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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. No. 2024-1124-JTL

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NATURE OF PROCEEDINGS

This appeal concerns the interaction between the following: (i) a charter provision that recites the default "shares-outstanding" voting standard generally applicable to stockholder votes to increase or decrease the company's authorized shares, *see* 8 *Del. C.* § 242(b)(2); and (ii) a 2023 statutory provision enacted to specifically replace that standard with a more lenient "votes-cast" standard for any such vote involving a public company, "unless otherwise *expressly required* by the certificate of incorporation[,]" 8 *Del. C.* § 242(d)(2) (emphasis added). The question presented is whether the generic recitation of the shares-outstanding standard in the earlier-adopted charter provision should override the votes-cast standard provided in the later-enacted statute. The answer to that question, as the trial court correctly determined in its thorough and well-reasoned Opinion, is simply "no".[1] Plaintiff fails to provide any basis to conclude otherwise.

Tilray Brands, Inc. ("Tilray" or the "Company") is a public company with a large retail investor base.[2] In 2018, Tilray adopted a provision in its charter to opt

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[1] The Court's November 27, 2024 Opinion Granting Summary Judgment for Defendants ("Opinion" or "Op.") is attached to the opening brief of Plaintiff-Below/Appellant ("Plaintiff") as Exhibit B.

[2] Along with Tilray, the Defendants-Below/Appellees are the members of the Company's board of directors: Chairman of the Board Irwin D. Simon and directors Jodi Butts, David Clanachan, John M. Harhalt, David Hopkinson, Thomas Looney, and Renah Persofsky. Tilray and its directors are collectively referred to herein as "Defendants."

out of Section 242(b)(2)'s general requirement that an amendment to increase or decrease the number of shares of particular classes of stock must be approved by a majority of the outstanding shares of each affected class; instead, as the last sentence of Section 242(b)(2) permits, Tilray's 2018 certificate required only a single vote of all classes of Tilray stock to approve such an amendment (the "Single Vote Provision," as the trial court called it).

Closely tracking the language of the last sentence of Section 242(b)(2), the Single Vote Provision refers generally to the shares-outstanding standard—the only standard authorized by Section 242(b) at the time—in describing the vote required for such an amendment to pass. By its very nature, the Single Vote Provision was designed to make it easier, not harder, to obtain stockholder approval of authorized-shares amendments, by allowing the Company to obtain approval through a single vote of all classes of outstanding stock, rather than through separate votes of each individual class. The Single Vote Provision has carried through several iterations of Tilray's charter over the years and remains extant in its charter today.

In 2023, the Legislature enacted a series of amendments to the DGCL, one of which was new Section 242(d)(2). Section 242(d)(2) was enacted to address a growing problem for public companies with significant retail investor bases: pervasive stockholder apathy towards voting that prevented authorized-shares proposals from passing for failure to reach Section 242(b)(2)'s majority-of-

outstanding-shares threshold, even if a quorum was achieved and the votes actually cast on the proposal overwhelmingly voted in favor of it.

To fix that problem, Section 242(d)(2) provides that, "*[n]otwithstanding the provisions of subsection (b) of this section*," any proposed "amendment to increase or decrease the authorized number of shares of a class of capital stock" of a public company would henceforth be subject to a majority-of-the-*votes-cast* standard. 8 *Del. C.* § 242(d)(2) (emphasis added). This new votes-cast standard would apply to all such proposals "unless otherwise expressly required by the certificate of incorporation[.]" *Id.* Importantly, the statute specifically accounts for public companies that may have adopted a Section 242(b)(2) class vote opt-out provision like the Single Vote Provision. Section 242(d)(2)(C) provides that, if a company has *not* adopted such a provision, then the additional class vote is required—but *with the new votes-cast standard applied to that vote*. The necessary implication is that the votes-cast standard also would apply where a company adopted a Section 242(b)(2) class vote opt-out provision, but only a single vote under the new votes-cast standard would be required.

Recognizing that Section 242(d)(2) was designed to benefit public companies just like Tilray, the Company issued a proxy statement less than two months after the statute's enactment in which it proposed an amendment to increase the number of authorized shares of common stock and disclosed that new Section 242(d)(2)'s

votes-cast standard would apply to the proposal. No Tilray stockholder—including Plaintiff—objected to the proxy statement on the grounds that it disclosed the incorrect voting standard, and the proposed amendment was approved by an overwhelming majority of the voted shares. Notably, however, only 40 percent of outstanding shares voted, meaning that the amendment would not have passed in Section 242(d)(2)'s absence.

The Company proposed a similar amendment in September 2024, and again disclosed in the proxy statement that Section 242(d)(2)'s votes-cast standard would apply to the proposal. This time, however, Plaintiff surfaced to contest the accuracy of the Company's disclosures in the 2023 and 2024 proxy statements concerning the applicable voting standard. According to Plaintiff, the generic reference to Section 242(b)(2)'s shares-outstanding standard in the Single Vote Provision, adopted *five years prior* to the enactment of Section 242(d)(2), means that the Company's certificate "expressly require[s]" application of the very voting standard that Section 242(d)(2) was enacted to replace. 8 *Del. C.* § 242(d)(2).

This hyper-literal, mechanical construction of Section 242(d)(2) violates the primary "goal of statutory construction," which "is to determine and give effect to legislative intent." *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999). As noted, Section 242(d)(2) was enacted to make it easier for public companies like Tilray to obtain approval of authorized-shares amendments. Plaintiff's interpretation

contravenes that intent because, on Plaintiff's reading, any public company that adopted a generic Section 242(b)(2) class vote opt-out before Section 242(d)(2)'s enactment would be automatically denied the benefit of Section 242(d)(2)'s more lenient votes-cast standard. That reading also contravenes the text of the statute, which contemplates the circumstance in which a corporation has adopted a Section 242(b)(2) opt-out.

Plaintiff's reading therefore would lead to the "absurd result[]" that public companies that previously took advantage of a statutory provision designed to relax the voting requirements on authorized-shares amendments are denied the benefit of Section 242(d)(2), while public companies that did not do so are not. *Zambrana v. State*, 118 A.3d 773, 776 (Del. 2015). As a matter of law, therefore, Plaintiff's reading of Section 242(d)(2) is unreasonable, and the trial court was right to "reject[] that interpretation in favor of" Defendants' interpretation, which avoids that outcome. *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1247 (Del. 1985).

