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IN THE SUPREME COURT OF THE STATE OF DELAWARE

STREAM TV NETWORKS, INC., Plaintiff below, Appellant, v. SEECUBIC, INC., Defendant below, Appellee.	No. 360, 2021 Court Below: Court of Chancery of the State of Delaware
SEECUBIC, INC., Counterclaimant and Third-Party Plaintiff below, Appellee, v. STREAM TV NETWORKS, INC., Counterclaim Defendant below, Appellant, and MATHU RAJAN and RAJA RAJAN, Third-Party Defendants below, Appellants.	C.A. No. 2020-0766-JTL REDACTED PUBLIC VERSION FILED ON JANUARY 5, 2022

APPELLANTS' CORRECTED AND REVISED OPENING BRIEF

[redacted]

Dated: December 30, 2021

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NATURE OF PROCEEDINGS

The appealed judgment declared that a contract to transfer all of a Delaware corporation's assets in exchange for stock in a new reorganized entity did *not* require shareholder approval, under that corporation's charter or under 8 *Del. C.* § 271 ("Section 271"). To so hold, the Court of Chancery ("Trial Court") resurrected an "insolvency exception" from the pre-DGCL common law last applied (differently) in Delaware in 1915, and ruled as a matter of first impression that both Section 271 and the corporation's charter implicitly incorporate it. This appeal argues that neither the plain text of Section 271 nor the charter contain ancient implicit "insolvency exceptions." The disputed contract could not transfer all of the corporation's assets without both common and Class B voting shareholder approval. Thus, the disputed contractual asset transfer was unlawful.

Appellants Stream TV Networks, Inc. ("Stream" or "Company"), and Mathu and Raja Rajan (the "Rajans") appeal the September 23, 2021 Order Granting In Part Seecubic, Inc.'s Motion for Summary Judgment (the "SJ Order") and the November 10, 2021 Order Entering Partial Final Judgment Under Rule 54(b) (the "Partial Final Order").[1] The SJ Order granted Defendant-Appellee Seecubic, Inc. ("Seecubic") a

[1] The SJ Order is attached hereto as Exhibit A. The Partial Final Order is attached hereto as Exhibit B.

[redacted]

permanent injunction, as well as declaratory relief that a May 6, 2020 Omnibus Agreement (the "Omnibus Agreement") that *inter alia* transferred all of Stream's assets to Seecubic is valid and did not require the approval of a majority of the common or Class B voting shareholders under Stream's certificate of incorporation (the "Charter"). (SJ Order at 4-5).

Both the SJ Order and Partial Final Order incorporate the December 8, 2020 Memorandum Opinion (the "Injunction Opinion" or "Inj. Op.")[2], stating the factual background and legal analysis underpinning the Trial Court's prior issuance of a preliminary injunction in Seecubic's favor and against Stream. (Inj. Op. at 49).

The Trial Court also entered an Order Denying the Rajans' Motion to Modify the Preliminary Injunction (the "Modification Order")[3], rejecting the argument that the Omnibus Agreement caused both a "stock exchange" and a "reorganization," and also granted Seecubic's principals an option to force Stream to issue new shares that would change its voting control from the Rajans to Seecubic, thereby requiring Class B voting approval as an "Acquisition" under the Charter's definition of that term.

[2] The Injunction Opinion is attached hereto as Exhibit C.
[3] The Modification Order is attached hereto as Exhibit D.

[redacted]

On December 8, 2021, the Trial Court issued an Opinion denying Stream's and the Rajans' Motion to Modify Injunction Pending Appeal, or Alternatively for Entry of Additional Status Quo Order Pending Appeal (the "Stay Opinion" or "Stay Op.").[4] The Stay Opinion substantially expands the Trial Court's reasoning to resurrect the pre-DGCL common law insolvency exception and might be called a mulligan attempt to buttress citation deficiencies of the earlier Injunction Opinion.

[4] The Stay Opinion is attached hereto as Exhibit E.

[redacted]

SUMMARY OF ARGUMENT

The Trial Court erred by holding that:

(i) The Charter did not require Class B voting shareholder approval of the Omnibus Agreement, because the Trial Court's first-impression 2020 adoption of a defunct minority version of the common law insolvency exception was somehow anticipated by the Charter's drafters in 2018 and therefore implicitly incorporated therein, and also controls the Charter's treatment of the Omnibus Agreement.

(ii) At some unknown date before 1915, Delaware law had adopted an insolvency exception that allowed boards to approve asset transfers to creditors, instead of the rule that required majority shareholder approval that actually appears in Delaware case law.

(iii) The 1916 adoption of the predecessor of 8 *Del. C.* § 271 did not supersede the former common law insolvency exception, such that the Trial Court's "board only" insolvency exception has been Delaware law from some unknown point in the 19th Century to today.

(iv) The public policy of Delaware favors a first-impression adoption of the pre-1916 minority rule version of the insolvency exception now, by the judiciary and without action of the General Assembly.

[redacted]

STATEMENT OF FACTS

I. FACTUAL BACKGROUND.

A. The Parties.

Stream is a Delaware corporation based in Philadelphia, whose business is to advance three-dimensional display technology without the viewer needing to wear special 3D glasses. (Inj. Op. at 5).

The Rajan family controls Stream. (*Id.*) Mathu Rajan personally owns 18,000 shares of Class A voting stock, which each carry one vote per share. (*Id.*) An investment vehicle owned by the Rajans and their parents holds 19,000,000 shares of Stream's Class B voting stock, each carrying ten votes per share. (*Id.*) Another 116 investors own 7,698,964 Class B voting shares issued in 2013.

Seecubic is a Delaware corporation formed in May 2020 to receive Stream's assets under the Omnibus Agreement. (*Id.* at 1). It is controlled by two creditors of Stream described *post*.

B. Stream's Business.

Between 2009 and 2020, Stream raised $160 million through equity investments, unsecured convertible debt, and direct loans. (*Id.* at 6). [redacted]

[redacted]

[redacted] (A-195-96). Eventually, Stream [redacted] (*Id.*)

During this critical commercialization period in early 2020, Stream suffered substantial financial challenges including several insolvency events. (A-201-02; Inj. Op. at 1, 45; Stay Op. at 1, 10). As it had over its past $160 million of capital raises, Stream intended to address that liquidity crisis with an additional capital raise. One such capital source was that Stream's secured creditors had signed certain debt-to-equity conversion agreements in 2018. (Inj. Op. at 7). Another was that in 2020, Stream was weeks away from signing a major commercialization agreement with [redacted] (A-232). Stream did not declare Chapter 11 bankruptcy or take other judicial reorganization acts during those early 2020 solvency difficulties because it instead intended to raise capital (as it had in the past) after announcing its anticipated [redacted]

[redacted]

C. Stream's Board of Directors.

Historically, the Rajans served as the sole members of Stream's Board of Directors (the "Board"). (Inj. Op. at 5). Between 2011 and 2014,[5] Shad Stastney served as an outside director, and later rejoined the Board as Vice Chairman in 2018 until resigning in January 2020. (*Id.* at 6). Stastney is also the principal of SLS Holdings VI, LLC ("SLS"), which is Stream's senior secured creditor. (*Id.*) Two other men also served as outside directors between 2015 and July 2019. (*Id.*)

In February 2020, four outside directors joined the Board: Kryzstof Kabacinksi, Asaf Gola, Kevin Gollop, and Frank Hodgson (the "Outside Directors"). (*Id.* at 8-9).

