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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 REPLY BRIEF

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PRELIMINARY STATEMENT[1]

Appellees' entire Answering Brief[2] is predicated on their contention that Article IV.B is a "generic" or "general" recitation of Section 242(b)'s majority-of-outstanding-shares voting standard for amendments to certificates of incorporation. Appellees argue that the General Assembly did not mean to give effect to general recitations when enacting Section 242(d), which lowers the threshold for approval of amendments to change the number of shares authorized under a corporate certificate to a votes-cast standard in certain circumstances. Article IV.B in Tilray's Certificate, however, is not generic or general. It specifically sets an outstanding-shares threshold only for Certificate amendments increasing or decreasing "[t]he number of authorized shares of Common Stock or Preferred Stock[.]" No other type of amendment falls with its ambit, much less all Certificate amendments generally.

When it enacted Section 242(d), the General Assembly demonstrably meant to give effect to existing certificate language setting a higher voting threshold specifically for authorized share amendments. Appellees cannot deny that the lead-in to Section 242(d) provides that the votes-cast standard will not apply where a higher standard for authorized-share amendments is "otherwise expressly required

[1] Defined terms used herein shall have the meaning ascribed in Appellant's Opening Brief (Filing ID 75490100, "Op. Br.").

[2] Filing ID 75676864 ("Ans. Br.").

by the certificate of incorporation[.]" Article IV.B expressly requires otherwise and Section 242(d)'s votes-cast standard therefore does not apply to authorized-share amendments at Tilray. Appellees deride this conclusion as a "hyper-literal, mechanical construction of Section 242(d)(2)" but it is the only viable reading that gives effect to the statutory lead-in.[3]

Even if the lead-in to Section 242(d) were unclear, *arguendo*, the Synopsis confirms that a corporation may opt into a higher voting standard by "expressly stat[ing] that the stockholder vote otherwise required under [Section 242](b) is required to adopt any amendment to the certificate of incorporation specified in [Section 242](d)[.]" Article IV.B applies to the first of the two types of amendments specified in Section 242(d), *viz*: "[a]n amendment to increase or decrease the authorized number of shares of a class of capital stock[.]"[4] Accordingly, the Synopsis confirms that Article IV.B "otherwise expressly require[s]" a higher voting standard for purposes of the statutory lead-in.

In their Answering Brief, Appellants simply ignore that the Synopsis provides for opt-ins, as well as the fact that Tilray's Certificate precisely satisfies the conditions set by the General Assembly to constitute an opt-in. Article IV.B provides

[3] *See* Ans. Br. at 4.

[4] The second type of amendment is one "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[.]" 8 *Del. C.* § 242(d)(2).

that "a majority of the voting power of all of the outstanding shares" is required to approve an "increase[] or decrease[]" in "[t]he number of authorized shares[.]" If that is not an opt-in contemplated by the Synopsis, then nothing is.

With both the unambiguous terms of the statute and its legislative Synopsis contradicting their position, Appellees fall back on an appeal to policy. Abstract arguments about retail apathy are unconvincing given Delaware's strong policy in favor of giving effect to the terms of statutes and corporate charters. Section 242(d) allows corporations to opt into higher voting standards for authorized-share amendments. Article IV.B specifically subjects such amendments to a majority-of-outstanding-shares standard. But even if Delaware corporations with unmotivated stockholder bases were facing an existential need for additional authorized shares, they could achieve this end through amendments providing for reverse stock splits, as specifically provided for by Section 242(d)(2).

Ultimately, Appellees cannot marshal a single sound argument in support of their position. Because the statute, the Synopsis, and Delaware policy all support the ineluctable conclusion that the General Assembly meant to give effect to existing, higher voting standards in corporate certificates for authorized share amendments, reversal of the Opinion and Order is appropriate.

ARGUMENT

Appellees' arguments on appeal closely track the Opinion but fail to address any of the problems with the Court of Chancery's reasoning that were identified in Appellant's Opening Brief. This reply addresses the flaws in the few rehashed arguments made in Appellee's Answering Brief.