In resolving this interpretive dispute in Defendants' favor, the Court of Chancery first determined that both sides had advanced a reasonable interpretation of Section 242(d)(2) as applied to the Single Vote Provision, and thus that Section 242(d)(2) was ambiguous under the circumstances. (Op. at 48.) For the reasons stated above and described further below, Defendants respectfully submit that their

interpretation is reasonable, Plaintiff's interpretation is not, and the trial court's entry of summary judgment can be affirmed on the ground that Section 242(d)(2) is unambiguous as applied to the Single Vote Provision. *See, e.g.*, *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012).

But even if this Court were to agree that Section 242(d)(2) is ambiguous as applied here, any such ambiguity must be resolved in Defendants' favor, as the trial court correctly concluded. (*See* Op. at 48-54.) As the court below observed, the legislative history of Section 242(d)(2) states unequivocally that a "general recitation" of Section 242(b)(2)'s shares-outstanding standard in a certificate of incorporation would be insufficient to "opt out" of Section 242(d)(2). (*Id*. at 49-50.) The trial court also rightly acknowledged that Delaware's recognized public policy of making it easier for public companies to increase their number of authorized shares, and the timing of Tilray's adoption of the Single Vote Provision relative to the enactment of Section 242(d)(2), strongly supported Defendants' interpretation. (*Id*. at 50-53.) If there were any doubt about whose interpretation is more consistent with the legislature's intent, these factors resolve any such doubt conclusively in Defendants' favor.

The judgment of the trial court should be affirmed.

SUMMARY OF ARGUMENT

1. DENIED. Contrary to Plaintiff's assertion, the Court of Chancery correctly determined that it is reasonable to read Section 242(d)(2) to require a certificate of incorporation to do more than merely recite Section 242(b)'s shares-outstanding standard in a generic Section 242(b)(2) class vote opt-out provision to effectuate an opt-out from Section 242(d)(2)'s votes-cast standard. Specifically, the trial court correctly found that the Single Vote Provision is an example of a provision "made pursuant to the last sentence of subparagraph (b)(2) of [Section 242]," 8 *Del. C.* 242(d)(2)(C), and thus only "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." (Op. at 35-36.)

In other words, the Single Vote Provision, as a generic Section 242(b)(2) opt-out, does not act as an opt-out of Section 242(d)(2)'s default votes-cast standard—it only ensures that an amendment to increase or decrease the number of authorized shares of a particular class of stock will continue to require just a single vote, rather than separate class votes. This reading is consistent with the legislature's intent in adopting Section 242(d), which is to ensure that public companies with large retail investor bases like Tilray are able to take advantage of the new votes-cast standard. Plaintiff's contrary reading defeats that intent and therefore is unreasonable.

2. DENIED. The trial court correctly resolved any ambiguity in Section 242(d), as applied to the Single Vote Provision, in Defendants' favor. (Op. at 48-54.) First, the Synopsis to Section 242(d) states that a generic Section 242(b)(2) class vote opt-out like the Single Vote Provision is insufficient to "otherwise expressly require[]" a different vote than the votes-cast standard: "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." Del. S.B. 114 syn., 152d Gen. Assem. (2023).

Second, the practitioner memoranda describing the 2023 Amendments make clear that the Council of the Corporate Law Section of the Delaware State Bar Association (the "Council") sought to make it easier for corporations to increase their authorized shares. Contrary to this intent, interpreting the Single Vote Provision to "otherwise expressly require[]" a vote under the Majority-of-the-Outstanding Standard as Plaintiff suggests would make it harder to obtain the vote necessary to increase a corporation's authorized shares, not easier.

Third, Section 242 evolved with corporations adopting provisions like the Single Vote Provision under the Section 242(b)-only regime, and the trial court correctly determined that Section 242(d) was intended to override the pre-existing provisions that sought to implement Section 242(b)(2)'s class vote opt-out and reset the voting regime for amendments relating to authorized shares.

STATEMENT OF FACTS

Defendants adopt the factual findings of the trial court as stated in the Opinion. (Op. at 2-7.) For purposes of this appeal, however, a brief recitation of the facts and statutory framework is helpful.

A. The Section 242 Framework Prior To Section 242(d) Amendment

Section 242 of the DGCL governs amendments to a corporation's charter after the corporation has received payment for its stock. Section 242(a) identifies examples of permissible charter amendments. Section 242(b) describes a process that a corporation must follow to adopt an amendment and asserts that "[e]very amendment authorized by subsection (a) of this section shall be made and effected in the following manner." 8 *Del. C.* § 242(b).[3]

Section 242(b) identifies the generally required steps for approving and implementing a charter amendment. Under Section 242(b)(1), which is the first statutorily required vote under the pre-amendment Section 242(b) regime (the "Majority-of-the-Outstanding Standard"), the board must first approve the amendment. Then the board must submit the amendment to the stockholders, and

[3] The trial court aptly noted that some amendments to increase or decrease the authorized shares can be made and effected as authorized by later-enacted Section 242(d). (Op. at 12-13.) Thus, since the adoption of Section 242(d), that statement is no longer true. (*Id*.)

the holders of a majority of the outstanding stock must approve the amendment. In other words, the amendment must meet the Majority-of-the-Outstanding Standard.

Section 242(b)(2) introduces a second required vote (the "Majority-of-the-Class Requirement"):

> The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the certificate of incorporation, if the amendment would increase or decrease the aggregate number of authorized shares of such class, increase or decrease the par value of the shares of such class, or alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely.

8 *Del. C.* § 242(b)(2). Under this provision, if an amendment would increase the authorized shares of any class of stock, then the corporation must obtain approval for the amendment from a majority of the shares in that class, voting separately.

Critical to the analysis in this case, the last sentence of Section 242(b)(2) creates an optional path for dispensing with the Majority-of-the-Class Requirement for amendments that increase or decrease the authorized shares of a class:

> The number of authorized shares of any such class or classes of stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the *affirmative vote of the holders of a majority of the stock of the corporation entitled to vote irrespective of this subsection, if so provided in the original certificate of incorporation*, in any amendment thereto which created such class or classes of stock or which was adopted prior to the issuance of any shares of such class or classes of stock, or in any amendment thereto which was authorized by a resolution or resolutions adopted by the affirmative vote of the holders of a majority of such class or classes of stock.

Id. (the "Class Vote Opt-Out") (emphasis added). If a corporation has adopted a provision implementing the Class Vote Opt-Out, then the Majority-of-the-Class Requirement no longer applies. Instead, the company can increase the authorized shares of a class of stock by satisfying only the Majority-of-the-Outstanding Standard.

