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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE FOX CORPORATION / SNAP INC. SECTION 242 LITIGATION	CONSOLIDATED No. 120, 2023 Court below: Court of Chancery of the State of Delaware C.A. No. 2022-1007-JTL C.A. No. 2022-1032-JTL

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES & OTHER AUTHORITIES

PRELIMINARY STATEMENT[1]

The Defendants' answering brief ("Answering Brief") is the litigation embodiment of gaslighting[2]: the factual assertions and legal reasoning upon which it rests are not merely incorrect; they turn reality on its head. Defendants offer personal and vindictive attacks (at both Plaintiffs and the trial judge himself), cynically seeking to distract from the fundamental flaws in their own arguments.[3]

First, Defendants accuse Plaintiffs of sidestepping the statutory language and resting their position on appeals to policy. Just the opposite is true: Plaintiffs' first brief below and every submission since has demonstrated that the plain language of Section 242(b)(2) requires a class vote when a board seeks to amend a charter to remove one of the core "powers" inherent to that stock. *See* Section I, *infra*.

It is Defendants who fail to confront Section 242(b)(2) head-on. Instead, Defendants try to import words (like "peculiar") that the legislature never used, and

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[1] Unless indicated, emphasis and alterations are added, and internal quotations and citations are omitted. Undefined capitalized terms have the same meaning as in Appellants' Opening Brief, filed on May 31, 2023 (the "Op. Br.").

[2] "[T]he act or practice of grossly misleading someone especially for one's own advantage." *Gaslighting*, MERRIAM-WEBSTER (last visited July 14, 2023), https://www.merriam-webster.com/dictionary/gaslighting.

[3] While this Court will determine the tone and tenor expected of briefs filed by Delaware counsel, Plaintiffs were struck by the frequency of Defendants' personal attacks on the Vice Chancellor that go beyond disputing his reasoning. Beyond harsh rhetoric, Defendants rarely bother directly confronting the lower court's logic at all. That Defendants were victorious below makes their agressiveness all the more confounding.

fabricate the notion of a "triad" of characteristics of stock that departs from the words of the statute, as written. Simply put, the plain language unambiguously supports Plaintiffs' position. That reality should end the analysis under well-settled rules of statutory interpretation. *See* Section II, *infra*.

Second, Defendants mischaracterize the import and holding of two cases — *Dickey Clay*[4] and *Orban*[5] — that answered a fundamentally different question from the one before the Court here. Those cases confronted whether a class vote is required when a proposed charter amendment would dilute the relative (and collective) voting influence of a preexisting class of shares by authorizing additional shares of a senior class or a new class of voting stock entirely. The settled answer is "no." But that question is simply not the one this Action poses.

Defendants accuse Plaintiffs and the Vice Chancellor of ignoring or seeking reversal of the supposed "black-letter" import of those rulings. Plaintiffs correctly argued that neither case is controlling, since neither even considered whether a vote is needed when a charter amendment impairs the inherent power of a particular share (such as the power to vote), much less one that affirmatively eliminates the power of that share to bring suit for breach of fiduciary duty. Indeed, this appeal exists

[4] *Hartford Accident & Indemnity Co. v. W. S. Dickey Clay Manufacturing Co.*, 24 A.2d 315 (Del. 1942).

[5] *Orban v. Field*, 1993 WL 547187 (Del. Ch. Dec. 30, 1993).

because the Vice Chancellor correctly recognized that the language on which Defendants rest their position is unworkable *dicta*, but nevertheless deferred to this Court to reach that inescapable determination. *See* Section III, *infra*.

Defendants repeatedly take the Vice Chancellor to task for sending the parties a pre-argument letter. That letter focused the parties on the main issues with which the trial court was grappling (a plainly reasonable exercise of judicial discretion) and used a series of hypotheticals to "stress-test" the Defendants' inconsistent statements of law. Unable to provide coherent answers to the Vice Chancellor's appropriate inquiries, Defendants now deflect by disparaging the Court's use of hypotheticals and by whining about perceived time pressures.

