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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SERGEY ALEYNIKOV, Plaintiff Below/Appellant, v. THE GOLDMAN SACHS GROUP, INC., a Delaware corporation, Defendant Below/Appellee.	:	No. 366, 2016 Court of Chancery C.A. No. 10636-VCL

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Regulations

Journals & Treatises

Other Authorities

NATURE OF PROCEEDINGS

Plaintiff, Sergey Aleynikov ("Aleynikov"), a former Vice President of Goldman, Sachs & Co. ("Goldman LP"), filed this action to compel Defendant, The Goldman Sachs Group, Inc. ("Goldman Parent"), to advance his fees to defend counterclaims (the "Counterclaims") that it and Goldman LP filed against him in an indemnification action pending in federal court in New Jersey (the "New Jersey Action"). The court granted Aleynikov summary judgment in the New Jersey Action, declaring him an officer under Goldman Parent's bylaws (the "Bylaws"). But a divided panel of the Third Circuit reversed and remanded, finding that the term was ambiguous; that material issues of fact precluded summary judgment; and that this Court would not apply *contra proferentem* to resolve that ambiguity.

Following a one-day trial, the Court of Chancery found that a reasonable person in the parties' position would interpret the term officer to include Goldman LP Vice Presidents such as Aleynikov. But the court held that the Third Circuit's forecast of Delaware law was binding on him even though wrong; apparently believed that prediction sidelined all evidence of how a reasonable person in the parties' position would interpret the term "officer;" and—although his analysis made clear that the remaining evidence weighed in Aleynikov's favor—held it was in equipoise and that Aleynikov did not prove he was an officer under the Bylaws.

SUMMARY OF ARGUMENT

1. The Third Circuit held that the term "officer" in the Bylaws was ambiguous, that *contra proferentem* did not apply, and that extrinsic "course of dealing" and "trade usage" evidence might illuminate how a reasonable person in the parties' position would understand the term. The court below correctly found that Goldman Parent's use of "officer" elsewhere in the Bylaws, the historical use of the term at investment and commercial banks, the wording of Delaware statutes, and the definition of "officer" in SEC rules and commentary—***all classic trade usage evidence***—compelled the reasonable conclusion that the term includes all Vice Presidents. And the court correctly rejected all of Goldman Parent's arguments to the contrary—that title inflation in the investment banking industry, Goldman LP's procedure for appointing officers by written consent, and its record of providing indemnification compel the conclusion that "officer" does not include all Vice Presidents. That analysis of the evidence was entirely sound. But the court below erred as a matter of law in failing to apply its correct findings to interpret the ambiguous term. Even assuming the Third Circuit's *contra proferentem* ruling was binding on it, the lower court misread the Third Circuit's opinion, which instructed the district court to evaluate course of dealing ***and trade usage evidence*** to determine how a reasonable person in the parties' position

would understand the term "officer." Although the court below did that analysis, it apparently concluded that its findings only explained how *contra proferentem* would apply if it were available, and lamented that it was not. The lower court's view of the Third Circuit's *contra proferentem* ruling—that it precluded consideration of the voluminous record evidence it compiled of how a reasonable person would interpret the term "officer"—was legally erroneous. The common understanding of a term as reflected in the Bylaws, historical industry practices, statutory law, and commentary is directly relevant to determining how a reasonable person would interpret an ambiguous contract term—and thus to resolving that ambiguity—*regardless of who drafted the contract*. The lower court's findings were adverse to Goldman Parent not because it drafted an ambiguous bylaw—which *contra proferentem* entails—but because the most reasonable interpretation of that bylaw disfavored Goldman Parent. Thus, the court's decision to treat its findings as to the reasonable understanding of "officer" as relevant only to *contra proferentem* was erroneous as a matter of law.

2. The court below erred in declaring that the truncated evidence to which it erroneously limited its assessment was in equipoise. The court recounted no evidence weighing in favor of Goldman Parent, and the record contains none. To the contrary, the court rejected all of Goldman Parent's evidence and credited

all of Aleynikov's. Its findings of fact therefore compelled the legal conclusion that the Bylaws' term "officer" includes all Vice Presidents of Goldman LP.

3. The court below erred in finding that the Third Circuit's *contra proferentem* ruling was binding under the doctrine of issue preclusion. That ruling was not "final" in any ordinary sense of the word—the case in which it was entered is still pending—and there is no good reason to treat it as such. The appeals court's interlocutory *Erie* prediction that Delaware would not apply *contra proferentem* in an advancement case to determine whether a party had rights under corporate bylaws was inherently tentative and, as the court below explained, wrong as a matter of existing Delaware law. Moreover, the equally flawed factual assumption underlying that ruling—that Aleynikov had no rights under the Bylaws as a Goldman LP employee unless he was an officer—was not "actually litigated" in the New Jersey Action. Goldman Parent did not even make that argument until appeal. Thus, although the Third Circuit *assumed* that Aleynikov would only have rights under the Bylaws if he was found to be an officer, that question was never "actually litigated" in the New Jersey Action, where it remains an open issue to be resolved on remand. Here, where the question *was* actually litigated, the lower court correctly found that "Aleynikov was a party to and entitled to benefits under the Bylaws in his capacity as an employee." (Op. ¶ 5d.xvi.)

STATEMENT OF FACTS

A. The Parties And The Relevant Provision Of The Bylaws.

Goldman LP is a non-corporate subsidiary of Goldman Parent, a Delaware corporation. (A510, ¶¶ 1-2.) By letter dated March 22, 2007, a Vice President from Goldman LP offered Aleynikov the position of Vice President in Goldman LP's Equities Division. (A267-68.) Aleynikov accepted the offer and, between May 7, 2007, and June 30, 2009, served as a Vice President and computer programmer responsible for developing and maintaining computer source code for Goldman LP's high-frequency trading ("HFT") business. (A510-11, ¶¶ 10, 12, 15.) Goldman LP issued business cards to Aleynikov bearing the Goldman Sachs logo and identifying him as a Goldman LP Vice President. (A511, ¶ 11; A724.)

