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Case Number 366,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT IN REPLY

In his Opening Brief,[1] Aleynikov identified three errors of law that require reversal of the Court of Chancery's Post-Trial Order and Final Judgment: (1) its animating premise—that the Third Circuit's *contra proferentem* ruling required the Vice Chancellor to disregard the overwhelming trade usage evidence adduced at trial, which he found clearly demonstrated that a reasonable person in the parties' position would understand the undefined term "officer" to include all Goldman LP Vice Presidents; (2) its unexplained and unsupported conclusion that without the sidelined trade usage evidence or any proof of an industry-specific meaning of officer and Vice President, the evidence was "in equipoise;" and (3) its holding that the Third Circuit's tentative and erroneous *contra proferentem* ruling was nonetheless binding in this proceeding.

Goldman Parent did not address any of these arguments. It never explained how the wealth of trade usage evidence detailed in the Order on appeal could be barred by the Third Circuit's *contra proferentem* ruling when that ruling expressly directed the district court to consider trade usage evidence on remand. It never explained how the evidence was in equipoise when the court credited Aleynikov's evidence and rejected Goldman Parent's. And it never explained how the Third

[1] Aleynikov's Opening Brief is referred to throughout as "Opening Brief" or "OB," and Appellee's Answering Brief as "Answering Brief" or "AB."

Circuit's inherently tentative and manifestly erroneous prediction of Delaware law on *contra proferentem* could be issue preclusive in this proceeding. Instead, Goldman Parent asked this Court to endorse the legal error at the heart of the Vice Chancellor's ruling—that the Third Circuit's *contra proferentem* ruling barred him from considering trade usage evidence; to dismiss as "dicta" (and erroneous dicta at that) the court's sound factual findings as to the meaning of officer and Vice President and embrace instead its illogical conclusion that the evidence was in equipoise; and to perpetuate the Third Circuit's tentative and erroneous prediction of Delaware law by treating it as binding.

The Court should decline to do so. Instead, it should correct the lower court's legally erroneous view that trade usage evidence was barred by the Third Circuit's *contra proferentem* ruling, reject the court's resulting inference that the record evidence was in equipoise, and adopt the Vice Chancellor's correct statement of Delaware law on the doctrine of *contra proferentem*.

ARGUMENT

I. THE COURT BELOW ERRED AS A MATTER OF LAW IN READING THE THIRD CIRCUIT'S *CONTRA PROFERENTEM* RULING TO QUARANTINE TRADE USAGE EVIDENCE.

To appreciate the lower court's principal mistake of law, one must focus upon the ruling that guided the proceedings below, *Aleynikov v. Goldman Sachs Group, Inc.*, 765 F.3d 350 (3d Cir. 2014). In that split decision, the Third Circuit ruled that the term "officer" in § 6.4 of the Bylaws was ambiguous, but predicted that this Court would not use *contra proferentem* to resolve that ambiguity because, under Delaware law as the majority envisioned it, the doctrine can only be used to determine the scope of a party's rights under a contract, not whether a party has rights. *Id.* at 362, 366. Finding itself "left in a bind" because (i) it could not use *contra proferentem* to resolve the ambiguity (given its prediction of Delaware law and its assumption that Aleynikov did not have rights under the Bylaws); but (ii) most types of extrinsic evidence are irrelevant to the parties' intent (because Aleynikov did not participate in the drafting of the Bylaws and thus had no *intent* regarding them), the court nevertheless identified two types of extrinsic evidence that might resolve the ambiguity: "course of dealing" evidence (Goldman Parent's course of dealing with the term) and trade usage evidence (how officer and Vice President are used in the investment banking industry). *Id.* at 367.

As framed by the Third Circuit, the question at the heart of this case was thus: "How would reasonable individuals in the investment banking industry and at Goldman LP have interpreted the term officer in § 6.4 of Goldman Parent's Bylaws?" The Court of Chancery sought to resolve that question through a summary proceeding at which it carefully considered: (a) the use of "officer" in other sections of the Bylaws; (b) the "widespread understanding" of officer and Vice President; (c) the use of officer and Vice President in the Delaware General Corporation Law; (d) the historical use of officer and Vice President at commercial and investment banks; (e) the definition of officer in the federal securities laws; (f) the SEC's 1988 revision to the definition of officer in its short-swing profit reporting rules (based on its express observation that officers include Vice Presidents who do not have significant managerial and policymaking duties and are not privy to inside information); (g) title inflation; (h) the written consents reflecting Goldman LP's appointment of its executive officers; and (i) Goldman Parent's history of providing indemnification and advancement to Goldman LP Vice Presidents and others. Based on that evidence, the court correctly concluded that reasonable individuals in the investment banking industry and at Goldman LP would have interpreted the term officer in § 6.4 of the Bylaws to include all those holding the title Vice President at Goldman LP—regardless of their number,

