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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TRACEY WEINBERG, Plaintiff Below, Appellant, v. WAYSTAR, INC., DERBY TOPCO INC., DERBY TOPCO PARTNERSHIP LP and DERBY GP, LLC, Defendants Below, Appellees.	:	No. 274, 2022 Court Below: Court of Chancery of the State of Delaware C.A. No. 2021-1023 SG

APPELLANT'S CORRECTED REPLY BRIEF

Dated: November 14, 2022

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INTRODUCTION

Competent users of language rarely hesitate over the difference between *and* *or*. *And* combines items while *or* creates alternatives. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012). Cases from Delaware and across the Unites States routinely hold that the plain, quotidian meaning of "and" is conjunctive. Yet, contrary to the overwhelming weight of case law and other authorities that say "and" means "and," Appellees argue for a strained construction of the Call Right provisions in the three Option Agreements at issue here, which alone they drafted and presented to Appellant as a form contract, in which "and" means "or."

Appellees' argument resolves the tension between it and the clear weight of contrary authorities mostly by ignoring them. Appellees never acknowledge that the plain meaning of "and" is conjunctive, and make no effort to distinguish the Delaware cases and other sources that say so. Instead, Appellees (like the trial court) rely heavily upon a 60 year old article that has never been previously cited by a Delaware court (and rarely elsewhere) and which, by its author's admission, advanced an untested thesis that did not rely upon case law. Appellees fail to explain why "and," as it appears in the Call Right provision, should be given the same disjunctive meaning as "or," which also appears on several occasions in the same provision, including in the very next sentence after the one at issue here.

And Appellees fail to identify any other place in the three Option Agreements where "and" is used to create alternatives.

Appellees argue that the Call Right provision in all three Option Agreements should be interpreted in a way that they argue harmonizes it with the two tiered Repurchase Price agreement present in only the Second and Third Option Agreement. Not only do Appellees misread the interplay of the Call Right provision and the Repurchase Price provision, but they wrongly argue without any supporting authority that all three Option Agreements should be interpreted identically as contemporaneous agreements, even though each Option Agreement was executed on a different day and related to an entirely separate transaction.

Against this backdrop, Appellees urge this Court to adopt their preferred construction of the Call Right provision but without explaining how that is possible without first declaring them ambiguous. Doubtless Appellees wish to avoid a finding of ambiguity because, as sole drafters of the Option Agreements, the doctrine of *contra proferentum* would require that the ambiguity be resolved against them. Appellees claim that Appellant waived application of *contra proferentum* is based on circular illogic, because she neither negotiated the form Option Agreements that were presented to her or the Partnership Agreement which contained the waiver at issue (which she adopted later). Appellees would have this Court resolve any ambiguity in their favor, which would have the

effect of denying Appellant the value of the stock options that she earned as a consequence of her faithful service to Appellees.

ARGUMENT IN REPLY

I. THE TRIAL COURT ERRED WHEN IT FAILED TO APPLY OR EVEN ACKNOWLEDGE THE PRESUMPTION THAT "AND," AS USED IN THE CALL RIGHT PROVISION, MUST BE GIVEN ITS ORDINARY CONJUNCTIVE MEANING.

A. In Delaware, And Elsewhere, "And" Is Presumed To Carry Its Common And Ordinary Conjunctive Meaning.

It is well-settled that "and" is presumed to be conjunctive. *See Silverman v. Silverman*, 206 A.3d 825, 833 (Del. 2019) ("When construing a statute, "and" is presumed to be conjunctive—especially when "or" is used in the same section disjunctively"); *Williams v. State*, 818 A.2d 906, 912 (Del. 2002) (superseded by statute on other grounds) ("In its commonly accepted meaning "'and' is a connective, and is not generally used to express an alternative – unless it is followed by words which clearly indicate that intent"); *see also* OB at 11-14 (collecting authorities supporting that "and" is typically given a conjunctive meaning).[1] Despite the overwhelming weight of these authorities, Appellees never acknowledge that the plain and ordinary meaning of "and" is conjunctive. Instead, Appellees counter with a "straw man"[2] construction of Appellant's

[1] Appellant Weinberg's Opening Brief is cited herein as OB at __. Appellees' Answering Brief is cited herein as AB at__.

