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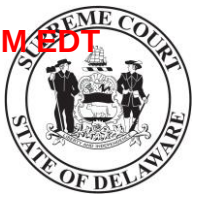


**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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|---|---|---|
| SERGEY ALEYNIKOV, | ) | |
| | ) | |
| Plaintiff Below/Appellant, | ) | |
| | ) | C.A. No. 366, 2016 |
| v. | ) | |
| | ) | Court of Chancery |
| THE GOLDMAN SACHS GROUP, INC., | ) | C.A. No. 10636-VCL |
| | ) | |
| | ) | |
| Defendant Below/Appellee. | ) | |

# APPELLEE'S ANSWERING BRIEF

Kevin G. Abrams (#2375)
John M. Seaman (#3868)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

*Attorneys for Defendant Below/ Appellee The Goldman Sachs Group, Inc.*

Of Counsel:

Christopher E. Duffy
Karen A. Chesley
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, New York 10022
(212) 446-2300

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## NATURE OF PROCEEDING

Sergey Aleynikov appeals from the Court of Chancery's Post-Trial Order and Final Judgment (the "Order"), which denied his claim for advancement of fees incurred to defend counterclaims in a separate indemnification action he initiated in 2012 against appellee The Goldman Sachs Group, Inc. ("GS Group") in New Jersey federal court (the "DNJ Action").

In the DNJ Action, Aleynikov sought advancement and indemnification of fees relating to his defense of criminal charges for stealing computer code from a GS Group subsidiary. The key issue in that case, as in this one, is whether Aleynikov was an "officer" of that subsidiary, Goldman, Sachs & Co. ("GSCo"), for purposes of 8 *Del. C.* § 145 and GS Group's indemnification bylaw (the "Bylaws"). Frustrated with the results in the DNJ Action, including a Third Circuit ruling that "officer" was ambiguous on the then-existing record and that *contra proferentem* could not be used to resolve the ambiguity, Aleynikov filed this summary proceeding essentially seeking a do-over that, if favorable, he could attempt to use in the DNJ Action.

The trial below ensued based on a record imported from the DNJ Action, supplemented by additional document discovery and testimony from the parties' industry experts. Aleynikov, who was employed as a mid-level computer programmer, has admitted throughout the course of both actions that he was not

designated as an officer under GSCo's written resolution process, that he had none of the hallmarks of "officers"—managerial, supervisory, or policymaking authority—and that his claim to officer status was based solely on the fact that he had the mid-level title of "vice president," like thousands of other employees at GSCo and throughout the investment banking industry.

The Order held that, under principles of issue preclusion, the court was bound by the Third Circuit's determination that *contra proferentem* did not apply, and that Aleynikov failed to meet his burden of proving he was an "officer" by virtue of title alone or the record evidence.

## SUMMARY OF ARGUMENT

1. Denied. Aleynikov contends that he was an officer based solely on having the title of "vice president"—which denotes a rank in the investment banking hierarchy held by thousands of employees above the level of analyst and associate (but below managing director). The central question on appeal is therefore whether a mid-level employee, who was never elected to any office and never had any managerial role, is an "officer" under 8 *Del C.* § 145 ("Section 145") and GS Group's Bylaws. In the related appeal in the DNJ Action, the Third Circuit strongly suggested that the answer is "no," but remanded for further proceedings, including to accommodate evidence as to trade usage. In this action, the Court of Chancery held that the answer is "no," consistent with precedents that a title alone does not automatically confer officer status and in light of the overall evidentiary record. As the court held, Aleynikov "failed to prove that someone who held the bare title of 'Vice President,' but who otherwise held a position with the responsibilities of an employee, qualified as an officer for purposes of advancement under the Bylaws." Order ¶ 10. The court's dicta about what Aleynikov may have believed, which Aleynikov suggests pointed to the opposite conclusion, related to the use of the "vice president" title, not the objective plain meaning of "officer" under Section 145 and the Bylaws. Thus, the court below explained that while it was "personally inclined to think" that *contra proferentem*

may apply absent the Third Circuit's opinion, "[w]hether I agree or disagree with the Court of Appeals is of no moment." Order ¶¶ 5(d), (d)(xvii).

2. Denied. The court weighed the trial evidence and correctly concluded that Aleynikov failed to meet his burden of proof. As shown below, the evidence was not merely in "equipoise," but weighed heavily in GS Group's favor. GS Group presented substantial evidence that GSCo has a formal resolution procedure to appoint its few officers (which did not include Aleynikov); that the plain meaning of officer in the corporate law context is a person to whom the primary functions of management are delegated (a delegation that Aleynikov concedes he never received); and that the investment banking industry's trade usage of "vice president" titles is for mid-level employees, not officers. Aleynikov has not given this Court any reason to deviate from the trial court's conclusion as to the weight of the evidence.

3. Denied. The court correctly held that issue preclusion prevented Aleynikov from obtaining a do-over of the Third Circuit's holding that *contra proferentem* was inapplicable to the threshold question of whether Aleynikov was an officer. The Third Circuit record shows that *contra proferentem* was "actually litigated." And under the applicable Restatement approach to issue preclusion, the Third Circuit's rulings are considered final for issue preclusion purposes. The court below also correctly held that it was not inequitable to apply issue preclusion.

In all events, the Third Circuit's analysis was correct, as *contra proferentem* can apply only to determine the *scope* of rights under an ambiguous contract, not to the threshold issue of whether a litigant is a party to the relevant agreement.

## COUNTERSTATEMENT OF FACTS

### A. Aleynikov Was A Mid-Level Programmer At GSCo.

Defendant GS Group is a Delaware corporation. A316. GSCo, which is organized as a New York limited partnership, is a GS Group subsidiary that employed Aleynikov. *Id*.

In March 2007, GSCo offered Aleynikov a job as a computer programmer with the title of vice president. A267-68. The word "officer" does not appear in Aleynikov's offer letter, which described him only as an "employee." *Id.* The offer letter contained a broad integration clause, meaning that it constituted the entire agreement between Aleynikov and GSCo. A268.

Like other investment banks, GSCo employs thousands of employees with a "vice president" title. As GS Group's general counsel testified, there are "13,000 vice presidents at Goldman Sachs. We probably have 30,000 employees in total… [I]t can be defined no other way as mid level." B126, 346:10-15.

Aleynikov's former supervisor testified that the title "only is reflective of relative seniority within GS & Co. and it has no roles and responsibilities associated with it." B104-05, 48:8-9, 175:10-13. He added that "vice presidents hired at GS & Co. to be midlevel programmers are not officers of the firm." B106, 246:15-17.