I. SECTION 242(d)(2)(C) DOES NOT CREATE AMBIGUITY IN THE LEAD-IN TO SECTION 242(d).

Appellees anchor their Answering Brief on the premise that Article IV.B "is simply an example of … a provision 'made pursuant to the last sentence of paragraph (b)(2) of [Section 242]'" (*i.e.*, the class-vote opt-out provision) and claim that it only serves to eliminate the need for a class vote of holders of common stock under Section 242(d)(2)(C).[5] As Appellant acknowledged, however, the parties agree that Article IV.B is a class-vote waiver.[6] The salient point, which Appellees cannot deny, is that Article IV.B also unmistakably specifies that authorized share amendments at Tilray require "the affirmative vote of the holders of a majority of the voting power of all of the outstanding shares of stock[.]"

[5] Section 242(d)(2)(C) requires certain corporations seeking approval of an increase or decrease in the number of authorized shares of a class of stock to hold a separate vote of that class unless there is a class vote waiver in the corporate certificate.

[6] Op. Br. at 16-17.

Appellees advance no sound reason why Article IV.B should only be read to serve as a class-vote waiver when it also specifies a voting standard for authorized-share amendments. As Appellant argued in his Opening Brief, there is no basis to disregard the latter aspect of Article IV.B as mere surplusage when it was not necessary to accomplish the former end.[7] Indeed, the Court of Chancery specifically credited as a "strong argument" Appellant's reasoning that, "because it is possible to satisfy [Section 242(b)(2)] by simply stating that no class of shares votes as a separate class on any amendment to increase a corporation's authorized shares, then the decision to include a voting standard in [Article IV.B] must have significance."[8] Appellees do not address this argument.

Instead, they fall back on the Court of Chancery's comparison of the terms of Article IV.B to those of Section 242(b)(2) and claim that "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 … would henceforth be subject to the new votes-cast standard without any further corporate action."[9] Appellees—like the Court of Chancery—cite no authority to support this cut-from-whole-cloth

[7] Op. Br. at 14-18; *see also* A0140-42 (examples of corporate certificate language waiving entitlement to class votes on authorized-share amendments without specifying a higher voting standard).

[8] Op. at 40.

[9] Ans. Br. at 30-31.

divination of legislative intent or, more generally, their position that the number of words in common between certificate language and the DGCL will render the voting standard a general recitation.

Appellees' *ipse dixit* runs headlong into the very legislative history in which they attempt to ground it. The Synopsis, which says nothing about the extent to which certificate language "tracks" statutory language, confirms instead that "[a] general recitation in the certificate of incorporation" is, in fact, a statement of the outstanding-shares standard without "a specific reference to the amendments specified in subsection (d)[.]" Appellant has pointed to numerous examples in the record of such "general recitation[s]" of the Section 242(b) standard for certificate amendments generally that do not specifically provide that they apply to either of the types of amendments identified in Section 242(d).[10] Article IV.B, in contrast, contains a specific reference to amendments providing that the "number of authorized shares of Common Stock or Preferred Stock may be increased or decreased" — *i.e.*, one of the two types of certificate "amendments specified in subsection (d)[.]"

Further to this end, the Synopsis explicitly spells out how "the 'unless otherwise expressly required by the certificate of incorporation' lead-in to subsection

[10] Op. Br. at 26-27 & n.65 (citing A0124-28).

(d) permits a corporation to 'opt in' to the" Section 242(b) standard for a certificate amendment providing for an "increase or decrease in the authorized number of shares contemplated by subsection (d)." Specifically, an opt-in "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)[.]"[11] To deny that Article IV.B is an opt-in is to allow the last sentence of the Synopsis concerning the effect of general Section 242(b) recitations to swallow not just the rest of the Synopsis but also the entire statutory lead-in to Section 242(d).

In addition to being bereft of supporting authority, Appellees' approach of looking to whether verbiage "closely tracks" statutory language to determine whether it is "general" is also logically unsound. Appellant has pointed to certificate provisions requiring supermajority votes for authorized-share amendments.[12] By way of example and not limitation, the Court of Chancery specifically considered the Amended and Restated Certificate of Incorporation of Kura Sushi USA, Inc.,

[11] An opt-out provision, alternatively, "must expressly 'opt out' of the provisions of subsection (d)." Consistent with their briefing below, Appellees continue to conflate the two alternative ways to trigger the lead-in. *See, e.g.*, Ans. Br. at 7 (arguing that Article IV.B "does not act as an opt-out of Section 242(d)(2)'s default votes-cast standard" even though Appellant has only ever said it is an opt-in). The only appearance of the term "opt in" in the Answering Brief is in a block quote of the Synopsis on page 33.

