

NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 21

FALL 2024

NUMBER 1

FOREWORD

EMILIANO M. CATAN*, ROBERT J. JACKSON**
& EDWARD B. ROCK***

In the opening episode of the 2000s television show *Ed*, a hotshot New York lawyer is fired after drafting a contract with a misplaced comma that ends up causing his firm a significant financial loss.¹ This fictional anecdote—though dramatized for entertainment—serves as a lighthearted reminder of a stark reality in corporate law: words matter. For corporate lawyers and judges alike, the meaning of even the smallest words—“and,” “a,” or a carefully placed parenthetical—can determine the outcome of disputes involving millions or even billions of dollars.² In her Distinguished Jurist Lecture, Justice Karen Valihura offers a fascinating, practical exploration of how Delaware courts interpret corporate documents, charters, bylaws, and statutes through the lens of “plain language.”

Drawing on her extensive experience as a Justice on the Delaware Supreme Court, where she has served for over a decade, and her time as a practicing corporate lawyer, Justice Valihura provides a masterful analysis of the interpretive principles

* Catherine A. Rein Professor of Law and co-director of the Institute for Corporate Governance & Finance.

** Nathalie P. Urry Professor of Law and co-director of the Institute for Corporate Governance & Finance.

*** Martin Lipton Professor of Law and co-director of the Institute for Corporate Governance & Finance.

1. *Ed: Pilot* (NBC television broadcast Oct. 8, 2000).

2. In *SR International Business Insurance Co. v. World Trade Center Properties*, for instance, the litigation turned on the meaning of the word “occurrence” in an insurance policy, with billions of dollars at stake following the tragic events of September 11. *SR Int’l Bus. Ins. Co. v. World Trade Ctr. Props.*, 467 F.3d 107 (2d Cir. 2006).

that guide Delaware's courts. Delaware law adheres to the objective theory of contracts, under which the construction of a contract is determined based on what an objective, reasonable third party would understand the language to mean.³ If the language of a contract is clear and unambiguous—that is, it conveys an unmistakable meaning and is reasonably susceptible of only one interpretation—Delaware courts will enforce it as written, and will not resort to extrinsic evidence to interpret the contract, vary its terms, or create ambiguity where none exists.⁴ At the same time, Delaware law requires courts to read contracts as a whole, ensuring that each provision is given meaning and that no part is rendered superfluous.⁵ These principles reflect the Delaware courts' commitment to preserving the parties' bargain while ensuring consistency and coherence in the interpretation of commercial agreements.

Justice Valihura's lecture examines how these broad principles are applied not only to contracts but also to the interpretation of bylaws and statutes. Under Delaware law, corporate bylaws are contractual in nature, and courts apply the same interpretive tools to bylaws as they do to commercial agreements.⁶ Drawing from its approach to statutory interpretation, Justice Valihura highlights Delaware's adherence to plain language while acknowledging the role of legislative intent. In cases such as *Activision Blizzard*,⁷ the courts interpreted statutory provisions governing the board's role in mergers and stockholder approval of mergers by focusing on both the text of the statute and the legislative purpose behind it. Justice Valihura's lecture analyzes how Delaware courts approach statutes as part of an integrated system, interpreting individual provisions in a way that preserves the integrity of the broader legislative scheme.

3. *BitGo Holdings, Inc. v. Galaxy Digital Holdings, Ltd.*, 319 A.3d 310, 322 (Del. 2024).

4. *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

5. *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1044 (Del. 2023).

6. *BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd.*, 224 A.3d 964, 977 (Del. 2020) (citing *Hill Int'l, Inc. v. Opportunity Partners L.P.*, 119 A.3d 30, 38 (Del. 2015)).

7. *Sjunde AP-fonden v. Activision Blizzard, Inc., et al.*, 2024 WL 863290 (Del. Ch. Feb. 29, 2024).

Justice Valihura's remarks also raise an important question about the role of market practice in contractual interpretation. Delaware courts are often asked to consider industry norms and commercial expectations when interpreting language. In *Chicago Bridge & Iron Co. N.V. v. Westinghouse Electric Co.*,⁸ for instance, the Delaware Supreme Court considered market practice in evaluating whether certain post-closing adjustments were consistent with the parties' intent. Justice Valihura's analysis highlights the tension between honoring market expectations and maintaining fidelity to the text of an agreement or a statute. Courts must strike a careful balance, ensuring that commercial realities inform their analysis without allowing market practice to override clear contractual or statutory language.⁹

The cases Justice Valihura discusses reveal the challenges inherent in contract interpretation. In *Cox Communications, Inc. v. T-Mobile US, Inc.*,¹⁰ for example, the Delaware Supreme Court split over whether a settlement agreement's terms were unambiguous—with three Justices concluding that the language had a single clear meaning, while the remaining two Justices found multiple reasonable interpretations. Justice Valihura's analysis of this and other decisions illustrates how Delaware courts navigate ambiguity without losing sight of their central commitment: to respect the intent of sophisticated parties who choose their words carefully—or even, at times, imperfectly.

Justice Valihura's lecture also prompts deeper reflection on the realities of the drafting process. As lawyers, we know that not every ambiguity is a failure of skill or diligence. For what benevolent reasons would sophisticated parties, assisted by expert counsel, include provisions whose meaning they might later dispute? Sometimes, ambiguity arises because a provision addresses a contingency too unlikely to justify exhaustive negotiation. In other cases, ambiguity reflects a practical

8. *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 913–14 (Del. 2017).

9. *See, e.g.*, *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 311 A.3d 809, 816 (Del. Ch. 2024) (“What happens when the seemingly irresistible force of market practice meets the traditionally immovable object of statutory law? A court must uphold the law so the statute prevails.”); *Activision*, 2024 WL 863290 at *4 (“[w]here market practice exceeds the generous bounds of private ordering afforded by the DGCL, then market practice needs to check itself.”).

10. 278 A.3d 752 (Del. 2022).

compromise, deferring difficult decisions to future negotiations or preserving deal momentum when time is short.¹¹

Justice Valihura's lecture does not directly address these dynamics, but her analysis of Delaware's case law invites us to consider their implications. If ambiguity stems from strategic compromises or practical constraints, should courts interpret those provisions flexibly, with an eye toward commercial reasonableness? Conversely, if ambiguity results from poor drafting or intentional vagueness, should courts enforce the language strictly to encourage greater care in the future? And how should the court, in attempting to interpret contractual language, account for the fact that future contracting parties may be able to contract around the court's proposed interpretation—or, on the contrary, for the possibility that drafting practices may prove too sticky for the judge's interpretation to be undone? These questions, while not answered in Justice Valihura's lecture, are inspired by her reflections.

In a similar vein, although Justice Valihura's lecture does not say it in so many words, bylaws occupy a unique place in corporate governance, as they are typically unilaterally adopted or amended by boards. As a result, their interpretation requires courts to go beyond standard canons of contractual interpretation and balance the rights of stockholders with the authority of directors. In *Kellner v. AIM ImmunoTech, Inc.*, for example, although the Delaware Supreme Court ultimately upheld the Chancery Court's validation of certain advance notice bylaw provisions, it also held that one "unintelligible" bylaw adopted by a board in the face of an activist campaign was invalid, and that the board had acted inequitably in adopting other bylaws for the primary purpose of interfering with the challenger's nomination.¹²

Justice Valihura concludes her lecture with a forward-looking discussion of the role of artificial intelligence in contract drafting and interpretation. As AI tools become increasingly prevalent in corporate practice, they offer the promise of efficiency and consistency. Yet Justice Valihura cautions that

11. See, e.g., Jennifer Arlen, *Designing Mechanisms to Govern Takeover Defenses: Private Contracting, Legal Intervention, and Unforeseen Contingencies*, 69 U. CHI. L. REV. 917, 927 & n.35 (2002) (citing B. Douglas Bernheim & Michael D. Whinston, *Incomplete Contracts and Strategic Ambiguity*, 88 AM. ECON. REV. 902 (1998)).

12. *Kellner v. AIM ImmunoTech, Inc.*, 320 A.3d 239, 246 (Del. 2024).

machines cannot replace the human judgment required to navigate context, ambiguity, and intent. Her reflections remind us that the art of drafting—like the art of interpretation—is ultimately a human endeavor, one that requires care, precision, and an understanding of the relationships and realities that contracts are meant to govern.

Justice Valihura's Distinguished Jurist Lecture is the latest in a series that celebrates the contributions of leading jurists to corporate law and governance. This series began in 2018 with Chief Justice Leo Strine's criticism of corporate political spending;¹³ and was followed by Chancellor Bouchard's analysis of *Corwin*,¹⁴ *Trulia*¹⁵ and their progeny;¹⁶ Chief Justice Collins J. Seitz Jr.'s reflections on independence;¹⁷ Chancellor Kathaleen McCormick's discussion of the centrality of the specific performance remedy in M&A disputes;¹⁸ and, most recently, Vice Chancellor Travis Laster's examination of the fiduciary duties of controlling shareholders.¹⁹ Justice Valihura's lecture continues in the tradition of thoughtful engagement with the principles that shape corporate and business law.

We are grateful to Justice Valihura for sharing her insights and for continuing this important dialogue. Her reflections offer a skillful blend of practical wisdom and doctrinal clarity, reminding us that the work of interpreting contracts—like the work of drafting them—requires attention, care, and a deep respect for the role of language. For lawyers, judges, and scholars alike, Justice Valihura's lecture serves as both a guide and an inspiration, underscoring the enduring importance of plain language in the law.

13. Leo E. Strine, Jr., *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans' Savings for Corporate Political Spending*, 97 WASH. U. L. REV. 1007 (2020).

14. *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980 (Del. Ch. 2014).

15. *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884 (Del. Ch. 2016).

16. NYU School of Law Institute for Corporate Governance and Finance, *2019 Distinguished Jurist Lecture: Chancellor Andre Bouchard*, YOUTUBE (Nov. 13, 2019) <https://www.youtube.com/watch?v=YLO2knjEM5>.

17. Collins J. Seitz Jr., *A Declaration of Independence: Committees, Conflicts, and the Courts*, 19 N.Y.U. J.L. & Bus. 467 (2022).

18. Kathaleen St. Jude McCormick & Robert Erikson, *Delaware's Approach to Specific Performance in M&A Litigation*, 20 N.Y.U. J.L. & Bus. 7 (2023).

19. J. Travis Laster, *The Distinctive Fiduciary Duties that Stockholder Controllers Owe*, 20 N.Y.U. J.L. & Bus. 461 (2023).

NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 21

FALL 2024

NUMBER 1

“PLAIN LANGUAGE”
IN DELAWARE CORPORATE LAW

KAREN LYNN VALIHURA*

INTRODUCTION	8
I. EXAMPLES OF GENERAL PRINCIPLES AS APPLIED IN DIFFERENT CONTEXTS	10
A. <i>Construing Contracts and Transaction Agreements</i>	10
1. <i>General Principles</i>	10
2. <i>Illustrative Cases</i>	15
a. <i>Weinberg v. Waystar</i> — “And”	15
b. <i>ION Geophysical Corp.</i> — “A” and “The”	20
c. <i>SeaWorld Entertainment</i> — The Use of Parentheticals.	24
B. <i>Construing Charters and Bylaws</i>	27
1. <i>General Principles</i>	27
2. <i>Illustrative Cases</i>	28
a. <i>Kellner v. AIM ImmunoTech, Inc.</i>	28
b. <i>Hill International Inc. v. Opportunity Partners, L.P.</i>	30

* Karen Lynn Valihura is a Justice on the Delaware Supreme Court. The views expressed are solely those of the author and not those of any other judicial officer or of the Delaware Supreme Court. Justice Valihura acknowledges the assistance of certain of her present and former law clerks, namely, Alex MacLennan, Jillian Patterson, Caitlin Hawkins, Theodore Kotler and Francesca D’Agostino, as well as Wolcott Fellows, Benjamin W. Byerly, and Patrick Tkacik and summer interns, Lauren Young, Dylan Kirton and Jett Meek. Nothing herein is intended to express any view on how any future appeal might or should be resolved.

C.	<i>Construing Statutes</i>	31
1.	<i>General Principles</i>	31
2.	<i>Illustrative Cases</i>	31
a.	<i>Fox/Snap</i>	31
b.	<i>Moelis</i>	37
c.	<i>Activision</i>	42
d.	<i>Stream TV Networks, Inc. v. SeeCubic, Inc.</i>	47
D.	<i>Irrevocable Proxies — Daniel v. Hawkins</i>	51
II.	DEVIATIONS FROM PLAIN LANGUAGE	54
A.	<i>The Reasonable Expectations Doctrine — Ferrellgas</i>	54
B.	<i>Boilerplate in Bond Indentures</i>	55
1.	<i>The Three and a Half Minute Transaction</i>	55
2.	<i>Interpreting Debenture Boilerplate Language in Delaware</i>	59
3.	<i>Boilerplate Beyond Debentures</i>	60
C.	<i>Strategic Use of Proximity, Complexity and Vagueness (“Tripwires”)</i>	62
1.	<i>Advance Notice Bylaws — Kellner</i>	62
2.	<i>Rights Plans — Williams</i>	63
III.	NEW FRONTIERS FOR “PLAIN LANGUAGE”	
IN THE WORLD OF AI		65
A.	<i>Judge Newsom’s Concurrence in Snell</i>	65
B.	<i>AI in Drafting Agreements</i>	69
IV.	CONCLUSION	70

INTRODUCTION

In this article, I explore the role of “plain language” as an interpretative guide for Delaware courts construing corporate agreements, charters, bylaws, and statutes. This is not a rigorous scientific or linguistic study. Rather, it is a collection of my observations and musings based upon some of my experiences from my past decade on the Delaware Supreme Court.

I examine several recent decisions by the Delaware Supreme Court and the Delaware Court of Chancery to illustrate certain points. One key point is that discerning the meaning of words is no simple task. Judges can rely upon dictionary definitions, the context of the words within the document and common usage. But my experience has shown that, parties, judges and courts often disagree on the “plain meaning” of words.

The separate opinion in the Delaware Supreme Court’s decision in *Cox Communications, Inc. v. T-Mobile US, Inc.*¹ questions whether language is truly plain and unambiguous if jurists reading the same language disagree on its meaning. There, our *en banc* Delaware Supreme Court divided over how to interpret a provision in a settlement agreement between the corporate entities.² In a 3-2 split, the Majority declared the provision to be an unambiguous Type II preliminary agreement that merely obligated the parties to negotiate open items in good faith.³ The Vice Chancellor had also found the provision to be unambiguous, but concluded that it meant something different. The separate concurring and dissenting opinion maintained that both readings were reasonable and, as a result, the provision was ambiguous. Thus, in *Cox*, of the six judicial officers who examined the provision, three Justices saw it one way and three (the other two Justices and the Vice Chancellor) saw another reasonable reading.⁴ One might legitimately question, under these circumstances, the strength of the argument that there is only one reasonable way to read the provision. Although the separate opinion acknowledged that the law is well-established that the parties’ disagreement over the meaning of a provision does not render it ambiguous, it cited to case law suggesting that when members of a judicial panel disagree, there is more than one reasonable reading.

This article explores the importance of the words corporate drafters use and how those words can either achieve the drafters’ goals or lead to findings of ambiguity and unintended results. It raises the question of what the appropriate role is, if any, of “corporate practice” and settled commercial expectations in the analytical process. It also explores how prolixity and complexity in drafting has been perceived by courts as an attempt to create uncertainty or “tripwires” for strategic corporate advantage. Finally, the article comments on the downsides of boilerplate models in corporate instruments, briefly explores one federal judge’s recent foray into the use

1. 278 A.3d 752 (Del. 2022).

2. *Id.*

3. *Id.* at 760–61.

4. See *Cox Commc’ns, Inc.*, 278 A.3d at 768, 772 (Valihura, J., concurring in part, dissenting in part, joined by Montgomery-Reeves, J.) (“Although there is authority to the contrary, we are not, here suggesting that a divided panel — where one or more members contend that there is another reasonable interpretation — automatically ‘creates’ an ambiguity.”).

of artificial intelligence and large language models as an interpretive aide, and comments on the challenges lawyers now face in the corporate drafting exercise as a result of the increasing “commoditization” of the practice of law. My end goal, with hopefully a bit of levity at times, is to show that when drafters carefully choose clear, simple plain language to craft corporate documents, they are more likely to achieve their clients’ goals.

I.

EXAMPLES OF GENERAL PRINCIPLES AS APPLIED IN DIFFERENT CONTEXTS

A. *Construing Contracts and Transaction Agreements*

1. *General Principles*

Recently, in *BitGo Holdings, Inc. v. Galaxy Digital Holdings, Ltd.*,⁵ our Delaware Supreme Court commented that the basic principles that guide us when we review a trial court’s interpretation of a contract are well-settled. We summarized these principles as follows:

Delaware courts read the agreement as a whole and enforce the plain meaning of clear and unambiguous language. Delaware law adheres to the objective theory of contracts, *i.e.*, a contract’s construction should be that which would be understood by an objective, reasonable third party. 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. If a contract is plain and clear on its face, *i.e.*, its language conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent. Stated differently, clear and unambiguous language is reasonably susceptible of *only one* interpretation. Language from a contract need not be perfectly clear for an interpretation of it to be deemed as the only reasonable one.⁶

Other principles are also well-settled, such as the principle that courts seek to give each provision of corporate instruments

5. 319 A.3d 310 (Del. 2024).