[2] One way of ignoring an argument is by creating the fallacy of a "straw man"; constructing a distortion or caricature of the opposing position, and subsequently attacking that caricature. Wilma R. Ebbitt & David R. Ebbitt, *Index to English* (8th ed. 1990) at 107-108.

argument: "that 'and' is a one-dimensional word that must always or nearly always be interpreted in its conjunctive sense…." AB at 11. Appellees' characterization of Appellant's position is patently false and reveals the fundamental weakness in Appellees' position.

Appellant acknowledges that under certain circumstances, it is appropriate to substitute the normal, conjunctive meaning of "and" for the disjunctive, for example: to avoid an absurd result (OB at 11); when words following "and" clearly indicate that "and" should be read as "or" (OB at 12); or, similarly, when the clause at issue is itself internally ambiguous (*id.*). Nevertheless, at bottom, because Delaware courts are extremely reluctant to assign a meaning to "and" other than its well-accepted conjunctive meaning, "and" is given a disjunctive meaning only in narrowly-described circumstances. For instance, in *Stockman v. Heartland Indus. Partners,* L.P., 2009 WL 2096213 (Del. Ch. July 14, 2009) the court stated that "[a]lthough the normal approach to interpretation is to treat 'and' as conjunctive and 'or' as disjunctive, the opposite approach has been applied [by courts] where the normal approach would lead to an absurd result or one contrary to the drafter's overall intent." *Id*. at, *14.

Similarly, in *Concord Steel, Inc. v. Wilmington Steel Processing Co.*, 2008 WL 902406 (Del. Ch. Apr. 3, 2008), the court denied a preliminary injunction, reasoning that because "the contract language at issue "uses 'or' elsewhere, and

reading the "and" connecting clauses (a) and (b) in the conjunctive would not lead to an absurd result" it was "unlikely" that the plaintiff would ultimately succeed in convincing the court that "and" had a disjunctive meaning. *Id.* at *7.

In the present case, the Call Right Provision uses "or" elsewhere, including in the sentence immediately following the disputed one. Part of the trial court's reasoning in *Concord Steel* that "and" was properly read in its typical conjunctive form involved "determining its meaning based on the elements of the list and the surrounding words." *Id.* Similarly, in *Stockman,* (2009 WL 2096213) then Vice Chancellor Strine's "and" or "or" analysis focused solely on the several sentences that formed the indemnification provision at issue. Even the recent case of *United States v. Pulsifer*, 39 F.4th 1018 (8th Cir. 2022), brought to the attention of this Court by Appellees, (AB at 16) represents yet another instance of a court determining that "and" had a conjunctive meaning by analyzing only the precise statutory provision in question. And, in *Cipla Ltd v. Amgen Inc.*, F. App'x 135 (3rd Cir. 2019), also cited by Appellees, (AB at 12) the Third Circuit *rejected* an attempt to interpret "or" conjunctively because of the use of "and" conjunctively in the same section of the agreement at issue.

When the analysis is focused on the Call Right provision itself, ample evidence that "and" was meant in its usual conjunctive sense is readily apparent. In the two sentences that comprise the Call Right provision, "or" appears three

times, including in the sentence that immediately follows the disputed use of "and." All of the occurrences of "or" clearly carry a disjunctive meaning. "And" appears exactly once, and when it is read in its typical conjunctive sense the Call Right provision makes perfect sense. Moreover, there is certainly nothing absurd about interpreting "and" in its usual conjunctive sense which thus limits Appellees' use of its Call Right to circumstances where an employee was terminated and violated the Restrictive Covenant. The trial court erred when it failed to apply the framework set forth in *Stockman* and *Concord Steel*, concluding that "and" should be read in the disjunctive without first determining that application of the conjunctive form would produce an absurd result.

Appellees incorrectly summarize *State v. Klosowski*, 310 A.2d 656, 657 (Del. Super. Ct. 1973) as "interpreting 'and' in the disjunctive sense based on context….'" AB at 11. In *Klosowski*, the court read a criminal statute that banned the possession of a sawed-off shotgun, 11 Del. C. § 465(A), examined the words following "and," and determined those words "'clearly indicated (the) intent' to express an alternative…, [thereby] creating *an exception to the ordinary rule of construction*." *Id*. (emphasis added). Before the *Klosowski* court applied this exception, it explicitly stated that, generally: "'And' is a connective, in its commonly accepted meaning, and is not generally used to express an alternative—unless it is followed by words which clearly indicate that intent.'" *Id*. at 657. This

Court should disregard Appellees' selective account of *Klosowski*, as it encourages circumvention of the general rule and jumps prematurely to an ambiguous exception analysis.

