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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 FEBRUARY 11, 2022

APPELLANTS' REPLY BRIEF

[redacted]

Dated: February 4, 2022

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REBUTTAL FACTS

The Answering Brief's fact recitation requires correction, despite being largely irrelevant to the appeal.[1]

A. SeeCubic Failed To Discharge The Debt.

Contrary to AB 10-11, SeeCubic has not fulfilled its side of the Omnibus Agreement. While the Omnibus Agreement supposedly transferred all Stream's assets to SeeCubic in lieu of SLS and Hawk foreclosing on Stream's assets (Inj. Op. at 11; A137, § 1.1(a), A140, § 1.2), SeeCubic has not cancelled Stream's debt via a UCC Statement or other satisfaction instrument. The Schedule 1.1(b) (A139) still lists the senior debt as owed by Stream. SeeCubic took Stream's assets without paying any consideration at all. Instead, SeeCubic presently is holding Stream's individual shareholders hostage, promising to perform its side of the Omnibus Agreement only in exchange for broad legal releases to protect Mr. Stastney and others. (AR015). SeeCubic has also failed to dismiss the relevant Superior Court foreclosure action, breaching Omnibus Agreement § 1.2. *See SLS Holdings VI, LLC v. Stream TV Networks, Inc., et al.*, C.A. No. N20C-03-225-MMJ CCLD (Del. Super. Ct.).

[1] Citations to "OB" refer to Appellants' Corrected and Revised Opening Brief. Citations to "AB" refer to Appellee SeeCubic, Inc.'s Answering Brief On Appeal. Capitalized terms not defined herein have the meanings given in the Opening Brief.

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B. SeeCubic Acknowledged The Omnibus Agreement Is A Reorganization.

Answering Brief 9's assertion that "the Outside Directors concluded that the only path forward was to negotiate a resolution (not a 'reorganization' …) with Stream's secured creditors" is false. SeeCubic's principals referred to the transaction contemplated by the Omnibus Agreement as a "reorg", for example:

[redacted]

(AR001).

C. Mr. Stastney Is Not A Credible Source For Fiduciary Allegations.

Answering Brief 11's criticism of the Rajans as fiduciaries is not from a credible source. SeeCubic's principal, Mr. Stastney: (i) was charged with breach of fiduciary duty by the SEC in 2013 for orchestrating an undisclosed principal transaction, that he settled with the SEC for $2.9 million,[2] and (ii) was sued in Massachusetts for breach of fiduciary duty, civil conspiracy, interference with contractual relations, deceptive practices that violated Chapter 93A, by offering a bribe to implement a corporate takeover (*see Hallal v. Vicis Cap. Master Fund Ltd.*,

[2] Press Release, U.S. Securities and Exchange Commission (Sept. 18, 2013), https://www.sec.gov/news/press-release/2013-183.

[redacted]

Shadron Stastney, et. al. (Docket No. 1:12-cv-10166) (D. Mass. Jan 27, 2012)); (iii) was sued again in Florida for a different suite of fiduciary breaches (*see QHP Financial Group, Inc. and QHP Group, Inc. v. Vicis Capital Master Fund, Shadron L. Stastney, et. al.* (Docket No. 12-CA-06446) (Fla. Cir. Ct. Apr. 23, 2012)), then (iv) was sued again in 2014 on breach of fiduciary duty for unlawfully usurping company control to the detriment of shareholders. *Telestrata, LLC, v. NetTALK.com, Inc., Shadron Stastney, et al.* (Docket No. 1:14cv24137) (S.D. Fla. Nov 05, 2014). The Rajans are legitimate high technology company leaders; Mr. Stastney is a serial breach-of-fiduciary-duty defendant in dodgy interested-party takeover schemes. *Id.*

[redacted]

ARGUMENT IN REPLY

The Answering Brief offers four (4) arguments:

- Generally, arguments ruled upon below were somehow waived;
- On the Charter, the Trial Court analyzed the Charter independently from Section 271, found it ambiguous, and properly determined that its drafters intended to include an implicit insolvency exception to its text.
- On the DGCL, the Trial Court correctly relied upon treatises to rule as a matter of first impression that (i) prior to 1915, Delaware courts somewhere adopted a board-only insolvency exception, and (ii) that board-only exception survived codification of Section 271, and (iii) that board-only insolvency exception has silently existed within Section 271 for more than 100 years, without ever being cited or litigated.
- On public policy, the Trial Court correctly ruled that creditors should be able to circumvent shareholder blocking rights immediately on an insolvency event, charters and bylaws and shareholder franchise be damned.