whether they were elected or appointed by formal process, and whether they performed managerial tasks—and, therefore, would have understood the term to include Aleynikov.

But despite those clear and comprehensive findings, the Court of Chancery did not rule in Aleynikov's favor. To the contrary, the Vice Chancellor held that the Third Circuit's *contra proferentem* prediction compelled him to ignore the wealth of compelling trade usage evidence he found established that a reasonable person in the investment banking industry would understand the unqualified term officer to include all Vice Presidents. The Vice Chancellor apparently reasoned that because *contra proferentem* rewards the reasonable expectations of the non-drafting party, the Third Circuit's refusal to apply that doctrine sidelined all evidence of how a reasonable person in the parties' position would understand an ambiguous term.

That reasoning was unsound. Contrary to the Vice Chancellor's analysis, the question of how a reasonable person in the position of the parties would understand ambiguous language is at the heart of *every dispute* over the meaning of such language, regardless of who drafted it. Where *contra proferentem* applies, the reasonable expectations of the non-drafting party are honored automatically, by default, on the theory that the drafter should be held responsible for its failure to

speak unambiguously. But contrary to the Vice Chancellor's animating premise, the converse is not true. Where *contra proferentem* does not apply—where, for example, the drafting of ambiguous language was a joint venture, and expressly acknowledged as such—the court cannot abandon the quest to determine the meaning of that language. Rather, it must turn to extrinsic evidence of the parties' intent, including trade usage evidence, to answer the very question obviated by the doctrine of *contra proferentem*: what would a reasonable person in the parties' position understand the ambiguous language to mean. That is precisely what the Third Circuit directed the district court to do. Had the Vice Chancellor not viewed the wealth of trade usage evidence he found persuasive as relevant only to the banished doctrine of *contra proferentem*, he would easily have concluded that Aleynikov was an officer of Goldman LP.

Realizing as much, Goldman Parent casts the court's detailed findings as "dicta about what Aleynikov may have believed." (AB3.) Goldman Parent is mistaken. First, those findings were not "about what Aleynikov may have believed." Rather, they identify the meaning *any reasonable person* in the parties' position would ascribe to the terms officer and Vice President—an understanding the court correctly described as "consistent with the practice at commercial and investment banks . . . dating as far back as the early twentieth century," and one

expressly reflected in the nation's securities laws. (Op. ¶ 5d.v.)

Second, those findings are not dicta—"judicial statements that 'would have no effect on the outcome of the case,'" *In re MFS S'holders Litig.*, 67 A.3d 496, 502 n.4 (Del. Ch. 2013) (quoting *Brown v. United Water Del., Inc.*, 3 A.3d 272, 276 & n.17 (Del. 2010))—in any sense of the word. The distinction between dictum and holding relates to whether a prior decision should be accorded precedential weight. *See, e.g., Waters v. United States*, 787 A.2d 71, 74 (Del. 2001). The concept has no application to an appellate court's review of a trial court's fact-finding, which is governed instead by the clearly-erroneous standard of review. Where a trial court's fact-finding is sound under that standard, but leads to a different conclusion than the trial court reached due to the trial court's legal error, an appellate court properly relies on that factual finding when applying the correct legal standard. *See In re Pennie & Edmonds LLP*, 323 F.3d 86, 93 (2d Cir. 2003) (reversing Rule 11 sanctions because the trial court's finding that the attorney acted in subjective good faith, which the appellate court accepted, compelled a conclusion that sanctions were not appropriate under the applicable legal standard); *Lawlor v. Zoning Bd. of Appeals*, 986 N.E.2d 897 (Mass. App. Ct. 2013) (reversing the lower court's decision dismissing the case for lack of standing because the facts it found established standing as a matter of law); *Fraser Public Schools Dist. v.*

Kolon, 193 N.W.2d 64, 66 (Mich. Ct. App. 1971) (noting "the settled principle that the findings of fact of a trial judge, sitting as trier of the facts, will not be set aside unless clearly erroneous, because we reverse for an error of law" and explaining "we believe the learned trial judge misapplied the applicable law to his found facts."). It makes no sense to ask whether the Supreme Court would be "bound" under the law of precedent by a fact found by the Court of Chancery; any facts found are to be reviewed and either accepted or rejected under the applicable standard of review.

