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Case Number 502,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NABIL SALAMA, individually and on behalf of all others similarly situated, Plaintiff-Below, Appellant, v. IRWIN D. SIMON, JODI BUTTS, DAVID CLANACHAN, JOHN M. HERHALT, DAVID HOPKINSON, THOMAS LOONEY, RENAH PERSOFSKY, and TILRAY BRANDS, INC., Defendants-Below, Appellees.	No. 502, 2024 On Appeal from the Court of Chancery of the State of Delaware, C.A. 2024-1124-JTL

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

The members of the board of directors (the "Board") of Tilray Brands, Inc. ("Tilray" or the "Company" and, together with the Board, the "Appellees") filed a proxy statement advising Tilray's stockholders that a proposal to amend Tilray's certificate of incorporation to increase the number of shares of common stock authorized thereunder (the "Proposal") was subject to a "votes-cast" standard. Appellees' disclosure was based on their claimed belief that the standard for the Proposal was provided for by a 2023 amendment to 8 *Del. C.* § 242 ("Section 242") lowering the voting standard for authorized-share proposals at certain corporations.

Tilray stockholder Nabil Salama (the "Appellant") sent a written demand to the Board explaining that a provision in the Fourth Amended and Restated Certificate of Incorporation of Tilray Brands, Inc. (the "Certificate") provided that a majority-of-outstanding-shares standard applied to the Proposal, as follows:

> The number of authorized shares of Common Stock or Preferred Stock may be increased or decreased (but not below the number of shares of Common Stock, or Preferred Stock then outstanding) by the affirmative vote of the holders of a majority of the voting power of all of the outstanding shares of stock of the Company entitled to vote thereon, without a vote of the holders of the Preferred Stock, or of any series thereof, or Common Stock unless a vote of any such holders is required pursuant to the terms of any certificate of designation filed with respect to any series of Preferred Stock[.]

("Article IV.B"). Appellant pointed to language in amended Section 242 providing

that authorized-share proposals would still be subject to a higher voting standard where "otherwise expressly required by the certificate[.]"

When Appellees rejected Appellant's demand to correct their disclosures, Appellant filed suit and moved to enjoin the stockholder vote on the Proposal. Appellees cross-moved for summary judgment.

On November 27, 2024, the Court of Chancery issued its Opinion Granting Summary Judgment for Defendants (Ex. B (the "Opinion" or "Op.")), in which it found that each side had advanced a reasonable reading of Section 242, creating an ambiguity that necessitated examination of extrinsic evidence. Based on its consideration of that evidence, the Court of Chancery concluded that the provision in Article IV.B of Tilray's Certificate specifying a majority-of-outstanding-shares standard for authorized-share amendments did not apply to the Proposal. The Court entered its Order Granting Motion for Summary Judgment (Ex. A (the "Order")) that same day.

Appellant maintains that the Opinion and Order are at odds with the plain language of both the Certificate and Section 242, as well as the legislative intent behind the 2023 amendment to that statute, and accordingly brings this appeal.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred when it found ambiguity in Section 242(d). Section 242(d) unambiguously provides that the votes-cast standard will only apply where a different standard is not "otherwise expressly required by the certificate[.]" Tilray's Certificate provides that "[t]he number of authorized shares . . . may be increased . . . by the affirmative vote of the holders of a majority of the voting power of all of the outstanding shares of stock of the Company entitled to vote thereon." The Court of Chancery erred in reading ambiguity into Section 242 based on Appellee's argument that the Certificate language "is simply an example" of a provision waiving entitlement to separate, class-based votes on authorized-share amendments under Section 242(d)(2)(C). While Article IV.B does waive class-vote entitlement, it also specifies that authorized-share amendments are subject to a majority-of-outstanding-shares standard. All parties agree that Article IV.B serves the former function. Though Appellees may deny that it serves the latter function, that does not create ambiguity in Section 242(d)(2)(C).

2. Even if Section 242(d) were ambiguous, the Court of Chancery erred in resolving that ambiguity against Appellant. The Court concluded that the General Assembly's unarticulated intent was to override existing charter language specifying a higher voting standard for authorized-share proposals. However, extrinsic considerations evince no such intent by the General Assembly and, in fact,

demonstrate that the opposite is true. The legislative synopsis accompanying the 2023 amendment to Section 242 expressly provides that language in a certificate will "opt in" and require more than the votes-cast standard where it specifies (i) the higher standard and (ii) the type of charter amendment(s) to which that standard applies. Additionally, law firm practice notes and market practices presented in the record below both indicate that corporations with existing charter language specifying a higher standard are bound by that language and cannot avail themselves of the more permissive votes-cast standard. The Court erred in resolving the supposed ambiguity against Appellant.

STATEMENT OF FACTS

A. Tilray's Certificate, the 2023 Amendments to Section 242, and the Rejected Demand

Tilray is a Delaware corporation, which has listed shares of its common stock to trade on the Nasdaq Global Select Market.[1] As of September 26, 2024, there were 875,444,828 shares of Tilray common stock outstanding.[2] At all times relevant to this litigation, Article IV.B of Tilray's Certificate provided that "[t]he number of authorized shares of Common Stock ... may be increased or decreased ... by the affirmative vote of the holders of *a majority of the voting power of all of the outstanding shares* of stock of the Company entitled to vote thereon[.]"[3]

In 2023, the General Assembly lowered the standard for charter amendments changing the number of shares authorized thereunder to a comparatively permissive votes-cast standard, "unless otherwise expressly required by the certificate of incorporation[.]"[4]

Notwithstanding this carveout, on September 27, 2024, the Company filed a definitive proxy statement (the "Proxy"), through which the Board advised stockholders that the Proposal to approve an increase in the number of shares of

[1] A0016.

[2] A0028.

[3] A0021 (emphasis added), A0025; Op. at 3.