During Aleynikov's tenure at Goldman LP, the Bylaws stated:

> Section 6.4. Indemnification. The Corporation shall indemnify to the full extent permitted by law any person made or threatened to be made a party to any action, suit or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that such person . . . is or was a director or ***officer*** of . . . a Subsidiary of the Corporation. . . . [W]hen used with respect to a Subsidiary or other enterprise that is not a corporation . . ., ***the term "officer" shall include*** in addition to ***any officer of such entity***, any person serving in a similar capacity or as the manager of such entity. . . .

(A283-84 (emphasis added).)

B. The New Jersey Action And The Third Circuit's Decision.

In June 2009, Aleynikov electronically transferred lines of HFT computer source code to a server outside the firm. *United States v. Aleynikov*, 676 F.3d 71,

74 (2d Cir. 2012). That conduct led to his trial and conviction on federal charges, for which he served almost a year in prison before the Second Circuit reversed his conviction and ordered him acquitted and released immediately on February 16, 2012, the day his appeal was argued. *Id.* at 75. Shortly thereafter, New York commenced a prosecution of Aleynikov on state charges based on the same underlying conduct. As in the federal case, he was acquitted of all charges. *See People v. Aleynikov*, 15 N.Y.S.3d 587 (N.Y. Sup. Ct. 2015). The People's appeal regarding one charge dismissed by the court is pending.

After his state arrest, Aleynikov sued Goldman Parent in the New Jersey Action, seeking indemnification for his successful defense of the federal criminal action and advancement to defend the state criminal action. The district court denied cross-motions for summary judgment and ordered discovery on Goldman Parent's representations that it "has established a process of appointment that clearly distinguishes between officers and non-officers," and that "Vice President" was not an officer's title because it was "something of a courtesy title in its industry." *Aleynikov v. The Goldman Sachs Group, Inc.*, 2012 WL 6603397, at *1 (D.N.J. Dec. 14, 2012). Goldman LP joined the New Jersey Action and, together with Goldman Parent, filed the Counterclaims. (A297-308.)

Following discovery, the district court granted Aleynikov's renewed

summary judgment motion for advancement. The court found that "[t]he usual and ordinary meaning of vice president, supplemented by [the case law discussed in its opinion]," indicated that the Bylaws read unambiguously in Aleynikov's favor and "may be enforced as written, as a matter of law." *Aleynikov v. The Goldman Sachs Group, Inc.*, 2013 WL 5739137, at *17 (D.N.J. Oct. 22, 2013). Nonetheless, "in the interest of thoroughness," *id.* at *19 n.17, the court considered the extrinsic evidence developed in discovery—that is, (i) Goldman LP's process of appointing certain "officers" by written consent of its General Partner; (ii) Goldman Parent's history of indemnification decisions, which showed that it had paid the legal fees of 51 of the 53 persons who sought them, including 15 Vice Presidents, *id*. at *6; and (iii) evidence that investment banks have many "Vice Presidents," *id.*—but concluded this evidence was not "sufficient to raise a material issue of fact" because it was either irrelevant or supported Aleynikov's position. *Id.* at *18. It further reasoned that, even if the evidence raised a question of fact, "it would cease to be a material one in light of the Delaware doctrine of *contra proferentem*." *Id.*

In a split decision, the Third Circuit reversed. All panel members agreed that, as a threshold matter, the term "officer" was "ambiguous." *Aleynikov*, 765 F.3d at 362, 367-68; *id.* at 368 (Fuentes, J., dissenting). But the majority, over a vigorous dissent, found that "the relevant extrinsic evidence . . . raise[ed] genuine

issues of material fact [that] preclude[d] summary judgment." *Id.* at 353. The first category of "extrinsic evidence" the majority believed might reveal the parties' intent[1] was "course of dealing" evidence, which consisted of Goldman LP's "procedure for appointing officers and . . . record of providing indemnification and/or advancement." *Id.* at 363. The second consisted of "trade usage" evidence "showing that title inflation in the financial services industry is prevalent and the title of vice president is not particularly meaningful." *Id.* at 364-65. The court noted that this extrinsic evidence could be irrelevant, but left that determination to the district court. *Id.* at 364 & n.8. The Third Circuit also invited Aleynikov "to present his own evidence with respect to the meaning of this term at [Goldman LP]." *Id.* at 365 n.9. It directed the trial court to determine "how a reasonable person in the position of the parties would interpret the contract term." *Id.* at 365.

Then, finding "no case law directly on point," the appeals court predicted that, if confronted with the issue, this Court would hold that *contra proferentem* does not apply to determine whether one has rights under a contract. *Id.* at 366. The dissent disagreed, noting that the majority's "exception" contravened "clear language in Delaware case law stating that *contra proferentem* applies to

[1] The Third Circuit noted that most extrinsic evidence was irrelevant because Aleynikov had no role in drafting the Bylaws, but found itself "in a bind" given its view that (a) *contra proferentem* does not apply to determine whether one has rights under a contract; and (b) Aleynikov would have rights under the Bylaws only if he was found to be an officer. *Aleynikov*, 765 F.3d at 362.

ambiguous provisions of governing documents" and "the public policies motivating the rule." *Id.* at 369 (Fuentes, J., dissenting).

C. The Instant Advancement Action And The Order On Appeal.

Following remand, when the district court ruled that Aleynikov could not secure emergent relief there on his advancement claim because there was no federal analogue to 8 *Del. C.* § 145(k), *Aleynikov v. The Goldman Sachs Group, Inc.*, 2015 WL 225804, at *2 n.4 (D.N.J. Jan. 16, 2015), he filed this action to compel Goldman Parent to advance his fees to defend the Counterclaims. (A315-25.) A one-year delay followed, caused by Goldman Parent's improvident removal of this action and its eventual remand to this court. *See Aleynikov v. The Goldman Sachs Group, Inc.*, 2016 U.S. Dist. LEXIS 1166 (D.N.J. Jan. 6, 2016).