In May 2020, the Outside Directors determined to negotiate a reorganization with Stream's secured creditors to address Stream's financial difficulties. (*Id.* at 9). Mr. Gola proposed that the Board create the Resolution Committee, comprised of himself and Mr. Gollop, to "resolve any existing or future debt defaults or claims, and any existing or future litigation, or threats thereof, on behalf of Stream." (*Id.* at

[5] Mr. Stastney settled a set of SEC charges regarding breaches of fiduciary duty in unrelated investments in September 2013. The settlement *inter alia* barred Mr. Stastney from investment advisory work for 18 months. The SEC settlement is public record. *In the Matter of Shadron L. Stastney*, United States Security and Exchange Comm. Admin. File No. 3-15500, Release Nos. 3671, 30689 (Sep. 18, 2013), published at https://www.sec.gov/litigation/admin/2013/ia-3671.pdf.

[redacted]

10). As described *post*, the Resolution Committee purported to bind Stream to the May 6, 2020 Omnibus Agreement to effect that reorganization goal.[6] *See infra*, § F.

D. Stream's Secured Creditors.

In 2011 and 2012, SLS loaned Stream $6 million via multiple senior notes, secured against all assets of Stream and its subsidiaries. (Inj. Op. at 6). SLS is Stream's senior secured creditor. (*Id.*)

Between 2014 and 2020, Hawk Investment Holdings Limited ("Hawk") loaned Stream over £50 million plus $1.336 million through a series of 17 separate notes. (*Id.* at 7). Stream also pledged its assets for those notes subject to SLS's senior security, thereby rendering Hawk a junior secured creditor. (*Id.*)

E. Stream's Charter Unambiguously Guarantees Blocking Rights To The Class B Voting Shareholders To Veto Asset Transfers.

Stream's December 17, 2018 Third Amended and Restated Certificate of Incorporation (the "Charter") expressly requires Class B voting shareholder

[6] The circumstances of the Resolution Committee appointments, the status of directors Gollop and Gola during the period of negotiation of the Omnibus Agreement, and the true signing dates of various documents associated with the Omnibus Agreement (i.e., backdating) all are disputed. The Trial Court made various preliminary factual findings in the Injunction Opinion to the effect that Messrs. Gollop and Gola held *de facto* director status during the critical early May 2020 period. Those fact findings are not appealed here. There exists a stayed related action alleging breaches of fiduciary duty in which it is anticipated that a prearranged *quid pro quo* deal between Mr. Gola and Mr. Stastney will be litigated. *See Crawford v. Rajan*, C.A. No. 2020-0004-JTL (Del. Ch.).

[redacted]

approval for all possible transactions that could remove control of Stream's technology from the Class B voting shareholders (including the Rajans), however named. The Class B voting shareholder provision was added to the Charter in 2013. Charter § IV.D.2(d) provides:

> **Separate Vote of Class B Voting Stock**. For so long as shares of Class B Voting Stock remain outstanding, in addition to any other vote or consent required herein or by law, the affirmative vote or written consent of the holders of a majority of the then-outstanding shares of Class B Voting Stock, voting as a separate class, shall be necessary for the Company to consummation [sic] an Acquisition or Asset Transfer.

(A-124) (the "Class Vote Provision"). Charter § IV.D.4(b) further defines the term "Acquisition" as:

> (A) ***any consolidation, stock exchange or merger*** of the Company with or into any other corporation or other entity or person, ***or any other corporate reorganization***, other than any such consolidation, merger or reorganization in which the stockholders of the Company immediately prior to such consolidation, merger or reorganization, continue to hold a majority of the voting power of the surviving entity in substantially the same proportions (or, if the surviving entity is a wholly-owned subsidiary, its parent) immediately after such consolidation, merger or reorganization; ***or (B) any transaction or series of related transactions to which the Company is a party and in which in excess of fifty percent (50%) of the Company's voting power is transferred***; provided that an Acquisition shall not include (x) any consolidation or merger effected exclusively to change the domicile of the Company, or (y) any transaction or series of transactions principally for bona fide equity financing purposes in which cash is received by the Company or any successor or indebtedness of the Company is cancelled or converted or a combination thereof.

(A-126) (emphasis added). And, the term "Asset Transfer" is defined as:

[redacted]

> a sale, lease or other disposition of all or substantially all of the assets or intellectual property of the Company or the granting of one or more exclusive licenses which individually or in the aggregate cover all or substantially all of the intellectual property of the Company.

(*Id.*)

The law firm DLA Piper wrote the Charter. (A-394-95). DLA Piper averred that, contrary to the Trial Court's idiosyncratic non-textual interpretations, the express purpose of the Class Vote Provision was to require Class B voting shareholder approval for any transfer of the Company's technology, however characterized. (*Id.*) DLA Piper further averred that it commonly includes such protections for founder equity in corporate charters. (*Id.*)

F. The Omnibus Agreement Transaction.

On March 9, 2020, SLS noticed default of its secured notes. (Inj. Op. at 8). The default notice sparked a flurry of activity among Stream's investors, which eventually evolved to an appointment of a "Resolution Committee" of the Board in early May 2020.[7] (Inj. Op. at 9-10). On May 6, 2020, the Resolution Committee acting alone – without approval of the Class A or Class B voting shareholders – caused Stream to enter into the Omnibus Agreement with SLS and Hawk (and

[7] *Supra* n. 6.

[redacted]

certain other investors) as counterparties. (A-135). The Resolution Committee then approved the Omnibus Agreement the same day. (Inj. Op. at 11).

The Omnibus Agreement transferred all of Stream's assets to Seecubic in lieu of SLS and Hawk foreclosing on Stream's assets. (Inj. Op. at 11; A-137, 140, §§ 1.1(a), 1.2). Once the assets were transferred, the SLS Notes and Hawk Notes would be extinguished. (*Id.*)

The Omnibus Agreement also provided for the issuance of one million shares in Seecubic to Stream. (A-139, § 1.1(f)). Stream's Class A common shareholders, other than the Rajans who were expressly excluded, were granted the right to "exchange" their Class A common shares for the equivalent number of shares of Seecubic's common stock for no cost. (*Id.*, § 1.1(d)).

The Omnibus Agreement further incorporated a secret Side Letter, under which Stream obliged itself to issue 48 million new shares of Stream Class A common stock to Seecubic. (A-157, § 1.1; A-379-80). The first Whereas clause of Side Letter expressly conditions the Omnibus Agreement upon the additional terms of the Side Letter. Those 48 million shares are precisely numbered to cause the Rajan's voting control within Stream to decline to 49.9%. (*Id.*) The Omnibus Agreement therefore not only transferred all of Stream's assets to Seecubic and exchanged Stream's common shares for Seecubic's common shares, but also granted

[redacted]

Seecubic an option to take majority voting control of Stream whenever it likes. (*Id.*) Seecubic has stated that it does not "presently intend" to exercise its option to take voting control of Stream. (Modification Order at 6).