Aleynikov's job was to write computer code. A538, 39:2-22; B133, 31:9-32:2. He admits that he had no "supervisory, managerial or policymaking authority or responsibility" and did not otherwise exercise any corporate authority. B099; A538, 40:12-15.

While working for GSCo, Aleynikov never told anyone that he was an officer, and had no memory that "any vice president claimed that he or she was an officer of GSCo." B134, 40:12-41:10. Moreover, no one at GSCo ever referred to Aleynikov as an officer; and Aleynikov never spoke with anyone at GSCo about whether a vice president was an officer. A533, 17:24-18:2; A538, 37:1-5. Aleynikov admitted that, while working at GSCo, it "never crossed [his] mind" whether GSCo had any obligation to pay legal fees he might incur. A534, 23:5-17, A545, 65:10-66:2. He also admitted that he never read GS Group's Bylaws while he worked for GSCo. A545; 66:10-23.

**B. <u>GSCo Never Identified Aleynikov As An Officer.</u>**

The uncontradicted record established that Aleynikov's employer, GSCo, has a formal, written resolution process for appointing officers, and that Aleynikov was never appointed pursuant to this process. *See* A240-50 (together, the "Written Consents"). Each Written Consent appointed one or more officers to senior management offices (*e.g.*, Chief Executive Officer) or to offices created for regulatory purposes (*e.g.*, Compliance Registered Options Principal). *See* A251-

66. The uncontroverted testimony of GS Group's general counsel and the in-house lawyer responsible for governance issues confirmed that GSCo officer appointments were accomplished exclusively through this formal resolution process. *See, e.g.*, B124, 216:6-11; B139-40, 12:21-25, 20:6-9. All GSCo officers are also identified in publicly available forms at the SEC and FINRA. *See* A251-66.

### C. Aleynikov Is Criminally Charged For Stealing Computer Source Code.

In July 2009, the F.B.I. arrested Aleynikov for stealing a portion of GSCo's computer source code. *United States v. Aleynikov*, 676 F.3d 71, 74 (2d Cir. 2012). In 2010, Aleynikov solicited assistance in paying legal fees on his personal website, www.aleynikov.org, stating in part: "I cannot afford to mount the necessary defense without the support of those who believe in me." B057-58. At that point, and for the two-plus years that followed, Aleynikov never suggested to anyone that he had a legal right to advancement from GS Group. Aleynikov admitted that it "didn't even occur to me that that was an option at the time." B136.1, 111:21-112:3.

In August 2012, after Aleynikov's federal conviction was reversed on appeal due to the limited scope of the federal statutes at issue, the New York County District Attorney brought charges against Aleynikov based on the same theft of GSCo's computer code. (That criminal case remains pending.) On August 15,

2012, Aleynikov posted an updated internet solicitation for help with legal fees, repeating that he could not "afford to mount the necessary defense without the support of those who believe in me." B071. Again, he did not mention any purported right to advancement from GS Group.

**D. <u>Aleynikov Pursues Advancement Through The DNJ Action.</u>**

On August 24, 2012—more than three years after his initial arrest, and several weeks after his re-arrest—Aleynikov's attorneys sent a demand to GS Group seeking indemnification of fees incurred in connection with the federal criminal case, and advancement related to the state criminal proceedings. B065-69. The letter suggested that Aleynikov believed he was an officer of ***GS Group***, not GSCo (as he now argues). B067.[1]

Rather than filing a summary proceeding in Delaware under Section 145, Aleynikov sued GS Group several weeks later in the DNJ (his home forum), seeking indemnification, advancement, and "fees on fees." B073-89. Each claim was based on the premise that, solely by virtue of his title of "vice president," Aleynikov was an "officer" under Section 6.4 of GS Group's Bylaws, which

[1] Aleynikov's demand letter also referred to him as "a corporate officer" (B067), which contradicts his expert's later claim that the term "corporate officer" has a special meaning that does not apply to Aleynikov. *See* A558, 117:17-21 (stating that "the definition of corporate officer" is "different than the title vice president"); A579, 201:4-8 (defining "corporate officer" to mean "executive officer" based on a supposed "common understanding").

provides directors and officers of GS Group and its subsidiaries with a right to advancement of certain legal fees and costs. *See id*.

GS Group filed counterclaims against Aleynikov in the DNJ Action based on the same theft of computer code that led to his criminal charges. Following expedited discovery limited to Aleynikov's advancement claim, the DNJ granted partial summary judgment for Aleynikov on advancement and otherwise denied the parties' cross-motions. *Aleynikov v. Goldman Sachs Group, Inc.*, 2013 WL 5739137, at *1 (D.N.J. Oct. 22, 2013). GS Group appealed the ruling to the Third Circuit, which published an opinion vacating the advancement order and remanding for further proceedings. *Aleynikov v. Goldman Sachs Group, Inc.*, 765 F.3d 350 (3d Cir. 2014).

The Third Circuit's opinion observed that the "evidence presented to this Court strongly suggests that to the extent that Aleynikov understood himself to be an officer, this was unreasonable *in the relevant industry*," and held, among other things, that "the plain meaning of the term officer is someone holding a position of trust, authority, or command"; even if the advancement bylaw was ambiguous, "*contra proferentem* has no application in resolving whether a person has rights under the contract at all"; and the record as it stood after expedited discovery was not conducive to summary disposition. *Id*. at 360-67 & n.9 (emphasis in original).

Aleynikov filed a petition for rehearing in the Third Circuit, which was denied. B441-508. Shortly after the Third Circuit issued its mandate, but before any additional development of the record, Aleynikov filed a third summary judgment motion seeking advancement in the DNJ. The DNJ denied his motion. *Aleynikov v. Goldman Sachs Group, Inc.*, 2015 WL 225804 (D.N.J. Jan. 16, 2015).

### E. Aleynikov Seeks To Circumvent The Third Circuit's Ruling By Filing A New Advancement Action In Delaware.

Frustrated with the DNJ Action, Aleynikov filed this action, where he nominally seeks advancement of about $250,000 of fees purportedly incurred to defend against the DNJ counterclaims, plus "fees on fees." *See* A315-25. Aleynikov previously sought advancement for the defense of those counterclaims in the DNJ Action. *See* B179. His transparent objective in changing course was to get a "restart" on the question of his officer status, given the Third Circuit's ruling that *contra proferentem* did not apply, as well as its observation that his purported understanding that he was an officer was probably unreasonable in the relevant industry. *Aleynikov*, 765 F.3d at 365 n.9.

