate directly and to interdict interstate commerce, including commerce wholly outside the state"). As the trial court correctly noted, Op. at 21 n.39, the United States Supreme Court has upheld various states' Blue Sky laws because those statutes regulated only transactions occurring within the regulating states. *Edgar*, 457 U.S. at 641.

Applying those principles in *Singer*, the Court held that the plaintiffs, who lived in Pennsylvania and were not solicited in Delaware, could not invoke the Delaware Securities Act because no part of the sale occurred *in Delaware*. 380 A.2d at 981-82. The Court expressly rejected the plaintiffs' argument that application of the Act was proper because merger documents were filed in Delaware and Magnavox was registered as a Delaware corporation. *Id.* at 982. Those connections were too attenuated to invoke the Delaware Securities Act. *Id.*

Similarly, the trial court here properly held that there was not a sufficient nexus between the Merger and Delaware. Op. 22. None of the parties to the

transaction are alleged to have been in Delaware—instead, they were located in Wisconsin, New York, and Illinois. *Id.* In fact, the only alleged connection A&R could make to Delaware was that the parties to the merger were incorporated in Delaware. *Id.*; *see also* Opn'g Br. 7. That connection is the same attenuated one the Court rejected in *Singer*, and, as a result, the trial court properly dismissed A&R's Delaware Securities Act claim.

b. A Generic Choice-of-Law Provision Cannot Operate to Incorporate the Delaware Securities Act Because Section 2708 Is Limited in Scope and Effect.

As it did before the trial court, A&R improperly seeks to expand the scope and intended effect of 6 *Del. C.* § 2708 ("Section 2708") beyond a stipulated choice-of-law analysis. Specifically, A&R asserts that Section 2708 should operate to import the Delaware Securities Act into the parties' relationship because the Merger Agreement contains a generic Delaware choice-of-law provision. Opn'g Br. 11-13. However, the text of Section 2708, its legislative history, and its reasonable construction, whether taken alone or cumulatively, demonstrate "that it would be unreasonable to construe…the Merger Agreement to encompass the Delaware Securities Act." Op. 21.

Section 2708 expressly supplants Delaware's common law test for resolving conflicts of law by providing, in relevant part, that:

> The parties to any contract...may agree in writing that the contract...shall be governed by or construed under the laws of

> this State, without regard to principles of conflict of laws.... The foregoing shall conclusively be presumed to be a **significant**, **material** and **reasonable** relationship with this State and shall be enforced whether or not there are other relationships with this state.

6 *Del. C.* § 2708 (emphasis added).

Section 2708 was adopted in 1993, twenty years *after* the Delaware Securities Act became law. Prior to that time, Delaware courts performed a contractual choice-of-law analysis under the common law, most often relying on the "most significant relationship test" set forth in the Restatement (Second) of Conflict of Laws, which examines whether there is a reasonable basis for the parties' choice of law and whether another state has a materially greater interest than the chosen state in the determination of the particular issue. Op. 18. "Using similar language as the Restatement, Section 2708 essentially stipulates that for purposes of deciding whether to apply a Delaware choice of law provision," courts may assume a negative answer to these questions. *Id.*; *see also Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1049 (Del. Ch. 2006) ("§ 2708 also establishes that this State has a material relationship sufficient to satisfy § 187 of the Restatement (Second) of Conflict of Laws.").

The synopsis of the legislation resulting in Section 2708 makes clear that the statute was intended "to supersede all Delaware *common law* limitations on the enforceability of Delaware choice-of-law provisions (including any restrictions

contained in the Restatement (Second) Conflict of Laws), as well as limitations on contractual consent to jurisdiction or service of process." 69 Del. Laws, ch. 127, § 1 (1993). Nowhere does the synopsis discuss the Delaware Securities Act or the Delaware Code more generally and, instead, focuses exclusively on the supersession of common law limitations on Delaware choice-of-law provisions.

For these reasons, the trial court correctly interpreted "Section 2708 as intending to permit contracting parties to incorporate the law of Delaware, which primarily would concern its common law, to decide questions concerning the interpretation and enforceability of a contract." Op. 19-20. But "[w]hat Section 2708 does not stand for…is a mechanism for the wholesale importation of every provision of Delaware statutory law into the commercial relationship of contracting parties." Op. 20.