6. *Id.* at 322 (citations and quotations omitted) (emphasis in original).

meaning.⁷ “If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity.”⁸ Courts should read specific provisions of the contract in light of the entire contract.⁹

Delaware is a contractarian state.¹⁰ When Delaware courts refer to themselves as “contractarian,” they refer to the tradition in Delaware law that protects the freedom enjoyed by sophisticated parties to contract.¹¹ Beyond Delaware courts and Delaware case law, the Delaware General Assembly has reinforced this principle in certain statutes.¹² The Delaware Revised Uniform Limited Partnership Act (“DRUPLA”), for example, gives “maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements.” Such provisions provide business entities like LLC’s and Partnerships with greater freedom to contract, thereby allowing them to “structure their relationship in the way they believe best suits them and their business.”¹³

7. *See* Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199, 1208 (Del. 2021) (explaining that contracts should be read as a whole to “enforce the plain meaning of clear and unambiguous language” and, in doing so, the Court should strive to “‘give each provision and term effect’ and not render any terms ‘meaningless or illusory’”).

8. *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

9. *See* Weinberg v. Waystar, Inc., 294 A.3d 1039, 1044 (Del. 2023) (quoting *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 913–14 (Del. 2017)) (“[I]n giving sensible life to a real-world contract, courts must read the specific provisions of the contract in light of the entire contract.”); *Lorillard Tobacco v. Am. Legacy Found.*, 903 A.2d 728, 740 (Del. 2006) (“A court must accept and apply the plain meaning of an unambiguous term in the context of the contract language and circumstances, insofar as the parties themselves would have agreed *ex ante*.”).

10. *See, e.g.*, *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 279 A.3d 323, 355 (Del. 2022) (“Delaware is a contractarian state.”); *Huatuco v. Satellite Healthcare*, No. CV 8465-VCG, 2013 WL 6460898, at *1 (Del. Ch. Dec. 9, 2013), *aff’d*, 93 A.3d 654, tbl., 2014 WL 2566155, (Del. 2014) (“Delaware law with regard to limited liability companies is contractarian . . .”).

11. *See, e.g.*, *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 180 n.14 (Del. 2015) (quoting *NACCO Indus., Inc. v. Applicia Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009)) (“Delaware upholds the freedom of contract and enforces as a matter of fundamental public policy the voluntary agreements of sophisticated parties.”).

12. *See, e.g.*, DEL. CODE ANN. tit. 6, § 17-1101 (West 2024) (“It is the policy of this chapter to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements.”).

13. *Touch of Italy Salumeria & Pasticceria, LLC v. Bascio*, No. CIV.A. 8602-VCG, 2014 WL 108895, at *1 (Del. Ch. Jan. 13, 2014).

In *Cantor Fitzgerald, L.P. v. Ainslie*,¹⁴ our Court emphasized this freedom of contract when it diverged from the common law on forfeitures and chose to uphold a forfeiture provision attached to a limited partnership agreement.¹⁵ The Court relied upon both the DRUPLA and Delaware case law.¹⁶ The Court highlighted the fact that the “sophisticated” party voluntarily entered into the partnership agreement and by its own actions assumed the risk of triggering the forfeiture provision.¹⁷ However, the Court in *Cantor Fitzgerald*, also acknowledged that this freedom is not without limits as “it is conceivable that a public-policy interest or inequitable outcome could, under some circumstances, outweigh the interest in freedom of contract enshrined in DRULPA. . . .”¹⁸ In this regard, our Court stated:

When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract.

Such public policy interests are not to be lightly found, as the wealth-creating and peace-inducing effects of civil contracts are undercut if citizens cannot rely on the law to enforce their voluntarily-undertaken mutual obligations.¹⁹

But some interpretative principles may appear to be counter-contractarian. In *Chicago Bridge & Iron Co. N.V. v. Westinghouse Electric Co.*,²⁰ this Court stated that “[t]he basic business relationship between parties must be understood to give sensible life to any contract.”²¹ This suggests the overall business context

14. 312 A.3d 674 (Del. 2024).

15. *Id.* at 692.

16. *Id.* at 688–89, 692.

17. *Id.* at 692.

18. *Id.*

19. *Id.* at 689 (quoting *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 903 (Del. 2021)).

20. 166 A.3d 912 (Del. 2017).

21. *Id.* at 927. *See also* *Heartland Payment Sys., Inc. v. InTEAM Assocs.*, 171 A.3d 544, 557 (Del. 2017) (considering the “spirit of the overall transaction”).

matters also.²² This “big picture” notion was not new. Our Supreme Court, in 1988 stated in *E.I. duPont de Nemours v. Shell Oil Co.*, that “the meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement’s overall scheme or plan.”²³ But discerning the purpose is still grounded in the text.²⁴

In *BitGo Holdings*, our Court reversed the trial court, finding the merger agreement to be ambiguous as to whether the seller’s financial statements had to comply with an SEC Staff Accounting Bulletin (SAB 121, issued one day after the agreement was signed) when those financials were submitted to the buyer, or later when the buyer submitted them to the SEC.²⁵

The Court did not refer to *Chicago Bridge* in its analysis, but it did comment that “Galaxy’s interpretation accords with a common sense reading of the definition’s ‘file-ready’ requirement.”²⁶ It found the definition of “Company 2021 Audited Financial Statements” to be ambiguous and remanded so that the trial court could consider extrinsic evidence to resolve the ambiguity.²⁷ BitGo’s failure to submit the financial statements to Galaxy on time would provide Galaxy with a termination right. Thus, although the Court noted that a “common sense reading” of the “Company 2021 Audited Financial Statements” definition in the merger agreement would support Galaxy’s interpretation of the provision, the Court did not find that common sense approach controlling. Instead, it held that there were two reasonable interpretations of the language and that the provision was ambiguous.²⁸

22. *See* *Lorillard Tobacco v. Am. Legacy Found.*, 903 A.2d 728, 740 (Del. 2006) (“A court must accept and apply the plain meaning of an unambiguous term in the context of the contract language and circumstances, insofar as the parties themselves would have agreed *ex ante*.”).

23. 498 A.2d 1108, 1113 (Del. 1985).

24. *See* *Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019) (“To determine what contractual parties intended, Delaware courts start with the text.”).

25. *BitGo Holdings, Inc. v. Galaxy Digital Holdings, Ltd.*, 319 A.3d 310, 314 (Del. 2024).

26. *Id.* at 328.

27. *Id.* at 314. The financial statements were to be “in a form that complies with the requirements of Regulation S-X for an offering of equity securities pursuant to a registration statement on Form S-1 for a nonreporting company.” *Id.* at 315.

28. *Id.* at 328.

Most recently, this Court affirmed the Court of Chancery's decision in *Soleimani v. Hakkak and White Oak Healthcare Finance LLC*²⁹ on the basis of the opinion below, which reinforced Delaware's contractarian principles described above. The Court of Chancery relied upon these principles to interpret a termination provision in a series of identical LLC agreements, namely, "provided that the Company has satisfied," as creating a condition precedent that payment obligations in a term sheet must be satisfied *before* the plaintiff could be removed as an employee and manager.³⁰ The Court of Chancery opinion reasoned that because other provisions of the LLC agreements used a different future construction, namely, "provided . . . shall," the principle that "[t]he use of different language in sections of a contract indicates that the distinction is intentional" applied. Based upon that principle, the court concluded that the parties intended the different terms to have different meanings.³¹

Accordingly, the Court of Chancery held that "provided . . . has satisfied" was a condition precedent, and that meant that the employee had to be paid for his equity stake before he could be removed.

The Appellants argued that the Court of Chancery's interpretation was contrary to the entire deal structure and led to an absurd result where the terminated founder was allowed to remain in his position until the payments provided for in the agreement were made. Ultimately, the Court concluded that "[e]nforcing the plain language of the contract does not create an absurd or commercially unreasonable result" because the plaintiff negotiated for a fully vested equity stake if he devoted five or more years to the company.³² As the Court of Chancery noted, and the Supreme Court affirmed, Section 6.1 "says what

29. No. 2023-0948-LWW, 2024 WL 1593923 (Del. Ch. Apr. 12, 2024), *aff'd*, 2024 WL 4235006, tbl. (Del. Sept. 19, 2024).

30. *Id.* at *5. Section 6.1 of the LLC agreements at issue states in relevant part: "Mr. Soleimani may be removed by the Company as an employee in accordance with the provisions of the Term Sheet, *provided that the Company has satisfied its obligations under the Term Sheet relating to a Specified Termination Event* (as defined in the Term Sheet)." *Id.* (emphasis added by lower court).

31. *Id.* at *6 (citing *Williams Cos., Inc. v. Energy Transfer LP*, No. 12168-VCG, 2020 WL 3581095, at *12 n.123 (Del. Ch. July 2, 2020) ("One principle of contract interpretation in Delaware is that the use of different language in different sections of a contract suggests the difference is intentional—*i.e.*, the parties intended for the sections to have different meanings.")).

32. *Id.* at *10.

it means and means what it says,” and although the defendants “may find this outcome unpalatable[,] . . . it is not [the] court’s job to relieve sophisticated parties of the burdens of contracts they wish they had drafted differently. Parties have a right to enter into good and bad contracts, the law enforces both.”³³

2. *Illustrative Cases*

Moving from “big picture” principles to the exact opposite end of the plain language spectrum, the next several cases illustrate that a court’s interpretation of even small words like “and,” “a,” and “the” can be outcome determinative in significant corporate disputes. In these cases, the Delaware courts were required to wade into the minutiae of grammar and punctuation rules.

a. *Weinberg v. Waystar* — “And”

The plain language of even the smallest and most common words can have significant consequences for the parties to a contract. In *Weinberg v. Waystar*,³⁴ for example, the Delaware Supreme Court was asked to construe the meaning of a surprisingly controversial word—“and”—in three separate stock option agreements executed by Waystar, Inc. (“Waystar”) and its then-employee Tracy Weinberg (“Weinberg”) (the “Option Agreements”). The answer to the question would determine whether Waystar had validly exercised a call right to repurchase approximately \$1.8 million worth of company units from its former employee, Weinberg.³⁵

In *Waystar*, the divisive “and” was located in a call right provision contained in each Option Agreement (the “Call Right Provision”). The Call Right Provision provided that:

The Converted Units shall be subject to the right of repurchase (the “Call Right”) exercisable by Parent, a member of the Sponsor Group, or one of their respective Affiliates, as determined by Parent in its sole discretion, during the six (6) month period following (x) the (i) the Termination of [Weinberg’s] employment with the Service Recipient for any reason

33. *Id.* (cleaned up).

34. (*Waystar II*), 294 A.3d 1039 (Del. 2023).

35. *Id.* at 1042, 1046.

(or, if later, the six (6) month anniversary of the date of the exercise of the [Substitute] Options in respect of which the Option Stock was issued, **and** (y) a Restrictive Covenant Breach. The Call Right shall expire on the earlier of (i) an Initial Public Offering or (ii) a Change of Control.³⁶

The question was whether Waystar could exercise its call right after either the “Termination of [Weinberg’s] employment” or “a Restrictive Covenant Breach,” or only after both events had occurred. At the time of litigation, Waystar had exercised its call right, but the parties agreed that only one event—Weinberg’s termination—had occurred.³⁷

The Court of Chancery determined that the “and” in the Call Right Provision was unambiguous.³⁸ In doing so, the court did not deny that “and” was being used in the conjunctive sense, as opposed to a disjunctive sense, as Weinberg argued.³⁹ Instead, the court found that in the context of the Option Agreements, and considering that the Call Right Provision was “permissive,” the “and” was being used in its “several” sense.⁴⁰ This meant that Waystar had the option of exercising its call right after Weinberg’s termination, or her breach of a restrictive covenant, or both.

Moreover, the Court of Chancery found that Waystar’s interpretation was the only interpretation that gave effect to all of the terms in the first two of the three option agreements.⁴¹ Specifically, the court found that Weinberg’s interpretation would render a provision in the first two option agreements, which determined the price which Waystar would pay to repurchase Weinberg’s units, surplusage.⁴² That provision provided that, upon the occurrence of certain enumerated events, including a Restrictive Covenant Breach, the repurchase price would be calculated differently than if such event had not occurred. Accordingly, if Weinberg were correct that the call right was

36. *Id.* at 1042.

37. *Id.*

38. *Weinberg v. Waystar, Inc. (Waystar I)*, No. 2021-1023-SG, 2022 WL 2452141 (Del. Ch. July 6, 2022).

39. *Id.* at *3 (“According to Weinberg, the Defendants’ interpretation would transform the conjunctive ‘and’ into a disjunctive ‘or.’”).

40. *Id.* at *4.

41. *Waystar II*, 294 A.3d at 1056.

42. *Waystar I*, 2022 WL 2452141, at *5.

only triggered upon the occurrence of both termination and a Restrictive Covenant Breach, then only one repurchase price would ever apply, leaving the other repurchase price clause meaningless.

Weinberg appealed from the Court of Chancery’s decision, arguing that the trial court had erred in failing to give “and” its plain meaning as a conjunctive word.⁴³ Citing case law from many jurisdictions, including Delaware, she argued that courts construe “and” according to its ordinary, conjunctive meaning, absent an absurd result.⁴⁴ In Weinberg’s view, to construe “and” disjunctively would be tantamount to finding that “and” means “or.”⁴⁵ At the least, she argued, the Call Right Provision was ambiguous, and should be construed against Waystar as the drafter of the Option Agreements.⁴⁶

Reviewing Weinberg’s appeal, the Delaware Supreme Court began by affirming that it would apply its well-established principles of contract interpretation.⁴⁷ In other words, it would give “and” its plain meaning if it determined the word was unambiguous, as informed by context, as the Court of Chancery had done in its trial opinion.⁴⁸ Ultimately, it agreed with the Court of Chancery that “and” in the Call Right Provision was unambiguous: it provided Waystar the option to exercise its call right after either condition had occurred.

Regarding the meaning of “and,” the Delaware Supreme Court observed that “two avenues of interpretation — the ‘conjunctive or disjunctive’ path and the ‘joint or several’ path — have emerged from the, at times, lively debate.”⁴⁹ As to the

43. *Waystar II*, 294 A.3d at 1043.

44. *Id.* n.5.

45. *Id.* at 1047 n.29.

46. *Id.* at 1061.

47. In doing so, the Court rejected Weinberg’s contention that in Delaware, courts would construe an “and” conjunctively, absent a finding that such a construction would produce an absurd result. *Id.* at 1043 n.5.

48. Specifically, the Court stated “[w]e will read the contract as a whole and ‘enforce the plain meaning of clear and unambiguous language.’ In doing so, we endeavor ‘to give each provision and term effect’ and not render any terms ‘meaningless or illusory.’ Moreover, ‘[i]n giving sensible life to a real-world contract, courts must read the specific provisions of the contract in light of the entire contract.” *Id.* at 1044 (first quoting *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1208 (Del. 2021), then quoting *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 913–14 (Del. 2017)).

49. *Id.* at 1044–45.

first path, the Court noted that “although ‘and,’ typically bears a conjunctive meaning, that presumption can be overcome by context.”⁵⁰ As to the second path, the Court observed that “when confronting whether ‘and’ is several or joint, we will look to ‘the context of the sentence, and what we externally know about the conjoined elements.’”⁵¹ It emphasized that, although courts “often conflate[] the two issues,” “the determination between joint and several is distinct from the determination between conjunctive and disjunctive.”⁵²

In illustrating this point, the Court explored the federal circuit court of appeals cases interpreting an “and” in a federal criminal statute known as the First Step Act.⁵³ As the Court

50. *Id.* at 1045.

51. *Id.* at 1046 (quoting *OfficeMax, Inc. v. United States*, 428 F.3d 583, 600 (6th Cir. 2006) (Rogers, J., dissenting)).

52. *Id.* at 1046–47.

53. *Id.* at 1047. The Court examined then-recent decisions from: the Ninth Circuit, *see United States v. Lopez*, 998 F.3d 431, 435 (9th Cir. 2021), *reh’gen banc denied*, 58 F.4th 1108 (9th Cir. 2023), *abrogated by Pulsifer v. United States*, 601 U.S. 124 (2024); the Eighth Circuit, *see United States v. Pulsifer*, 39 F.4th 1018 (8th Cir. 2022), *aff’d*, 601 U.S. 124 (2024); the Seventh Circuit, *see United States v. Pace*, 48 F.4th 741 (7th Cir. 2022), *reh’gen banc denied*, 2022 WL 17254332 (7th Cir. 2022), *cert. denied*, 144 S. Ct. 1092 (2024); the Fifth Circuit, *see United States v. Palomares*, 52 F.4th 640 (5th Cir. 2022), *cert. denied*, 144 S. Ct. 1092 (2024); the Sixth Circuit, *see United States v. Haynes*, 55 F.4th 1075 (6th Cir. 2022), *cert. denied*, 144 S. Ct. 1093 (2024); the Fourth Circuit, *United States v. Jones*, 60 F.4th 230 (4th Cir. 2023), *judgment vacated*, 144 S. Ct. 1091 (2024), and *abrogated by Pulsifer v. United States*, 601 U.S. 124 (2024); and two decisions (one panel and one en banc) from the Eleventh Circuit, *see United States v. Garcon*, 997 F.3d 1301 (11th Cir. 2021), *opinion vacated*, 23 F.4th 1334 (11th Cir. 2022), *reh’gen banc*, 54 F.4th 1274 (11th Cir. 2022) and *United States v. Garcon*, 54 F.4th 1274 (11th Cir. 2022), *abrogated by Pulsifer v. United States*, 601 U.S. 124 (2024) (en banc). The Supreme Court resolved this circuit split in *Pulsifer v. United States*, 601 U.S. 124 (2024). Justice Kagan, writing for the six-justice majority, held that although the conjunctive and disjunctive reading are both grammatically permissible, the disjunctive reading is the only plausible statutory construction. *Id.* at 141–42. The Safety Valve functioned as a checklist with three necessary conditions for relief. *Id.* at 139–49. Because there was only one plausible statutory construction, the majority held the rule of lenity did not grant the appellant relief. *Id.* at 152–53. Justice Gorsuch dissented, joined by Justice Jackson and Justice Sotomayor, arguing the “and” should be given its conjunctive meaning because “an ordinary reader would naturally understand that a defendant is eligible for individualized sentencing if he does not have’ trait A, trait B, *together with* trait C.” *Id.* at 162 (Gorsuch, J., dissenting). Justice Gorsuch characterized the provision as unambiguous but would have applied lenity where there was still reasonable doubt about the best interpretation. *Id.* at 184–85. Thus, even the Supreme Court could not agree on whether “and” was conjunctive or disjunctive.

observed, the federal circuit courts divided on which avenue of interpretation to venture down and on which canons of interpretation were relevant to the issue. Notwithstanding their different interpretations, each circuit court found that the “and” was unambiguous.⁵⁴

Turning to the context in which the Call Right Provision’s “and” appeared, the Delaware Supreme Court agreed with the Court of Chancery that Waystar’s interpretation—“and” as having a several sense—was the only interpretation that gave effect to all terms in the Option Agreements.⁵⁵ Moreover, it agreed with the Court of Chancery that the Call Right Provision was a “permissive” sentence, *i.e.*, it permitted Waystar to take action, and, accordingly, the “several” sense of “and” “aligns with our understanding of common, ordinary usage.”⁵⁶

The Delaware Supreme Court also determined that the “several” “and” aligned with what a reasonable third party would expect from the Option Agreements.⁵⁷ Further, Weinberg’s suggested joint “and” would produce an illogical result, depriving Waystar of the ability to repurchase its equity in certain scenarios (*i.e.*, a Restrictive Covenant Breach), but not in others (*i.e.*, an employees’ commission of a felony).⁵⁸ Finally, the Court found that Waystar’s interpretation was the only interpretation that accorded with the purpose of a call right, both as that right is generally understood and as stated in the company’s equity incentive plan documents.⁵⁹ Thus, the Call Right Provision was unambiguous and Waystar had validly exercised its call right to repurchase Weinberg’s units after her termination, despite the absence of a restrictive covenant breach.