Each argument is incorrect. The Opening Brief's arguments were considered below, albeit erroneously. The Trial Court analyzed the case upside-down by failing to analyze the Charter as the expression of the parties' intent, and failing to find the

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Charter ambiguous, to apply a first-impression statutory default rule. The Trial Court then erred as a matter of first impression by *sua sponte* ruling that there has always been an "insolvency exception" to Section 271 that allows boards to transfer all assets of Delaware corporations without *any* shareholder vote, despite that neither Section 271 nor *any Delaware case* says any such thing. And, the Trial Court's policy analysis is wrong: dual class share companies count on a plain text interpretation of their charter blocking rights; upsetting that reliance has negative policy effects that the General Assembly should consider. Reversal is required.

[redacted]

I. ALL OF THE OPENING BRIEF'S ARGUMENTS WERE CONSIDERED BELOW, AND NOT WAIVED.

Appellee argues that the following arguments were waived: (i) the Trial Court's analysis impermissibly disenfranchises Stream's Class B shareholders (AB 20), (ii) the Charter and Section 271 are not "close enough" such that the Trial Court need not independently analyze the language of the Charter (AB 22), (iii) the Omnibus Agreement effected an Acquisition as defined by the Charter, because it did more than just transfer assets (AB 23-31), and (iv) the terms "sale" and "exchange" are defined in Delaware law, *inter alia* in the Delaware Securities Act. (*Id.*) Each waiver assertion is wrong.

A. Class B Shareholder Disenfranchisement – By Vitiating Charter Blocking Vote Rights – Is The Point Of The Case.

Appellee's first waiver assertion is its strangest: if the parties have not always been litigating Class B shareholder voting rights, why then are there multiple memorandum opinions holding that the Charter's Class B voting rights are unenforceable via a *sua sponte* first impression adoption of a board-only insolvency exception? (Inj. Op. at 27-45; Stay Op. at 15-33).

To the contrary, the right of Class B shareholders to vote on the Omnibus Agreement *is and always has been* the key dispute, and has appeared in every brief

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and opinion below. (*Id.*; *see also* A207-12, A297-99, A326-32, A367-69, A378-91, A399-410, A419-21).

B. The Language Differences Between The Charter And Section 271 Were Argued Below.

The important differences between the Charter and Section 271 were also argued below, repeatedly. (*Id.*; *see also* A403-06, A417-19). The Charter's definition of Asset Transfer uses the broad phase, "or other disposition" to require a Class B shareholder vote whenever all of Stream's assets are disposed of in any manner whatsoever. (A126). The Injunction Opinion skipped over that important language. (Inj. Op. at 46-49). When Stream challenged that deficiency, the Trial Court did not find waiver. (Stay Op. at 33-34).

C. The Charter's Definition Of Acquisition Received A Full Opinion Below That Is Appealed.

The Charter's definition of Acquisition requires a Class B vote upon any consolidation, stock exchange, merger, or "any other corporation reorganization." (OB 9; A126). Section 271 is only about transfers of all assets, and is irrelevant to Acquisitions as defined by the Charter. On the Charter's plain text, it is possible for a transaction to cause only an Asset Transfer, e.g., an asset purchase agreement. It is also possible to effect a more complicated transaction like a reorganization that

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both transfers all the assets *and also* does many other things. In the latter circumstance, the definition of Acquisition applies.