[4] A0017-18; Op. at 4, 14-15; 8 *Del. C.* § 242(d).

common stock authorized under the Certificate to 1,416,000,000 required only "[t]he affirmative vote of the holders of a majority of the shares of voting power casting votes in person … or by proxy[.]"[5]

On October 21, 2024, Appellant sent a letter to the Board in his capacity as a stockholder, demanding that it amend the Proxy to disclose that approval of the Proposal required the affirmative vote of a majority of Tilray's outstanding shares.[6] On October 24, 2024, Tilray rejected that demand.[7]

B. This Litigation and the Opinion below

Appellant filed suit on October 31, 2024, seeking, *inter alia*, entry of an order enjoining stockholders' vote on the Proposal pending dissemination of corrective disclosures.[8] Appellees cross-moved for summary judgment.[9]

Following argument, the Court of Chancery entered summary judgment in favor of Appellees. Crediting their supposedly "reasonable reading of the [Article

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[5] A0014, A0024-25; Op. at 1 ("The proxy statement disclosed that the amendment would pass if more shares voted for it than against it, thereby applying a votes-cast standard."); *accord* A0025 (disclosing that the Proposal "require[d] the affirmative 'FOR' vote of at least a majority of the voting power shares of common stock casting votes in person (online during the virtual meeting) or by proxy at the 2024 Annual Meeting by the holders entitled to vote thereon").

[6] A0026.

[7] A0027.

[8] A0031-32, A0051-62; Op. at 2.

[9] A0066-100; Op. at 2.

IV.B] Provision"—namely, that it "addresses whether Section 242(d)(2)(C) requires a separate class vote using the votes-cast standard, but it does not otherwise have any effect"—the Court of Chancery bootstrapped Appellee's claim about the intent behind Article IV.B into a finding of ambiguity in Section 242(d) itself.[10] The Court of Chancery also credited Appellant's reading of Article IV.B's plain language, which subjects authorized-share amendments to a majority-of-outstanding-shares standard, and opined "[b]oth readings are reasonable, creating ambiguity."[11]

Having found statutory ambiguity arising from the parties' different readings of the Certificate, the Court of Chancery proceeded to consider the legislative synopsis, practice notes issued by various law firms, policy considerations, and the parties' arguments based on practices at other corporations and other provisions in the Delaware General Corporation Law (the "DGCL").[12] Based on this consideration, the Court of Chancery determined that the "correct voting standard for the [Proposal was] the Majority-of-the-Votes-Cast Standard."[13] It entered summary judgment in Appellees' favor.[14]

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[10] Op. at 36-37.

[11] *Id*. at 18.

[12] *Id*. at 36-54.

[13] *Id*. at 54.

[14] *Id*.

This appeal is not merely an academic exercise. Three weeks after the Opinion was issued, the Company held the stockholder vote on the Proposal. The Proposal carried enough votes under the votes-cast standard proffered by Appellee but would have failed under the majority-of-outstanding-shares standard set forth in Article IV.B.[15]

[15] A0977-79 (Tilray Brands, Inc., Current Report (Form 8-K) (Dec. 19, 2024)), *available at* https://ir.tilray.com/static-files/3d24f10f-f28f-4eb4-97b5-bf23ee1e16ec (last visited Jan. 22, 2025).

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN FINDING SECTION 242(d) AMBIGUOUS.

A. Question Presented

Whether the Court of Chancery erred in determining that Section 242 is ambiguous based on Appellees' reading of an undisputed and irrelevant provision.[16]

B. Scope of Review

This Court reviews *de novo* legal questions of statutory interpretation.[17]

C. Merits of the Argument

The Court of Chancery's finding of statutory ambiguity arose from its consideration of two different parts of Section 242. It correctly noted that "[a] statute is not ambiguous simply because the parties disagree about its meaning."[18] The Court of Chancery also correctly interpreted the lead-in to Section 242(d), which provides that the votes-cast standard set forth in the balance of the subsection will not apply where a higher standard is "otherwise expressly required by the certificate of incorporation[.]"[19]

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[16] A0107-13, A0959 (Tr. at 41:9-22).

[17] *Salzberg v. Sciabacucchi*, 227 A.3d 102, 112 (Del. 2020).

[18] Op. at 10 (citing *Ross v. State*, 990 A.2d 424, 429 (Del. 2010)); *see also id.* at 11 ("A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction." (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992))).

[19] Op. at 18-35 (interpreting the lead-in to 8 *Del. C.* § 242(d)).

It nonetheless deemed Section 242(d) ambiguous after crediting as "reasonable" Appellees' reading of an inapplicable—and therefore irrelevant—portion of the statute, Section 242(d)(2)(C). Appellees pointed to that subparagraph, which only applies where "no provision has been made" to waive entitlement to a separate vote by each class of outstanding stock under Section 242(b)(2), and claimed that Article IV.B is merely a 242(b)(2) class-vote waiver provision.[20] As shown below, Article IV.B is both (i) a class-vote waiver and (ii) an express provision for a higher voting standard applicable to authorized share proposals. Because the former function does not preclude the latter, the portion of the statute providing the basis for the supposed ambiguity—*viz*: Section 242(d)(2)(C)—is not implicated.

It was therefore plain legal error for the Court of Chancery to read ambiguity into Section 242(d) based on a perplexing claim, which is not relevant to operation of the statute, that Article IV.B is "merely" a class-vote waiver even though its plain terms also "otherwise expressly require[]" application of a higher voting standard for authorized-share amendments.[21] The terms of Section 242(d) are unambiguous and confirm that Tilray's Certificate expressly requires that authorized share

[20] Op. at 17 (crediting argument that Article IV.B was "merely a 'provision . . . made pursuant to the last sentence of paragraph (b)(2)[']").

[21] *Id.*

proposals are subject to the majority-of-outstanding-shares voting standard.