B. Tilray and Its Charter

Tilray is a Delaware corporation formed in 2018 and headquartered in Leamington, Ontario, Canada. (Op. at 3.) Briefly, Tilray is a global lifestyle consumer products company that offers a portfolio of brands and products, including medical and adult-use cannabis, craft beer, spirits, beverages, and hemp foods. (*Id*.) Its common stock is publicly traded on Nasdaq under the symbol TLRY. (*Id*.) Irwin D. Simon has been the Company's President, Chief Executive Officer, and Chairman of the Board since May 2021. (A0017.) Directors Jodi Butts, David Clanachan, John M. Harhalt, David Hopkinson, Thomas Looney, and Renah Persofsky have been members of the Board since May 2021. (*Id*.)

Tilray's initial certificate of incorporation, filed July 23, 2018, contained a version of the Single Vote Provision that closely tracks the last sentence of Section 242(b)(2). (Op. at 3.) Following its inception, Tilray amended and restated its Charter four times, with each iteration retaining substantially the same Single Vote

Provision. (*Id*.; *see* B0001-62.) The Single Vote Provision in Tilray's operative Charter ("Article IV.B") states:

> 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 (a "Certificate of Designation").

(A0174 (Cert. of Incorp. Art. IV, § B) (emphasis added).) Based on its Single Vote Provision, Tilray need not hold a separate vote for each class of stock entitled to vote on a proposed authorized-shares amendment—it need only hold a single vote of all classes of stock entitled to vote on the proposal.

C. The 2023 Amendments

On May 16, 2023, the Delaware Senate passed a number of proposed DGCL amendments. (Op. at 4.) Included among them was an amendment to add a new subsection (d) to Section 242 to eliminate or reduce the stockholder approval requirement to effect certain stock splits and changes in the number of a corporation's authorized shares. (A0214 (Del. B. Summ. 2023 Reg. Sess. S.B. 114 (May 16, 2023)).) The relevant language of Section 242(d) states:

> Notwithstanding the provisions of subsection (b) of this section, unless otherwise expressly required by the certificate of incorporation:
>
> …

> (2) An amendment to increase . . . the authorized number of shares of a class of capital stock . . . may be made and effected, without obtaining the vote or votes of stockholders otherwise required by subsection (b) of this section if:
>
> (A) the shares of such class are listed on a national securities exchange immediately before such amendment becomes effective and meet the listing requirements of such national securities exchange relating to the minimum number of holders immediately after such amendment becomes effective,
>
> (B) at a meeting called in accordance with paragraph (b)(1) of this section, a vote of the stockholders entitled to vote thereon, voting as a single class, is taken for and against the proposed amendment, and the votes cast for the amendment exceed the votes cast against the amendment, and
>
> (C) if the amendment increases . . . 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 for the amendment by the holders of such class exceed the votes cast against the amendment by the holders of such class.

8 *Del. C.* § 242(d) (formatting modified for clarity).

Under this structure, Section 242(b) no longer establishes the statutorily required votes to increase the authorized shares when a corporation can satisfy the criteria in Section 242(d)(2)(A). (Op. at 15.) By stating that the lower voting standard in Section 242(d)(2) applies "[n]otwithstanding the provisions of subsection (b) of this section" and that a corporation can proceed under Section 242(d)(2) "without obtaining the vote or votes of stockholders otherwise required by

subsection (b) of this section," Section 242(d)(2) eliminates the need to comply with Section 242(b) in that setting. (*Id*.)

Importantly, when Section 242(d)(2) applies, Section 242(d)(2)(B) imposes a Majority-of-the-Votes-Cast Standard: The corporation only needs approval from "the stockholders entitled to vote thereon, voting as a single class," with the operative voting standard being whether "the votes cast for the amendment exceed the votes cast against the amendment" (the "Majority-of-the-Votes-Cast Requirement"). (Op. at 15-16.)

Still, Section 242(d)(2)(C) preserves the possibility of a class vote envisioning two settings: (i) a corporation that has not taken advantage of the Class Vote Opt-Out; and (ii) a corporation that has taken advantage of the Class Vote Opt-Out. (Op. at 16.) Under Section 242(d)(2)(C), if "no provision has been made pursuant to the last sentence of paragraph (b)(2) of this section," then the corporation must obtain a class vote using the Majority-of-the-Votes-Cast Standard. (*Id*.) Implicitly, this means that if "provision has been made pursuant to the last sentence of paragraph (b)(2) of this section," then the additional vote does not apply, and the only vote required is the Majority-of-the-Votes-Cast Requirement. (*Id*.)

The trial court emphasized this latter point in further explaining that:

> By twice saying that the votes required by Section 242(b) do not apply, Section 242(d) eliminates the requirement for the class vote contemplated by Section 242(b)(2). Section 242(d)(2)(C) thus accomplishes two things. First, it restores the class vote for a class of

> shares "for which no provision has been made pursuant to the last sentence of paragraph (b)(2) of this section." Second, it provides that for purposes of the class vote, the Majority-of-the-Votes-Cast Standard applies, not the Majority-of-the-Outstanding Standard specified in Section 242(b)(2).

(Op. at 17-18.) Here, Tilray's Charter maintains a provision that closely tracks the last sentence of Section 242(b)(2), making the only vote required the Majority-of-the-Votes-Cast Requirement.

D. Tilray Increases Its Number of Authorized Shares

On September 27, 2023—nearly two months after Section 242(d) went into effect—the Company filed a definitive proxy statement with the SEC (the "2023 Proxy") in connection with the annual meeting of Tilray stockholders held on November 21, 2023. (B00063-137; *see* Op. at 6 n.3.) At that meeting, the Company sought stockholder approval of a proposal to approve an increase in the number of shares of common stock authorized under the Certificate from 980,000,000 to 1,198,000,000 (the "2023 Proposal"). (B00123.) Taking into consideration newly adopted Section 242(d), the Board informed the stockholders that a votes-cast standard applied and further advised of the effect that abstentions and broker non-votes, if any, would have on the proposal. (B00124.) That is, abstentions, broker non-votes, and shares not present at the meeting would have no effect. (Op. at 7.)

On November 22, 2023, the Company filed a Form 8-K Current Report announcing that the 2023 Proposal had carried with 68,136,045 votes "For,"

24,322,596 votes "Against," and 4,480,777 votes "Abstain." (A0023; B00138-141.) Despite overwhelming support for the 2023 Proposal, only 40% of the outstanding shares voted, which duly satisfied the Company's quorum of 33%. This highlights the exceptional difficulty in getting a majority of the outstanding shares just to *vote* for a proposal, let alone a majority of the outstanding shares to *approve* of a proposal. On December 4, 2023, the Company filed the Certificate amendment contemplated by the 2023 Proposal with the Delaware Secretary of State. (A0024.) For almost a full year, the Company and its stockholders have been operating under the (correct) assumption that the 2023 Proposal was valid and have conducted business on that assumption without issue.