Defendants' gaslighting continues when they inexplicably accuse Plaintiffs of failing to address the trial court's hypotheticals at oral argument. To the contrary, Plaintiffs' counsel observed that upon reviewing those hypotheticals holistically, the conclusion that emerges is that Defendants' legal position is incoherent and leads to indefensible and inconsistent results.[6] Defendants deride the trial judge's method for analyzing the parties' competing positions (because that method showed just how deeply flawed Defendants' position is) while superficially reframing their

[6] *See* B0201 ("So this gets to – again, I don't know if Your Honor intended it with the hypotheticals and framing the first question to each hypothetical as how do the three defenses work. You know, what I took from it, kind of working through them one at a time, is I stepped back and I said they don't provide a cogent paradigm. They conflict; they're inconsistent.").

unworkable rule of law in their Answering Brief.

Third and finally, having cynically rewritten the statute, overstated (and misstated) the case law, and disrespectfully attacked the trial judge for using sound logic to reject their proposed rule of law, Defendants obfuscate their failure to give a class-wide vote a thought (at least prior to this Action). Defendants refer to supposed "conventional wisdom" to create the impression that their failure to comply with the statute was thoughtful, when the record (or lack thereof) before this Court supports no such conclusion.

Defendants could have submitted evidence on the parties' cross-motions for summary judgment, like board minutes or other materials, showing that they assessed whether a class vote is required when eliminating the stockholders' right to sue for certain breaches of fiduciary duty. They chose not to do so. Instead, Defendants rationalize their failure to comply with the statute by overstating the import of a few generalized legal commentaries and present a "sky-is-falling" threat to this Court. Both strategies fail. None of the so-called "conventional wisdom" commentaries actually address the question posed in this case, and this Court should never feel bound to interpret Delaware law incorrectly to perpetuate loose language or undisciplined reasoning that worked its way into legal commentaries. Nor should this Court fear negative consequences of ruling for Plaintiffs, as the rare, identified instances of companies previously missing votes can readily be managed, while

affirmance despite all logic and law mandating reversal would allow controllers at multi-class companies to unilaterally eliminate core minority stockholder powers. *See* Section IV, *infra*.

In sum, as Plaintiffs made clear in their Opening Brief, the Vice Chancellor's ruling for Defendants reflects deference to this Court in a context where the trial court easily could (and, Plaintiffs submit, should) simply have read the statute as written, correctly identified extraneous language in *Dickey Clay* and *Orban* as the *dicta* that it is, and then cabined loose language in some legal treatises that suggests what the trial court itself described as accepting an "incoherent" position.[7] It is ironic that Defendants' response to the Vice Chancellor showing so much respect to this Court's prerogative to interpret its 80-year old precedent is a litany of arguments that are disingenuous when offered to this Court and disrespectful to the trial judge.

[7] B0211, B0217.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 242(B)(2) MANDATES REVERSAL

At best, Defendants are wrong (and at worst, affirmatively misleading) when they say Plaintiffs "eschew their arguments below."[8] This Action originated from a straightforward, plain-language reading of Section 242(b)(2): a "power" of the stock necessarily includes the power to sue for breach of fiduciary duty.[9] Plaintiffs' core premise is that a charter amendment eliminating or diminishing stock's inherent power requires a class vote under the statute. Plaintiffs made that argument in briefing below,[10] at oral argument,[11] and in the very first argument section in their Opening Brief on this appeal.[12]

"[W]hen a statute is clear and unambiguous there is no need for statutory interpretation."[13] Plaintiffs submit that it is "clear and unambiguous" that the term "powers," as employed by Section 242(b)(2), includes the ability to sue. Plaintiffs

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[8] Appellees' Omnibus Answering Brief, filed on June 30, 2023 (the "Ans. Br.") at 3.

[9] B0046-B0049.

[10] B0074-B0075 & n.15.

[11] B0174-B0176.

[12] Op. Br. at 23-28.