1. Tilray's Certificate Opts into a Majority-of-Outstanding-Shares Voting Standard for Authorized-Share Amendments.

The votes-cast standard set forth in Section 242(d) does not apply where a higher standard is "otherwise expressly required by the certificate of incorporation" and Tilray's Certificate provides that "[t]he number of authorized shares … may be increased … by the affirmative vote of the holders of a majority of the voting power of all of the outstanding shares[.]"[22] Accordingly, the Proposal was properly subject to a majority-of-outstanding-shares standard. In the briefing below, the parties agreed that the terms of the lead-in to Section 242(d) and the Certificate "end[] the matter" and a court need not look beyond the foregoing two quotations.[23]

Appellees, however, protested that the term "expressly" required the Certificate to contain a direct invocation of Section 242(d) itself.[24] They argued that, because the Certificate does not expressly disclaim Section 242(d), the voting standard specified for authorized-share amendments in Article IV.B is of no moment.[25] There is no basis in language, law, or logic for reading such a requirement into the word "expressly" — the Certificate is a written instrument, the terms of

[22] 8 *Del. C.* § 242(d); Article IV.B.

[23] A0089, A0107.

[24] A0090-93.

[25] *Id.*

which can never be anything but express, and Article IV.B requires a different voting standard than Section 242(d). The Court of Chancery recognized as much and rejected Appellees' interpretation of Section 242(d)'s lead-in provision, finding that adverbs such as "expressly … simply require that the charter state the proposition affirmatively, rather than a court inferring the proposition from context."[26]

To this end, the Court of Chancery painstakingly surveyed the DGCL for use of the terms "explicitly", "specifically", or "expressly" to evaluate Appellees' contention that use of such terms demonstrates legislative insistence on a heightened degree of specificity.[27] It did not find that any of those adverbs requires a particularized reference to any section of the DGCL.[28] With specific regard to the term "expressly" as applied to DGCL provisions concerning certificates of incorporation, the Court of Chancery found that it did "not indicate anything other than a need for the certificate to address the issue the statute contemplates."[29]

The definition of the word is consistent with this survey of the DGCL. "Expressly" is the adverbial form of "express", an adjective defined as "[c]learly and

[26] Op. at 19.

[27] Op. at 19 *et seq*.

[28] Op. at 20-24.

[29] Op. at 24. The Court of Chancery contrasted the DGCL with "statutes governing trusts and the obligations of trust fiduciaries [that] do require language that expressly references a specific section[.]" Op. at 32.

unmistakably communicated; stated with directness and clarity."[30] Tilray's Certificate clearly, unmistakably, and directly states a higher voting standard for authorized-share proposals, to wit: "[t]he number of authorized shares … may be increased … by the affirmative vote of the holders of a majority of the voting power of all of the outstanding shares[.]"[31]

For the sake of exhaustion, the Court of Chancery also addressed Appellees' argument—raised for the first time in colloquy during oral argument[32]—that "required" is a mandatory term and the phrase "may be increased" in Article IV.B is supposedly just permissive, such that Section 242(d)'s lead-in would not be implicated.[33] As the Court of Chancery recognized, "[a] corporation cannot simply increase its authorized shares on a whim; it must comply with the requirements in the DGCL and its governing documents, including its charter", and Article IV.B "identifies a limited means by which the corporation 'may' increase its authorized

[30] Op. at 18 (citing *Express*, Black's Law Dictionary (12th ed. 2024).

[31] Article IV.B.

[32] A0944-45 (Tr. at 26:22-27:20); *see In re Morrow Park Hldg. LLC*, 2020 WL 3415649, at *20 (Del. Ch. June 22, 2020) (holding parties' second basis for promissory estoppel claim was waived when raised for first time at oral argument rather than briefing).

[33] Op. at 33-35.

shares[.]"[34] Accordingly, the Court of Chancery correctly rejected Appellees' argument.[35]

By its plain terms, Section 242(d) does not lower the voting standard for the Proposal because Article IV.B of Tilray's Certificate "otherwise expressly require[s]" that authorized-share amendments be approved by "the affirmative vote of the holders of a majority of the voting power of all of the outstanding shares[.]" There is no uncertainty in the statutory lead-in.

2. The Existence of Class Vote Waivers Does Not Give Rise to Statutory Ambiguity.

In contrast to the unambiguous lead-in to Section 242(d), the Court of Chancery saw ambiguity in Section 242(d)(2)(C):

> (d) Notwithstanding the provisions of subsection (b) of this section, unless otherwise expressly required by the certificate of incorporation...
>
> (2) An amendment to increase or decrease the authorized number of shares of a class of capital stock or an amendment to reclassify by combining the issued shares of a class of capital stock into a lesser number of issued shares of the same class of stock may be made and effected, without obtaining the vote or votes of stockholders otherwise required by subsection (b) of this section if ... (C) if the amendment increases or decreases the authorized number of shares of a class of capital stock for which no provision has been made pursuant to the last sentence of paragraph (b)(2) of this section, the votes cast

[34] Op. at 36.

[35] *Id.*

> for the amendment by the holders of such class exceed the votes cast against the amendment by the holders of such class.[36]

Initially, Appellees had argued that subparagraph (C) "contemplates application of the new 'votes-cast' standard where the certificate of incorporation contains a Section 242(b)(2) opt-out provision, as Tilray's certificate does."[37] Appellant pointed out in reply that subparagraph (C) only provides that, where a charter does not contain a class-vote waiver, class votes are still required.[38] Appellees ignored subparagraph (C) in their reply and did not plainly speak to the effect of this clause, which is not relevant to this action, in colloquy.[39]

In its Opinion, the Court of Chancery nonetheless looked to Appellees' observation that Article IV.B "closely tracks Section 242(b)(2)"[40] and concluded that, "[b]ecause the language is functionally identical, the defendants can reasonably read [Article IV.B] as simply a restatement of the Class Vote Opt-Out."[41] The Court of Chancery thus credited as "reasonable" Appellees' argument that Article IV.B is purportedly no more than "a 'provision . . . made pursuant to the last sentence of

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[36] 8 *Del. C.* §242(d).

[37] A0079.

[38] A0111-12.

[39] *See* A0954-58 (Tr. at 36:10-40:2).

[40] A0074; Op. at 50.

