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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BIOLASE, INC., a Delaware corporation, Defendant/Counterclaim Plaintiff-Below, Appellant, v. ORACLE PARTNERS, L.P., a Delaware limited partnership, Plaintiff/Counterclaim Defendant-Below, Appellee.	No. 270, 2014 On Appeal from the Court of Chancery C.A. No. 9438-VCN

APPELLANT'S OPENING BRIEF

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NATURE OF THE PROCEEDINGS

This is an appeal from the May 21, 2014 Final Judgment (Ex. A) of the Court of Chancery in an action by Oracle Partners, L.P. ("Oracle") under 8 *Del. C.* § 225 to determine the composition of Biolase, Inc.'s ("Biolase" or the "Company") Board of Directors ("Board"). Oracle initiated this action on March 11, 2014, asserting that during a Board meeting on February 28, 2014 ("Meeting"), two directors, Alexander Arrow and Samuel Low, resigned, and two directors, Paul Clark and Jeffrey Nugent, were appointed to fill the purported vacancies. Biolase disputes those assertions.

After expedited discovery and a trial on the merits, the Court of Chancery issued a Memorandum Opinion ("Opinion") (Ex. B) on May 21, 2014, determining that Arrow—but not Low—had orally resigned at the Meeting, and that, solely by virtue of the sequence in which his alleged appointment was listed in the draft minutes, Clark was appointed to fill the vacancy. The Court further found that Low resigned in writing after the Meeting, leaving one vacancy. Finally, the Court determined that Clark and Nugent had not obtained their Board seats by fraud, Oracle's claim was not barred by unclean hands, and Biolase had not carried its burden on its fraud and negligent misrepresentation counterclaims.

Biolase challenges the portions of the Opinion and Final Judgment finding Arrow resigned at the Meeting and that Clark was appointed in his place.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred as a matter of law in interpreting Section 3.3 of Biolase's by-laws as permitting Arrow to resign from the Board orally.

2. The Court of Chancery applied the wrong standard for determining whether an oral resignation is effective. Although Delaware law requires an "unequivocal expression" of intent to resign, the Court applied a lower standard by holding that only "a sufficiently clear manifestation" was needed to effect a resignation.

3. The Court of Chancery erred in finding that, under either standard identified above, Arrow sufficiently manifested an intent to resign from the Board, as the objective evidence, including the draft minutes, the written resignation, and Arrow's actions demonstrate that he did not resign at the Meeting.

4. The Court of Chancery erred in failing to apply any legal principles in determining that Clark should be appointed to the vacancy that Arrow's supposed resignation created. There was and is no evidence that the Board intended for Clark to replace Arrow.

STATEMENT OF FACTS

A. The Parties

Oracle is a private investment firm specializing in healthcare investments. (A785 at 8-9; A235). Larry Feinberg is the managing member of Oracle's general partner, Oracle Investment Management. (A785 at 9). Eric Varma is a medical device analyst at Oracle and one of Feinberg's trusted associates. (A785-86 at 9-10). Presently, Oracle and its affiliates beneficially own approximately16.4% of Biolase's common stock. (A92). As described below, Oracle has relied on his relationships with a number of allies, including several Biolase insiders, to target Biolase for a backdoor takeover.

Biolase, a publicly traded Delaware corporation headquartered in Irvine, California, manufactures medical devices and is a world leader in dental laser surgery. (A1184). Before February 28, 2014, the Board of Biolase consisted of Federico Pignatelli, Alexander Arrow, Norman Nemoy, James Talevich, Frederic Moll, and Samuel Low. (A92). Federico Pignatelli is Biolase's Chairman and Chief Executive Officer ("CEO"). (A496). Pignatelli first became involved with Biolase in 1991, when he financed Biolase with approximately $1 million. (A494, A496-97). Although Pignatelli is known for his demanding management style, the Company's performance during his tenure has greatly improved. Pignatelli joined Biolase in 1994 as its Executive Chairman, and left active management in 2006.

After four years of poor performance for Biolase, Pignatelli returned to Biolase in 2010 to improve the Company's operations. When Pignatelli became CEO in August 2010, the Company was $16 million in debt and on the verge of bankruptcy. (A1081 at 80). Since then, the Company's business has had a significant turnaround and the debt has been reduced to a couple of million dollars. (*Id.*).

B. Oracle's Allies and Targets

Paul Clark has known and invested with Feinberg for nearly 30 years. (A730 at 13, A731 at 15; A792 at 35-36). In addition to a social relationship, the two have a history of sharing investment strategies. (A732 at 18, 19, 21; A733 at 22; A759 at 128). Since 2013, Biolase director Frederic Moll and Clark have served together on the board of a company called Ceravast, and Moll is "very friendly" with Clark. (A943 at 43).

Jeffrey Nugent has served as a director of several companies, including the Delaware public companies Revlon, Inc. and Bioform Medical Inc. (A997 at 7-8). Nugent first met Feinberg in 2010 when Nugent was seeking investors for a company he had formed. (A794-95 at 45-46).

Moll, a member of Biolase's Board since June 2013, met Feinberg several years ago, and the two consider themselves "friends." (A791 at 31; A938 at 24-25). Moll encouraged Oracle's initial investment in the Company and involvement

thereafter. (A791 at 31).