[12] Op. Br. at 35 & n. 87 (citing A0136-38).

which also closely tracks Section 242(b):[13]

Kura Sushi	*[T]he 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* shares of capital stock of the Corporation representing at least 66 2/3% of the voting power of all the outstanding shares of capital *stock of the Corporation 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*[.]

The relevant provisions in the certificates of 23andMe Holding Co. and Landsea Homes Corporation track the statute just as closely.[14] There is no evidentiary basis suggesting that Tilray's choice of an outstanding-shares standard was not every bit as intentional as those companies' supermajority standards. If the basis for disregarding the plain terms of Tilray's Certificate is that "the language [in Article IV.B] is functionally identical" to that of Section 242(b), then Appellees' reading will trump the obviously deliberate choices of numerous companies' stockholders.[15]

Notwithstanding this "facially unreasonable" and "absurd result[,]" Appellees insist that it is Appellant's interpretation that "defies legislative intent and leads to

[13] Op. at 44-45.

[14] A0136-38.

[15] *See* Op. at 38; *but see id*. at 45 (characterizing the vitiation of stockholders' supermajority vote preferences based on an arbitrary number of words in common as "another strong argument against the defendants' reading of Section 242(d)(2)").

unreasonable results."[16] They are mistaken. Acknowledging the existence of the statutory lead-in is not failing to "give effect to the legislative intent." It is equally unclear how disregarding the Certificate, which "otherwise expressly require[s]" the outstanding-shares standard for authorized-share amendments, could further the General Assembly's goal—which is manifest in the lead-in—of choosing not to statutorily supersede existing certificate language.[17]

In this regard, it does not follow that, because Article IV.B was drafted to "make it easier to pass authorized-shares amendments" through waiver of class votes, the General Assembly intended to "make it easier" for Tilray to secure passage of its latest authorized-share amendment by lowering the standard in contravention of the Certificate approved by the Company's stockholders.[18] The drafters of Article IV.B chose to go beyond merely waiving the class vote entitlement contemplated by Section 242(b)(2), as they also included an outstanding-shares voting standard for authorized share increases. It is not "facially unreasonable" to afford those words their meaning.

[16] Ans. Br. at 5, 20, 26-27 (citation omitted).

[17] Ans. Br. at 21.

[18] *See* Ans. Br. at 27.

Nonetheless, Appellees wax alarmist about undermining the General Assembly's intent.[19] Had the legislature been in monomaniacal pursuit of a singular end, admitting of no nuance or exception, it would have omitted the lead-in to Section 242(d) in its entirety. Rather, the General Assembly drafted a statute requiring a corporation to meet certain prerequisites[20] to be eligible for Section 242(d)'s votes-cast standard, while respecting the wishes of those corporations who had chosen to specify higher voting standards in their certificates.[21] For those corporations, the General Assembly afforded alternative means to create authorized-share headspace on a votes-cast standard by way of a reverse stock split amendment — a point raised in Appellant's Opening Brief that went unanswered in Appellee's Answering Brief.[22]

Appellees are unwilling to entertain the possibility that the General Assembly could have intended existing certificate standards like Article IV.B, which they stress "was adopted *five years before* Section 242(d) was enacted[,]" to opt into a

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[19] Ans. Br. at 4, 6, 8, 27, 32, 34, and 36-37.

[20] *See* 8 *Del C.* § 242(d)(2) (requiring that "the shares of such class [be] 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").

[21] *See* 8 *Del C.* § 242(d) ("unless otherwise expressly required by the certificate").

[22] *See* Op. Br. at 38-39.

higher standard.[23] The Court of Chancery similarly mused that "[t]he Council seems to have intended for Section 242(d) to reset the voting regime for amendments relating to authorized shares."[24] Appellees and the Court of Chancery are wrong.

Appellant cited an amendment to 8 *Del. C.* § 272(d) ("Section 272(d)"), which was part of the same Senate Bill through which Section 242(d) was codified, that by its own terms would "apply only to certificate of incorporation provisions that first become effective on or after August 1, 2023."[25] It is beyond reasonable belief that the General Assembly deemed it necessary to codify that the amendment to Section 272(d) would only apply prospectively and yet, *as part of the same legislation*, failed to provide that Section 242(d)'s lead-in and the Synopsis's definition of an opt-in would only apply on a going-forward basis. Appellees stress that "'[s]tatutory construction is a holistic endeavor[,]' which requires review of the entire 'statutory scheme[,]'" but ignore this language from Section 272(d), which is fatal to their position.[26]

Instead, Appellees appeal to "clear canons of statutory and contract construction" but never actually specify which canon allows them to ignore the

[23] Ans. Br. at 24 (emphasis in original).