On September 27, 2024, the Company filed a similar definitive proxy statement with the SEC (the "2024 Proxy"), which informed the stockholders that the Board had unanimously approved an amendment (the "2024 Proposal") to the Company's Certificate to increase the number of authorized shares of capital stock from 1,208,000,000 to 1,426,000,000. (Op. at 6; B00203.) Again, relying on Section 242(d), the Board advised stockholders that the votes-cast standard applied and that abstentions and broker non-votes, if any, would have no effect on the proposal. (*Id*. at 7.) The reasoning and explanation of the benefits of added flexibility that come with having a greater number of shares of common stock was spelled out in the Company's 2024 Proxy:

> The availability of additional shares of Common Stock would enhance the business and financial flexibility and allow the Company to execute any of these transactions in the future without the possible delays and significant expense of obtaining additional shareholder approval except as may be required in particular cases by the Charter, applicable law or the rules of any stock exchange or other system on which the Company's securities may then be listed.
>
> The Board believes that additional shares of capital stock will enable the Company to take timely advantage of market conditions and favorable financing and acquisition opportunities that become available to the Company. We anticipate that having additional flexibility will allow us to pursue our strategic objectives, in addition to allowing us to provide equity incentives to our employees in order to attract, retain and motivate key talent.

(B00204.) The vote on the 2024 Authorized Shares Proposal was originally scheduled for November 21, 2024.

E. This Litigation and the Outcome Below

On October 21, 2024, Plaintiff sent a letter to the Company asserting that the proxy statement misstated the applicable voting standard and that the Proposed Amendment had to satisfy the Majority-of-the-Outstanding Standard. (Op. at 7; A0043-47.) On October 31, 2024, Plaintiff filed this action seeking a preliminary injunction blocking the Company from proceeding with the vote on the Proposed Amendment unless and until the directors issue disclosures stating that the Proposed Amendment must satisfy the Majority-of-the-Outstanding Standard. (*Id*.; A0013-50; A0051-60: A0101-117.) The defendants cross-moved for summary judgment. (*Id*.; A0065-100; A0143-66.)

The parties agree that the complaint rises and falls with the following legal question: What voting standard do Section 242(d) and the Single Vote Provision require for the Proposed Amendments? (Op. at 7.) As the trial court found, based on Defendants' reasonable reading of Section 242 and the extrinsic evidence that points in Defendants' favor, the Single Vote Provision does not trigger a Majority-of-the-Outstanding Requirement and the correct voting standard for the Proposed Amendments is the Majority-of-the-Votes-Cast Standard. (Op. at 54.)

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT DEFENDANTS' INTERPRETATION OF THE SINGLE VOTE PROVISION AND SECTION 242(d)(2) IS REASONABLE

A. Question Presented

Is it reasonable to interpret Section 242(d)(2) as providing for a default votes-cast standard that can only be overridden by express amendment to a company's certificate of incorporation and to read the Single Vote Provision in Tilray's Charter as a provision made pursuant to the last sentence of Section 242(b)(2) that addresses whether Section 242(d)(2)(C) requires a separate class vote using the votes-cast standard, but otherwise does not act as an express opt-out of Section 242(d)(2)'s default votes-cast standard? (Preserved at A0065-100; A0143-166.)

B. Scope of Review

Statutory interpretation is a question of law, which is reviewed *de novo*. *Salzberg v. Sciabacucchi*, 227 A.3d 102, 112 (Del. 2020). "The construction or interpretation of a corporate certificate or by-law is a question of law subject to *de novo* review by this Court." *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 926 (Del. 1990). This Court "may affirm a grant of summary judgment on grounds other than those on which the trial judge relied." *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012).

C. Merits of the Argument

Plaintiff contends that the Court of Chancery erred in finding Section 242(d) ambiguous based on its determination that both sides had advanced a reasonable interpretation of the statute as applied to the Single Vote Provision. (OB at 9.) Though Defendants agree with the trial court's conclusion that their reading of the statute is reasonable, Defendants respectfully disagree with the conclusion that Plaintiff's reading also is reasonable.

"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." *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1247 (Del. 1985). Plaintiff's interpretation of Section 242(d)(2) and the Single Vote Provision leads to the facially unreasonable result that a public company that previously took advantage of a statutory provision designed to ease the burden in obtaining stockholder approval of authorized-shares amendments must be denied the benefit of a later-enacted statute designed to further relax the voting standards applicable to such amendments.

In addition, and relatedly, Plaintiff's interpretation ignores the broader context in which both the Single Vote Provision and Section 242(d) were respectively adopted. The purpose of the Single Vote Provision was not to adopt Section 242(b)'s

shares-outstanding standard—before the adoption of Section 242(d), that standard would have applied regardless—it was to ensure that only a single vote would be required for authorized-shares amendments. And the intent behind Section 242(d), reflected in the text of the statute itself, was to ensure that public companies similarly situated to Tilray would be able to rely on the new votes-cast standard. Plaintiff's reading of the statute defeats that intent. *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999).

Plaintiff's reading of Section 242(d) is not reasonable, and Defendants therefore have proffered the only reasonable interpretation of the statute as applied to the Single Vote Provision. This Court accordingly can affirm the trial court's judgment on the ground that the statute is unambiguous as applied here. *Riverbend*, 55 A.3d at 334.

1. Principles Of Statutory and Contract Construction

The trial court found, and all parties agreed, that this case requires the application of Delaware's well-defined principles of statutory and contract interpretation. (Op. at 9 ("The[se] two bodies of law largely parallel each other. Each looks first for plain meaning, then turns to extrinsic evidence to resolve ambiguity.").)

"The goal of statutory construction is to determine and give effect to the legislative intent." *Eliason*, 733 A.2d at 946. As a starting point, a court "must seek

to ascertain and give effect to the intention of the Legislature as expressed in the Statute itself." *Keys v. State*, 337 A.2d 18, 22 (Del. 1975).

"[T]he words of the statute themselves are the first and most authoritative source of the meaning of its command." *Stoltz v. Wilm. Tr. Co.*, 1992 WL 127516, at *5 (Del. Ch. June 9, 1992). "The Delaware Code states that '[w]ords and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language.'" *State ex rel. Jennings v. City of Seaford*, 278 A.3d 1149, 1161 (Del. Ch. 2022) (quoting 1 *Del. C.* § 303). "Consistent with this provision, the Delaware Supreme Court has instructed courts to 'give the statutory words their commonly understood meanings.'" *Id*. (quoting *Kofron v. Amoco Chems. Corp.*, 441 A.2d 226, 230 (Del. 1982)).