The DNJ Action, where Aleynikov seeks advancement and indemnification of more than $7 million, *see* B512, remains pending but has been mostly dormant since the start of this action. In the Court of Chancery, a one-day trial took place based largely on the evidentiary record amassed in the DNJ Action, some

additional discovery, and live testimony from Aleynikov and the parties' industry experts.

After trial, the court entered judgment in favor of GS Group. Aleynikov's appeal followed.

## ARGUMENT

## I. THE COURT OF CHANCERY CORRECTLY HELD THAT ALEYNIKOV FAILED TO PROVE THAT HE WAS AN OFFICER.

### A. Question Presented

Was the court correct in holding that Aleynikov did not satisfy his burden to prove that he was an officer of GSCo under Section 6.4 of the Bylaws?

### B. Scope of Review

Matters of contract and statutory interpretation, such as whether Aleynikov meets the definition of officer in of the Bylaws and 8 *Del. C.* § 145, are reviewed *de novo*. *See Gatz Props., LLC v. Auriga Capital Corp*., 59 A.3d 1206, 1212 (Del. 2012). An abuse of discretion standard applies to the trial court's ultimate weighing of evidence to find that Aleynikov did not carry his burden of proof. *See In re Shell Oil Co*., 607 A.2d 1213, 1221 (Del. 1992). "To the extent the trial court's interpretation of the contract rests upon findings extrinsic to the contract, or upon inferences drawn from those findings," appellate "review requires [this Court] to defer to the trial court's findings, unless those findings are not supported by the record or unless the inferences drawn from those findings are not the product of an orderly or logical deductive reasoning process." *Honeywell Int'l Inc. v. Air Prods. & Chems., Inc.*, 872 A.2d 944, 950 (Del. 2005).

Aleynikov claims that the court made "subsidiary factual findings" reviewable only for "clear error." But he acknowledges (at pp. 18-19) that those

statements were "confined … to discussing whether *contra proferentem* should apply." More specifically, the statements in paragraphs 5(d)(i-xvi) of the Order expressed why the court was "personally inclined to think" that the Third Circuit's *contra proferentem* holding was flawed, even though its application of issue preclusion meant that its view was "of no moment." Unlike the court's actual holding that Aleynikov had not proven officer status, this dicta is entitled to no deference here. *See Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 397-98 (Del. 2010) (holding that the Court of Chancery's findings were "*obiter dictum* and without precedential effect" where "a decision either way would not alter the result we have reached nor would a gratuitous statutory interpretation [of a term used in the Delaware General Corporation Law ("DGCL")] resolving this difficult issue be prudent"); *see also Gatz Props.*, 59 A.3d at 1218.

### C. Merits of Argument

This case is about the meaning of a commonly used term that appears in a Delaware corporate bylaw adopted under the Delaware statute that lets corporations provide advancement to directors and officers. *See* 8 *Del. C.* § 145(e). In Delaware corporate law parlance, an officer is commonly understood as someone "to whom the primary functions of management are delegated." *See* Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations & Business Organizations* ("Balotti & Finkelstein") § 4.10[C], at 4-37 (3d ed. 2015).

As part of the DNJ Action, the Third Circuit expressed a similar "plain meaning" of officer—a person "holding a position of trust, authority, or command." *Aleynikov*, 765 F.3d at 360-61. The Third Circuit also identified two other possible definitions: (1) "someone elected or appointed to that particular position"; or (2) "something else entirely in the relevant industry." *Id.* at 362. Given these potential definitions, the Third Circuit held that officer was ambiguous on the then-existing record.[2]

Aleynikov failed to show that the vice president title is independently sufficient to make someone an officer, and the one-sided trial record established that Aleynikov did not otherwise meet his burden to prove he was an officer under any of these formulations.[3]

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[2] The proceedings in the Court of Chancery have since arguably made clear that no ambiguity existed about Aleynikov's lack of officer status. *See Activision Blizzard, Inc. v. Hayes*, 106 A.3d 1029, 1034 (Del. 2013) (a "provision may be ambiguous when applied to one set of facts but not another") (internal punctuation omitted). Whether the Bylaws were unambiguous as applied to Aleynikov need not be determined, as the record below was clear that Aleynikov failed to meet his burden.

[3] The Order (at ¶ 1) properly allocated to Aleynikov "the burden to prove by a preponderance of the evidence that he was an officer" under Section 6.4 of the bylaws, citing *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 464 (Del. Ch. 2008). Aleynikov argues in a footnote (at p. 27 n.6) that the court "erred in even assigning Aleynikov the burden of proof." Despite clear opportunities to do so, Aleynikov failed to make this argument in the proceedings below. *See* B596; B509-11. For example, in a pre-trial motion regarding an unclean hands defense, Aleynikov noted that GS Group had previously confirmed, in response to a

### 1. Aleynikov's Title-Driven Approach Contradicts The Meaning Of Officer In The Relevant Corporate Law Context.

The Third Circuit observed that the dictionary-derived meaning of "officer" is a person in "a position of trust, authority, or command." *Aleynikov*, 765 F.3d at 361 (summarizing certain dictionary definitions of officer). This comports with the Delaware corporate law definition of officer as someone "to whom the primary functions of management are delegated." *Stoms v. Federated Serv. Ins. Co.*, 125 A.3d 1102, 1108 n.28 (Del. 2015) (quoting Balotti & Finkelstein § 4.10[C], at 4-37). Aleynikov's brief avoids these definitions, because he conceded at trial that he does not meet them. *See* pp. 32-33 below.[4] Instead, the sole argument he continues to advance is that a "vice president" title was enough by itself to render him an officer. The trial court, like the Third Circuit before it, correctly rejected that argument in accordance with numerous precedents, leaving it with the wealth of evidence, discussed at pp. 28-34 below, that Aleynikov did not qualify as an officer.

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question from the court during a teleconference, that "it would not bear the burden of proof with respect to any issue at trial." B540 at n.1. Aleynikov never disputed that he had the burden of proof, and therefore has waived that argument. *See Alexander v. Cahill*, 829 A.2d 117, 128-29 (Del. 2003).