The cases on which Goldman Parent relies to support its dicta argument are not to the contrary. *See Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 398 (Del. 2010) (holding that courts in future cases should regard the Court of Chancery's interpretation of the term "stock ledger" as *obiter dictum* having no precedential effect for future courts because the Supreme Court disposed of the matter on other grounds); *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1218 n.62 (Del. 2012) (holding that the Court of Chancery's pronouncement regarding the imposition of fiduciary duties was dictum given that the Supreme Court decided the case on different grounds, and clarifying that it highlighted the dictum to avoid confusion in future cases).

Here, the trial judge made findings in his capacity as fact finder to resolve

the precise question the Third Circuit framed and the parties tried: "What would a reasonable person in the position of the parties understand the undefined term officer to mean?" Those factual findings are properly reviewed for clear error. *Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014). And if this Court determines that the court below made sound findings of fact but misapprehended the law, it should properly accept those factual findings but reverse the judgment because of that legal error. *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417-18 (1977). In other words, if this Court accepts the lower court's findings of fact but determines that it erred in limiting the applicability of the very trade usage evidence the Third Circuit described as particularly relevant, those findings will compel a ruling in Aleynikov's favor.

Aware that those findings are not dicta—*obiter* or judicial—and that the lower court misread the Third Circuit's ruling to confine the trade usage evidence underlying them, Goldman Parent challenges those findings on the merits. First, it takes a page from the Third Circuit's critique of the district court's opinion in the New Jersey Action, criticizing the court for focusing in its *contra proferentem* discussion on the term "vice president" rather than "officer." (AB22.) But the court carefully and properly framed the issue as whether a reasonable person would believe the term "officer" included employees of a non-corporate subsidiary

with the title "vice president." (*See, e.g.*, Op. ¶ 5d.ii. ("An individual with the title 'Vice President' could reasonable conclude that he was an 'officer' who was entitled to advancement rights under the Bylaws."); *id.* ¶ 5d.iv. ("A set of 'officers' that encompasses 'vice presidents' is consistent with the widespread understanding of who typically comprise the officers of an entity."); *id.* ¶ 5d.v. ("A set of 'officers' that encompasses 'vice presidents' is consistent with the practice at commercial and investment banks.").)

Goldman Parent next challenges the court's "historical understanding" finding because it was "based on data that is more than 85 years old, and did not mention the evidence presented by GS Group about the use of the title as an indication of rank during the past 30 years." (AB24.) That Aleynikov's historical evidence was, in fact, historical, does not diminish its probative value. This Court relied on historical evidence dating to 1899 in *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1192 (Del. 2010). Indeed, the historical nature of Aleynikov's evidence enhances its probative value because it shows that the drafters of the seminal New Deal legislation incorporated that understanding when they federalized the concept of "officer" to apply across commercial and investment banks nationwide. The value of that historical evidence was bolstered by its extension in the following decades, culminating in the SEC's 1988 recognition

that, unless the term "officer" were modified for purposes of the short-swing profit rule, it would include all persons holding the title "vice president."[2] And contrary to Goldman Parent's claim that its "title inflation" evidence was ignored, the trial court specifically considered and rejected that evidence. (Op. ¶ 5d.x. ("The evidence supports an inference that these titles have been used in lieu of other employment benefits, such as greater compensation").)

Goldman Parent next claims the federal securities regulations Aleynikov cited and the court found persuasive are "of no value" because "the internal affairs doctrine requires that the law of the state of incorporation should determine issues relating to internal corporate affairs." (AB25.) But the internal-affairs doctrine is a choice-of-law concept. *McDermott, Inc. v. Lewis*, 531 A.2d 206, 216 (Del. 1987). While Delaware law applies, the federal securities laws surely inform one's understanding of "officer" in the investment banking industry. (Op. ¶ 5d.ix. ("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.").) Goldman Parent's claim to the contrary is simply wrong.