"[I]f a statute is clear and unambiguous, the plain meaning of the statutory language controls." *Shawe v. Elting*, 157 A.3d 152, 164 (Del. 2017) (internal quotation marks omitted). A statute is unambiguous "where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion." *Friends of H. Fletcher Brown Mansion v. City of Wilm.*, 34 A.3d 1005, 1059 (Del. 2011) (cleaned up). On the other hand, a statute "is ambiguous if it is susceptible of two <u>*reasonable*</u> interpretations." *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011)

(emphasis added). A statute is not ambiguous simply because the parties disagree about its meaning. *Ross v. State*, 990 A.2d 424, 429 (Del. 2010).

"Parallel principles apply to contracts and, hence, to certificates of incorporation." (Op. at 10.) Under Delaware law, "[c]ertificates of incorporation are regarded as contracts between the shareholders and the corporation, and are judicially interpreted as such." *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012). That means certificates of incorporation are "interpreted using standard rules of contract interpretation which require a court to determine from the language of the contract intent of the parties." *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996). To discern the intent of the parties, "the Certificate should be read as a whole and, if possible, interpreted to reconcile all of the provisions of the document." *Id*. The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant. *Id*.

If the contract is unambiguous, "the Court must give effect to [its] clear language." *Id*. "A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction." *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992). "[A] contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *Id*.

2. The Earlier-Adopted Single Vote Provision Does Not "Expressly" Override the Later-Enacted Section 242(d)

As noted, Section 242(d) overrides "the provisions of [Section 242(b)], unless *otherwise expressly required* by the certificate of incorporation[.]" 8 *Del. C.* § 242(d) (emphasis added). On Plaintiff's reading, this language unambiguously means that, whenever a certificate recites the shares-outstanding standard provided under Section 242(b)—regardless of whether the certificate predated the enactment of Section 242(d)—the certificate necessarily prevails over the statute, and therefore the shares-outstanding standard that Section 242(d)(2) was intended to replace applies. (*See* OB at 11-14.) That reading ignores clear canons of statutory and contract construction and leads to unreasonable results—including under the circumstances presented here. The yawning logical gaps in Plaintiff's interpretation should have led the court below to reject it as unreasonable, as this Court should do now. *Riverbend*, 55 A.3d at 334.

Consistent with his approach below, Plaintiff ignores the undisputed fact that the Single Vote Provision was adopted *five years before* Section 242(d) was enacted. (Op. at 52.) The timing matters, as it exposes the logical flaws in Plaintiff's mechanical interpretation of Section 242(d)'s lead-in language. As Plaintiff notes, and Defendants agree, the word "expressly" is derived from the adjective "express," which means "[c]learly and unmistakably communicated; stated with directness and clarity." (OB at 12-13.) Plaintiff fails to explain how the Single Vote Provision

could "clearly and unmistakably communicate[]" to the reader an intent to disclaim application of a statutory provision that did not exist at the time the provision was adopted and would not exist for five years hence. There is no explanation, and established canons of construction foreclose that unreasonable result.

Plaintiff's analysis of Section 242(d)'s lead-in language ignores its express disclaimer of "the provisions of [Section 242(b)]." 8 *Del. C.* § 242(d). By its plain terms, that disclaimer means that Section 242(d) applies to proposed certificate amendments falling within its scope notwithstanding anything to the contrary in Section 242(b), except where the certificate "expressly require[s]" otherwise.

To "expressly require[]" otherwise in a certificate, it stands to reason that applicability of the provisions in Section 242(d) must in some way be expressly disclaimed. And because Section 242(d) was specifically enacted to override Section 242(b)'s shares-outstanding standard for authorized-shares amendments meeting Section 242(d)'s requirements, a certificate's generic recitation of the overridden Section 242(b) standard cannot qualify as the requisite "express" disclaimer of Section 242(d)'s provisions. That result logically follows from a combination of two familiar legal principles.

First, "when the General Assembly enacts a later statute in an area covered by a prior statute, it has in mind the prior statute," and in the event of a "conflict between the statutes, . . . the later supersedes the earlier." *E.g.*, *Salzberg v. Sciabacucchi*, 227

A.3d 102, 118 n.73 (Del. 2020) (internal quotations omitted). Here, the General Assembly made its intent to supersede Section 242(b)'s shares-outstanding standard express; consequently, there is no question that, in the event of a conflict with Section 242(b), Section 242(d) controls.

Second, it is well established that among "the hierarchical components of the entity-specific corporate contract," the DGCL reigns supreme, and the corporation's charter and bylaws are secondary. *New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 572-73 (Del. Ch. 2023) (internal quotations omitted). If Section 242(b)'s generic recitation of a shares-outstanding vote standard was supplanted by a later-enacted provision of the *DGCL*, then it necessarily follows that an earlier-adopted generic recitation of that standard in a *certificate of incorporation* cannot override that supplantation.

The Court of Chancery aptly recognized that the timing of Tilray's adoption of the Single Vote Provision relative to the timing of the enactment of Section 242(d) was "[a] key event" that "supports the defendants' interpretation." (Op. at 52-53.) That is because, as is clear on the face of the statute, Section 242(d) was intended "to reset the voting regime for amendments relating to authorized shares." (*Id.* at 52.) As matter of simple logic, Section 242(d) must have been intended "to override pre-existing provisions that sought to implement the Class Vote Opt-Out." (*Id.*) The

trial court's interpretation therefore "give[s] effect to the legislative intent[,]" the primary aim of statutory construction. *Eliason*, 733 A.2d at 946.

Plaintiff's interpretation, by contrast, defies legislative intent and leads to unreasonable results, two other touchstones of statutory interpretation. *Spintz*, 228 A.3d at 701 n.68; *Eliason*, 733 A.2d at 946. As the text of the statute itself establishes, Section 242(d) was enacted to benefit companies with shares of stock "listed on a national securities exchange," i.e., public companies. 8 *Del. C.* § 242(d)(2)(A). The statutory text also shows that the General Assembly was aware that some public companies may or may not have previously adopted a Section 242(b)(2) class vote opt-out provision in their charters. *See id.* at § 242(d)(2)(C).[4]

Yet according to Plaintiff, a public company that previously invoked Section 242(b)(2)'s class vote opt-out as a way to make it easier to pass authorized-shares amendments must be denied the benefit of Section 242(d)(2) if its class vote opt-out provision makes even a general reference to the default shares-outstanding standard in effect prior to Section 242(d)'s enactment. On this reading, therefore, two provisions designed to make it easier to pass authorized-shares amendment—the Single Vote Provision and Section 242(d)(2)—somehow can combine to make it

[4] Section 242(d)(2)(C)'s role in interpreting Section 242(d) and the Single Vote Provision is discussed in greater detail in Part I.C.3. below. Contrary to Plaintiff's contention, the provision is not "inapplicable" or "irrelevant" (OB at 10)—it is highly relevant to establishing the reasonableness of Defendants' interpretation.

harder to do so. That unreasonable result cannot possibly be what the legislature intended when it passed Section 242(d). That is reason enough to reject Plaintiff's interpretation. *Coastal Barge Corp.*, 492 A.2d at 1247.