[41] Op. at 38.

paragraph (b)(2),' such that its sole effect would be to render inapplicable the class vote otherwise required by Section 242(d)(2)(C)[,]" which in turn created ambiguity.[42]

Article IV.B does track the language of Section 242(b)(2) but that provides no basis to bootstrap Appellees' argument into the statutory text. Section 242(d)(2)(C) merely provides that where "no provision has been made pursuant to the last sentence of paragraph (b)(2) of this section," class votes must still be held. Because Tilray has such a provision in Article IV.B, the subparagraph is not implicated. At argument the Court of Chancery recognized as much, observing that "[y]ou are increasing the authorized shares of a class for which provision has been made. So (C) doesn't seem to apply."[43]

Put differently, the Court of Chancery read ambiguity into a statute based on Appellee's characterization of Article IV.B as no more than an example of a term mentioned in a part of the statute that is not even at issue in this Action.[44] At argument, the parties and the Court of Chancery did not disagree about the (in)application of Section 242(d)(2)(C),[45] which has the effect of subjecting class

[42] Op. at 2 ("Each side has advanced a reasonable reading of Section 242(d), creating ambiguity and requiring an examination of extrinsic evidence.").

[43] A0955 (Tr. at 37:12-14).

[44] Op. at 38.

[45] A0956-60 (Tr. at 38:2-42:19).

votes to a votes-cast standard where there is no class-vote waiver.[46] Nor is there disagreement, for that matter, over whether Article IV.B waives entitlement to class votes. It most certainly does. Appellees' contention that Article IV.B *cannot* serve as anything more than a "provision … made pursuant to" Section 242(b)(2) is orthogonal to application of Section 242(d)(2)(C) in this Action.

The Court of Chancery's assessment of that contention puts the "reasonableness" cart before the "ambiguity" horse. Because subparagraph (C) is not implicated, there is no dispute giving rise to an ambiguity that might preclude operation of the unambiguous lead-in to Section 242(d).

But even if it were implicated, there is no basis to conclude that charter language that not only waives entitlement to a class vote but *also* specifies a voting standard should be relegated in meaning to a waiver alone because it tracks the language used in Section 242(b)(2). In other words, the presence of the class-vote waiver does not expunge the presence of the voting standard. This strained interpretation would discard charter language on the basis that corporate drafters are drones operating by rote, without regard to the effect of the language they are supposedly parroting without intent, a presumption that is at odds with Delaware

[46] Subject, of course, to the lead-in caveat "unless otherwise expressly required by the certificate[.]" 8 *Del. C.* § 242(d).

law.[47] The Court of Chancery recognized that corporate drafters have devised class vote waivers that do not also specify voting standards.[48] Implicit in this recognition is that drafters who include language beyond what is necessary to merely waive entitlement to class votes do so with intent.[49] Delaware courts afford contract terms their plain meaning without presuming that drafters included language without any reason for doing so.[50] Here, there is no reason to disregard Article IV.B of Tilray's Certificate, which unambiguously provides that the "number of authorized shares … may be increased" by a majority of "all of the outstanding shares[.]"

To highlight the absurdity of this argument, consider its application in other contexts. 8 *Del. C.* § 102(b)(3) provides that "[n]o stockholder shall have any preemptive right to subscribe to an additional issue of stock … except to the extent that, such right is expressly granted to such stockholder in the certificate of

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[47] *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage. We will not read a contract to render a provision or term meaningless or illusory." (internal quotations and citations omitted)).

[48] Op. at 39.

[49] *See* Op. at 31 (discussing the canon against surplusage); *see also In re Explorer Pipeline Co.*, 781 A.2d 705, 723 (Del. Ch. 2001) (recognizing that courts "must accept the words chosen by the drafters" and that "it is not the function of the Court, on this record, to substitute its views for the language drafted on behalf of and approved by sophisticated and informed" parties).

[50] *Osborn*, 991 A.2d at 1159.

incorporation." Imagine a corporation with a provision in its certificate entitling existing stockholders to buy shares at 90% of the price of any follow-on offering, which proceeds to deny them the right to participate at less than the offering price.[51] Should that corporation be heard to argue the statute is ambiguous and its provision is no more than a "right [] expressly granted to such stockholder" to merely purchase shares?

8 *Del. C.* § 141(c)(1) provides that "unless the … certificate of incorporation expressly so provides, no [board] committee shall have the power or authority to declare a dividend, to authorize the issuance of stock or to adopt a certificate of ownership and merger pursuant to § 253 of this title." Imagine a corporation with a certificate authorizing a committee to issue dividends but requiring that all classes of stock participate in any dividend that is not approved by the full board. Should that committee declare a dividend payable only to preferred stockholders and then be heard to argue the statute is ambiguous and the provision is no more than a conferral of "the power or authority to declare a dividend"?

8 *Del. C.* § 141(b) currently provides that a corporation's bylaws may fix the number of directors "unless the certificate of incorporation fixes the number of directors[.]" Imagine that a corporation's certificate provides that "the number of

[51] Op. at 44 & n.11 (concerning the utility of hypotheticals in legal analysis).

directors shall be fixed at eleven and a majority thereof shall constitute a quorum for the transaction of business." Further imagine that the DGCL is amended to provide that only a third of directors are necessary to establish a quorum unless the certificate provides otherwise. Should the corporation be heard to argue that Section 141(b) is ambiguous and only four directors are necessary to meet quorum requirements because the provision is merely one "fix[ing] the number of directors"?

The answer, of course, is no. In each of these circumstances there would be no ambiguity in the DGCL and the plain terms of each certificate would be breached. The Court of Chancery's Opinion, however, would open the door to any of these wrongdoers to shield themselves from a breach of contract suit by saying that certificate language providing for two separate things only provides for one thing. Courts would then have to delve into legislative history and policy considerations rather than limiting their analysis to the four corners of the certificate.

Both parties agree that Article IV.B eliminates entitlement to a class vote on authorized-share amendments, a consensus rooted in the text itself. Because the ambiguity perceived by the Court of Chancery does not exist, the plain meaning of the statute governs. Any inquiry into legislative history, which the Court of Chancery undertook predicated on its finding of ambiguity, is inappropriate under the "plain

meaning rule" because the statute is unambiguous.[52] And because the Court of Chancery agreed with Appellant about the plain meaning of the lead-in, in the absence of ambiguity, the Order was entered in plain legal error and must be vacated.