54. *Waystar II*, 294 A.3d at 1048.

55. *Id.* at 1054–55. Not only did the Delaware Supreme Court agree with the Court of Chancery that Weinberg’s interpretation would render a repurchase price provision surplusage, but it also found that an “if later” clause elsewhere in the Option Agreements would be rendered surplusage under Weinberg’s reading. *Id.* at 1055.

56. *Id.* at 1058.

57. *Id.* at 1059 (“[T]he nature of a Call Right and the plain language of the Call Right Provision in each Option Agreement suggest that a reasonable third party would expect that Appellees retained a broad right to repurchase Weinberg’s Converted Units.”).

58. *Id.*

59. *Id.* at 1060–61.

b. *ION Geophysical Corp.* — “A” and “The”

Another example of small words having big consequences is *ION Geophysical Corp. v. Fletcher International, Ltd.* There, the Delaware Court of Chancery was asked to interpret the plain language of Section 6(b) found in the preferred stock purchase agreement between ION Geophysical Corp. (“ION”) and Fletcher International, Ltd. (“Fletcher”). ION sought a declaration that a notice provision found in that section of the stock purchase agreement permitted Fletcher to issue only one notice, rather than multiple notices.⁶⁰ That notice provision enabled Fletcher to increase the total number of ION common shares into which it may convert its preferred shares.⁶¹ One method in which Fletcher could increase its liquidity under the Agreement was to convert its Series D Stock into ION common stock.⁶² Upon the occurrence of certain events, Section 6(b) gave Fletcher the right to increase the Maximum Number from 7,669,434 shares by giving a 65-Day Notice of the increase to ION stock.⁶³ Section 6(b) established this right and provided:

(b) The aggregate number of shares of Common Stock issued, as of a particular date, upon conversion or redemption of, or as dividends paid on the Series D Preferred Shares owned by Fletcher and issuable pursuant to this Agreement shall not exceed the Maximum Number as of that date. The “Maximum Number” shall initially equal seven million, six hundred sixty-nine thousand, four hundred thirty-four (7,669,434), or, in the event of a Change of Control, shall equal nine and three-fourths percent (9.75%) of the outstanding common stock of the Acquiring Person as of immediately after the consummation of the Change of Control, and may be increased upon expiration of a [*8] 65-Day Notice period (*the* “Notice Period”) after Fletcher delivers *a* notice (*a* “65-Day Notice”) to the Company designating a greater Maximum Number. A 65-Day Notice may be given at any time. From time to time following the Notice Period,

60. *ION Geophysical Corp. v. Fletcher Int’l, Ltd.*, No. 5050-VCP, 2010 WL 4378400, at *1 (Del. Ch. Nov. 5, 2010).

61. *Id.*

62. *Id.* at *2.

63. *Id.*

Common Stock may be issued to Fletcher for any quantity of Common Stock, such that the aggregate number of shares of Common Stock issued hereunder is less than or equal to the Maximum Number.⁶⁴

In November 2008, the 20-day volume-weighted average from the previous 20 trading days of the common stock fell to less than the Minimum Price.⁶⁵ On that day, Fletcher delivered a 65-Day Notice, increasing the Maximum Number by two million shares.⁶⁶ Then, about a year later, on September 15, 2009, Fletcher delivered another 65-Day Notice to increase the shares by another two million.⁶⁷ They were now up four million shares. ION received the second notice but decided not to honor that one.⁶⁸ ION filed a complaint against Fletcher seeking a declaration that the second notice was invalid under the Agreement. ION claimed that the plain language of the Agreement gave Fletcher the right to issue only one 65-Day Notice to raise the Maximum Number of shares.⁶⁹ This is because Section 6(b) referred to “a notice” and “the notice period” in the singular tense.⁷⁰ On the other hand, Fletcher argued that the plain language showed that they had the right to issue multiple 65-Day Notices.⁷¹ This is because “a” is indefinite and should be read as one or more.⁷²

The Delaware Court of Chancery determined that “the plain language of Section 6(b) is unambiguous and that the only reasonable interpretation is that Fletcher is entitled to issue to ION one or more 65-Day Notices” and, even if the section were considered ambiguous and extrinsic evidence were necessary, the interpretation would be the same.⁷³ The Court explained that an article is “definite” if “it provides distinct and certain limits to the noun it precedes” but “indefinite” when the article “does not designate an identified or immediately identifiable person or thing or fails to give exact limits to the noun it modifies.”⁷⁴

64. *Id.*

65. *Id.* at *3.

66. *Id.* at *4.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at *6.

71. *Id.*

72. *Id.*

73. *Id.* at *5.

74. *Id.* at *7.

“The” is used as a function to indicate the following noun is definite whereas “a” is indefinite and used “as a function word before singular nouns when the referent is unspecified.”⁷⁵ “A” does not, according to the Court, limit the frequency or duration of that noun.⁷⁶

The court explained that in Section 6(b), “a” was placed before the noun “65-Day Notice” and put indefinite and definite articles to modify the noun “Notice Period.”⁷⁷ This, according to the court, “places no limitation on the number of 65-Day Notices that may be issued.”⁷⁸ The court used an example and explained that once a Notice is issued and the 65 day period is up, that new share number becomes the Maximum Number and, once that time limit passes and the other party were to deliver a second Notice specifying an increase, the Maximum would once again increase.⁷⁹ This was contradictory to ION’s interpretation, where it would be fixed at the first Notice number increase.⁸⁰ However, “[n]otably, under Fletcher’s interpretation, one could determine the Maximum Number on any particular date and the dates of the governing Notice Period.”⁸¹

Furthermore, the Court recognized that ION cited cases where “a” referred to a single event or item; the Court responded by stating that the interpretation can depend on both context and grammar laws.⁸² Moreover, even though those cases use “a” in the singular form, ordinary usage is often in the plural form.⁸³ Therefore, given the context and the ordinary usage notion, the court reached the conclusion that “a” should generally be read in the plural sense.⁸⁴ The fact that the article “the” is used to modify “Maximum Number,” and “a” is later used in the same sentence to modify “a 65-Day notice period” and “a notice” is contextual evidence that “a” is plural.⁸⁵ The court explained that “[t]he use of the indefinite article ‘a’ in the second sentence of §6(b), especially in contrast to the use

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at *8.

83. *Id.*

84. *Id.*

85. *Id.*

of the definite article ‘the’ in the same sentence, supports the interpretation that Fletcher was not limited to issuing a single 65-Day Notice.”⁸⁶

Moreover, even though ION attempted to focus on “the” in the fourth sentence, the analysis was deemed weak as “[t]he parties used the definite article ‘the’ in the fourth sentence to signify that once a 65-Day Notice is issued, a particular Notice Period of 65 days in length begins to run.”⁸⁷ The court explained further that, “the fourth sentence describes what happens once a 65-Day notice is issued; it does not prescribe how many such notices may be issued.”⁸⁸ In terms of the third sentence, the court found that the phrase “at any time” concerned when a Notice may be issued, not how many notices may be issued.⁸⁹ Furthermore, taking “at any time” with the rest of Section 6(b), the phrase does not limit Fletcher to a single issuance of a 65-Day Notice.⁹⁰ Therefore, when taking Section 6(b) within its own confines, the court found that it was unambiguous.

In terms of analyzing Section 6(b) in light of the other sections of the Agreement, the court further concluded that it was unambiguous. Even though other sections used language like “one or more” to indicate multiple or plural words — rather than “a” — this did not mean that Section 6(b) was ambiguous.⁹¹ The Court cited to other sections that used the plural “a” form and stated that “ION’s reliance on other provisions in the Agreement and the Certificate to support its position that the parties intended the indefinite article ‘a’ in Section 6(b) of the Agreement to mean there could be one and only one 65-Day Notice is unavailing.”⁹² Overall, the plural phrases are used to achieve the same purpose as using “a.”⁹³ “[N]one of the other provisions in the Agreement or the Certificate clearly indicates that the article ‘a’ in §6(b) should not be read in its usual, plural sense.”⁹⁴ Therefore, the court held that the only “reasonable interpretation” was to conclude that you could bring one or more 65-Day Notices.

86. *Id.* at *9.

87. *Id.*

88. *Id.*

89. *Id.* at *10.

90. *Id.*

91. *Id.* at *11.

92. *Id.* at *12.

93. *Id.*

94. *Id.*

c. *SeaWorld Entertainment* — The Use of Parentheticals

In *SeaWorld Entertainment, Inc. v. Brad Andrews, et al.*, the Court of Chancery was asked to interpret the plain language of separation agreements entered into between former executives of SeaWorld Entertainment, Inc. (“SeaWorld”), and SeaWorld, at the time that the executives were terminated as employees of the company.⁹⁵ During the course of each executives’ employment at SeaWorld, each entered into an equity agreement with the company pursuant to which they were granted unvested equity awards. The equity agreements conditioned the vesting of the awards on both the performance of the company in the event of a sale (the “Performance Condition”), and the continued employment of the employee receiving the award (the “Employment Condition”). Later, upon the executives’ termination from SeaWorld, each executive entered into a separation agreement with the company, which “amended” the equity agreements.⁹⁶ Each separation agreement provided that the executives’ unvested equity awards: “shall not be forfeited on the Termination Date and shall continue to be eligible to vest (as if the Participant had remained continuously employed with the Company) in accordance with the provisions of [the Equity Agreements.]”⁹⁷

Following the executives’ termination from SeaWorld, in connection with a sale of the company that did not meet the Performance Condition, SeaWorld amended the equity agreements of current employees and incumbent management.⁹⁸ That amendment, the “60% Amendment” provided that, despite the failure of the sale to meet the Performance Condition, 60% of those employees’ unvested equity awards would vest. Specifically, the 60% Amendment provided: “Notwithstanding the foregoing [conditions], subject to Participant’s continued employment with the Company through the Closing [of the Sale] . . . sixty percent (60%) of the [Unvested Awards] . . . shall [vest] upon the Closing.”⁹⁹

95. *SeaWorld Ent., Inc. v. Andrews*, 2020-0955-NAC, 2023 WL 3563047, at *1 (Del. Ch. May 19, 2023).

96. *Id.*

97. *Id.* (alteration in original).

98. *Id.* at *2.

99. *Id.* (alteration in original).

Despite the fact that SeaWorld did not modify the separation agreements of the departed executives, the executives demanded that SeaWorld issue them 60% of their unvested awards. SeaWorld responded by filing suit in the Court of Chancery to declare that the executive defendants were not entitled to any vested equity awards. In a letter opinion, the Court of Chancery granted SeaWorld’s motion to dismiss and motion for judgment on the pleadings, because “the Company has offered the only reasonable interpretation of the Separation Agreements.”¹⁰⁰

First, the Court of Chancery observed that the purpose of the equity incentive plan, was “to offer incentive compensation to Company personnel.”¹⁰¹ Thus, the equity agreements contained the Employment Condition, which tied the vesting of the equity awards to the continued employment of the employee receiving the award. The separation agreements the executives entered into upon their termination untied the vesting of the awards from their employment. In other words, “the Separation Agreements were designed solely to remove the Employment Condition.”¹⁰²

The Court of Chancery found that “neighboring provisions reinforce this conclusion.”¹⁰³ Moreover, the separation agreements “reflect[ed] the Company’s broad discretion to amend the Equity Agreements.”¹⁰⁴ Ultimately,

The Separation Agreements amended the Equity Agreements of *Defendants, i.e.*, certain former employees, to remove the *Employment Condition*. In contrast, the 60% Amendment amended the Equity Agreements of *current* employees to remove the *Performance Condition*. The 60% Amendment caused 60% of the Unvested Awards to vest in the Sale, “subject to Participant’s continued employment . . . through the closing” of the Sale, even though the Sale did not satisfy the Performance Condition. The 60% Amendment did not mention, let alone amend, the Separation Agreements.¹⁰⁵

100. *Id.* at *4.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at *5.

In response, the defendant executives argued that the contracts were ambiguous.¹⁰⁶ They argued, in part, that the parenthetical in the separation agreements — “(as if the Participant had remained continuously employed with the Company)” — “deputized them as current employees for all vesting purposes.”¹⁰⁷ Thus, “[b]ecause the 60% Amendment applies to current employees (including executives), the 60% Amendment must apply to them too.”¹⁰⁸ In rejecting the defendants’ interpretation as “unreasonable,” the Court of Chancery stated:

Words do not exist in isolation. So contracts cannot be construed in isolation either. Quite the opposite: In upholding the intentions of the parties, a court must construe the agreement as a whole, giving effect to all provisions therein. A particular word or phrase cannot be read to pollute the larger linguistic sea in which it swims. Put doctrinally, [t]he meaning from a particular provision cannot control the meaning of the entire agreement if such an inference conflicts with the agreement’s overall scheme or plan.¹⁰⁹

Specifically, the Court of Chancery found that the parenthetical clause modified the preceding clause “shall continue to be eligible to vest.”¹¹⁰ Thus, the parenthetical clause “did not establish a right to the Unvested Awards that did not previously exist under the Equity Agreements. Instead, the Parenthetical Clause means that Defendants would have been entitled to their Unvested Awards — “(as if they had remained continuously employed)” — if the Sale had satisfied the Performance Condition. It did not.”¹¹¹

The Court of Chancery then concluded with what can be read as a parting warning to drafters thinking of using parenthetical clauses: “Delaware courts have described contracts that place terms in parentheticals as ‘poorly drafted,’ ‘sloppy,’ less than ‘careful,’ ‘potentially puzzling,’ and in some cases, ‘an

106. *Id.* (“Defendants do not respond with a plain reading of their contracts. Instead, they try to create ambiguity. Those efforts fall short.”).

107. *Id.*

108. *Id.*

109. *Id.* (internal footnotes omitted) (internal quotations omitted).

110. *Id.*

111. *Id.*

obvious blunder.’ Although the Parenthetical Clause may not reflect model drafting, it does not support Defendants’ interpretation.”¹¹²

B. *Construing Charters and Bylaws*

Let us now turn our attention to some specific types of corporate instruments — charters and bylaws.

1. *General Principles*

“Because corporate charters and bylaws are contracts, our rules of contract interpretation apply.”¹¹³ “If [a contract] is unambiguous, then there is no room for judicial interpretation and ‘the plain meaning . . . controls.’”¹¹⁴ A court is bound by the principles of contract interpretation when construing a corporation’s bylaws.¹¹⁵ Words must be “given their commonly accepted meaning unless the context clearly requires a different one or unless legal phrases having a special meaning are used.”¹¹⁶ If the language of a bylaw is unambiguous, a “court need not interpret it or search for the parties’ intent.”¹¹⁷ Moreover, “‘the construction or interpretation of a corporate certificate or by-law is a question of law subject to *de novo* review by [the Delaware Supreme Court].”¹¹⁸

112. *Id.* at *6 (internal footnotes omitted) (internal quotations omitted).

113. *BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd.*, 224 A.3d 964, 977 (Del. 2020) (quoting *Hill Int’l Inc. v. Opportunity Partners L.P.*, 119 A.3d 30, 38 (Del. 2015)); *see also* *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 279 A.3d 323, 336 (Del. 2024) (quoting *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012)) (“‘Certificates of incorporation are regarded as contracts between the shareholders and the corporation, and are judicially interpreted as such.’”).

114. *PHL Variable Ins. Co. v. Pure Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1070 (Del. 2011) (quoting *LeVan v. Indep. Mall, Inc.*, 940 A.2d 929, 933 (Del. 2007)).

115. *Brown v. Matterport, No. 2021-0595-LWW*, 2022 WL 89568, at *3, *aff’d* 282 A.3d 1053 (Del. 2022) (citing *Saba*, 224 A.3d at 977 (“Because corporate charters and bylaws are contracts, our rules of contract interpretation apply.”)).

116. *Id.* at *3 (quoting *Hill*, 119 A.3d at 38).

117. *Id.* (quoting *Saba*, 224 A.3d at 977).

118. *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 279 A.3d 323, 336 (Del. 2022) (quoting *Centaur Partners, IV v. Nat’l Intergroup, Inc.*, 582 A.2d 923, 926 (Del. 1990)).