3. The Trial Court Correctly Determined That Defendants' Interpretation of the Single Vote Provision and Section 242(d) Is Reasonable

The Court of Chancery rightly concluded that Defendants reasonably interpreted the Single Vote Provision "as simply a restatement of the Class Vote Opt-Out[]" under Section 242(b)(2) that, under Section 242(d)(2)(C), "does not establish a different voting standard; it simply avoids the need for a separate class vote using the Majority-of-the-Votes Cast Requirement." (Op. at 38.) In other words, the Single Vote Provision only determines whether "a separate class vote using the votes-cast standard" is required but "does not otherwise have any effect." (*Id*. at 36-37.) That reading is supported by the plain language of the Single Vote Provision and Section 242(d)(2)(C).

Section 242(d)(2)(C) provides as follows:

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

8 *Del. C.* § 242(d)(2)(C). This provision envisions (i) a scenario in which a corporation has taken advantage of the Class Vote Opt-Out and (ii) a scenario in

which a corporation has *not*. If the corporation *has* taken advantage of the Class Vote Opt-Out, then Section 242(d)(2)(C) does not require the additional class vote. But if the corporation has *not* taken advantage of the Class Vote Opt-Out, then Section 242(d)(2)(C) requires the additional class vote under the *votes-cast* standard.

The Single Vote Provision, which neither party argues is ambiguous, is simply an example of a generic Class Vote Opt-Out—i.e., a provision "made pursuant to the last sentence of paragraph (b)(2) of [Section 242]." (Op. at 36-37.) By the plain terms of Section 242(d)(2)(C), therefore, a Class Vote Opt-Out removes only the requirement to hold a separate class vote and does not displace the votes-cast standard. In other words, Section 242(d)(2)(C) enshrines the votes-cast standard as the default standard, regardless of whether the company has adopted a Class Vote Opt-Out like the Single Vote Provision.

In finding this interpretation to be reasonable, the trial court compared the almost identical language of Section 242(b)(2) and the Single Vote Provision. (Op. at 37-38.) The key language of the Single Vote Provision states (emphasis added):

> *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 (a "Certificate of Designation").

Compared with the key language from the Class Vote Opt-Out of Section 242(b)(2), which states:

> The number of authorized shares of any such class or classes of stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of the holders of a majority of the stock of the corporation entitled to vote irrespective of this subsection . . . .

8 Del. C. § 242(b)(2). The court below noted that the only meaningful divergence between these provisions is that the Single Vote Provision refers to "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" rather than "the affirmative vote of the holders of a majority of the stock of the corporation entitled to vote." (Op. at 37-38.) But the court further found, correctly, that this distinction makes no difference, and both statements mean the same thing. (*Id*. at 36-37.)

On appeal, Plaintiff mistakenly contends that Section 242(d)(2)(C) is "inapplicable" and "irrelevant." (OB at 10.) That assertion ignores the purpose of that provision, in violation of the fundamental principle that "[s]tatutory construction is a holistic endeavor[,]" which requires review of the entire "statutory scheme" to "produce[] a substantive effect that is compatible with the rest of the law." *See Terex Corp. v. S. Track & Pump*, 117 A.3d 537, 543 (Del. 2015) (cleaned up) (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988)). Section 242(d)(2)(C) evidences the Legislature's intent that pre-existing

provisions tracking the last sentence of Section 242(b)(2) almost verbatim—which, as Plaintiff does not dispute (OB at 16), the Single Vote Provision does—would henceforth be subject to the new votes-cast standard without any further corporate action. As the trial court's thorough analysis of Section 242(d)(2)(C) shows, Plaintiff's result-driven interpretation contravenes that intent.

Plaintiff's strained use of Sections 102(b) and 141 is equally unavailing. Plaintiff does not explain how his hyper-technical reading of these cherry-picked sections of the DGCL in any way defeats Defendants' reasonable reading of the Single Vote Provision as exactly the kind of generic provision contemplated by Section 242(d)(2)(C).

In summary, because the Single Vote Provision is a generic Class Vote Opt-Out of the type anticipated by Section 242(d)(2)(C), Defendants reasonably interpreted the Single Vote Provision not to "expressly require[]" a voting standard different from that required under Section 242(d)(2). Defendants thus have advanced the only reasonable interpretation of the Single Vote Provision and Section 242(d), the statute is unambiguous as applied here, and the judgment below can and should be affirmed on that basis alone. *Spintz*, 228 A.3d at 701 n.68; *Riverbend*, 55 A.3d at 334.

II. EVEN IF SECTION 242(d) WERE AMBIGUOUS, THE EXTRINSIC EVIDENCE CONFIRMS DEFENDANTS' INTERPRETATION

A. Question Presented

Did the trial court correctly determine that: (i) the Synopsis to Section 242(d) suggests that a provision like Tilray's Single Vote Provision should not be sufficient to "otherwise expressly require[]" a different vote than the votes-cast requirement contemplated by Section 242(d)(2); (ii) the practitioner memoranda describing the 2023 Amendments make clear that the Council sought to make it easier for corporations to increase their authorized shares; and (iii) the evolution of Section 242 demonstrates an intent to override the pre-existing provisions that sought to implement the Class Vote Opt-Out and reset the voting regime for amendments relating to authorized shares? (Preserved at A0065-100; A0143-166.)

B. Scope of Review

Statutory interpretation is a question of law, which is reviewed *de novo*. *Salzberg*, 227 A.3d at 112. "The construction or interpretation of a corporate certificate or by-law is a question of law subject to *de novo* review by this Court." *Centaur Partners*, 582 A.2d at 926.

C. Merits of the Argument

When a statute is ambiguous, courts applying Delaware law "consider the statute as a whole, rather than in parts, and . . . read each section in light of all others to produce a harmonious whole." *Taylor*, 14 A.3d at 538. Where a statute is

"'reasonably susceptible' of different conclusions or interpretations, [the courts] normally consider extrinsic evidence, such as legislative history and any historical applications of the text at issue." *Jack Lingo Asset Mgmt., LLC v. Bd. of Adjustment of Rehoboth Beach*, 282 A.3d 29, 33 (Del. 2022). A court may also apply "canons of statutory construction" to resolve ambiguities. *See also Director of Revenue v. Verisign, Inc.*, 267 A.3d 371, 377 (Del. 2021).

