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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TRACEY WEINBERG, Plaintiff and Counterclaim Defendant Below / Appellant, v. WAYSTAR, INC., DERBY TOPCO, INC., DERBY TOPCO PARTNERSHIP LP, and DERBY GP, LLC Defendants and Counterclaim Plaintiffs Below / Appellees.	)	No. 274, 2022 On Appeal from the Court of Chancery of the State of Delaware C.A. No. 2021-1023-SG

APPELLEE'S CORRECTED ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This Court has discretion to affirm the ruling below on the same grounds as the trial court and on any other grounds supported by the record. In the prior sentence, "and" is used in the disjunctive, several sense, and conveys that this Court may affirm in two independent situations—when it agrees with the trial court's reasoning and also when it finds a different basis to affirm the trial court's ruling—without requiring both.

The same is true for the Call Right provision at the center of this case. It allows Waystar to repurchase Weinberg's shares following "(x)…Termination…for any reason…, *and* (y) a Restrictive Covenant Breach."[1] Therefore, Waystar may exercise its Call Right in two independent situations—upon Weinberg's termination and also upon a restrictive covenant breach—without requiring both.

Thus, this case is not about whether "and" means "or." This case is about applying the Delaware rules of contract construction to determine whether the parties' use of "and" in the Call Right provision was intended to be conjunctive (*i.e.*, joint) or disjunctive (*i.e.*, several). Delaware law, dictionaries, and legal usage guides do not support Weinberg's one-dimensional view that "and" is always or nearly always conjunctive. Rather, "and" is correctly and commonly used in the disjunctive,

[1] A273 ¶ 10(a); A285 ¶ 10(a); A303 ¶ 10(b). All capitalized terms have the same meaning as set forth in the trial court's Memorandum Opinion.

several sense, and should be interpreted as disjunctive when context requires. Delaware law does not require an absurdity to interpret "and" according to its ordinary disjunctive meaning.

The trial court properly applied Delaware law, including long-settled legal usage principles regarding the meaning of "and" in permissive sentences, and correctly held that "and" is disjunctive in the Call Right provision. Further, the trial court construed the Option Agreements as a whole and correctly held that Weinberg's interpretation would render other contractual terms meaningless. Although not addressed in the trial court's ruling, additional contract provisions and principles of construction confirm Waystar's interpretation. Accordingly, the trial court correctly held that the Call Right provision is unambiguous: it granted a Call Right upon Weinberg's termination, without requiring a restrictive covenant breach.

The Call Right provision is not ambiguous, but to the extent there is any doubt about the parties' intent, it can be resolved through extrinsic evidence, and the trial court's ruling should be affirmed on that basis. The undisputed extrinsic evidence establishes that Waystar has consistently interpreted and enforced the Call Right provision by exercising its Call Right when employees have been terminated, even absent a restrictive covenant breach. The doctrine of *contra proferentum* does not apply because Weinberg contractually waived construction against the drafter and

because construction against the drafter is appropriate only as a last resort when there is no other way to ascertain the parties' intent. Here, the parties' intent is clear.

For these reasons, the trial court correctly held that the Call Right provision is unambiguous, and that the use of "and" is disjunctive and several, describing two situations when Waystar may exercise its Call Right. Because the Call Right provision is unambiguous, the trial court granted Waystar's motion for judgment on the pleadings and denied Weinberg's motion. The ruling should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The trial court's ruling that "and" is disjunctive in the Call Right provision aligns with Delaware law providing that "and" should be interpreted in the disjunctive sense when context requires and with well-settled legal usage principles indicating that "and" is disjunctive and several in permissive sentences.

2. Denied. The trial court correctly held that the Call Right provision is permissive because Waystar has "discretion" to exercise its Call Right and is not required to do so. The Converted Units "shall be subject to" a Call Right only if Waystar elects to exercise that right, confirming that the sentence is permissive.

3. Denied. The trial court correctly held that interpreting "and" as conjunctive in the Call Right provision would improperly render the Repurchase Price Provision meaningless. It is irrelevant that the Repurchase Price Provision does not appear in the First Option Agreement because the Call Right provision is identical in all three Option Agreements and must be interpreted consistently. In addition to the trial court's reasoning, other contractual provisions and principles of construction confirm Waystar's interpretation of the Call Right provision.

4. Denied. Because the Call Right provision is unambiguous, the trial court correctly held that construction against Waystar was not warranted. Further, Weinberg, a sophisticated business executive, contractually waived construction against the drafter, and extrinsic evidence confirms Waystar's interpretation.

COUNTERSTATEMENT OF FACTS

A. Weinberg's Employment And The Option Agreements.

Weinberg is a former employee of Waystar, Inc. and most recently held the title of Chief Marketing Officer. A225, 229 ¶¶ 2, 19. Weinberg's employment at Waystar, Inc. was terminated on August 16, 2021 (the "Termination Date"). A225 ¶ 2. Weinberg was granted stock options in Derby TopCo, Inc., pursuant to the Derby TopCo 2019 Stock Incentive Plan, and received three such options grants under the Plan (collectively, the "Option Agreements"). A208 ¶ 14; A225 ¶ 3. The Option Agreements were signed in quick succession: October 22, 2019, October 23, 2019, and August 9, 2020, respectively. *Id*. When Weinberg signed each Option Agreement, she expressly agreed to be bound by the Partnership Agreement[2] (A59, A71, A89) which Weinberg concedes governs the Converted Units and the parties' dispute. A22–24 ¶¶ 14, 19–20; A28 ¶ 42. In the Partnership Agreement, the parties mutually waived construction against the drafter. A341 § 1.2. Weinberg also concedes that all three Option Agreements contain an identical Call Right provision, which is the subject of this litigation. A230–31 ¶ 28.

[2] The "Partnership Agreement" is defined as the "Amended and Restated Limited Partnership Agreement of Parent, dated October 22, 2019, as may be amended from time to time." *See, e.g.*, A53.

B. Waystar's Call Right.

Weinberg's Option Agreements granted Waystar a "call right"—*i.e.*, the right to repurchase or "call" shares. A229–30 ¶¶ 21, 27. The Call Right provision states:

> The Converted Units shall be subject to the right of repurchase (the "Call Right") exercisable by Parent, a member of the Sponsor Group, or one of their respective Affiliates, as determined by Parent in its sole discretion, during the six (6) month period following (x) the (i) the Termination of such Participant's employment with the Service Recipient for any reason (or, if later, the six (6) month anniversary of the date of the exercise of the [Substitute][3] Options in respect of which the Option Stock was issued, and (y) a Restrictive Covenant Breach.

A230 ¶ 28. Thus, Waystar has a Call Right in two circumstances: (1) during the six-month period following termination for any reason; and (2) during the six-month period following a restrictive covenant breach. A231 ¶ 29.

If Waystar exercises its Call Right, the Second and Third Option Agreements provide two different repurchase prices depending on whether there has been a "Forfeiture Event." A233–34 ¶¶ 37–38. There is one purchase price where there is Forfeiture Event (*i.e.*, a restrictive covenant breach or termination for cause), and a different purchase price where there is no Forfeiture Event. A234 ¶ 39. Accordingly, the Second and Third Option Agreements contemplate that Waystar has a Call Right even if there has been no restrictive covenant breach. A234 ¶ 40.