[13] *Bd. of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 331 (Del. 2012).

supported that contention with dictionary definitions, common usage, caselaw, and other provisions of the DGCL.[14]

Defendants, in contrast, elide over this first (and dispositive, here) step in statutory interpretation.[15] Instead, Defendants mischaracterize – at the fringes – Plaintiffs' argument in two respects.

First, Defendants assert that Plaintiffs argue that the 1969 amendments to the DGCL caused some seismic shift to Section 242(b)(2). Not so. Delaware courts have never considered the meaning of the word "powers" in the context of Section 242(b)(2), either pre- or post- the 1969 amendment. Plaintiffs' point, as the Vice Chancellor recognized,[16] is that following the amendment, it is indisputable that the word "powers" is not modified by the word "special." Thus, the 1969 amendment to Section 242(b)(2) enhances Plaintiffs' plain-language interpretation and precludes Defendants' insistence that the word "special" modifies "powers."

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[14] Op. Br. at 23-28. Defendants dispute the relevance of other DGCL provisions that Plaintiffs highlighted because they do not refer specifically to stockholders suing. Those provisions demonstrate that the DGCL treats the ability to sue as a "power."

[15] *See Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011) ("First, we must determine whether the statute under consideration is ambiguous.... If it is unambiguous, then we give the words in the statute their plain meaning."). Defendants identified no ambiguity requiring analysis beyond a plain reading of Section 242(b)(2). Indeed, their Answering Brief never uses the word "ambiguous."

[16] B0197.

Second, contrary to Defendants' hyperbole, Plaintiffs never argued that a class vote under Section 242(b)(2) is required whenever a charter amendment adversely affects stockholders' generalized "ability to act or not act."[17] Instead, when trying to discern the meaning of the word "powers," Plaintiffs appropriately looked to, among other things, dictionary definitions.[18] Whether or not some other "ability to act or not act" would be protected, Plaintiffs merely argue that the ability to sue for breaches of fiduciary duty to "police corporate misconduct"[19] is a fundamental power of the stock.[20] Section 242(b)(2)'s "powers" thus includes the ability to sue.

In short, as court below rightly noted, Plaintiffs' interpretation leads to an easily applied rule of law:

> I don't think there would be any great mystery. There are three fundamental stockholder powers: to vote, to sell, and to sue. There are other rights set forth in the DGCL. And there are express rights. If you

[17] Ans. Br. at 4, 32.

[18] *See In re Solera Ins. Coverage Appeals*, 240 A.3d 1121, 1132 (Del. 2020) ("This Court often looks to dictionaries to ascertain a term's plain meaning.")

[19] *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1226 (Del. 2021). *See also* 8 *Del. C.* § 121(a).

[20] *See, e.g.*, *Rivest v. Hauppauge Dig., Inc.*, 2022 WL 3973101, at *24 (Del. Ch. Sept. 1, 2022) ("Modern corporate law recognizes that stockholders have three fundamental, substantive rights: to vote, to sell, and to sue."); *Strategic Inv. Opportunities LLC v. Lee Enters., Inc.*, 2022 WL 453607, at *8 n.100 (Del. Ch. Feb. 14, 2022) (same); *Williams Co. Stockholder Litig.*, 2021 WL 754593, at *20 (Del. Ch. Feb. 26, 2021) (same); *Strougo v. Hollander*, 111 A.3d 590, 595 n.21 (Del. Ch. 2015) (same); *Choupak v. Rivkin*, 2015 WL 1589610, at *19 n.3 (Del. Ch. Apr. 6, 2015) (same).

> affect any of those adversely, you trigger a class vote for the affected class.[21]

This Court should not countenance Defendants' hyperbole that reversal of the Judgment would wreak havoc on corporate planners. Instead, Plaintiffs' reading of Section 242(b)(2) leads to the common-sense conclusion that a high-vote class of stock cannot unilaterally denude a low-vote class of its ability to sue.