[redacted]

ARGUMENT IN SUPPORT OF APPEAL

I. STREAM'S CHARTER UNAMBIGUOUSLY REQUIRED CLASS B VOTING SHAREHOLDER APPROVAL OF THE OMNIBUS AGREEMENT.

A. Question Presented.

Whether the Trial Court erred by holding that (i) the Class Vote Provision implicitly includes an "insolvency exception" derived from the common law predating Section 271, (ii) the Class Vote Provision is coextensive with, and not materially different from, Section 271, and (iii) the Omnibus Agreement does not qualify as an Acquisition under the Class Vote Provision (A-207-08, A-326-32, A-379-91; Inj. Op. at 46-49; Stay Op. 33-34).

B. Scope of Review.

This Court reviews interpretation of certificates of incorporation *de novo*. *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012).

C. Merits of Argument.

Respectfully, the Trial Court analyzed this case upside down, by all but ignoring the controlling Charter. The Trial Court never found the Charter to be ambiguous. Instead, it chose to expound upon the balance that the DGCL (not the Charter) should strike between tech founders who own preferred stock with blocking rights against changes in control, versus secured creditors. Only after the Trial Court had done all it liked to rewrite and rebalance Section 271 for every Delaware

[redacted]

corporation, did it deign to consider what the parties before it contractually bargained for within this particular Delaware corporation via their Charter. And it answered that question, paraphrased, as "The Charter and Section 271 are the same," when they clearly are not.

The Charter is mundanely applicable only to Stream; a modest opinion enforcing its plain text may garner few citations. Nonetheless, the Charter controlled this analysis; it should not have been ignored on the basis that, if only it did not exist, then the question presented would have been more broadly important.

In reality, (i) the Charter and not Section 271 controls the analysis, (ii) the plain text of the Class Vote Provision grants the Class B shares voting rights to veto all possible transactions that transfer Stream's technology, without any "insolvency exceptions," and (iii) the Omnibus Agreement did several things – an asset transfer, a stock exchange, a reorganization, and an optioned change in voting control – that each separately triggered a Class B approval requirement.

1. The Charter Unambiguously Controlled The Class B Voting Shareholders' Blocking Rights; Section 271 Was Irrelevant.

The Supreme Court summarized Delaware law interpreting corporate charters and bylaws in *BlackRock Credit Allocation Income Trust v. Saba Capital Master Fund, Ltd.*, 224 A.3d 964, 977 (Del. 2020), thus (internal punctuation omitted):

[redacted]

> Because corporate charters and bylaws are contracts, our rules of contract interpretation apply. Words and phrases used in a bylaw are to be given their commonly accepted meaning unless the context clearly requires a different one or unless legal phrases having a special meaning are used. Under the applicable interpretation rules, if the bylaw's language is unambiguous, the court need not interpret it or search for the parties' intent. If charter or bylaw provisions are unclear, we resolve any doubt in favor of the stockholder's electoral rights.

The DGCL is a broad enabling statute. "Both § 102(b)(1) and § 141(a) of the Delaware General Corporation Law … provide authority for charter provisions to restrict the authority that directors have to manage firms, unless those restrictions are contrary to the laws of this State." *Jones Apparel Grp., Inc. v. Maxwell Shoe Co., Inc.*, 883 A.2d 837, 838 (Del. Ch. 2004). This Court recently ruled that even Section 262 appraisal rights can be varied. *Manti Holdings, LLC v. Authentix Acquisition Co.*, 2021 WL 4165159 (Del. Supr. Sept. 21, 2021). Delaware charters may contractually provide voting rights to classes of shareholders that restrict the freedom of action that boards otherwise would enjoy under DGCL defaults. *Jones Apparel*, 883 A.2d at 838.

When a corporate charter varies a DGCL default rule, the Charter controls. *Id.* at 842. Therefore, the first place the Trial Court should have looked to determine whether Stream's shareholders held approval rights against the Omnibus Agreement was to Stream's Charter, and not to Section 271 (or worse, treatises predating Section 271). *Greenmont Cap. Partners I, LP v. Mary's Gone Crackers, Inc.*, 2012

[redacted]

WL 4479999, at *4 (Del. Ch. Sept. 28, 2012) ("In interpreting an unambiguous certificate of incorporation, the court should determine the document's meaning solely in reference to its language without resorting to extrinsic evidence."). The Charter's words must be given ordinary meaning, understood by a reasonable businessperson:

> When interpreting a contract, the court will give effect to the parties' intent based on the parties' words and the plain meaning of those words. The Court will give disputed terms their ordinary and usual meaning. Of paramount importance is what a reasonable person in the position of the parties would have thought the language of the contract meant.

Smartmatic Int'l Corp. v. Dominion Voting Sys. Int'l Corp., 2013 WL 1821608, at *4 (Del. Ch. May 1, 2013). Here, no reasonable businessperson would read the Class Vote Provision to deprive the Class B voting shareholders of the right to approve the Omnibus Agreement. The sole purpose of the Class Vote Provision is to protect the Rajans – the founders of Stream – from losing control of Stream's technology.

Section 271 default rules are relevant only if the Trial Court first ruled Stream's Charter ambiguous. *Id.* But the record contains no such ruling. The Charter was actually the *last* place the Court looked, in both the Injunction Opinion and the Stay Opinion. (Inj. Op. at 46-49; Stay Op. 33-34). The Trial Court twice grounded its analysis on the common law predating Section 271, and bootstrapped that analysis into the Charter. (*Id.*)

[redacted]

To effect an Acquisition or Asset Transfer, Stream required approval of the Class B voting shareholders "in addition to any other vote or consent required herein or by law." The Trial Court ruled that the Omnibus Agreement was an Asset Transfer. (Inj. Op. at 47). Therefore, the Omnibus Agreement required Class B voting shareholder approval by the plain text of the Charter.

This conclusion holds even assuming *arguendo* that Delaware common law, in some uncited case before 1915, had adopted a version of the insolvency exception that dispensed with majority shareholder approval. Even if the insolvency exception exists, then there is no "required by law" vote of the Class A common shareholders to approve the Omnibus Agreement. The Charter *still* requires that Class B voting shareholder approval "shall be necessary" to conduct an Asset Transfer. The Class B voting shareholders hold a contract right qua the Charter to veto the Omnibus Agreement even if the Class A common shareholders lose that right via default application of an insolvency exception.

Simply, the Charter grants the Class B voting shareholders class voting rights to block changes in control, enforceable in Delaware law. *Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843 (Del. 1998) (outlining charter language requiring class vote on merger negatively effecting interest of preferred shareholders).

[redacted]

Additionally, if *arguendo* the Class Vote Provision was ambiguous (and the Trial Court never said so), that ambiguity must be resolved against shareholder disenfranchisement. *Salamone v. Gorman*, 106 A.3d 354, 370-71 (Del. 2014); *Airgas, Inc. v. Air Products & Chemicals, Inc.*, 8 A.3d 1182, 1188 (Del. 2010).