2. *Illustrative Cases*

a. *Kellner v. AIM ImmunoTech, Inc.*

On July 11, 2024, our Supreme Court reaffirmed, in *Kellner v. AIM ImmunoTech, Inc.*, that “[u]nder Delaware law, bylaws are ‘presumed to be valid’ and must be interpreted ‘in a manner consistent with the law.’”¹¹⁹ “A facially valid bylaw is one that is authorized by the Delaware General Corporation Law (DGCL), consistent with the corporation’s certificate of incorporation, and not otherwise prohibited.”¹²⁰ When a bylaw is challenged facially in court, “it is insufficient for a plaintiff to simply assert that under some circumstances, a bylaw might conflict with a statute or operate unlawfully.”¹²¹ Instead, the plaintiff must demonstrate that the bylaw cannot operate lawfully under any set of circumstances.

In *Kellner*, a group of Aim ImmunoTech, Inc. stockholders thought that the board of directors was mismanaging the company. The insurgents included two felons convicted of wire fraud, insider trading, and other crimes. The campaign escalated into two attempts to nominate directors to the AIM board.

The board rejected both nomination notices under its existing bylaws, which led to a lawsuit over the second notice. The Court of Chancery denied the insurgents’ request for a mandatory preliminary injunction to place their nominees on the annual meeting ballot. The court held that factual disputes about the veracity of the insurgents’ disclosures precluded temporary mandatory injunctive relief.

The insurgents persisted and reshuffled their membership, with Ted D. Kellner leading a third attempt to nominate three new directors to the AIM board. The board amended its bylaws to include sweeping new advance notice provisions that required detailed disclosures by Kellner and his nominees. Many of the amendments were approved in direct response to the insurgents’ campaign.

Again, the AIM board rejected Kellner’s nominations for failing to comply with the new advance notice bylaws. Kellner sued. Following a trial, the Court of Chancery invalidated four

119. *Kellner v. AIM ImmunoTech, Inc.*, 320 A.3d 239, 258 (Del. 2024) (quoting *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985)).

120. *Id.* (citations and quotations omitted).

121. *Id.* (citations and quotations omitted).

of the six main advance notice bylaws and reinstated the 2016 version of one of the invalidated bylaws. In the end, the court upheld the board's rejection of the third nomination notice because it failed to comply with the two advance notice bylaws left standing, including the reinstated 2016 bylaw.

Kellner argued on appeal that the trial court erred in rejecting his notice based upon the 2016 bylaw because the AIM board did not rely on that bylaw in rejecting his notice. He also contended that the 2016 bylaw had been repealed when the board enacted the amended bylaws. According to Kellner, the court erred when it held that two of the amended bylaws withstood enhanced scrutiny when, at the same time, it had determined that many others were preclusive and had been adopted for an improper purpose. Finally, he argued that the court erred in finding that the notice failed to comply with the remaining bylaws left standing.

The defendants filed a cross-appeal challenging the trial court's invalidation of four of the amended bylaws. They contended that the court confused a "facial" challenge with an "as-applied" challenge and that Kellner had raised only an "as-applied" challenge. Thus, according to defendants, the court should not have invalidated the four amended bylaws which they asserted withstand enhanced scrutiny in any event.

In resolving the issues on appeal, we first established the framework for evaluating the issues as follows:

In a challenge to the adoption, amendment, or enforcement of a Delaware corporation's advance notice bylaws that is ripe for judicial review, the court should consider the following: first, if contested, whether the advance notice bylaws are valid as consistent with the certificate of incorporation, not prohibited by law, and address a proper subject matter; and second, whether the board's adoption, amendment, or application of the advance notice bylaws were equitable under the circumstances of the case.¹²²

In applying this framework, our Court held that: (1) one "unintelligible" bylaw was invalid; (2) the remaining advance notice bylaws at issue were valid because they were consistent

122. *Id.* at 246.

with the certificate of incorporation, not prohibited by law, and address a proper subject matter; and (3) the AIM board had acted inequitably when it adopted the amended bylaws for the primary purpose of interfering with, and ultimately rejecting Kellner's nominations. As a result, the remaining bylaws challenged on appeal were unenforceable. We also noted that, according to the Court of Chancery, Kellner had submitted false and misleading responses to some of the requests. Given the trial court's countervailing findings about Kellner's and his nominees' deceptive conduct, no further action was warranted, and the case was closed. We discuss other aspects of this case later in this article in the section on linguistic "tripwires."¹²³

b. *Hill International Inc. v. Opportunity Partners, L.P.*

In *Hill International Inc. v. Opportunity Partners, L.P.*,¹²⁴ our Court reinforced that "[t]he bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers and stockholders formed within the statutory framework of the Delaware General Corporation Law."¹²⁵ "Words and phrases used in a bylaw are to be given their commonly accepted meaning unless the context clearly requires a different one or unless legal phrases having a special meaning are used."¹²⁶

There our Court determined, in construing an advance notice bylaw, that the plain meaning of "the date" (in a provision referring to "notice or prior public disclosure of the date of the annual meeting") meant a specific day — not a range of possible days. The proxy statement's reference to "on or about June 10, 2015" did not refer to "the date" of the company's annual meeting.¹²⁷ Rather, "on or about" referred to an approximate, anticipated, or targeted time frame that was intended to encompass more than one "date."¹²⁸ Thus, the proxy statement did not provide "prior public disclosure" of the company's annual meeting.

123. See *infra* pp. 56–58.

124. 119 A.3d 30, 38 (Del. 2015).

125. *Id.*

126. *Id.* (quoting *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1188 (Del. 2010)).

127. *Id.* at 39–40.

128. *Id.* at 40.

C. *Construing Statutes*

Now, let us turn to some examples of plain language principles applied in the context of construing statutes.

1. *General Principles*

Our Court reviews the interpretation of statutes *de novo*.¹²⁹ We have summarized some of the relevant principles of statutory interpretation as follows:

The principles of statutory interpretation under Delaware law are clear. “When interpreting a statute, the Court’s priority is to ‘determine and give effect to the legislative intent.’ The starting point is the language of the statute. The ‘most important consideration for a court in interpreting a statute is the [language] the General Assembly used in writing [the statute].’ If a statute is unambiguous, there is no need for judicial interpretation, and the plain meaning of the statutory language controls. “The fact that the parties disagree about the meaning of the statute does not create ambiguity.” Statutory language is ambiguous when it is reasonably susceptible to different conclusions or interpretations. “When statutory language is ambiguous, it should be interpreted in a way that will promote its apparent purpose and harmonize it with the statutory scheme.”¹³⁰

2. *Illustrative Cases*

a. *Fox/Snap*

In the recent decision of *In Re Fox Corporation/Snap, Inc. Section 242 Litigation* (“*Fox/Snap*”), the Supreme Court grappled with the plain meaning of the word “power” as it appears in 8

129. *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 279 A.3d 323, 336 (Del. 2022) (quoting *Salzberg v. Sciabacucchi*, 227 A.3d 102, 112 (Del. 2020)) (“Statutory interpretation is a question of law, which we review *de novo*.”).

130. *Protech Minerals, Inc. v. Dugout Team, LLC*, 284 A.3d 369, 375 (Del. 2022) (citations omitted); *see also* *State v. Barnes*, 116 A.3d 883, 888 (Del. 2015) (“The starting point for the interpretation of a statute begins with the statute’s language.”); *Freeman v. X-Ray Assocs., P.A.*, 3 A.3d 224, 227 (Del. 2010) (citing *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985)) (“We must give effect to the legislature’s intent by ascertaining the plain meaning of the language used.”).

Del C. § 242(b)(2).¹³¹ Following a new amendment of Section 102(b)(7) of the Delaware General Corporation Law (“DGCL”), both Fox Corporation (“Fox”) and Snap Inc. (“Snap”) (f/k/a/ Snapchat Inc.) sought to amend their corporate charters and expand liability protections for their officers.¹³² The new amendments would exculpate officers from duty of care damages.¹³³ Both Fox and Snap (together, the “Companies”) had a multi-class stock structure with homonymous “Class A” common stockholders (collectively the “Class A Stockholders” or “Class A”) that enjoyed no voting rights except to the extent stated in the Companies’ certificates of incorporation or as required by the DGCL.¹³⁴

In both instances, each company’s voting class (or classes) voted to approve the exculpation amendments. Neither company solicited a vote from the Class A Stockholders.¹³⁵ Believing that they were entitled to a class vote, the Class A Stockholders filed separate class action complaints in the Court of Chancery which were consolidated against Fox and Snap.¹³⁶ The Class A Stockholders sought a declaration that the Company’s decision to vote on the amendments without their input violated Section 242(b)(2), which states, in part, that:

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.*¹³⁷

131. *In re Fox Corp./Snap, Inc. Sec. 242 Litig.*, 312 A.3d 636 (Del. 2024) [hereinafter *Fox-Snap*].

132. *Id.* at 639.

133. *Id.*

134. *Id.* Fox has a dual-class stock structure consisting of Class B common stockholders with one vote per share and Class A common stockholders who enjoyed no voting rights, except to the extent stated in Fox’s certificate of incorporation or as required by DGCL. Snap has a three-class stock structure which consists of Class A common stock with no vote, Class B common stock with one vote per share, and Class C common stock with ten votes per share.

135. *Id.*

136. *Id.*

137. DEL. CODE ANN. tit. 8, § 242(b)(2) (2024) (emphasis added).

According to the Class A Stockholders, the amendments to the Companies’ charters adversely diminished Class A’s power to sue the Companies’ officers for breach of their duty of care, and thus, the language of Section 242(b)(2) “unambiguously required a class vote before adopting the exculpatory charter provisions.”¹³⁸

The Court of Chancery acknowledged the merit in the Class A Stockholders’ contentions, but ultimately determined that “the officer exculpation amendment does not require a class vote of the company’s non-voting stock because the officer exculpation amendment does not affect a power, preference, or special right that appears expressly in the charter.”¹³⁹ The Court of Chancery advanced four main reasons for its decision.

First, textual overlap between Sections 242(b)(2), 151(a), and 102(a)(4) suggested that powers must be explicitly outlined in the corporate charter to qualify for the protection of Section 242(b)(2).¹⁴⁰ Second, two cases, namely, *Hartford Accident & Indemnity Co. v. W.S. Dickey Clay Mfg. Co.* (“*Dickey Clay*”),¹⁴¹ and *Orban v. Field* (“*Orban*”),¹⁴² demonstrated that “power” only referred to “peculiar, or special characteristic of a class of

138. *Fox/Snap*, 312 A.3d at 639. The Class A Stockholders’ arguments to the Court of Chancery were essentially fourfold. First, they contended that stockholders have three “fundamental” powers which are to vote, sell, and sue, because the dictionary definition of “power” includes “[t]he ability to act or not act[.]” *Id.* at 640 (quoting *Power*, Black’s Law Dictionary (11th Ed. 2019)). Second, Class A asserted that a change between previous iterations of Section 242 and the current form, which modified the pertinent phrase from “preferences, special rights or powers” to “powers, preferences, or special rights[.]” foreclosed any ambiguity and evinced that “powers” did not refer to special powers unique to the voting class, but general powers including the power to sue. *See id.* Third, Class A claimed that the greater context of the DGCL supported a reading of power which associated the term with ability to sue or be sued. *Id.* at 640. Finally, Class A argued that two cases relied upon by the Companies (and later the Court of Chancery), *Hartford Accident & Indem. Co. v. W.S. Dickey Clay Mfg. Co.*, 24 A.2d 315 (Del. 1942), and *Orban v. Field*, No. 12820, 1993 WL 547187 (Del. Ch. Dec. 30, 1993), were inapposite because they addressed changes to a capital structure and not, as here, the elimination of a personal power. *Id.*

139. *Id.* at 641 (quoting Transcript of Record at 61, 69, Elec. Workers Pension Fund, Local 103, I.B.E.W. v. Fox Corp., No. 2022-1007JTL (Del. Chl. Mar. 29, 2023) [hereinafter “*Fox Corp.*”] (internal quotation marks omitted)).

140. *Id.*

141. 24 A.2d 315.

142. 1993 WL 547187.

shares rather than rights incidental to share ownership[.]”¹⁴³ Third, no commentators supported Class A’s interpretation of powers.¹⁴⁴ And fourth, practitioners of Delaware law had long interpreted *Dickey Clay* to support the Companies’ reading.¹⁴⁵

The Class A Stockholders appealed. The Supreme Court affirmed the Court of Chancery’s decision.¹⁴⁶ First, the Supreme Court agreed with the Companies’ textual argument.¹⁴⁷ Sections 242(b)(2), 151(a), and 102(a)(4) all included similar usage of the words “powers,” “privileges,” and “special rights.”¹⁴⁸ The similar usage in each of these sections indicated they ought to be read together,¹⁴⁹ and when read together, the Sections

143. *Fox/Snap*, 312 A.3d at 641–42 (internal quotation marks omitted). In other words, the power to sue, although a power inherent in all classes of shares, was not expressly reiterated in the description of Class A shares in the Companies’ charters, and thus was not a “power” contemplated by Section 242(b)(2). See *Fox Corp.*, C.A. No. 2022-1007-JTL at 69 (“Accordingly, under *Dickey Clay* and *Orban*, the officer exculpation amendment does not require a class vote of the company’s non-voting stock because the officer exculpation amendment does not affect a power, preference, or special right that appears expressly in the charter.”).

144. *Fox/Snap*, 312 A.3d at 642.

145. *Id.*

146. *Id.* at 651.

147. *Id.* at 645–46.

148. Looking at the language of each statute in turn, Section 102(a)(4) stated that: “The certificate of incorporation shall also set forth a statement of the designations and the powers, preferences and rights, and the qualifications, limitations or restrictions thereof, which are permitted by § 151 of this title in respect of any class or classes of stock or any series of any class of stock of the corporation” DEL CODE ANN. tit. 8, § 102(a)(4) (2024) (emphasis added). Section 151(a), as referenced in 102(a)(4) then states: “Every corporation may issue 1 or more classes of stock . . . and which classes or series may have such voting *powers*, full or limited, or no voting powers, and such designations, *preferences* and relative, participating, optional or other *special rights*, and qualifications, limitations or restrictions thereof, as shall be stated and expressed in the certificate of incorporation or of any amendment thereto” DEL CODE ANN. tit. 8, § 151(a) (2024) (emphasis added). Finally, Section 242(b)(2) extends this right to vote on amendments to non-voting shares under specific circumstances. It states, in pertinent part: “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.” DEL CODE ANN. tit. 8, § 242(b)(2) (2024) (emphasis added).

149. See *Fox/Snap*, 312 A.3d at 646 (“it was not by accident that the same sequence of words was used in Sections [242(b)(2)], 151(a), and 102(a)(4)”).

showed that the power to sue an officer for breach of their duty of care was not a “power” under Section 242(b)(2).

First, Section 151 allows for the creation of different classes of stock with different characteristics including “voting powers,” “preferences,” and “special rights.” For these characteristics to be validly attached to a certain class of stock, they must be made express in the corporate charter as required by Section 102(a)(4).¹⁵⁰ Thus, the Supreme Court reasoned that the specific prescriptions of Sections 151(a) and 102(a)(4) imparted a particular meaning to the “powers, preferences, and special rights” referred to in the statutes which distinguished them from general powers incidental to stock ownership.¹⁵¹ It is to these expressed “powers, preferences, and special rights” that Section 242(b)(2) specifically refers when setting the conditions allowing typically non-voting stock to vote,¹⁵² and because the power to sue a director for breach of fiduciary duty was not expressed in either of the companies’ charters, it was not one of the preconditional express “powers” which triggers section 242(b)(2).¹⁵³

The Supreme Court’s conclusion with respect to the textual argument dove-tailed with the Court’s subsequent analyses of the *Dickey Clay* and *Orban* cases, which the Court found applicable and instructive.¹⁵⁴ The upshot of the analysis was that *Dickey Clay* “held that ‘[t]he *peculiar, or special quality* with which [the class shares] are endowed . . . serves to distinguish them

150. See DEL CODE ANN. tit. 8, § 102(a)(4) (2024).

151. See *Fox/Snap*, 312 A.3d at 647 (“The word ‘powers’ in Section 242(b)(2) refers to specific class powers under Section 151(a), made express in the corporate charter as required by Section 102, and not to general powers incidental to stock ownership”).

152. *Id.* at 650.

153. The Supreme Court rebuffed counterarguments by the Class A Stockholders. For example, the Court rejected a dictionary definition argument, referring to it as a “stilted approach” that “ignores the context in which ‘powers’ is used and how Section 242(b)(2) interacts with other sections of the DGCL employing the same words.” *Id.* at 647. Additionally, the Court rejected an argument that different DGCL provisions supported Class A’s reading by describing “power” as the authority to file suit. *Id.* at 648. All provisions cited by Class A that supported such a reading spoke to a different subject matter than stockholder powers, and further defined power within the context of their own statute. *Id.*

154. See *Fox/Snap*, 312 A.3d at 649 (“According to the Class A Stockholders, *Dickey Clay* ‘merely [held] that the relative position of stock in the capital structure is not a “power, preference, or special right” under Section 242(b)(2)’ But a court’s ruling is rarely limited to the specific facts before it.”).

from shares of another class[.]”¹⁵⁵ *Orban*, for its part, “makes clear that [Section 242(b)(2)] affords a right to a class vote when the proposed amendment adversely affects the peculiar legal characteristics of that class of stock.”¹⁵⁶

The “peculiar” characteristics referred to in *Dickey Clay* and *Orban* are the same as the “powers, preferences, and special rights” referred to in Section 242(b)(2).¹⁵⁷ “Powers, preferences, and special rights” as contemplated by Section 242(b)(2) must be expressed in the charter as the textual argument demonstrated,¹⁵⁸ and as *Dickey Clay* supports.¹⁵⁹ The power to sue an officer for breach of duty of care was, again, not expressed in the Companies’ charter so it was not a “peculiar or special quality,” but a right incidental to stock ownership.¹⁶⁰ As *Orban* explained, Section 242(b)(2) only provides the right to vote when “peculiar” legal characteristics are adversely affected.¹⁶¹ Therefore, an amendment affecting Class A’s incidental right to sue directors does not implicate Section 242(b)(2) since it does not affect a peculiar or special quality of Class A stock.