Equally problematic is Appellees' position that *Lipman v. GPB Capital Holdings LLC*, 2020 WL 6778781, (Del. Ch. Nov. 18, 2020) stands for "analyzing 'and' based on context, including whether reading 'and' disjunctively would create 'surplusage.'" AB at 12. In *Lipman*, the court interpreted a limited partnership agreement and held that it did not limit liability for all breaches of fiduciary duty except bad faith. The court wrote "the Defendants… appear[ed] to be confusing the conjunctive nature of the provision's conditions precedent for a disjunctive one… But that is not what the provision says." *Id.* at *10. The court concluded: "Indeed, a plain reading of the provision shows that the provision's limitation on liability applies only when *all three conditions* are met, instead of requiring only one condition." *Id*. (emphasis in original). These quotations show *Lipman* does not support Appellees' position that "and" in the Call Right provision means "or." On the contrary, *Lipman* supports Appellant's argument that both (x) and (y) of the Call Right provision must be triggered before Appellees could exercise the Call Right.

Appellees incorrectly argue that "under Delaware law, 'and' is interpreted in the disjunctive sense when dictated by context." AB at 11. This Court's adoption

of Appellees' argument, as well as the trial court's interpretation, would eliminate decades of Delaware law that holds "[c]lear and unambiguous language in [a contract] should be given its ordinary and usual meaning." *Lazard Tech. Partners, LLC v. Qinetiq N. Am. Operations LLC*, 114 A.3d 193, 195 n.9 (Del. 2015) (alteration in original) (further reasoning that "when the language of a [contract] is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented"). The argument that the trial court erred by not giving the "and" in the Call Right provision its ordinary, conjunctive meaning is supported in further detail below.

B. The Trial Court Erred When It Rejected The Majority Rule That "And" Ordinarily Has A Conjunctive Meaning And Instead Relied on Outdated Secondary Sources That Overemphasize Ambiguous Contexts.

Appellees observe that Delaware courts routinely look to legal usage authorities when interpreting contracts. AB at 14. Appellant agrees, and urges this Court to do what the trial court failed to do, which is to interpret the usage of "and" as it appears in the Call Right provision in light of the overwhelming weight of legal usage authorities that proffer the traditional meaning of "and."

The United States Court of Appeals for the Sixth Circuit has observed that "[d]ictionary definitions, legal usage guides and case law compel [courts] to start from the premise that 'and' usually does not mean 'or'." *OfficeMax, Inc. v. United*

States, 428 F.3d 583, 588 (6th Cir. 2005). In addition, the United States Court of Appeals for the Ninth Circuit recently summarized the plain meaning of "and" by noting that [f]or the past fifty years, dictionaries and statutory-construction treatises have instructed that when the term "and" joins a list of conditions, it requires not one or the other, but all of the conditions." *United States v. Lopez*, 998 F.3d 431, 436 (9th Cir. 2021) (colleting authorities). The Appellees' reliance upon *United States v. Pulsifer*, 39 F.4th 1018 (8th Cir. 2022) actually supports Appellant's argument. The *Pulsifer* court noted that "[t]he most natural reading of "and" is conjunctive—"along with or together with." *Id. at* 1021. *Pulsifer* is also easily distinguished on its facts. The *Pulsifer* court found that the distributive use of "and" was appropriate because the first of the three criteria sentencing criteria being analyzed would be superfluous if "and" was read to require the existence of all three qualifying factors. *Id.* Obviously, the converse is true here, as termination for any reason and a breach of a restrictive covenant are wholly separate and distinguishable acts. Using "and" in its usual conjunctive sense to require the existence of both conditions before the Call Right is exercised renders neither condition superfluous.

By adopting Appellees' position, the trial court ignored the traditional view that "and" is presumptively conjunctive. *See* 11 Williston on Contracts § 30:12 (4th ed.); 17A C.J.S. Contracts § 428 (Nov. 2021). *See also* 1A Sutherland

Statutory Construction § 21:14 (7th ed.). These authorities (and others) cited by Appellant in the Opening Brief were ignored by the trial court in the Memorandum Opinion.