On April 28, 2016, the court below conducted a one-day trial. The trial record consisted of numerous exhibits, including discovery responses and admissions from the New Jersey Action, SEC rules and commentary, and reports submitted by testifying experts for both parties, as well as deposition transcripts. (A522-28; A10-14.) At trial, Aleynikov's expert, Donald Jones, a long-time senior human resources executive at three prominent investment banks, testified that in the investment-banking industry as elsewhere, employees with the title "Vice President" are commonly understood to be officers of their firms. (A562, Tr.

133:24-134:2; *accord* A553, Tr. 100:5-13; A561, Tr. 129:10-13; A566, Tr. 152:3-9.) He further testified that this common understanding was reflected in the SEC rules, which expressly define the unqualified term "officer" to include a "Vice President." (A558, Tr. 118:1-24.) By contrast, Goldman Parent's expert, industry consultant Michael Curran, testified that there was no commonly understood meaning of the term "officer" in the investment-banking industry. (A593-94, Tr. 259:1-18, Tr. 260:23-261:4.)

At the trial's conclusion, the court called for additional briefing to address, in particular, the historical treatment of the "vice president role" at investment banks, which the court indicated it would find especially probative. (A613, Tr. 337:6-15.) In response, Aleynikov submitted a post-trial brief and accompanying materials demonstrating beyond question that, in both the commercial and investment banking sectors, employees with the title "Vice President" have been considered "officers" of their institutions since the early 20th century, and that this understanding was reflected in key New Deal legislation and ensuing SEC regulations. (A698-712; A28-A142.) Goldman Parent, by contrast, submitted no such evidence; it simply echoed its trade usage "title inflation" argument by citing additional articles and books making the uncontroversial point that investment banks, including Goldman LP, have had many Vice Presidents since at least the

1980s. (A717-19.)

On July 13, 2016, the lower court rendered its Post-Trial Order and Final Judgment. The court held, as an initial matter, that the Third Circuit's ambiguity ruling and its *contra proferentem* prediction were preclusive in this litigation. (Op. ¶¶ 4-5.) The court expressly found the *contra proferentem* analysis inconsistent with Delaware law, (*id.* ¶ 5.d), but held that it was final and binding. (*Id.* ¶ 5.a.) The court also refused to apply the exception to issue preclusion permitting reconsideration of issues of law whose application would lead to inequitable results, reasoning that there was no "intervening" legal change because the Third Circuit's *contra proferentem* ruling was wrong on the law *ab initio*. (*Id.* ¶ 5.c.)

The court then considered how a reasonable individual in the parties' position would interpret "officer" in light of the Bylaws' text and the trial evidence. Accepting Aleynikov's analysis and rejecting that of Goldman Parent, the court made several findings, each of which was supported by the text of the Bylaws, the record evidence, or matters of which the court took judicial notice.

First, the court found that reading the related provisions of the Bylaws *in pari materia* "suggest[ed] that the set of 'officers' for non-corporate subsidiaries would include 'vice presidents.'" (Op. ¶ 5.d.iii.) That was because a separate section of the Bylaws—§ 4.1—expressly defined an "officer" at Goldman Parent

to include "'vice presidents.'" (*Id.*)

Second, the court found that "[a] set of 'officers' that encompasses 'vice presidents' is consistent with the widespread understanding of who typically comprise the officers of an entity." (Op. ¶ 5.d.iv.) This understanding, the court explained, was reflected in Delaware's corporate code, which "expressly treats the concept of an entity's 'officers' as including a 'vice president' . . . ." (*Id.* ¶ 5.d.iv (citing 8 *Del. C.* § 158); *id.* ¶ 5.d.iv n.1.)

Third, the lower court found that "[a] set of 'officers' that encompasses 'vice presidents' is consistent with the practice at commercial and investment banks, which historically have included within their set of 'officers' numerous 'vice presidents'. . . ." (Op. ¶ 5.d.v.) The court supported this factual finding with evidence dating "at least as far back as the early twentieth century," which included numerous instances in which commercial and investment banks had listed a large number of "Vice Presidents" as "officers" of their institutions. (*Id.* ¶ 5.d.vi (citing A120 (Guardian Trust Company 1929 annual statement identifying 61 "Officers," including 23 "Vice Presidents"); A117-18 (Guardian Detroit Union Group listing 23 "Officers," including 16 "Vice Presidents"); A123-24 (identifying at least seven "vice presidents" who were "officers" of the Chase National Bank); A132 (listing the titles of "Vice President" and "Assistant Vice President" as

"officers' titles" at commercial banks).) The court also cited cases documenting the widespread conferral of officer titles in both the commercial and investment banking industries. *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953); *Wells Fargo Bank v. Superior Court*, 811 P.2d 1025 (Cal. 1991).[2] (Op. ¶ 5.d.v-vi.)

Fourth, the court found that the widespread understanding that "[a] set of 'officers' . . . encompasses 'vice presidents'" is reflected in the federal securities laws and its implementing regulations. (Op. ¶ 5.d.vii.) The court noted that seminal New Deal legislation imposed disclosure and other obligations on "officers" generally and that, since 1934, the SEC's Rule 3b-2 has defined the term "'officer'" to include a "vice-president." (*Id.* ¶ 5.d.vii, ix.) It further found that, in 1988, the SEC was particularly concerned about the definition's inclusion of "'all vice presidents,'" which would sweep too broadly for purposes of the Exchange Act's short-swing-profit provisions because it would include "'[o]fficers without policy-making responsibility.'" (*Id.* ¶ 5.d.viii (quoting A153).) To address that problem, the court explained, the SEC created a more limited definition of

[2] *See Morgan*, 118 F. Supp. at 659 (observing that the securities affiliate of the Guarantee Trust Company of New York "was a very large organization, with a total personnel of approximately 500 persons, including 17 senior officers and 21 junior officers," including at least three "vice-presidents"); *id.* at 670-71 (explaining that the First Boston Corporation, after a series of restructurings and after hiring "officers" of related institutions, had "16 vice presidents"); *Wells Fargo*, 811 P.2d at 1029 (citing a 1941 edition of a treatise listing the "usual bank officers" as, *inter alia*, "a president" and "one or more vice-presidents"); *id.* (citing a 1988 treatise that "describe[d] a general banking practice favoring large numbers of officers with the title of 'vice-president'").

