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Case Number 117,2016

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,	)	No. 117, 2016
	)	
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.	)	

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INTRODUCTION

Parties can choose Delaware law to govern their contract's validity and interpretation. The parties' choice establishes the nexus needed for Delaware to regulate the contract, either by statute or by common law. Unless a particular law by its terms applies only to conduct physically within the State, such a contractual choice creates no concerns about "extraterritorial application" of the law. That is all that A&R contends here.

Counterclaim-Defendants' vision of the law is convoluted by comparison. They admit that a choice-of-law agreement is consent to the application of Delaware law. But they ask the Court to hold that such an agreement does not give Delaware the authority to apply its statutes to the transaction. This rule finds no support in the law. Rather, this Court made clear in *Singer v. Magnavox* that the Delaware Securities Act "govern[s] transactions which are subject to Delaware jurisdiction under traditional tests." 380 A.2d 969, 981 (Del. 1977). And one traditional test is that parties can consent to a State's law—both common law and statutory law.

Counterclaim-Defendants argue that the federal Commerce Clause requires their outcome, but they cite no support for that contention. Counterclaim-Defendants cannot identify a single case holding that the Commerce Clause voids a contractual choice-of-law agreement, as to statutory laws or otherwise.

Indeed, Counterclaim-Defendants' proposal lacks coherence. If applying the Delaware Securities Act to this contract would be unconstitutional "extraterritorial regulation," Counterclaim-Defendants cannot explain how Delaware could nevertheless apply its common law. Their rule thus would void thousands of choice-of-law agreements (not to mention most applications of 6 *Del C.* § 2708 and Restatement § 187, neither of which requires a physical nexus between a contract and the state of its chosen law). But even if the rule somehow were limited to statutes, the result would be calamitous. Would many contracts with Delaware choice-of-law clauses be governed by a "statute-free" version of Delaware contract law—no Statute of Frauds, no Arbitration Act, no Uniform Commercial Code? Or would parties instead be required to guess which state's statutes a court would apply based on a traditional choice-of-law analysis? Whichever of these scenarios resulted from Counterclaim-Defendants' rule, it would certainly cause the rapid extinction of contractual choices of Delaware law. That is contrary to Delaware's legislative and judicial policy of hospitality to such contractual choices.

To be sure, some Delaware statutes (such as provisions of the tax code, the General Corporation Law, and other portions of the Securities Act) do, *by their explicit terms*, require an additional specific connection to Delaware as an element of the statutory violation. These statutes would not govern a transaction whose only contact with Delaware is a choice-of-law clause. Such laws usually are outside the

scope of choice-of-law agreements anyway, as such agreements are intended to govern the relationship between private parties and not between the parties and the State. But A&R here has brought a claim under provisions of the Delaware Securities Act that directly regulate the validity and enforceability of contracts, and that include no reference to conduct in Delaware. Both law and logic compel the application of these statutes. The Court should clarify that they do apply here and reverse the judgment below.

ARGUMENT

I. The Delaware Securities Act Governs The Parties' Securities Contract.

A. A Contractual Choice of Delaware Law Satisfies All Legal Requirements for Delaware Statutes to Govern the Contract's Enforceability.

This is exactly the kind of case that contractual choice-of-law clauses, and 6 *Del C.* § 2708, are meant to address. The parties to a multistate transaction signed a securities contract that says the transaction "will be governed by and construed in accordance with the laws of the State of Delaware." App. A142. The buyer (A&R) claims it was defrauded in the purchase of securities and seeks protection under the Delaware Securities Act. But the sellers' lawyers argue that A&R is out of luck, because (notwithstanding the contract) it should have sued under some other state's blue-sky law, though they never say which. "[A] sound commercial law" does not turn commercial relationships into a game of hide-and-seek. *See Abry Partners V, LP v. F&W Acq. LLC*, 891 A.2d 1032, 1048 (Del. Ch. 2006).

1. Contractual consent to apply Delaware law establishes all necessary nexus to apply the Delaware Securities Act.

Delaware caselaw and 6 *Del C.* § 2708 are both straightforward: when parties agree that Delaware law will apply, Delaware law applies. Counterclaim-Defendants labor mightily to complicate this simple reality, by invoking concepts of Delaware's "jurisdiction" to have its statutes govern a transaction. Their efforts fail. In *Singer* this Court made clear that the Delaware Securities Act "govern[s]

transactions which are subject to Delaware jurisdiction under traditional tests." 380 A.2d at 981. That rule is fully satisfied here. When a party consents to the application of a state's law to a given transaction, this establishes the State's authority to apply its statutes to the transaction.

a. Parties can consent to apply a chosen state's statutes.

Singer's reference to "Delaware jurisdiction" has a specific meaning in a conflict-of-laws analysis. The term "jurisdiction," in this context, refers to "the authority of a state to make its law applicable to persons or activities." *Adventure Commc'ns, Inc. v. Ky. Reg. Elec. Fin.*, 191 F.3d 429, 435 (4th Cir. 1999) (citation omitted); *see* Restatement (Second) of Conflict of Laws § 9, cmt. b; Restatement (Third) of the Foreign Relations Law of the United States § 401(a) & cmt. a. The rule is simply that, to have authority to regulate a transaction, a "State must have a significant contact or … contacts" with the transaction, "such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality); *accord Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 821-22 (1985).[1] This is very similar to the test for whether the State's courts have

[1] These cases do not expressly use the word "jurisdiction" to describe their test, but later U.S. Supreme Court decisions do. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988); *see also, e.g., Adventure Commc'ns*, 191 F.3d at 435-37.

personal jurisdiction over the transaction's participants. *Adventure Commc'ns.*, 191 F.3d at 435.

Unsurprisingly, this test is satisfied, and a State has authority to govern a transaction, when the parties consent to apply that State's law:

> A person's consent may provide another basis of jurisdiction. So if parties in their contract provide that their rights and obligations under the contract shall be determined in accordance with the local law of state X, this law may be so applied.

Restatement (Second) of Conflict of Laws § 9 cmt. f. The Restatement even spells out that this "includes both a state's decisional *and statutory law* …." *Id.* cmt. e (emphasis added).