The Injunction Opinion recognized the potential applicability of the definition of Acquisition. (Inj. Op. at n. 24). The issue thereafter was argued and rejected in both the Modification Opinion (which predated the SJ Opinion) and again in the Stay Opinion, and not waived. (Modification Order at 2-7; Stay Op. at 33-34).

D. The Meaning Of Sales And Exchanges Was Argued Below.

The Trial Court *sua sponte* held the ordinary, plain English terms "sale" and "exchange" are ambiguous, in order to justify skipping over analyzing the Charter to get to the desired statutory analysis. (Inj. Op. at 39-41). After that *sua sponte* ruling, the definitions of "sale" and "exchange" were raised and argued below, in both the Modification Opinion and again in the Stay Opinion. (Modification Order at 2-7; Stay Op. at 33-34; A406-08, A419-21). The Trial Court did not find the argument waived. (*Id*.)

[redacted]

II. THE TRIAL COURT SKIPPED PROPER ANALYSIS OF THE CHARTER TO DECIDE THE CASE ON DEFAULT APPLICATION OF SECTION 271.

The core error of this case is that the Trial Court focused its analysis on its *sua sponte* first impression holding that Section 271 contains a unwritten insolvency exception derived from pre-DGCL common law, in a form contrary to the handful of Delaware cases that discuss it, which has mysteriously has gone unlitigated and unmentioned from at least 1924 to present. Neither side briefed that argument nor asked for that holding. That focus caused the Trial Court to analyze the case as if default statutory rules controlled, without ever holding that the Class Vote Provision of Stream's Charter was ambiguous.

In reality, the Charter controls this dispute. The voting rights of Stream's Class B shareholders are significantly greater than the statutory defaults. (A124). The Charter states Class B voting rights several times, in several interlocking ways, *precisely to prevent the exact thing that occurred here*: a Board-structured take-over of Stream's assets without Class B shareholder approval, and without the approval of Stream's founders who had made that company their life's work.

The Answering Brief defends the Trial Court's conclusions that the Omnibus Agreement was an asset transfer, that the Charter's definition of Asset Transfer is indistinguishable from Section 271 and therefore has no independent contractual

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significance, and that the Omnibus Agreement is not an Acquisition as defined in the Charter. (AB § I). Each argument is incorrect.

A. The Trial Court Incorrectly Analyzed The Asset Transfer Elements Of The Omnibus Agreement.

The Trial Court ruled that the Omnibus Agreement is an Asset Transfer within the meaning of the Charter, and that the Charter "closely tracks" Section 271 such that the Charter's words have no significance apart from the statute. (Inj. Op. at 46-49). Therefore, if Section 271 is ambiguous, then the Charter is also ambiguous, and ripe for the Trial Court's first-impression board-only insolvency exception. On the Charter, each holding defended in the Answering Brief is error.

1. The Trial Court Failed To Rule The Charter Ambiguous.

Appellee argues that the Trial Court ruled that the Charter is ambiguous. (AB 3, 4, 16-21). Appellee's claim is belied by absence of citation. The Trial Court never made any such holding. It instead ruled that the Charter "tracks" Section 271 (Inj. Op. at 46-49), and reasoned that because Section 271 is ambiguous, so too is the Charter. (*Id.* at 40, 49). This Court will review the interpretation of Stream's Charter *de novo. Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012). Reversal is required if the Charter is unambiguous (it is), or meaningfully different than Section 271 (it is), or if Section 271 is unambiguous (it is).

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2. "Other Disposition" Has Broad, Independent Meaning.

Appellee next argues that the expanding phrase "or other disposition" in the Asset Transfer provision is surplusage, to be interpreted co-extensively with the earlier words "sale" and "leases." (AB 19-20). The Opening Brief cited case law barring that surplusage interpretation. (OB 19) (citing *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")).

Granting the phrase "or other disposition" contractual significance changes the outcome of the ambiguity analysis. The definition of Asset Transfer unambiguously requires a Class B shareholder vote on any "disposition" of Stream's assets, no matter the name tag placed upon it.