"officer" within Rule 16a-1(f) that tracks the "executive officer" definition found in Rule 3b-7. (*Id.* ¶ 5.d.ix.) Thus, the court concluded, "[a] reasonable employee who sought to determine whether the set of 'officers' included 'vice presidents' and who looked to the federal securities regime would find that it did." (*Id*.) The court separately credited the testimony of Aleynikov's expert, who relied on these same SEC rules and interpretations, (A558, Tr. 118:1-24; A361, ¶ 12; A384-89, ¶¶ 21-28), and "opined that the concept of an officer in the investment banking industry is the same as in other industries." (Op. ¶ 9.)

By contrast, the court below rejected all of Goldman Parent's arguments that the term "officer" encompassed only executive officers. Specifically, the court rejected the "title inflation" argument at the heart of the opinion of Goldman Parent's expert: that because investment banks have many Vice Presidents, they cannot all be "officers." To the contrary, the court below found that the "evidence support[ed] an inference that these titles have been used in lieu of other employment benefits, such as greater compensation," and that a "reasonable individual with the title 'Vice President' would *not* think that the existence of a large number of Vice Presidents in an organization meant that he could not possess advancement rights." (Op. ¶ 5.d.x-xi (emphasis supplied).) The record fully

supported those findings.[3]

The court below also rejected Goldman Parent's argument that a reasonable Vice President would not consider himself an "officer" because "his offer letter did not refer to the board of directors or a similar governing body having taken formal action to appoint him." (Op. ¶ 5.d.xii.) The court explained that the Third Circuit explicitly rejected the argument that an "officer" must be "'elect[ed] or appointed'" and that the Bylaws "themselves contemplate that at Goldman Parent, officers can be empowered to appoint other categories of officers, and Section 4.1 of the Bylaws specifically contemplates that officers can be empowered to appoint other vice presidents." (*Id.* ¶ 5.d.xii.) The court correctly concluded that "[a] reasonable individual with the title 'Vice President' would not think that he could not be an officer simply because his offer letter did not refer to the board of directors or a similar governing body having taken formal action to appoint him." (*Id.* ¶ 5.d.xii; A267-68 (offer letter).)

The court likewise rejected Goldman Parent's contention that a reasonable person with the title Vice President would not understand himself to be an officer if he did not have management or supervisory functions. (Op. ¶ 5.d.xiii.) The court cited caselaw and SEC commentary confirming that Vice Presidents serve

[3] (*See* A556, Tr. 109:16-110:7; A601, 291:4-13 (titles were compensatory); A365, ¶ 24 (same); A368-69, ¶¶ 34-38 (indemnification rights are conferred broadly).)

many functions that do not include managing employees or setting policy. (*Id.*)

Finally, the court below rejected the "course of dealing" and "trade usage" evidence advanced by Goldman Parent (although the court did not use the term "trade usage" anywhere in its opinion). The court found that Goldman LP's "officers" could not consist of only those identified in its "written consents" because (i) the consents "were not widely disseminated"; (ii) the individuals listed in them were identified in regulatory filings as "executive officers," not as Goldman LP's *only* "officers"; and (iii) the consent appointments "had a regulatory purpose and therefore were less persuasive as indications of what the term 'officer' meant for purposes of advancement and indemnification." (Op. ¶ 7.) (Indeed, the regulatory filings and websites on which Goldman Parent's expert relied to show that the identity of its "officers" was widely known expressly identified them as "executive officers." (A251-66; A351-52; A371-72.)) The court further found that Goldman Parent's past indemnification decisions were not relevant because they were "discretionary," and thus offered no insight into its interpretation of the mandatory advancement provision at issue. (Op. ¶ 8.) Moreover, the court found that Goldman Parent—perhaps most remarkably, given its previously central "trade usage" argument that "Vice President" meant something quite different, and far less significant, at investment banks than elsewhere—"disavowed any reliance

on a readily identifiable, industry-specific meaning of the term 'officer,'" (Op. ¶ 9), and offered no evidence that Vice President had such a meaning. The record also supported these findings.[4]

Despite crediting Aleynikov's evidence and rejecting Goldman Parent's, the court ruled in favor of Goldman Parent. It did so by treating its textual analysis and factual findings as relevant only to *contra proferentem* and discarding those critical findings because it determined the Third Circuit had precluded application of that doctrine. (Op. ¶¶ 5.a-c, 5.d.i-xvii.) Ignoring nearly all the evidence it reviewed, the court held that the remaining evidence—*none of which weighed in Goldman Parent's favor*—was "in equipoise." (*Id.* ¶ 10.) This appeal follows.

[4] (*See, e.g.*, A716 (contending there "is no industry-specific definition"); A593-94, Tr. 259:1-18, 260:23-261:4 (disclaiming knowledge of and basis to opine on the common meaning of the term "officer"); A392-401, Tr. 116:18-117:7, 305:24-306:3, 309:11-12, 384:19-390:24, 392:3-393:4 (same); A603, Tr. 297:16-23 (written consents not broadly available); A310-11, ¶¶ 44-47 (same); A345-46, Response Nos. 5-6 (same); A240-50 (written consents labeled "Confidential"); A561-62, Tr. 132:20-133:8 (regulatory reports list "executive officers"); A394, Tr. 186:17-187:9; A397, 366:6-10 (same); A251-66, A351-52, A371-72 (listing "executive officers"); A314 ¶ 9 (appointments reflected in written consents were for "regulatory purposes"); A720 (indemnification decisions were discretionary); A337, Response No. 16 (same).)