This makes good sense. When a party *agrees* that a transaction will be governed by Delaware law, there manifestly is nothing "arbitrary" or "unfair" if Delaware law actually governs. A state generally may apply its law where, under the circumstances, the parties "can hardly claim unfamiliarity with the laws of the host jurisdiction [or] surprise that the state courts might apply forum law." *Allstate Ins. Co.*, 449 U.S. at 317-18. That certainly is true where the parties to a contract expressly chose a state's laws to govern. Moreover, parties of course can consent by contract to personal jurisdiction in a state's courts. *E.g., Genuine Parts Co. v. Cepec*, 2016 WL 1569077, at *17 (Del. Apr. 18, 2016); *Nat'l Indus. Grp. (Hldg.) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 381 (Del. 2013). Since the test for con-

senting to application of a state's law is very similar, the outcome also should be the same.

FdG suggests that allowing parties to consent to a state's statutory law is somehow extraordinary, if not alarming. Br. 20-21. But it does not and cannot explain why. Consenting to be governed by the chosen state's laws is the whole point of choice-of-law agreements, and FdG identifies nothing pernicious about such agreements as a class.[2] *Cf.* Restatement (Second) of Conflict of Laws § 187, cmt. e ("The law of the state chosen by the parties is applied, not because the parties themselves are legislators, but simply because this is the result demanded by the choice-of-law rule of the forum.").

b. The Securities Act applies when parties agree to Delaware law.

This is fully consistent with this Court's holding in *Singer.* Because a physical nexus to Delaware is a common way of triggering Delaware's authority to regulate a transaction, the *Singer* Court noted the "presumption that a law is not intended to apply outside the territorial jurisdiction of the State." 380 A.2d at 981.

[2] Indeed, even if the "territorial nexus" requirement were as literal and rigid as Counterclaim-Defendants argue, out-of-state parties presumably could still opt in to Delaware law simply by traveling to Wilmington to sign their contract. The General Assembly might be able to require such formalities, if it wanted to, as a condition of applying Delaware law. But nothing in 6 *Del. C.* § 73-605(a) and (f) or 6 *Del C.* § 2708 suggests such a requirement exists here. And it is hard to see why that would be desirable, let alone as imperative as FdG seems to believe.

But *Singer* pointedly did not say that a territorial connection is the *only* way the Securities Act might govern a transaction. It simply said that the Act "govern[s] transactions which are subject to Delaware jurisdiction under traditional tests." *Id.* There was no choice-of-law agreement at issue in *Singer* and Section 2708 had not been enacted at that time, so the Court had no need to address those matters. But there can be no serious question that consent is one of the "traditional tests" for "Delaware jurisdiction" in the conflicts-of-law arena.

Section 2708 confirms this. Counterclaim-Defendants do not advance any non-constitutional basis for their extraterritoriality arguments (*see* FdG br. 1, 5, 14-17), because Section 2708 forecloses any such basis. The General Assembly expressly instructs that choice-of-law agreements "shall be enforced whether or not there are other relationships with this State." 6 *Del. C.* § 2708. There is no reason to think it intended to *require* some other relationship with the State before the parties' consent suffices. So even if there were a background, presumptive rule of statutory interpretation that might require an additional relationship in other factual circumstances, Section 2708 clarifies that no such rule applies when the parties validly choose Delaware law.

Finally, FdG's attempt to analogize to federal securities laws does not change this outcome. Like *Singer*, the case FdG cites did not involve a choice-of-law agreement and so did not discuss the impact of such agreements. *See Morri-*

son v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010). In an international securities case that did involve a choice-of-law clause, the U.S. Supreme Court strongly suggested it would be enforceable. *Scherk v. Alberto-Culver Co.* involved a German citizen's sale of European companies to an American buyer that was agreed to in Austria, closed in Switzerland, and negotiated in "Europe and the United States." 417 U.S. 506, 508-09, 515 (1974). The contract required that disputes be arbitrated in Paris under U.S. law. *Id.* at 508. The buyer sued under the federal securities statutes, claiming it was defrauded into the purchase. *Id.* at 509. The Court noted that without the contractual choice "considerable uncertainty existed" whether "the laws of the United States generally, and the federal securities laws in particular, would govern disputes arising out of the stock-purchase agreement." *Id.* at 515. In that light it held that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is … an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Id.* at 516. Technically the Court's holding applied only to the forum-selection clause because the conflict-of-laws issue had not been presented to it. *Id.* at 516 n.9. But the courts regularly follow *Scherk*'s logic and enforce choice-of-law agreements to determine which nation's securities laws govern a contract. *E.g., Richards v. Lloyd's of London*, 135 F.3d 1289, 1294-96 (9th Cir. 1998) (en banc) (collecting cases).

* * *

In short, the consent of the parties is exactly the sort of "traditional test[]" of Delaware jurisdiction that this Court in *Singer* held triggers application of the Securities Act. While *Singer* recognized that a territorial nexus is the most common means of bringing conduct within the scope of a statute, a consensual nexus of this type also suffices. Counterclaim-Defendants' reliance on jurisdictional limitations—either as a constitutional limit on Delaware's legislative authority or as a guide to interpreting the Securities Act's own scope—thus falls flat.

2. The Commerce Clause permits contractual choices of law.

Counterclaim-Defendants are left to argue that the Commerce Clause of the U.S. Constitution prohibits applying Delaware law. They are wrong here, too.