[52] *See Chase Alexa, LLC v. Kent Cty. Levy Ct.*, 991 A.2d 1148, 1151 (Del. 2010) ("First, the Court must determine whether the statute is ambiguous, because if it is not, then 'the plain meaning of the statutory language controls.'").

II. THE COURT OF CHANCERY ERRED IN FINDING THAT EXTRINSIC EVIDENCE DID NOT DEMONSTRATE THE GENERAL ASSEMBLY'S INTENT TO GIVE "OPT-IN" EFFECT TO EXISTING CHARTER LANGUAGE SPECIFYING A HIGHER VOTING STANDARD FOR AUTHORIZED-SHARE PROPOSALS.

A. Question Presented

Whether the Court of Chancery erred in determining that the General Assembly intended Section 242(d) to override existing charter language requiring satisfaction of a higher voting standard for charter amendments changing the number of a corporation's authorized shares, particularly in the absence of any legislative indication of such intent.[53]

B. Scope of Review

This Court reviews *de novo* legal questions of statutory interpretation.[54]

C. Merits of the Argument

"In Delaware, the available legislative history is sparse and consists largely of the legislative synopsis."[55] Here, the legislative synopsis[56] provides as follows:

> Notably, the "unless otherwise expressly required by the certificate of incorporation" lead-in to subsection (d) ***permits a corporation to "opt in" to the stockholder votes that otherwise would be required under subsection (b) in connection with any*** subdivision or combination of the

[53] A0109-15.

[54] *Salzberg*, 227 A.3d at 112.

[55] Op. at 48-49; *see also id*. at 49 (quoting *Bd. of Adjustment of Sussex Cty. v. Verleysen*, 36 A.3d 326, 332 (Del. 2012) ("A synopsis is a proper source for ascertaining legislative intent.")).

[56] A0208-15 (S.B. No. 114, 152nd Gen. Assem. (Del. 2023) (the "Synopsis")).

> issued shares or ***increase*** or decrease ***in the authorized number of shares*** contemplated by subsection (d). ***Any such provision in the certificate of incorporation must expressly state that the stockholder vote otherwise required under subsection (b) is required to adopt any amendment to the certificate of incorporation specified in subsection (d)*** or must expressly "opt out" of the provisions of subsection (d). A general recitation in the certificate of incorporation of the vote generally required under subsection (b) without a specific reference to the amendments specified in subsection (d) is not sufficient.[57]

Put differently, the General Assembly envisioned two ways for a higher voting standard to apply. A corporation can "opt out" by disclaiming Section 242(d) in its certificate. It can alternatively "opt in" to the higher standard by: (i) "expressly stat[ing] the stockholder vote otherwise required"; and (ii) identifying the type of "amendment to the certificate of incorporation specified in subsection (d)" (*i.e.*, either a "subdivision or combination of the issued shares" or "increase or decrease in the authorized number of shares") to which the voting standard applies.

Article IV.B does ***precisely*** what is required of an opt-in. It states the voting standard (namely, "a majority of the voting power of all of the outstanding shares") and the type of amendment governed by Section 242(d) (namely, an "increase[] or decrease[] in "[t]he number of authorized shares") to which that standard applies. Accordingly, even if there were an ambiguity in Section 242(d), Article IV.B would still fall squarely within the parameters of what the General Assembly says it

[57] *Id*. (emphasis added).

intended when it drafted the "unless otherwise expressly required" lead-in.

In briefing and at argument below, Appellees essentially denied that the Synopsis contemplates opt-in provisions.[58] In a variation on their theme, Appellees expanded upon their claim that Article IV.B is merely a provision "made pursuant to the last sentence of [Section 242](b)(2)" to waive entitlement to class votes on authorized-share proposals, claiming that Article IV.B is the sort of "general recitation in the certificate of incorporation of the vote generally required under [Section 242](b)" that the General Assembly says is "not sufficient" to trigger Section 242(d)'s lead-in.[59]

While the Court of Chancery acknowledged that "the general recitation" provision was "not directly on point", it erred in finding that Article IV.B "resembles something like a 'general recitation.'"[60] As set forth below, its error arose from a plain misreading of the Synopsis and practitioner notes, as well as a failure to afford weight to Delaware's interest in enforcing the terms of corporate certificates.

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[58] A0091, A0163, A0946 (Tr. at 28:2-18). Appellees consistently maintained that an opt-in would have to meet the requirements of the Synopsis *and* disclaim any contrary provision of the DGCL. That is, according to Appellees, an "opt-in" would also have to "opt out", rendering half the Synopsis language nugatory.

[59] A0158, A0966 (Tr. at 48:8-10).

[60] Op. at 49-50.

1. The Synopsis Confirms the General Assembly's Intent to Give Effect to Certificate Language Identical to Article IV.B.

The Court of Chancery began its analysis with its observation that "[t]he most probative language in this passage asserts that '[a] general recitation in the certificate of incorporation of the vote generally required under subsection (b) without a specific reference to the amendments specified in subsection (d) is not sufficient.'"[61] Appellant submits that is debatable. The most probative language in the Synopsis is the specification of what a "provision in the certificate of incorporation must expressly state" to constitute an opt-in, and Article IV.B undeniably meets this requirement:

Synopsis Requirement	**Article IV.B**
"the stockholder vote otherwise required under [Section242](b) [that] is required to adopt"	"a majority of the voting power of all of the outstanding shares of stock of the Company entitled to vote thereon"
"any amendment to the certificate of incorporation specified in [Section 242](d)"	"[t]he number of authorized shares of Common Stock or Preferred Stock may be increased or decreased"

It bears repeating, Article IV.B specifies the Section 242(b) standard (*i.e.*, the majority-of-outstanding-shares standard) and the type of certificate amendment specified in Section 242(d) (*i.e.*, an amendment to change the number of shares authorized by the certificate). *Quod erat demonstrandum.*

[61] Op. at 49.