1. The Extrinsic Evidence Unequivocally Resolves Any Ambiguity in Defendants' Favor

In resolving the purported ambiguity in Defendants' favor, the trial court rightfully began with the Synopsis for guidance as to Section 242's legislative history. *VonFeldt v. Stifel Fin. Corp.*, 714 A.2d 79, 84 (Del. 1998) (noting that when interpreting an ambiguity, "it is proper to search for guidance in legislative history"). As Plaintiff admits, "[a] synopsis is a proper source for ascertaining legislative intent." (OB at 22 n.55 (quoting *Bd. of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 332 (Del. 2012)).

Here, the Synopsis could not be clearer in stating that a provision like the Single Vote Provision is insufficient to "otherwise expressly require[]" a different vote than Section 242(d)(2):

> 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). . . . 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.*

(A0204 (Del. S.B. 114 syn., 152d Gen. Assem. (2023)) (emphasis added); s*ee* Op. at 49.)

The trial court agreed with Defendants that the "most probative language"—and the clearest example of the General Assembly's manifestation of its intent with respect to Section 242(d)—is its statement 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." (Op. at 49; A0204 (Del. S.B. 114 syn., 152d Gen. Assem. (2023)).) As the trial court rightly observed, this "general recitation" concept clearly indicated that the Council thought that a provision tracking the last sentence of Section 242(b)(2) would not be enough to meet the "otherwise expressly required" test. (*Id*. at 49-50.) Again, the language of the Single Vote Provision is nearly identical to the Class Vote Opt-Out in Section 242(b)(2); thus, it resembles a "general recitation" and does not satisfy the "otherwise expressly required" test. (*See id*.)

Next, the trial court reviewed the public policy underlying Section 242(d) (and (b)) in making increases easier. *Wyatt v. Rescare Home Care*, 81 A.3d 1253, 1261 (Del. 2013) ("Where the text of a statute is ambiguous, this Court will resort to other

sources of the statute's apparent purpose, including relevant public policy.") (cleaned up). In doing so, the trial court reviewed memoranda discussing the 2023 amendments, issued by law firms whose partners serve on the Council, as persuasive insight into the Council's purpose and the public policy considerations of its members. These memoranda from numerous reputable law firms confirm the intent and sensibility of the General Assembly requiring an express opt out of Section 242's lower, votes-cast standard.[5] (Op. at 50 ("The practitioner memoranda describing the 2023 Amendments make clear that the Council sought to make it easier for corporations to increase their authorized shares.").)

As these practitioners observed, the primary purpose of the amendment was to address recent difficulties encountered by public corporations in securing an applicable stockholder vote regardless of the merits or substance of the amendment:

> In recent years, due to a wider dispersion of shares among retail holders and policies in which brokerage firms decline to exercise their

[5] A0254-265, Bayard Law, *Delaware General Corporation Updates Enacted Into Law* (July 26, 2023) ("The synopsis to SB 114 cautions that a general recitation of the voting standard set forth in Section 242(b) without specific reference to Section 242(d) will not be sufficient to "opt out" of Section 242(d)."); A0450-462, Richards, Layton & Finger, P.A., *2023 Proposed Amendments to the General Corporation Law of the State of Delaware* (May 1, 2023) (Section 242(d)'s lead-in language requires certificate to "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)."); A0464-466, Venable LLP, *2023 Amendments to the Delaware General Corporation Law*, Michael D. Schiffer and Gabriel M. Steele (June 30, 2023) (similar); A0437-444, ABA, 2023 Amendments to the Delaware General Corporation Law: A Summary (Sept. 15, 2023) (similar).

> discretionary authority to vote shares held in "street name," many public corporations have encountered significant difficulty in securing various stockholder votes and, in particular, 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. The lack of interest and participation among stockholders and beneficial owners in these critical votes is often attributable not to the merits of the proposal—few stockholders, it would seem, would support a de-listing that would assuredly diminish the liquidity of the stock—but to "rational apathy" among retail and other dispersed investors, each of whom individually owns too few shares to have a vested interest in the corporation but all of whom collectively represent a significant portion of the voting base.

(A0450-462, Richards, *2023 Proposed Amendments to the General Corporation Law of the State of Delaware*; *see* A0446-448, Skadden, *Proposed Changes to Delaware Law Would Facilitate Ratification of Defective Corporate Acts, Disposition of Pledged Assets, Stock Splits and Changes to the Number of Authorized Shares* ("These amendments are intended to address the increasing challenges faced by many corporations in obtaining stockholder approval by a majority of outstanding shares, particularly in light of recent trends relating to broker non-votes.").)

Overall, the trial court explained that the memoranda identified as a public policy goal easing the voting requirements on amendments to increase a corporation's authorized shares because of the many possible uses of the additional shares. (Op. at 50-51.) And, because interpreting the Single Vote Provision to "otherwise expressly require[]" a vote under the Majority-of-the-Outstanding

Standard would make it harder, not easier, to obtain the vote necessary to increase the Company's authorized shares, Plaintiff's suggested outcome runs contrary to the Council's stated goal. Instead, that outcome would only exacerbate the increasing challenge of many public companies in obtaining stockholder approval by a majority of the outstanding shares. Plaintiff claims to agree "to an extent" with this goal (OB at 37), but his reading directly conflicts with that goal. As already discussed, Plaintiff's stilted interpretation, if adopted, would mean that a *pre-existing* charter provision reciting the majority-of-the-outstanding (higher) standard *automatically* opts the company out of new, default votes-cast (lower) standard. It should go without saying that this construct is antithetical to the Council's goal.

In this vein, it was not lost on the trial court that the Council referenced the Class Vote Opt-Out in Section 242(d)(2)(C) when drafting Section 242(d). The Council likely would have taken into account that many corporations would have implemented the Class Vote Opt-Out through provisions that tracked the last sentence of Section 242(b)(2). Accordingly, interpreting a provision like the Single Vote Provision to "otherwise expressly require[]" a vote under a Majority-of-the-Outstanding Standard would "handicap the ability of Section 242(d) to make increasing the number of authorized shares easier." (Op. at 51-52.) The Council simply could not have intended that result.

The trial court understood that the timing of Section 242(d)'s enactment relative to the adoption of Tilray's Single Vote Provision was critical to whether the Single Vote Provision could be deemed to override Section 242(d). (*See* Op. at 52-53.)[6] Tilray's Single Vote Provision pre-dated Section 242(d) by *five* years, and during the Section 242(b)-only regime, Tilray was one of many corporations adopting provisions intended to make it easier to increase or decrease their authorized shares.