[3] The Call Right provision in the First Option Agreement includes the word "Substitute."

C. Waystar Validly Exercised Its Call Right.

As of her Termination Date, Weinberg held 89,318.96 vested options under the First Option Agreement and 18,000 fully vested options under the Second and Third Option Agreements. A229–30 ¶¶ 23–25. On November 12, 2021, Weinberg elected to exercise her vested options by paying $898,756.74 to purchase 107,318.96 shares of common stock of Derby TopCo, Inc. A230 ¶ 26. Those shares immediately converted to Class A-2 shares of Derby TopCo Partnership LP having an equivalent value ("Converted Units"). *Id*.

On or about November 18, 2021, Waystar invoked its Call Right. A236 ¶ 45. Pursuant to the Option Agreements, Waystar issued a check to Weinberg in the amount of $1,824,422.32 to repurchase the Converted Units. A236 ¶ 46. Accordingly, Weinberg stands to gain nearly $1 million if it is confirmed that Waystar validly exercised its Call Right.

D. Waystar Has Consistently Exercised Its Call Right.

To date, Waystar has terminated six employees, including Weinberg, who had the same Call Right provision. A229–30, 237–41 ¶¶ 22–25, 49, 53–54, 57–58, 61–62, 65–66, 69–70. All six employees were terminated without cause and Waystar had not asserted that any of the six employees breached their restrictive covenants. A231, 238–40 ¶¶ 31, 52–53, 57, 61, 65, 69. In each situation, Waystar exercised its Call Right upon the employee's termination. A238–41 ¶¶ 51, 56, 60, 64, 68, 72.

Contrary to Weinberg's assertion, the fact that these former employees had the same Call Right provision does not establish that the Option Agreements were provided on a take-it-or-leave-it basis. There are no facts in the record establishing that Weinberg was unable to review or negotiate (with or without legal counsel) the terms of the Option Agreements.

E. The Trial Court Granted Judgment For Waystar.

After Waystar exercised its Call Right, Weinberg filed suit and Waystar filed a Counterclaim to resolve whether Waystar had validly exercised its Call Right. The trial court granted Waystar's motion for judgment on the pleadings, concluding that the Call Right provision granted Waystar a Call Right upon Weinberg's termination, without also requiring a restrictive covenant breach. *See* Memorandum Opinion ("Memo. Op.") (attached as Exhibit A to Weinberg Brief) at 11.

To reach its conclusion, the trial court first analyzed the plain language of the Call Right provision. *Id.* at 9. The trial court reasoned that the Call Right provision is permissive because it granted Waystar the discretion to exercise a Call Right, without requiring Waystar to do so. *Id*. at 11. Based on long-settled legal usage principles regarding the use of "and" in permissive sentences, the trial court concluded that "and" in the Call Right provision was used in the disjunctive and several sense. *Id.* This means that Waystar could exercise its Call Right upon an employee's termination without also requiring a restrictive covenant breach.

The trial court further reasoned that the Repurchase Price Provision bolstered Waystar's interpretation. *Id.* at 11–12. The trial court explained that the Second and Third Option Agreements provide different repurchase prices depending on whether there is a "Forfeiture Event" (*i.e.*, a termination for cause or a restrictive covenant breach) or not. *Id.* at 12–13. The trial court held that Weinberg's interpretation of the Call Right provision rendered "the repurchase price that applies in the absence of a Forfeiture Event nugatory" because if a restrictive covenant breach is always required, the repurchase price applicable to Forfeiture Events would always apply. *Id*. at 13. The trial court held that, in contrast, Waystar's interpretation of the Call Right provision preserves the meaning of the Repurchase Price Provision. *Id*.

Given its holding that the Call Right provision is unambiguous, the trial court rejected Weinberg's argument that the Option Agreements must be construed against Waystar. *Id.* at 14. The trial court concluded that Waystar was entitled to exercise the Call Right upon Weinberg's termination, regardless of a restrictive covenant breach. *Id*. at 13. The trial court's decision should be affirmed.

ARGUMENT

I. The Trial Court Correctly Applied Delaware Law To Hold That "And" Is Disjunctive And Several In The Call Right Provision.

A. Question Presented.

Whether the trial court followed Delaware law to reach its holding that "and" is disjunctive and several in the Call Right provision. A682–88; A758–63.

B. Standard of Review.

This Court reviews questions of law and interprets contracts *de novo*. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

C. Merits of the Argument.

The trial court properly applied Delaware law when holding that "and" is disjunctive in the Call Right provision. Weinberg's argument that the trial court "ignored" Delaware precedent is premised upon a series of misunderstandings about what Delaware law says.

First, Delaware law holds that "and" is disjunctive when dictated by context. Second, Delaware law endorses reliance on legal usage guidance when interpreting contracts, particularly when such guidance is time-tested and well-settled. Third, Delaware law does not require an absurd result to interpret "and" in its ordinary disjunctive, several sense. Fourth, Delaware law does not hamstring courts to consider only the sentences immediately following "and" to determine its meaning.

As with any other word, when interpreting the meaning of "and," Delaware law requires courts to effectuate the parties' intent by construing the contract as a whole and giving effect to every provision. That is precisely what the trial court did to reach its conclusion that "and" is disjunctive in the Call Right provision.

i. Delaware Law Holds That "And" Is Disjunctive When Dictated By Context.

Weinberg's assertion that "and" is a one-dimensional word that must always or nearly always be interpreted in the conjunctive sense is wrong as a matter of Delaware law and everyday speech. Dictionaries consistently feature a disjunctive definition of "and." *See, e.g.*, RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY, at 77 (2d ed.1997) (defining "and" as being "used to connect alternatives" and providing the usage example, "*He felt that he was being forced to choose between his career and his family.*"). "And" is also appropriately used in the disjunctive sense in legal drafting and is preferred over "or" to express that a party has rights in multiple circumstances. *Infra* at 14, 21.

It is no surprise, then, that under Delaware law, "and" is interpreted in the disjunctive sense when dictated by context. *See State v. Klosowski*, 310 A.2d 656, 657 (Del. Super. Ct. 1973) (interpreting "and" in the disjunctive sense based on context); *see also Concord Steel, Inc. v. Wilmington Steel Processing Co.*, 2008 WL 902406, at *7 & n.57 (Del. Ch. Apr. 3, 2008) (identifying three possible approaches for interpreting "and" in a contract—always conjunctive, inclusive of the

disjunctive, or determining meaning from context—and adopting the third approach, that each instance of "and" must be viewed in context).

The Delaware cases cited by Weinberg unanimously support, rather than contradict, Waystar's position. Each case declares that "and" should be interpreted as disjunctive when context requires, and one of Weinberg's cases held that "and" was disjunctive based on context. *See Lipman v. GPB Cap. Hldgs. LLC*, 2020 WL 6778781, at *10–11 (Del. Ch. Nov. 18, 2020) (analyzing "and" based on context, including whether reading "and" disjunctively would create "surplusage"); *Blatt v. Concord Mall*, C.A. No. 80C-JA10 (Del. Super. Ct. Feb. 26, 1982) (analyzing "and" based on syntax and wording of provision); *Le Tourneau v. Consol. Fisheries Co.*, 51 A.2d 862, 865–66 (Del. 1947) (analyzing "and" based upon the interpretation of similar statutes).