[2] Contrary to Goldman Parent's claim, the general definition of "officer" found in SEC Rule 3b-2, not the definition found in amended Rule 16a-1(f), governs because the latter rule applies "solely to section 16 of the [Exchange Act] and the rules thereunder." 17 C.F.R. § 240.16a-1.

II. THE LOWER COURT'S CONCLUSION THAT THE EVIDENCE WAS IN EQUIPOISE WAS AN OUTGROWTH OF ITS ERRONEOUS BELIEF THAT THE THIRD CIRCUIT'S RULING BARRED CONSIDERATION OF TRADE USAGE EVIDENCE.

The trial court's statement that the evidence was "in equipoise" was analytically dependent upon its erroneous conclusion that it was legally precluded from relying on trade usage evidence regarding the meaning of officer and Vice President. And the improperly quarantined evidence confirms that in the investment banking industry as elsewhere, the unqualified term officer includes all Vice Presidents. (A359 ("The term 'officer,' in the investment banking industry as elsewhere, in both corporations and non-corporate entities such as limited partnerships, is commonly understood to include all employees holding the title 'Vice President.'").) As the Third Circuit noted, it was *Goldman Parent*, not Aleynikov, that insisted the title "Vice President" in the investment banking industry is one of the "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 outside." *Aleynikov*, 765 F.3d at 365 n.9. But at trial, Goldman Parent reversed course and "disavowed any reliance on a readily identifiable, industry-specific meaning of the term 'officer.'" (Op. ¶ 9.)

Goldman Parent does not explain its shift in position. Instead, it lauds the court for assigning the burden of proof to Aleynikov on a legal issue, then changes

the subject, urging this Court to revisit factual issues that were either foreclosed by the Third Circuit's opinion or rejected by the court below (or both). This Court should decline that invitation and find that the evidence regarding the reasonable understanding of the term "officer" was not in equipoise.

A. The Court of Chancery Erred By Assigning To Aleynikov The Burden To Prove A Legal Issue.

Goldman Parent does not dispute that when parties advance competing interpretations of an ambiguous term, the court must choose the more reasonable one. (OB19 (citing *Bank of N.Y. Mellon v. Commerzbank*, 65 A.3d 539, 552 (Del. 2013).) Instead, Goldman Parent contends that the court below properly relied on *Sassano v. CIBC World Mkts. Corp*., 948 A.2d 453, 464 (Del. Ch. 2008), for the proposition that Aleynikov had the burden to prove that he was an officer by a preponderance of the evidence. (AB15.) Goldman Parent claims that Aleynikov waived his no-burden-of-proof argument by failing to challenge its assertion that *it* had no burden of proof. (AB15n.3.)

That misses the point. *Neither party* had the burden of proving the legal definition of "officer." The meaning of a contract term, viewed in light of the undisputed evidence, is always a question of law for the court. *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1258-59 (Del. 2010).

In concluding otherwise, the trial court misread *Sassano*'s statement that a

plaintiff "bears the burden of persuasion in demonstrating that the Bylaws entitle him to mandatory advancement." 948 A.2d at 464. *Sassano* correctly explained that the interpretation of the "officer" provision at issue there was "a question of law," while "the question of whether [the plaintiff] me[t] that definition [was] one of fact." *Id.* at 463. Because the bylaws in that case defined the term "officer," *id.* at 461, the relevant questions were whether the plaintiff, as a factual matter, met that definition and the bylaws' other advancement prerequisites. *Id.* at 465-68. The converse is true here, where the contested issue is the legal definition of the term "officer," not Aleynikov's status at Goldman LP or his satisfaction of other advancement prerequisites. Aleynikov never had the burden to prove the proper definition of the contractual term; he had the burden to prove that he met that definition once it was established.

B. The Trial Court's Findings Compel The Conclusion That The Officers Of Goldman LP Include Its Vice Presidents.

Even if it was proper to assign Aleynikov the burden to prove the meaning of the term "officer"—and it was not, for the reasons stated above—Aleynikov met that burden. Rejecting the trial court's conclusion that the evidence was in equipoise, Goldman Parent claims the evidence weighed heavily in its favor, pointing in particular to evidence of title inflation and its appointment process. But the trial court, the Third Circuit, or both, considered and rejected Goldman Parent's

claims based on that evidence. First, the Third Circuit rejected the dictionary definition of "officer" that Goldman Parent reasserts here: "a person in 'a position of trust, authority, or command,'" (AB16), finding that "the dictionary definition . . . does not result in an unambiguous provision. . . ." *Aleynikov*, 765 F.3d at 361. The court below accepted that finding as preclusive. (Op. ¶ 4.)