Counterclaim-Defendants cite several cases establishing that Delaware cannot regulate commerce (or any other transaction) that has no nexus to this State at all. *E.g.*, FdG br. 16, 19-20.[3] But tellingly, they cannot identify a single case stating that the parties' consent to be governed by Delaware law is not a sufficient nexus for these purposes. A&R is not aware of any such case either. That is not surprising. The dormant Commerce Clause "limits the ability of States and locali-

[3] FdG's reliance on *Lehman Bros. Bank, FSB v. State Bank Commissioner*, 937 A.2d 95, 108 (Del. 2007) is not fully apposite. *Lehman Bros.* was a tax case and applied a tax-specific dormant Commerce Clause test. *See id.*

ties to regulate or otherwise burden the flow of interstate commerce." *McBurney v. Young*, 133 S.Ct. 1709, 1720 (2013) (citation omitted). "The common thread among those cases in which the [Supreme] Court has found a dormant Commerce Clause violation is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation." *Id.* (citation and quotation marks omitted). As long as it does not treat interstate commerce less favorably than intrastate transactions, a "law will be upheld" under the Commerce Clause "unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits." *Dep't. of Rev. of Ky. v. Davis*, 553 U.S. 328, 338-39 (2008) (quotation marks, alteration, and citations omitted). As Delaware and many other States have repeatedly recognized, enforcing contractual choice-of-law clauses does not remotely disfavor, burden, or interfere with interstate commerce. It has the opposite effect. Contractual choices of law *facilitate* interstate commerce by allowing parties to know what law will govern their interstate transactions, and to plan accordingly. *E.g.*, *Abry Partners*, 891 A.2d at 1048; *Weil v. Morgan Staney DW Inc.*, 877 A.2d 1024, 1032-33 (Del. Ch. 2005); *Transdigm, Inc. v. Alcoa Global Fasteners, Inc.*, 2013 WL 2326881, at *5 (Del. Ch. May 29, 2013).

3. The terms of the DSA's anti-fraud provisions do not require conduct physically within Delaware's borders.

Of course a party's contractual consent to Delaware's law does not mean that every single Delaware law automatically governs the transaction. The Bedeker appellees are badly mistaken in arguing otherwise. Br. 3, 19-20. For one thing, the scope of a choice-of-law agreement is not unlimited. If the parties agree to apply a state's law only to determine the validity and meaning of their contract (or only to govern other aspects of their relationship with each other), there is no basis for importing the chosen state's laws addressing other subjects. For another thing, even when the contractual consent is broader, some state laws include an additional Delaware connection (such as conduct within the state's physical borders) as an element of the statutory violation.

These principles address the concerns invoked by Counterclaim-Defendants and the Court of Chancery. Counterclaim-Defendants point to a number of cases that, like *Singer* itself, do not address the effect of choice-of-law agreements at all. *See Klig v. Deloitte LLP*, 36 A.3d 785, 797 (Del. Ch. 2011); *Sullivan v. Oracle Corp.*, 254 P.3d 237 (Cal. 2011); *Abel v. Planning & Zoning Comm'n*, 998 A.2d 1149 (Conn. 2010) (applying statute despite extraterritoriality objection); *Doe v. Boy Scouts*, 2013 WL 6040344 (Del. Super. Sept. 4, 2013). In other cases, a choice-of-law agreement may not include the kinds of claims a plaintiff tries to bring. *See Nat'l Indus. Grp.*, 67 A.3d at 377 (Del. 2013) (contract chose Delaware

law with express exception for blue-sky claims).[4] Finally, many statutes specify that they only regulate conduct with a particular kind of connection to the State. *E.g.*, *Klig*, 36 A.3d at 797 (Del. Ch. 2011) (New York plaintiff could not sue under a Delaware statute applicable to employees "suffered or permitted to work by an employer under a contract of employment either made in Delaware or to be performed wholly or partly therein."). In this vein, the Bedeker appellees echo the Court of Chancery's concern about applying Delaware tax or corporate-governance statutes (Br. 19-20), but A&R already has explained that these statutes by their terms apply only to income earned or entities incorporated *in Delaware*. Opening Br. 20-21. Moreover, it is unlikely that parties who agree that their private relationship is governed by Delaware law are thereby consenting to the imposition of, for instance, Delaware's income tax law.

Finally, the Bedeker appellees try to argue that the Delaware Securities Act also is limited by its terms to conduct "in this State." Br. 5, 15, 20. But they are reading the wrong sections of the Act. A&R explained in its opening brief that the Act's registration provisions do include "in the State" limitations. Opening Br. 19-20. A&R, however, is suing under the Act's false-statement provisions, which do not contain any such language.

[4] More generally, a contract that provides it shall be governed by Delaware law would not likely be consent to, for instance, paying income taxes to the State.

4. Counterclaim-Defendants' contentions would lead to absurd results.

For all these reasons, well-established legal principles prevent Counterclaim-Defendants from wriggling out of their contractual agreement to Delaware law. Ruling in their favor therefore would require a revolution in the law. Counterclaim-Defendants assume that parties can choose Delaware common law to govern their contract even though they are barred from similarly choosing Delaware statutes. *See* FdG br. 24 ("Chancellor Bouchard *did* apply both the statutory and common law of Delaware," despite finding a sufficient geographical nexus to enforce only the latter). They offer no coherent justification for that result. But whether it is correct or not, the consequences of Counterclaim-Defendants' broader position would be calamitous.

Counterclaim-Defendants insist that basic jurisdictional and constitutional rules require an actual physical nexus before Delaware applies its law to a contract—a "super-nexus," if you will. The parties' consent will not do, they say. If that were true it necessarily would bar application of Delaware's common-law contract rules as well as its statutory contract law. The Restatement makes clear that a state can apply neither its common law nor its statutes to a transaction without the minimum jurisdictional contacts needed to regulate the transaction. Restatement

(Second) of Conflict of Laws § 9, cmt. f.[5] Likewise, if the federal Constitution prohibits a state from burdening conduct in other states through legislation, there is no reason to think the state could constitutionally accomplish the same thing by imposing its common law. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572, 573 n.17 (1996) ("[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States," and "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute"); *Alamo Recycling, LLC v. Anheuser Busch InBev Worldwide, Inc.*, 191 Cal. Rptr. 3d 592, 602 (Cal. Ct. App. 2015) (collecting cases).