[21] Ex. A to Notices of Appeal – Transcript of Telephonic Rulings on Cross-Motions for Summary Judgment, dated March 29, 2023 ("Ex. A") at 55.

II. DEFENDANTS' MOST RECENT ITERATION OF THEIR ARGUMENT IS FUNDAMENTALLY FLAWED

A. Defendants' Interpretation Is Facially Infirm

Defendants' statutory interpretation has been a moving target throughout this Action. Their scattershot approach was sufficiently confusing that the Vice Chancellor appropriately sent a pre-hearing letter to the parties that tried to synthesize Defendants' various proffered rules of law to focus the issues at argument.[22] Defendants' Answering Brief attacks the lower court for sending the letter and for supposedly mischaracterizing Defendants' positions—they inexplicably go so far as to deny that they made an "express rights argument."[23]

At the hearing, the trial court pressed Defendants to articulate their position, to which Defendants' counsel responded: "Look, I think 'express' is fair. It's the things that are spelled out. In addition – yeah, I think that's fair. I mean, that's the point."[24] Accordingly, both the Vice Chancellor and Plaintiffs understood Defendants to have posited the "express right argument."[25]

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[22] *See* B0211 ("Look, I do think that defendants' three arguments are internally inconsistent and incoherent.").

[23] Ans. Br. at 4, 26.

[24] B0294; *see also* B0298 ("Yes, you could, I guess, sum that up all as express.").

[25] Ex. A at 54; Op. Br. at 18-19, 29-30.

Now, Defendants attack the trial court, asserting that labeling their position as the express rights argument "misses the nuance."[26] In the latest articulation of their proffered rule of law, Defendants say that "a separate class vote under Section 242(b)(2) of the DGCL is required only where the charter amendment would impair a ***peculiar*** attribute of that class of stock."[27] Such "peculiar attribute[s]" apparently are "imbued under Section 151" via either express language in the charter or unidentified "gap-filler provisions of the DGCL."[28] Other than pointing to Section 212(a)'s default of one vote per share, Defendants never articulate which provisions of the DGCL would function as gap-fillers for purposes of "imbuing" the particular attributes of stock, versus which gap-fillers would fall outside the scope of Section 151 (and, apparently, Section 242(b)(2)).[29] As best Plaintiffs can understand it, Defendants are still pushing the same express rights argument that they agreed below the trial court should assess. That slightly modified articulation of their position remains flawed for at least three reasons.

First, the word "peculiar" appears nowhere in the statute. Instead, the term arises from *dicta*, as discussed in Section III, *infra*. Defendants inappropriately try

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[26] Ans. Br. at 26.

[27] Ans. Br. at 1 (emphasis in original).

[28] Ans. Br. at 26, 29.

[29] As the Vice Chancellor noted, there are a litany of default rights of stock that arise under the DGCL that generally do not appear expressly in a charter. Ex. A at 9-11.

to inject that modifier into their made-up "triad" of "powers, preferences, and special rights," to avoid giving independent meaning to ***each*** of those three terms. Adding words into statutes and combining the words that exist so they lose independent significance is simply not how statutory interpretation works.[30]

Second, Defendants' latest definition of "peculiar" remains incoherent. In one breath, they assert that a "peculiar attribute" is "one that defines the specific characteristics of a class of stock, as opposed to general rights held by all stockholders."[31] A few breaths later, Defendants concede that "peculiar" attributes may be "shared by other classes of the corporation."[32] Defendants' inability to cogently articulate the meaning of their own word that they insert into Section 242(b)(2) demonstrates the unworkability of their interpretation. However, their admission that a power can be both "peculiar" and yet shared with other classes concedes the crux of Plaintiffs' position: the fundamental power to sue is protected under Section 242(b)(2), even if that power is "shared by other classes."

Third, Defendants submit that, whatever these "peculiar attributes" are, they must be "imbued" by Section 151. Section 242(b)(2) contains no reference to – much less limitation by – Section 151. The drafters of the DGCL clearly knew how

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[30] *See Taylor*, 14 A.3d at 538 ("We also ascribe a purpose to the General Assembly's use of statutory language, construing it against surplusage, if reasonably possible.").