3. The Case Affidavits Prove The Charter Unambiguous.

Appellee next argues that the Charter is ambiguous because Stream submitted an affidavit from the law firm who wrote it (DLA Piper) stating its correct meaning. (AB 20; A393-96). Not so. That affidavit was submitted only *after* the Trial Court erroneously ruled that the Charter was indistinguishable from Section 271. The Class Vote Provision was never ambiguous. But if it was ambiguous, its author told the Trial Court its clear meaning, but was ignored. Specifically, the author averred:

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5. The "Acquisition" section was intended to protect Stream TV from a transaction such as that contemplated by Shadron Stastney and the Omnibus Agreement.

6. The "Asset Transfer" section was meant to protect Stream TV against any sale of all or substantially all of the assets Stream TV without stockholder approval, including any sort of "private foreclosure" such as that contemplated by Shadron Stastney and the Omnibus Agreement. It was not Stream TV's intention to allow for a transfer of all or substantially all of its assets under any circumstances without a shareholder vote.

(A394-95).

4. Section 271's "Parallel Language" Proves Stream Is Right.

Appellant argues that the Trial Court properly applied Section 271 to explain the Charter definition of Asset Transfer, citing *Warner Communications Inc. v. Chris-Craft Industries, Inc.*, 583 A.2d 962 (Del. Ch. 1989) ("*Warner*"). (AB 21-23).

Warner proves the error of the Trial Court's analysis. In *Warner*, the Class B shares held approval rights over: (a) corporate acts to adversely affect the rights and preferences of those specific shares, and (b) to amend the corporate charter or bylaws to adversely affect the rights and preferences of those specific shares. *Id.* at 964-65. A different charter provision granted the Class B shares voting rights against a

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merger if the Class B shares were not replaced with the highest ranked securities of the surviving corporation. *Id.* at 970. The corporation did a two-step merger starting with a public tender offer, followed by a merger into a subsidiary with stock conversion. *Id.* at 965.

Chancellor Allen ruled that the merger agreement *qua* 8 *Del. C.* § 251 adversely affected the Class B shares, and that the later charter amendment had no additional adverse effect. *Id.* at 967. Section 251 states voting rights for mergers, and does not automatically grant preferred share blocking rights. The charter additionally granted the preferred shares only one specific right regarding mergers. *Id.* at 970. Additionally, 8 *Del. C.* § 242(b) governs charter amendments which adversely affect preferred share voting rights. The charter's language "closely tracked" Section 242(b), and made no reference to Section 251. *Id.* at 969-70. The *Warner* Court thus reasoned that the Class B shareholders had no voting rights against the charter amendment following the merger, because the merger and not the amendment did the damage. *Id.* at 967-71.

Warner causes the opposite result in this case. Here, the Trial Court ruled that the Omnibus Agreement is a Section 271 asset transfer. (Inj. Op. at 46-49). Unlike Section 251 in *Warner*, Section 271 expressly guarantees a shareholder vote upon an all-asset transfer. Unlike in *Warner*, there is no competing statute with different

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independent voting rights in play; the whole case revolves around whether the Charter is indistinguishable from Section 271, only. And unlike in *Warner*, Stream's Charter materially expanded the voting rights of the Class B shareholders. (A124, A126). The *Warner* charter only swapped out a majority vote with a 2/3 vote qua Section 242(b) issues. 583 A.2d at 964-65. The Stream Charter grants Class B blocking rights for a "sale, lease *or other disposition*" of Stream's assets (and also intellectual property licenses), covering all possible asset dispositions. (A126). If *Warner* is the correct analysis framework, a Class Vote was clearly required here.

The Trial Court's errors did not just hurt the Rajans. There are 118 Class B shareholders of Stream, all of whom were disenfranchised here.

B. The Trial Court Erred By Ignoring The Elements Of The Omnibus Agreement That Triggered The Charter's Acquisition Provision.