This reveals just how radical Counterclaim-Defendants' proposed rule is. It would void all contractual choice-of-law clauses unless the transaction had a sufficient physical connection with the chosen state. Section 2708 would be unconstitutional as applied to a great many cases, as would the similar statutes of many other states.[6] Even Section 187 of the Restatement, which requires only a

[5] It has been many decades since courts viewed the common law as "a brooding omnipresence in the sky." *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). Under that now-defunct view, the common law could be applied without restriction even though statutes had to be limited to the jurisdiction of the enacting sovereign. But there is no longer any question that a state's common-law rules, like its statutes, are "the articulate voice of some sovereign." *Id.*

[6] *See* Cal. Civ. Code § 1646.5; Fla. Stat. § 685.101; 735 Ill. Comp. Stat. 105/5-5; Ohio Rev. C. § 2307.39; N.Y. Gen. Oblig. Law § 5-1401; La. Civ. Code Art. 3540.

"reasonable basis" for a contractual choice of law and not necessarily a physical connection, would be unconstitutional in a large number of applications. *See id.* cmt. f ("The parties to a multistate contract may have a reasonable basis for choosing a state with which the contract has no substantial relationship"). Our federalism is designed to facilitate interstate transactions and comity, not destabilize them in this way. There has been no hint from the U.S. Supreme Court that it somehow requires the chaos that would result.

Matters would be just as bad if Counterclaim-Defendants were right, and a contractual choice of law could invoke Delaware's common law of contracts but not its contract statutes. In that scenario, contracting parties could choose Delaware law—but they would get drastically different versions of Delaware law depending on whether their transaction was physically connected to Delaware. Contracts without a physical connection would be governed by Delaware common law but not Delaware's Statute of Frauds, 6 *Del. C.* § 2711, or the Delaware Arbitration Act, 10 *Del. C.* § 5701 *et seq.* Contracts involving sales or leases of goods, negotiable instruments, or secured transactions would not be governed by Delaware's Uniform Commercial Code. *See* 6 *Del C.* § 1-301. Online or electronic contracts that chose Delaware law but lacked physical Delaware connections would be governed by Delaware common law, but not by Delaware's Uniform Electronic Transactions Act. *See* 6 *Del. C.*§§ 12A-101 *et seq.* And those are only

some of the most obvious examples; even more examples doubtless would surface over time.

Counterclaim-Defendants suggest that in these instances *no* state's contract statutes would govern the contract. That is the logical outcome of their insistence that the court below "*did* apply" the Delaware Securities Act, but it just does not cover conduct outside Delaware. FdG br. 11, 24; *see* Bedeker br. 26-27. But even if some other state's contract statutes applied, the parties would be left to guess which state—and to guess how the courts would resolve any conflicts or inconsistencies between those statutes and Delaware common law.[7] The result of either scenario would be the very opposite of the certainty and predictability a choice-of-law clause is supposed to achieve. So if Counterclaim-Defendants' view were the

[7] The Bedeker appellees try to deny that their proposed rule would lead to a choice-of-law guessing game. Br. 25. But their argument refutes itself: they do not suggest which states' blue-sky laws would apply here if Delaware's does not. They refuse even to say whether *any* blue-sky law would apply. *See id.* at 25 (faulting A&R for not "bringing claims under Blue Sky laws of [unidentified] states that *might* satisfy the nexus requirement" (emphasis added)), 25-26 (suggesting that multiple unidentified blue-sky laws may apply), 26 (reversing course and suggesting that A&R may be "precluded … from pursuing a private right of action under the securities laws of any state other than Delaware" and thus "without a [securities-law] remedy for the Securityholders' alleged fraud"). One of the Bedeker appellees' suggestions is that multiple states with "overlapping regulatory interests" can all apply their blue-sky laws to a transaction. *Id.* at 25. Whether or not that is true, it does not help them. If multiple blue-sky laws can apply, it makes even less sense to exclude the blue-sky law of the state chosen by the parties—whose common law Counterclaim-Defendants concede would apply.

law, Delaware choice-of-law clauses likely would vanish from commercial contracts.

Counterclaim-Defendants argue for a sweeping rule of general application: that the U.S. Constitution and fundamental rules of statutory interpretation prohibit the enforcement of choice-of-law clauses with respect to state statutes except in relatively strict factual circumstances. If that were the law, it would have applied to thousands of contracts in all 50 states ever since the first American choice-of-law clause was drafted. And yet Counterclaim-Defendants have not identified a single case refusing on the grounds they assert to apply a choice-of-law clause to state statutes governing contract enforceability or interpretation. Not one.

By contrast, A&R has cited multiple cases enforcing choice-of-law clauses with respect to state blue-sky laws. *See Pyott-Boone Elecs. Inc. v. IRR Trust for Donald L. Fetterolf*, 918 F. Supp. 2d 532, 548 (W.D. Va. 2013); *Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 224 n.28 (3d Cir. 2006); *Concheck v. Barcroft*, 2011 WL 3359612, at *7-8 (S.D. Ohio Aug. 3, 2011); *Malon Res. Corp. v. Midland Bank*, 1997 WL 403450, at *2-3 (S.D.N.Y. July 17, 1997). The Bedeker appellees object that these cases dismiss blue-sky claims brought under the wrong state's law, rather than upholding securities claims brought under the law of the contractually chosen state. Br. 20-21. But that only demonstrates that few previ-

ous defendants have been brazen enough to challenge the applicability of the blue-sky law of a state that they themselves chose.

The Court should not open the Pandora's Box offered by Counterclaim-Defendants unless established law absolutely required it. Fortunately it does not. Counterclaim-Defendants' strange arguments find no support in either law or logic. The Court should reaffirm that contractual choices of Delaware law mean exactly what they say: that Delaware law governs the contract. Here, that includes the Delaware Securities Act.

B. The Delaware Securities Act Applies to Cash-For-Stock Mergers.

Counterclaim-Defendants alternatively try to fall back on 6 *Del C.* § 73-103(a)(17)(d), which codifies what is known as the "no sale" doctrine. The Court of Chancery did not adopt Counterclaim-Defendants' reading of this statute, but they nonetheless reprise it here. This does not help them. Their expansive interpretation of the exemption is unsupported by caselaw, refuted by sound principles of statutory interpretation, poorly fitted to the purpose of the Securities Act, and inconsistent with the sound administration of the securities laws.

1. The Securities Act exempts only stock-for-stock mergers from its coverage.

Section 73-103(a)(17)(d) provides that the terms "sale" and "offer to sell," as they appear in the Securities Act, 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 ….