Second, the Third Circuit expressly held that written consents memorializing the appointment of certain executive officers of Goldman LP "cannot supply the meaning of the term [officer] when the By-Laws make no mention of appointment by written resolution and Goldman can point to no generally promulgated documents identifying officers as appointed only by written resolution." *Aleynikov*, 765 F.3d at 361 n.5. Taking up that issue, the court below concluded that "the evidence at trial showed that the written consents in fact were not widely disseminated, and although the individuals listed on the consents were held out as the executive officers of Goldman LP, they were not held out as the only officers of Goldman LP." (Op. ¶ 7.)

Third and finally, the trial court properly rejected Goldman Parent's history of offering discretionary advancement and indemnification as probative of the obligations imposed by § 6.4. (AB31n.10; Op. ¶ 8.)

III. THE VICE CHANCELLOR ERRED IN CONCLUDING THAT THE THIRD CIRCUIT'S PREDICTION OF DELAWARE LAW WAS FINAL AND SHOULD BE BINDING IN THIS PROCEEDING.

The Court of Chancery erred in giving the Third Circuit's *contra proferentem* ruling preclusive effect because (a) that ruling is subject to change based on further fact-finding in the New Jersey Action and clarification of Delaware law; and (b) treating it as preclusive would lead to inequitable administration of the laws. In its Answering Brief, Goldman Parent misstates the law on finality of decisions and mischaracterizes Aleynikov's argument as to what issues were actually litigated in the New Jersey Action. The Third Circuit's *contra proferentem* holding is not final and, as an incorrect prediction of a purely legal principle, its application would result in the inequitable administration of the laws.

A. The Third Circuit's *Contra Proferentem* Ruling Was Not Final Because It Was An *Erie* Prediction That The Federal Court Must Revisit And Was Based On A Disproven Factual Assumption.

Goldman Parent argues that the Third Circuit's ruling was "final" even if it was an *Erie* prediction because courts give preclusive effect to incorrect federal predictions of state law in interlocutory orders. (AB37.) This argument is both wrong and misstates the issue on appeal.

First, Goldman Parent misapprehends the concept of finality in the issue preclusion context. It relies almost exclusively on cases that did not involve

interlocutory decisions, but on final orders in the ordinary, traditional sense. *See, e.g., B&B Hardware, Inc., v. Hargis Indus.*, 135 S. Ct. 1293, 1308-09 (2015) (giving preclusive effect to a final decision of the Trademark Trial and Appeal Board); *Ideker v. PPG Indus., Inc.*, 788 F.3d 849, 853-54 (8th Cir. 2015) (giving preclusive effect to an unappealed decision dismissing an earlier case); *Lobato v. Taylor*, 70 P.3d 1152, 1166 (Colo. 2003) (holding that *res judicata* precluded relitigation of property rights finally determined in an action in the 1960s); *Jones v. Reliant Energy Res. Corp.*, 2001 WL 111988, at *8 (Del. Ch. Feb. 2, 2001) (finding that a prior litigation fully and finally determined who was legally responsible to pay royalty owners).[3]

Here, unlike the usual case, the prior action is on-going, and the ruling at issue is subject to change. Indeed, the court in the New Jersey Action has an on-going obligation to reconsider its prediction of Delaware's *contra proferentem* law in light of any subsequent changes until that litigation is completely over.

[3] Goldman Parent cites *Pyott v. Louisiana Mun. Police Emps. Ret. Sys.*, 74 A.3d 612 (Del. 2013), for the proposition that this Court should also defer to the Third Circuit's *contra proferentem* ruling for comity's sake. (AB42n.13.) But *Pyott*, like the other cases on which Goldman Parent relies, involved a final judgment. 74 A.3d at 616. Here, the order at issue is not final, and it is well-established that full-faith and credit is not required when a decree is interlocutory or subject to modification by the rendering court. *Barber v. Barber*, 323 U.S. 77, 81 (1944); *Padron v. Lopez*, 220 P.3d 345, 354 (Kan. 2009) (collecting cases).