[31] Ans. Br. at 1.

[32] Ans. Br. at 5.

to cross reference Section 151 – *see, e.g.*, Section 102(a)(4), which discusses only powers "permitted by § 151" – but chose not to do so in Section 242(b)(2). This silence suggests that Defendants' assertion that "powers" in Section 242(b)(2) can only mean those "imbued" by Section 151 is unduly – and incorrectly – cramped.

B. The Trial Court's Logic Demonstrates that Defendants' Proffered Rule of Law is Incoherent

In their Opening Brief, Plaintiffs discussed the Vice Chancellor's thoughtful hypotheticals concerning modifications to the power to vote, sell, and sue.[33] Those fact patterns demonstrated that Defendants' interpretation of Section 242(b)(2) is "incoherent" and necessarily incorrect.[34] Beyond disdainful rhetoric, Defendants did not bother engaging with the Vice Chancellor's actual reasoning, thus waiving arguments on this score.[35]

That those fact patterns undermine Defendants' position applies with equal force to the latest iteration of Defendants' proffered rule of law. But, before turning to the lower court's reasoning, Plaintiffs feel compelled to address Defendants'

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[33] Op. Br. at 18-20, 41-42.

[34] *See Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1247 (Del. 1985) ("The golden rule of statutory interpretation ... is that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result.").

[35] *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999).

accusations that the trial court issued some sort of advisory opinion, and that the Vice Chancellor's reasoning is "irrelevant."[36] Not so.

An advisory opinion provides a ruling on a question not ripe for adjudication.[37] It is undisputed that the question presented here – whether charter amendments reducing the power to sue triggers a class vote under Section 242(b)(2) – is ripe. In analyzing that issue, the court below explained its reasoning and, in doing so, assessed various hypotheticals to pressure-test the parties' respective interpretations. Considering the broader implications of a party's position is exactly what courts are supposed to do. As the Vice Chancellor explained:

> So I am doing what I think is my job and trying to test ... the implications of the plain language argument for these sort of historical understandings, and I keep coming up with things that don't really hang together and don't make sense. And this is where my conundrum has started.[38]

Parsing Defendants' heated rhetoric in their Answering Brief, they still do not provide principled answers to the trial court's questions. So, Defendants attempt to

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[36] Ans. Br. at 14.

[37] *See XL Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1217 (Del. 2014) ("Delaware courts decline to exercise jurisdiction over a case unless the underlying controversy is ripe, *i.e.*, has matured to a point where judicial action is appropriate. That principle is sometimes expressed in terms of the adage that Delaware courts do not render advisory or hypothetical opinions.").

[38] B0254.

deflect, protesting that the trial court should not have explained its reasoning.[39] Defendants' continued refusal to directly address legitimate questions highlights the paucity of logical support for their position. To be sure, whether the trial judge's analysis is a core holding or *dicta* is irrelevant to this Court in all events. Plaintiffs submit that this Court should be swayed by the Vice Chancellor's reasoning, and thereby reverse his overriding deference to "conventional wisdom."

Consider the following hypothetical that the Vice Chancellor posed concerning a limitation on the power to sell:[40]

- A company has two class of stock, Class A and Class B.
- The company proposes a charter amendment that would provide that if any share of Class B common stock is to be sold to a competitor, then the company has a right of redemption to buy such shares at 10% below fair market value.

Under Plaintiffs' plain language interpretation, "powers" necessarily includes stockholders' three core powers, *i.e.*, voting, selling, and suing. *See* Section I, *supra*. The proposed elimination or diminution of any of those powers – whether or not expressly set forth in the charter – requires a class vote under Section 242(b)(2). Under this fact pattern, alienability would be adversely affected, necessitating a separate class vote for the Class B common stock.