Applying Section 2708 in the manner A&R proposes is inconsistent with the text and legislative intent of the statute and "would risk absurd results contrary to basic principles of statutory construction." *Id.* The trial court observed several real-world consequences were it to adopt the interpretation advanced by A&R. For example, Section 2708, as interpreted by A&R, would trigger the application of the Delaware tax code to this, and any, merger where it otherwise would not apply. *Id.* It would also trigger the Delaware General Corporation Law's requirements for stockholder approval of a merger between entities incorporated outside of Delaware,

contrary to the internal affairs doctrine. Op. 20. As the trial court observed, no authority exists suggesting that the General Assembly intended any of these outcomes or "to rewrite the Delaware Securities Act in such a radical way *sub silentio* through the later adoption of Section 2708." *Id.*

Based on these principles, the trial court correctly held that the boilerplate choice-of-law provision in the Merger Agreement could not be read to import the Delaware Securities Act—a statute intended to regulate the intrastate sale of securities—into the parties' contractual relationship.

c. Even if the Court Were To Hold that the Merger Agreement's Choice-of-Law Provision Incorporates the Delaware Securities Act, A&R's Claim Was Properly Dismissed Because the Choice-of-Law Provision Is Insufficient Alone To Apply the Act To the Merger.

Even if the Court were to hold that the Delaware choice-of-law provision in the Merger Agreement incorporated the Delaware Securities Act into the parties' commercial dealings, the trial court still ruled correctly when it dismissed A&R's claim under the Act. As the trial court explained, "if one assumes that a generic Delaware choice-of-law provision encompassed the Delaware Securities Act, it is reasonable to assume that the parties (at least absent expressing a contrary intent) intended to incorporate the Act 'as is,' which would include the jurisdictional limitations inherent in the Act." Op. 16. These limitations require that offers and sales of securities take place *in this State*. As discussed above, A&R can never

satisfy that territorial requirement with respect to the Merger Agreement. *See* Argument, *supra*, Section I(C)(1)(a).

A&R is advocating not for an application of the Act in its present form, but for removing the jurisdictional limitations inherent in the Act. Such a change cannot be achieved by this litigation. Notably, A&R has failed to cite a single instance of what it is asking the Court to do here – to ignore the constitutionally-mandated nexus requirement of its own forum's Blue Sky law.

Instead, A&R points to several federal court decisions in its Opening Brief where courts found that a contractual choice-of-law provision was broad enough to encompass the chosen state's Blue Sky law. Opn'g Br. 18. But none of those cases stands for the proposition that a choice-of-law provision, even if applicable, is alone sufficient to bring a claim under that state's securities act where, as here, there is no physical nexus between the chosen state and the transaction at issue. In fact, *all* of A&R's authorities involve the *dismissal* of Blue Sky claims brought under one state's laws where the parties' choice-of-law provision required the application of the law of another forum.[5] *See* Opn'g Br. 18 (citing *Pyott-Boone Elecs. Inc. v. IRR Trust for Donald L. Fetterolf*, 918 F. Supp. 2d 532, 548 (W.D. Va. 2013) (dismissing

[5] These cases are not instructive on the issue of whether the Delaware choice-of-law provision in the Merger Agreement is broad enough to encompass the Delaware Securities Act in the first instance because, unlike the trial court's Opinion, none of those cases includes a substantive analysis as to the proper scope of the choice-of-law provision.

Virginia Securities Act claims where parties' agreement called for application of Delaware law); *Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 224 n.28 (3d Cir. 2006) (New York choice-of-law provision barred proceeding under Pennsylvania Securities Act); *Concheck v. Barcroft*, 2011 WL 3359612, at *7-8 (S.D. Ohio Aug. 3, 2011) (dismissing claims under Ohio Securities Act where parties' agreement called for application of Michigan law); *Mallon Resources Corp. v. Midland Bank*, 1997 WL 403450, at *2-3 (S.D.N.Y. July 17, 1997) (Colorado Securities Law claim dismissed where parties' agreement chose application of New York law).

Indeed, even in instances where a court has dismissed a securities law claim in favor of a contract provision choosing another state's law, the chosen state's securities law could be applied only "as is." For example, in *JP Morgan Chase Bank, N.A. v. McDonald*, the court dismissed the counter-plaintiff's claims under Illinois' and Indiana's Blue Sky laws based on a New York choice-of-law provision. 2015 WL 6784238, at *4 (N.D. Ill. Nov. 6, 2015). Applying New York law "as is," the court noted that "although there is no private cause of action under the applicable New York securities act, Counter-Plaintiffs can still bring their gross negligence and fraud claims in New York, affording them the opportunity to collect the money damages they seek." *Id.* This is precisely what the trial court did here in applying the Delaware Securities Act to the Merger "as is," which included the jurisdictional limitations inherent in the Act. Op. 16.