Goldman Parent makes no attempt to dispute the authorities Aleynikov cited for this critical point. (OB30 (citing, *inter alia*, *Delano v. Kitch*, 663 F.2d 990, 996 (10th Cir. 1981)). Instead, it cites *Syverson v. I.B.M. Corp.*, 472 F.3d 1072, 1079 (9th Cir. 2007), for the proposition that a decision can be final for issue preclusion purposes even though there are to be further proceedings in the matter on remand. (AB38.) But Goldman Parent ignores *Syverson*'s further statement that although finality in the sense of appealability of an entire case is not necessary to make an interlocutory order final for issue preclusion purposes, "the proper query . . . is whether the court's decision *on the issue as to which preclusion is sought* is final." *Id.* (emphasis in original). An interlocutory order can be sufficiently final for issue preclusion purposes where "the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961) (Friendly, J.). But Goldman Parent cites no case in which an incorrect interlocutory federal prediction of state law in a still-pending case was treated as binding in that state's court. That makes sense, because the federal district court on remand is bound to change its position to follow what a state court says about state law—not what the court of appeals predicted. Thus, there is more than "good reason" to permit relitigation of the *contra proferentem* decision in the New Jersey

Action; the issue must be revisited in that action if a Delaware court says (as the court below did) that the Third Circuit was wrong. Since the issue of Delaware law is thereby open to relitigation in the New Jersey Action, there is no good reason to foreclose its authoritative resolution here.

Goldman Parent also incorrectly attributes to Aleynikov the argument that the *contra proferentem* issue was not "actually litigated." (AB38.) This misstates the argument. Aleynikov demonstrated in his Opening Brief that the factual predicate on which the Third Circuit based its ruling—that the only way for him to be a beneficiary under the Bylaws was by being an "officer" (as opposed to an "employee")—was never raised and tested in the district court. Thus, it is the factual underpinning for the Third Circuit's *contra proferentem* ruling—that Aleynikov had yet to establish that he was a party to the Bylaws—that was not actually litigated.

And when that matter *was* actually litigated in this case, the Court of Chancery correctly found that § 6.4 confers a valuable right upon employees of Goldman LP—the right to seek advancement on a discretionary basis. (Op. ¶ 5d.xvi ("Aleynikov was a party to and entitled to benefits under the Bylaws in his capacity as an employee.");[4] A285.) The right to have discretion exercised, even

[4] Goldman Parent challenges the court's finding on this score, asserting that

with no assurance that it will be exercised favorably, is itself a valuable right. *INS v. St. Cyr*, 533 U.S. 289, 325 (2001). Because the Third Circuit's *Erie* prediction is subject to change in the New Jersey Action based on developments in Delaware law, and because the factual predicate for the *contra proferentem* ruling was subject to refutation on remand, the Court of Chancery erred in finding that ruling sufficiently final for issue preclusion purposes.

B. Giving Preclusive Effect To The Third Circuit's *Contra Proferentem* Ruling Would Lead To An Inequitable Administration Of The Laws.

The Third Circuit's *contra proferentem* ruling articulated a broad principle of law: that Delaware courts would not apply *contra proferentem* to construe contractual ambiguities against a unilateral drafter when there is a dispute about whether the party seeking benefits under the contract can even claim status as a party to that contract. *Aleynikov*, 765 F.3d 362. Although that principle was repudiated in *Stoms v. Federated Serv. Ins. Co.*, 125 A.3d 1102, 1108 (Del. 2015), Goldman Parent contends it would not be inequitable to apply it here because (i)

Aleynikov would only have rights under the Bylaws if he were an employee of Goldman LP and suggesting that the Court of Chancery must have been confused about which entity employed Aleynikov. There was no misunderstanding. Counsel argued during post-trial proceedings that Aleynikov would only have rights under the Bylaws if he had been an employee of Goldman Parent, not Goldman LP; the Court of Chancery engaged with counsel on the point, understood his argument, and rejected it. (AR3-7; Op. ¶ 5d.xvi.)

Stoms is consistent with the Third Circuit's decision; and (ii) the existence of another similar litigant who would be treated differently raises no fairness concern. (AB40-41.)