2. The Class Vote Provision Does Not Track Section 271.

The Trial Court used Section 271 as a parol evidence interpretive aid without first ruling the Class Vote Provision ambiguous, violating the cannon of objective contract interpretation. (Inj. Op. at 48) The Trial Court emphasized "parallel phrasing." (*Id*.) But Section 271 and the Charter's definition of Asset Transfer are materially different (in relevant part, emphasis added):

- "Every corporation may at any meeting of its board of directors or governing body *sell, lease* ***or exchange*** *all or substantially all of its property and assets* … when and as authorized by a resolution adopted by the holders of a majority of the outstanding stock of the corporation[.]" 8 *Del. C.* § 271(a).

- Asset Transfer means "a sale, lease ***or other disposition*** *of all or substantially all of the assets* or intellectual property of the Company or the granting of one or more exclusive licenses … cover[ing] all or substantially all of the intellectual property" of Stream. (A-126).

The Trial Court recognized "only two differences" between Section 271 and the Class Vote Provision: intellectual property and exclusive licenses. (Inj. Op. at 48). That holding was wrong. The Charter employs a third, material variance from Section 271: the phrase "or other disposition."

[redacted]

The words "other disposition" are broader than Section 271, which is limited to a "sale, lease or exchange of all or substantially all assets." "Disposition" means: "[t]he act of transferring something to another's care or possession, esp. by deed or will; the relinquishing of property." Black's Law Dictionary (11th ed. 2019); *see also Wilm. Tr. Co. v. Tropicana Entm't, LLC*, 2008 WL 555914, at *8 (Del. Ch. Feb. 29, 2008) (interpreting "disposition" as an "inherently broad term[] generally understood to encompass changes in title or ownership" and noting "the broad reading that transfer and disposition would ordinarily receive").

The choice of Charter language different from a statute is material *per se*. *Jones Apparel*, 883 A.2d at 842 (emphasizing "that the drafters [of a charter] could have simply tracked the language of the statute, but did not. That choice cannot be seen as anything other than intentional, reinforcing the conclusion that to read a proviso back into [the charter] allowing the board to set the record date would contravene the plain meaning of that provision."); *Williams Cos., Inc. v. Energy Transfer LP*, 2020 WL 3581095, at *12 n.123 (Del. Ch. July 2, 2020) ("the use of different language in different sections of a contract suggests the difference is intentional—i.e., the parties intended for the sections to have different meanings").

The Class B shares get to vote on any "disposition" of the Company's assets, including but not limited to those covered by Section 271. The contextual phrase

[redacted]

"other disposition" is well-plowed ground in Delaware precedent. *See, e.g.*, *Ford v. VMware, Inc.*, 2017 WL 1684089 (Del. Ch. May 2, 2017) (as here, Class B shares with 10 votes each and blocking rights against "other dispositions"); *In re Loral Space & Commc'ns. Inc. Consol. Litig.*, 2008 WL 4293781, at *13 (Del. Ch. Sept. 19, 2008) (preferred stock with blocking rights against "other disposition" reformed after a transaction failed entire fairness review).

3. The Omnibus Agreement Also Meets The Charter's Definition of "Acquisition," Separately Requiring Class B Voting Shareholder Approval.

The Trial Court erred by holding that the Omnibus Agreement was *only* an Asset Transfer and not an Acquisition qua the Charter's definitions. (Inj. Op. at 46-49; Modification Order). The Omnibus Agreement is both an Acquisition *and* an Asset Transfer.[8]

The Omnibus Agreement exchanged stock between Stream's shareholders and Seecubic, reorganized Stream, and granted Seecubic's principals an option to

[8] The Class Vote Provision uses the word "or" in the inclusive disjunctive tense, rather than the exclusive disjunctive ("You must wear a winter coat if it is windy or snowy" means you must wear a coat if it is just windy, or just snowy, or both windy and snowy.). *Stockman v. Heartland Indus. Partners, L.P.*, 2009 WL 2096213, at *14 (Del. Ch. July 14, 2009) ("Although the normal approach to interpretation is to treat 'and' as conjunctive and 'or' as disjunctive, the opposite approach has been applied where the normal approach would lead to an absurd result or one contrary to the drafter's overall intent.").

[redacted]

take Stream's voting control. (A-137, § 1.1). The contract is named "Omnibus Agreement" instead of "Asset Purchase Agreement" because it caused a complete reorganization amongst the former shareholders and secured creditors of Stream via a private-party workout. Indeed, the Omnibus Agreement is a statutorily recognized form of "reorganization," as codified in the IRS Code at 26 *U.S.C.A.* § 368(a)(1)(D).

To avoid that conclusion, the Trial Court erroneously applied a contractual carve-out for debt cancellation. (Modification Order at 5). But that exception excludes from the definition of Acquisition only the following:

> (x) any consolidation or merger effected exclusively to change the domicile of the Company, or (y) any transaction or series of transactions ***principally for bona fide equity financing purposes*** in which cash is received by the Company or any successor or indebtedness of the Company is cancelled or converted or a combination thereof.

(A-126) (emphasis added). The Omnibus Agreement does not purport to be a transaction "principally for bona fide equity financing" of Stream. The Trial Court defined the Omnibus Agreement as a "private foreclosure," not a financing effort. (Inj. Op. at 4, 40-41, 45; Stay Op. at 11). The recapitalization carve-out did not apply.

a. The Omnibus Agreement Caused A Stock Exchange.

The Omnibus Agreement causes a "stock exchange" of 1 million Seecubic shares for the existing common shares of Stream, excluding those owned by the

Rajans. (A-139, § 1.1(f)). The Trial Court approved of the stock exchange provision of the Omnibus Agreement. (Inj. Op. at 40). But despite that approval, the Injunction Opinion omits the dispositive phrase, "stock exchange … with or into any other Company" from its analysis of the Charter without explaining why. (Inj. Op. at 46).

It appears that the Trial Court implicitly considered the Omnibus Agreement to be *only* an "exchange" of Stream's assets for Seecubic stock within the default meaning of Section 271. But the Charter puts the class voting right against stock exchanges, reorganizations, and changes in voting control in the definition of Acquisition, again materially varying the Charter from DGCL defaults. The Trial Court's analysis framework reads the "stock exchange" provision out of the Charter entirely. *Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).

b. The Omnibus Agreement Caused A Reorganization.

The Omnibus Agreement is an acquisitive "reorganization" of Stream's business that changed the voting proportions from those of Stream to new ones in Seecubic. The word "reorganization" is defined in the federal tax code. 26 *U.S.C.A.* § 368(a) states in relevant part:

Definitions relating to corporate reorganizations:

(a) Reorganization.

[redacted]

> (1) In general. For purposes of parts I and II and this part, the term "reorganization" means: ***
>
> (C) the acquisition by one corporation, in exchange solely for all or a part of its voting stock (or in exchange solely for all or a part of the voting stock of a corporation which is in control of the acquiring corporation), of substantially all of the properties of another corporation, but in determining whether the exchange is solely for stock the assumption by the acquiring corporation of a liability of the other shall be disregarded;
>
> (D) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor, or one or more of its shareholders (including persons who were shareholders immediately before the transfer), or any combination thereof, is in control of the corporation to which the assets are transferred; but only if, in pursuance of the plan, stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 354, 355, or 356 …

26 *U.S.C.A.* § 368(a). The Delaware Code also uses the term "reorganization" frequently and recognizes the distinction between judicial reorganizations (e.g., Chapter 11 bankruptcies, Section 291 receiverships, and the like), and non-judicial reorganizations (e.g. workouts) specifically in the context of stock exchanges.[9] For example, Delaware's Securities Act defines a security sale at 6 *Del. C.* § 73-103(a)(20):

> (20) "Sale" or "sell" includes every contract of sale of, contract to sell or disposition of a security or interest in a security for value. ***

[9] *See, e.g.*, 6 *Del. C.* §§ 15-601, 17-402, 18-304, 73-103, 73-207; 12 *Del. C.* §§ 3923, 49A-204; 18 *Del. C.* § 4972.