[4] Aleynikov's expert expressly rejected these well-established definitions during his testimony. *See* B530, 41:4-19 (disagreeing that "officer" applies "only to those in whom administrative and executive functions have been entrusted and does not apply to those without judgment or discretion as to corporate matters"); A567,

### a. The Delaware Precedents and Statutory Scheme Establish That Title Alone Does Not Confer Officer Status.

No Delaware court has ever held that a vice president title alone is independently sufficient to make someone an officer. In fact, the Court of Chancery recently held that a "vice president" was not an officer because he was not appointed by the process set forth in the company's bylaws. *See Pulier v. Computer Sciences Corp.*, C.A. No. 12005-CB, Tr. at 17-19 (Del. Ch. May 12, 2016) (B658-59). The plaintiff in *Pulier* performed high-level managerial functions, was listed on a corporate website as having a leadership role, and shared the vice president title with 85 other employees (compared to the thousands of GSCo employees with whom Aleynikov shared the vice president title). *Id.* Nonetheless, the Court of Chancery rejected the argument that he was an officer, which meant "that individuals carrying the title of vice president may not be officers." *Id.* Many other cases, in a variety of contexts, have likewise rejected arguments that a vice president title automatically makes someone an officer.[5]

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153:23-154:19 (disagreeing that "the plain meaning of the term 'officer' is someone holding a position of trust, authority, or command"). Incredibly, he also testified that "the term officer has absolutely no functional component." A567, 155:4-7.

[5] *See, e.g.*, *Connell v. Del. Aircraft Indus.*, 55 A.2d 637, 641 (Del. Super. 1947) (holding in an employment case that "title alone is meaningless. A janitor cannot be converted into an executive officer merely by calling him a Vice-President; in order to effect such a change, his duties would have to be materially altered. A

These precedents rejecting a title-driven approach make perfect sense in the context of 8 *Del. C.* § 145, which, like the Bylaws, does not define "officer." The absence of a separate definition means that Section 145 incorporates the common law meaning focused on management functions and authority, because "when the statute under construction does not define its terms it is proper to refer to the common law for the meaning of disputed language." *Porter v. Delmarva Power & Light Co.*, 547 A.2d 124, 128 (Del. 1988); *see also Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 163, 168 (Del. Ch. 2003) (applying common law meaning of "agent" to determine rights under bylaw that tracked Section 145).[6]

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man's duties, his authority and his responsibility, not his title, determine his status."); *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 450 (2003) (citing with approval an EEOC Compliance Manual stating: "An individual's title . . . does not determine whether the individual is a partner, officer, member of a board of directors, or major shareholder, as opposed to an employee.") (alteration in original); *In re NMI Sys., Inc.*, 179 B.R. 357, 370 (Bankr. D.C. 1995) ("a mere title of 'vice president' is insufficient to make an individual an officer," and undertaking detailed analysis of vice president's job responsibilities to conclude he "was not an officer"); *Flight Equip. & Eng'g Corp. v. Shelton*, 103 So.2d 615, 623 (Fla. 1958) ("Employees are usually subordinate to and act under control of corporate officers, while the officers exercise the power of management under the policies or directives of the board of directors.").

[6] Because "officer" has a well-established meaning at common law, most Delaware statutes—including the DGCL—do not define it. *See* 8 *Del. C.* § 142; *see also id.* § 103(a)(2); *id.* § 109(b); *id.* § 110; *id.* § 122(5); *id.* § 143; *id.* § 144; *id.* § 145; *id.* § 219(a); *id.* § 223(a); *id.* § 225(a); *id.* § 228; *id.* § 275(d)(4); *id.* § 321(a); *id.* § 325; *id.* § 326; *id.* § 374; Del. Ch. Ct. Rules 32(a)(2) (governing use of depositions of "officer, director or managing agent") & 43(b) ("officer, director or managing agent" of adverse party may be treated as hostile witness).

Applying the common law meaning absent a statutory definition promotes certainty and clarity. If a party wants to deviate from the normal use of a term, it is "free to craft more specific contracts" when the party determines "that is in their best interests as a business." *Fasciana*, 829 A.2d at 172. But absent that choice, "corporations crafting general advancement bylaws should be able to do so based on a relatively stable and confined definition" of a common law term, "without the need to include numerous caveats." *Id.*

**b. The "Plain Meaning" Of Officer Turns On Management Functions And Authority, Not Title.**

In the corporate law context, an officer is someone who manages the affairs of a company. *See Stoms*, 125 A.3d at 1108 n.28 ("officers are those 'to whom the primary functions of management are delegated'") (quoting Balotti & Finkelstein § 4.10[C], at 4-37). As this Court has explained, "[c]orporate officers" are "charged in law with affirmative official responsibility in the management and control of the corporate business." *T.V. Spano Bldg. Corp. v. Dep't of Nat. Res. & Envtl. Control*, 628 A.2d 53, 61 (Del. 1993) (citation omitted).[7]

This usage has remained consistent for decades. For example, the Court of Chancery explained in 1965 that, unlike mere agents, officers "are the corporation"

[7] Although Aleynikov's advancement demand letter expressly described him as a "corporate officer," *see* note 1 above, he subsequently argued that "corporate officer" has a special meaning that does not apply to him to escape the impact of definitions he cannot satisfy.

and "possess general powers to exercise . . . personal judgment and discretion in dealing with the corporate acts." *Goldman v. Shahmoon*, 208 A.2d 492, 494-95 (Del. Ch. 1965). As a leading Delaware article put it later, "'officer' is properly applicable only to those in whom administrative and executive functions have been entrusted, and does not apply to those without judgment or discretion as to corporate matters." A. Sparks & L. Hamermesh, *Common Law Duties of Non-Director Corporate Officers*, 48 Bus. Law. 215, 216 (1992); *see also id.* at 216-17 ("For purposes of determining whether fiduciary duties attach, the scope of the term 'officer' seems to be a function of responsibilities. A title is not dispositive. For example, a business manager is not necessarily an officer, nor is a vice president for sales necessarily an officer whose appointment or removal requires board action.").

The usage of "officer" in Section 6.4 of the Bylaws—where it appears nine times adjacent to "director"—supports the conclusion that it should be given its traditional corporate law meaning. As this Court held in *Stoms* while interpreting the words "directors" and "officers" in an insurance contract, "when read in the context of the whole policy, 'directors' and 'officers' must be given their traditional corporate law meanings and cannot be reasonably read as encompassing someone who was a finance manager" at a car dealership. 125 A.3d at 1104; *see also id.* at 1107 ("When read in the context of the Policy, it is clear that 'director'

and 'officer' refer to those terms as used in corporate law."); *cf. Delaware Bd. of Nursing v. Gillespie*, 41 A.3d 423, 427 (Del. 2012) ("*Noscitur a sociis* provides that words grouped in a list should be given related meaning.") (internal punctuation omitted). Applying the usual corporate law meaning here is fatal to Aleynikov's case, which is why his brief fails to address it.