The Charter defines "Acquisition" to include consolidations, mergers, stock exchanges, and reorganizations. (A126). The Omnibus Agreement caused both a stock exchange *and* a reorganization. (OB 21-24). The Trial Court ignored those aspects of the Omnibus Agreement, holding that the contract is most like a Section 271 asset transfer (Inj. Op. at n.24), and therefore only the definition of Asset Transfer applies, because "the specific controls the general." (Modification Order at 4-5). All of the Answering Brief's arguments supporting that holding are incorrect. (AB 23-30).

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1. The Omnibus Agreement Is Not A Simple Asset Transfer.

The Trial Court applied the canon: "the specific controls the general" backwards. (Modification Order at 4-5). The Charter contains a very broad defined term, "Acquisition," and a narrower (but still broad) defined term, "Asset Transfer." (A126). On its face, the Omnibus Agreement caused a 1:1 "exchange" of Stream shares for SeeCubic shares not owned by the Rajans, meaning SeeCubic takes the place of all Stream's former investors *within Stream*. (A139, § 1.1(d)). The Omnibus Agreement further incorporates a mandatory Side Letter requiring Stream (not SeeCubic) to issue 48 million new shares to SeeCubic's controllers, thereby lowering the voting control of the Rajans to below 50%. (A157, § 1.1; A379-80). The Omnibus Agreement did not just move the assets from Stream to SeeCubic; it entirely reorganized Stream via a stock exchange and subsequent mandatory change-in-control share issuance. (*Id.*) The Omnibus Agreement thus triggered the "specific" defined term, "Acquisition", by triggering the specific defined terms, "exchange" and "reorganization."

2. The Omnibus Agreement Is Not A Simple Debt Cancellation.

The Charter's debt cancellation carve-outs are inapplicable for the reasons stated by the Opening Brief (OB 21), the Answering Brief's arguments notwithstanding. (AB 26-30).

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The Omnibus Agreement does not raise "bona fide equity financing" for Stream; it obliterates Stream by transferring all of its assets while leaving with all of its debts except for that owed to SeeCubic's principals.

Stream is not arguing inconsistently; it is responding to the Trial Court's inconsistent holdings. The term "equity financing" is defined as "[t]he raising of funds by issuing capital securities (shares in the business) rather than making loans or selling bonds" and secondarily, "[t]he capital so raised." Black's Law Dictionary (11th ed. 2019). The Omnibus Agreement does not define itself as equity financing or a fundraising vehicle. Moreover, the Trial Court ruled it to be a "private foreclosure," not a financing effort. (Inj. Op. at 4, 40, 41, 45; Stay Op. at 11). A foreclosure is not "bona fide equity financing."

Nor is Stream arguing extra-contractual facts. The Letter Agreement expressly states that it is an integral and mandatory condition to the Omnibus Agreement. (A157) (referencing the Omnibus Agreement, stating the parties "wish to agree among themselves to certain additional matters related to the Omnibus Agreement, and on which their execution of the Omnibus Agreement is conditioned")). The Omnibus Agreement and Letter Agreement are an integrated contract. (A161, § 3.4). *See also Milton Investments, LLC v. Lockwood Bros., II, LLC*, 2010 WL 2836404, at *7 n.74 (Del. Ch. July 20, 2010). The Trial Court erred

[redacted]

by glossing over the integrated Letter Agreement to reach its preferred Section 271 analysis framework.

3. The Integrated Omnibus Agreement Requires A Stock Exchange.

Answering Brief at 29 correctly notes that the Trial Court ignored that the Omnibus Agreement caused a "stock exchange" *qua* the Charter. Appellee then argues that the error was harmless because "stock exchange" means only "stock-for-stock merger", citing Maryland and North Carolina statues. (AB 29-30).

"Stock exchange" does not mean "only stock-for-stock merger" in seminal Delaware case law. *See Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) (upholding selective stock exchange as a poison pill on the business judgment rule). Indeed, Stream's Charter would grant the Class B shareholders voting rights on the exact "stock exchange" employed in *Unocal*, which was the *opposite* of a merger (a poison pill). *Id.*

4. The Omnibus Agreement Was A Reorganization.

Appellee argues that the Omnibus Agreement is not a reorganization because there is not common control between Stream and SeeCubic. (AB 30-31).