The question is whether the words "in consideration of the issuance of securities" limit all the items in the preceding list, or instead only the phrase "sale of corporate assets" as Counterclaim-Defendants contend. In other words, the question is whether this provision exempts every merger, including cash-for-stock mergers like the one at issue in this case, or instead only exempts stock-for-stock mergers.

a. No caselaw supports Counterclaim-Defendants' reading.

First, Counterclaim-Defendants have offered no authority for their reading of the statute, and the authority that exists points the other way. Section 73-103(a)(17)(d) is derived from Section 401(j) of the Uniform Securities Act of 1956. *See* Unif. Secs. Act of 2002, Prefatory Note. Even before the Uniform Act was drafted, the federal Securities Exchange Commission had been applying a similar rule under federal law since the 1930s. SEC Comm'r Francis M. Wheat, *Disclosures to Investors—A Reappraisal of Federal Administrative Policies Under the '33 and '34 Acts*, at 256 (1969) ("SEC Wheat Rpt."), *available for download at* http://www.sechistorical.org/museum/galleries/tbi/gogo_d.php (discussing Securi-

ties Act Release No. 493 (Sept. 19, 1935)).[8] But despite the age and widespread use of this rule, Counterclaim-Defendants have not identified even a single case applying it to bar securities-fraud claims based on a cash-for-stock merger like this one. A&R's own research has not uncovered any such case either. *Cf., e.g., Galvin v. Gillette Co.*, 2005 WL 1155253, *1, *4 (Mass. Super. Ct. Apr. 28, 2005) (applying statutory no-sale rule to a stock-for-stock merger).[9] Instead, in some of the only caselaw addressing this issue, the Massachusetts courts have referred to their very similar no-sale statute as "the stock-for-stock merger … exemption" to the securities laws. *Harbourvest Int'l Private Equity Partners II v. Axent Techs., Inc.*, 12 Mass. L. Rptr. 323, 2000 WL 1466096, at *8 (Mass. Super. Aug. 31, 2000) (internal quotation marks omitted).

b. Canons of statutory interpretation favor A&R's reading.

Second, standard canons of statutory interpretation indicate that the "in consideration of" phrase should apply to each item in the preceding list. The "series modifier" canon prescribes that when a modifying phrase appears before or after a series or list of items, it modifies all of them if it is logically capable of doing so.

[8] The Wheat Report was "[a] milestone document in SEC history" that "laid the groundwork for the development of an integrated disclosure system." http://www.sechistorical.org/museum/galleries/tbi/gogo_d.php. Its chapter on the no-sale doctrine reviews the SEC's historical understanding of the rule as applying to stock-for-stock transactions.

[9] The Bedeker appellees note that no Delaware court has ruled the other way, either. Br. 28. Indeed, this is a question of first impression under Delaware law.

See Opening Br. 27. That is the sentence structure that appears in § 73-103(a)(17)(d). Counterclaim-Defendants point out that it would be grammatically possible to apply the more general last-antecedent canon to this kind of sentence structure. But if the series-modifier canon means anything, it at least must indicate that this often is not the correct approach.[10]

FdG suggests that the series-modifier canon could apply only if the postpositive modifier is set off from the list by a comma. Br. 27-28. The U.S. Supreme Court rejected that argument in *United States v. Bass*, 404 U.S. 336 (1971). There the statute applied to "any person … who receives, possesses, or transports in commerce or affecting commerce … any firearm." *Id.* at 337. The question was whether the words "in commerce …" modified only "transports." The Court noted the absence of a comma before the modifying phrase "in commerce," but stated "that use of such commas is discretionary," and described linguistic authorities as

[10] *See Lockhart v. United States*, 136 S.Ct. 958, 970 (2016) (Kagan, J., dissenting) (the Supreme "Court has made clear that the last-antecedent rule does not generally apply to the grammatical construction present here: when the modifying clause appears at the end of a single, integrated list. Then, the exact opposite is usually true: … the modifying phrase refers alike to each of the list's terms." (alteration and quotation marks omitted)). Most of the last-antecedent cases Counterclaim-Defendants cite did not involve a statute with this kind of parallel sentence structure. *See In re Surcharge Classification 0133*, 655 A.2d 295, 300 (Del. Super. 1994); *Rubick v. Sec. Instr. Corp.*, 766 A.2d 15, 18-19 (Del. 2000).

"cheerfully tolerant" of omitting the comma even where the modifier applies to the entire list. *Id.* at 340 n.6.[11]

The text of the Securities Act overwhelmingly uses exactly that convention. One of the Act's foremost provisions makes it unlawful "[t]o employ any device, scheme or artifice to defraud" in a securities sale. 6 *Del. C.* § 73-201(1). Plainly the words "to defraud" modify all three items in the preceding list. *See also id.* § 73-305(a) (using same language to same effect). Similar sentence structures appear over and over again in other portions of the Act, in situasituations where the modifier obviously applies to the entire list. Many examples are reproduced in Table 1.

[11] Experience confirms that this is how people write every day. To give just one example, consider this sentence: "I will not go to clubs, restaurants, or bars that support my college's big rival." With or without a comma after the word "bars," a reasonable reader would not think that the author refuses to go to any club or restaurant. The phrase beginning "that support" is modifying every item in the list. For further examples from colloquial and legal writing *see Lockhart v. United States*, 136 S.Ct. 958, 969, 972 n.2 (2016) (Kagan, J., dissenting).

Table 1. Series-Modifier examples from the Delaware Securities Act.