Alexander Arrow is the President and Chief Operating Officer ("COO") of Biolase and began his service as a director in July 2010. (A336-37, A339) Before Biolase, Arrow worked with Moll at Circuit Therapeutics, on whose board Moll still serves as Chairman. (A944-45). Moll fired Arrow from that company, (*id.*), but Arrow still considers Moll a "mentor." [Arrow Depo. 102-103].

Samuel Low, a professor at the University of Florida, joined the Biolase Board in December 2013 and began consulting for the Company in May 2014. (A552-53; A902 at 7).

C. Oracle Begins to Amass Biolase Shares

In 2013, Moll identified Biolase as a good investment for his "friend" Feinberg. (A791 at 31; A938 at 25; 5-9; A236-37, A239). Feinberg recognized that the opportunity would quickly turn lucrative if he could get control of the Company. Feinberg anticipated that he could make "5-10x" return on his investment within a few years if he executed his plan to get control.[1] (A1274). As a result, from the outset, Feinberg had a plan to replace Pignatelli. (A1207).

In August and September 2013, Oracle began negotiating with Biolase regarding an initial investment. (A236-37, A239; A1068 at 29; A791 at 32-33).

[1] Feinberg testified that control does not have its normal meaning at Oracle and only means becoming active. Other than Feinberg's self-serving testimony, there is no basis for affording the term control such a special meaning.

Oracle hoped to increase its ownership in Biolase without conflict, so that Oracle could "get board seats and management change immediately." (A1211). Internally, however, Feinberg and Varma discussed the value of "add[ing] on weakness [then] go[ing] hostile" as a back-up plan. (A1211). When Biolase ultimately rejected Oracle's offer for a $6 million investment in exchange for two board seats, Oracle bought Biolase stock on the open market. (A1215; A734 at 28:6-29:5). On November 11, 2013, Feinberg confided in Clark that he had purchased enough Biolase stock that "we are now in a position to decide whether to get hostile or not." (A1215).

The next day, November 12, 2013, Oracle filed its first Form 13-D statement with respect to Biolase, stating that it owned 9.89% of the Company's outstanding common stock. (A92). Item 4 of the 13-D statement disclosed the transaction was only for "investment purposes." (A1226). It did not disclose, as required by 17 C.F.R. § 240.13d-101, that Oracle intended to make "[a]ny change in the present board of directors or management of the issuer." Yet Oracle's internal communications confirm it had "left all options open, including actively seeking to restructure the company and its management," including the CEO position. (A1243; A1242; A1244). To accomplish these goals, Feinberg anticipated that he was "going to have to get active and perhaps nasty on this one." (A1250).

Meanwhile, Biolase and Oracle re-entered negotiations for a private

placement, which resulted in Oracle's December 19 purchase of 340,000 shares for $612,000. (A1252). Oracle filed an amended 13-D statement the same day stating that it now owned 11.4% of the outstanding stock of Biolase. (A1256) Oracle continued to represent that Oracle's purchases were for investment only and never disclosed Oracle's intent to change the Board or management. (A1256).

In February 2014, the parties negotiated another private placement. As part of the transaction, Oracle asked that Biolase raise the threshold of its rights plan from 15% to 20%. (A1683-84 at 88-90; A1273). Feinberg told Pignatelli that the current threshold was limiting his fund to a position that was too small for Oracle to continue to have an interest in Biolase. (A1083 at 89; A503-06). Internally, Oracle's principals discussed the fact that the higher threshold would allow Oracle to "build a bigger position for proxy if wanted." (A1270). Subsequently, on February 10, 2014, Biolase amended its shareholder rights plan to raise the threshold to 20%, and Oracle purchased 1,945,525 shares for $5 million, increasing its ownership to 16.4%. (A1278). Yet Oracle's Amended 13-D, filed the same day, still did not amend Item 4 to announce its interest in changing management or the board. (A1282.1; A790 at 27:8-28:3).

D. Oracle Schemes to Place Insiders on the Biolase Board

Immediately following the February 2014 private placement, Feinberg began to advocate to Pignatelli that Biolase change the composition of its Board. Feinberg proposed that Pignatelli consider two candidates—Clark and Mark Gainor—to replace existing Board members. (A1415). Feinberg's suggested appointments, however, were part of Oracle's plot to stack the Board with Oracle loyalists and remove Pignatelli from management. (A1242; A1274; A1211; A1244; A1275; A802 at 76:16-77:10).

Although Feinberg continued to hope to seize control of Biolase without resistance, he prepared his proposed Board nominees for a proxy fight. (A1274) ("I am considering launching a proxy contest for 2 board seats in a few weeks."); (A1415). To ensure the success of Oracle's takeover attempt and avoid detection of its plans, Feinberg remained in constant contact with his nominees and managed their interactions with Biolase, including reviewing and approving their communications with Pignatelli. (A1310; A1411; A1335).

While Oracle recruited for its Board coup, Biolase began exploring a relationship with Nugent, who—by appearances—had approached Biolase independently to discuss the possibility of a senior management position (likely, as Chief Operating Officer). (A1277). In reality, Oracle had been re-introduced to Nugent in October 2013. Oracle was considering Nugent as a potential

replacement for Arrow. (A1275; A999 at 17:2-14).