ARGUMENT

I. THE COURT BELOW ERRED IN HOLDING THAT THE THIRD CIRCUIT'S *CONTRA PROFERENTEM* RULING PREVENTED IT FROM INTERPRETING THE BYLAWS ACCORDING TO THE VOLUMINOUS EVIDENCE IT COMPILED THAT A REASONABLE PERSON IN THE PARTIES' POSITION WOULD UNDERSTAND "OFFICER" TO INCLUDE ALL VICE PRESIDENTS.

A. Question presented.

Whether the court below erred in holding that the Third Circuit's *contra proferentem* ruling prevented it from interpreting the Bylaws according to the voluminous evidence it compiled that a reasonable person in the parties' position would understand "officer" to include all Vice Presidents. (Preserved at A440-56, 481-90, 686-713.)

B. Scope of review.

This Court reviews "questions of contract interpretation *de novo*," and subsidiary factual findings for clear error. *Salamone v. Gorman*, 106 A.3d 354, 367, 380 (Del. 2014). This Court reviews the application of law to undisputed facts *de novo*. *Virdin v. State*, 780 A.2d 1024, 1030 (Del. 2001).

C. Merits of argument.

The Vice Chancellor made all the legal and factual findings necessary to interpret the ambiguous term "officer" favorably to Aleynikov, but failed to discharge his duty to choose between the competing interpretations of the term

because he improperly confined his findings, including those as to the trade usage of the terms "officer" and "Vice President," to discussing whether *contra proferentem* should apply. Even if the lower court were correct that it was bound by the federal court's prediction of Delaware law—and it was not—the court was wrong to believe it was constrained by the Third Circuit's *contra proferentem* ruling to ignore settled canons of construction such as *in pari materia*, and disregard the welter of evidence—including the very "trade usage" evidence the Third Circuit found especially relevant—as to how reasonable persons in the investment banking industry and at Goldman LP would interpret the term officer.

The ultimate meaning of a contract term is that "'which would be understood by an objective, reasonable third party.'" *Salamone*, 106 A.3d at 367-68; *accord AT&T Corp. v. Lillis*, 953 A.2d 241, 253 (Del. 2008); *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992). Interpreting a contract term in light of the undisputed evidence is a question of law for the court to decide. *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010); *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1258-59 (Del. 2010). When the parties advance competing interpretations of an ambiguous contract term, the court must choose the more reasonable one. *Bank of N.Y. Mellon v. Commerzbank*, 65 A.3d 539, 552 (Del. 2013); *Axis Reinsurance*

Co. v. HLTH Corp., 993 A.2d 1057, 1063 (Del. 2010). This is precisely what the Third Circuit envisioned when it directed the fact finder to "consider the extrinsic evidence and determine whether that evidence resolves the ambiguity to ascertain 'which of the reasonable readings [of the term officer] was intended by the parties.'" *Aleynikov*, 765 F.3d at 367 (quoting *Harrah's Entm't, Inc. v JCC Holding Co.*, 802 A.2d 294, 309-10 (Del. Ch. 2002)). The court below failed to discharge its duty to determine the more reasonable interpretation.

This Court held in *Brehm v. Eisner*, 906 A.2d 27 (Del. 2006), that "[w]here corporate governing instruments are ambiguous, [Delaware] law permits a court to determine their meaning by resorting to well-established legal rules of construction, which include the rules governing the interpretation of contracts." *Id.* at 69. There are many settled rules of construction. That one such rule is unavailable—here, under the court's reading of the Third Circuit's ruling, *contra proferentem*—does not mean all such rules are similarly inapplicable. The court below found that enumerating Vice Presidents as a type of "officer" in § 4.1 of the Bylaws with respect to Goldman Parent would lead a reasonable person in the parties' position to believe that when the term was used again in § 6.4 with respect to non-corporate subsidiaries such as Goldman LP, it included Vice Presidents of that entity as well. (Op. ¶ 5.d.iii (applying *in pari materia*).) Likewise, the court

rejected Goldman Parent's argument that the regulatory filings Goldman LP made to identify its "executive officers" would suggest to a reasonable person that they were the firm's only "officers" within the meaning of the Bylaws. (*Id.* ¶ 7.) In so doing, the court properly gave effect to the doctrine that when interpreting a contract, a court cannot "supply omitted provisions." *Gertrude L.Q. v. Stephen P.Q.*, 466 A.2d 1213, 1217 (Del. 1983). These maxims confirmed—wholly apart from *contra proferentem*—that a reasonable person in the parties' position would construe the term "officer" to include "Vice Presidents" because the "titles" established in a company's bylaws are directly relevant to determine "officer" status, *Stoms v. Federated Serv. Ins. Co.*, 125 A.3d 1102, 1108 (Del. 2015), and reading the Bylaws' "officer" definition in a more restrictive way would improperly insert modifiers where none exist. Yet the court below disregarded these findings based solely on its view that the Third Circuit precluded *contra proferentem* as an interpretive device.

With respect to the extrinsic evidence, the Vice Chancellor credited all of the evidence submitted by Aleynikov at trial in support of his position that the term "officer" in Goldman Parent's Bylaws should be understood to include Vice Presidents of Goldman LP. The court found that the common understanding of the term "officer" included Vice Presidents. (Op. ¶ 5.d.iv.) It also found that the

extrinsic evidence demonstrated that this understanding was shared historically within the commercial and investment banking industries. (*Id.* ¶ 5.d.v-vi.) This understanding, the evidence showed, was similarly reflected in state and federal regulations, including extensive commentary by the SEC. (*Id.* ¶ 5.d.vii-ix.)