As a final point, the Supreme Court commented on the Court of Chancery’s conclusions that the plain meaning of “powers, preferences and special rights” was consistent with the long-standing expectations of commentators and practitioners:¹⁶²

The Court of Chancery determined that this evidence [of corporate practice] fit its understanding that ‘in the nearly 40 years since 1986 and the adoption of Section 102(b)(7) for directors, no one has taken the position until this case that an exculpation amendment requires a class vote.’ Although the Class A

155. *Id.* at 650 (quoting *Hartford Accident*, 24 A.2d at 318–319).

156. *Id.* (quoting *Orban v. Field*, No. 12820, 1993 WL 547187, at *8 (Del. Ch. Dec. 30, 1993)) (internal quotation marks omitted).

157. *Id.*

158. *See id.* at 646.

159. *Id.* at 650 (“For three quarters of a century, *Dickey Clay* has stood for two points: 1) that rights incidental to stock ownership are not a peculiar characteristic of the shares of a class of stock, and 2) that Section 242(b)(2) should be read considering other provisions of the DGCL.”).

160. *See id.* at 647. *Dickey Clay* showed “that rights incidental to stock ownership are not a peculiar characteristic of the shares of a class of stock.” *Id.* at 650.

161. *Orban*, 1993 WL 547187, at *8.

162. *Fox/Snap*, 312 A.3d at 650–51.

Stockholders argue otherwise, the Court of Chancery did not make practitioner experience central to its ruling. Instead, it simply observed that a statutory interpretation which deviated from the historical understanding would conflict with the stability of our corporate law.¹⁶³

This observation regarding the “historical understanding” of a statute raises the interesting question as to what extent “long-standing expectations of commentators and practitioners” should factor into the interpretive exercise. Several recent decisions wrestle more directly with this precise issue.

b. *Moelis*

One such decision is *West Palm Beach Firefighters’ Pension Plan Fund v. Moelis & Co.*¹⁶⁴ where the Court of Chancery began with the following question:

What happens when the seemingly irresistible force of market practice meets the traditionally immovable object of statutory law? A court must uphold the law so the statute prevails.¹⁶⁵

Because this case is on appeal, my discussion of it herein will be limited strictly to reporting on the decision issued by the Court of Chancery. Nothing herein is intended to suggest how any member of our Court (including myself) would view any issue that might be raised by the parties on appeal.

The “immovable object” referred to by the Vice Chancellor was Section 141(a) of the DGCL which provides that “the business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.”¹⁶⁶ As the Court of Chancery observed, “Section 141(a) is the source of Delaware’s board-centric model of corporate governance.”¹⁶⁷

In *Moelis*, the plaintiff challenged the facial validity of various provisions in a stockholder agreement that provided

163. *Id.*

164. 311 A.3d 809 (Del. Ch. 2024).

165. *Id.* at 816.

166. DEL CODE ANN. tit. 8, § 141(a) (2024).

167. *Moelis*, 311 A.3d at 816.

Moelis' eponymous founder, CEO and Chairman, Ken Moelis, with certain veto rights or "pre-approval" rights over various corporate actions and over the composition of Moelis' board of directors and board committees. The types of corporate actions that required Mr. Moelis' pre-approval included "the entry into any merger, consolidation, recapitalization, liquidation, or sale of the Company or all of substantially all of the assets of the Company or consummation of a similar transaction involving the Company."¹⁶⁸

The Court of Chancery held that the stockholder agreement was void because the requirement that the board obtain Mr. Moelis' prior approval for significant corporate actions effectively and improperly delegated managerial authority to him and restricted the board's ability to exercise its independent judgment. The trial court observed that, "[t]he presence of a stockholder who controls the corporation does not alter the board-centric framework,"¹⁶⁹ and that:

Internal corporate governance arrangements that do not appear in the charter and deprive boards of a significant portion of their authority contravene Section 141(a). The Delaware courts have regularly considered challenges to contractual governance arrangements under Section 141(a) and have frequently invalidated arrangements that improperly constrain a board's authority.¹⁷⁰

The plaintiff's argument was simple:

Under Chancellor Seitz's seminal decision in *Abercrombie v. Davies*, governance restrictions violate Section 141(a) when they 'have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters' or 'tend[] to limit in a substantial way the freedom of director decisions on matters of management policy.

168. *Id.* at 825. The Vice Chancellor described the stockholder agreement as a "new wave" agreement that "does not involve stockholders contracting among themselves to address how they will exercise their stockholder-level rights." *Id.* at 817. The pre-approval requirements "encompass virtually everything the Board can do," and because of them, "the Board can only act if Moelis signs off in advance." *Id.* at 818.

169. *Id.* at 817.

170. *Id.*

. . .’ The Delaware Supreme Court has repeatedly endorsed the *Abercrombie* test. This court has repeatedly applied it.¹⁷¹

The Court of Chancery rejected the defendants’ “one-size-fits-all response” which was that “[a] contract is a contract is a contract.”¹⁷² Delaware corporations possess the power to contract, and contracts necessarily constrain a board’s freedom of action. Defendants argued that a court cannot differentiate between an internal governance arrangement and an external commercial contract.

In resolving the dispute, the Court of Chancery reasoned that the challenged provisions were part of an internal governance arrangement. The court observed that the only parties to the stockholder agreement are the Company, Moelis, and the three entities he controls. The provisions “resemble the type of governance rights associated with preferred stock” and are part of “an indefinite agreement that the Board cannot terminate.”¹⁷³ As such, they were subject to Section 141(a).

The question then became whether the provisions violated the *Abercrombie* test.¹⁷⁴ The court held that they did:

Taken together, the Pre-Approval Requirements force the Board to obtain Moelis’ prior written consent before taking virtually any meaningful action. With the Pre-Approval Requirements in place, the Board is not really a board. The directors only manage the Company to the extent Moelis gives them permission to do so. This decision need not consider whether some lesser combination of rights might pass muster under Section 141(a). The Pre-Approval Requirements go too far.¹⁷⁵

In short, “[b]ecause of the Pre-Approval Requirements, the business and affairs of the Company are managed under the direction of Moelis, not the Board.”¹⁷⁶ As such, the Court

171. *Id.* at 818–19.

172. *Id.* at 819.

173. *Id.* at 820. The parties entered into the agreement just before the Company’s shares started trading publicly. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 821.

of Chancery held that the Pre-Approval Requirements “violate Section 141(a).”¹⁷⁷

The trial court also rejected the Company’s public policy arguments finding that the case did not call for a public policy analysis. That was because “[w]hen the General Assembly has enacted a statute, that statute embodies Delaware’s public policy.”¹⁷⁸

In addressing the Company’s observation that other corporations had entered into similar stockholder agreements, the court observed that “the number of companies using this structure remains low relative to the total number of companies in the market.”¹⁷⁹ But that “[i]n any event, market practice is not law.”¹⁸⁰ Rather,

Delaware courts consider market practice, because market practice can reflect the judgments of experienced counsel about what is possible under Delaware law. But corporate lawyers are marvelous mimics. And clients pay corporate lawyers to push the envelope. When the General Assembly has enacted a statute, a court’s job is to enforce the statute, even if that has implications for market practice.¹⁸¹

The Court of Chancery concluded by reiterating that “[w]hen market practice meets a statute, the statute prevails,”¹⁸² and that unless and until the General Assembly acts, the statute controls.

That is exactly what happened next. The General Assembly and Governor enacted statutory amendments to legislatively override the Court of Chancery’s decision at least as it might apply prospectively and retrospectively, but not to the *Moelis* case or other cases pending at the time of the enactment of the amendments. In response to the *Moelis* decision,¹⁸³ the Delaware

177. *Id.*

178. *Id.* at 877.

179. *Id.* at 878.

180. *Id.*

181. *Id.* at 878–79.

182. *Id.* at 881.

183. See Marcel Kahan & Edward B. Rock, *Proposed DGCL § 122(18), Long-term Investors, and the Hollowing Out of DGCL § 147(a)*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 21, 2024) (“The opinion has caused considerable consternation among a group of transactional lawyers because it raises doubts about the validity of a current market practice in which significant

General Assembly added DGCL Section 122(18) in the 2024 Amendments to address the conflict between common market practice and statutory language that was highlighted in that decision. Section 122(18) provides as follows:

Every Corporation created under this chapter shall have the power to:

(18) Notwithstanding § 141(a) of this title, make contracts with one or more current or prospective stockholders (or one or more beneficial owners of stock), in its or their capacity as such, in exchange for such minimum consideration as determined by the board of directors (which may include inducing stockholders or beneficial owners of stock to take, or refrain from taking, one or more actions); provided that no provision of such contract shall be enforceable against the corporation to the extent such contract provision is contrary to the certificate of incorporation or would be contrary to the laws of this State (other than § 115 of this title) if included in the certificate of incorporation. Without limiting the provisions that may be included in any such contracts, the corporation may agree to: (a) restrict or prohibit itself from taking actions specified in the contract, (b) require the approval or consent of one or more persons or bodies before the corporation may take actions specified in the contract (which persons or bodies may include the board of directors or one or more current or future directors, stockholders or beneficial owners of stock of the corporation), and (c) covenant that the corporation or one or more persons or bodies will take, or refrain from taking, actions specified in the contract (which persons or bodies may include the board of directors or one or more current or future directors, stockholders or beneficial owners of stock of the corporation).¹⁸⁴

governance provisions are apparently included in stockholder agreements rather than in the certificate of incorporation.”) <https://corpgov.law.harvard.edu/2024/05/21/proposed-dgcl-%C2%A7-12218-long-term-investors-and-the-hollowing-out-of-dgcl-%C2%A7-141a/>.

184. DEL CODE ANN. tit. 8, § 122(18) (2024).

Section 122(18) permits corporations to enter into agreements with stockholders or beneficial owners concerning corporate governance matters in exchange for minimum consideration that is determined by the board. Thus, Section 122(18) authorizes corporations to take (or not take) certain actions listed in a stockholders' agreement. The only explicit limitation is that the stockholders' agreement's provisions cannot violate the corporation's certificate of incorporation or other provisions of the DGCL. Section 122(18) also provides a non-exclusive list of provisions that a corporation may agree to in a stockholders' agreement.

Commentators have observed that the new amendments raise many issues, including whether counterparties to such agreements will be deemed "controllers," and what happens when control rights obtained via Section 122(18) clash with a board's fiduciary obligations?¹⁸⁵ These questions will have to await further developments in the law. Other commentators, referring to the amendments as "market practice amendments," have questioned whether the amendments "signal a change in approach for how Delaware corporate law will be evolved, shaped, and clarified."¹⁸⁶ Again, only time will tell.

c. *Activision*

In another recent case, *Sjunde AP-fonden v. Activision Blizzard, Inc., et al.*,¹⁸⁷ the Court of Chancery again wrestled with the plain meaning of statutory provisions and an apparent conflict with the long-standing expectations of legal commentators and practitioners as well as common market practices. This case stems from Microsoft's 2022 acquisition of Activision, Blizzard Inc. ("Activision") — a developer and publisher of

185. *Id.*

186. See Keith Gottfried, *Proposed DGCL Amendments Depart from Delaware's Historical Approach to Activism and Takeover Defense*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 1, 2024) (observing that "[t]he approach taken by the Council and the Delaware General Assembly to quickly amend the DGCL in response to the *Moelis* decision, rather than allow the Delaware Supreme Court the opportunity to weigh in and possibly either overturn or clarify, shape, and evolve the *Moelis* decision, appears to be at odds with historical practice.") <https://corpgov.law.harvard.edu/2024/07/01/proposed-dgcl-amendments-depart-from-delawares-historical-approach-to-activism-and-takeover-defense/>.

187. No. 2022-1001-KSJM, 2024 WL 863290 (Del. Ch. Feb. 29, 2024).

interactive entertainment content and services — for \$95 per share.¹⁸⁸

In January 2022, the Activision Board of Directors (the “Board”) received and approved a draft of the merger agreement (the “Draft Merger Agreement”). The board neither approved nor reviewed any subsequent version of the merger agreement, including the final and complete execution version.¹⁸⁹ The draft contained several omissions: (i) the company disclosure letter and the disclosure schedules; (ii) the certificate of incorporation of the surviving corporation; and (iii) the amount of consideration paid as well as Activision’s name as the target (placeholders were used for both).¹⁹⁰ The Court of Chancery found that these items needed to be included “[a]t bare minimum.”¹⁹¹ The Draft Merger Agreement also omitted any reference concerning Activision’s future dividends while the deal awaited regulatory approval — a process that could take years.¹⁹² Activision later filed a proxy statement (the “Proxy Statement”) seeking stockholder approval.¹⁹³ The Proxy Statement omitted the disclosure letter, the disclosure schedules, and the surviving company’s charter.¹⁹⁴ At a special stockholder meeting on April 28, 2022, the stockholders approved the merger with more than 98% of stockholders present voting in favor.¹⁹⁵

In November 2022, the plaintiff — an Activision stockholder — filed suit in the Court of Chancery, alleging that the defendants had violated Sections 251 and 141 of the DGCL by failing to include in the merger agreement approved by the

188. *Id.* at *1. Activision is perhaps most famous for its production of video games, including the highly-successful “Call of Duty” franchise. *See About Us*, ACTIVISION, <https://www.activision.com/company/aboutus> (last visited July 2, 2024).

189. *Activision*, 2024 WL 863290, at *2. The parties executed the merger agreement (the “Merger Agreement”) on January 18, 2022. In its final form, the Merger Agreement contained multiple changes from the Draft Merger Agreement. *Id.*

190. *Id.* at *1.

191. *Id.* at *7.

192. *Id.* at *1. The board had delegated this matter to a committee to negotiate and resolve.

193. *Id.* at *2.

194. *Id.* Specifically, “[t]he Proxy Statement purported to attach the Merger Agreement as Annex A. But Annex A did not contain the Disclosure Letter, Disclosure Schedules, or the Survivor’s Charter.” *Id.*

195. *Id.*

Board items required by statute.¹⁹⁶ The Court of Chancery denied the defendants' motion to dismiss as to some of the claims.

In its analysis, the court first focused on the statutory language. Section 251(b) requires that when a corporation desires to merge or consolidate, its board must approve an "agreement of merger."¹⁹⁷ Section 251(b) lists the information that must be included in an agreement of merger, such as the "terms and conditions of the merger[.]"¹⁹⁸ The plaintiff argued that the Board violated Section 251(b) because the Draft Merger Agreement did not include all of the statutorily required terms and, thus, the Board failed to approve the final executed version of the merger agreement.¹⁹⁹

The defendants responded that this narrow interpretation of Section 251(b) was not required by the statutory language and would also conflict with common corporate practices: "[g]iven the practical realities of negotiating merger agreements, boards commonly adopt resolutions approving a merger agreement in draft or near-final draft form and declaring its advisability before the agreement has been finalized, and this is especially true with respect to ancillary documents, including disclosure schedules."²⁰⁰ The defendants also emphasized that the plaintiff's interpretation of Section 251(b) would create "uncertainty" about the validity of mergers; would create uncertainty for third parties dealing with Delaware corporations; and would "disserve" Delaware's long-standing public policy of encouraging mergers.²⁰¹

The Court of Chancery rejected the defendants' arguments. Instead, it determined that the plaintiff's interpretation found support in the "plain language of Section 251(b); the unique status of mergers within the DGCL; the essential role of the agreement of merger within Section 251; a board's non-delegable authority with respect to mergers; and the aura of mandatory provisions and strict adherence that engulfs the statutory scheme."²⁰²

196. *Id.* The defendants were the Board, Microsoft, Microsoft's Board of Directors, and the merger subsidiary (collectively, the "defendants"). *Id.*

197. DEL. CODE ANN. tit. 8, § 251.

198. *Id.*

199. *Activision*, 2024 WL 863290, at *4.

200. *Id.* at *5 (quoting *Activision Defendants' Opening Brief* at 32).

201. *Id.* at *6.

202. *Id.* at *5 (internal citation omitted).

Although the court recognized that the plaintiff's interpretation did not "square with norms of market practice," it held that "[w]here market practice exceeds the generous bounds of private ordering afforded by the DGCL, then market practice needs to check itself."²⁰³ Moreover, the court added that:

At bare minimum, Section 251(b) requires a board to approve an essentially complete version of the merger agreement (the "essentially complete interpretation"). This is so because, absent an essentially complete draft, the board-approval requirement of Section 251(b) would make no sense.

....

Nor does Defendants' policy argument work in the face of the essentially complete interpretation. In fact, it is unclear what room there is for a policy analysis on this point. To again quote *Moelis*: "When the General Assembly has enacted a statute, that statute embodies Delaware's public policy. A court is not free to disregard it." Here, the statute reflects public policy. The court is not free to disregard it.

It is reasonably conceivable that the Board failed to satisfy the minimal requirements of Section 251(b) by failing to approve an essentially complete version of the Merger Agreement. Plaintiff alleges that the Draft Merger Agreement omitted the consideration, the Disclosure Letter, the Disclosure Schedules, the Survivor's Charter, and the Dividend Provision. There was a lot of important stuff missing from the Draft Merger Agreement. The consideration was essential. The Disclosure Letter was referenced 45 times in the Merger Agreement and contained information that was important to the agreement. Section 251(b) specifically calls out the Survivor's Charter in the list of six statutorily mandated items. The Dividend Provision was a "key open" issue. Perhaps the Disclosure Schedules were not essential, as Defendants argue. Reasonable minds could reach different conclusions on this point.