The principle that "and" is disjunctive where context requires is not just the law in Delaware—it is the law everywhere. *See, e.g.*, *Spanski Enters., Inc. v. Telewizja Polska S.A.*, 832 F. App'x 723, 725 (2d Cir. 2020) (interpreting "and" based on "the context in which the word is used"); *Cipla Ltd. v. Amgen Inc.*, 778 F. App'x 135, 140 (3d Cir. 2019) (whether requirements in a contract are to be treated as "disjunctive or conjunctive…turns on context"); *Trammell Crow Residential Co. v. Am. Prot. Ins. Co.*, 574 F. App'x 513, 518 (5th Cir. 2014) (interpreting "and"

disjunctively based on context); *Peacock v. Lubbock Compress Co.*, 252 F.2d 892, 893 (5th Cir. 1958) (interpreting "and" disjunctively based on context).

Indeed, not one secondary source or non-Delaware case cited by Weinberg holds that "and" has an exclusively conjunctive meaning and several of her sources state that "and" is disjunctive when context requires. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011) (simply characterizing "and" as "linking independent ideas"); *OfficeMax, Inc. v. U.S.*, 428 F.3d 583, 592 (6th Cir. 2005) (whether "and" should be read disjunctively depends on "the context in which the word appears"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 80 (1993) (recognizing that "and" is a "function word" that may be used "to express…reference to *either* or *both* of two alternatives"); 11 Williston on Contracts § 30:12 (4th Ed. 2022) (acknowledging "and" can be disjunctive when "necessary in context"); 17A C.J.S. Contracts § 428 (Oct. 2022) (acknowledging "and" can be disjunctive to "give effect to the parties' plain intention"); *see also* 1A Sutherland Statutory Construction § 21:14 (7th Ed. 2021) (recognizing "and" can be disjunctive to conform with legislative intent).

The trial court did not ignore these authorities; the trial court properly recognized that "and" is disjunctive when context requires, and held "and" is disjunctive in the Call Right provision based on context.

ii. Delaware Law Endorses Reliance On Legal Usage Guidance To Aid In Interpreting Contracts.

The trial court's reliance on Professor Reed Dickerson's cogent analysis of the interpretation of "and" in permissive versus mandatory sentences was proper under Delaware law. Delaware courts routinely look to legal usage principles, such as those discussed by Dickerson, Bryan A. Garner, and Scott J. Burnham, among others, when interpreting contracts. *See, e.g.*, *Siegman v. Columbia Pictures Ent., Inc.*, 576 A.2d 625, 633 (Del. Ch. 1989) (relying upon Dickerson's legal usage analysis in determining the meaning of a statute); *Williams Field Servs. Grp., LLC v. Caiman Energy II, LLC*, 2019 WL 4668350, at *23 (Del. Ch. Sept. 25, 2019) (relying upon Garner's legal usage analysis in determining the meaning of a phrase), *aff'd*, 237 A.3d 817 (Del. 2020) (TABLE).

In the article relied upon by the trial court, Dickerson explained that "and" can be used in the "several" sense (*i.e.*, disjunctive), meaning A and B, jointly or severally, and also in the "joint" sense (*i.e.*, conjunctive), meaning A and B, jointly but not severally. *See* F. Reed Dickerson, *The Difficult Choice Between "And" and "Or"* 310 (1960) (hereinafter, "*Dickerson*"). In a permissive sentence, Dickerson explained that the several "and" and inclusive "or" are interchangeable—but stated that does not mean that "'and' means 'or'."[4] Dickerson also said that where the

[4] As discussed below, the trial court properly applied Dickerson's analysis to the Call Right provision. *See* Section II.

drafter's intent is to reflect that a person "is free to have either, neither, or both," the several "and" is preferred. *Id*. at 313.

Although Dickerson's analysis may have been untested at the time of his 1960 article, more than sixty years have passed and the principles he discussed are now well-settled. The concepts in Dickerson's article were later published in his book, *The Fundamentals of Legal Drafting*, and Dickerson authored at least ten books on legal drafting, including *Legislative Drafting*, *Interpretation and Application of Statutes*. Gary D. Spivey, *F. Reed Dickerson: The Persistent Crusader*, 6 Scribes J. Legal Writing 149 (1997). Dickerson has come to be known as the "dean of American legislative drafting." *Id.*

Dickerson's teachings on the use of "and" in permissive versus mandatory sentences are not his alone; they have been adopted and discussed by many legal usage scholars. *See* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 624 (1995) ("and" has both a joint (conjunctive) and several (disjunctive) sense and that "[t]he meaning of *and* is usually *several*"); Scott J. Burnham, *The Contract Drafting Guidebook*, at 163 (1992) ("The meaning of *and* is usually *several*."); Maurice B. Kirk, *Legal Drafting: The Ambiguity of "And" and "Or,"* 2 TEX. TECH. L. REV. 235, 237–39 (1971) (when "and" is used in a permissive sentence, it is likely to be used in its several sense) (citing F. Reed Dickerson, *The Fundamentals of Legal Drafting* 78–85 (1965)).

Additionally, Dickerson's conclusions regarding the meaning of "and" in mandatory versus permissive sentences have been adopted by numerous courts, including in a very recent decision by the Eighth Circuit, where the court found "and" to be disjunctive. *U.S. v. Pulsifer*, 39 F.4th 1018, 1021–22 (8th Cir. 2022) (recognizing that "the word 'and' has a distributive (or several) sense as well as a joint sense") (internal quotation marks omitted), *petition for cert. filed*, No. 22-340 (U.S. Oct. 12, 2022); *see also Mason v. Range Res.-Appalachia LLC*, 120 F. Supp. 3d 425, 445–46 (W.D. Pa. 2015) ("When the word 'and' is used in a permissive sentence, it is likely to be used in its several sense.") (citing F. Reed Dickerson, *The Fundamentals of Legal Drafting* 84 (1965)).

Accordingly, it was proper under Delaware law for the trial court to rely on Dickerson's well-settled analysis to hold that "and" was used in the several, disjunctive sense in the Call Right provision.

iii. Delaware Law Does Not Require An Absurd Result To Interpret "And" As Disjunctive.

Contrary to Weinberg's assertion, Delaware law does not require courts to find an "absurd result" before interpreting "and" in its ordinary disjunctive sense.

The sole case Weinberg relies upon for the proposition that the trial court was required to find an absurd result before interpreting "and" as disjunctive—*Concord Steel*—does not support that proposition. 2008 WL 902406, at *7. In *Concord Steel*, whether the conjunctive "and" would lead to an absurd result was one of several

considerations that factored into the court's decision, but nowhere does the court say that an absurd result is required to interpret "and" as disjunctive. *Id*. In fact, the court expressly declined to adopt a black-letter rule regarding the meaning of "and," instead reasoning that the meaning of "and" must be determined "contextually" based on the "surrounding words." *Id.* at *7, n.58.