The trial court further erred when it relied on Appellees' citation to Bryan Garner's, *A Dictionary of Modern Legal Usage* (2d ed. 1995), which states that "the meaning of 'and' is usually several." AB at 15. Garner's commentary on the meaning of "and" has expanded since 1995. For example, in the latest edition of *Garner's Dictionary of Legal Usage*, (3d ed. 2011), Garner laments that " [s]loppy drafting sometimes leads courts to recognize that *and* in a given context means sometimes means *or,* much to the chagrin of some judges." *Id.* at 56. And in Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012), the authors write that "[u]nder the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives." *Id*. at 116. Justice Scalia and Garner explain that in scenarios involving a conjunctive list (*i.e.*, a list of elements joined by "and") *all* of the elements in the list must be satisfied. *Id.* at 116-117. These developments show that the trial court's favorable reference to the second edition of *A Dictionary of Modern Legal Usage* was misplaced. OB Ex. A at 9.

To reinforce its position that "and" means "or" in the Call Right provision, Appellees now double down on its citation, as well as the trial court's favorable application, of an article that F. Reed Dickerson wrote in 1960 ("The Difficult

Choice Between "And" and "Or, 46 A.B.A.J. 310, 310 (1960))." AB at 14, 15, OB Ex. A at 9-11. This secondary source should bear little weight on appeal, because even Dickerson describes his analysis as an untested theory unfettered by case law and properly subject to "honest skepticism." *Id.* at 313. If the reed whittled by Dickerson were not thin enough, since 1960 his article has been cited in a court opinion only five times – including the instant case – anywhere in the United States. The article has never been cited by a Delaware court prior to the trial court's reliance upon it in the instant case, and has never been cited by any Federal Court. The plain meaning of "and" in the Call Right provision should not be distorted by an application of Dickerson's outdated and disregarded academic exercise.

C. The Trial Court Ignored Well-Settled Delaware Law When It Departed From The Plain And Common Conjunctive Meaning Of "And" Without First Finding That The Call Right Provision Was Ambiguous.

Appellant agrees with Appellees that, in Delaware, a court interpreting a contract must "apply traditional principles of contract interpretation to decipher its meaning." AB at 19. But the trial court, as well as Appellees, have ignored this bedrock principle of contract interpretation in Delaware: "All written contracts… are to be read, understood, and interpreted according to the plain meaning and ordinary import of the language employed in them" *Neary v. Philadelphia, W. & B.R. Co.*, 9 A. 405, 407 (Del. 1887). *See also Stream TV Networks, Inc. v.*

SeeCubic, Inc., 279 A.3d 323, 336 (Del. 2022) ("Unless there is ambiguity, Delaware courts interpret contract terms according to their plain, ordinary meaning.") As noted *supra*, as well as in Appellant's Opening Brief, (AB at 11-14) there can be no doubt that the plain, ordinary meaning of "and" is conjunctive. Neither the trial court below, nor Appellees here, have acknowledged that fact. Instead, the trial court departed from the plain, ordinary conjunctive meaning of "and," even though it explicitly held that the Call Right Provision was *not* ambiguous. Memorandum Opinion, Op. Br. Ex. A at 14. This was improper, because in the absence of ambiguity, the parties are bound by the plain meaning of their contract. *Ingram v. Thorpe*, 2014 WL 4805829, at *3 (Del. Sept. 26, 2014). For this reason alone, the trial court's decision was erroneous.

Another "traditional principle of contract interpretation" ignored by the trial court and Appellees is: whether or not a given contract term – in this case the Call Right provision – would lead "a reasonable person in the position of either party" to have expectations inconsistent with the plain meaning of the contract language. *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012). Delaware "adheres to an objective theory of contracts, meaning that a 'contract's construction should be that which would be understood by an objective, reasonable third party.'" *Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752, 760 (Del. 2022), reargument denied (Mar. 22, 2022), citing *Osborn ex*

rel. Osborn v. Kemp, 991 A.2d 1153, 1159 (Del. 2010). Given that the ordinary meaning of "and" is conjunctive, no a reasonable third party would assign the disjunctive meaning of "and" to the Call Right provision.