Upon later discovering that Nugent had separately approached Arrow to discuss joining Biolase, Feinberg was incensed. (A261; A1303; A1306 ("The idea was to get control and then talk to Nugent and decide if we liked him. Matt really is screwing up our deal! Dammit."); A1275). However, after conferring with Varma, who pointed out that "we can make the best of this situation and actually end up with an extra board seat (Mark, Paul, Fred, and Jeff out of 6 members)!", (A1306, A1283), Feinberg revised his strategy and reached out to Nugent to involve him in Oracle's plan to overtake the Board and replace Pignatelli. (A1310, A795 at 48:5-14; A1024 at 115:6-22). The new plan would be to "[m]aybe let Federico think he found Jeff while we run a separate process to bring in Mark and Paul." (A1306). Oracle "just need[ed] to make sure [Nugent] is aligned with us and doesn't count as one of our nominees. . . he shouldn't since Federico doesn't even realize we have a connection to Jeff." (A1309). Because he wanted the CEO position, Nugent was willing to play ball with Oracle and began providing a "real time feed" to Feinberg about his Biolase meetings. (A437-39). Nugent's provision of information was not a two-way street as he did not keep Pignatelli informed about his meetings with Oracle. Meanwhile, Feinberg counseled Clark and Nugent to act as though Nugent had no ties to Oracle, at the same time concealing from Pignatelli his own connections with Nugent. (A1301; A1316

(Feinberg to Pignatelli, "I don't really know Jeff"); A1322; A1325 ("Remember.. We don't know Jeff if Federico contacts u! :)"); A750-51 at 93:9-94:2). Feinberg admitted to having advised Clark to "make a misrepresentation" to Pignatelli regarding Nugent's involvement. (A816 at 132:22-133:2). Feinberg even sought the assistance of his friend and business associate Moll, with whom Feinberg shared his "well-crafted plan for board composition," to convince Pignatelli to accept Oracle's proposed nominees. (A938 at 25, A953-54 at 85-87, A959 at 106-07, A961 at 115-16; A791 at 31; A1306, A1283, A1326, A1402).

Ultimately, it became clear that Biolase would offer only one Board seat to Oracle's nominee, Clark, reserving the other for Nugent. (A1412; A1322, A461-63; A1085 at 95-96). Having recruited Nugent, however, and with Moll secretly acting on Oracle's behalf, Oracle was well-positioned to seize control. (A1411). Indeed, Oracle, along with Clark and Nugent, immediately began to carry out their plan to take control. The night before the February 28 Board meeting at which Clark and Nugent were to be appointed to the Board, Feinberg texted Gainor: "Paul and Jeff Nigent [sic] are going to be appointed to the board tomorrow. They will immediately call a board meeting to review the CEO position and eliminate Federico from that job." (A1340, A818 at 138-39).

E. Confusion Abounds Around the February 28 Board Meeting

Unaware of Oracle's motivations and Clark and Nugent's allegiances, Pignatelli attempted to facilitate Feinberg's proposed changes to the Board. Days before the Meeting, Pignatelli called Low to acknowledge that Low was interested in relinquishing his directorship to return to a contractual consulting relationship with Biolase. (A906 at 22; A556-57). Low thanked Pignatelli and said he would "consider" his resignation. (A558-59; A906 at 22).

On February 27, 2014, Pignatelli also attempted to secure Arrow's agreement to "resign from the board the following morning at the board call." (A669 at 101). Arrow was "surprised and unhappy" with Pignatelli's request. (A439-51). The two debated at length over whether Arrow should resign or serve out the rest of his term. (*Id.*).

Later that night, Arrow had dinner with Pignatelli and Nugent. On the drive over, Arrow discussed the possibility of resigning with Nugent, who advised that, "There are several other cards to be played here, so I would not get too exercised [sic] on it right now." (A417). The three continued to discuss Arrow's resignation over dinner, with Arrow stating at one point that he "wanted to a few days to think about it." (A379-80). Eventually, however, Arrow shook hands with Pignatelli and "tentatively agreed" to resign. (A4670 at 102; A352.) But Arrow "didn't want to have to really follow through with [his] handshake deal and resign." (A670 at

104). Arrow was concerned that he would lose money through the early expiration of his director stock options. (*Id*. at 105-106).

F. Neither Low Nor Arrow Resign at the February 28 Meeting

On February 28, 2014 a telephonic Board meeting was convened with Pignatelli, Nemoy, Moll, Talevich, Low, and Arrow present, along with the Company's Chief Financial Officer Frederick Furry and general counsel Michael Carroll. (A1395; A1144 at 40-41).

The Alleged Resignations. Carroll began the meeting by raising the potential resignations of Arrow and Low. Ex. B at 23. "Arrow quickly interrupted Carroll to discuss whether the expiration date on his director stock options could be extended[, and] also likely suggested that the board could be expanded to seven." (*Id.* at 24; A353-54; A384-85; A946-47 at 57-58; A1385). Arrow and Pignatelli then engaged in a "conversation regarding Arrow's potential resignation and the treatment of the expiration of Arrow's stock options should he resign from the Board." (A1395; A908 at 29; A554; A908 at 31, A9089 at 35).