Without explaining how the generic choice-of-law provision in the Merger Agreement could be read to express a specific intent to import the Delaware Securities Act into the Merger Agreement, A&R criticizes that the trial court's Opinion "create[s] a fact question regarding the interpretation of the contract in this case" that should not have been decided without developing a factual record. Opn'g Br. 25. Not only did A&R not raise this objection below, but A&R never before suggested the choice-of-law provision was ambiguous. This argument should, therefore, be deemed waived. Del. Supr. Ct. R. 8.

As to its merits, A&R's argument is based on a misapplication of Delaware contract law, and must be rejected. The statement on which A&R bases its argument appears in a parenthetical in the trial court's opinion. It states:

> The implied rationale of the Court's approach in *Eurofins* is that, if one assumes that a generic Delaware choice of law provision encompassed the Delaware Securities Act, it is reasonable to assume that the parties (at least absent *expressing a contrary intent*) intended to incorporate the Act "as is," which would include the jurisdictional limitations inherent in the Act.

Op. 16 (emphasis added). According to A&R, the Merger Agreement's choice-of-law provision, which requires that "all issues concerning the [Merger Agreement]…be governed by and construed in accordance with the laws of the State of Delaware," could be interpreted by a trier of fact to mean "that the parties intended…to invoke the Delaware Securities Act, without geographical limitation."

Opn'g Br. 25. Thus, A&R argues it was improper for the trial court to interpret the provision as lacking this unexpressed intent.

However, basic principles of contract law dictate that it is only where two opposing interpretations of a contract provision are reasonable that the court may not choose between them at the motion to dismiss stage. *Prokupek v. Consumer Capital Partners LLC*, 2014 WL 7452205, at *3 (Del. Ch. Dec. 30, 2014). Here, where the Merger Agreement's choice-of-law provision is unambiguous, its application is a pure question of law that was appropriate for ruling on a motion to dismiss. *See id.*; *Hughes v. Kelly*, 2010 WL 3767624, at *3 (Del. Ch. June 30, 2010).

Nevertheless, even if the boilerplate choice-of-law provision in the Merger Agreement could be interpreted to mean that the parties intended to apply the Delaware Securities Act to any future disputes, regardless of the territorial connection, the Court could not uphold that provision without expanding the Delaware Securities Act beyond its permissible constitutional reach. To apply the choice-of-law provision as A&R advocates, the Court would have to invoke the Delaware Securities Act to regulate conduct that occurred completely outside of Delaware. That exercise of Delaware's regulatory power would violate the Commerce Clause. *See* Argument, *supra*, Section I(C)(1)(a).

The Court should affirm the trial court's dismissal of A&R's claim under the Delaware Securities Act.

d. Affirming the Trial Court's Ruling Will Not Lead To Absurd Results.

A&R paints a picture of confusion as to the application of the appropriate Blue Sky laws to the Merger, suggesting that it is "left to guess which states' securities laws govern its validity." Opn'g Br. 14. This is not so.

As a threshold matter, this is A&R's second bite at the apple. In response to the counterclaim-defendants' original motions to dismiss the Counterclaim, which sought, among other things, dismissal of A&R's Delaware Securities Act claim on the same grounds, A&R elected to amend its Counterclaim. But rather than cure its pleading defect by bringing claims under Blue Sky laws of states that might satisfy the nexus requirement,[6] A&R did not alter course and chose to rely solely on the Delaware Securities Act for its putative private remedy.

Furthermore, A&R's assertion that a choice of law must be made in connection with its securities claims is misguided. The application of conflict-of-law rules presupposes that two or more coequal jurisdictions have a competing exclusive interest in regulating a transaction so that the court must make a "choice of law." But overlapping regulatory interests do not require a choice of law unless one state's regulation necessarily excludes regulation by the other. *See, e.g., Lintz*

[6] A&R asserts that the Blue Sky laws of various states, including New York, Illinois, and Wisconsin, might arguably apply to the Merger, without addressing whether these states actually offered A&R a private remedy. *See* Opn'g Br. 14.

v. Carey Manor Ltd., 613 F. Supp. 543, 550 (W.D. Va. 1985) (rejecting argument that a conflict of law existed requiring the trial court to choose between multiple states whose securities acts might apply); *In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 2012 WL 10731957, at *14 (C.D. Cal. June 29, 2012) (affirming holding that conflict-of-law analysis is not necessary for Blue Sky laws because they are nonexclusive). To the extent the Merger Agreements' choice-of-law provision precluded A&R from pursuing a private right of action under the securities laws of any state other than Delaware, A&R's error lies in its misunderstanding of the limits of the Delaware Securities Act.