203. *Id.* at *5-6.

The court need not drill down that deep at the pleading stage. Wherever the line in this context is drawn, the Draft Merger Agreement inferably crossed it.²⁰⁴

According to the Court of Chancery, no matter how one looks at it, the Draft Merger Agreement omitted information required by statute, and accordingly, it denied the motion to dismiss. The court also found the notice defective because (i) although the proxy statement contained a summary of the merger agreement, the notice did not, and (ii) the merger agreement annexed to the proxy statement, did not include a copy of the surviving corporation's charter.

Following the *Activision* decision, multiple amendments to the DGCL were proposed and adopted. Notably, the amendments include a new Section 147 of the DGCL which states that when a board is required to “approve or take other action with respect to any agreement, instrument or document, such agreement, instrument or document may be approved by the board of directors in final form *or in substantially final form.*”²⁰⁵ According to the amendments' accompanying synopsis, Section 147 “is intended to enable a board of directors to approve an agreement, instrument or document if, at the time of board approval, all of the material terms are either set forth in the agreement, instrument or document or are determinable through other information or materials presented to or known by the board.” Thus, Section 147 relaxes the *Activision* court's interpretation of DGCL Section 251(b) — which held that boards must approve the final execution version of a merger agreement — to better conform with common corporate practice.

The amendments also include a new Section 268 of the DGCL. Section 268(a) details the limited contexts in which an agreement of merger need not include “any provision regarding the certificate of incorporation of the surviving corporation.”²⁰⁶ The accompanying legislative synopsis adds that this “this amendment will provide flexibility to a buyer in a typical ‘reverse triangular merger’ to adopt the terms of the certificate of incorporation of the corporation that, following the effectiveness of the merger, will be wholly owned and controlled

204. *Id.* at *7–8 (internal citations omitted) (quoting *Moelis*, 311 A.3d at 877).

205. DEL CODE ANN. tit. 8, § 147 (emphasis added).

206. DEL CODE ANN. tit. 8, § 268(a).

by the buyer.”²⁰⁷ Section 268(b) further adds that, unless stated otherwise in the agreement of merger, disclosure letters, disclosure schedules, or any similar documents or instruments will not be considered part of the merger agreement.²⁰⁸ According to the accompanying legislative synopsis, this provision “reflects the fact that disclosure schedules and similar documents frequently operate as extrinsic facts incorporated by reference into the agreement but are not themselves part of the agreement and, as such, may be negotiated and prepared by officers and agents at the direction of the board of directors without the need, as a statutory matter, for formal approval by the board of directors.”²⁰⁹ Also new Section 232(g) was amended to provide that materials attached to and included with a notice to stockholders were deemed to be part of the notice of DGCL compliance purposes.

The DGCL amendments became effective on August 1, 2024. They apply to (a) all contracts made by a corporation; (b) all agreements, instruments or documents approved by the board of directors; and (c) all merger and consolidation agreements entered into by a corporation — in each case — whether approved or entered into on or before August 1, 2024. Notably, they do not apply to or affect any civil action or proceeding completed or pending on or before August 1, 2024. In those cases, the law pre-dating the amendments applies.²¹⁰

d. *Stream TV Networks, Inc. v. SeeCubic, Inc.*

In another case involving the interpretation of a charter and a statute, *Stream TV Networks, Inc. v. SeeCubic, Inc.*,²¹¹ the Delaware Supreme Court addressed whether approval of a corporation’s Class B stockholders was required to transfer pledged assets to secured creditors in connection with what was, in essence, a privately structured foreclosure transaction (the “Omnibus Agreement”). *Stream TV Networks, Inc.* (“Stream”), along with its founders, argued that the agreement authorizing

207. S.B. 313, 152d. Gen. Assem. (Del. 2024).

208. § 268(b).

209. S.B. 313.

210. The Court of Chancery’s decision in *Moelis* has been appealed and the new amendments do not apply to it. *See, e.g., Seavitt v. N-Able, Inc.*, 321 A.3d 516, 556 (Del. Ch. 2024) (stating that, “[t]his case falls into the donut hole, as do *Moelis*, *Wagner*, and a handful of other pending actions.”).

211. 279 A.3d 323 (Del. 2022).

the secured creditors to transfer Stream's pledged assets was invalid because Stream's unambiguous certificate of incorporation (the "Charter") required the approval of Stream's Class B stockholders. Stream contended that the court erred in applying a common law insolvency exception to 8 Del. C. § 271 in interpreting the Charter, and that the enactment of Section 271 and its predecessor superseded any common law exceptions. It further argued that, in any event, such a "board only" common law exception never existed in Delaware.²¹²

The Delaware Supreme Court agreed that a majority vote of Class B stockholders was required under Stream's Charter. In reversing, the Court based its holding on "the plain and ordinary meaning of the term 'disposition'" as used in the Charter.²¹³ Under Stream's Charter, an affirmative vote of the holders of a majority of the then-outstanding shares of Class B stock was necessary to consummate an Asset Transfer. The Charter defined "Asset Transfer" as:

[A] sale, lease or other disposition of all or substantially all of the assets or intellectual property of [Stream] or the granting of one or more exclusive licenses which individually or in the aggregate cover all or substantially all of the intellectual property of [Stream].²¹⁴

The parties agreed that the Omnibus Agreement was not a sale or lease of Stream's assets. Rather, the question was whether it was a "disposition" within the meaning of the Charter. By comparison, Section 271 uses the phrase "sell, lease or exchange."²¹⁵

212. The "board only" insolvency exception would allow directors of an insolvent (or "failing") corporation to transfer all the assets of the company without stockholder approval.

213. *Stream TV Networks*, 279 A.3d at 337.

214. *Id.* at 338.

215. *Id.* Section 271(a) provides:

Every corporation may at any meeting of its board of directors or governing body sell, lease or exchange all or substantially all of its property and assets, including its goodwill and its corporate franchises, upon such terms and conditions and for such consideration, which may consist in whole or in part of money or other property, including shares of stock in, and/or other securities of, any other corporation or corporations, as its board of directors or governing body deems expedient and for the best interests of the corporation, when and as authorized by a resolution adopted by the holders of a majority of the outstanding stock of the corporation entitled to vote thereon or, if the corporation is a nonstock corporation, by a majority of the members having the right to vote for the election of the members of the governing body and any other members entitled to vote thereon under the certificate

Further, the Charter contained express reference to “intellectual property” and the granting of “exclusive licenses.” The Supreme Court observed that the Charter could have simply tracked the language of Section 271, but it did not. The Supreme Court concluded that “the Charter’s use of the phrase ‘other disposition’ has a meaning that is different, and broader, than the term ‘exchange.’”²¹⁶ Because the Supreme Court disagreed with the Court of Chancery that the relevant language of the Charter tracked the text of Section 271, it declined to look at Section 271 as an interpretive guide in construing the Charter.²¹⁷

That determination then led the Court to the key inquiry — the meaning of “other disposition” which was not defined in the Charter. It began its analysis with the observation that:

The Court must first attempt to ascertain the parties’ intent from the language of the contract. Words or phrases used in a bylaw or charter are to be given their commonly accepted meaning, and this Court often looks to dictionaries to ascertain a term’s plain meaning.²¹⁸

The Court reviewed various dictionary definitions of “disposition” and ultimately concluded that the term “other disposition” included the transfer of assets contemplated by the Omnibus Agreement.

Although the Court did not need to further consider Section 271 (and whether, for example a stockholder vote was required under Section 271), it clarified that a common law insolvency exception, if one ever existed in Delaware, did not survive the enactment of Section 271 and its predecessor.²¹⁹ The Supreme Court concluded that a “board only” insolvency exception was inconsistent with a statutory default majority vote rule.²²⁰ It relied on “the plain language of Section 271, which contains no exceptions and is not ambiguous.”²²¹

The Court of Chancery had found that there was a common law exception to the long-established requirement of

of incorporation or the bylaws of such corporation, at a meeting duly called upon at least 20 days’ notice. The notice of the meeting shall state that such a resolution will be considered. DEL CODE ANN. tit. 8, § 271.

216. *Stream TV Networks*, 279 A.3d at 339.

217. *Id.*

218. *Id.* at 339 (quotations omitted).

219. *Id.* at 343.

220. *Id.* at 353.

221. *Id.*

stockholder approval for the directors of a corporation to transfer away substantially all the assets of the business.²²² This exception would allow directors of an insolvent (or “failing”) corporation to transfer all the assets of the company without stockholder approval.²²³ For evidence of the exception, the Vice Chancellor relied primarily upon several treatises and a Court of Chancery opinion from 1915 citing two of these treatises for a related proposition.²²⁴ Section 271 and its statutory predecessor, Section 64a, did not supersede this common law exception either, the Court of Chancery reasoned, because there is no indication the General Assembly intended to restrict the authority of directors at common law.²²⁵

Stream TV Networks, appellant and plaintiff below, argued on appeal that 8 Del. C. § 271 superseded any common law insolvency exception.²²⁶ Moreover, it argued “that the ruling, as a matter of public policy, would upset Delaware’s contractarian focus and the predictable application of Section 271.”²²⁷ The Delaware Supreme Court agreed stating that “Section 271 was intended to occupy the field and that no such insolvency exception survives, assuming *arguendo*, that it existed in the first place.”²²⁸ Still, the Court went on to note:

As a matter of policy, unearthing a “board only” insolvency exception cited only decades ago, and never by any Delaware court, would foster uncertainty and potential inconsistency in a context where predictability is crucial for corporations that have availed themselves of Delaware law. “Our General Assembly has [] recognized the need to maintain balance, efficiency, fairness, and predictability in protecting the legitimate interests of all stakeholders, and to ensure that the laws do not impose unnecessary costs on Delaware entities.” Promoting stability in our DGCL is and remains of paramount importance.²²⁹

222. *Stream TV Networks, Inc. v. SeeCubic, Inc.*, No. 2020-0766-JTL, 2021 WL 5816820, at *6–13 (Del. Ch. Dec. 8, 2021).

223. *Id.* at *13.

224. *Id.* at *6–13.

225. *Id.* at *13.

226. *Stream TV Networks*, 279 A.3d at 336.

227. *Id.*

228. *Id.* at 353.

229. *Id.* at 353–54 (alteration in original) (footnote omitted).

The Court stated that, “[i]nstead, we think, the focus should be on the statute’s plain language.”²³⁰ As the Court stated that, “[s]tability and predictability are not advanced by reading Section 271 to embody a common law exception that was never the basis of a single holding by any Delaware court nor by other courts, according to the parties, for decades.”²³¹ The Court clarified that there is no insolvency exception today, emphasizing the Court’s “policy of seeking to promote stability and predictability in our corporate laws, and with recognition that Delaware is a contractarian state.”²³²

D. *Irrevocable Proxies — Daniel v. Hawkins*

In *Daniel v. Hawkins*, the Delaware Supreme Court construed an irrevocable proxy and recognized that “Delaware public policy and law require that the terms of an irrevocable proxy be clear and unambiguous.”²³³ Accordingly, when confronted with an ambiguity in an irrevocable proxy, Delaware courts do not look to extrinsic evidence.²³⁴ “Rather, they construe the irrevocable proxy in favor of the rights of the beneficial owner of the shares.”²³⁵

The Delaware Supreme Court explained that this rule is rooted in the presumption Delaware courts afford to

230. *Id.* at 354.

231. *Id.* (alteration added).

232. *Id.* at 355 (footnote omitted). On August 1, 2023, following the Delaware Supreme Court’s *Stream TV* holding, the Delaware General Assembly amended DGCL Section 272. The amendment made two notable changes. First, it permits a secured party to effect a sale, lease, or exchange of a corporation’s mortgaged/pledged assets without the approval of stockholders if the secured creditor exercises this right under applicable law — such as UCC Article 9. Second, the amendment also provides a safe harbor permitting a corporation to sell, lease, or exchange pledged/mortgaged assets without holding a stockholder vote in certain situations. Specifically, a board may sell, lease, or exchange pledged/mortgaged assets to satisfy a corporation’s obligations to a secured party without soliciting stockholder approval if: (i) the value of the assets is less than or equal to the total amount of the corporation’s liabilities/obligations being eliminated or reduced (the “Asset Value Test”); and (ii) the sale, lease, or exchange is not prohibited by the law governing such mortgage or pledge. See DEL CODE ANN. tit. 8, § 272(b). This amendment was proposed following the *Stream TV* decision and addresses the constraints of Section 271 that were highlighted in that decision.

233. (*Daniel II*), 289 A.3d 631, 645 (Del. 2023).

234. *Id.*

235. *Id.* at 648.

stockholders that they “vote in their economic interest.”²³⁶ It observed that “[t]his presumption underlies our Delaware courts’ preference to defer to the vote of disinterested stockholders.”²³⁷ And because “[t]he legitimizing influence of a stockholder vote is premised upon the alignment of the economic and voting interests of stockholders,” early Delaware courts were suspect of arrangements that split economic interests in shares from the voting interests of shares.²³⁸ The Court then recognized that “by its very nature, a proxy, which temporarily splits the power to vote from the residual ownership claim of the stockholder, has the potential to create misalignment between the voting interest and the economic interest of shares.”²³⁹ And the risk of misalignment is enhanced where the proxy is irrevocable, and even more so when the proxy runs with the shares in a subsequent sale.²⁴⁰

Although the Court noted that Delaware courts’ approach to such arrangements have liberalized over the years,²⁴¹ the Court agreed with the Court of Chancery’s statement in *TR Investors, LLC v. Genger* that proxies “[h]istorically have been interpreted narrowly and when there is an ambiguity, read as not restricting the right to vote the shares.”²⁴² With this Delaware rule in mind, the *Daniel* Court turned to the question posed by the *Daniel* litigants.

The question before the Court was whether an irrevocable proxy, which gave appellant W. Bradley Daniel (“Daniel”)

236. *Id.* at 645 (quoting *Hawkins v. Daniel (Daniel I)*, 273 A.3d 792, 808 (Del. Ch. 2022)).

237. *Id.* at 646; *see also* *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304, 313–14 (Del. 2010); *In re Lear Corp. S’holder Litig.*, 926 A.2d 94, 114–15 (Del. Ch. 2007).

238. *Daniel II*, 289 A.3d at 646. Other such arrangements include vote-buying arrangements and voting trusts. *See* *Shreiber v. Carney*, 447 A.2d 17 (Del. Ch. 1982); *Crown EMAK Partners LLC v. Kurz*, 992 A.2d 377, 389 (Del. 2010).

239. *Daniel II*, 289 A.3d at 648.

240. *Id.*

241. *Id.* (citing *Oceanic Exploration Co. v. Grynberg*, 428 A.2d 1, 7 (Del. 1981)).

242. *Id.* (quoting (*Genger Trial*), No. 3994-VCS, 2010 WL 2901704, at *20 (Del. Ch. July 23, 2010), *aff’d*, 26 A.3d 180 (Del. 2011)). In *Genger Trial*, the Delaware Court of Chancery confronted the same question: whether an irrevocable proxy had run with the underlying shares in a sale to a third party. The Court of Chancery held that the plain language of the irrevocable proxy there indicated that it did not run with its underlying shares. The Delaware Supreme Court affirmed. *See* *Genger v. TR Invs., LLC (Genger)*, 26 A.3d 180, 190 (Del. 2011).

voting power over all 100 shares of N.D. Management, Inc. (“Danco GP”) (the “Irrevocable Proxy”), would bind a third-party buyer of such Danco GP Shares. The appellee, Mrs. Sharon Hawkins (“Mrs. Hawkins”), wished to purchase the underlying Danco GP shares (the “Proxy Shares”) free and clear of the Irrevocable Proxy, and, accordingly, filed suit against Daniel requesting a declaratory judgment that the Irrevocable Proxy would terminate upon a sale.²⁴³

The Court of Chancery, relying on *Genger* and *Genger Trial*, found that the plain language of the Irrevocable Proxy did not unambiguously provide that it would survive a sale of the Proxy Shares to an unaffiliated third party.²⁴⁴ On appeal, Daniel did not dispute the Delaware rule that irrevocable proxies are construed narrowly. Instead, he argued that the Court of Chancery erred in interpreting the Irrevocable Proxy by erroneously relying on the Restatement (Third) of Agency instead of the Irrevocable Proxy’s plain language, which he argued unambiguously provided that the Irrevocable Proxy would run with the shares in a sale.

The Delaware Supreme Court ultimately agreed with the Court of Chancery, at least to the extent that the Irrevocable Proxy was ambiguous, and accordingly construed the Irrevocable Proxy against the proxyholder, Daniel.²⁴⁵ Instead of relying on the Restatement (Third) of Agency as an interpretive guide, the Delaware Supreme Court relied on the Court of Chancery’s three unchallenged findings about the Irrevocable Proxy’s plain language, which supported an interpretation that the Irrevocable Proxy *did not* run with the underlying shares.

First, the definitions of “Stockholder” and “Shares” in the Irrevocable Proxy “cabin[ed] the applicability of the Irrevocable Proxy” to shares owned by persons agreeing to be bound by the Irrevocable Proxy.²⁴⁶ *Second*, by its plain language, the

243. The facts of the case are complex, primarily due to a convoluted corporate governance structure. Importantly, whoever controlled Danco GP would control two sub-entities, including the operating entity that distributed profits to Danco GP and its owners. Danco GP was 75% owned by another entity, MedApproach, L.P., in which Mrs. Hawkins owned an 88% interest. The litigation in the Court of Chancery was spurred by the dissolution of MedApproach, L.P., which gave Mrs. Hawkins the opportunity to purchase its assets in the winding up process, including the 75% interest in Danco GP.

244. *Daniel I*, 273 A.3d at 832–33.

245. *Daniel II*, 289 A.3d at 656–57.