Specifically, Arrow testified that he acknowledged that he "had a deal" with Pignatelli, but that was "before [he] knew it was going to be costing [him] a lot of money." (A671 at 109). He explained that, due to his concerns about his options, he objected to resigning and stated that he wanted to remain on the Board at least until the annual stockholder's meeting. (*Id*. at 108; A871 at 83, A871 at 87;

A467). Not knowing "really . . . what to do," Arrow asked for Moll's opinion. Moll did not suggest that Arrow resign, but instead thought a compromise might be reached on Arrow' options. (A947 at 58-59; A908 at 32; A1145 at 44). Following Moll's comment about the options, Arrow then vaguely stated "Okay, I agree, I go along with that." (A354; A672 at 110-111). Arrow claimed at trial that he believed that he had orally resigned from the Board at that point. (A554-55). But Arrow admits that he "did not say the words 'I resign'" or words to that effect. (A695 at 203). In fact, after the Meeting, Arrow continued to debate with Pignatelli whether he should resign. Arrow suggested that Nemoy should resign instead because, as an officer, Arrow received no director compensation, while Biolase paid Nemoy $42,000 as a director. (A690 at 182; A391-92; A1091 at 120-21).

Several witnesses confirmed the ambiguity of Arrow's statements at the Meeting. Furry, testifying on behalf of the Company, understood that Arrow and Low "were going to resign," but did not understand when that would occur. (A871 at 88, A872 at 90-91). Likewise, Pignatelli testified that he recalls that Arrow fought his resignation and never actually resigned at the Board meeting because he had "changed his mind." (A1092 at 122-123; A545). And on March 10, 2014, Talevich sent an e-mail to the Audit Committee purporting to set forth "all of the relevant facts" pertaining to Low and Arrow's resignations—there, Talevich never

stated that Arrow said "I resign" or words to that effect. (A1149 at 58-59; A1382). Instead, the e-mail states only that Arrow sent a written resignation to Pignatelli at 11:55 a.m. on February 28, 2014. (A1382).

There is no dispute that neither Low nor Arrow resigned in writing at the Meeting. (A467-68; A1145 at 44:5-15; A947 at 59:22-60:6; A1092 at 123). Further, it is undisputed that Low did not say anything at the Meeting. Ex. B at 24 & n.119. The draft minutes do not state that either Arrow or Low resigned at the Meeting.[2] (A1395).

At some point during the Meeting, the directors turned to discuss the proposed appointments of Clark and Nugent to the Board. (A1395; A1385; A1389). After brief discussion, the directors voted to appoint Nugent and Clark to the Board. (*See, e.g.*, A1146 at 47-48; A1395). Furry testified that Arrow affirmatively participated in the vote, but could not recall if Low said anything. (A469; A872 at 91). Arrow also believed that he voted on the appointments. (A386). The draft minutes reflect that "Messrs. Jeffrey Nugent and Paul Clark be, and they hereby are, appointed to the Board of the Directors of the Company . . . ." (A1395). No trial exhibits address and no witness testified as to the significance (if any) of the sequence in which Nugent and Clark were named in the draft minutes. Indeed, Talevich's own notes of the meeting reflect that "Two new directors, Paul

and Jeff, were appointed." (JX 208). The meeting adjourned at 11:12 a.m. Pacific time. (A1395).

G. Low and Arrow Submit Written Resignations After the February 28 Board Meeting That Are Later Rescinded

After the February 28, 2014 Board meeting, the Company's general counsel provided Low and Arrow with form written resignation letters to submit to the Company. (A1329). The form letters each stated:

> This letter is notice to Biolase, Inc. (the "Company") that I am resigning as a member of the Board of Directors of the Company, effective as of 12:00 p.m. Pacific Time today. (*Id.*)

Low understood that his resignation would become effective only "[w]ith the completion of a written resignation." (A555, A560-61; A910 at 37-38). Low copied the template, without modification, and sent his resignation to Pignatelli, Furry, and Biolase's counsel at 2:55 p.m. on February 28. (A1330).

Like Low,[3] Arrow believed that a written resignation was necessary in order for it to be effective. (A650 at p. 25-26). Unlike Low, however, Arrow modified the form letter significantly to convey his comments on his experience while on the Board and his wishes for Biolase's successful future. (A1331). Arrow, however, did not change the words stating that his resignation was effective as of noon on

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[2] Oracle has suggested that the draft minutes were altered in some fashion. There is not a shred of evidence in the record to support such a claim.

February 28. (*Id.*; A395). Arrow sent his resignation to Pignatelli, Furry, and the Biolase's counsel at 11:55 a.m. on February 28. (A1331).

H. With the Advice of Oracle's Counsel, Nugent and Clark Attempt to Fire Pignatelli and Take Control of the Board

On March 3, 2014, the next business day after their purported appointments, Nugent and Clark carried out their plan to terminate Pignatelli and demanded his resignation as Chairman and CEO. (A1011 at 62-63; A749 at 86-87; A1096-97 at 138-143; A423-24). Pignatelli was shocked and upset. (A1096-97 at 138-43; A515-17; A547). Although Pignatelli had known he would eventually transition from his CEO position if Biolase found a qualified candidate, (A1070 at 34-36), neither Feinberg nor any of his co-conspirators ever told Pignatelli they intended to immediately remove him from the Company.

That same day, Feinberg reached out to Pignatelli, feigning ignorance of the confrontation with Nugent and Clark. (A519; A1099 at 150-151). Feinberg also asked Moll, as one of Pignatelli's trusted advisors, to help defuse the situation. (A1402 ("All hell is breaking loose with Biolase. Hopefully you are in communication with Jeff and Paul. We can't do this without you. . . . I didn't tell Jeff and Paul to tell him he has to leave I just asked them to remove him as

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[3] When Pignatelli asked Arrow to resign in December, Arrow's father told Arrow that a resignation was not official unless in writing. Believing that to be accurate, Arrow did not send an email. (A650 at 25-26) ("So I didn't send the email.").