But assuming the general-recitation provision were the most probative, it is clear from that provision's terms that Article IV.B cannot be such a "general" recitation. That provision states that a "general recitation" is a recitation of the majority-of-outstanding-shares standard "without a specific reference to the amendments specified in [Section 242](d)[.]"[62] Article IV.B contains such a specific reference to amendments providing for "changes in the number of authorized shares", one of the two types of amendments specified in Section 242(d)(2). A "general recitation" would only refer to the standard generally applicable to the vast universe of certificate amendments for which a vote is required.[63] The Court of Chancery seemed to recognize the flaw in this argument, observing that the general-recitation provision "is not directly on point because it refers to 'the vote generally required under subsection (b).'"[64]

In briefing below, Appellant pointed to numerous examples of recitations of

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[62] It is of no moment that the "general recitation" provision uses the plural "amendments" because, as the first sentence of the Synopsis makes clear, a corporation can opt into the higher standard for a "subdivision or combination of the issued shares ***or*** increase or decrease in the authorized number of shares contemplated by [subsection](d)[.]" Put differently, an opt-in does not need to apply to both authorized-share and reverse-split amendments.

[63] Section 242(b)(1); *see also* Section 242(d)(1) (enumerating three charter requirements that do not require a vote).

[64] Op. at 49.

the majority-of-outstanding-shares standard for certificate amendments generally.[65] By way of example and not limitation, consider the certificate of Quest Diagnostics Incorporated:

> **Amendment or Repeal.** In addition to any other vote required by law or this Certificate of Incorporation (including any Certificate of Designation relating to a series of Preferred Stock), the affirmative vote of the holders of record of outstanding shares of capital stock of the Corporation representing at least a majority of the voting power of all the outstanding shares of capital stock of the Corporation shall be required to amend, alter or repeal, or adopt any provision of this Restated Certificate of Incorporation.[66]

Indeed, Tilray has its own general recitation, albeit one that is clumsily drafted. The Certificate provides as follows:

> Notwithstanding any other provisions of this Restated Certificate or any provision of law that might otherwise permit a lesser vote or no vote, but in addition to any affirmative vote of the holders of any particular class or series of the Company required by law or by this Restated Certificate or any Certificate of Designation, the affirmative vote of either (a) the holders of a majority of the voting power of all then-outstanding shares of capital stock entitled to vote generally at an election of directors, voting together as a single class or (b) the holders of at least 66 2/3% of the voting power of all of the then outstanding shares of capital stock of the Company entitled to vote generally in the election of directors, voting together as a single class, shall be required to alter,

[65] A0109, A0124-28.

[66] *Id.*

amend or repeal Articles V, VI, and VIII.[67]

The only way to read this provision in a manner that gives effect to all of its terms is that clause (a) is a recitation of the standard to amend the Certificate, generally, and clause (b) imposes a supermajority, two-thirds standard to amend or repeal certain enumerated Articles, specifically.

The Court of Chancery never addressed this argument, notwithstanding that it gives logical effect to every part of the Synopsis. Instead, the Court of Chancery accepted Appellees' invitation to go in search of generality and looked to the similarity in structure between the text of Article IV.B and the text of Section 242(b)(2).[68] It observed the following parallel, with elisions framing the similarities in the light most favorable to Appellees:

Article IV.B	The number of authorized shares … may be increased or decreased (but not below the number of shares … then outstanding) by the affirmative vote of the holders of a majority of the … stock of the Company entitled to vote[.]
Section 242(b)(2)	The number of authorized shares … may be increased or decreased (but not below the number of shares … then outstanding) by the affirmative vote of the holders of a majority of the stock of the corporation entitled to vote[.]

Ultimately, the Court of Chancery concluded that "a provision tracking an aspect of

[67] A0041.

[68] Op. at 37-38.

the language in Section 242(b) would not go far enough to meet the 'otherwise expressly required' test."[69]

This elevation of form over substance cannot be squared with the Synopsis, pursuant to which a recitation is "general" if it does not apply to the type of amendment specified in Section 242(d) — *i.e.*, an authorized-share or a reverse-split amendment. The Synopsis says nothing about how many words in common a recitation may permissibly have with other statutory language before it becomes a "general" recitation. As previously mentioned, the Court of Chancery's approach disregards that drafters went beyond what was necessary to waive class-vote entitlement. The presence and meaning of language that drafters choose to include in the charter of a public corporation cannot be simply cast aside. Additionally, this approach ignores the Synopsis—which the Court of Chancery recognized is essentially the *only* source of legislative intent[70]—which unquestionably provides that it is substance, and not form, that matters.

Perhaps mindful of this tension, the Court of Chancery went out of its way to cabin the Opinion as much as possible. In this regard, it limited application of its decision to certificate provisions predating the 2023 amendment of Section 242, reasoning that "[t]here is no indication that Section 242(d) sought to override future

[69] *Id.* at 50.

[70] *Id.* at 48-49.

provisions."[71] As Appellant pointed out below, however, there was no indication that the General Assembly did not intend the entirety of Section 242(d)—including the lead-in—to apply with equal force to existing charter provisions.[72]

Consideration of a contemporaneous amendment to the DGCL lends further credence to Appellant's position. As part of the same Senate Bill through which Section 242(d) was codified[73], the General Assembly also amended 8 *Del. C.* § 272(d). That amendment, which concerned the application of certificate provisions "requir[ing] the authorization or consent of stockholders for a sale, lease or exchange of property or assets", would by its terms "apply only to certificate of incorporation provisions that first become effective on or after August 1, 2023." As Appellant pointed out in briefing below, it is impossible to reconcile the General Assembly's express codification that one aspect of the DGCL amendment would apply only prospectively with any argument that the General Assembly did not intend a contemporaneous DGCL amendment to apply to existing charter provisions.[74] Again, notwithstanding that Appellant raised this argument, it was not addressed in the Court of Chancery's Opinion.

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[71] *Id.* at 52 & 54 n.16.

[72] A0114-15.

[73] *See* A0237-38.

[74] A0114-15, A0926-27 (Tr. at 8:21-9:2).