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[39] Defendants ironically criticize the Vice Chancellor for explaining his reasoning, yet rely exclusively on *dicta* from *Dickey Clay* and *Orban* to alchemize their proffered rule of law.

[40] Ex. A at 44-46.

Defendants' interpretation, however, yields irrational results, because whether there would be a class vote under Section 242(b)(2) depends on whether free alienability arises by default under the DGCL or is expressly set forth in the pre-amendment charter. Defendants concede that if the initial charter ***expressly*** provided that shares of Class B common stock are freely alienable (such as by expressly inserting Section 159's language into the charter), then a class vote would be required for the imposition of a redemption right.[41] In that instance, alienability would be an express power of the stock imbued via Section 151, so any limitation on that power would require a class vote under Section 242(b)(2).[42]

Yet, according to Defendants, if the stock was freely alienable ***implicitly***, *i.e.*, by default under Section 159, then no class vote would be required, since the power of alienability was not "imbued" by Section 151.[43] Defendants' position "does not make sense"[44] for at least two reasons.

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[41] Ex. A at 44-46.

[42] *See* Ex. A at 41 ("So I've shifted in these hypotheticals to using a redemption right, which, under Section 151, is necessarily and expressly by statute an attribute of a class of shares.").

[43] B0159. Ex. A at 47. Defendants argue that transfer restrictions are governed by Section 202(b). Ans. Br. at 33. The Vice Chancellor already addressed that argument by explaining Section 242(b)(2) governs implementation of a charter amendment, while Section 202(b) governs the enforceability of transfer restrictions against a particular stockholder.

[44] Ex. A at 44.

First, as the Vice Chancellor explained, Defendants' interpretation illogically elevates form over substance:

> The scenario, therefore, no longer satisfies the express right argument. But again, so what? The amendment is still reducing the scope of the Class B common's power to sell by making the shares subject to the competitor redemption call right. That is an adverse effect on a power appurtenant to a class of stock, and Section 242(b)(2) should provide the Class B common with a class vote.[45]

Second, there is no principled basis to cabin the "powers" contemplated by Section 242(b)(2) to the "powers" "imbued" by Section 151(a).[46] Conveniently for Defendants, the only "powers" expressly contemplated by Section 151(a) are ***voting*** powers, yet it is clear that the DGCL recognizes a much more expansive suite of stockholder powers.[47] Defendants themselves concede this point.[48] Nevertheless, their interpretation would statutorily permit a class of high-vote stock to amend a charter to unilaterally denude a class of low-vote stock of implicit yet foundational powers just because those powers are not "imbued" by Section 151.

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[45] Ex. A at 47.

[46] Defendants make much of their fabricated triad of "powers, preferences, and special rights." As a textual matter, that "triad" differs among Sections 102(a)(4), 151(a), and 242(b)(2). Section 102(a)(4) only mentions "rights" (as opposed to Section 242(b)(2)'s "special rights"), and Section 151(a) only discusses "***voting*** powers" (as opposed to Section 242(b)(2)'s "powers").

[47] *See* Op. Br. at 26-28.

[48] Ans. Br. at 26, 30-31 & n.84. *See also* Tr. at 9-10.

Plaintiffs' concerns are not hypothetical – this Action is about the Companies' super-voting stock unilaterally eliminating the "foundational" power of classes of non-voting stock to sue the officer-controllers for certain breaches of fiduciary duty. Suing is a power that the statute plainly recognizes – if the DGCL did not, then there would be no need to amend Section 102(b)(7) to allow for permissive exculpation.[49] Accordingly, Section 242(b)(2) required class votes on the Charter Amendments, but the Companies improperly denied their public stockholders that opportunity.

[49] Defendants' discussion of forum selection provisions is a red herring. *See* Ans. Br. at 33-34. A forum selection provision is a procedural limitation, dictating the place where a stockholder can exercise the power to sue. Forum selection does not eliminate the underlying power to sue that adheres to the stock.