CEO."); A959 at 106-107). When Pignatelli spoke with Feinberg on the phone, Feinberg demonstrated extensive knowledge of Biolase's confidential financial results, confirming Pignatelli's suspicion that Feinberg had received material financial information from Nugent and Clark. (A1096-97 at 138-43). That night, Pignatelli asked Low and Arrow to continue serving on the Board, and the two purported to rescind their resignations. (A1333; A1342).

In a second attempt to execute Oracle's plan, Nugent and Clark, with Moll and Talevich's help, drafted detailed resolutions that proposed to change the composition of the Board and its committees. (*See, e.g.*, A1380; A1004 at 35, A1013 at 70). Nugent presented the resolutions at the March 7, 2014 Board meeting. (A1012 at 67-69; A1380). Clark seconded the motion, but it was tabled before a vote was taken. (A1012 at 67-69; A1100 at 154-55).

I. Nugent and Clark, as Purported Directors of Biolase, Share Confidential Company Information with Oracle

After February 28, Nugent and Clark, in violation of their fiduciary duties and (for Nugent) non-disclosure agreement, began regularly forwarding Board communications and material, non-public information to Feinberg. (*See, e.g.*, A1338; A1347; A1346; A1341; A434-37; A443-45; A998 at 10:21-11:2, A998 at 11:16-21, A1021 at 102:13-103:5, A1022 at 109:2-11, A1027-28 at 129:8-130:16; A753 at 104:9-105:7). Indeed, at trial, Nugent conceded that he likely provided confidential information to Oracle regarding certain Board activities, but claimed

that "unusual circumstances" justified doing so. (A434-37). Nugent, however, could not point to any provision in his confidentiality agreement that permitted him to disclose company information based on "unusual circumstances." On March 8, 2014, Clark even shared his impressions of and offered to forward to Oracle Biolase's draft Form 10-K, despite being unsure as to whether such action was legal. (JX1378). Feinberg admitted that he learned this non-public and market-moving financial information during a phone call with Clark or Nugent. (A278; A326-28).

J. Oracle's Two Paths to Control: Litigation and a Proxy Contest

When Nugent and Clark's efforts to remove Pignatelli and reconfigure the Board proved unsuccessful, Feinberg sent the Company notice of Oracle's intent to launch a proxy contest. (A1353). Oracle's nominees included Nugent, Clark, Moll, and Varma. (*Id.*). Meanwhile, Oracle initiated this Section 225 action in the Court of Chancery seeking a temporary restraining order and a declaration that Nugent and Clark properly had been appointed directors of the Company. On March 20, 2014, the Court of Chancery entered a Status Quo Order providing that the undisputed directors—namely, Pignatelli, Nemoy, Moll, and Talevich—would constitute the Board during the pendency of this litigation. (A88-90).

After a one-day trial on the merits, the Court of Chancery issued its Opinion on May 21, 2014.

ARGUMENT

I. The Court of Chancery Erred in Interpreting Section 3.3 of Biolase's By-laws to Permit Arrow to Resign from the Board Orally.

A. Question Presented: Did the Court of Chancery err in interpreting Section 3.3 of Biolase's by-laws to permit Arrow to resign from the Board orally? This issue was preserved for appeal. (A628-29; A140-43).

B. Standard of Review: Construction or interpretation of a corporate by-law is a question of law which this Court reviews *de novo*. *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 926 (Del. 1990). Because Section 3.3 of the by-laws derives to some extent from an earlier version of 8 *Del. C.* § 141(b), the Court below also relied in its analysis on its interpretation of this statute. *See* Ex. B at 38-39. The construction of the statute is an issue of law that is subject to *de novo* review by this Court. *Clark v. Clark*, 47 A.3d 513, 517 (Del. 2012).

C. Merits: The Court of Chancery correctly recognized that whether Clark and Nugent were validly appointed to the Board turns on whether there were vacancies to be filled at the time of their appointments, and thus on when Arrow and Low resigned. Ex. B at 37. However, the Court of Chancery erred in ruling that Arrow *orally* resigned during the Meeting, thus creating the vacancy to which the Court appointed Clark. Ex. B at 42. Biolase's by-laws do not permit the oral resignation of a director.

1. Biolase's By-laws Plainly Require Written Resignations.

A plain reading of Biolase's by-laws confirms that they require written resignation of a director. As a general matter, by-laws must be interpreted in accordance with principles of contract construction. *Airgas, Inc. v. Air Products & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010). "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." *Id.* (citing *Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 343 (Del. 1983)).

Section 3.3 of Biolase's by-laws provides that, "Any director or member of a committee of, the Board may resign at any time upon written notice to the Board, the Chairman of the Board, the Executive Vice Chairman of the Board, the CEO or the President." (A40-58). The Court of Chancery determined that the by-law "is unambiguous because 'may' in this context can only be interpreted as permissive, not mandatory." Ex. B at 39. Respectfully, the Court misconstrued the by-law. The auxiliary verb "may" refers to the phrase immediately following it—"resign at any time." The remainder of the sentence refers to the way in which resignations are to occur—"upon written notice to the Board, the Chairman of the Board, the Executive Vice Chairman of the Board, the CEO or the President." The permissive nature of the by-law reflects only that directors cannot be forced to resign.