> c. Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as ***every sale or offer of a security which gives the holder a present or future right or privilege to convert into another security of the same or another issuer***, is considered to include an offer of the other security.
>
> d. The terms defined in this subsection do not include any bona fide pledge or loan; any stock dividend whether the corporation distributing the dividend is the issuer of the stock or not, if nothing of value is given by stockholders for the dividend other than the surrender of a right to a cash or property dividend when each stockholder may elect to take the dividend in cash or property or in stock; ***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; ***or any act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims or property interests, or partly in such exchange and partly for cash***.

6 *Del. C.* § 73-103(a)(20) (emphasis added). A contract that transfers all assets of a Delaware corporation to another corporation in exchange for stock of the acquiring corporation and a cancellation of debt is an IRS Code Type D reorganization, of a type also recognized in Delaware law. 6 *Del. C.* § 73-103(a)(20)(d).

Again, the Charter required Class B voting shareholder approval of "any other corporate reorganization." The Charter's plain text controls.

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c. The Side Letter Granted An Option To Change Stream's Voting Control.

The Side Letter granted Seecubic's principals and certain other investors the right to call 48 million new Class A common shares of Stream. (A-157, § 1.1). Those shares are numbered to reduce the Rajan's voting control of Stream to 49.9%. (*Id.*) The Trial Court blindly accepted Seecubic's oral representations that it does not "presently intend" to exercise the option rights of the Side Letter as dispositive, despite that the plain text of the Side Letter states that Stream will not receive any consideration from the Omnibus Agreement if the Side Letter is not fulfilled. (Modification Order at 6).

Under the Trial Court's reasoning, the Class B voting shareholders would never get a vote to block a change in voting control. They do not get to vote on issuance of the option, and they also do not vote on exercise because no additional corporate acts would occur to spark a vote. (Modification Order). The Trial Court's interpretation renders the blocking right against changes in voting control illusory. *Osborn*, 991 A.2d at 1159 ("We will read a contract as a whole and we will give each provision and term effect … We will not read a contract to render a provision or term 'meaningless or illusory.'").

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II. THE TRIAL COURT ERRED BY HOLDING THAT THE COMMON LAW INSOLVENCY EXCEPTION EXISTS IN DELAWARE LAW AND MODIFIES THE PLAIN LANGUAGE OF 8 *DEL. C.* § 271.

A. Question Presented.

Whether the Trial Court erred by holding: (i) implicitly, Section 271 is ambiguous and requires reference to other authority for interpretation, (ii) pre-1916 Delaware common law endorsed a version of the insolvency exception permitting boards to transfer all company assets without shareholder approval, (iii) Section 271 failed to supersede the old insolvency exception that (supposedly) dispensed with shareholder approval, and thus (iv) Stream's Class A common and Class B voting shareholders enjoyed no approval rights against the Omnibus Agreement. (A-403-06; A-417-20).

B. Scope of Review.

Statutory interpretation is a question of law reviewed *de novo*. *See, e.g.*, *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 524 (Del. 1999).

C. Merits of Argument.

The Trial Court primarily erred by ignoring the Charter in favor of Section 271 default rules. *See supra*, § I. However, even on its chosen battleground, the Trial Court's rewrite of Section 271 is dead wrong. No Delaware case has ever adopted the version of the common law insolvency exception now espoused by the

Trial Court. The seminal 1915 Delaware case expressly requires majority shareholder approval. The General Assembly closely followed that case in 1916 with enactment of the predecessor of Section 271, also requiring majority shareholder approval. The United States Supreme Court followed in 1921. The Model Business Corporation Act followed in 1950, expressly requiring majority shareholder approval at Section 12.02 thereof, which was gradually adopted by 32 other states.

Delaware law is not now, *and has never been*, that boards may transfer all assets of Delaware corporations without shareholder approval.

1. Section 271 Is Not Ambiguous, Contains No Exceptions, And Means What It Says.

In the absence of ambiguity, the language of a statute must be regarded as conclusive of the legislature's intent. *See, e.g., Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 68 (Del. 1993). "If the statute as a whole is unambiguous, there is no reasonable doubt as to the meaning of the words used and the Court's role is then limited to an application of the literal meaning of the words." *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985).

Section 271(a) requires, "a resolution adopted by the holders of a majority of the outstanding stock of the corporation entitled to vote thereon" to transfer all of a

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Delaware corporation's assets. 8 *Del. C.* § 271(a). The statute contains no exceptions of any kind, including insolvency exceptions. That ends the inquiry.

When a statute is unambiguous, it is inappropriate to interpret it by attempting to place it in a "broader statutory scheme." *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr., ex rel. Christiana Bank & Tr. Co.*, 28 A.3d 1059, 1070 (Del. 2011). The Trial Court thus erred by using 8 *Del. C.* § 272[10] to abrogate the plain text of Section 271. *Manti Holdings*, 261 A.3d at 1214.

The Trial Court relied heavily on an unpublished transcript opinion in *Gunnerman v. Talisman Capital Talon Fund, Ltd.*, C.A. No. 1894-VCS (Del. Ch. July 12, 2006), for the proposition that Section 271 is ambiguous and thus modified by Section 272. (Inj. Op. at 38, 43-45). *Gunnerman* is a breach of fiduciary duty action in which the plaintiffs alleged, *inter alia,* that a proposed foreclosure transaction violated Section 271. The Court dismissed that claim, without prejudice, for failure to state a claim. (A-109, 112). The transcript contains no citations to any authorities other than the Court's own opinions about the interplay of Sections 271

[10] Sections 271 and 272 do not conflict. Section 272 allows boards to pledge corporate assets. A creditor holding a defaulted pledge has two options: (a) foreclose in the Superior Court, as was attempted in this case, or (b) compromise sufficiently to attain shareholder approval of an asset transfer qua Section 271. Section 271 does not deprive secured creditors of foreclosure rights; it merely states that shareholders get to approve any non-judicial workout agreement.

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and 272. Notably absent from the brief portion of the bench ruling pertaining to Section 271 was any discussion about the common law insolvency exception. (A-87-90, 109; *see infra*, § II.3.a). *Gunnerman*'s statements are unsupported dicta that should carry no weight. *Gatz Properties, LLC v. Auriga Capital Corp*., 59 A.3d 1206, 1220 (Del. 2012) (trial courts should refrain from rulings that that "propagate their individual world views on issues not presented"); *Humm v. Aetna Cas. & Sur. Co*., 656 A.2d 712, 716 (Del. 1995) (dicta not binding as precedent).