Accordingly, the doctrine of avoiding "absurd" results is just another principle invoked by Delaware courts to aid in interpreting a contract, and in some respects that principle is coextensive with other rules of contract construction, such as interpreting a contract to avoid rendering a term meaningless or creating inconsistency. *See Miramar Police Officers' Ret. Plan v. Murdoch*, 2015 WL 1593745, at *7 (Del. Ch. Apr. 7, 2015) (courts will consider "how a term operates with respect to the contract as a whole," and will "avoid interpreting a term in an unreasonable way that would yield an absurd result or that would render other contractual language superfluous") (citation omitted). In fact, Weinberg conceded at oral argument that interpreting a contract so as to create surplusage or render portions of the contract meaningless would qualify as an "absurd result" under Delaware law of contract interpretation. *See* A829 at 10:7–20.

Because context dictated that "and" in the Call Right provision is disjunctive, the trial court was not also required to find that interpreting "and" in the conjunctive sense would lead to an absurd result.[5]

iv. Delaware Law Does Not Limit The Court's Analysis To The Sentences Immediately Following "And."

Contrary to Weinberg's assertion, the trial court was not required to limit its analysis of the meaning of "and" to the words or sentence that immediately follow it. Once again, the sole case Weinberg relies upon—*State v. Klosowski*—does not support this proposition. 310 A.3d at 657. In *Klosowski*, the court interpreted "and" as disjunctive because the phrase containing "and" was "followed by words which clearly indicate" the intent to treat it disjunctively. *Id*. The court did not, however, hold that this is the only time "and" can be interpreted disjunctively under Delaware law. *Id*. Indeed, the law in Delaware is that contracts must be construed as a whole, giving effect to all provisions, to ascertain the intent of the parties. *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1985) (the "cardinal rule of contract construction" is to "give effect to all contract provisions"). The analysis in *Klosowski* does not alter that well-settled principle.

[5] If this Court were to find that an absurd result is required, Weinberg's interpretation creates an absurd result for the reasons set forth in Section III—*i.e.*, that Weinberg's interpretation renders other provisions of the Option Agreements meaningless, injects ambiguity, and is inconsistent with the rationale for a call right.

v. The Trial Court Followed Delaware Law When Interpreting The Call Right Provision.

Just like any other word in the English language, when parties dispute the meaning of "and," Delaware courts apply traditional principles of contract interpretation to decipher its meaning. *Sanders v. Wang*, 1999 WL 1044880, at *7 & n.23 (Del. Ch. Nov. 8, 1999) (citing *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996) ("the meaning of contract provisions should be 'interpreted using standard rules of contract interpretation which require a court to determine, from the language of the contract, the intent of the parties'"). That is precisely what the trial court did. The trial court applied Delaware law and considered "and" in the Call Right provision in context. The trial court analyzed the plain language, principles of legal usage, and rules of contract construction to hold that "and" in the Call Right provision is unambiguously disjunctive.

II. The Call Right Provision Is Permissive And Thus "And" Is Interpreted In The Several, Disjunctive Sense.

A. Question Presented.

Whether the trial court correctly held that the Call Right provision is permissive, and thus "and" in the Call Right provision is interpreted in the several, disjunctive sense. A760–62.

B. Standard of Review.

This Court reviews questions of law and interprets contracts *de novo*. *Osborn*, 991 A.2d at 1158.

C. Merits of the Argument.

The trial court correctly found that the Call Right provision is permissive and that the plain language of the Call Right is consistent with the "several" use of "and" that is used in permissive sentences. *See* Memo. Op. at 9.

The trial court correctly reasoned that whether "and" is joint (*i.e.*, requiring all items on a list to be true) or several (*i.e.*, requiring any of the items on a list to be true) depends in part on whether "and" is used in a mandatory or permissive sentence. *Id*. Dickerson illustrated this principle using the phrase "charitable institutions and educational institutions." *Id*. at 10 (citing *Dickerson* at 313). In a mandatory sentence—such as, "You *must* contribute to charitable institutions and educational institutions"—the individual is required to contribute to both types of

institutions. *Dickerson* at 312. Accordingly, in mandatory sentences, "and" is typically joint because it denotes a packaged deal. *Id*.

In contrast, in a permissive sentence—such as, "You *may* contribute to charitable institutions and educational institutions"—the individual may contribute to charitable institutions, to educational institutions, to neither, or to both. *Id.* Accordingly, in permissive sentences, "and" is typically several because you may have one item on the list without the other.[6] *Id.* The trial court also illustrated that in permissive sentences, "and" and "or" produce the same result, but this does not mean that "and" means "or." Memo. Op. at 10 (citing *Dickerson* at 313). Rather, it means that "in such a context the two words are reciprocally related in that the implied meaning of one is the same as the expressed meaning of the other." *Id.* Indeed, in a permissive sentence "and" is preferred over "or" to convey that an individual has all three options available.[7] *Id*.

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[6] Weinberg's discussion of the conjunctive/disjunctive canon from *Reading Law: The Interpretation of Legal Texts* is misplaced. Weinberg Br. at 17–18. As illustrated by the examples provided by Scalia and Garner, the conjunctive/disjunctive canon is applicable to mandatory sentences. *See* ANTONIN SCALIA & BRYAN A. GARNER, *Reading Law: The Interpretation of Legal Texts* 116 (2012) (every example of the conjunctive/disjunctive canon uses "must") (hereinafter "*Scalia & Garner*"). Scalia and Garner do not discuss the use of "and" in permissive sentences. In other books where Garner does discuss the use of "and" in permissive sentences, Garner agrees with Professor Dickerson that "[t]he meaning of and is usually several." *See* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 624 (1995).

[7] When describing this portion of Dickerson's analysis, the trial court characterized Dickerson as asserting that the several use of "and" was the "least ambiguous."

The trial court correctly found that the Call Right provision is permissive. Memo. Op. at 11. Under Delaware law, a contract clause is mandatory when it creates a requirement, and it is permissive when it provides an option. *See Republic Env't Sys., Inc. v. RESI Acq. (Del.) Corp.*, 1999 WL 464521, at *2 (Del. Super. Ct. May 28, 1999) (a "mandatory" forum selection clause means "the parties [are] *required* to litigate in Pennsylvania", but a "permissive" forum selection clause means "the parties have the *option* of litigating in Pennsylvania, but are not required to do so"); *Mason*, 120 F.Supp.3d at 445–46 (finding a lease clause permissive because it gave the lessee certain rights). To put it succinctly, "[m]andatory words impose a duty; permissive words grant discretion." *See Scalia & Garner* at 112. Accordingly, whether the Call Right provision is mandatory or permissive turns on whether Waystar is *required* to exercise the Call Right once it is triggered or whether Waystar has the *option* to do so.