II. THE CALL RIGHT PROVISION IS CLEARLY MANDATORY BECAUSE THE CONVERTED UNITS *SHALL* BE SUBJECT TO THE RIGHT OF REPURCHASE ESTABLISHED BY THE CALL RIGHT PROVISION.

The trial court held, and Appellees maintain, that the Call Right provision is permissive and therefore "and" takes on a disjunctive meaning. This interpretation is misguided, because the subject of the Call Right provision is the Converted Units, which *shall* be subject to the discretionary Call Right of the employer if (x) and (y) conditions are met. A56 at § 10(a); A68 at § 10(a); A86 at § 10(b) ("Converted Units *shall* be subject to the right of repurchase (the Call Right) exercisable by Parent…"). The wording is clear: all Converted Units must be subject to the Call Right. Scalia and Gardner's *Reading Law: The Interpretation of Legal Texts* notes that when a provision is mandatory, "shall" may be substituted with "must." Scalia and Garner, *supra* at 113-114. In the Call Right, using "must" instead of "shall" perfectly retains the meaning of the provision, thus underscoring its mandatory nature. It is the Converted Units that are the subject of the Call Right, and its application to them is mandatory. The trial court erred when it held otherwise.

III. WHEN READ IN CONTEXT, THE USE OF "AND" IN THE CALL RIGHT IS CLEARLY CONJUNCTIVE, AND THE TRIAL COURT ERRED BY HOLDING OTHERWISE.

A. The Trial Court And Appellees Erred By Ignoring The Absence Of A Two-Tiered Repurchase Price Provision In The First Option Agreement.

The trial court erred when it limited its context analysis to a comparison of the Call Right provision with the two-tiered Repurchase Price provision in the Second and Third Option Agreements, while completely ignoring that a different Repurchase Price provision is present in the First Option Agreement (pursuant to which 83% of the options at issue in this case were awarded.) OB Ex. A. at 11-13. Appellees now attempt to defend the trial court's analysis by arguing that the First, Second and Third Option Agreements were "contemporaneous contracts" that must be construed consistently." AB at 28. Appellees are wrong on both the law and the facts.

Appellees cite to *Florida Chem. Co., LLC v. Flotek Indus., Inc.,* 262 A.33d 1066 (Del. Ch. 2021), in support of the idea that "contemporaneous contracts" must be read together. In *Florida Chemical*, the court states that "all writings that are part of the same transaction are interpreted together." *Id., citing* Restatement (Second) of Contracts § 202(2). And, in *Comerica Bank v. Glob. Payments Direct, Inc.*, 2014 WL 3567610, (Del. Ch. July 21, 2014) (also cited in *Florida Chemical*), use of the rule is limited to "contemporaneous contracts between the same parties

concerning the same subject matter." *Comerica Bank* at *7. Once properly understood, it is clear that this rule of interpretation is of no relevance to the interpretation of the Call Right provision in the First Option Agreement.

The Second and Third Option Agreements were not executed contemporaneously with the First Option Agreement. The Second Option Agreement was executed one day after the First, and the Third was executed nearly one year later. The First Option Agreement makes no reference, express or implied, suggesting the subsequent Option Agreements were anticipated, and neither the Second nor Third Option agreements make any reference, express or implied, to the prior Option Agreement(s). By contrast, in *Florida Chemical*, the two agreements in question were executed at the same time, and one agreement was an attachment to the other. *Florida Chem. Co.* 262 A.3d at 1066. Similarly, in *Comerica Bank* the two agreements in question were executed on the same day and each agreement explicitly referenced the other. *Comerica Bank* v 2014 WL 3567610, at *8. Appellees have failed to identify any Delaware case that applied contemporaneous contract rule to contracts written on different days, and which do not somehow reference each other.

Moreover, the trial court completely ignored the other critical factual differences between the First Option Agreement, versus the Second and Third. The options pursuant to the First Option Agreement were "Substitute Options", as the

preamble explains, because they were given to Appellant to substitute for other options she owned that had already vested and could have been cashed out. (See preamble of First Option Agreement.) There is also no definition of a "Forfeiture Event" contained within the First Option Agreement (Paragraph 2 in each agreement) or forfeiture risk even upon a termination for cause described in the termination section (Paragraph 3 in each agreement), unlike the Second and Third Agreements. The First Option Agreement (governing 83% of Appellant's options at issue) is quite simply factually different, which was completely ignored by the trial court.