2. Certainty And Predictability In Interpretation Are Hallmarks Of Delaware's Corporate Governance Regime.

Two bedrock policies "underlying the DGCL include certainty and predictability." *Salzberg v. Sciabacucchi*, 227 A.3d 102, 137 (Del. 2020). These values depend on interpretations of the DGCL founded upon the plain language of the statutes as they were written by the General Assembly in a collaborative process with the Council of the Corporation Law Section of the Delaware State Bar Association. *See* Alex Righi, *Shareholders on Shaky Ground: Section 271's Remaining Loophole*, 108 Nw. U.L. Rev. 1451, 1457 (2014) (describing the DGCL amendment process); Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1755-1758 (2006) (describing the role of the Delaware State Bar Association in suggesting changes to the DGCL to the General Assembly).

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Consistent with those principles, then Vice-Chancellor Strine warned against writing exceptions into Section 271 that do not appear in its plain text:

> [O]ur courts arguably have not always viewed cases involving the interpretation of § 271 through a lens focused by the statute's plain words. Nonetheless, it remains a fundamental principle of Delaware law that the courts of this state should apply a statute in accordance with its plain meaning, as the words that our legislature has used to express its will are the best evidence of its intent. To analyze whether the vote requirement set forth in § 271 applies to a particular asset sale without anchoring that analysis to the statute's own words involves an unavoidable risk that normative preferences of the judiciary will replace those of the General Assembly.

Hollinger Inc. v. Hollinger Int'l, Inc., 858 A.2d 342, 376 (Del. Ch. 2004).

3. On Substance, The Trial Court Erred By Holding That Delaware Common Law Adopted A Version Of The Insolvency Exception That Entirely Dispensed With Shareholder Approval, And That Such Exception Still Exists.

The core of the Trial Court's rulings under appeal can be paraphrased as follows. Sometime prior to 1915, Delaware adopted a version of the insolvency exception that dispensed with shareholder approval entirely, which the Trial Court could only find in treatises and not in any Delaware case. (Inj. Op. at 27-45). When the General Assembly enacted the first version of Section 271 in 1916, it only superseded the historic common law rule requiring unanimous shareholder approval to transfer all assets of solvent corporations. (*Id.* at 33). Section 271 did not

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supersede the (supposed) right of boards to transfer all assets of insolvent corporations, despite Section 271's text requiring majority shareholder approval without any express exceptions. (*Id.*) Every one of those conclusions is wrong.

a. Delaware Only Adopted The "Majority Vote" Version Of The Insolvency Exception.

The Injunction Opinion wrongly implied that the seminal Delaware case, *Butler v. New Keystone Copper Co*., 93 A. 380, 382 (Del. Ch. 1915), "recognized" the "board only" version of the insolvency exception, thus: "Chancellor Curtis thus acknowledged the general prohibition on selling all of a corporation's assets, as well as the exception for an insolvent or failing firm." (Inj. Op. at 32).

Butler does no such thing. Chancellor Curtis actually stated:

> The general rule as to commercial corporations seems to be settled that neither the directors nor the stockholders of a prosperous, going concern have power to sell all, or substantially all, the property of the company if the holder of a single share dissent. ***But if the business be unprofitable, and the enterprise be hopeless, the holders of a majority of the stock may, even against the dissent of the minority, sell all the property of the company*** with a view to winding up the corporate affairs.

93 A. at 383 (emphasis added). *Butler* endorsed the same version of the common law insolvency exception that the General Assembly codified into Section 271 a year later. *Id.* A majority of shareholders, and not just boards, may approve transfers of all assets of "unprofitable" and "hopeless" Delaware corporations. *Id.*

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Moreover, *Butler* recognizes that corporate charters may *increase* that approval requirement. *Id.* at 382-83. The charter in *Butler* required a 75% vote to sell all assets. *Id.* at 382. In an early version of liberal deference to private ordering, Chancellor Curtis enforced that 75% charter requirement against the simple majority rule of the insolvency exception. *Id.* at 384-85.

Apart from *Butler*, the Trial Court cited zero Delaware cases to support its "board only" version of the insolvency exception. The Trial Court acknowledged that problem in the Stay Opinion. (Stay Op. at 22-25). No such case exists. Delaware recognized the common law rule that only a unanimous shareholder vote could transfer all assets of a Delaware corporation. *Butler*, 93 A. at 383. Delaware also recognized the insolvency exception, later codified in Section 271, that a simple majority of shareholders could transfer assets of insolvent corporations. *Id.* But Delaware *never* recognized the version of the insolvency exception that allowed boards acting alone to transfer all assets. The General Assembly then halted development of common law exceptions by adopting an unambiguous statute controlling this topic in 1916.

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The Delaware case most illuminative on the meaning of *Butler* is *Allied Chemical & Dye Corp. v. Steel & Tube Co*., 120 A. 486 (Del. Ch. 1923).[11] *Allied Chemical* was decided only 8 years after *Butler*, and 7 years after the first version of Section 271 was codified in 1916 to change *Butler's* statement of the common law restriction requiring unanimous shareholder approval of transfers of all assets. *Allied Chemical* considered a sale of all assets approved by 100% of preferred shareholders and 76% of the common shareholders. 120 A. at 489. The dissenting minority common shareholders alleged self-dealing by the controlling shareholder. *Id.* at 489, 493. The Court of Chancery considered *Butler*, the then-recent United States Supreme Court case *Geddes v. Anaconda Copper Mining Co*., 254 U.S. 590 (1921) which also explained the common law rule allowing a simple majority of shareholders to approve asset sales for failing corporations, and the 1916 adoption of the first predecessor statute of Section 271. *Id.* at 490. The Court of Chancery ruled that a sale of all assets approved by a majority of shareholders in compliance with all applicable charter provisions could not be enjoined by a dissenter except for a claim of fraud. *Id.* at 491.

[11] All 13 cases in *Butler's* progeny recognize the shareholders' right to vote upon a transfer of all assets. None state a "board only" version of the insolvency exception.

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The *Allied Chemical* Court reasoned:

> At the time of this [*Butler*] decision, the General Corporation Law of this State contained no provision touching the right of the corporation to sell all of its assets. At the next session of the Legislature, an act was passed amending the General Corporation Law, which, among other things, provides a new section as follows:
>
> Section 64a. Sale of Assets and Franchises.--Every corporation organized under the provisions of this chapter, may at any meeting of its board of directors, sell, lease or exchange all of its property and assets, including its good will and its corporate franchises, upon such terms and conditions as its board of directors deem expedient and for the best interests of the corporation, when and as authorized by the affirmative vote of the holders of a majority of the stock issued and outstanding having voting power given at a stockholders' meeting duly called for that purpose…provided, however, that the certificate of incorporation may require the vote or written consent of a larger proportion of the stockholders.
>
> ***This provision remains in the law to-day and fixes in statutory form the rule imposed on <u>all</u> corporations organized under the general act by which they are to be governed <u>whenever</u> the question of the sale of their entire assets is under consideration.***

120 A. at 490 (emphasis added, punctuation and internal citations omitted, full text of statute in original).

The Court of Chancery contemporaneously recognized that Section 271's majority vote requirement applies to "all" Delaware corporations "whenever" a sale of their entire assets is contemplated. *Id.* The words "all" and "whenever" include insolvent corporations. Thus, the Court of Chancery since 1923 has enforced Section 271 to mean what it says. *Id.*

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b. The Injunction Opinion's Non-Delaware Citations Are Bad Law.