6 *Del. C.* §:	**Series-Modifier Language**
73-201(3)	Prohibits "act, practice or course of business which operates or would operate as a fraud"
73-204(b)(8)	Requires reporting "cash, securities, contracts, or anything else of value to accrue to the underwriters or finders in connection with the offering"
73-205(b)	Requires reporting "any adverse order, judgment, or decree entered in connection with the offering by the regulatory authorities in each state or by any court or the [SEC]"
73-206(a)(2)	Authorizes stop orders for violation of "any rule, order, or condition lawfully imposed under this chapter"
73-207(a)(3)	Exempts issuances by "any bank organized under the laws of the United States, or any bank, savings institution, or trust company organized and supervised under the laws of any state"
73-211	"The Director may by rule or order require the filing of any prospectus, pamphlet, circular, form letter, advertisement or other sales literature or advertising communication addressed or intended for distribution to prospective investors"
73-304(a)(13)	Authorizes revoking registration of "a partner, officer, director, controlling person or any person occupying a similar status or performing similar functions in a broker-dealer or investment adviser whose registration in this State or any state, or with the [SEC], has been revoked for disciplinary reasons"
73-402	Authorizes subpoena of "any books, papers, correspondence, memoranda, agreements, or other documents or records which the Director deems relevant or material to the inquiry"
73-404	Prohibits penalties "on account of any transaction, matter, or thing concerning which the person is compelled, after claiming privilege against self-incrimination, to testify"
73-605(g)	"Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this chapter or any rule or order hereunder is void."
73-702	Specifies methods for service of process "in any noncriminal suit, action or proceeding against the person or the person's successor executor or administrator which arises under this chapter"

Even if the series-modifier canon did not control outright here, at the very least the choice between it and the last-antecedent canon would be inconclusive. *See Rag Am. Coal Co. v. AEI Res., Inc.*, 1999 WL 1261376, at *5 (Del. Ch. Dec. 7, 1999) (warning against "giving undue weight to the last antecedent rule and to the niceties of punctuation and sentence structure" in interpreting a contract, or to "weary drafters' placement of a comma where there is room for doubt as to the parties' intent").[12] And other principles of statutory interpretation confirm that the "in consideration of" phrase cannot be limited to asset sales.

For starters, the statutory reference to transactions "in consideration of the issuance of securities of *the same* or another corporation" (emphasis added) would not make sense if it applied only to asset sales. Corporations can and often do reissue stock to their own stockholders in consideration of reclassifications, consolidations, and mergers. But a corporation cannot sell its own assets "in consideration of" *its own issuance* of securities. The General Assembly would not

[12] U.S. Supreme Court precedent confirms this conclusion. Counterclaim-Defendants rely on the Court's recent use of the last-antecedent canon in *Lockhart*. They do not note, however, that the Court also recently applied the series-modifier canon to a statute with a similar linguistic structure. *See Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014) (construing 18 U.S.C. § 2259(b)(3)). The combination of *Paroline* and *Lockhart* demonstrates that, in situations where either the last-antecedent or the series-modifier canon might apply, the choice between them cannot be made mechanically.

have written a nonsense clause into Section 73-103(a)(17)(d) in this way.[13] "Words in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of statutory language, if reasonably possible." *Chase Alexa, LLC v. Kent Cnty. Levy Court*, 991 A.2d 1148, 1152 (Del. 2010) (brackets and citation omitted).

If any further tiebreaker were needed, it would be that securities statutes "are to be liberally and broadly construed, … with … the exemptions and exceptions being narrowly construed." 69A Am. Jur. 2d Securities Regulation—State, § 4. Counterclaim-Defendants protest that the Securities Act's exemptions are "broad." FdG br. 29; Bedeker br. 28. Even assuming that is an accurate description of the exemptions, it does not address the issue at hand: how those exemptions should be construed at their margins in cases of doubt. In that situation, an overwhelming consensus of States construe their blue-sky exemptions in favor of preventing fraud

[13] FdG gamely suggests that a corporation might pay someone (in securities) to take "contaminated property" off its hands. Br. 28 n.12. This is not a recognizable "sale" of "assets." On this reading leaving your trash on the curb once a week is "selling" it to the sanitation company. Even the source quoted by FdG puts the word "selling" in scare quotes when describing this kind of transaction. *Id.* And even if that scenario involved a sale, the issuance of securities would not be the *consideration* for the sale, as the statute requires. FdG's hypothetical corporation requires no inducement to "sell" its toxic "assets." Rather the issuance of securities is consideration for the "buyer" to *accept* them. On top of all this, FdG cannot explain why such a hypothetical transaction would ever be likely to require shareholder approval—which is necessary to trigger the statutory exemption.

rather than expanding the exemption further.[14] Delaware's no-sale rule should accordingly be read narrowly, rather than expanded to exempt Counterclaim-Defendants from the securities laws.

c. Statutory purpose also favors A&R's reading.

Both of Counterclaim-Defendants' briefs prominently quote "[t]he purpose of the Delaware Securities Act" as set forth in 6 *Del. C.* § 73-101(b). FdG br. 29;

[14] *E.g.*, *Gilford Partners v. Pizitz*, 630 So.2d 404, 406 (Ala. 1993); *Siporin v. Carrington*, 23 P.3d 92, 95 (Ariz. Ct. App. 2001), *as amended* (May 10, 2001); *Schultz v. Rector-Phillips-Morse, Inc.*, 552 S.W.2d 4, 9 (Ark. 1977); *People v. Rivera*, 56 P.3d 1155, 1163 (Colo. App. 2002); *Cox v. Garvin*, 607 S.E.2d 549, 552 (Ga. 2005); *Benjamin v. Cablevision Programming Inv.*, 499 N.E.2d 1309, 1315 (Ill. 1986) (adopting a "liberal application of the statutory definition of the term 'sale'"); *Midwest Mgmt. Corp. v. Stephens*, 291 N.W.2d 896, 910 (Iowa 1980); *State ex rel. Mays v. Ridenhour*, 811 P.2d 1220, 1230 (Kan. 1991); *Frishman v. Maginn*, 912 N.E.2d 468, 477 (Mass. App. Ct. 2009); *Fred J. Schwaemmle Constr. Co. v. Dep't of Comm.*, 360 N.W.2d 141, 146 (Mich. 1984); *Fairview Cemetery Ass'n v. Eckberg*, 385 N.W.2d 812, 815 (Minn. 1986); *Fin. Sols. & Assocs. v. Carnahan*, 316 S.W.3d 518, 527 (Mo. Ct. App. 2010); *State v. Duncan*, 593 P.2d 1026, 1033 (Mont. 1979); *DMK Biodiesel, LLC v. McCoy*, 859 N.W.2d 867, 871 (Neb. 2015); *E. Midtown Plaza Hous. Co. v. Cuomo*, 981 N.E.2d 240, 245 (N.Y. 2012); *Kaylor v. Iseman Mobile Homes*, 369 N.W.2d 101, 104 (N.D. 1985); *In re Columbus Skyline Sec., Inc.*, 660 N.E.2d 427, 429 (Ohio 1996); *Com. v. Bomersbach*, 393 A.2d 995, 998 (Pa. Super. 1978) ("[T]he section of the Act which delineates the classes of investments that are to be protected must be liberally construed."); *Gordon v. Drews*, 595 S.E.2d 864, 868 (S.C. Ct. App. 2004) ("[W]e must narrowly construe exemptions under the Act"); *State v. Casper*, 297 S.W.3d 676, 694 (Tenn. 2009); *Payable Acctg. Corp. v. McKinley*, 667 P.2d 15, 17 (Utah 1983); *Ascher v. Com.*, 408 S.E.2d 906, 917 (Va. Ct. App. 1991) (the courts "read narrowly the exemption provisions" of the securities laws) (quoting *Pollok v. Com.*, 229 S.E.2d 858, 860 (Va. 1976)); *Go2Net, Inc. v. Freeyellow.com, Inc.*,*109* P.3d 875, 881 (Wash. Ct. App. 2005) *aff'd*, 143 P.3d 590 (2006); *First Nat'l Sav. Found., Inc. v. Samp*, 80 N.W.2d 249, 256 (Wis. 1956); *Gaudina v. Haberman*, 644 P.2d 159, 166 (Wyo. 1982).