Aleynikov's brief also fails to address dictionary definitions of officer. He does recognize (at p. 19) that a contractual term should be interpreted as it "'would be understood by an objective, reasonable third party'" (quoting *Salamone v. Gorman*, 106 A.3d 354, 367-68 (Del. 2014)). But he ignores that this Court has consistently explained that dictionaries are the primary source for determining "objective, reasonable" meaning. As one decision explained, "Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract," because they "are the customary reference source that a reasonable person in the position of a party to a contract would use to ascertain the ordinary meaning of words not defined in the contract." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006).

### c. The Court's Dicta Regarding *Contra Proferentem* Does Not Support A Title-Driven Approach.

Without evidence beyond the mere fact of his title, Aleynikov seeks support for his title-driven approach in dicta that appears in the trial court's *contra proferentem* analysis about what a person like him with a vice president title might

believe. *See, e.g.*, Order ¶ 5(d)(xiii) (dicta that a "reasonable individual with the title 'Vice President' would not think that he could not be an officer simply because he did not have supervisory or managerial functions"). However, Delaware's method of objective contract interpretation involves reading the words actually used in the relevant provision—here, "officer." Thus, the Order's discussion of "vice president"—which, unlike "officer," does not appear in Section 6.4—was not at the heart of its interpretive task. The Third Circuit highlighted this point in reversing summary judgment, observing that the "District Court's focus of its analysis on the meaning of the term vice president, which does not appear at all in Section 6.4 of the By-Laws, was its first and most significant error." *Aleynikov*, 765 F.3d at 360.

Notably, the lower court itself did not find sufficient support in its musings to find that Aleynikov satisfied his burden at trial. Order ¶ 10. Moreover, as explained below, many of the court's observations in the context of its *contra proferentem* discussion are in all events flawed.

***"Vice President" in Bylaw Section 4.1.*** Section 4.1 of GS Group's Bylaws designates "Vice President" as one of the possible offices at ***GS Group*** (*i.e.*, the parent company), and further provides that GS Group's board of directors may authorize GS Group officers to appoint other GS Group officers. The court pondered whether this process for making ***GS Group*** officers might lead one to

"reasonably believe" that it also applies to determining who qualifies as an officer at its subsidiary GSCo, *see* Order ¶ 5(d)(xii), an argument Aleynikov advances in his opening brief (at pp. 20-21). But both the court and Aleynikov ignore that GSCo does not even have a board of directors, and that Section 6.4, the advancement provision at issue here, cross-references Section 4.1 solely for purposes of defining ***GS Group*** officers. It omits that reference for officers of subsidiaries, whether they are corporations or not. B038; *see Walt v. State*, 727 A.2d 836, 840 (Del. 1999) ("the expression of one thing is the exclusion of another."). Indeed, as the Court of Chancery recently held, the fact that corporate bylaws identify an office of "vice president" does "not require the inverse inference that merely because an individual holds the title of vice president, he or she must be an officer," which is Aleynikov's exact argument. *Pulier*, at 19 (B659).

Aleynikov's argument also ignores that the managing director title—which undisputedly was senior to Aleynikov's vice president title in the GSCo hierarchy—does not appear in Section 4.1, thus reinforcing that GSCo's four-part title hierarchy (*i.e.*, managing director, vice president, associate, and analyst) has nothing to do with officer status. In short, Section 4.1 does not support the notion that a GSCo employee "could reasonably believe" that he was a GSCo officer based solely on having a vice president title that came to him via an offer letter

signed by another vice president that said nothing about GS Group or officer status. To hold otherwise would require this Court to "read into § 145 an automatic conflation of a parent corporation and its wholly-owned subsidiary." *Cochran v. Stifel Fin. Corp.*, 2000 WL 286722, at *13 (Del. Ch. Mar. 8, 2000), *aff'd in relevant part*, 809 A.2d 555 (Del. 2002). Moreover, the suggestion that a reasonable person would have made these cascading assumptions contrasts with what the putatively reasonable Aleynikov actually did: He never read GS Group's Bylaws, had no memory of any vice president claiming to be an officer, and never thought about whether GSCo had any obligation to pay his legal fees. B134, 40:12-41:14; B136, 66:7-25.

***Historical Understanding and Title Inflation.*** Aleynikov points to the court's dicta that a "set of 'officers' that encompasses 'vice presidents'" is typical (Order ¶¶ 5(d)(iv)-(v)), and that investment banks use "impressive sounding titles" (*id.* ¶ 5(d)(x)). But those comments (at ¶ 5(d)(vi)) were based on data that is more than 85 years old as to how "vice president" is used, and did not mention the evidence presented by GS Group about the use of the title as an indication of rank during the past 30 years, including when Aleynikov worked at GSCo between 2007 and 2009. Nor did the court distinguish between commercial banks and investment banks, instead concluding that investment banks and commercial banks "used similar officer titles." Order ¶ 5(d)(vi). In fact, the court's primary source

for that statement was a 1953 decision that analyzed antitrust claims against investment banks dating back to 1915. *Id.* (citing *United States v. Morgan*, 118 F. Supp. 621, 658-80 (S.D.N.Y. 1953)). *Morgan* is silent about whether a vice president title, without more, was sufficient to confer officer status in the early twentieth century, and said nothing about non-managerial employees like Aleynikov.

Meanwhile, undisputed record evidence introduced by GS Group shows that by the mid-1980s, investment banks had adopted a uniform title structure to indicate relative internal rank—analyst, associate, vice president, and managing director—not officer status. *See* p. 34 below. Finally, the more recent "title inflation" does not mean that titles correspond with management or supervisory powers, or with trust, authority or command.

***Federal Securities Regulations.*** The federal securities regulations referenced by the court and in Aleynikov's brief (at pp. 13-14) are of no value in determining whether someone is an officer entitled to advancement from a Delaware corporation as a matter of Delaware law. It is beyond dispute that the "internal affairs doctrine requires that the law of the state of incorporation should determine issues relating to internal corporate affairs." *McDermott Inc. v. Lewis*, 531 A.2d 206, 215 (Del. 1987). Thus, statutory definitions in federal securities regulations, which have nothing to do with advancement, are inapposite here. *See*

*Smartmatic Int'l Corp. v. Dominion Voting Sys. Int'l Corp.*, 2013 WL 1821608, at *14 (Del. Ch. May 1, 2013) (federal patent law should not be used to interpret term in patent license agreement governed by state law). But even if they were relevant, Aleynikov, like the court below, misapplies the two regulations on which he relies.