The Injunction Opinion at footnote 9 cites six non-Delaware cases in support of the Trial Court's "board only" version of the insolvency exception, and the Stay Opinion adds one more. All seven cases are bad law.

Model Business Corporation Act § 12.02 requires majority shareholder approval for transfers of more than 75% of a corporation's assets, and thus is more strict than Section 271. *See Waters v. Double L, Inc.,* 755 P.2d 1294, 1299 (Idaho Ct. App. 1987), *aff'd on other grounds,* 769 P.2d 582 (Idaho 1989) (MBCA § 12.02 has no insolvency exception).

The Injunction Opinion cites cases from the following jurisdictions, with the year they were decided: South Dakota (1931), Alabama (1948), Illinois (1930), Illinois (1926), Iowa (1928), and Texas (1934). (Inj. Op. at 31, n. 9) The Stay Opinion added one additional 8th Circuit case decided on Texas law in 1932. (Stay Op. at 21). South Dakota, Alabama, and Iowa are now all Model Business Act jurisdictions, and each of those states has a codified version of MBCA § 12.02. *See, e.g.*, S.D. Codified Laws § 47-1A-1201; Ala. Code § 10A-2A-12.01; Iowa Code Ann. § 490.1202. The two Illinois opinions have not been cited in Illinois since 1937 and 1955, respectively. Both seem to have been abrogated by the adoption of the Illinois Corporation Act of 1983. Specifically, Section 11.60(c) of Illinois' Business

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Corporation Act is entitled "Sale, lease or exchange of assets, other than in usual and regular course of business" and imposes a 2/3 voting requirement to transfer all a corporation's assets. *See* 805 Ill. Comp. Stat. Ann. 5/11.60. Similarly, the Texas opinion has not been cited since 1939, and appears to have been abrogated by Tex. Business Organizations Code § 21.455, entitled "Approval of Sale of All or Substantially All of Assets," which expressly requires a shareholder vote closely mirroring Delaware Section 271.[12] The 8th Circuit Opinion is broadly cited for unrelated propositions, but not for the insolvency exception which, again, appears to have been abrogated out of Texas law at least since 1967. (Stay Op. at 21).

The Trial Court was correct that a minority rule "board only" version of the insolvency exception existed in 5 states through the 1930s, before being superseded by modern corporation statutes including the MBCA. Delaware law simply arrived at that now universal destination earlier than our sister states, in 1916.[13]

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[12] This Texas statute was enacted in 2003, but an earlier version was enacted in 1967. Tex. Bus. Corp. Act Art. 5.10.

[13] The Trial Court also erroneously cited treatise authority. One 1909 commentator cited by the Trial Court as firmly stating the insolvency exception also observed "[t]he authorities appear to be in conflict as to the rights and powers of private corporations, and the relative rights of the majority and minority stockholders in such corporations, to sell and dispose…[of] all the property of such corporations…" 3 Seymour D. Thompson & Joseph W. Thompson, *Commentaries on the Law of Private Corporations* § 2429, at 351 (2d ed. 1909). For another example, the Trial Court cited Walter Chadwick Noyes, *A Treatise on the Law of Intercorporate*

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Juxtaposed, Idaho and Michigan have expressly recognized that the insolvency exception was statutorily abrogated. *Waters,* 755 P.2d at 1299 ("[T]he black letter language of the Model Act provides that shareholders *are* entitled to vote on a sale of substantially all assets, whether or not the corporation is solvent.") (emphasis in original); *Michigan Wolverine Student Co-op. v. Wm. Goodyear & Co.*, 22 N.W.2d 884, 888 (Mich. 1946) (impossible to read an insolvency exclusion into the plain text of Michigan's version of Section 271, because *expressio unius et exclusio alterius*).

The Injunction Opinion emphasizes the proverbial "dog that did not bark." (Inj. Op. at 44-45). That reasoning proves the opposite of the Trial Court's argument. If the "board only" insolvency exception was good law in the 21st century, then it surely would have appeared in case law of at least one state arising from the Covid Crisis of 2020, the Great Recession of 2008, or the Dotcom Recession of 2001. The reason that the insolvency exception seems not to have been litigated anywhere since 1948 is that all modern corporation statutes, including the DGCL, superseded it.

Relations §§ 111, 112, at 210–13 (rev. 2d ed. 1909) to prove a distinction between a "losing" corporation and an insolvent one. (Stay Op. at 17-18). But that same section of Noyes's treatise also observed that "[i]n the absence of a controlling statute or by-law of the corporation, the directors have power to authorize an assignment of the property of an insolvent corporation for the benefit of its creditors." Noyes, *supra* at 213. This case presented both a controlling Charter provision and a controlling statute.

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4. The General Assembly Superseded The Common Law Insolvency Exception More Than A Century Ago.

Superseding occurs where a statute "replaces or ousts ('supersedes') the common law" which will "not be repealed by statute unless the legislative intent to do so is plainly or clearly manifested." *A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1121–22 (Del. 2009). Section 271 plainly superseded the common law unanimity rule; now, a majority of shareholders can vote to transfer all assets of both solvent *and* insolvent corporations, as was described in *Butler*, 93 A. 380. Because the common law rule of unanimity was superseded by Section 271, so too were any and all common law exceptions to that rule. There can be no exceptions to a common law rule that no longer exists.[14]

5. Changes In The Laws Of Bankruptcy And Corporate Governance Have Rendered The Insolvency Exception Unnecessary.

Modern bankruptcy law fills the need that the insolvency exception once addressed. 19th century bankruptcy procedure was convoluted for lack of a federal

[14] Commentators have highlighted that superseding. "It is not clear whether the failing business exception of the common law remains viable in Delaware, or whether Section 271 would be found to have superseded the failing business doctrine by extinguishing the common law requirement of stockholder unanimity. No Delaware decision answers the issue." R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 10.7 (4th Ed. Supp. 2021-22).

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bankruptcy law. Bankruptcy law was left to the states, and "[s]tate laws could not constitutionally provide for the discharge of preexisting debts or the discharge of debts owed citizens of other states." Charles Jordan Tabb, *A Century of Regress or Progress? A Political History of Bankruptcy Legislation in 1898 and 1998*, 15 BANKR. DEV. J. 343, 355–56 (1999). Congress passed the Bankruptcy Act of 1898, which marked the birth of modern bankruptcy practice. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 23 (1995).

Commentators, including those the Trial Court cited, recognize that the former common law insolvency exception was displaced by the Bankruptcy Act. *See* Balotti and Finkelstein, *supra* § 10.7 ("As a practical matter, in many instances federal bankruptcy statutes and other statutes governing creditors' rights have displaced the common law exception by providing explicit methods for addressing proposed asset dispositions by failing businesses.").