246. *Id.* at 650.

provision appointing the proxy holders only did so with respect to the Proxy Shares owned by someone agreeing to be bound by the Irrevocable Proxy at the time of a stockholder vote.²⁴⁷ Finally, the Irrevocable Proxy contained an addendum that expressly bound a subsequent owner to the Irrevocable Proxy, which the Delaware Supreme Court found indicative of an intent for the Proxy Shares to run free and clear of the Irrevocable Proxy upon their sale.²⁴⁸

On the other hand, none of the provisions that Daniel argued supported his interpretation, including the provision governing termination of the proxy and the provision governing assignment of rights under the proxy, overcame the foregoing plain language and unambiguously stated the proxy shall run with the shares in a sale.²⁴⁹ Accordingly, the Delaware Supreme Court affirmed the Court of Chancery's judgment. In doing so, it reaffirmed the principal stated in *Genger Trial*: In Delaware, irrevocable proxies will be construed narrowly, and absent plain and unambiguous language to the contrary, will be construed in favor of the beneficial owner of the shares.

II.

DEVIATIONS FROM PLAIN LANGUAGE

In certain discrete areas, our Delaware courts have indicated a willingness to depart from a strong focus on a corporate instrument's plain language. I identify a few next.

A. *The Reasonable Expectations Doctrine — Ferrellgas*

In *Ferrellgas Partners, L.P. v. Zurich American Insurance Co.*,²⁵⁰ our Court considered whether a run-off exclusion in an insurance policy barred coverage. In the course of affirming the Superior Court's determination that it did, we considered the appellant's contention that even if the policy were not ambiguous, it should be construed in a way that permits coverage consistent with the Reasonable Expectations of the Insured ("REI") doctrine. We observed that "[b]ecause an insurance

247. *Id.* at 651.

248. *Id.* at 651–52.

249. *Id.* at 645, 653.

250. 319 A.3d 849 (Del. 2024).

policy is an adhesion contract and is not generally the result of arms-length negotiation, courts have developed rules of construction which differ from those applied to most other contracts.”²⁵¹ “A fundamental premise of the doctrine is that ‘the policy will be read in accordance with the reasonable expectations of the insured so far as its language will permit.’”²⁵² We noted that our own case law was unclear as to whether the doctrine applies only after a determination that the insurance contract is ambiguous.²⁵³ But because the appellant’s theories could not prevail under any of the proffered interpretations of the doctrine, we did not reach that issue.²⁵⁴

B. *Boilerplate in Bond Indentures*

Courts addressing bond transactions have sometimes deviated from plain language interpretations. These courts’ willingness to do so generally revolves around efficiency concerns for capital markets. On some occasions, courts have interpreted the plain language of bond transactions in ways surprising to those regularly practicing in the area. Lawyers are no strangers to boilerplate — defined as “ready-made or all-purpose language that will fit in a variety of documents”²⁵⁵ — and boilerplate can have its virtues. It may be cheaper than crafting agreement-specific language for each transaction and it may already have meanings well-defined by the courts. But boilerplate’s vices have occasionally wreaked havoc in significant ways, as they did in the sovereign bond markets after an unexpectedly influential court case.

1. *The Three and a Half Minute Transaction*

In *The Three and a Half Minute Transaction*, authors Mitu Gulati and Robert E. Scott sought to unearth the history

251. *Id.* at 869.

252. *Id.* (internal quotation omitted).

253. *Id.* at 869–70.

254. *Id.* at 869 n.140 (“We need not today definitively resolve the unsettled state of our Delaware case law because even applying *Hallowell’s* arguably broader formulations, as opposed to *Stom’s* narrower formulation, *Fervellgas* would not prevail.”).

255. BRYAN A. GARNER, GARNER’S DICTIONARY OF LEGAL USAGE 115 (3d ed. 2011).

and understanding of *pari passu* clauses in sovereign bond transactions.²⁵⁶ *Pari passu* clauses are examples of sticky boilerplate — “standardized clauses that have been used by rote over long periods of time — often remain[ing] unchanged, even when a court decision has created uncertainty regarding the clauses’ meaning.”²⁵⁷ And in 2000, a Belgian court granted just such a decision.

That year, Elliott Associates, in *Elliott Associates v. Peru*,²⁵⁸ sought an *ex parte* injunction in a Belgian court in an effort to obtain payment on Peruvian sovereign bonds.²⁵⁹ Elliott had purchased the bonds at a deep discount and refused to participate in a settlement agreed to by other bondholders.²⁶⁰ Because of this refusal, Peru sought to pay the settling bondholders, but not Elliott.²⁶¹ Elliott pointed to the bonds’ *pari passu* clause²⁶² to argue that Peru could not selectively pay its bondholders and that the court should grant an injunction preventing Peru from paying its other bondholders through Belgium-based Euroclear.²⁶³ In a decision that shocked the legal community and threw sovereign bond markets into chaos, the court granted the injunction and, before it could be appealed, political instability led the Peruvian president to settle the case.²⁶⁴ Thus, this decision continued to stand as the leading persuasive authority on *pari passu* clauses and capital markets were left to process its chaotic effects.²⁶⁵

256. MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION* (2013). As for the title of the book, the authors explain that:

“Three and a half minutes” is one explanation that was candidly offered to us by a lawyer who sought to explain the trade-off between the time it took to “draft a new contract” and the effort costs of redesigning boilerplate that was widely used and had been part of the standard-form contract for many years. But “three and a half minutes” is also a metaphor for a business model that relies on herd behavior, fails to provide incentives for innovation and thus rises and falls on volume-based, cookie-cutter transactions. *Id.* at 6.

257. *Id.* at 10–11.

258. General Docket No. 2000/QR/ 92 (Ct. App. Brussels, 8th Chamber, Sept. 26, 2000).

259. GULATI & SCOTT, *supra* note 256, at 12.

260. *Id.* at 13.

261. *Id.* at 12–13.

262. *Pari passu* is defined as “with equal pace; equally; at the same time.” GARNER, *supra* note 255, at 654.

263. GULATI & SCOTT, *supra* note 256, at 12.

264. *Id.* at 12–16.

265. *Id.* at 16–17.

This interpretation of *pari passu* clauses lead to widespread concerns about market stability.²⁶⁶ Until 2000, sovereigns were strongly positioned to resist creditors’ demands. Collecting on judgments against sovereigns was difficult and sovereigns were well-positioned to force settlements on creditors by only paying creditors who agreed.²⁶⁷ But *Elliott* threw this into doubt. Although seizing sovereign property remained difficult, *Elliott* held that creditors could attack the payments made to other creditors of the sovereign, potentially nullifying sovereigns’ abilities to create effective settlements of sovereign bonds.²⁶⁸ If this decision gained traction, sovereigns may no longer be able to force holdout creditors’ hands, giving holdout creditors the power to throw a wrench in the gears of sovereign debt reorganization.

Yet, the presence of the chaos-threatening *pari passu* clauses in sovereign bond transactions did not change. Gulati and Scott’s research showed that even after *Elliott*, *pari passu* clauses could be found in well over ninety percent of sovereign bonds.²⁶⁹ These clauses had been in low and growing usage since 1871,²⁷⁰ but they spiked to include a majority of sovereign bonds in the post-war era.²⁷¹ As of the book’s writing, such clauses were virtually universal in sovereign bond transactions and often featured on the front-page of the document.²⁷²

With such standard usage of these clauses, Gulati and Scott figured they could track down the origin and meaning of them by interviewing the lawyers who regularly used them in sovereign bond transactions.²⁷³ But this assumption proved false. The authors interviewed hundreds of lawyers in the field but could not find a consistent story that explained the clause.²⁷⁴ Instead, the authors found many theories but few definite facts regarding the clauses’ history and understanding.²⁷⁵

266. *Id.*

267. *Id.* at 12.

268. *Id.*

269. *Id.* at 122.

270. *Id.* at 118.

271. *Id.* at 122.

272. *Id.* at 2–3.

273. *Id.* at 5–6.

274. *Id.* The authors observed, after speaking with a sample of New York lawyers who worked on sovereign debt contracts that, “[i]nstead of a straightforward agency problem or other market failure explanation, these hard-nosed Wall Street lawyers told us stories about rituals, talismans, alchemy, the search for the Holy Grail, and Zeus.” *Id.* at 5.

275. *Id.* at 178.

Explanations for the clauses' persistence varied. Some were based on institutional factors, including the refrain that associates working on the transactions did not have the power to remove them as lawyering has become increasingly commoditized.²⁷⁶ Others were based on the risk that changing the clause would implicitly accept *Elliott's* view of the existing clause.²⁷⁷ But, regardless of the reason, these boilerplate *pari passu* clauses remained sticky with the key lawyers involved having little understanding of their meaning.²⁷⁸

The ghost of *Elliott* came back to haunt the market in *NML Capital, Ltd. v. Republic of Argentina*.²⁷⁹ NML Capital, an Elliott subsidiary, had acquired Argentine sovereign bonds with *pari passu* clauses and refused to participate in Argentina's exchange offer.²⁸⁰ To induce creditors to accept the exchange, Argentina refused to make payments on non-exchanged bonds, including those acquired by NML.²⁸¹ At the district court, NML sought and obtained an injunction requiring Argentina, through its New York agents, to pay the non-exchanged bonds on a "rat-able" basis.²⁸² In reaching its decision, the district court cited the *pari passu* clause.²⁸³

Argentina appealed to the Second Circuit which affirmed the district court.²⁸⁴ The Second Circuit rejected Argentina's argument that customary usage of the clause weighed in Argentina's favor writing "the preferred construction of *pari passu* clauses in the sovereign debt context is far from general, uniform and unvarying[.]"²⁸⁵ After citing several commentators demonstrating a lack of agreement on what the clauses meant, the court analyzed it under New York contract law and affirmed the injunction.²⁸⁶

276. *Id.* at 91 (observing that, "[m]ultiple respondents told stories of their frustration with the increased commoditization of the contract-drafting process in the modern era of the big law firm.").

277. *Id.* at 90.

278. *Id.* at 178.

279. 699 F.3d 246 (2d Cir. 2012); *see also* GULATI & SCOTT, *supra* note 256, at 170–77.

280. GULATI & SCOTT, *supra* note 256, at 170–71.

281. *NML Capital*, 699 F.3d at 252; *see also* GULATI & SCOTT, *supra* note 256, at 171.

282. *NML Capital*, 699 F.3d at 254; *see also* GULATI & SCOTT, *supra* note 256, at 175.

283. *NML Capital*, 699 F.3d at 254.

284. *Id.*

285. *Id.* at 258 (internal quotation omitted).

286. *Id.* at 258–60.

2. *Interpreting Debenture Boilerplate Language in Delaware*

In *Bank of New York Mellon Trust Co. v. Liberty Media Corp.*,²⁸⁷ the Delaware Supreme Court faced the challenge of applying plain-language principles to boilerplate language. In that case, Liberty Media sought to split off part of its assets as part of a plan to create a new publicly traded company.²⁸⁸ This attempted split off followed three others as Liberty sought to reorganize its holdings.²⁸⁹ But Liberty faced a challenge: its outstanding indentures contained a Successor Obligor Provision that risked creating an event of default if Liberty transferred “substantially all” of its assets.²⁹⁰ Indeed, an anonymous Liberty bondholder sent Liberty a letter alleging that the split off would trigger the Provision because “Liberty has pursued a ‘disaggregation strategy’ designed to remove substantially all of Liberty’s assets from the corporate structure against which the bondholders have claims, and shift those assets into the hands of Liberty’s stockholders.”²⁹¹

The boilerplate at issue was the “series of transactions” language in the Successor Obligor Provision. The Trustee argued that this language allowed a court to aggregate transactions to meet the definition of splitting off “substantially all” of Liberty’s assets.²⁹² Liberty contended that this language required either a single transaction or a series of *integrated* transactions.²⁹³ To support its position, Liberty cited *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*²⁹⁴ — a Second Circuit case interpreting the “substantially all” language in debentures as requiring a single transaction or a series of integrated transactions.²⁹⁵ Although, *Sharon Steel* did not use the “series of transactions” language, Liberty pointed to the *Revised Model Simplified Indenture’s* commentary and reference to *Sharon Steel* to support its argument.²⁹⁶

In an opinion written by Justice Holland, the Court accepted Liberty’s argument giving weight to a uniform interpretation of boilerplate. The Court wrote that “[s]uccessor obligor

287. 29 A.3d 225 (Del. 2011).

288. *Id.* at 227.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 228.

293. *Id.* at 242.

294. 691 F.2d 1039 (2d Cir. 1982).

295. *Bank of N.Y. Mellon*, 29 A.3d at 237–38.

296. *Id.* at 241–42.

provisions in bond indentures consist of market-facilitating boilerplate language. Courts endeavor to apply the plain terms of such provisions in a uniform manner to promote market stability.”²⁹⁷ Next, the Court accepted that “boilerplate provisions in indentures are not the consequence of the relationship of particular borrowers and lenders and do not depend upon particularized intentions of the parties to an indenture.”²⁹⁸ Finally, the Court emphasized the uniform interpretation of boilerplate provisions in indentures writing that “in interpreting boilerplate indenture provisions, ‘courts will not look to the intent of the parties, but rather the accepted common purpose of such provisions.’”²⁹⁹

In ruling for Liberty, the court looked to the interpretation of the “substantially all” boilerplate in *Sharon Steel*. There, the Second Circuit held that the transactions had to be integrated to trigger the “substantially all” provision of indentures.³⁰⁰ In alignment with *Sharon Steel*, Justice Holland’s opinion held that because Liberty’s splitoffs were separate — not integrated — transactions, they did not trigger the “substantially all” provision.³⁰¹ Accordingly, the Successor Obligor Provision was not triggered and Liberty could proceed with the splitoff without causing an event of default.

3. *Boilerplate Beyond Debentures*

Delaware courts have also addressed the issue of boilerplate disclaimers, occasionally treating them differently than transaction-specific disclaimers. But should courts treat boilerplate disclaimers differently and does it matter if the parties are well-counseled and sophisticated? Treating boilerplate differently is not new. Professor Llewellyn contrasted boilerplate with bargained-for terms noting that consent to boilerplate is “on the implicit assumption and to the full extent that (1) it does not alter or impair the fair meaning of the dickered terms when read alone, and (2) that its terms are neither in the particular

297. *Id.* at 241.

298. *Id.* (internal quotations omitted).

299. *Id.* (citing Dennis J. Connolly & William Hao, *X Marks The Spot: Contractual Interpretation of Indenture Provisions*, 17 J. BANKR. L. & PRAC. 6 ART. 1, 12 (2008)).

300. *Id.* at 238 (discussing *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039 (2d Cir. 1982)).

301. *Id.* at 241–43.

nor in the net manifestly unreasonable and unfair.”³⁰² And, as Gulati and Scott’s research shows, even sophisticated parties may be unaware of the history and meaning of boilerplate.³⁰³

The Delaware Supreme Court addressed the validity of boilerplate disclaimers for unsophisticated party transactions in *Norton v. Poplos*.³⁰⁴ In *Norton*, a buyer attempted to rescind a real estate purchase contract by alleging seller misrepresentation and the seller defended by invoking a boilerplate disclaimer.³⁰⁵ The Court rejected this use of the boilerplate disclaimer noting that “[w]e see no reason why a court of equity should enforce a standard ‘boiler plate’ provision that would permit one who makes a material misrepresentation to retain the benefit resulting from that misrepresentation at the expense of an innocent party.”³⁰⁶

But sophisticated parties have found little success with citing *Norton* in Delaware courts. In *Great Lakes Chemical Corp. v. Pharmacia Corp.*, the Delaware Court of Chancery distinguished *Norton* noting that *Great Lakes Chemical Corp.* involved “two highly sophisticated parties, assisted by industry consultants and experienced legal counsel, entered into carefully negotiated disclaimer language after months of extensive due diligence.”³⁰⁷ Further, “[i]n limiting *Norton* to its facts, Delaware courts have held since [*Norton*] that ‘such disclaimer provisions are enforceable when the parties to the agreement are sophisticated entities that carefully negotiated its provision.’”³⁰⁸ Thus, *Norton*’s applicability to boilerplate appears limited and sophisticated parties have struggled to extend it beyond the unsophisticated party context.

Aside from boilerplate in bond indentures, there are decisions by the Delaware courts where the courts have considered custom and practice in ascertaining the meaning and purpose

302. KARL N. LEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 371 (1960); see also Russell A. Hakes, *Focusing on the Realities of the Contracting Process — An Essential Step to Achieve Justice in Contract Enforcement*, 12 DEL. L. REV. 95, 114 (2011).

303. GULATI & SCOTT, *supra* note 256, at 122.

304. 443 A.2d 1 (Del. 1982).

305. *Id.* at 4.

306. *Id.* at 7.

307. 788 A.2d 544 (Del. Ch. 2001).