Knowing this, the Council enacted Section 242(d) intending to reset the voting regime for amendments relating to authorized shares and for Section 242(d) to override pre-existing provisions that sought to implement the Class Vote Opt-Out, like the Single Vote Provision and the many others like it. It follows that if a corporation adopted a provision like the Single Vote Provision *after* the enactment of Section 242(d), that would suggest an effort to depart from the new default rule imposed by Section 242(d). Indeed, Section 242(d)'s "otherwise expressly required" language indicates it was never meant to override future provisions.

[6] The trial court apparently viewed the timing of the adoption of these two provisions as extrinsic evidence that could be considered to resolve ambiguity. (Op. at 52.) For the reasons explained above, Defendants respectfully submit that this timing issue is strong evidence, apparent from the two provisions, that no ambiguity exists. *See supra* at 24-28. But regardless, it is compelling evidence that Plaintiff's interpretation is mistaken.

At bottom, the sequencing of the Section 242(b)-only regime, followed by Tilray's Single Vote Provision, followed by the enactment of Section 242(d) (with its "otherwise expressly required" language) supports Defendants' position. Here, too, Plaintiff has no meaningful response except to advocate for its interpretation that Section 242(b) and (d) somehow work in tandem to increase the difficulty of obtaining the vote necessary to increase a corporation's authorized shares.

Finally, the trial court considered the interpretive canon that a court should interpret an ambiguous provision in favor of voting rights. (Op. at 53 (citing *Centaur P'rs*, 582 A.2d at 924–27; *Harrah's Ent.*, 802 A.2d at 311–12).) The trial court determined that this interpretive canon could favor either outcome, but without authority in the record pointing in one direction or the other it was left in *equipoise*. Defendants submit their interpretation favors affirmative voting rights. That is, those who vote for or against a specific amendment have an effect on that amendment, while nonvoters do not.

On the other hand, Plaintiff's interpretation favors inaction as having equal effect—*e.g.*, abstention from a vote is equal to a "no" vote. Arguably a stockholder abstaining from a vote with the understanding their abstention constituted a "no" vote is an exercise of that stockholder's voting rights. However, abstention is not always an affirmative choice. For example, certain brokers have instituted policies *requiring* them to decline to exercise their discretionary authority to vote shares held

in street name. Meaning, passivity or abstention is no longer an affirmative exercise of a stockholder's voting rights but rather a consequence of a third-party agreement or otherwise. *See Hammersmith v. Elmhurst-Chicago Stone Co.*, 1989 WL 99129, at *2-3 (Del. Ch. Aug. 17, 1989) (distinguishing between a limited proxy holder (with *no* authority to vote on an issue) and a proxy holder directed to abstain (someone acting for a shareholder who *chooses* not to vote). Thus, this interpretive canon also favors Defendants.

In any event, the extrinsic evidence in the record and analyzed by the trial court unequivocally favors Defendants' interpretation.

2. Plaintiff's Contrary Arguments Fail

Plaintiff begins by misapplying what is—and what the trial court found to be—the most critical sentence in the Synopsis: "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." (Op. at 49; A0204 (Del. S.B. 114 syn., 152d Gen. Assem. (2023)).) Here, Tilray's Charter contains a pre-existing provision, the Single Vote Provision, that mirrors the language of subsection (b) and contains no express reference to the amendments specified in subsection (d)—*nor could it because the Single Vote Provision was in place five years before subsection (d) was ever conceived*. Thus, Defendants' reading of Section 242(d) in conjunction with the Single Vote Provision

could not be more seamless with the Council's intent underlying the statute. Plaintiff simply cannot escape this irrefutable reality.

Plaintiff's next argument that the practitioner memoranda support their position falls flat. Plaintiff suggests that "not one practitioner memoranda in the record supported the Court of Chancery's conclusion." (OB at 32.) In fact, the opposite is true and each of the practitioner memoranda including the note from the American Bar Association confirm Defendants' and the trial court's understanding. (*See* Section II.C.1, *supra*.)

Plaintiff's only response is to say the practitioners "shared in Appellees' confusion." (OB at 33.) Of course, the universal agreement among practitioners as well as the trial court shows Plaintiff is the one confused. Plaintiff claims the only support comes from the American Bar Association note but gives it no credit for its purported "superficial cribbing of the Synopsis to churn confusing and logically unsound copy." (*Id*. at 34.) Again, this makes no sense, as the ABA's "superficial cribbing" is in fact a shared understanding among practitioners, Defendants, and the trial court and is a proper adoption of the Synopsis—the same source to which Delaware courts look for guidance when resolving ambiguity in a statute. *Verleysen*, 36 A.3d at 332.

Finally, Plaintiff's reliance on market practice fails. "[M]arket practice is not the law." *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 311 A.3d

809, 878 (Del. Ch. 2024). And when market practice is not "well-established and clear…the noise drowns out any signal." (Op. at 47 (*comparing In re Fox Corp./Snap Inc.*, 312 A.3d 636, 650 (Del. 2024) (approving trial court's consideration of forty years of consistent market practice) *with Moelis*, 311 A.3d at 878–79 (declining to give weight to inconsistent market practice).) The trial court reviewed the law firm client memos and public disclosure documents in the record and concluded that "[s]ome of those memos adopt the defendants' interpretation, but others suggest that a provision like the Single Vote Provision would be sufficient to opt out of Section 242(d)(2)." (*Id*. at 46 (footnotes omitted).) Although Defendants submit that <u>*all*</u> of the law firm memos favor their reading (Section II.C.1, *supra*), the trial court correctly held that "the market practice is not sufficiently consistent to support a particular interpretation. Instead, it suggests that practitioners have reached a variety of conclusions, reinforcing the existence of ambiguity." (*Id*. at 48.) Plaintiff simply has no ground left to stand on.

* * *

In sum, Defendants' reading of Section 242(d) and the Single Vote Provision is reasonable: Section 242(d)(2) provides for a default votes-cast standard that can only be overridden by an express charter amendment, and the Single Vote Provision in Tilray's Charter does not act as an express opt-out of Section 242(d)(2)'s votes-cast standard. The Single Vote Provision—adopted five years prior to Section

242(d)'s enactment—is merely an example of a generic Section 242(b)(2) class-vote opt-out expressly contemplated by Section 242(d)(2)(C), which confirms that Section 242(d)(2)'s new votes-cast standard applies equally to public companies that previously adopted a Section 242(b)(2) opt-out and those that did not. To the extent there is any ambiguity in Section 242(d), the Synopsis, the practitioner memoranda describing the 2023 Amendments, and the evolution of Section 242 unequivocally favor Defendants' interpretation.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's judgment.

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