The plain language of the Call Right provision answers this question: the Call Right provision provides Waystar an option; it does not impose a requirement. As an initial matter, the very essence of the Call Right provision is that it grants Waystar the "right" to repurchase shares; it does not impose an obligation to do so. The Call

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Memo. Op. at 10. Contrary to Weinberg's assertion, this was not a concession by the trial court that "and" is always ambiguous in permissive sentences (Weinberg Br. at 29); indeed, the trial court unequivocally held that "and" in the Call Provision is *unambiguous*. Memo. Op. at 14.

Right provision further indicates that when the Call Right is triggered, it is "*exercisable*" by Waystar, not that it must be *exercised*.

Moreover, the Call Right provision emphasizes that the Call Right is exercisable by Waystar "*in its sole discretion*." As the trial court correctly found, the language "in its sole discretion" indicates that Waystar has the choice whether to exercise the Call Right, making the provision permissive. *See, e.g., S. Telecom Inc. v. ThreeSixty Brands Grp., LLC*, 520 F. Supp. 3d 497, 513 (S.D.N.Y. 2021) (interpreting "and" disjunctively where agreement provided that approval from a licensor "may be withheld in Licensor's *sole discretion*") (emphasis added) (citation omitted).

There is no support for Weinberg's assertion that "in its sole discretion" refers to which entity exercises the Call Right, and not whether the Call Right is exercisable in Waystar's discretion. By its plain language, the Call Right provision conveys to the counterparty, Weinberg, that whether to exercise the Call Right is Waystar's decision, rather than Weinberg's. The provision would not need to say "in its sole discretion" to convey that any of the Waystar entities listed can exercise the Call Right, because that right already exists without that language.[8]

[8] Indeed, the article Weinberg relies upon refutes her argument. *See* Kenneth A. Adams, *Weinberg v. Waystar, Inc.: The Delaware Court of Chancery Considers an Ambiguous "And"*, ADAMS ON CONTRACT DRAFTING, July 6, 2022 (acknowledging that the Call Right provision states that "Waystar gets to decide whether it wants to exercise the call right").

Further, Weinberg's argument that the Call Right provision is mandatory because it says that "[t]he Converted Units *shall* be subject to the right of repurchase…" misses the point. As noted above, a contract provision is mandatory under Delaware law where it imposes a requirement on a party to the contract, but permissive where it grants the party a right or an option. *Supra* at 22. The Converted Units are not parties to the contract, and obviously do not have *any* rights or obligations under the Option Agreements or otherwise. Thus, the fact that the Converted Units "shall be subject to a right of repurchase" if *Waystar*, a party to the contract, elects to exercise its Call Right, does not answer the question of whether the Call Right provision is permissive or mandatory.[9]

Scalia and Garner illustrated this point in *Reading Law: The Interpretation of Legal Texts*. *Scalia & Garner* at 112. They explained that "shall" is appropriately interpreted in the mandatory sense when the word "shall" is replaceable by "has a duty to" or "is required to" and the sentence still makes sense. *Id*. In the Call Right provision, it would not make sense to say that the Converted Units "have a duty" or "are required" to "be subject to the right of repurchase." The fact that "Converted Units" are the subject of the sentence is irrelevant; what matters is whether the Call

[9] Additionally, the mere fact that a sentence says "shall" does not make it a mandatory sentence under Delaware law. As with all contract interpretation, the meaning of "shall" is dictated by context. *Cole v. Bd. of Dental Examiners*, 1999 WL 167728, at *7 (Del. Super. Ct. Feb. 10, 1999).

Right provision imposes a duty upon Waystar or creates an option. It clearly does the latter.

For these reasons, the trial court correctly held that the Call Right provision is permissive and that "and" in the Call Right provision is several.

III. The Context Of The Option Agreements Confirms That "And" Is Disjunctive In The Call Right Provision.

A. Question Presented.

Whether the trial court properly found that, in context, the word "and" in the Call Right provision is unambiguously used in the disjunctive, several sense, and therefore granted Waystar a Call Right following Weinberg's termination, regardless of a restrictive covenant breach. A688–700; A764–76.

B. Standard of Review.

This Court reviews questions of law and interprets contracts *de novo*. *Osborn*, 991 A.2d at 1158.

C. Merits of the Argument.

The trial court correctly held that, in context, the Option Agreements are unambiguous: they granted Waystar a Call Right following Weinberg's termination, regardless of whether she breached her restrictive covenants. First, the trial court correctly reasoned that the Option Agreements provide a purchase price for Waystar to exercise its Call Right even if there is no restrictive covenant breach, confirming that the parties contemplated that the Call Right could be exercised even absent a restrictive covenant breach. Memo. Op. at 11–13. Second, the trial court's ruling can be affirmed on the independent grounds that other aspects of the Option Agreements confirm Waystar's interpretation. Finally, interpreting "and" as disjunctive is consistent with the purpose of a call right.

i. The Repurchase Price Provision Demonstrates That "And" In The Call Right Provision Is Disjunctive.

Weinberg does not dispute the trial court's holding that "[o]nly Waystar's interpretation of the Call Right provision preserves the meaning of the Repurchase Price Provision in the Second and Third Option Agreements." Memo. Op. at 13.[10] Yet she claims that the trial court erred because it interpreted the Call Right provision in the First Option Agreement to have the same meaning as the Call Right provisions in the Second and Third Option Agreements. Weinberg Br. at 16. This was not error. As Weinberg concedes, the Call Right provisions are *identical* in all three Option Agreements. It would be illogical for identical provisions appearing in a series of contracts between the same two parties to have opposite, contradictory meanings. Weinberg's arguments lend no support to her position.

First, Weinberg's argument that the trial court should have analyzed the contracts separately is tantamount to saying that when the trial court analyzed the First Option Agreement, it should have ignored the Second and Third Option Agreements. Weinberg cites no authority for the proposition that the trial court was

[10] The Second and Third Option Agreements provide one purchase price when there is a Forfeiture Event (*i.e.*, when there is a restrictive covenant breach or termination for cause) and a different price when there is not. A285 ¶ 10(b); A303 ¶ 10(c). The trial court reasoned that if "Weinberg were correct that the Call Right exists only upon Termination *and* a Restrictive Covenant Breach, then the repurchase price applicable to Forfeiture Events would *always* apply," rendering the "repurchase price that applies in the absence of a Forfeiture Event nugatory." Memo. Op. at 13.

required to analyze the First Option Agreement with blinders on. In fact, the law in Delaware is that contemporaneous contracts between the same parties concerning the same subject matter must be construed consistently. *Fla. Chem. Co. v. Flotek Indus., Inc.*, 262 A.3d 1066 (Del. Ch. 2021).

The Option Agreements are related, contemporaneous contracts. The First and the Second Option Agreements were signed one day apart, on October 22, 2019, and October 23, 2019, respectively, and the Third Option Agreement was signed less than a year later, on August 19, 2020. Additionally, Weinberg concedes that the Option Agreements are related. She alleges that the Option Agreements were granted pursuant to the Stock Incentive Plan and that all three Option Agreements share key terms with respect to the Converted Units. Under all three Option Agreements, shares of Derby TopCo, Inc. are automatically upon exercise converted into economically equivalent units of its parent, those units are defined as "Converted Units," and the Converted Units are governed by Partnership Agreement. A208 ¶ 14. All three Option Agreements also contain identical Call Right provisions. A214 ¶¶ 31–32. Thus, the identical Call Right provisions must be interpreted consistently.