Bedeker br. 27, 31-32. But their quotation is incomplete. The full statutory statement of purpose is:

> 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, **as well as to remedy any harm caused by securities law violations**.

6 *Del C.* § 73-101(b) (emphasis added). Neither of their briefs acknowledges the second phrase of the statutory purpose. This omission matters a great deal. The Securities Act contains many provisions that regulate *only* broker-dealers, advisers, or agents. *See generally* 6 *Del. C.* § 73-301 to 306. Read in its full context, the stated statutory purpose of protecting the public from misconduct by such individuals is best understood as focusing primarily on those provisions. Meanwhile, the broader purpose of remedying "harm caused by securities law violations" is better read as focused more on the Act's general provisions that are not limited to broker-dealers or similar persons. In that light, the general statutory purpose provides no support for Counterclaim-Defendants' restrictive reading.

Unsurprisingly, Counterclaim-Defendants fare little better in trying to cook up a specific statutory purpose for the no-sale rule that supports their interpretation of it. They argue that it makes sense to exempt all transactions subjected to a stockholder vote, because the vote itself (plus appraisal rights) is adequate protection from fraud. Bedeker br. 31-32; FdG br. 29-30. But this rationale is a clumsy fit for the statutory language. If the General Assembly had wanted to exempt any

securities transaction authorized by a stockholder vote and backed by appraisal rights, it could simply have said that, instead of drafting an awkward list of different possible varieties of such transactions. Similarly, under Counterclaim-Defendants' rationale there would be no reason for the exemption to cover only asset sales in consideration of the *issuance* of securities. Rather, it would exempt stockholder-approved asset sales in connection with the transfer of *any* securities, whether or not they were newly issued.

Read properly, the statute shows the General Assembly was comfortable exempting transactions that are more like an internal corporate reorganization than an actual sale of securities. *See* Fletcher Cyclopedia of the Law of Corporations § 6798 (referring to the no-sale rule as "[t]he exemption for exchanges of securities in connection with a bona fide reorganization"). Stock-for-stock reclassifications, mergers, dissolutions, or asset sales often are ways for a corporate family to reorganize with little change in its stockholders' real-world ownership interests. When such transactions are approved by a stockholder vote, the General Assembly decided not to require the issuance to be registered and subjected to securities-fraud claims. By contrast, cash-for-stock mergers more often resemble pure sales—as here, where A&R paid $200 million in exchange for stock. The General Assembly reasonably concluded that this type of transaction should be regulated in the same manner as other cash sales of securities.

d. This merger was not "in consideration of the issuance of securities."

FdG makes a last-ditch attempt to invoke the no-sale rule by arguing that, because the merged corporation here issued new stock to its new owners, the merger actually was "in consideration of the sale of securities." Br. 28-29. This misunderstands the structure of the parties' transaction, the meaning of the word "consideration," or both. The exemption applies where a merger target's former owners are issued new stock in exchange for allowing the target to merge. *E.g.*, *Galvin*, 2005 WL 1155253, at *1, *4. That is not what happened here, where the target's former ownership (Counterclaim-Defendants) received cash in exchange for relinquishing their stock. The merger and the issuance of new stock were simply the two steps in the process of transferring ownership. The stock issuance was not consideration for the merger. Rather, the cash payment was consideration for both the merger and the new issuance. The Merger Agreement itself expressly stated as much. It defined the "Merger Consideration" not as securities, but as cash: the total of a "Per Share Common Payment and a Pro Rata Share of [certain] disbursements." App. A89.

2. The no-sale rule does not apply to securities sales negotiated by a majority stockholder.

Even if the no-sale rule sometimes applied to cash-for-stock transactions—and for the reasons discussed, it does not—it would not apply here. The rule's his-

tory makes clear it never exempts sales of securities that, like this one, were negotiated by a majority stockholder.

6 *Del C.* Section 73-103(a)(17)(d) enacts Section 401(j) of the Uniform Securities Act of 1956, and the drafting history of Section 401(j) makes plain that it "incorporates all of the SEC's traditional 'no sale theory'."[15] Draftsmen's Commentary, in Louis Loss, *Commentary on the Uniform Securities Act*, at 103; *see also* Uniform Securities Act of 2002, § 102 cmt. 27 ("Section 401(j) of the 1956 Act addressed the … SEC 'no sale' doctrine."). And the SEC repeatedly interpreted its no-sale rule to mean that "[w]here the persons negotiating an exchange, merger or similar transaction have sufficient control of the voting stock to make a vote of stockholders a mere formality, [the no-sale rule] does not apply." *In re Great Sweet Grass Oils Ltd.*, 37 S.E.C. 683, *6 (Apr. 8, 1957).[16] The SEC explained that the no-sale rule's rationale is that a stockholder is not really engaged in a sale of securities when "the exchange or alteration of the stockholder's security occurred not because he consented thereto, but because [a] corporate action" pursuant to a stockholder vote "converted his security into a different security." *Notice*

[15] The SEC's no-sale rule can be found at 17 C.F.R. § 230.133(a), which contains language very similar to Section 73-103(a)(17)(d).