Goldman Parent's assertion that the Third Circuit's decision is consistent with *Stoms* is particularly remarkable in light of the lower court's conclusion that "[t]he implicit reference to *contra proferentem* that appears in that decision is consistent with how I understood the doctrine to have operated historically," (Op. ¶ 5c.). In other words, the Third Circuit got it wrong.[5]

Goldman Parent's contention that *Gannon v. Am. Home Prods., Inc.*, 48 A.3d 1094, 1109 (N.J. 2012), foreclosed this argument is mistaken. *Gannon* did not apply Restatement (Second) of Judgments § 28(2) or address a situation in which the relevant issue was "one of law." Rather, *Gannon* involved a different

[5] In his Opening Brief, Aleynikov noted the pendency of *Jiampietro v. The Goldman Sachs Group, Inc.*, C.A. No. 12601-VCL (Del. Ch.), another advancement and indemnification action by a former Goldman LP Managing Director. That case called upon the same Vice Chancellor to determine whether *contra proferentem* should apply to interpret the term "officer" in the Bylaws. (OB34.) Whether to avoid the obvious answer to that question, which would inevitably change the Third Circuit's understanding of Delaware law in the New Jersey Action, or for some other reason, Goldman Parent settled *Jiampietro* after Aleynikov filed the Opening Brief. As the U.S. Supreme Court has noted, allowing parties to manipulate the path of the law through settlements disserves the public interest. *Cf. United States Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 27 (1994).

litigant seeking to prove its case based on different facts. *See Gannon*, 48 A.3d at 1109. Legal (as opposed to factual) rulings receive different treatment under New Jersey law and the Restatement because precluding their relitigation "might unduly delay needed changes in the law and might deprive a litigant of a right that the court was prepared to recognized for other litigants in the same position." Restatement § 28, cmt. b. Because the Third Circuit's pronouncement is a non-final, incorrect *Erie* prediction of a broadly applicable principle of Delaware law, it would be inequitable to give it preclusive effect in this case.

C. The Trial Court Correctly Found That But For The Application Of Issue Preclusion, Aleynikov Would Have Been Entitled To Invoke *Contra Proferentem*.

Finally, Goldman Parent argues that Aleynikov would not be entitled to invoke *contra proferentem* even if issue preclusion does not apply. (AB42-43.) Goldman Parent is again mistaken. First, Goldman Parent argued that *contra proferentem* would not apply because the extrinsic evidence resolved any ambiguity in its favor. But as shown above, the only relevant extrinsic evidence supported Aleynikov's reasonable interpretation of the term "officer" of a non-corporate subsidiary in § 6.4, not Goldman Parent's. Thus, to the extent the parties' reasonable interpretations of the term "officer" were in equipoise when the Third Circuit remanded the New Jersey Action, the trade usage evidence

Aleynikov marshalled before the Court of Chancery tipped the balance decidedly in his favor.

Second, Goldman Parent argued that the Third Circuit's ruling correctly stated Delaware's *contra proferentem* law. But that ruling was inconsistent with *Stoms, Lukk v. State Farm Mutual Insurance Company*, 2014 WL 4247767, at *5 (Del. Super. Aug. 29, 2014), *Kale v. Wellcare Health Plans, Inc.*, C.A. No. 6393-VCS, at *63-66 (Del. Ch. June 13, 2011) (AR8), and the extensive authority cited in the Third Circuit dissent, *Aleynikov*, 765 F.3d 371 (Fuentes, J.) (citing *Stockman v. Heartland Indus. Partners, L.P.*, 2009 WL 2096213 (Del. Ch. July 14, 2009)).

Finally, the Third Circuit's ruling cannot be salvaged because Aleynikov did not read the Bylaws while employed at Goldman LP. Delaware subscribes to the objective theory of contracts, in which ambiguous terms are interpreted based on the reasonable understanding of a person in the parties' position, not the subjective understanding of one of the litigants. *Estate of Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010). Moreover, § 6.4 states that "[t]he rights provided to any person by this by-law shall be enforceable against the Corporation by such person, who shall be presumed to have relied upon it in serving or continuing to serve as a director or officer or in such other capacity as provided above." (A284.) Hence, if *contra proferentem* applies, the Court should grant Aleynikov advancement.

CONCLUSION

For the foregoing reasons, this Court should reverse the Final Order and Judgment and direct the court below 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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