Second, Weinberg's argument that the Second and Third Option Agreements could not amend the First Option Agreement misses the point. The Call Right provision did not change—it is identical in all three Option Agreements. The addition of the Repurchase Price Provision in the Second and Third Option

Agreements did not serve to amend the First Option Agreement, but it did crystallize what the parties intended the identical Call Right provisions to mean.

Third, there is no logic to Weinberg's assertion that "if the presence of the repurchase price provision compelled a result in favor of Waystar, then the absence of the provision must compel a contrary conclusion." Weinberg Br. at 16–17. Reasoning "If A, then B. Not A, therefore not B[,]" is a classical logical fallacy referred to as denying the antecedent, and it is routinely rejected by courts. Stephen M. Rice, *Conventional Logic: Using the Logical Fallacy of Denying the Antecedent As A Litigation Tool*, 79 Miss. L.J. 669, 687 (2010) (citing *Iams v. DaimlerChrysler Corp.*, 883 N.E.2d 466, 479 (Ohio Ct. App. 2007) and collecting cases).

Accordingly, the trial court properly found that the Repurchase Price Provision bolsters Waystar's interpretation.

ii. Other Features Of The Option Agreements Establish That "And" In The Call Right Provision Is Disjunctive.

The trial court's ruling can be affirmed on the independent grounds that other features of the Option Agreements beyond the Repurchase Price Provision confirm that "and" in the Call Right provision is disjunctive. *See Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (stating that the court may affirm a trial court's decision "on the basis of a different rationale than that which was articulated by the trial court"). First, "and" is used in the disjunctive sense in other provisions of the Option Agreements. Second, Weinberg's interpretation would render

meaningless the "Termination…for any reason" clause in the Call Right provision. Third, Weinberg's interpretation would create uncertainty as to how to calculate the six-month period during which Waystar had a Call Right.

1. "And" Is Used Disjunctively Elsewhere In The Option Agreements.

The Option Agreements use "and" in the disjunctive sense in at least two other places in the Option Agreements, confirming that it would not have been unusual for the parties to use the disjunctive "and" in the Call Right provision.

First, the Repurchase Price Provision in the Second and Third Option Agreements states that in the event of a Forfeiture Event, the purchase price is "the lesser of" (x) the per unit price paid for the Converted Units ***and*** (y) the fair market value per unit on the closing date of repurchase. A285 ¶ 10(b); A303 ¶ 10(c). In this provision, Waystar is required to pay one price or the other, not both, establishing that "and" is disjunctive.

Second, the First Option Agreement states that with respect to tax withholding liability, the Company may extend the post-termination exercise period until the "earlier of" (x) such time the Company permits the Tax Withholding Election (as that term is defined in the First Option Agreement), ***and*** (y) the Final Expiration Date (as that term is defined in the First Option Agreement). A273 ¶ 9. Such a provision means that as soon as the earlier of (x) and (y) occurs, the right is triggered,

and the other event need not take place at all. Thus, the phrase "the earlier of (x) and (y)" uses "and" in the disjunctive sense.

Weinberg's assertion that "and" in the Call Right provision must be conjunctive because the Option Agreements use "or" in the disjunctive sense is not compelling. As discussed above, "and" can be conjunctive or disjunctive depending on context. Rather than considering how "or" is used in the Option Agreements to ascertain the meaning of "and," it is far more telling to consider how "and" is used elsewhere in the Option Agreements. Particularly given Weinberg's assertion that "and" is not typically disjunctive, the disjunctive use of "and" elsewhere in the Option Agreements supports that it is also disjunctive in the Call Right provision.

2. Waystar's Interpretation Gives Effect To The Phrase "Termination…for any reason."

Courts "will not read a contract to render a provision or term meaningless or illusory." *Osborn*, 991 A.2d at 1159 (internal quotation marks omitted) (citation omitted); *Gallup, Inc. v. Greenwich Ins. Co.*, 2015 WL 1201518, at *9 (Del. Super. Ct. Feb. 25, 2015) ("The Court must interpret the contract as a whole so as not to render any provision meaningless."). If the parties had intended Waystar to have a Call Right only if Weinberg was terminated *and* breached her restrictive covenants, as Weinberg argues, it would improperly render the "Termination…for any reason" clause in the Call Right provision meaningless.

Weinberg's view of the Call Right provision renders this phrase meaningless because a restrictive covenant breach nearly always occurs with a termination (it is either grounds for termination or occurs after termination), while termination "for any reason" most often occurs without a restrictive covenant breach.[11] Therefore, Weinberg's interpretation essentially strikes the "Termination…for any reason" clause and ties the Call Right solely to a restrictive covenant breach, as though the provision read:

> The Converted Units shall be subject to the right of repurchase (the "Call Right") … during the six (6) month period following ~~(x) the (i) the Termination of such Participant's employment with the Service Recipient for any reason (or, if later, the six (6) month anniversary of the date of the exercise of the [Substitute] Options in respect of which the Option Stock was issued, and (y)~~ a Restrictive Covenant Breach.

Thus, Weinberg's interpretation improperly renders that phrase meaningless.[12]

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[11] Waystar has never conceded that, under Waystar's view of the Call Right provision, the "Call Right is not exercisable against an employee who breaches a restrictive covenant, but whom the company decides not to terminate at all." Weinberg Br. at 23. Waystar has consistently stated that it has a Call Right when an employee is terminated for any reason and also when an employee breaches his or her restrictive covenants, without requiring both to be true. Whether Waystar would choose to exercise its Call Right when there is a restrictive covenant breach but no termination does not mean that Waystar would not have the option to do so.

[12] At oral argument, the trial court aptly illustrated the problem with Weinberg's position using a hypothetical. *See* A827 at 8:12–21. The trial court said, "So if I had just been sentenced to prison in Smyrna and … [the rules say] I could access the yard after breakfast and after lunch. What does that mean?' You would say, "Well it means after lunch," because it has to be both after breakfast and after lunch. That's how you read a permissive 'and.'" *Id*. Weinberg's counsel responded, "Yes." *Id*. Just as Weinberg's view improperly renders "after breakfast" meaningless in the trial

In contrast, Waystar's interpretation of the Call Right provision gives meaning to the "Termination…for any reason" clause. Pursuant to Waystar's interpretation, "Termination…for any reason" is a distinct event that triggers Waystar's Call Right, regardless of whether there has been a restrictive covenant breach. Additionally, the parties' use of the phrase "for any reason" underscores that an employee's termination need not be related to a restrictive covenant breach to trigger the Call Right. Courts have rejected interpretations of a contract that would "require the Court to read out of the contract the phrase 'for any reason'" and should also do so here. *See, e.g.*, *Am. Gen. Life Ins. Co. v. Mickelson*, 2012 WL 6020339, at *4 (S.D. Tex. Dec. 3, 2012) ("[Defendant]'s proposed interpretation of the term would conflict with the rest of provision 4.7, which specifically provides that it applies to unearned commissions received with respect to premiums returned to policy owners '*for any reason*.'") (emphasis added).