[24] Op. at 52.

[25] Op. Br. at 30; A0237-38.

[26] Ans. Br. at 30 (quoting *Terex Corp. v. S. Track & Pump*, 117 A.3d 537, 543 (Del. 2015) (cleaned up)).

unambiguous terms of the lead-in to Section 242(d), the Synopsis, and their own Certificate.[27] Rather, Appellees invoke the canon that, where statutes are in conflict, the later-enacted statute will control.[28] But there is no "conflict" between Section 242(b) and 242(d). If a corporation meets the statutory prerequisites, the latter subsection provides the applicable voting standard "[n]otwithstanding the provisions of" the former subsection — that is, of course, "unless otherwise expressly required by the certificate" of that corporation.[29]

Similarly, Appellees observe that "the DGCL reigns supreme" atop "the hierarchical components of the entity-specific corporate contract[.]"[30] True, but the DGCL regularly permits deviation from its terms via provision in a certificate.[31] In

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[27] Ans. Br. at 24. In a telling display of projection, Appellees accuse Appellant of "ignor[ing the lead-in's] express disclaimer of 'the provisions of [Section 242(b)].'" *Id*. at 25. This is not true. Appellant agrees, and always has, that Section 242(d) may displace the Section 242(b) standard — "unless otherwise expressly required by the certificate[.]"

[28] Ans. Br. at 25-26.

[29] 8 *Del. C.* § 242(d).

[30] Ans. Br. at 26 (quoting *New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 572-73 (Del. Ch. 2023)).

[31] *Compare* 8 *Del. C.* § 242(d) ("unless otherwise expressly required by the certificate") *with*, *e.g.*, 8 *Del. C.* §§ 141(k) (providing for removal of directors who sit on classified boards without cause "[u]nless the certificate of incorporation otherwise provides" for removal only for cause), 228(a) (allowing action via stockholder consent "[u] otherwise provided in the certificate of incorporation"), 242(b)(2) (requiring class votes on authorized-share amendments unless "so provided in the … certificate").

point of fact, it specifically authorizes inclusion in a certificate of "[p]rovisions requiring for any corporate action, the vote of a larger portion of the stock … than is required by" the DGCL.[32] For this reason, the Synopsis clarifies that the lead-in requires a corporation to "opt in" by specifying that a higher voting standard applies to the type of amendment identified in Section 242(d)(2) or "opt out" by disclaiming the voting standard in Section 242(d).[33] It is evident that the General Assembly did not wish for a specification of a higher standard for charter amendments generally to override Section 242(d) through operation of Section 102(b)(4).

Appellees' conclusory proclamations of intent and sweeping statements about context do not withstand scrutiny. The Synopsis makes clear that, while a "general recitation" of the outstanding-shares standard specified in Section 242(b)(1) will not be bootstrapped by Section 102(b)(4) to override Section 242(d), a certificate provision will "otherwise expressly require[]" a higher standard if it is an "opt-in" — *i.e.*, if it specifically applies that standard to authorized share proposals. There is no ambiguity.

[32] 8 *Del. C.* § 102(b)(4) ("Section 102(b)(4)").

[33] S.B. No. 114, 152nd Gen. Assem. (Del. 2023).

II. EXTRINSIC EVIDENCE CONFIRMS THAT THE GENERAL ASSEMBLY INTENDED TO ALLOW CORPORATIONS TO OPT INTO HIGHER VOTING STANDARDS FOR AUTHORIZED SHARE AMENDMENTS.

When not auguring intent from the arrow of time and context, Appellees search for it in "memoranda discussing the 2023 amendments, issued by law firms whose partners serve on the Council" that advises the General Assembly.[34] These sources support Appellant's position.

The articles cited by Appellees confirm that, while the General Assembly intended to lower the voting standard for authorized share amendments at *qualifying* corporations, the statutory lead-in carves out corporations that either (i) expressly opt out from Section 242(d)(2) or (ii) opt into a higher voting standard:

- Richards, Layton & Finger, P.A. confirms that "[n]ew Section 242(d) contains lead-in language (*i.e.*, 'unless otherwise expressly required by the certificate of incorporation') that permits a corporation to 'opt in' to the stockholder votes that otherwise would be required under subsection (b) in connection with any … increase or decrease in the authorized number of shares contemplated by Section 242(d). To make use of such lead-in language, though, the provision of the certificate of incorporation must expressly state that the vote of stockholders

[34] Ans. Br. at 35.