The first regulation—Rule 3b-2—was adopted in 1934 and states that an "officer" is a person with any of several titles, one of which is "vice president." 17 C.F.R. § 240.3b-2. However, nearly 70 years of uniform precedent from courts and the S.E.C. establish that a person is ***not*** an officer under Rule 3b-2 merely because that person has a title listed in the Rule, including that of vice president. *See, e.g.*, *C.R.A. Realty Corp. v. Crotty*, 878 F.2d 562, 565-66 (2d Cir. 1989) ("We do not believe that Rule 3b-2 requires us to hold that Crotty is an officer within the purview of § 16(b) merely by virtue of his title as a vice-president of the company."); *In re Yesner*, 2001 WL 587989, at *37 (ALJ May 22, 2001) (concluding for purposes of Section 13 that employee was not an "officer" despite his title of "controller" under Rule 3b-2, because the person's "functions and duties were not so significant that he should be considered an officer").

The second regulation—Rule 16a-1(f)—was adopted in 1991, and states that an "'officer' shall mean . . . any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance)." 17 C.F.R. § 240.16a-1(f). Thus, under this more recent regulation, a vice president

is *not* an officer unless he or she is "in charge" of something (which Aleynikov admits he was not). Aleynikov argues that Rule 16a-(1)(f) is irrelevant because Rule 3b-2 remained in place alongside it, but fails to offer any principled reason to favor one of these federal regulations over the other here.

**d. Delaware's Pro-Advancement Policy Does Not Support Making All Vice Presidents Officers.**

Adhering to the common law meaning of officer in this case would not undermine Delaware's pro-advancement policy. The purpose of that policy is to help Delaware corporations "retain high-quality directors and officers, especially ones willing to make socially useful decisions that involve economic risk." *Fasciana*, 829 A.2d at 170. By doing so, Section 145 ensures that officers will "be willing to commit their corporations, after the exercise of good faith and care, to risky transactions that promise a lucrative economic return." *Id.* This policy is not implicated, let alone undermined, by denying advancement to a mid-level employee like Aleynikov, who admittedly lacked any authority to engage in corporate decision-making. As has been recognized in the indemnification context, the "standard applicable to directors and officers may not be appropriate for office workers and hazardous waste workers, brokers and custodians,

engineers, and farm workers." Model Business Corporation Act ("MBCA") § 8.56, Official Comment at 8-98 (2008).[8]

Moreover, Delaware's pro-advancement policy cannot be distorted to lead to the creation of thousands of new fiduciaries, which is what Aleynikov's title-centered definition of "officer" would do. Officers owe fiduciary duties, while mere employees do not. *See Gantler v. Stephens*, 965 A.2d 695, 708-09 (Del. 2009) (holding that officers have fiduciary duties). Aleynikov's attempt to make every vice president an officer—irrespective of managerial responsibility—would impose fiduciary liability on a far broader swath of employees in the investment banking industry than is the case now, without any principled basis.

### 2. The Extrinsic Evidence At Trial Showed That Aleynikov Was Not An Officer.

Absent the title-driven theory espoused by his expert, all the evidence introduced at trial—including Aleynikov's mid-level role and lack of managerial responsibilities, GSCo's Written Consent process, and the investment banking industry's use of the "vice president" title—weighed heavily against finding that Aleynikov was an officer. Thus, while the court correctly found that he failed to

[8] Delaware courts frequently consult the MBCA and other American Bar Association ("ABA") publications to interpret bylaw provisions. *See Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1191-92 (Del. 2010) (citing model charter provision and accompanying commentary from ABA); *Hollinger Inc. v. Hollinger Int'l, Inc.*, 858 A.2d 342, 386 n.79 (Del. Ch. 2004) (noting MBCA and commentary provide "valuable perspective" in interpreting provision of DGCL).

meet his burden of proof, the weight of the evidence was beyond "equipoise"; it was one-sided in favor of GS Group.[9]

**a. <u>Aleynikov Was Not Elected Or Appointed An Officer.</u>**

The Third Circuit held that "officer" can mean "someone elected or appointed to that particular position." *Aleynikov*, 765 F.3d at 362; *see also Pulier*, at 18-19 (B658-59) (explaining that under the bylaws at issue, "the essential requirement to become an officer is that an individual must be elected by the board to such a position"). With respect to the "elected or appointed" definition, even Aleynikov's expert did not dispute that organizations get to decide who their officers are. *See* 8 *Del. C.* § 142(b) ("Officers shall be chosen in such manner and shall hold their offices for such terms as are prescribed by the bylaws or determined by the board of directors or other governing body."); B532, 174:5-9 ("Organizations do decide who their officers are."). As GSCo witnesses testified without dispute, the sole mechanism that GSCo has chosen for electing or

[9] Aleynikov argues that the court wrongly found the extrinsic evidence to be in "equipoise" and that its discussion of the vice president title, *see* Order ¶¶ 5(d)(ii-xvi), should have resulted in a decision in his favor. But as noted at p. 22 above, the court was faced with determining the meaning of *officer*, not vice president. As the Third Circuit observed, it would be a "significant error" to "focus [the] analysis on the meaning of the term vice president, which does not appear at all in Section 6.4 of the By-Laws." *Aleynikov*, 765 F.3d at 360. To the extent that the court factored its discussion of the "vice president" title into its analysis, it properly found those points outweighed by the raft of evidence that Aleynikov was not a GSCo officer.

appointing its officers is the Written Consent process. B091; *see also* B129-30, 72:16-20, 155:3-8; B124, 214:22-215:6, 216:6-11.

These Written Consents establish how GSCo designated its officers, and none of them ever denominated all (or even some) vice presidents. The first resolution, dated August 9, 2005, provides that "all persons previously elected as officers of the Company are hereby removed as officers of the Company." A240. Every resolution in the record thereafter contains language providing that "the following person(s) is/are elected to hold the office(s) of the Company set forth opposite his/her/their respective name(s)." A241, A245.