III. THE *DICTA* IN *DICKEY CLAY* AND *ORBAN* ARE NOT CONTROLLING IN THIS CASE

As this Court knows, a "holding" is "[a] court's determination of a matter of law pivotal to its decision."[50] The specific legal holdings of *Dickey Clay* and *Orban* are straightforward and not dispositive here. Those cases teach that the creation or expansion of a senior security does not adversely affect the "powers, preferences or special rights" of a junior security,[51] since "[n]othing about the legal rights or powers associated with the common stock change[] in any way."[52] Simply put – and despite Defendants' spin – those holdings are not implicated and do not answer the legal question presented in this Action.

The legal question in *Dickey Clay* was whether a junior class of securities was entitled to a class vote, under the predecessor statute to Section 242(b)(2), on a charter amendment that would increase the number of authorized shares of a senior class of securities.[53] *Dickey Clay* held that the answer to that question was "no":

> Stripping from the appellant's argument its garnishments, ***it is found to be based on the misconception that a position of a class of shares, as related to other shares in the capital structure, is a relative and, therefore, a special right of the shares***. Essentially, the contention is that protection by class vote against an increase of burden is a special right incident to the common shares. If the Legislature had intended to afford protection against the effects of an amendment generally by

[50] HOLDING, Black's Law Dictionary (11th ed. 2019).

[51] Ex. A at 29, 36, 40.

[52] *Id.* at 36.

[53] 24 A.2d at 317-18.

> requiring a class vote of shares in all cases where, by the amendment, the relative position of shares would be disturbed, as by an increase of subordination, apt language easily could have been found. ***But it is entirely clear that the statute in its mention of relative rights of shares did not refer to the position of shares in the plan of capitalization, but to the quality possessed by the shares***; and it is only by a refinement of interpretation that it can be said that a relative position is a relative right.[54]

Thus, as the Vice Chancellor observed, *Dickey Clay* simply teaches that a class of security's ***relative*** position in the capital structure is not a "special right" of the shares themselves. *Dickey Clay* did not even consider the meaning of the word "powers," much less find that powers (or rights, for that matter) inherent to the stock itself can be eliminated without a vote.[55]

Orban is similarly inapposite. There, the relevant legal question was whether a junior class of securities was entitled to a class vote, under Section 242(b)(2), on a charter amendment that created a senior class of securities.[56] *Orban* correctly held that the answer to that question was "no":

> The language of the statute makes clear that it affords a right to a class vote when the proposed amendment *adversely affects the peculiar legal characteristics of that class of stock*. The right to vote is not a peculiar or special characteristic of common stock in the capital structure of Office Mart. All classes of stock share that characteristic; the voting

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[54] *Id*. at 320.

[55] *Dickey Clay* only used Defendants' favorite word – peculiar – ***once***. In contrast, Defendants employed the word "peculiar" 39 times in their Answering Brief. As Plaintiffs noted in their briefing below, "Defendants' rhythmic chant does not make viable law." B0088.

[56] *Orban*, 1993 WL 547187, at *7.

> power of each class of stock would be pro-rata diluted by the issuance of Series C Preferred Stock and thus all were entitled to vote equally (in one general class) on the amendment.[57]

The creation and issuance of a superior class of stock does not trigger a class vote under Section 242(b)(2), "because the creation of a senior security does not effect any change or amendment to the rights or powers of the common stock. Nothing about the legal rights or powers associated with the common stock changed in any way."[58] Notably, the *Orban* court viewed the legal question exclusively through the analytical lens of *Dickey Clay*, which cabined it analysis to the meaning of "special rights." The *Orban* court was neither asked to interpret the term "powers" in Section 242(b)(2), nor to decide whether a core power inherent in the share — like the power to sue — can be eliminated without triggering a class vote.

That those decisions remain good law in no way undercuts Plaintiffs' argument. Defendants' insistence that reversal here requires overturning *Dickey Clay* and *Orban* is just more gaslighting and not a reflection of reality.