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).[35]

- Venable LLP confirms that "[t]he amendments provide that a corporation's certificate of incorporation may 'opt in' to the prior stockholder vote requirements for the above-referenced matters by expressly stating that the stockholder vote otherwise required under DCCL Section 242(b) is required to adopt any amendment to the certificate of incorporation specified in DCCL Section 242(d) or by expressly 'opting out' of the provisions of DCCL Section 242(d)."[36]
- Bayard, P.A. confirms that "In order to qualify for [the] reduced voting threshold … 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 that would otherwise qualify for the reduced voting threshold permitted under Section 242(d)."[37]

[35] A0457-58.

[36] A0464.

[37] A0258-59.

- Skadden, Arps, Slate, Meagher & Flom LLP confirms that "the proposed amendments to Section 242 permit a corporation's certificate of incorporation to 'opt in' to the majority-of-outstanding-shares voting standard presently in effect under Section 242(b) for amendments to the certificate of incorporation to effect forward or reverse stock splits, or to increase or decrease the number of authorized shares, 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)."[38]

Appellees' arguments about the "policy" motivating the General Assembly's advisors are directly contradicted by the Council-member firms' memoranda, which unequivocally support Appellants' position.

The final arrows in Appellees' quiver are an appeal to "voting rights" and an incorrect conflation of abstentions and broker non-votes.[39] Appellees do not explain how disregarding the voting standard Tilray chose to write into its Certificate could further Delaware policy, nor can they reconcile their position—namely, that "voting rights" favor excluding uninstructed shares from consideration in contravention of the voting standard—be reconciled with numerous DGCL provisions requiring a

[38] A0448.

[39] Ans. Br. at 39-40.

majority of all shares rather than a majority of actually voted shares.[40] Tilray itself requires a *supermajority* of outstanding shares to amend certain articles of the Certificate.[41] Delaware policy favors giving effect to voting standards adopted through the private ordering of corporate drafters.

* * *

In their Answering Brief, Appellees fail to address a host of facts and arguments that are inimical or even fatal to their position, including: (i) the General Assembly's affirmative choice not to only provide for opt-ins on a going-forward basis while contemporaneously adopting DGCL changes that would only apply prospectively;[42] (ii) stockholder will, memorialized in supermajority certificate provisions that track Section 242(b) in the same way as Article IV.B, that would be vitiated by the Opinion;[43] (iii) corporations which waived entitlement to class votes without choosing to simultaneously adopt outstanding-share standards for

[40] *See, e.g.*, 8 *Del. C.* §§ 141(k) (requiring the affirmative vote of the "holders of a majority of the shares then entitled to vote at an election of directors" to remove a director from a board), § 251(c) (requiring approval of a merger agreement by "a majority of the outstanding stock of the corporation entitled to vote thereon"), and 275(b) (requiring a majority of outstanding shares to effect a dissolution); *see generally Voigt v. Metcalf*, 2020 WL 614999, at *17 (Del. Ch. Feb. 10, 2020) ("Under the Delaware General Corporation Law, the most fundamental changes can be effectuated only if approved by a majority of the outstanding voting power.").

[41] A0041.

[42] *See* 8 *Del. C.* § 272(d).

[43] A0136-38.

authorized-share amendments;[44] (iv) public companies with charter provisions akin to Article IV.B that told their stockholders that authorized-share amendments would be subject to a majority-of-outstanding-shares standard;[45] and (v) the availability of the Section 242(d) votes-cast standard for reverse stock split amendments.[46] Appellees' policy arguments about the need for additional authorized shares are meritless, given the absence from the Certificate of a higher standard for reverse splits. Tilray is free to pursue a reverse stock split amendment under the votes-cast standard and, while it may prefer to proceed with an authorized-share amendment, that is no basis for this Court to ignore the unambiguous text of Section 242(d), the guidance in the Synopsis, and the plain terms of the Certificate.

[44] A0140-42.

[45] A0130-35.

[46] 8 *Del. C.* §242(d)(2).

CONCLUSION

For the foregoing reasons and those set out in Appellant's Opening Brief, Appellant respectfully maintains that reversal of the Court of Chancery's Order is appropriate.

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