Conversely, the Vice Chancellor rejected the evidence Goldman Parent advanced in support of its attempt to limit the reading of the term "officer" in its Bylaws to executive officers. Based on its consideration of the trial evidence, the court rejected the argument that because many non-supervisory, non-managerial investment bank employees like Aleynikov have the title Vice President as a result of "title inflation," they could not all be "officers" entitled to advancement. (*Id.* ¶ 5.d.x-xi.) It similarly rejected the argument that a reasonable person would not understand the title Vice President to denote officer status absent direct formal action by a board of directors or similar governing body to specifically appoint one an officer, (*id.* ¶ 5.d.xii), particularly because the "written consents" by which Goldman LP appointed its executive officers were not widely disseminated within the firm and did not indicate that the officers they appointed were Goldman LP's *only* officers, (*id.* ¶ 7). Likewise, the court rejected the suggestion that past indemnification and advancement decisions by Goldman Parent—specifically, its decision to indemnify or advance the fees of 51 of 53 employees, including 15

Vice Presidents (with Aleynikov being one of the two employees denied that relief)—supported its position because those decisions were discretionary and thus irrelevant to the interpretation of the advancement provision in § 6.4. (*Id.* ¶ 8.)

The Third Circuit specifically directed the district court to determine "how a reasonable person in the position of the parties would interpret the contract term [at issue]." *Aleynikov*, 765 F.3d at 365; *see also id.* at 367. Moreover, it expressly provided that "Aleynikov [was] free to present his own evidence with respect to the meaning of his term at [Goldman LP]." *Id.* at 365 n.9. This was a call to consider ***all*** potentially relevant extrinsic evidence, expressly including the "trade usage" evidence the lower court nonetheless felt it could not consider—or identify as such.

Based on its findings, which overwhelmingly favored Aleynikov, the court should have concluded as a matter of law that the Bylaws promised advancement to all Goldman LP Vice Presidents because a reasonable person in the parties' position would have understood the term "officer" to include all "Vice Presidents." *See Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, 1063-66 (Del. 1999) (reversing ruling that employee did not carry burden of proof where the only record evidence supported him). Instead, the court committed the same error that led to reversal in *Airgas*, 8 A.3d 1182: it failed to appropriately consider extrinsic evidence of the

"historical understanding" of an ambiguous term reflected in statutory law, case law and commentary—although that was undeniably trade usage evidence of the precise type the Third Circuit suggested would inform the question.[5] In *Airgas*, this Court held that the trial court erred as a matter of law by "fail[ing] to give proper effect to the overwhelming and uncontroverted extrinsic evidence" the plaintiff advanced. *Id.* at 1194. *Airgas* makes clear that the evidence catalogued in the lower court's *contra proferentem* analysis was highly relevant to—indeed, dispositive of—whether this extrinsic evidence resolved the contractual ambiguity. Indeed, the extrinsic evidence that resolved the contractual ambiguity in *Airgas* parallels the trade usage evidence catalogued in the trial court's *contra proferentem* analysis. *Compare Airgas*, 8 A.3d at 1191 (citing the practice of Delaware corporations implementing a charter provision) *with* Op. ¶¶ 5.d.v-vi (citing the historical practices of commercial and investment banks treating their "Vice Presidents" as "officers"); *Airgas*, 8 A.3d at 1191-92 (citing longstanding statutory language and commentary reflecting the common understanding of a charter provision) *with* Op. ¶¶ 5.d.iv, vii-ix (citing longstanding statutes, regulations, and

[5] At oral argument, the court below expressly recognized that *Airgas* required giving effect to the reasonable expectations of the parties. (A723 ("Again, I'm getting this reasonable expectation thing from *Airgas*[,] . . . which, for better or for worse, seems to tell me, hey, look, if contra proferentem is out the window . . . look at this stuff and figure out what the reasonable expectations are. ").) Yet when the Court issued its opinion, *Airgas* was not distinguished—or even cited.

commentary reflecting the common understanding of the term "officer").

Indeed, perhaps the most troubling aspect of the court's misreading of the Third Circuit's ruling was its complete disregard of the Third Circuit's finding as to trade usage evidence: that "[e]vidence of title inflation in the investment banking industry and industry usage of the title of vice president can be viewed as evidence of trade usage of titles that may connote officer-status to people inside the investment banking industry." 765 F.3d at 363. As the court explained:

> Evidence of "trade usage" of the terms officer and vice president seems to us to be particularly relevant to the parties' mutual understanding, as it addresses the reasonable expectations of employees of [Goldman LP]. Each industry has its idiosyncratic terms and titles, the meaning of which is widely known to members of the industry and the individual companies, but which suggest a different meaning to those on the outside. Goldman has suggested that the term "vice president" falls into this category.

Id. at 365, n.9. Yet in describing the Third Circuit's ruling, the court noted only course-of-dealing evidence (*i.e.*, written consents and advancement practices), which it found unpersuasive, and whether officer has a "readily-identifiable, industry-specific meaning," which the court found it does not. The court ignored Goldman Parent's claim that Vice President means something unique in the industry, and did not mention "trade usage," although the Third Circuit held that trade usage evidence was relevant and *not* precluded by its ruling. That evidence revealed that in investment banking as elsewhere, a Vice President is an officer.

II. THE COURT BELOW ERRED IN DECLARING THAT THE TRUNCATED EVIDENCE IT CONSIDERED WAS IN EQUIPOISE.

A. Question presented

Whether the court below erred in declaring that the truncated evidence it considered was in equipoise. (Preserved at A443-53, 481-90, 693-713.)

B. Scope of review

This Court reviews "questions of contract interpretation *de novo*," and subsidiary factual findings for clear error. *Salamone*, 106 A.3d at 367, 380. The Court reviews the application of law to undisputed facts *de novo*. *Virdin*, 780 A.2d at 1030.

C. Merits of argument

After its blinkered account of the intrinsic and extrinsic evidence it found supported Aleynikov's position, the court below turned to four pieces of evidence the Third Circuit suggested might be relevant. (Op. ¶¶ 6-10.) Even accepting its legally flawed analytical construct, the court erred in concluding that this evidence was in "equipoise." (*Id.* ¶ 10.) The court correctly determined that (i) Aleynikov's subjective belief regarding his status was not relevant to the meaning of the term officer (*id.* ¶ 6); (ii) the confidential written consents appointing executive officers of Goldman LP were not relevant to the generally understood meaning of its officers (*id.* ¶ 7); and (iii) Goldman Parent's history of providing advancement and

indemnification on a discretionary basis was irrelevant to the mandatory advancement provision at issue (*id.* ¶ 8).