Aleynikov adduced no evidence that GSCo made him an officer consistent with the statutory guidance that officers are "chosen in such manner . . . as are prescribed by the bylaws or determined by the board of directors or other governing body." 8 *Del. C.* § 142(b); *see* A542, 56:10-20 (testimony by Aleynikov that general partner of GSCo never elected or appointed him). Likewise, he adduced no evidence that GSCo ever took any corporate action—via the Written Consents or otherwise—to designate all vice presidents as officers. To the contrary, the resolutions in place during Aleynikov's employment provide that each officer will have "such powers and duties in the management of the Company as are consistent with the functions typically performed by such officers in a U.S.

registered broker-dealer." A244. Aleynikov indisputably had no "such powers and duties" at GSCo.[10]

Aleynikov and his expert tried to diminish the significance of the Written Consents by arguing that they identify only GSCo's "executive officers," as distinct from its "officers."[11] The face of every Written Consent, however, used the term "officer." None of them used the phrase "executive officer." And according to Aleynikov's own expert, when "an investment bank wishes to refer only to a particular subset of officers, it does so explicitly." A361 ¶ 12; *see also* B531, 91:12-18. Thus, by his expert's logic, "officer" in the Written Consents must refer to just that—GSCo's officers.

[10] The record also showed that, prior to Aleynikov's lawsuits, GSCo had rejected a request for advancement and indemnification from at least one other vice president. B059-64. GSCo has previously arranged for the payment of legal fees of some vice presidents, as well as associates and analysts, who Aleynikov does not contend were officers. B107-20. The record is clear that it did so in its discretion rather than under the mandatory advancement procedures set forth in Section 6.4 of the Bylaws. *See* B143-44, 35:14-17, 96:3-6; B123, 210:23-24; B125, 317:3-16.

[11] It is true that the relevant regulatory filings list these officers as "executive officers," but that is because "executive officer" is the only category that those forms provide. A251-66.

### b. Aleynikov Undisputedly Was Never Delegated Any Managerial Functions, And Did Not Have A Position Of Trust, Authority Or Command.

Whether or not the Written Consents are dispositive, none of the other evidence regarding Aleynikov's role at GSCo supported his claim to be an officer, leaving Aleynikov to argue that being an officer was "based completely on what your title is." A547, 74:20-24. The court correctly recognized that "the line between title and responsibilities is stark, because Aleynikov did not have any managerial or supervisory responsibilities." Order ¶ 5(d)(xv). Indeed, Aleynikov:

- Certified in the DNJ Action that he "did not receive or exercise any supervisory, managerial or policymaking authority or responsibility." B099; *see also* A533, 19:20-23.
- Agreed at trial that he was a "little-picture person, a narrow problem solver." A541, 51:21-52:2.
- Exercised no decision-making or corporate authority. A538, 40:8-15.
- Agreed that his duties were not established by written resolution. A541, 52:17-21.
- Was never delegated any of GSCo's management or executive functions. A533, 19:7-19; A538, 39:23-40:2; A543, 57:5-7.

Aleynikov also lacked basic knowledge of GSCo's corporate structure and governance. He admitted that he did not know the difference between GS Group and GSCo while employed, and that he first learned that he worked at GSCo, as distinct from GS Group, during a deposition in the DNJ Action. A538, 37:24-38:3; B135, 44:8-45:6. He testified that the general partner of GSCo was "Lloyd

Blankfeld" (when in fact it is Goldman, Sachs & Co. L.L.C.), and that GSCo is managed by a board of directors (which it is not). A542-43, 54:2-12, 57:8-13. He did not recognize the names of any of the officers of GSCo whose names were read to him at trial, who were all elected via the Written Consents. A546, 71:8-73:3; A240-50. He also did not know what "fiduciary duties" were. A537, 34:22-35:8. Here again, the extrinsic evidence strongly supports the trial court's ultimate conclusion that Aleynikov failed to prove he was an officer.

**c. It Was Undisputed At Trial That There Is No Industry-Specific Definition Of Officer In Investment Banking.**

In the one narrow opening that the Third Circuit left for Aleynikov, it invited the parties to present evidence on remand of whether "officer" has an industry-specific trade usage in investment banking (*i.e.*, the potential "something else entirely in the relevant industry" definition that Aleynikov might conceivably meet). *Aleynikov*, 765 F.3d at 362. It is now undisputed that no such definition exists. A359 ¶ 11; A547, 73:13-74:7; A577, 193:17-21; A592, 254:18-255:4. As an initial matter, the title-driven theory of Aleynikov's expert was expressly *not* industry-specific. A577, 193:17-194:2. Under both the Third Circuit's ruling and Delaware law, Aleynikov's failure to prove an industry-specific trade usage means that officer is a term "with no gloss in the [relevant] industry" and thus "should be construed in accordance with its ordinary dictionary meaning." *USA Cable v.*

*World Wrestling Fed'n Entm't, Inc.*, 766 A.2d 462, 474 (Del. 2000); *see also Lorillard*, 903 A.2d at 740 ("When a term's definition is not altered or has 'no 'gloss' in the [relevant] industry it should be construed in accordance with its ordinary dictionary meaning.'") (alteration in original; citation omitted); *Penn Mart Supermarkets, Inc. v. New Castle Shopping LLC*, 2005 WL 3502054, at *5 n.39 (Del. Ch. Dec. 15, 2005) (plaintiff failed to meet "burden of establishing an industry usage that would supersede the plain meaning").

Although no industry-specific definition justified departing from the plain meaning of *officer*, GS Group's expert credibly testified about the widespread trade usage of *vice president* as a mid-level title in the investment banking industry. B522 ¶ 39; A587, 233:19-234:16. The evidence showed that GSCo employees with advanced degrees were eligible for promotion to vice president just three years after graduating college (*see* B040), and that the vice president title has long been used as a designation of mid-level rank in the industry. A360 ¶ 11(a); B518-19 ¶ 22; B001-04; B022.1-24.3. Thus, as the Third Circuit anticipated, the evidence "strongly suggests that to the extent that Aleynikov understood himself to be an officer, this was unreasonable *in the relevant industry*." *Aleynikov*, 765 F.3d at 365 n.9 (emphasis in original).

## II. THE COURT OF CHANCERY CORRECTLY HELD THAT ISSUE PRECLUSION BARS RELITIGATION OF THE THIRD CIRCUIT'S RULING ON *CONTRA PROFERENTEM*.

### A. Question Presented

Did the court correctly hold that *contra proferentem* has no role in determining whether Aleynikov was an officer?

### B. Scope of Review

The application of issue preclusion and other issues of law are reviewed *de novo*. *See Betts v. Townsends, Inc.*, 765 A.2d 531, 533 (Del. 2000).

### C. Merits of Argument

Under the doctrine of issue preclusion, when "an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Winters v. N. Hudson Reg'l Fire & Rescue*, 50 A.3d 649, 659 (N.J. 2012) (quoting Restatement (Second) of Judgments (the "Restatement") § 27 (1982)). In other words, "[i]f an issue between the parties was fairly litigated and determined, it should not be relitigated." *First Union Nat'l Bank v. Penn Salem Marina, Inc.*, 921 A.2d 417, 423 (N.J. 2007).