That the by-law specifically lists "the Board" and four specific director or

officer positions to which a resignation may be tendered is significant. The Court below concluded that the by-law merely describes one way in which a director might resign. But the detailed list the by-law provides of persons to which a resignation may be tendered cannot be interpreted as merely illustrative. It cannot seriously be argued, for example, that a director could tender her resignation solely to the Vice President of Business Development on the grounds that Section 3.3 merely provides a nonexhaustive list of corporate officials to whom a director could elect to submit her resignation. The entire phrase in Section 3.3—"upon written notice to the Board, the Chairman of the Board, the Executive Vice Chairman of the Board, the CEO or the President"—describes the requirements for an effective resignation. The by-laws thus require that directors resign in writing.

2. The Court of Chancery Misconstrued 8 *Del. C.* § 141(b).

The by-law language at issue derives in part from the language of 8 *Del. C.* § 141(b) in effect between 1968 and 2000, which provided that, "Any director may resign at any time upon written notice to the corporation." 8 *Del. C.* § 141(b). Section 3.3 of the by-laws largely tracks the language of the pre-2000 version of Section 141(b), although the by-law is more specific about to whom a director may tender a resignation and thereby confirms that a director must resign in writing. As the by-law is more specific than the statute, the Court need not construe Section 141(b) to conclude that the by-laws do not permit oral resignations.

In any event, the Court's interpretation of the statute violates several principles of statutory interpretation not addressed in the Opinion. *First*, it renders the 2000 Amendment to Section 141(b) mere surplusage. *Second*, it violates the principles of *expressio unius est exclusio alterius*.

The General Assembly's 2000 amendments to Section 141(b) underscore the more restrictive reading of the statute than the lower court employed. At that time, the legislature replaced the phrase "written notice" with the phrase "notice given in writing or by electronic transmission." 8 *Del. C.* § 141(b). If Oracle's reading of the statute is correct and a resignation can take any form, then the legislature added meaningless language to the statute by listing another illustration (and a particularly obvious one) about how a director might resign. However, as this Court has recognized, courts "should ascribe a purpose to the General Assembly's use of statutory language, and avoid construing it as surplusage, if reasonably possible." *Anderson v. Krafft-Murphy Co.*, 82 A.3d 696, 702 (Del. 2013). Under this canon, Oracle's reading of the statute is not tenable.

The current version of Section 141(b) provides that:

> Any director may resign at any time upon notice given in writing or by electronic transmission to the corporation. A resignation is effective when the resignation is delivered unless the resignation specifies a later effective date or an effective date determined upon the happening of an event or events.

8 *Del. C.* § 141(b). Oracle argues that Section 141(b) simply specifies two ways—

"in writing" or "by electronic transmission"—in which a director may resign. But courts have long recognized the canon of statutory interpretation, *expressio unius est exclusio alterius*. "As the maxim is applied to statutory interpretation, where a form of conduct, the manner of its performance and operation, and the *persons and things to which it refers are affirmatively or negatively designated, there is an inference that all omissions were intended by the legislature*." *Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007) (emphasis in original) (citations omitted). Here, the General Assembly's reference to resignations "in writing" and "by electronic transmission" demonstrates that the legislature did not intend to permit oral resignations.

3. The Court of Chancery Misinterpreted 8 *Del. C.* § 141(b).

The Court below erroneously ruled that, "This Court has long interpreted the word 'may' in this statute as permissive rather than mandatory, which necessarily implies that a director may resign in other ways—such as verbally." Ex. B at 38. This interpretation, which has never been addressed by this Court, is based entirely on dicta and unfounded concerns about the consequences of not recognizing oral resignations. Neither ground justifies permitting oral resignations.

The Court below cited three cases in which the Court of Chancery has held oral resignations effective under Delaware law: *Boris v. Schaheen*, 2013 WL 6331287 (Del. Ch.); *General Video Corporation v. Kertesz*, 2008 WL 5247120

(Del. Ch.); and *Dionisi v. DeCampli*, 1995 WL 398536 (Del. Ch.). Ex. B. at 38 & n.183. Each of these cases relies on *Bachmann v. Ontell*, 1984 WL 8245 (Del. Ch.), which offers, at best, a shaky foundation for the proposition that oral resignations are effective under Delaware law.

In *Bachmann*, the Court of Chancery noted that Delaware law does not require written director resignations because (1) the language of Section 141(b) "*can be* construed as permissive rather than mandatory," and (2) the court could "conceive of circumstances where a completely illogical result would follow from the refusal of the law to recognize an oral resignation clearly given." 1984 WL 8245, at *2 (emphasis added). Although *Bachmann* noted that resolution of the questions was not necessary to its case, later courts have deferred to its cautious dicta rather than returning to the plain language of Section 141(b). In particular, neither *Boris* nor *General Video* addressed the effect of the 2000 amendments to Section 141(b).

Although the *Bachmann* court also speculated that a refusal "to recognize an oral resignation clearly given" could lead to illogical results, (1984 WL 8245, at *2), the General Corporation Law contains a number of provisions that require a formal writing, such as the issuance of stock, (*see* 8 *Del. C.* § 151(a)), that may frustrate clearly expressed oral intentions. Such provisions are not simply formalistic but promote better recordkeeping and corporate governance, as well as

much needed certainty.