The court erroneously concluded that the only other type of evidence it could consider—which established that there was no readily-identifiable, industry-specific common meaning of the term "officer"—did not weigh in either party's favor. Aleynikov has always maintained that the term "officer" and the title "Vice President" mean the same thing in the investment banking industry as elsewhere. Goldman Parent, by contrast, has always argued that no reasonable person on Wall Street would think "officer" included all Vice Presidents or that the title conferred officer status. Thus, the court's correct finding that the term and title mean the same in this industry as elsewhere did *not* leave the evidentiary record "in equipoise." Rather, it compelled the court—even on the truncated record it felt constrained to consider—to rule for Aleynikov. *Commerzbank*, 65 A.3d at 552 ("When the parties advance competing interpretations of an ambiguous contract term, the court must choose the more reasonable one.").[6]

[6] Given the court's duty in this regard, it erred in even assigning Aleynikov the burden of proof. *See Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 114 (2011) (Breyer, J., concurring) ("[T]he evidentiary standard of proof applies to questions of fact and not to questions of law."); *see also Antilles S.S. Co. v. Members of Am. Hull Ins. Syndicate*, 733 F.2d 195, 207 (2d Cir. 1984) (Newman, J., concurring) ("what a reasonable person would think [a contract's] terms mean" is a question of law); *see also Airgas*, 8 A.3d at 1188; *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1258-59 (Del. 2010). Bylaws mean one thing—what a reasonable person would understand them to mean—and the court *must* determine it. Equipoise is not an option.

III. THE COURT BELOW ERRED IN CONCLUDING THAT THE THIRD CIRCUIT'S *CONTRA PROFERENTEM* PREDICTION HAD PRECLUSIVE EFFECT.

A. Question presented.

Whether the court below erred in concluding that the Third Circuit's *contra proferentem* prediction bound the parties under the doctrine of issue preclusion. (Preserved at A461-63, A490-502, 676-83.)

B. Scope of review.

This Court reviews the trial court's application of issue preclusion *de novo*. *See Betts v. Townsends, Inc.*, 765 A.2d 531, 533 (Del. 2000).

C. Merits of argument.

1. The Third Circuit's *Contra Proferentem* Ruling Was Not "Final."

The preclusive effect of a federal judgment is determined by federal common law, which in a diversity case generally incorporates the law that would be applied by state courts where the federal diversity court sits—here, New Jersey. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001). Under New Jersey law, issue preclusion has five elements, including that the issue was "actually litigated" in a prior proceeding and that the court "issued a final judgment" on that issue. (Op. ¶ 3 (quoting *First Union Nat. Bank v. Penn Salem Marina, Inc.*, 921 A.2d 417, 424 (N.J. 2007).) A ruling is treated as "final" for

issue preclusion purposes when it is "'sufficiently firm to be accorded conclusive effect,'" (Op. ¶ 4(b) (quoting *Hills Dev. Co. v. Bernards*, 510 A.2d 621, 652 (N.J. 1986) (quoting Restatement (Second) of Judgments § 13).)

In the context of issue preclusion, a decision that is not final in any other sense can be treated as final where the "court sees no really good reason for permitting it to be litigated again." *Free Speech Coalition, Inc. v. AG of the United States*, 677 F.3d 519, 541 (3d Cir. 2012) (citing *In re Brown*, 951 F.2d 564, 569 (3d Cir. 1991); Restatement § 13, cmt. g). Relevant factors include "the nature of the decision (*i.e., that it was not avowedly tentative*), the adequacy of the hearing, and the opportunity for review." *Lummus Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 89 (2d Cir. 1961) (emphasis supplied). The Third Circuit's *contra proferentem* ruling was not "final" in any ordinary sense—the New Jersey Action, in which Aleynikov's indemnification and advancement claims relating to his successful defense of federal and state criminal charges will be decided, is still pending. And there are plenty of good reasons to revisit it. As Aleynikov argued below, that ruling (a) was avowedly tentative because it was an interlocutory *Erie* prediction of Delaware law that would not be binding on remand in the New Jersey Action in light of any intervening state court decision, including this Court's decision in this case; and (b) was contingent upon a factual assumption—that

Aleynikov was not a "party" under the Bylaws unless he was an officer—that was both subject to refutation on remand (A679) and, as the court below correctly held, simply wrong.

First, because the majority's ruling was predictive in nature, the district court will be required to "'conform its decision and judgment to the latest decision'" of this State. *Delano v. Kitch*, 663 F.2d 990, 996 (10th Cir. 1981).[7] This Court cannot treat as final and binding an erroneous interlocutory *Erie* prediction made in a still-pending case. Second, the appeals court based its *contra proferentem* ruling on the assumption that Aleynikov's status as a "party" under the Bylaws turned on whether he was an officer. *Aleynikov*, 765 F.3d at 367. But Goldman Parent never argued to the district court that although Aleynikov was a Goldman LP employee, he was not a party to the Bylaws unless he was also found to be an officer. It first made that argument on appeal. On remand in the New Jersey Action, Aleynikov intends to prove that, as the court below found, he undeniably *was* a party to the Bylaws by virtue of his status as an "employee." (Op. ¶ 5.d.xvi.)[8] This finding, as

[7] *Accord Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941); *Kansas Pub. Employees Ret. Sys. v. Russell*, 140 F.3d 748, 751 (8th Cir. 1998); *Richardson v. United States*, 841 F.2d 993, 996 (9th Cir. 1988); *United States v. Fernandez*, 506 F.2d 1200, 1203 n.7 (2d Cir. 1974); Wright & Miller, 18B Fed. Prac. & Proc. Juris. § 4478 (2d ed.).