3. Waystar's Interpretation Identifies Clear Six-Month Periods To Exercise The Call Right.

The Call Right provision granted Waystar a Call Right during the six-month period following an employee's termination for any reason (or following the date the options are exercised following termination, whichever is later) and during the

court's hypothetical, which Weinberg's counsel conceded (A829 at 10:7–20), it improperly renders "Termination…for any reason" meaningless in the Call Right provision.

six-month period following an employee's restrictive covenant breach. A273 ¶ 10(a); A285 ¶ 10(a); A303 ¶ 10(b). Weinberg's interpretation of the Call Right provision would create confusion regarding what triggers the six-month period: the day of termination for any reason (or, if later, the day the options are exercised) or the day the employee breached his or her restrictive covenants. It is highly unlikely—indeed, improbable—that an employee's termination and an employee's restrictive covenant breach would occur on the same day.

It is no answer to say that the parties intended the six-month period to be calculated from the later of the two events. Elsewhere in the Call Right provision, the parties clarified that the applicable six-month period runs from "Termination…for any reason" or "*if later*, the six (6) month anniversary of the date of the exercise of the Options…." A273, A285 ¶ 10(a); A303 ¶ 10(b). This language establishes that if the parties had intended the six-month period to run from the later of termination or the restrictive covenant breach, they would have said so. *In re Verizon Ins. Coverage Appeals*, 222 A.3d 566, 578 (Del. 2019) (absence of provision referred to elsewhere in policy demonstrates parties knew how to expressly provide that provision when intended); *MicroStrategy Inc. v. Acacia Rsch. Corp.*, 2010 WL 5550455, *7 (Del. Ch. Dec. 30, 2010) ("use of different language in the two sections shows the parties knew how" to provide coverage when intended).

Waystar's interpretation creates no such confusion because there are two distinct events that trigger a Call Right and the six-month period during which Waystar may exercise its Call Right runs independently from each one. Accordingly, the Court should adopt Waystar's interpretation to avoid an illogical result. *See Cyber Hldg. LLC v. CyberCore Hldg., Inc.*, 2016 WL 791069, at *5 (Del. Ch. Feb. 26, 2016) ("courts should not aspire to an illogical interpretation").

iii. The Disjunctive Use Of "And" Creates The Most Reasonable Outcome.

Waystar's interpretation is the most reasonable because it is consistent with the purpose of a call right, while Weinberg's interpretation essentially guts Waystar's right all together because under Weinberg's interpretation, Waystar almost never has a Call Right.

The purpose of a call right is to allow employers to "retire the shares of a departing shareholder who is no longer important to the success of the venture" (*see* COMMERCIAL CONTRACTS: STRATEGIES FOR DRAFTING AND NEGOTIATING § 19.03[G] (Vladimir R. Rossman & Morton Moskin eds., 2d ed. 2022)), and is "usually triggered by…termination of such employee's employment with the company." Minority Investments: Overview, Practical Law Practice Note Overview 1-422-1158, definition of "call option." Indeed, a recent article describing this case explained that "[s]trategically, many companies do not want ex-employees to participate in the upside of the company's growth post-termination because these

ex-employees are no longer contributing to the company's success;" thus, "call rights are typically triggered upon the termination of an executive's employment."[13]

In contrast, under Weinberg's interpretation, Waystar would not have the right to "retire the shares" of an employee who had been terminated by Waystar and was no longer contributing to Waystar's success *unless* that employee had also breached his or her restrictive covenants. Because it is far more common for employees to comply with their restrictive covenants than to breach them, Weinberg's view of the Call Right provision would mean that Waystar would rarely have the ability to repurchase its shares from a terminated employee and that most terminated employees would have the ability to remain stockholders.

Weinberg argues that it is logical for her to hold Waystar's shares indefinitely because she received the options in exchange for providing ongoing loyalty in the form of complying with her restrictive covenants. The restrictive covenants, however, are finite in duration. Each of Weinberg's restrictive covenants will have lapsed by early 2023, yet Weinberg's position is that she should be able to remain a

[13] Seth J. Safra, David B. Teigman & Aaron M. Weiss, *A Conjunction Is Worth Thousands Of Dollars: Recent Case Highlights Significance of "And" vs. "Or."* , THE NATIONAL LAW REVIEW, July 14, 2022.

Waystar shareholder forever.[14] Accordingly, the very limited duration of the restrictive covenants does not justify Weinberg's interpretation.

Weinberg has also incorrectly characterized the Call Right as part of a "graduated sanction structure."[15] Weinberg contends that this "structure of graduated sanctions" culminates with the Call Right provision being the "harshest penalty." But the Call Right provision is not a penalty at all. Instead, if Waystar exercises its Call Right, Waystar purchases the shares from the employee, and the employee receives payment for those shares. In Weinberg's case, she paid $898,756.74 for the shares when she exercised her options and she will receive $1,824,422.32 once it is confirmed that Waystar properly exercised its Call Right, meaning that Weinberg will net $925,665.58. This is not a penalty.[16] For this same reason, it is not accurate

[14] *See, e.g.*, A291 ¶ 4(a) (12-month restricted period); A311 ¶ 5(c)(v) (18-month restricted period).

[15] Notably, Weinberg relies on language that appears in the Second and Third Option Agreements, but is absent from the First Option Agreement, in support of this argument, but otherwise takes the position that language should only be considered if it appears in all three agreements.

[16] In contrast, there is a penalty when employees are terminated for cause or breach their restrictive covenants because they forfeit their vested options. In Weinberg's case for example, had she been terminated for cause or breached her restrictive covenants, she would have forfeited the 107,318.96 vested options that became the Converted Units at issue in this case. Thus, she would have received nothing from Waystar instead of netting close to $1 million on the Converted Units.

for Weinberg to characterize Waystar as "seizing" an employee's shares; Waystar is purchasing them.

Weinberg also argues that Waystar's interpretation would allow Waystar to fire all of its employees who own shares to prevent those employees from benefitting from an expected increase in the value of Waystar's shares.[17] This assertion is nonsensical. As Weinberg concedes, it would not make good business sense for Waystar to grow successfully and then fire all the employees who own shares and who contributed to that success, only to have to start over from scratch. *See* Weinberg Br. at 20 (conceding that stock options are used as an incentive tool for a company anticipating substantial growth and for the individuals whose performance has a direct impact on the company's stock price). Additionally, as noted above, it is common practice for companies to have call rights upon an employee's termination, and Weinberg points to no situation where such a provision led a company to terminate all of its equity-owning employees.

[17] The final sentence of the Call Right provision, which says there will no longer be a Call Right if there is a change in control or initial public offering, does not create a "promise[] that the Call Right would not be used to revoke the future value of earned option[s]." Weinberg Br. at 21. The final sentence of the Call Right provision simply reflects the reality that upon a change in control or initial public offering, the Converted Units will be replaced with new equity, and so the Call Right would expire along with the Converted Units.

Accordingly, between the competing interpretations of the Call Right provision, Waystar's interpretation leads to the most reasonable outcome and is consistent with the purpose of a call right.