Next, as clarified by the Restatement, application of the contemporaneous contract rule is appropriate only when the multiple writings "are part of the same transaction." *Restatement (Second) of Contracts* § 202(2). Each of the three Option Agreements describe the terms of distinct transactions that were executed independently of each other. Appellees have not identified any authorities that applied the contemporaneous contract rule to contracts that involve separate transactions.

Finally, Appellees offer no authority to support its position that to reconcile the language in the three Option Agreements, the First Option Agreement must take on the language of the later executed Second and Third Option Agreements. On the contrary, differences in the wording of similar provisions in two contracts

between the same parties must be presumed to intend different meanings. *Cf. Lukk v. State Farm Mut. Auto. Ins. Co.*, 2014 WL 4247767, at *4 (Del. Super. Ct. Aug. 27, 2014), as corrected (Aug. 29, 2014) (When different words are used in two clauses in the same contract it must be presumed different meanings are intended.); (2 Lewis' *Sutherland Stat. Const*. [2d ed.] (A legislature's changes to the words and phraseology of a statute will be presumed to have been made with an intent to substantively change the law.) If the Court were to find that "and" should be read disjunctively in the Second and Third Option Agreements as a result of ambiguity, it does not follow that the First Option Agreement should bear the same outcome. Instead, the First Option Agreement must compel the contrary conclusion, that "and" takes on the traditional, conjunctive connotation.

B. Appellees Fail To Identify Any Other Place In The Option Agreements Where "And" Is Used Disjunctively.

Appellees wrongly argue that because there are two places in the Option Agreements where "and" is used to join two terms that are expressed as the "lesser of x *and* y" or the "earlier of x *and* y" the Court should impart that meaning to the use of "and" as it appears in the Call Right Provision AB at 30. Appellees argument fails as a matter of basic grammar. Section 10(b) of the Second Option Agreement and Section 10(c) of the Third Option Agreement provide that, in the event of a Forfeiture Event, the Defendants have the right to pay a purchase price that 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. OB Ex. A at 68, 86. As used, "and" is conjunctive and connective, because *both* (x) and (y) conditions must be present to permit determination of the "lesser of" one of (x) and (y) as the purchase price. *See Merriam Webster*, https://www.merriam-webster.com/dictionary/and (last visited Nov. 4, 2022) (defining "and" as "a logical operator that requires both of two inputs to be present or two conditions to be met for an output to be made or a statement to be executed); *Webster's Third New International Dictionary* 80 (defining "and" to mean a "sentential or propositional connective that produces a compound proposition true only if both compounds are true[.]"). Unlike the Call Right provision, the two events identified in the purchase price provision must occur simultaneously (the applicability of two prices on a date certain). If "and" in either provision were replaced by the disjunctive "or," the meaning of each provision would lose meaning.

C. Appellees' Argument That Only A Disjunctive Reading Of "And" Gives Effect To The Phrase "Termination For Any Reason" Is Incorrect.

Appellees suggest interpreting "and" as used in the Call Right Provision would render the phrase "termination… for any reason" as it occurs in the Call Right Provision meaningless. AB at 31. This argument is misplaced. An employee could be terminated for many reasons without having breached a restrictive covenant. Conversely, and as recognized by Appellees, a restrictive

covenant breach does not always occur with or result in a termination. AB at 32. And the words "termination for any reason" have other obvious contract purposes, especially in light of employment law. First, the phrase states that the Call Right does not require a "for cause" termination. Employees terminated without cause could still suffer the Call Right, but *only* if they breach their restrictive covenants. This actually benefits Appellees. It would only need to prove a restrictive covenant breach before exercising its Call Right, thus dispensing with further substantiation of a "for cause" termination. This comports with the aforementioned discussion that the Call Right is intended to punish restrictive covenant breaches, not all possible misconduct. Second, as discussed *infra*, the phrase contributes to the timing limitation upon the Call Right.

D. Appellant's Reading Of The Call Right Provisions Permits A Reasonable Interpretation Of When The Six Month Period Following Termination During Which The Call Right Must Be Exercised Begins.