Finally, to the extent A&R suggests it is somehow without a remedy for the Securityholders' alleged fraud, A&R continues to maintain claims for common law fraud and contractual indemnification with the added security of an escrow holdback. A&R would be hard pressed to complain that its common law fraud claim is somehow inadequate to protect its rights after asserting that the Delaware Securities Act "simply incorporates and *slightly modifies* the common-law and equitable remedies for fraudulent inducement of a contract." Opn'g Br. 13 (emphasis added). In essence, the fundamental flaw in A&R's reasoning is A&R's presumption that it enjoys some existential right to a *private* right of action under Blue Sky laws generally, which is incorrect. *See, e.g.*, *JP Morgan Chase*, 2015 WL

6784238, at *4 (noting there is no private cause of action under New York's securities act).

2. The Trial Court Properly Dismissed A&R's Delaware Securities Act Claim Because the Act Does Not Apply To Mergers.

Even if A&R could demonstrate a sufficient physical nexus with Delaware, which it cannot, the Delaware Securities Act still would not qualify as an "applicable law" governing the Merger Agreement. As the trial court recognized, the Delaware Securities Act is a consumer protection statute intended "to prevent the *public* from being victimized by unscrupulous or overreaching *broker-dealers, investment advisers or agents* in the context of selling securities or giving investment advice." 6 *Del. C.* § 73-101(b) (emphasis added); *Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 349 (Del. 1993). Here, on the other hand, a private equity firm negotiated a merger to take control of A&R as a going concern.

Given the inapplicability of consumer protection concerns to mergers generally, let alone when conducted as portfolio transactions, the Delaware Securities Act expressly exempts from the statute these and analogous transactions taken pursuant to a stockholder vote (the "Merger Exemption"). The Merger Exemption explains that the terms "sale," "sell," "offer," and "offer to sell"

> do not include...any act *incident to a vote by stockholders* (or approval pursuant to § 228 of Title 8) pursuant to the certificate of incorporation, or the provisions of Title 8, *on a merger*, consolidation, reclassification of securities,

> dissolution, or sale of corporate assets in consideration of the issuance of securities of the same or another corporation.

6 *Del. C.* § 73-103(a)(17)(d) (emphasis added). The Merger Exemption also accounts for why, forty years after the Act's enactment, A&R could not cite *a single* Delaware decision utilizing the Delaware Securities Act to rewrite a merger agreement, irrespective of any nexus.

Contrary to A&R's characterization of Blue Sky exemptions generally, Opn'g Br. 27-28, "the exemptive provisions of the [Delaware Securities] Act and the regulations adopted thereunder are broad." 1 R. Franklin Balotti and Jesse A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 17.7[B] (2015) ("The reason for these *very broad exemptive provisions* is the belief that the federal requirements that are applicable to such securities are sufficient to protect the Delaware investor." (emphasis added)). In this case, A&R must admit that the Merger Agreement and the Merger were submitted to, and approved and adopted by, the stockholders of both Merger Corp. and A&R. A119, § 7.1(D)(5)(B); A121, § 7.2(D)(3)(i)(c). As such, the transaction falls squarely within the Act's "very broad exemptive provisions."

Nevertheless, A&R makes an unprecedented argument – at least in Delaware – that the Merger Exemption does not reach "cash for stock mergers," including where the surviving corporation, as "incident to a vote of the stockholders,"

converted its pre-existing securities into the right to receive cash. Opn'g Br. 26-27. Neither policy nor grammar invites this limitation into the Merger Exemption's text. *See New Cingular Wireless PCS v. Sussex County Bd. of Adjustment*, 65 A.3d 607, 611 (Del. 2013) ("It is axiomatic that a statute or an ordinance is to be interpreted according to its plain and ordinary meaning."). To the contrary, A&R misconstrues a disjunctive clause that *expands* the list of exemptions to include a "sale of corporate assets in consideration of the issuance of securities" as if it *limits* the preceding exemptions for "a merger, consolidation, reclassification of securities, dissolution." *But see Lockhart v. United States*, 136 S. Ct. 958 (Mar. 1, 2016) (teaching that such statutory clauses traditionally describe a self-contained category).