Instead, the Court of Chancery endorsed a line of reasoning that will negate opt-ins contemplated by the Synopsis, provided that their verbiage tracks existing statutory language to some undefined extent. The Court of Chancery seemed to recognize the infirmity of this position, crediting as "another strong argument" Appellant's position "that simply because [Article IV.B] in this case tracks [Section 242(b)(2)] does not mean a court should not give effect to its language." Yet—contrary to the Synopsis—it nonetheless sided with Appellees, relying on practitioner notes and policy while disregarding market practice. As set forth below, the Court of Chancery was mistaken in each of these regards.

2. Practitioner Notes Confirm Appellant's Reading.

Numerous contemporaneous advisory memoranda issued by prominent practitioners confirm Appellant's correct reading of the Synopsis, a matter than was front and center in Appellant's briefing below.[75] For example, Baker Hostetler LLP observed that "if a corporation's existing charter expressly requires the preexisting stockholder approval thresholds, those historic thresholds will continue to govern" and, if such corporation's board were "interested in taking advantage of the lowered stockholder voting thresholds offered by §242(d)", they "should review their existing charters and amend them if they contain conflicting language."[76] Similarly,

[75] *See, e.g.*, A0018-20, A0110.

[76] A0243-45.

Bayard P.A. observed that, "to qualify for this reduced voting threshold" in Section 242(d), "the certificate of incorporation must not contain language[] expressly requiring a vote pursuant to Section 242(b) in order to approve a reverse stock split or change in authorized shares[.]"[77] By negative inference, Jones Walker LLP agreed that existing charter language would constitute a valid opt-in: "Notably, the inclusion in a certificate of incorporation of the vote generally required under Section 242(b) without a specific reference to the type of charter amendments described above (i.e., to effect a reverse stock split or increase or reduce the number of authorized shares) will not be considered an opt-in."[78]

The Court of Chancery nonetheless perceived "a [l]ack of [u]niform [i]nterpretation" where there was none, claiming that certain "memos adopt the [Appellee's] interpretation[.]"[79] It even went so far as to go beyond the Synopsis and attempt to divine legislative intent from the fact that that "[l]aw firms whose partners serve on the Council issued memoranda discussing the 2023 Amendments."[80] There was no lack of uniform interpretation, however, and not one practitioner memorandum in the record supported the Court of Chancery's conclusion.

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[77] A0257-59.

[78] A0250-51.

[79] Op. at 46.

[80] *Id.* at 50.

Starting with the Bayard memorandum, which the Court of Chancery cited as the exemplar in support of Appellees, its authors recognized that existing charter language "requiring a vote pursuant to Section 242(b) in order to approve a … change in authorized shares" would opt into the higher standard. The Court of Chancery quoted the Bayard article for the proposition that "a general recitation … will not be sufficient to 'opt out' of Section 242(d)."[81] It apparently shared in Appellees' confusion — Appellant ***never contended*** that Article IV.B is an "opt out" provision, which would necessarily have to disclaim Section 242(d). Appellant ***always*** maintained that Article IV.B is an opt-in and, as demonstrated above, the Court of Chancery misread the Synopsis on this point.

The other memoranda show more of the same. Skadden, Arps, Slate, Meagher & Flom LLP observed that a corporation can opt into the Section 242(b) standard "by expressly stating that the stockholder vote otherwise required under Section 242(b) is required to approve such matter, or by expressly opting out of some or all of the provisions of new Section 242(d)[.]"[82] Venable LLP likewise acknowledged that "a corporation's certificate of incorporation may 'opt in' to the prior stockholder vote requirements for [reverse-split and/or authorized-share amendments] by expressly stating that the stockholder vote otherwise required under DCCL Section

[81] *Id.* at 46 n.12.

[82] A0447-48.

242(b) is required to adopt any" such amendment.[83] Finally, Richards, Layton & Finger, P.A. looks to the Synopsis language in writing that, "[t]o make use of such lead-in language … the certificate of incorporation must expressly state that the vote of stockholders otherwise required under Section 242(b) is required to adopt any amendment to the certificate of incorporation specified in Section 242(d), or it must expressly 'opt out' of the provisions of Section 242(d)."[84] Every practitioner note in the record confirms the availability of an opt-in.

The only support for Appellees' reading came from an American Bar Association note. The note evinces a superficial cribbing of the Synopsis to churn confusing and logically unsound copy:

> Section 242(d) of the DGCL continues to permit a corporation to opt in to the required stockholder votes under Section 242(b). Thus, a corporation must affirmatively opt out of the new Section 242(d). A general recitation of the vote generally required under Section 242(b) in the certification of incorporation will not be sufficient to opt out of Section 242(d).[85]

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[83] A0464-65.

[84] A0456-58 (the "RLF Memorandum"). The firm also observed that "[i]n ***general*** … an amendment to the certificate of incorporation must be approved by … the holders of a majority in voting power of the outstanding stock entitled to vote thereon[.]" A0456. This employment of the term "general" is consistent with its usage in the Synopsis.

[85] A0441-42. Portions of the text in the printed version of the ABA note contained in the Joint Compendium below were obscured. The full text is available at https://www.americanbar.org/groups/business_law/resources/business-law-today/2

Tellingly, this ABA "analysis" was not cited in the Opinion and—perhaps for good reason—does not appear to have played any part in the Court of Chancery's decision.

In sum, practitioner memoranda either banally repeat the language of the Synopsis or, where they do interpret the language, support Appellant's position. The Court of Chancery erred in concluding that any of these sources (save for the ABA) "adopt the [Appellees'] interpretation" or otherwise support their position.

3. Policy Supports Appellant's Reading.

Policy also supports Appellant's position. The Court of Chancery recognized "the priority Delaware places on enforcing the plain language of charter provisions"[86] and, through this appeal, Appellant is seeking to safeguard the General Assembly's intent, manifested in the Synopsis, to give effect to opt-in provisions clearly specifying a higher voting standard for authorized-share amendments.

At times, the Court of Chancery seemed to agree. Appellant pointed to many charter provisions at corporations that had adopted supermajority voting requirements for authorized-share amendments.[87] Appellant explained that, employing Appellees' reading, these corporations would also see their standards

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023-september/2023-amendments-to-the-delaware-general-corporation-law/ (last visited January 22, 2025).