Another departure from 19th century corporate governance is Delaware's rejection of the "trust fund doctrine." Early 20th century commentators held that the directors owed fiduciary duties to the corporation's creditors akin to trustees. *In re RegO Co.*, 623 A.2d 92, 95 (Del. Ch. 1992); *see* 2 Seymour D. Thompson & Joseph W. Thompson, *Commentaries on the Law of Corporations* § 1320 (3d ed. 1927).

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The "board only" formulation of the insolvency exception was consistent with the former trust fund doctrine; it allowed directors to fulfill fiduciary duties to creditors at the expense of dissenting shareholders. However, the trust fund doctrine has long been rejected by Delaware authority. "[D]irectors of an insolvent firm do not owe any particular duties to creditors." *Quadrant Structured Prods. Co., Ltd. v. Vertin*, 115 A.3d 535, 546 (Del. Ch. 2015); *CML V, LLC v. Bax*, 6 A.3d 238, 253-54, n.10 (Del. Ch. 2010), *aff'd*, 28 A.3d 1037 (Del. 2011), as corrected (Sept. 6, 2011) (collecting authorities criticizing the trust fund doctrine). The "board only" version of the insolvency exception is no longer needed to serve a trust fund doctrine long abandoned by Delaware law.

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III. DELAWARE PUBLIC POLICY DOES NOT FAVOR RESURRECTING THE INSOLVENCY EXCEPTION.

A. Question Presented.

Whether the Trial Court erred by holding that public policy favors writing a "board only" insolvency exception into 8 *Del. C.* § 271. (Inj. Op. at 43-44; A-390-91, A-417-22).

B. Scope of Review.

Public policy questions are reviewed *de novo*. *See, e.g., RSUI Indem. Co. v. Murdock,* 248 A.3d 887, 902 (Del. 2021)

C. Merits of Argument.

1. Affirmance Would Destabilize The Delaware General Corporation Law And Disincentivize Incorporation In Delaware.

Both Stream's Charter and Section 271 unambiguously state that shareholder approval of the Omnibus Agreement was required. *See supra*, §§ I-II. The Trial Court erred by grasping for a policy rationale to contradict unambiguous contracts and Delaware statutes. (Inj. Op. at 43-45).

Arguendo if public policy were relevant, the Trial Court erred upon it. First, the appealed judgment upsets the reasonable expectations of hundreds of thousands of Delaware certificates of incorporation, which will have to be redrafted to accommodate the Trial Court's new insolvency exception. Second, the appealed

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judgment will disincentivize incorporation of early-stage technology companies in Delaware, by vitiating the protective blocking rights of founders and venture capitalists upon a simple insolvency event.

a. The Trial Court Upset The Predictable Application Of Section 271.

Many commentators, both within and without Delaware, have remarked favorably upon the stability of the DGCL, the predictability of this Court's interpretations of it and the collegial and collaborative manner in which significant changes to it, are proposed to the General Assembly. *See, e.g.*, R. Franklin Balotti, Jesse A. Finkelstein, John Mark Zeberkiewicz and Lawrence A. Hamermesh, 1 *The Policy Foundations of Delaware Corporate Law* (4th ed. supp. 2021) (commenting on the supermajority vote requirement for amendments to the DGCL set forth in the Delaware Constitution at Del. Const. Art. IX, § 1); Yaman Shukairy, *Megasubsidiaries and Asset Sales Under Section 271: Which Shareholders Must Approve Subsidiary Asset Sales*, 104 MICH. L. REV. 1809, 1813 (2006) ("…strict statutory interpretation promotes definiteness and certainty in the law, which invariably enables corporations to better plan based on statutory language… the Delaware courts have clung to the notions of certainty when interpreting the DGCL,"); E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004*? *A Retrospective on*

Some Key Developments, 153 U. PA. L. REV. 1399, 1410 (2005) (because of the importance of *stare decisis* to the Delaware courts' role in "defining the corporation law and in preserving stability and predictability in corporate jurisprudence… [c]ourts should tread carefully when setting out on a new jurisprudential path…"). This Court has long recognized the importance of stability and predictability in the interpretation of the DGCL as well. *See, e.g.*, *Salzberg*, 227 A.3d at 137; *Armstrong v. Pomerance*, 423 A.2d 174, 178 (Del. 1980) (recognizing "need for consistency and certainty in the interpretation and application of Delaware corporation law.'").

The Trial Court's disinterment of an obsolete insolvency exception contradicts the policy of consistent interpretation. So, too, does the fact that the Trial Court raised the insolvency exception issue *sua sponte* in the Injunction Opinion. There is no mention of the insolvency exception, its common law origins, or any authorities that discuss it in any of the briefing preceding that opinion; the first mention of any of those things occurred in the Injunction Opinion. And, the Trial Court cited zero Delaware cases supporting its conclusion. The most recent case the Trial Court was able to cite in support of its conclusions was an Alabama opinion from 1948. (Inj. Op. at 31 n. 9). Based just on the Trial Court's two lengthy opinions, it appears no U.S. court *anywhere* has applied the insolvency exception in this manner for 72 years, and that no Delaware court has *ever* done so. The appealed

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judgment upsets the reasonable expectation that Delaware courts will enforce the plain text of Section 271, as has occurred from 1916 until this case. Only the General Assembly holds power to reorder Section 271 in this manner.

b. The Appealed Judgment Disadvantages Delaware's Comparative Corporate Law Competitiveness.

It is not clear that any U.S. state still maintains the "board only" insolvency exception from the pre-DGCL and pre-MBCA eras. *See supra*, § II.C.3. Delaware will suffer comparative law disadvantage by resurrecting it.

The Trial Court reasoned that rewriting Section 271 to allow boards to hand over assets without shareholder approval will prevent "suffering" by secured creditors. (Inj. Op. at 44). Supposedly, Delaware shareholders would also "suffer" by being allowed to vote against secured creditors, through increased costs of capital. (*Id.*)

Secured creditors do not choose a state of incorporation. Founding equity does. The prevalence of dual class stock corporations indicates that founders consider maintaining voting control, including during financial distress, to be mission critical. Household big tech names like Alphabet, Facebook, Zillow, Zoom, Roku, Wayfair, Fitbit, and Lyft all are dual class corporations in which the founding equity enjoys voting control. *See Counsel of Institutional Investors Dual Class Companies List*, available at:

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https://www.cii.org/files/FINAL%20format%20Dual%20Class%20List%209-27-19.pdf. The appealed judgment tells super-voting founders like Sergey Brin, Larry Page, and Mark Zuckerberg to take their business elsewhere, because Delaware will not honor the plain text of its own statutes or the class vote protections unequivocally written into Facebook and Alphabet's corporate charters.

Perhaps the Trial Court is correct, and the policy benefit of slightly increased foreclosure convenience is worth the price of sending future Googles and Facebooks off to incorporate in Nevada. But that policy decision solely belongs to the General Assembly.

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CONCLUSION

For the foregoing reasons, this Court should reverse the Injunction Opinion and the SJ Order.

Dated: December 30, 2021

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CERTIFICATE OF SERVICE

I, Andrew S. Dupre, Esquire, hereby certify that on the 5th day of January, 2022, true and correct copies of the foregoing *Redacted Public Version of Appellants' Corrected and Revised Opening Brief* were served on the following via File & ServeXpress:

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