Grammatically, A&R's interpretation violates the traditional "rule of the last antecedent," which the United States Supreme Court emphasized this year in *Lockhart v. United States*. *Id.* at 962 ("When this Court has interpreted statutes that include a list of terms or phrases followed by a limiting clause, we have typically applied an interpretive strategy called the 'rule of the last antecedent.'"). Analogous to the statutory list at issue in *Lockhart*, the clause in the Merger Exemption combines a disjunctive ("or") set off with a comma to signify that the qualifier "in consideration of the issuance of securities" modifies only "sale of corporate assets." *Cf. In the Matter of Surcharge Classification 0133*, 655 A.2d 295, 302 (Del. Super. Ct. June 15, 1994) (applying rule).

While not inflexible, the last antecedent rule is consistent with the Delaware Securities Act's policy and avoids insertion of A&R's counterintuitive qualifier and resultant ambiguities. *See Rubick v. Sec. Instrument Corp.*, 766 A.2d 15, 19 (Del. 2000) (applying last antecedent rule to determine scope of Workers' Compensation Act); "Rule of the Last Antecedent," *Black's Law Dictionary* (10th ed. 2014) ("[Q]ualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing."). A&R's construction inexplicably makes the exemption for all five listed transactions turn on the form of consideration in addition to a shareholder vote. Yet it admits that a sale of corporate assets is unlike the first four classes of transactions. Asset sales come within the purview of the Delaware Securities Act so as to require an exemption only *if* consideration included securities.

As this Court has explained, "'referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.'" *Rubick*, 766 A.2d at 18 (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.33 (6th ed. 2000)). Indeed, in *Lockhart*, the United States Supreme Court cited A&R's only authority on this point – A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 144 (2012) – to *refute* A&R's "interpretive strategy." *Compare Lockhart*, 136 S. Ct. at 962-63, *with* Opn'g Br. 27. The court explained:

> The rule provides that "a limiting clause or phrase... should ordinarily be read as modifying only the noun or phrase that it immediately follows." This Court has applied the rule from our earliest decisions to our more recent. The rule reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it.

Lockhart, 136 S. Ct. at 962-63 (internal citations omitted).

Presumably, the Delaware General Assembly was aware of this time-honored drafting maxim, and A&R's proposed extension is not "clearly required" after forty years of invisibility. *See In the Matter of Surcharge Classification 0133*, 655 A.2d at 302-03. The Merger Agreement accordingly fits squarely within the Delaware Securities Act's express merger exemption, regardless of whether A&R could have satisfied the nexus between its former Illinois employees and itself.

Moreover, and fundamentally, all five exemptions are triggered by a *shareholder vote*, not the form of consideration.[7] *Cf.* 14 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 6798 (rev. vol. 2012) (The Uniform Securities Act's merger exemption "recognizes that the potential for abuse

[7] Regardless of whether A&R's former Illinois employees voted for or against the Merger through which former management was phased out, those votes could not have anticipated a merger triggering Blue Sky laws, let alone potential joint and several liability under the Delaware Securities Act based on the insertion of a generic conflicts clause into the Merger Agreement. *See, e.g.*, *Carlson v. Bear, Stearns & Co.*, 906 F.2d 315, 316-19 (7th Cir. 1990) (strictly construing private remedies under the Illinois Securities Act of 1953 to rescission claims against underwriters, dealers, and salespersons). A&R's arguments inject uncertainties that threaten to convert this forum's traditional incentives into disincentives.

in such transactions is much less than in a direct offering of securities for cash, *since shareholders must approve the transaction* and often have appraisal rights if they choose to dissent." (emphasis added)). A&R never explains how shareholders voting for a "cash for stock" merger pose such a distinct threat to the public that it would necessitate carving them out of the Merger Exemption.

Ultimately, a plain reading of the Delaware Securities Act, backed by the legislative history, English grammar, and decades of Delaware practice, teaches that the Merger Exemption hinges on the stockholders' vote rather than the precise form of consideration. Any other construction sacrifices stockholder certainty yet does nothing "to prevent the public from being victimized by unscrupulous or overreaching *broker-dealers, investment advisers or agents* in the context of selling securities or giving investment advice." 6 *Del. C.* § 73-101(b) (emphasis added). For this separate reason, the trial court's Opinion should be affirmed.

CONCLUSION

For the foregoing reasons, the Individual Appellees respectfully request that the Opinion and Order below be affirmed.

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