[86] Op. at 41.

[87] A0136-38; *see generally* 8 *Del. C.* § 102(b)(4) (authorizing charter provisions for higher voting standards than the statutory default).

reset to the Section 242(d) votes-cast standard because existing charter provisions, in Appellees' eyes, can never constitute an opt-in without preemptively disclaiming future DGCL amendments.[88]

The Court of Chancery correctly recognized the absurdity of this result.[89] Yet it provided no basis whatsoever for distinguishing corporations with supermajority requirements from those corporations who had specified that the Section 242(b) standard would apply to authorized-share proposals. Rather, the Court opted to disregard the presumed intent of such drafters, evident from the plain language of their provisions, and instead look to the number of words in common between provisions to ascertain whether the drafters were simply lazy.[90]

To bolster its position with policy, the Court of Chancery went in search of some obscured "intent" based on the syllogism that because the Council of the Corporate Law Section of the Delaware State Bar Association (the "Council") "is principally (if not exclusively) responsible for drafting synopses for entity-related legislation"[91] and "[l]aw firms whose partners serve on the Council issued memoranda discussing" Section 242(d)[92], it would therefore be appropriate to

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[88] A0660, A0086.

[89] Op. at 42-45.

[90] *Id.* at 50.

[91] *Id.* at 49.

[92] *Id.* at 50.

impute the contents of those memoranda to the General Assembly. This syllogism fails, of course, because the members of the Council do not sit in the General Assembly and the memoranda were not necessarily even written by those members of the Council. But even if there were merit in this approach, it would not support Appellees' position.

Again, not one of the firm memoranda in the record supports the notion that some unspecified number of words in common with statutory language setting forth the majority-of-outstanding-shares standard will convert a provision that meets the criteria for an "opt-in" set forth in the Synopsis into a "general" recitation. To the extent the Court of Chancery looked to these memoranda for the proposition that "the Council sought to make it easier for corporations to increase their authorized shares[,]"[93] Appellant would agree — to an extent. It was the General Assembly's intent to make it easier for certain corporations—namely, those who had not already specified a higher voting standard for authorized-share amendments in their certificates—to gain stockholder approval of such amendments. It does not "run[] contrary to the Council's goal of making that easier" to give effect to the opt-in provision that the Council advised the General Assembly to include in the Synopsis.[94] Moreover, Article IV.B did not make it harder to obtain the vote

[93] *Id.*

[94] *See id.* at 51.

necessary to increase a Tilray's authorized shares; it simply kept it at the same level of difficulty as it was prior to the 2023 DGCL amendment.

What is more, Appellant pointed out in briefing below that corporations that had opted into a higher standard for authorized-share amendments would still be free to seek additional authorized shares for use as corporate currency by availing themselves of the Section 242(d) votes-cast standard for a reverse-split amendment.[95] Indeed, the RLF Memorandum observed that Section 242(d) was enacted "in particular" to help secure "a vote necessary to effect a reverse stock split to help a corporation maintain the minimum share price amount necessary to be listed on a national securities exchange."[96] The Court of Chancery's policy concerns ring hollow when corporations with apathetic retail stockholders have an alternative means to achieve their desired end. Though Appellant made this point,[97] it is not discussed in the Court of Chancery's Opinion.

Given that corporations with apathetic retail stockholder bases may still seek approval of reverse-split amendments to gain use of authorized shares,[98] the Court of Chancery was mistaken in imputing some policy concern from (some of) the

[95] A0113.

[96] A0456-57.

[97] A0113.

[98] Appellees have not advanced a single charter provision specifying a higher voting standard for reverse-split amendments, and Appellant is aware of none.

Council members' firms to the General Assembly in divining the latter's unstated intention. And given this lack of any countervailing policy, there is no reason to abandon the acknowledged "priority Delaware places on enforcing the plain language of charter provisions[.]"[99] Policy favors Appellant.

4. Market Practice Supports Appellant's Reading.

As a final matter, Appellant pointed to disclosures by a number of public companies with charter provisions akin to Article IV.B, in which the companies inform their stockholders that authorized-share amendments would be subject to a majority-of-outstanding-shares standard, consistent with Appellant's position.[100] The Court of Chancery acknowledged these disclosures in its Opinion.[101] But while it acknowledged that "[w]hen market practice is both well-established and clear, a judge may take it into account as a reflection of what experienced counsel believe is legally permissible[,]" it proceeded to conclude that "[h]ere, the market practice is not sufficiently consistent to support a particular interpretation."[102] It reached this conclusion notwithstanding that Appellees did not identify any corporation with a

[99] Op. at 41; *see also Rhone-Poulenc*, 616 A.2d at 1196 ("Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty.").

[100] A0130-35.

[101] Op. at 46-47 & n.24.

[102] *Id.* at 47-48.

comparable charter provision who had advised their stockholders that the lower, Section 242(d) votes-cast standard was applicable to an authorized-share proposal.[103]

Respectfully, the Court of Chancery had no basis before it to conclude that practice was not "sufficiently consistent[.]" Rather, *all* of the evidence on this point in the record was entirely consistent with Appellant's position. The Court of Chancery was correct in observing that market practice is by no means outcome-determinative. But here, it clearly supports Appellant's position.

* * *

The lead-in to Section 242(d) is not ambiguous and Article IV.B clearly specifies a majority-of-outstanding-shares standard for authorized-share amendments. But even if it were ambiguous, the Synopsis makes clear that the General Assembly intended existing charter provisions, like Article IV.B, that specified a higher standard for authorized-share amendments would "opt in" to that higher standard. Practice notes confirm as much. Market practices confirm as much. And policy supports giving effect to provisions like Article IV.B. The Court of Chancery's Order was entered in plain error.

[103] Appellant's counsel have challenged an authorized-share amendment based on votes-cast disclosures in one other matter. *See Sell v. Macrae*, C.A. No. 2024-0593-PAF (Del. Ch.).

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court reverse the Court of Chancery's Order and remand for proceedings consistent therewith.

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