Appellees claim that giving "and" its usual conjunctive meaning would "create confusion" regarding the boundaries of the six month period during which the Call Right must be exercised. Appellees' argument ignores that the structure of the Call Right simply provides that the six month period begins to run on the later of two dates, which is a risk allocation between employer and employee that benefits Appellees. The commencement of the six month period within which Appellees must exercise its Call Right follows satisfaction of both conditions: (x)

termination for any reason and (y) a restrictive covenant breach. So, for example, if an employee is fired on Day 1 and then breaches a restrictive covenant on Day 30, the six month period begins to run on Day 30. Or, if an employee breaches a restrictive covenant on Day 1, but is not fired until Day 60 (after the breach is uncovered), the six month period begins to run on Day 60. This interpretation actually benefits Appellees, and is consistent with the common conjunctive meaning of "and."

E. Appellees' Argument That The Disjunctive Use Of "Or" Creates The "Most Reasonable Outcome" Is Irrelevant.

Appellees attempt to engage this Court as the arbiter of whose interpretation of the Call Right provision produces the "most reasonable outcome" (AB at 35) misses the mark. When interpreting a contract, this Court's role is to fulfill the shared intent of the parties at the time they contracted by interpreting clear and unambiguous terms according to their ordinary meaning. *E.g. Cox Commc'ns* 273 A.3d at 760 (Del. 2022). Though this Court must avoid an interpretation that avoids an absurd or unreasonable result, that is as far as the Court's qualitative analysis should go. *Id.* Appellees provide no authority suggesting that this Court's role is to choose the "most reasonable outcome" from among competing alternatives.

IV. THE DOCTRINE OF *CONTRA PROFERENTUM* SHOULD BE APPLIED SO AS TO CONSTRUE THE CALL RIGHT AGAINST APPELLEES.

Appellees do not dispute that they drafted the three Option Agreements containing the Call Right provision, nor do they claim that the terms of the Option Agreements were subject to negotiation. Instead, Appellees argue that the doctrine of *contra proferentum* does not apply because Appellant waived her right to invoke it. AB at 41. Appellees' argument fails.

Appellees point to the waiver provision in the Partnership Agreement, which provides, in pertinent part:

> *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 favoring or disfavoring any party because of the Authorship of this provision…

A341 (emphasis added). Appellees argue that Appellant is bound by this language, even though the recital in the Partnership Agreements clearly states that Appellant played no part in the negotiations that led to its execution, nor was she an original party to its terms. A340, A384-385. Appellees do not dispute these facts.

The waiver provision in the Partnership Agreement is not enforceable against Appellant because it rests upon a factual predicate that is simply not true. Appellant was not one of the original parties who "participated jointly in the negotiation and drafting" of the Agreement, nor is she a successor to any of them.

Accordingly, the waiver provision does not apply on its own express terms for failure of a factual predicate. It should also be void for public policy reasons, because enforcing this provision against Appellant would constitute an employer (or this Court) enforcing a knowingly false statement against an employee in an adhesion contract.

This Court has applied the doctrine of *contra proferentum* against the drafter of an ambiguous partnership agreement in favor of limited partners who did not negotiate for the agreement's terms. *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013); *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 42 (Del. 1998). As in *Norton*, Appellant had no role whatsoever in the negotiation and drafting of the Partnership Agreement. There is a circular illogic in Appellees' attempt to avoid the application of *contra proferentum* by relying on language in form contracts that Appellees drafted without negotiation – the Option Agreements – which incorporate language in another contract they drafted and presented to Appellant as a fait accompli, the waiver provision in the Partnership Agreement. Just as Appellant had no choice but to accept the Option Agreements as drafted by Appellees if she wished to receive valuable stock options as partial compensation for her good and faithful service, she similarly had no choice but to accept the Partnership Agreement as it already existed. On these facts, the doctrine of c*ontra preferentum* cannot be defeated by unilaterally rolling one "take it or leave it"

contract, the First Option Agreement, into two others, the Second and Third Option Agreements. It would be fundamentally unfair for Appellees to reap the benefits of their drafting errors if the Court finds the language at issue in the Option Agreements is ambiguous.

CONCLUSION

For the foregoing reasons, this Court should reverse the Memorandum Opinion.

Dated: November 4, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2022, a true and correct copy of the **Appellant's Corrected Reply Brief** was served via File & ServeXpress on the following counsel of record:

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