[16] FdG suggests that the negotiated-transaction exception had been abrogated before 1971. Br. 31 n.13. That is plainly wrong, as the SEC was still applying it in 1971. *E.g.*, *Moxie-Monarch-Nugrape Corp.*, SEC No-Action Ltr., 1971 WL 259509 (Sept. 24, 1971).

of Adoption of Rules 145 & 153a, SEC Rel.No. 5316 (Oct. 6, 1972). But this is not the case when "the terms of the transaction are essentially 'negotiated' by the shareholders of the company." SEC Wheat Rpt., *supra* at 20. In that situation, the SEC clarified that the no-sale exemption is not available.

Counterclaim-Defendants do not dispute that this merger was negotiated by the stockholders of the target. The objections they do make are unmeritorious. They note that the SEC phased out its no-sale rule just before the Delaware Securities Act was adopted. FdG br. 31. But that does not change the fact that Delaware's no-sale doctrine is modeled on the former SEC rule. FdG also notes that the negotiated-transaction rule means the securities laws apply to a transaction "in the absence of a statutory exemption." *Id*. But it badly misses the point in arguing that the Delaware Securities Act's no-sale rule is such an exemption. *Id.* The negotiated-transaction doctrine is and was an exception *to the no-sale rule.* So a negotiated transaction is governed by the Act unless some *other* statutory exemption applies.

Thus, even if Section 73-103(a)(17)(d) exempted *some* cash-for-stock mergers from the securities laws, it would not exempt this one.

II. FdG Should Not Be Allowed To Abscond With The Proceeds Of A Partial Judgment.

All indications are that FdG is planning to evade any judgment against it for fraud. In both the Court of Chancery and this Court, A&R has sounded the alarm that FdG likely is going out of business and probably will refuse to honor any judgment against it on the remaining counterclaims. So allowing FdG to execute on its partial final judgment would risk a perverse outcome where this litigation determines that FdG fraudulently induced the contract—but the result of the litigation is that FdG nets $2 million under the contract anyway.

FdG has not disputed this in either court. It says not a word suggesting that a stay was not necessary in these circumstances. Instead FdG puts all its eggs in the basket of waiver, arguing that A&R did not request below that the Court of Chancery prevent FdG from dissipating an interlocutory payment.[17] That is demonstrably wrong. A&R expressly requested below that FdG not be permitted to collect immediately regardless whether the court entered a partial final judgment. Counterclaim-Defendants discussed this request in their briefing, and the Court of Chancery considered and rejected it.

[17] In light of the Court of Chancery's decision regarding the Delaware Securities Act, the parties agree that a partial final judgment pursuant to Rule 54(b) was appropriate to facilitate appellate review. *See* FdG br. 6, 34-35. The problem is not with entering the judgment but with allowing its unfettered execution.

Counterclaim-Defendants' summary-judgment brief requested that A&R be ordered to pay them, but did not expressly ask for a partial final judgment or mention Rule 54(b). In opposition, A&R argued that the pendency of the larger counterclaims suggested not entering summary judgment, or at least leaving any partial summary judgment nonfinal under Rule 54(b). But A&R then argued that even if a partial final judgment were appropriate,

> the better option is to order the funds paid into court, rather than arbitrarily shifting possession of them from one side to the other before it is clear who will wind up owing whom when all is said and done.

App. A374-75. A&R noted that "[a]ll the reasons against rushing to order interlocutory payments apply with full force here," App. A375, and so maintained that

> [i]f for some reason the Court were to find immediate payment by [A&R] to be necessary, this would be all the more reason to have [A&R] deposit the funds with the Court, rather than compel [A&R] to hand over $2 million to FdG at this stage when the prospect of [A&R's] $200 million recovery … looms.

App. A376.

In other words, A&R requested that the Court of Chancery stay execution of any partial final judgment on the condition that the funds be paid into court. Of course the Court of Chancery could have crafted some alternative condition on the stay—such as requiring a letter of credit or an internal reserve from A&R,[18] or

[18] The Court of Chancery accepted a letter of credit from A&R as security for a stay pending appeal. App. A559-60.

simply accepting A&R's assurances that it could pay the partial judgment should its counterclaims eventually fail. *See* App. A375-76. Even if the request was "inartfully expressed," that does not cause a waiver. *Delle Donne & Assocs., LLP v. Millar Elevator Serv. Co.*, 840 A.2d 1244, 1251 (Del. 2004). In its reply FdG even agreed that a payment into court could be an acceptable alternative to immediate payment. App. A406-07. The Court of Chancery clearly understood that the issue before it was not just whether a partial final judgment was appropriate, but also whether it should order an immediate payment. It recognized A&R's position "that an interlocutory payment to FdG Logistics would be inappropriate" and that "it rarely makes sense to order *payment* on a smaller claim until it is known whether it will be swallowed up by a larger one." Op. 38-39. And it expressly rejected A&R's position, ruling that "A&R could have bargained for the right to delay payment" but "did not do so," and declining "to rewrite the … Agreement … to have it serve A&R's current strategic interests in delaying payment." Op. 39.

FdG does not dispute that there is significant risk it will not pay any judgment against it. Nor does it dispute that this warrants a stay of execution or other appropriate safeguards. At the very least, then, this Court should instruct the Court of Chancery to stay execution of its partial final judgment, or otherwise ensure that any interlocutory payment will be available to satisfy a judgment on A&R's still-pending counterclaims.

CONCLUSION

The judgment of the Court of Chancery should be reversed as to FdG's contract claim and A&R's counterclaim under the Delaware Securities Act.

Respectfully submitted,

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