[8] *See also* Carina M. Meleca, *An "Officer" and a G[old]man: The Third Circuit Finds Ambiguous Corporate Titles Jeopardize Right to Advancement Under Delaware Law in Aleynikov v. Goldman Sachs Group, Inc.*, 60 Vill. L. Rev. 781, 804 (2015) (noting that "it is

the court below explained, would entitle Aleynikov to invoke *contra proferentem*, even under the majority's reading. (*Id.*) Because that factual issue has yet to be "actually litigated" by the parties, the Third Circuit's resolution of it is not final and binding. *See Chicago Truck Drivers, Helpers & Warehouse Union Pension Fund v. Century Motor Freight*, 125 F.3d 526, 532 (7th Cir. 1997) (declining to find critical issue was actually litigated when it was first raised in a reply brief and never received "the kind of analysis needed to resolve such an important issue"); *Diplomat Elec. Inc. v. Westinghouse Elec. Supply Co.*, 430 F.3d 38, 45 (5th Cir. 1970) (declining to credit resolution of issue where court "assumes to adjudicate an issue or question not submitted by the parties in their pleadings nor drawn into controversy by them in the course of the evidence, and bases its judgment on such adjudication"); *see also Valenzuela v. Union Pac. R.R. Co.*, 2016 WL 3670176, at *7-11 (D. Ariz. July 11, 2016) (holding that factual findings or assumptions made by appellate court were not binding in subsequent litigation); *Canadian Nat'l Ry. Co. v. Montreal, Me. & Atl. Ry.*, 786 F. Supp. 2d 398, 419 (D. Me. 2011) (rejecting argument that a statement made by the First Circuit constituted a binding factual finding where "the lower court made no factual findings," noting that "[a]s an appellate court, the First Circuit rarely makes factual findings"); *Paley v. Estate of*

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without question that Goldman's individual employees were parties to the broader bylaw contract").

Ogus, 20 F. Supp. 2d 83, 88-89 (D.D.C. 1998) (refusing to give estoppel effect to an appellate court's factual presumption that an issue was uncontested where the plaintiffs lacked notice that the appellate court would do so); *In re Access Beyond Techs, Inc.*, 237 B.R. 32, 41 (Bankr. D. Del. 1999) (declining to find issue actually litigated where Bankruptcy Court appeared to assume its resolution).

A divided federal court's *Erie* guess that this Court would adopt a heretofore unheard of exception to *contra proferentem*—a prediction that ignored settled law and relied on an erroneous factual assumption—to deny an employee advancement under an ambiguous corporate bylaw is simply not the sort of ruling that should be afforded finality. Instead, this Court should resolve that issue in keeping with the legally correct and factually accurate reasons outlined in the lower court's ruling, Judge Fuentes's dissenting opinion in the Third Circuit, and the district court's opinion granting Aleynikov summary judgment in the New Jersey Action.

2. The Third Circuit's *Contra Proferentem* Ruling Demanded Correction To Prevent Its Inequitable Administration.

New Jersey law is also clear that, even where the elements of issue preclusion are met, the doctrine should not be applied when "'[t]he issue is one of law and . . . (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws.'" *Olivieri v. Y.M.F. Carpet, Inc.*, 897 A.2d 1003, 1010

(N.J. 2006) (quoting Restatement § 28(2)). Here, there is no question that the majority's *contra proferentem* ruling articulates a broad principle of Delaware law. Nor can there be any doubt that, in *Stoms*, 125 A.3d at 1108, had the Court found that an insurance provision defining officer and director was ambiguous, it would have construed that provision against the drafting party.

The court below acknowledged that *Stoms*, decided one year after the Third Circuit's *contra proferentem* ruling, confirmed the error of that decision. (Op. ¶ 5.c.) But the court refused to apply the Restatement § 28(2) issue preclusion exception to that erroneous ruling because *Stoms* did not *change* Delaware law on *contra proferentem*, but rather reflected the doctrine's consistent application by Delaware courts. (*Id.*) In the court's view, if the Third Circuit had simply made an erroneous prediction of unsettled Delaware law—a modest mistake—that prediction would have been disregarded in light of a subsequent Delaware ruling to the contrary. But because the Third Circuit botched settled Delaware law—a glaring error—its ruling must be treated as preclusive. It is inconceivable that a federal court—whose law ultimately governs the preclusive effect of a federal court judgment—would so rule.[9] A divided federal court made an incorrect

[9] *Cf. Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 88 (1984) (White, J., concurring) (noting longstanding principle under the Full Faith and Credit Clause and statute that a court can accord a judgment no greater efficacy than would the judgment-rendering court).

interlocutory guess regarding Delaware law in a case that is still pending. If that guess is binding in this action, Aleynikov will be denied relief based on an incorrect interlocutory impression of Delaware law in an action that is still pending—and in which the federal courts must follow this court—when no other litigant would. Here, binding Aleynikov to the majority's *contra proferentem* ruling would be "'particularly unjust'" because it would "'preclude reargument of [a] question[] of law that would be open to challenge by other litigants,'" *Chicago Truck Driver*, 125 F.3d at 532—a challenge that, crediting the Vice Chancellor's analysis of Delaware law on *contra proferentem*, would certainly succeed. That is because, while Aleynikov would be precluded—in this action at this time—from invoking *contra proferentem*, other litigants would not be bound by that prediction when seeking advancement or indemnification under the Bylaws. Indeed, in a recently filed summary action, a former Goldman LP Managing Director is seeking advancement and indemnification under the same provision of the Bylaws at issue in this case. *See Jiampietro v. The Goldman Sachs Group, Inc.*, C.A. No. 12601-VCL (Del. Ch.). This Court cannot be bound to hold that a provision of a Delaware corporation's Bylaws has two opposing meanings—simultaneously. Such a result could hardly be less equitable.

CONCLUSION

For the foregoing reasons, the Court of Chancery's Final Order and Judgment should be reversed and the court below directed to enter judgment in favor of Aleynikov, granting him advancement of his reasonable legal fees and expenses to defend the Counterclaims and awarding him "fees on fees."

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