IV. The Option Agreements Should Not Be Construed Against Waystar.

A. Question Presented.

Whether the doctrine of *contra proferentum* applies where the Option Agreements are unambiguous, where Weinberg contractually waived construction against the drafter, and where extrinsic evidence confirms the parties' intent. A700–05; A776–81.

B. Standard of Review.

This Court reviews questions of law and interprets contracts *de novo*. *Osborn*, 991 A.2d at 1158.

C. Merits of the Argument.

For the reasons stated in Sections I–III, the Option Agreements are unambiguous. Regardless, the Option Agreements should not be construed against Waystar. First, Weinberg contractually waived the right to argue construction against the drafter. Second, construction against the drafter applies only when there is no other basis to ascertain the parties' intent, but in this case, extrinsic evidence confirms that the Call Right provision granted Waystar a Call Right upon an employee's termination for any reason, even absent a restrictive covenant breach.

i. *Contra Proferentum* Does Not Apply Because Weinberg Waived Construction Against The Drafter.

Weinberg has contractually waived the ability to argue construction against the drafter. Weinberg is a sophisticated business executive who had the opportunity

to review and negotiate the Option Agreements. When Weinberg signed each Option Agreement, she expressly agreed, in language appearing in all-capitalized letters, to be bound by the Partnership Agreement. A59, A71, A89. Weinberg concedes that the Partnership Agreement governs the Converted Units. A22 ¶14; Weinberg Br. at 7. She also concedes that it governs the parties' dispute. A22–24 ¶¶ 19–20; A28 ¶ 42. Indeed, Weinberg expressly invoked the terms of the Partnership Agreement to justify bringing her lawsuit in Delaware court. *Id*.

In the Partnership Agreement, the parties mutually waived construction against the drafter. The Partnership Agreement states:

> The parties hereto have participated jointly in the negotiation and drafting of this Agreement. If any ambiguity or question or intent or interpretation arises, this Agreement will be construed as drafted jointly and no presumption or burden of proof will arise favoring or disfavoring any party because of the authorship of any provision of this Agreement.

A341 § 1.2. Accordingly, any ambiguity arising out of the Option Agreements cannot be construed against Waystar. *See I.U. N. Am., Inc. v. A.I.U. Ins. Co.*, 896 A.2d 880, 885 (Del. Super. Ct. 2006) (rejecting construction against the drafter where agreement "expressly addressed and prohibited an argument of *contra proferentum* by its terms").

It is no answer that Weinberg did not negotiate the terms of the Partnership Agreement and thus is not bound by this provision. Weinberg does not get to hand-select which contractual provisions apply and which do not. Nothing prevented

Weinberg from consulting with counsel regarding the Option Agreements and negotiating those documents. The fact that Weinberg did not negotiate the Option Agreements is not evidence that she could not have done so. Accordingly, Weinberg is bound by the terms of the Option Agreements, including the Partnership Agreement's waiver of construction against the drafter.

Weinberg relies upon *Stockman v. Heartland Industrial Partners, L.P.*, but that case is distinguishable. 2009 WL 2096213, at *4 (Del. Ch. July 14, 2009). In that case, unlike here, there was no contract provision waiving the doctrine of *contra proferentum*, and the party challenging the contract did not have the opportunity to negotiate the agreement. *Id.* at *5. The *Stockman* court also applied *contra proferentum* because doing so served the overarching policy goal of benefitting indemnitees; but here, no such overarching policy demands application of *contra proferentum*. *Id*. at *18.

ii. Construction Against The Drafter Is Improper Because Extrinsic Evidence Confirms The Parties' Intent.

Construction against the drafter is also inapplicable because the parties' intent can be ascertained from extrinsic evidence. Under Delaware law, the construction against the drafter rule "may be invoked only as a rule of last resort when all other means of ascertaining the intent of the parties fail[.]" *Cleveland Tr. Co. v. Wilm. Tr. Co.*, 258 A.2d 58, 64 (Del. 1969). A "court will not apply" the rule of last resort "if

a problem in construction can be resolved by applying more favored rules of construction." *E.I. du Pont de Nemours & Co.*, 498 A.2d at 1114.

Accordingly, under Delaware law, courts will not construe a contract against the drafter if extrinsic evidence is available to "clarify the vague terms." *Rodman Constr. Co. v. BPG Residential P'rs, V, LLC*, 2013 WL 656176, at *2 (Del. Super. Ct. Jan. 8, 2013) (citation omitted) ("Delaware law requires a court to look to extrinsic evidence to resolve ambiguous contractual terms[.]") *Id*. at *3. In considering extrinsic evidence, the Court may "look to the actions of the parties subsequent to the making of the contract to ascertain their practical interpretation of it, and so to determine what the parties meant by their contract." *Schwartz v. Centennial Ins. Co.*, 1980 WL 77940, at *5 (Del. Ch. Jan. 16, 1980).

The undisputed facts alleged in Waystar's Verified Counterclaim establish that Waystar has always interpreted the language in the option agreements with employees to mean that Waystar has a Call Right when an employee is terminated, even without a restrictive covenant breach. A237 ¶¶ 48–52. Prior to Weinberg's termination, Waystar terminated five employees without cause between February 2020 and January 2021 who had vested options under option agreements containing identical, or nearly identical, language to Weinberg's Option Agreements. A238–41 ¶¶ 53–72. Like Weinberg, none of the five employees were terminated due to a restrictive covenant breach, and Waystar did not assert that a restrictive covenant

breach occurred. A238–41 ¶¶ 52–53, 57, 61, 65, 69. Upon termination of each of the five employees, Waystar exercised its Call Right pursuant to the same Call Right provision as in Weinberg's Option Agreements. A238–41 ¶¶ 51, 56, 60, 64, 68, 72.

It is well-settled that "when a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the courts." *Radio Corp. of Am. v. Phila. Storage Battery Co.*, 6 A.2d 329, 340 (Del. 1939). Here, Waystar consistently interpreted the Call Right provision with respect to all of its employees, which is strong evidence of intent. Moreover, Waystar's exercise of its Call Right between February and July 2020 overlapped in time with Waystar entering into the Option Agreements with Weinberg between October 2019 and August 2020. A225–26 ¶ 3; A238–40 ¶¶ 56, 60, 64, 68. In contrast, Weinberg did not assert her contrary interpretation until after her termination in 2021. *In re Westech Cap. Corp.*, 2014 WL 2211612, at *14 (Del. Ch. May 29, 2014) (contemporaneous extrinsic evidence is "more credible than the ex post explanations"). Weinberg should not be treated differently than the numerous employees who have come before her. Thus, the extrinsic evidence confirms that the parties intended Waystar to have a Call Right upon an employee's termination, even without a restrictive covenant breach.

For these reasons, the doctrine of *contra proferentum* is inapplicable.

CONCLUSION

For the foregoing reasons, Waystar respectfully requests that this Court affirm in its entirety the trial court's order.

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Dated: October 24, 2022

CERTIFICATE OF SERVICE

I hereby certify that, on October 24, 2022, true and correct copies of Appellee's Corrected Answering Brief were caused to be served by File & Serve*Xpress* on the following counsel of record:

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