308. *Transdigm Inc. v. Alcoa Global Fasteners, Inc.*, No. 7135–VCP, 2013 WL 2326881, at *10 (Del. Ch. May 29, 2013) (quoting *Progressive Int’l Corp. v. E.I. Du Pont de Nemours & Co.*, No. 19209, 2002 WL 1558382, at *7 n.36 (Del. Ch. July 9, 2002)).

of provisions that have become standardized in transaction agreements, at least to the extent past practices are reflected in model transaction agreements. In *HControl Holdings LLC v. Antin Infrastructure Partners S.A.S.*, the Court of Chancery observed that “[i]n an M&A transaction, agreements are not created from scratch. Instead, they are based on provisions negotiated in prior deals and past practices’ and lawyers ‘negotiate provisions with knowledge of these past practices.’”³⁰⁹ It is not uncommon for the Delaware courts to refer to model transaction agreements and related commentary in ascertaining the purpose of certain provisions.³¹⁰

C. *Strategic Use of Proximity, Complexity and Vagueness (“Tripwires”)*

1. *Advance Notice Bylaws — Kellner*

Now we return to *Kellner* and to the notion of linguistic “tripwires.”³¹¹ To the extent the defendants in *Kellner* argued to the Court of Chancery that the 2023 amendments to the AIM

309. No. 2023-0283-KSJM, 2023 WL 3698535, at *24 (Del. Ch. May 29, 2023) (quotation omitted).

310. See, e.g., *Express Scripts, Inc. v. Bracket Holdings Corp.*, 248 A.3d 824, 831 n.29 (Del. 2021) (citing ABA MERGERS & ACQUISITIONS COMM., MODEL STOCK PURCHASE AGREEMENT WITH COMMENTARY 302–03 (2d ed. 2010)) (analyzing the indemnification section of a Stock Purchase Agreement and how the inclusion of one undefined term alters the mental state required for fraud); *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1241 (Del. 2021) (Valihura, J., dissenting) (citing the National Venture Capital Association’s Model documents when discussing policy concerns with using stockholder agreements to effect *ex ante* waivers of appraisal rights for common stockholders); *AB Stable VIII LLC v. Maps Hotels and Resorts One LLC*, No. 2020-0310-JTL, 2020 WL 7024929, at *91 (Del. Ch. Nov. 30, 2020) (citing ABA MERGERS & ACQUISITIONS COMM., MODEL STOCK PURCHASE AGREEMENT WITH COMMENTARY 212 (2d ed. 2010)); *Lou R. Kling & Eileen T. Nugent, Negotiated Acquisitions of Companies, Subsidiaries and Divisions* § 13.06, at 13–47 (2020 ed.) (analyzing whether a party breached a Reasonable Efforts Covenant); *Akorn, Inc. v. Fresenius Kabi AG*, No. 2018-0300-JTL, 2018 WL 4719347, at *46–49 (Del. Ch. Oct. 1, 2018) (citing ABA MERGERS AND ACQUISITIONS COMM., MODEL MERGER AGREEMENT FOR THE ACQUISITION OF A PUBLIC COMPANY (2011)) (determining what is “material” regarding a material adverse effect clause); *Fortis Advisors LLC v. Johnson & Johnson*, No. 2020-0881-LWW, 2024 WL 4048060, at *22 (Del. Ch. Sept. 4, 2024) (citing ABA MERGERS & ACQUISITIONS COMM., MODEL STOCK PURCHASE AGREEMENT WITH COMMENTARY 213 (2d ed. 2010)) (holding that variations of efforts clauses—particularly those using the term “reasonable”—are largely interchangeable).

311. *Kellner v. AIM ImmunoTech, Inc.*, 320 A.3d 239 (Del. 2024).

advance notice bylaws comported with “market practice,”³¹² the opinion offers guidance in finding that several of them operated unreasonably and one was “unintelligible.”

Notably, our Court affirmed the invalidity of an “ownership” provision which was a 1,099-word run-on sentence with 13 subsections directed to disclosure interests in AIM and “any principal competitor” of AIM. The Court of Chancery commented that it “cannot say whether the Ownership Provision would choke a horse,” but that “it has certainly flummoxed this judge.”³¹³ Further, although the trial court “tried to read and understand it, the bylaw — with its 1,099 words and 13 subparts — is indecipherable.”³¹⁴ As the Court of Chancery found, “[a] provision requiring a stockholder to disclose such information seems perfectly legitimate[,]” but the problem for AIM was that “the Ownership Provision as drafted sprawls wildly beyond this purpose.”³¹⁵

With regard to the as-applied challenge to the adoption of the bylaws, our Court credited the trial court’s findings the AAU (Agreement, Arrangement and Understanding) provision “functioned as a ‘tripwire’ rather than an information-gathering tool and ‘suggest[ed] an intention to block the dissident’s effort.’”³¹⁶ We agreed that the Consulting/Nomination Provision was unreasonable because it imposed “ambiguous requirements” across a lengthy term.³¹⁷ And we agreed that the Known Supporter Provision “impedes the stockholder franchise while exceeding any reasonable approach to ensuring thorough disclosure.”³¹⁸

2. *Rights Plans — Williams*

In *Williams Companies Stockholder Litigation*, the Court of Chancery considered several challenges to a stockholder rights plan. The plan, adopted during the COVID-19 pandemic, was, at the time, “unprecedented in that it contain[ed] a more extreme combination of features than any pill previously evaluated by this court—a 5% trigger threshold, an expansive definition of

312. *Kellner v. AIM ImmunoTech, Inc.*, 307 A.3d 998, 1034 (Del. Ch. 2023) (referring to similar provisions as “very common”).

313. *Id.*

314. *Id.*

315. *Id.*

316. *Kellner*, 320 A.3d at 265.

317. *Id.* at 266.

318. *Id.*

‘acting in concert,’ and a narrow definition of ‘passive investor.’”³¹⁹ The Court of Chancery, in describing the plan’s key features as “extreme,” found, for example, that the plan’s definitions of “beneficial ownership” and “acting in concert” went well beyond default federal definitions.³²⁰ The “acting in concert” provision, in the court’s view, was the “primary offender” because its “broad language sweeps up potentially benign stockholder communications ‘relating to changing *or influencing* control of the Company.’”³²¹ The provision’s language “encompasses routine activities such as attending investor conferences and advocating for the same corporate action.”³²² This broad language gave the Board discretion to determine whether mundane action such as “exchanging information, attending meetings, [or] conducting discussions” could trigger the Plan.³²³

The Court of Chancery quoted a 2019 analysis by Professors Marcel Kahan and Edward Rock who had expressed concerns over the breadth of some acting-in-concert provisions:³²⁴

In their 2019 doctrinal and policy analysis of anti-activist poison pills, Professors Marcel Kahan and Edward Rock express concerns over the breadth of a nearly acting-in-concert provision. In their view, “wolf-pack provisions suffer from two fatal flaws, each of which would on its own be sufficient to render them invalid.” First, they “do not clearly specify what activities would result in aggregation.” Key terms like “parallel,” “relating to,” and “influencing” are hard to apply, and “plus factors like ‘exchanging information’ and ‘attending meetings’” are quite broad. “Because triggering a pill would have severe adverse consequences, such vague provisions would have a chilling effect on an activist’s ability to communicate with other shareholders.

319. *Williams Cos. S’holder Litig.*, No. 2020-0707-KSJM, 2021 WL 754593, at *1 (Del. Ch. Feb. 26, 2021), *aff’d sub nom. Williams Cos., Inc. v. Wolosky*, 264 A.3d 641, tbl., No. 2020-0707, 2021 WL 5112495 (Del. Nov. 3, 2021).

320. *Id.* at *35.

321. *Id.* at *37.

322. *Id.* (Moreover, “it gloms on to this broad scope the daisy-chain concept that operates to aggregate stockholders even if members of the group have no idea that the other stockholders exist.”).

323. *Id.* “In sum, the plan increases the range of Williams’ nuclear missile range by a considerable distance beyond the ordinary poison pill.” *Id.* at *35.

324. *Id.* at *38 (quoting Marcel Kahan & Edward Rock, *Anti-Activist Poison Pills*, 99 B.U. L. REV. 915 (2019)).

Second, “the very purpose of wolf-pack provisions — to make illicit parallel actions that are not the product of an agreement — is based on a fundamental misconception of how shareholders *ought* to interact.” Expounding on this last criticism, the authors explain that “[t]hese sorts of provisions threaten to chill the sort of shareholder interaction upon which sound corporate governance depends and that decades of reform have sought to encourage.”³²⁵

Further, the court described the Passive Investor Definition in the plan as “another easily activated tripwire.”³²⁶ Specifically, the court noted that a representative of a major stockholder criticizes Williams for failing to be fully transparent concerning the adoption of the Plan. The court surmised that such communication could be seen as “exercising the power to direct or cause the direction of the management and policies of the Company,” thus excluding the major stockholder from the Passive Investor Definition.³²⁷ The court noted that while the Board would likely exempt this major stockholder, other stockholders may not be so fortunate.³²⁸

The Court of Chancery ultimately declared the plan to be unenforceable, finding that Defendants failed to show that the plan’s “extreme, unprecedented collection of features” bore a reasonable relationship to their stated corporate objective.³²⁹ Our Supreme Court summarily affirmed.

III.

NEW FRONTIERS FOR “PLAIN LANGUAGE” IN THE WORLD OF AI

I will conclude this article with some musings about potential “new frontiers” in the “plain language” arena.

A. Judge Newsom’s Concurrence in *Snell*

At first glance, *Snell v. United Specialty Insurance Co.*³³⁰ seems like a typical case. United Casualty Insurance Company

325. *Id.* at *38 (citations and quotations omitted).

326. *Id.* at *39.

327. *Id.*

328. *Id.*

329. *Id.* at *40.

330. 102 F.4th 1208 (11th Cir. 2024).

(“United”) refused to defend James Snell, a landscaper, in a civil lawsuit alleging that Snell had negligently installed a ground-level trampoline in a client’s backyard.³³¹ Snell sued, contending that United had breached its insurance contract with him in bad faith and sought a declaratory judgment that United had a duty to defend and indemnify him.³³²

The district court granted summary judgment for United, holding that the accident did not arise from Snell’s “landscaping” work within the meaning of his commercial general liability policy.³³³ In reaching this conclusion, the district court noted that the policy did not define “landscaping,” and that the “common, everyday meaning of the word” did not include trampoline installation “even [under] the definitions submitted by Snell in his briefing.”³³⁴ The Eleventh Circuit affirmed.³³⁵

Snell could have ended there, but a concurrence by Judge Newsom made this case stand out from the pack of plain language insurance disputes. Rather than being content with the traditional plain language tool of the dictionary, Judge Newsom offered a “modest proposal.”

Those, like me, who believe that “ordinary meaning” is *the* foundational rule for the evaluation of legal text should consider – *consider* – whether and how AI-powered large language models like OpenAI’s ChatGPT, Google’s Gemini, and Anthropic’s Claude might – *might* – inform the interpretive analysis.³³⁶

Judge Newsom noted that “many will reflexively condemn [it] as heresy” and recognized that “having thought the unthinkable, I’ve said the unsayable.”³³⁷

Judge Newsom then took a fresh approach using large language models to review the definition of “landscaping” as used in the insurance policy and how it fit with the in-ground trampoline. He admitted that his instinct cut against this. Midway through the analysis, he asked: “*Is it absurd to think that ChatGPT might be able to shed some light on what the term “landscaping”*”

331. *Id.* at 1211.

332. *Id.*

333. *Id.*

334. *Id.* at 1213.

335. *Id.* at 1211.

336. *Id.* at 1221 (Newsom, J., concurring) (emphasis in original).

337. *Id.*

*means?*³³⁸ His immediate answer was that it was “positively absurd.”³³⁹ But after thinking more deeply on it, he considered it less absurd than it seemed.³⁴⁰

Judge Newsom’s method may be new, but his philosophy of using plain language is not. He describes himself as “unabashedly a plain-language guy — firmly of the view that ‘[t]he ordinary meaning rule is the most fundamental semantic rule of interpretation’ and that it should govern our reading not only of ‘constitutions, statutes, [and] rules,’ but also, as relevant here, of ‘private instruments.’”³⁴¹ And he used the LLMs for the plain language purpose of discerning the ordinary meaning of “landscaping.”³⁴²

Judge Newsom’s concurrence will undoubtedly inspire a plethora of more in-depth articles on AI and plain language interpretation, but I wish to briefly address a few points here.

First, the LLM search obtained results and notably, they differed from the conclusions reached by the Majority. His research into dictionary definitions revealed that Webster’s defined “landscaping” as “to modify or ornament (a natural landscape) by altering the plant cover.” Merriam-Webster’s defined it to mean, as did Oxford, “improv[ing] the aesthetic appearance of (an area) by changing its contours, adding ornamental features, or by planting trees and shrubs.”³⁴³ After “languishing in definitional purgatory,” Judge Newsom found no single discerning criterion. That is when he turned to ChatGPT. Upon asking ChatGPT “Is installing an in-ground trampoline ‘landscaping?’”, ChatGPT answered that it was and briefly explained its answer.³⁴⁴ According to ChatGPT:

Response: Yes, installing an in-ground trampoline can be considered a part of landscaping. Landscaping involves altering the visible fixtures of an outdoor area for aesthetic or practical purposes, and adding an in-ground trampoline would modify the appearance

338. *Id.* at 1222.

339. *Id.*

340. *Id.*

341. *Id.* at 1222–23 (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69 (2012)).

342. *Id.* at 1222.

343. *Id.* at 1223 (citing MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 699 (11th ed. 2014); OXFORD DICTIONARY OF ENGLISH 991 (3d ed. 2010)).

344. *Snell*, 102 F.4th at 1225.

and function of the space. It's a deliberate change to the outdoor environment, often aimed at enhancing the overall landscape and visibility of the area.³⁴⁵

And Google's Bard (since replaced by Gemini) returned a similar result to Judge Newsom's question.³⁴⁶

Second, Judge Newsom's concurrence also sketched out his view of the benefits and risks of using LLMs. Notably, this was done with the assumption that LLMs would not replace other sources, but would be "one implement among several in the textualist toolkit[.]"³⁴⁷ As Judge Newsom wrote, the benefits of LLMs include that they train on ordinary language inputs, can "understand" context, are accessible, and have relatively transparent research.³⁴⁸ Finally, Judge Newsom credited the wide-ranging surveying ability of LLMs that could give judges and lawyers a resource to effectively poll ordinary citizens in a way not possible with traditional methods.³⁴⁹

Judge Newsom also addressed several potential drawbacks of LLMs. These drawbacks included LLM's potential to "hallucinate," their failure to capture offline speech and usages of underrepresented populations, concern over manipulation by interested parties, and the potential for LLMs to create a dystopia of algorithmic "robo-judges[.]"³⁵⁰ Judge Newsom took these concerns seriously but concluded they could be mitigated by keeping the traditional tools in the interpretation toolkit alongside LLM datapoints.³⁵¹

No doubt, there are a host of issues raised by judicial officers and lawyers using generative AI. These range from ethical issues, data security issues and technical competence, among many others.³⁵² Some uses by judicial officers may be acceptable

345. *Id.*

346. *Id.*

347. *Id.* at 1226.

348. *Id.* at 1226–30.

349. *Id.* at 1230.

350. *Id.* at 1230–32.

351. *Id.* at 1232.

352. A number of ethics opinions have addressed the use of AI. *See, e.g.*, THE FLA. BAR, FLORIDA BAR ETHICS OPINION 24–1, at 4 (Jan. 19, 2024), <https://www.floridabar.org/etopinions/opinion-24-1> (last visited Apr. 23, 2024). Responsible use of generative AI technology also requires an understanding of how it operates and a solid understanding of best practices. *See* National Center for State Courts, *Interim Guidance: Developing an Internal Use Policy* (April, 2024), https://ncsc.org/__data/assets/pdf_file/0042/99978/ncsc-ai-rrt-developing-policies-april-2024.pdf (last visited Jan. 11, 2025).

to achieve certain efficiencies. However, judicial officers should not use AI services to reach a decision or determine the outcome of a case or disputed issue. Guidelines on the assessment and procurement of AI technology are also essential as is training if courts determine to permit certain limited uses by judicial officers.³⁵³

B. AI in Drafting Agreements

The reality is that the legal marketplace may force lawyers to use AI to increase their efficiency in drafting agreements, whether they want to or not.³⁵⁴ In addition, it will likely significantly affect how judicial officers do their work.³⁵⁵ Gulati and Scott noted in *The Three and a Half Minute Transaction* that the legal industry is becoming increasingly commoditized with clients not necessarily willing to pay for extra billable hours spent on finessing the nuances of an agreement.³⁵⁶ Currently, this leads to pre-existing forms and clauses being used for routine transactions.³⁵⁷ One may question whether clients will be willing to pay for the billable hours necessary to draft certain agreements without the assistance of AI. The result may be agreements with less thought given to their individual clauses – much as the meaning of the *pari passu* clause remained mysterious to the lawyers who used it.³⁵⁸ The private implementation of technology in the legal field carries both promises and pitfalls. New technologies have made the legal profession and the judiciary evolve before and the growth of AI will, no doubt, lead to many changes in the way lawyers and judges work.³⁵⁹

353. The Delaware Commission on Law and Technology is an arm of the Delaware Supreme Court charged with providing Delaware lawyers and judges guidance and education relating to technology and best practices for its use. On October 14, 2024, the Commission approved an Interim Policy on the Use of GenAI by Judicial Officers and Court Personnel.

354. See, e.g., RICHARD SUSSKIND, *TOMORROW’S LAWYER* (Oxford Univ. Press, 3d ed. 2023).

355. See CHIEF JUSTICE ROBERTS, 2023 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (stating, “I predict that judicial work—particularly at the trial level—will be significantly affected by AI,” and that, “[t]hose changes will involve not only how judges go about doing their job, but also how they understand the role that AI plays in cases that come before them.”).

356. GULATI & SCOTT, *supra* note 256, at 89–93.

357. *Id.*

358. *Id.*

359. See generally, SUSSKIND, *supra* note 354.

IV. CONCLUSION

I will end my musings about plain language in Delaware corporate law by stating that I continue to be impressed with the quality of lawyering we are so fortunate to have in our Delaware courts. I am confident that our Bar and judicial branch will continue to address new developments promptly and adeptly. Even with the challenges posed by new technologies and increased commoditization, I am confident that there will continue to be a demand for talented lawyers who are willing and capable of addressing difficult issues that arise in drafting and interpreting corporate documents.

In sum, as you have seen, although the interpretative exercise remains anchored in well-established general principles and rules of grammar, there is much room for good-faith differences of opinion on what words mean. It is my sincere hope that those who read this article might benefit in some small way, even if it is to make readers more focused on the importance of the words selected in the corporate drafting exercise. I hope you have enjoyed my foray into the world of “plain language.”