The Omnibus Agreement does the following: (i) transfers Stream's assets to SeeCubic, (ii) exchanges the shares and warrants of Stream not owned by the Rajans for shares of SeeCubic on a 1:1 basis, causing SeeCubic to own a majority of Stream

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common stock, (iii) issues an additional 48 million shares of Stream stock to SeeCubic's principals, to cause the Rajans to lose majority control of Stream. (Inj. Op. at 11; A137, § 1.1(a), A139, § 1.1(d) and (f), A157, § 1.1).

The IRS Code's definition of "Reorganization" does not require identical control of the transferor and transferee corporations. Quite the contrary: the federal code defines reorganization seven different ways, only some of which have any common control. 26 *USC* § 368(a)(1). But Type D reorganizations involve *overlapping shareholder* pre- and post-transaction control, not *identical* control:

> (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…**

26 *USC* § 368(a)(1)(D) (emphasis added). The controllers of SeeCubic such as SLS and Mr. Stastney were also shareholders of Stream, and thus the 26 *USC* § 368(a)(1)(D) definition of "reorganization" applies.

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III. THE TRIAL COURT'S FIRST IMPRESSION BOARD-ONLY INSOLVENCY EXCEPTION TO SECTION 271 IS WRONG.

Though enforcement of the Charter is vital to Stream, the Trial Court's erroneous *sua sponte* creation of its board-only insolvency exception is vital to all Delaware corporations and to the DGCL itself. The Answering Brief defends that judicial fiat as best it may, but fails. (AB § II).

A. No Case Law Supports A Board-Only Insolvency Exception.

Neither the Trial Court nor Appellee mustered a single Delaware case stating that Delaware adopted an insolvency exception that permits boards acting without shareholder approval to transfer all of a Delaware corporation's assets. **There is no such case: there has never been a board-only insolvency exception in Delaware law.** Only two Delaware cases discuss the insolvency exception at all: *Butler v. New Keystone Copper Co.*, 93 A. 380 (Del. Ch. 1915) and *Allied Chemical & Dye Corp. v. Steel & Tube Co.*, 120 A. 486 (Del. Ch. 1923). Both of those cases define it as the majority-shareholder-vote version of the common law insolvency exception (now codified as Section 271), and not the board-only version as ruled by the Trial Court. (OB 33-34).

Like the Trial Court, the Answering Brief offers Delaware-case-law-free argument, relying only on treatises. (AB 36-37). It is true that early 20th century general corporate treatises identify that a board-only insolvency exception existed *in*

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some jurisdictions. (*Id.*; Inj. Op. at 30-31). *None* of those treatises say the board-only exception ever existed in Delaware.

Worse yet, at least one of the treatises cited by the Trial Court[3] (and studiously ignored by Appellee) states that some jurisdictions adopted a board-only exception while others adopted the majority vote exception. (Stay Op. at 24). Delaware's case law places it firmly in the majority-vote exception camp, where it has remained without challenge for nearly one hundred years until the Trial Court *sua sponte* decided otherwise.

The Answering Brief criticizes Appellants' challenge to the Trial Court's misapplication of *Butler* and *Allied Chemical*. (AB 38-40). Bluntly, the Trial Court did misapply those cases, as well as the identical description of the insolvency exception in *Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590, 595 (1921). The Stay Opinion implicitly so acknowledges, and walks back the Preliminary Injunction's misstatement of *Butler*, at length. (Stay Op. at 24).

The Trial Court reasoned, paraphrased: *Butler* recognized the majority-shareholder-vote insolvency exception, therefore all types of insolvency exceptions found in treatises were also adopted in Delaware law. (Inj. Op. at 32). That is not a

[3] 3 Seymour D. Thompson & Joseph W. Thompson, *Commentaries on the Law of Private Corporations* § 2429 (2d ed. 1909) (cited at AB 36 and Stay Op. at 24).