4. A Narrow Reading of Section 141(b) is Consistent with Strong Corporate Governance.

To the extent that the text of Section 141(b) is ambiguous, the Court should adopt a reading of the statute that supports strong corporate governance principles. The Court below observed that, "Despite their prevalence and utility, . . . telephonic meetings have certain disadvantages—foremost among them being the lack of non-verbal communication, such as shaking another's hand or nodding one's head in agreement." Ex. B at 1. Permitting resignations to be effective based on off-the-cuff statements in telephonic Board meetings is a recipe for costly and unnecessary litigation about board composition and fosters uncertainty that undermines effective corporate governance.

If this Court decides it must reach the issue, it should adopt a bright-line rule adhering to the text of Section 141(b) and requiring that resignations of directors of Delaware corporations be in writing. In the age of smart phones and laptop computers, the burden on directors to resign in writing, especially considering the gravity of the action and its potential repercussions for fiduciary duties and the like, is minimal. In contrast, the benefits of requiring written resignations are great, particularly in providing more certainty about board composition.

II. The Court of Chancery Erred in Applying the Wrong Legal Standard to Determine Whether Arrow Resigned at the February 28 Meeting.

A. Question Presented: Did the Court of Chancery err in holding that Delaware law requires only "a sufficiently clear manifestation," rather than an "unequivocal" expression, of a director's intent to orally resign to be effective? This issue was also preserved. (A610; A144).

B. Standard of Review: Whether the trial court applied the proper legal standard to decide whether Arrow resigned is a question of law subject to *de novo* review. *Hawk v. Div. of Child Support Enforcement*, 47 A.3d 971 (Del. 2012).

C. Merits: This Court has not addressed the proper standard for determining whether a director has resigned. The Court should hold, consistent with other opinions of the Court of Chancery, that a director must *unequivocally* express her intent to resign for the statement to constitute a resignation.

The *Kertesz* and *Dionisi* courts determined that a resignation was effective after the director unequivocally expressed his intent to resign. *Kertesz*, 2008 WL 5247120, at *18; *Dionisi*, 1995 WL 398536, at *9. As *Dionisi* explained, "Loose and ambiguous language will not be regarded as sufficient to prove the resignation of a corporate officer, at least where the subsequent acts and declarations of the officer are inconsistent with any such contention." 1995 WL 398536, at *9 (citing *Bachmann*, 1984 WL 8245, at *3). The ruling in this case, however, considered whether Arrow resigned under a lower standard—whether there was "a *sufficiently*

clear manifestation of . . . intent to resign." Ex. B at 39 (emphasis added). The rule adopted by the lower court suggests that Arrow's purported resignation could have been effective as long as an objective listener would have considered it more likely than not he resigned, even if some confusion about his intentions remained.

If the Court is to permit an oral resignation to be effective at all, it should require that the statement of intent to resign be unequivocal. That is, no reasonable listener should be able to doubt that a director has in fact resigned. This high standard is in keeping with the gravity of a director's decision to resign, which can create instability and any number of other problems for a company. Requiring that a resignation be unequivocal to be effective reduces the risk of misunderstanding (and litigation) concerning the composition of the board.

III. The Court of Chancery Erred in Finding that Arrow Manifested a Legally Adequate Intent to Resign from the Board.

A. Question Presented: Even if Biolase's by-laws permit oral resignations of directors, did the Court of Chancery err in finding that Arrow's testimony that he said at the Meeting, "Okay, I agree, I go along with that," was legally sufficient, in light of the context of that statement and other evidence to the contrary, to manifest an intent to resign? This issue was preserved. (A610-615; A144-47).

B. Standard of Review: This Court may overturn the factual findings of the Court of Chancery if "they are clearly wrong and the doing of justice requires their overturn." *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chi.*, 75 A.3d 101, 108 (Del. 2013).

C. Merits: Under either the "unequivocal" or "sufficiently clear" standard, the trial evidence does not support a finding that Arrow adequately communicated his intent to resign at the Meeting. There is no dispute that Arrow did not resign in writing during the meeting. (A467-68; A1145 at 44:5-15; A947 at 59:22-60:6; A1092 at 123). Thus, the question is whether Oracle carried its burden to show that Arrow's oral statements during the meeting and subsequent conduct show that he clearly intended to resign. It did not. The Opinion gives insufficient weight to the evidence that on February 28, 2014, (1) Arrow believed that a written statement was necessary to give effect to his resignation, (2) Arrow never said "I

resign" or words to that effect at the meeting, (3) it is unclear whether Arrow's apparent statement that "Okay, I agree, I go along with that," referred to treatment of his stock options, rather than his purported resignation from the Board more generally, (4) the draft minutes of the meeting do not reflect that Arrow resigned, (5) Arrow continued to vote at the meeting even after his purported oral resignation, and (6) Arrow's request *after* the meeting that Nemoy resign instead shows that he did not believe his resignation to be final.

The trial evidence showed that the day before the Meeting, Pignatelli asked Arrow to "resign from the board the following morning at the board call." (A669 at 101). Arrow was "surprised and unhappy" with the request and objected to resigning at that time. (A349-51). Significantly, Arrow was concerned that he would lose money because his director stock options would expire earlier if he left the Board earlier. (A670 at 105-06). Eventually Arrow shook hands with Pignatelli and "tentatively agreed" to resign, (*see Id*. at 102, A352), although Arrow testified that he was conflicted about the prospect of resigning from the Board and that he "didn't want to have to really follow through with [his] handshake deal and resign," (A670 at 104).