For instance, Defendants cite *Monk*, where the Court of Chancery held (and this Court affirmed) that the creation of a preferred class of stock did not trigger class

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[57] *Id.* at *8 (emphasis in original). While *Orban* interchanges the "right to vote" with the "voting power," the context makes clear that the use of "right to vote" in connection with a diminution of a class's power does not mandate that one class can unilaterally denude another class of its right to vote.

[58] Ex. A at 36.

voting rights because "*Orban* teaches that under Section 242, voting powers or vote percentages are not *peculiar legal characteristics* of the class."[59] Plaintiffs agree. A class's "voting powers" or "vote percentages" refers to a ***collective*** power or right. Indeed, the statute itself focuses on "the powers, preferences, or special rights ***of the shares*** of such class as to affect them adversely."

* * * * *

In sum, *Dickey Clay* and *Orban* do not control here. Those decisions dealt with the question of whether a class of stock's relative position in the capital structure constitutes a "special right" under Section 242(b)(2). It does not.

This case presents a substantively different legal question, and this Court need not disturb *Dickey Clay* or *Orban* to reverse. The question here is whether the ability to sue is a power of stock, such that reduction of that power through a charter amendment requires a class vote. Under the plain language of Section 242(b)(2), the answer must be "yes." And, that result conforms with *Dickey Clay*, which articulated that a class vote is required when a "***quality possessed by the shares***" would be adversely affected.[60]

[59] A0725.

[60] 24 A.2d at 318

IV. DEFENDANTS FAILED TO PRESENT ANY EVIDENCE IN SUPPORT OF THEIR "CONVENTIONAL WISDOM" ARGUMENT

Defendants disingenuously argue that "[t]he trial court did not rely on practitioners' understanding of Section 242(b)(2) ... to override the statute's plain text."[61] That assertion is difficult – if not impossible – to square with the Vice Chancellor's statements that he "decided [Plaintiffs] had a good plain-language argument," but deferred to "an established understanding as to how Section 242(b)(2) works."[62] Doing so was reversible error.

The procedural posture of this Action is cross-motions for summary judgment, yet Defendants did not present admissible evidence of their reliance on any legal understanding, much less on "long-standing practitioner expectation."[63] Defendants could have informed the record with board minutes or other corporate materials showing why they did not provide a class vote while eliminating stockholders' right to sue for breach of duty. They chose not to and, it seems, recognized at oral argument that they left a gaping factual hole in the record.[64]

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[61] Ans. Br. at 7.

[62] Ex. A at 68.

[63] *Id.*.

[64] *See* B0321 ("To the extent Your Honor's decision was going to turn on the absence thereof, if Your Honor believed that there needed to be evidence, then we would think you'd need to deny the cross-motions.").

The best that Defendants mustered below was pointing to a few high-level commentaries in treatises summarizing the holdings of *Dickey Clay* and *Orban*, as well as a handful of votes solicited on director exculpation amendments in the 1980s on the heels of *Smith v. Van Gorkom*.

With respect to the treatises, and as discussed in Section III, *supra*, *Dickey Clay* and *Orban* are inapposite. Neither decision considered the meaning of the term "powers," let alone whether eliminating or diminishing the ability to sue would be an adverse effect on a protected power. So, Defendants contort silence on a question of first impression into supposed support for their "conventional wisdom" argument.

Finally, nine director exculpation amendment votes in the 1980s are hardly evidence of widespread market practice. And, as explained in Plaintiffs' Opening Brief, some of these examples undermine Defendants' argument. Most notably, The Washington Post affirmatively solicited a class vote in favor of its exculpation amendment. So, nearly 40 years ago, some practitioners correctly concluded that separate class votes were necessary to eliminate the power to sue.[65]

[65] Reversal would not destabilize the republic. Challenges to improperly adopted director exculpation provisions (to the extent there are any, given this case is cabined to charter amendments at multi-class corporations) likely would be ratified under Section 205. Far greater harm comes from inviting controllers *via* super-voting classes of stock to eliminate core minority rights unilaterally.

CONCLUSION

The Judgment should be reversed.

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