[redacted]

valid reading. *Butler* adopted the majority-shareholder-vote insolvency exception (as would *Allied Chemical* and *Geddes* a decade later), which the General Assembly then rapidly codified by enacting the first version of Section 271 one year later, in 1916. 93 A. at 383. *Butler* did not purport to adopt a board-only insolvency exception, and the General Assembly certainly did not. To the contrary, *Butler* enforced a 75% shareholder vote requirement in the company's charter, while the Trial Court here refused to enforce the Charter. *Id.* at 382.

B. Section 271 And Predecessors Supersede The Trial Court's Ability To Adopt A Board-Only Insolvency Exception.

Appellee argues that Section 271 did *not* supersede the common law insolvency exception. (AB 40-42). Supposedly, because the General Assembly did not expressly state it was superseding the (phantom) board-only insolvency exception within the text of Section 271, that exception survived. (*Id.*)

The problem is that no Delaware case ever adopted a board-only version of the insolvency exception. The common law rule was shareholder unanimity for all-asset transfers. *Butler* adopted the majority-vote version of the insolvency exception. (OB 31-32). The General Assembly then codified *Butler*'s holding. (*Id.* at 32). The board-only insolvency exception never existed in Delaware law, and thus was not there in 1916 for the General Assembly to discuss in a supersession context. What never existed cannot "survive" supersession by statute.

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The correct analysis is more sophisticated. Section 271 superseded the Trial Court's *ability* to adopt *any* insolvency exception to the statute's plain text. (OB 38). The General Assembly fully covered this matter with a crystal clear statute, with zero exceptions. Since 1916, a transfer of all assets requires majority shareholder approval, period. *Allied Chemical*, 120 A. at 490.

Further, the Trial Court's analysis proves the opposite of its point. The 1890-1910 treatises the Trial Court cites were available to the General Assembly in 1916, and indeed were more relevant than now. But the General Assembly did not write the first version of Section 271 with *any* or *all* of the ten types of exceptions stated by 3 Seymour D. Thompson & Joseph W. Thompson, *Commentaries on the Law of Private Corporations* §§ 2421, 2424 (2d ed. 1909), as the Trial Court reasoned. Instead, the General Assembly picked *one* of the then-existing insolvency exceptions – majority vote – and made that the law of Delaware, codifying Chancellor Curtis's adoption of it in *Butler*. *Butler*, 93 A. at 383.

Nor does the "directional thrust" of *Butler* show intent to implicitly adopt ten contradictory exceptions, instead of the one clear exception actually described in the opinion. (AB 41). The "directional thrust" of both *Butler* and Section 271 in this context is "moderation." *Butler* and Section 271 reduced shareholder voting rights on all asset-transfer from unanimity to majority. But neither the case nor the statute

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discarded shareholder voting rights entirely upon an insolvency event, as the Trial Court erroneously did.

C. Cross-Reference To Bankruptcy Authority Is Appropriate.

Appellee argues that treatise citations explaining that the insolvency exception has been abrogated by *modern* bankruptcy practice are improper. (AB 42). Appellee ignores that the treatises cited by the Trial Court and Appellee state that modern bankruptcy law (not the original bankruptcy code of 1898) rendered the insolvency exception moot:

> As a practical matter, in many instances federal bankruptcy statutes and other statutes governing creditors' rights have displaced the common law [insolvency] exception by providing explicit methods for addressing proposed asset dispositions by failing businesses.

R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 10.7 (4th Ed. Supp. 2021-22) (cited at AB 37; Inj. Op. at 31-32). The Trial Court based its ruling on a treatise that says bankruptcy law controls, and therefore bankruptcy law is fairly in play on appeal.