The lower court found that, at the Meeting the next morning, Carroll, Biolase's Secretary and General Counsel, began the meeting by raising the potential resignations of Arrow and Low. Ex. B at 23. "Arrow quickly interrupted

Carroll to discuss whether the expiration date on his director stock options could be extended[, and] also likely suggested that the board could be expanded to seven." *Id.* at 24. At this point, Pignatelli joined the increasingly animated conversation. The Opinion appears to interpret Pignatelli's comments as focusing primarily on the "handshake deal" for Arrow to resign. *Id.* But the draft minutes show, and the testimony of percipient witnesses confirms, that Arrow and Pignatelli "engaged in a conversation regarding Arrow's potential resignation *and the treatment of the expiration of Arrow's stock options should he resign from the Board*." (*See, e.g.*, A1395 (emphasis added); A467). This is a crucial distinction, because the Court below found that Arrow then "asked Moll about what he should do, and Moll encouraged him to follow Pignatelli's lead on this point." Ex. B at 24. Only then did Arrow supposedly say, "Okay, I agree, I go along with that." (A354).

The Opinion treats Arrow's statement as a clear manifestation of his agreement to resign. *See* Ex. B. at 24. However, it is far from clear in this context what Arrow agreed to and what the "that" in "I go along with that" meant. The evidence, including Arrow's own testimony at trial, (*see* A353-54, A384-85), shows that he was most concerned with the expiration date for his director stock options and how much money this might cost him, (*see* A671 at 109), and his "I agree" comment proceeded a lengthy discussion about this subject. Thus, it is unclear whether Arrow agreed to a specific proposal from Pignatelli concerning his

stock options rather to resign more generally.

Finally, the Opinion appears to place undue weight on Arrow's testimony that he believed he resigned at the meeting. *See* Ex. B. at 40. Arrow's actions after his purported resignation belie his claim now that he thought he had resigned.[4] *First*, after his purported oral resignation, he continued to vote at the meeting. (A386). *Second*, after the meeting, Arrow asked Pignatelli whether Nemoy could resign instead because, as an officer, Arrow received no director compensation, whereas Biolase paid Nemoy $42,000 as an outside director. (A391-92; A1091 at 120-21]. *Third*, after the Meeting, Arrow submitted a written resignation in which he modified the form letter sent by Biolase's general counsel, but, importantly, did not change the effective time of his resignation. Arrow is highly educated and, if he believed that he resigned at the meeting, he would have changed the letter to say so, but he did not. *Finally*, the Court of Chancery appears to have ignored Arrow's contradictory trial testimony that he believed that a resignation does not take effect unless it is in writing. (A255-56). This series of conduct, including the evidence of Arrow's hesitation and oscillation at the meeting, does not show that there was an objective manifestation of an intent to resign, regardless of Arrow's private belief at the time (or later expressed at trial).

[4] In December, Arrow's father told him that a resignation was not "official" unless in writing. Believing that to be accurate, Arrow decided to not send a written resignation. (A650 at 25-26) ("So I didn't send that email").

IV. The Court of Chancery Erred in Concluding Clark Was Appointed to Fill the Purported Vacancy Left by Arrow's Alleged Resignation.

A. Question Presented: Assuming Arrow effectively resigned during the Meeting, but Low did not, resulting in a single vacancy, did the Court of Chancery err in concluding the Board appointed Clark to fill that vacancy? This issue was preserved. (A629-31; A1419-23).

B. Standard of Review: Whether the Court of Chancery applied the proper legal standard in determining whether to appoint Clark to the Board is a question of law subject to *de novo* review. *Hawk*, 47 A.3d at 971.

C. Merits: Even assuming that the purported oral resignation of Arrow at the Meeting created a single vacancy, the Court of Chancery erred in concluding that the Board appointed Clark to fill the vacancy. The Court's decision to select Clark instead of Nugent was not based on any legal principle. Instead, the Court essentially randomly picked Clark. In doing so, the Court committed legal error.

The Opinion holds that "[a] board's appointing two directors where there is legally only one vacancy cannot mean that neither nominee was duly appointed." Ex. B at 41. This blanket assertion rests on no legal precedent, and neither party has found any Delaware law that would support it. Indeed, Oracle counsel was asked at the argument if there was any principled way to pick one director over another, and he admitted that there was no way to do so.

> I think it would be whichever one wanted to serve at this point.

> I mean, I -- the resolution as reported in the minutes says that Nugent and Clark were hereby appointed. So maybe Nugent was appointed first and so maybe he would fill the one vacancy. But I think, as a practical matter, there would be discussion as to which one should serve, and one of them would serve and the other one would agree not to serve if we got to that point. You know, we would be happy -- they are both independent directors, and we would be happy with either of them on the board, although we think very strongly that both of them were properly elected to the board. (A591).

The standard articulated by the Opinion also is contrary to public policy, as it would supplant the judgment of the Board with that of the court. *See In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 746 (Del. Ch. 2005).

The trial court explained that it appointed Clark to the vacancy left by Arrow's purported resignation because Clark's name appeared first in the draft minutes, in parallel to the order in which Arrow and Low's alleged resignations were supposed to have occurred. This was entirely arbitrary, especially given the absence of testimony regarding the Board's intent and contrary evidence reflecting a different sequence of appointments (which the Opinion does not address). [JX 208]. Because there is no evidence Clark was intended to fill Arrow's seat, equity dictates that neither Clark nor Nugent be appointed to the Board.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2014 a copy of the herewith document was served electronically via *File & ServeXpress* on the following counsel of record:

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