D. *Gunnerman* Is *Dicta,* And Inapplicable.

At the PI phase, Appellee argued that Section 272 created an exception to earlier-adopted Section 271 for the enforcement of mortgages and pledges. (A297-99, A367-69). The sole case cited for that argument was *Gunnerman v. Talisman Capital Talon Fund, Ltd.*, C.A. No. 1894-VCS (Del. Ch. July 12, 2006). Appellee

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did not argue that Delaware law contains a board-only insolvency exception from pre-1916 common law; that ruling came *sua sponte*. Appellee still seems to favor its original argument. (AB 43-45). Appellee particularly challenges the Opening Brief's characterization of *Gunnerman*'s discussion of Section 271 as dicta. (AB 45).

Gunnerman simply cannot bear the weight of a first-impression redrafting of Section 271. The case is a transcript dismissal on demand futility; the Section 271 issue was a tangent not integral to the holding. (A109-13). The nature of the asset transfer in the case was not materially briefed; the parties discussed it orally in cursorial fashion, on the fly. (A087-90, A109). The case contains no citations regarding the interplay of Section 272 and 271, nor any legal analysis on the topic. Respectfully, it represents then-Vice Chancellor Strine expounding in *dicta* about an issue that was not really briefed or important to the case, as he was occasionally known to do.

Moreover, Chief Justice Strine's opinions on the enforceability of the plain text of Section 271 were well-known, as stated in *Hollinger*:

> [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

[redacted]

> 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, 377 (Del. Ch. 2004), *aff'd* 872 A.2d 559 (Del. 2005).

E. The Dog Did Not Bark Because Nothing Was There.

Appellee incorrectly argues that Appellants cited no authority to rebut the Trial Court's incorrect non-barking dog analogy. (AB 45). Not so. Opening Brief at 35-37 explains that no case anywhere in the United States has applied the insolvency exception since 1948, identifies Michigan and Idaho cases stating that the insolvency exception no longer exists, and explains the adoption of modern corporate statutes in Texas, Illinois, and MBCA jurisdictions that have superseded the bad law upon which the Trial Court bolstered its conclusions in the Stay Opinion.

The "barking dog" argument makes no sense. *Of course* no litigant has ever tried to enforce a board-only insolvency exception that was never adopted in Delaware law, and then foreclosed by statute a century ago. The dog did not bark because there is no board-only insolvency exception to bark at.

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IV. PUBLIC POLICY FAVORS ENFORCING PLAIN TEXT OF STATUTES AND CORPORATE CHARTERS, OVER SECURED CREDITORS DISSATISFIED WITH FORECLOSURE REMEDIES.

Answering Brief at 47-49 argues that the appealed judgement does *not* upset stable interpretation of Section 271. Not so. This is the first case for 107 years that: (a) ruled Section 271 ambiguous, and (b) grafted an insolvency exception of any kind onto its plain text. It holds that the unambiguous words "Every corporation" used in Section 271 *really* mean "every solvent corporation." It does so based upon treatise authority and abrogated cases from other jurisdictions predating 1948. The appealed judgment likely will require the redrafting of hundreds of thousands of Delaware certificates of incorporation that heretofore relied upon the plain text of Section 271 to define their shareholder voting rights upon a transfer of all assets.

Appellee argues that dual class share companies can simply draft new charter provisions around the appealed judgment to provide blocking rights against non-judicial foreclosures. (AB 49). But Stream's Charter *does* provide multiple layers of blocking rights against non-judicial foreclosure, which the Trial Court ignored.

The appealed judgment makes it obvious that Delaware courts will not respect or enforce unequivocal blocking rights in a corporate charter, if those blocking rights force secured creditors to use judicial instead of private foreclosures. The Trial Court's ruling does not even respect the common shareholder's right to vote under

Section 271, let alone preferred equity voting rights via a charter. That is a drastic reordering of the DGCL's carefully ordered balance of the rights of shareholders, boards, and creditors. Again, the General Assembly already struck that balance in 1916 by adopting Section 271; only the General Assembly holds power to alter it.

CONCLUSION

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

Dated: February 4, 2022

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CERTIFICATE OF SERVICE

I, Andrew S. Dupre, Esquire, hereby certify that on the 11th day of February, 2022, true and correct copies of the foregoing *Redacted Public Version of Appellants' Reply Brief* were served on the following via File & ServeXpress:

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