Issue preclusion promotes numerous goals, including "finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and

uncertainty; and basic fairness." *Id.* (citation omitted). The trial court correctly held that the Third Circuit's analysis of *contra proferentem* was an "issue-preclusive ruling" that meant that *contra proferentem* "cannot be used" in this case. Order ¶ 5. Aleynikov argues that issue preclusion should not apply because the Third Circuit's ruling was not final and, alternatively, because it would be inequitable to apply that ruling to him. He is wrong. Moreover, the Third Circuit's analysis was correct, even if this Court visits the issue anew.

### 1. The Third Circuit's Holding On *Contra Proferentem* Was Sufficiently Firm To Trigger Issue Preclusion.

An issue is final for purposes of issue preclusion where the resolution was "'sufficiently firm to be accorded conclusive effect.'" *Hills Dev. Co. v. Bernards Twp.*, 510 A.2d 621, 652 (N.J. 1986) (quoting Restatement § 13). New Jersey law looks to several factors under the Restatement to determine whether the resolution of an issue meets this standard: "[t]hat the parties were fully heard, that the court supported its decision with a reasoned opinion, [and] that the decision was subject to appeal or was in fact reviewed on appeal." *Comm'r N.J. Dep't of Banking & Ins. v. Budge*, 2009 WL 2245764, at *7 (N.J. App. Div. July 29, 2009) (quoting Restatement § 13, cmt. g).

Applying this standard, the lower court correctly concluded that the Third Circuit's ruling on *contra proferentem* was final because: (1) the parties had a "full opportunity to advance their arguments" on it; (2) the Third Circuit

considered those arguments in a "reasoned opinion"; (3) "[i]t was a decision by the Court of Appeals in the appeal itself"; and (4) "[i]t was necessarily binding on remand and final for purposes of further proceedings" in the DNJ. Order ¶¶ 4(b), 5(a).

Aleynikov does not challenge these findings. Instead, he argues (at p. 30) that the ruling lacked finality because it was an incorrect federal prediction of Delaware law in an interlocutory order. But courts routinely give preclusive effect to federal predictions of state law, even where those predictions are incorrect. *See, e.g.*, *Ideker v. PPG Indus., Inc.*, 788 F.3d 849, 853-54 (8th Cir. 2015) (preclusion barred reconsideration of mistaken prediction of Missouri law); *Lobato v. Taylor*, 70 P.3d 1152, 1166 (Colo. 2003) (en banc) (according preclusive effect to decisions in which federal courts "wrongly interpreted Colorado law"). And as the United States Supreme Court recently explained, "issue preclusion prevent[s] relitigation of wrong decisions just as much as right ones." *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1308-09 (2015) (alteration in original; citation omitted); *see also Jones v. Reliant Energy Res. Corp.*, 2001 WL 111988, at *8 (Del. Ch. Feb. 2, 2001) ("the pertinent collateral estoppel inquiry cannot be whether the determination in the first action was right or wrong, but only whether the issue determined was actually litigated, finally decided, and essential to the judgment"), *aff'd*, 782 A.2d 265 (Del. 2001).

Thus, the correctness of the Third Circuit's ruling is not part of the issue preclusion analysis. And as many authorities have emphasized, the fact that the ruling arose in an interlocutory appeal does not change the outcome. *See* Restatement § 13(g), illustration 1 (applying issue preclusion to interlocutory decision by appellate court); *Syverson v. I.B.M. Corp.*, 472 F.3d 1072, 1079 (9th Cir. 2007) (decision was "sufficiently 'final' even though there are to be further proceedings on remand on the merits"); 18A Fed. Prac. & Proc. Civ. § 4434 (2d ed.) ("Recent decisions have relaxed traditional views of the finality requirement by applying issue preclusion to matters resolved by preliminary rulings or to determinations of liability that have not yet been completed by an award of damages or other relief. The most prominent decisions have involved issues that were resolved by appeal prior to final judgment.").

Nor is Aleynikov aided by the authorities he cites that stand for the unremarkable proposition that an issue is not "actually litigated" if it is not raised by the parties. *See Chicago Truck Drivers, Helpers & Warehouse Union Pension Fund v. Century Motor Freight*, 125 F.3d 526 (7th Cir. 1997); *Diplomat Elec., Inc. v. Westinghouse Elec. Supply Co.*, 430 F.2d 38 (5th Cir. 1970). These authorities are inapposite because Aleynikov does not dispute that the parties actually litigated *contra proferentem* in the DNJ Action. Equally irrelevant are the cases Aleynikov cites (at pp. 31-32) for the proposition that an appellate court's factual findings are

generally not preclusive. The Third Circuit decided *contra proferentem* as a matter of law. *See Aleynikov*, 765 F.3d at 367; *see also Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 630 (Del. 2003) (applicability of *contra proferentem* is "one of law").

Aleynikov also argues (at pp. 30-32) that the Third Circuit's holding that *contra proferentem* does not apply to the threshold issue of whether he had rights under the Bylaws is not preclusive because he has a purportedly new theory as to why he *was* in fact a "party" to the Bylaws with rights thereunder: merely being an employee of ***GSCo*** made him a "party." But Aleynikov already presented this argument to the Third Circuit, which ruled against him. *See* B279 (arguing that "Goldman erroneously contends that . . . *contra proferentem* cannot be used to determine whether a corporate by-law applies to an employee."). In fact, Aleynikov based his Third Circuit rehearing petition on this exact issue, arguing that "every Goldman Sachs employee is someone who has rights under its By-Laws" and that he therefore "was undeniably entitled to have them construed against Goldman Sachs. B453-55. The Third Circuit denied his petition. *See* B507-08.[12] In short, Aleynikov had his day in court on *contra proferentem* in the

[12] Even if employees *qua* employees could be considered parties to their employers' bylaws (which is not the case under Delaware law), Aleynikov was never an employee of GS Group; he worked only for GSCo. Moreover, the grant of discretion to GS Group to advance legal fees to its subsidiaries' employees is a

federal forum that he first chose. The fact that his arguments did not carry the day provides no basis for revisiting the Third Circuit's decision.

### 2. Applying Issue Preclusion Is Not Inequitable.

Aleynikov also argues that the court erred by applying issue preclusion because it is inequitable in light of this Court's subsequent opinion in *Stoms*. Aleynikov declares (at p. 33) that the trial court "acknowledged that *Stoms*, decided one year after the Third Circuit's *contra proferentem* ruling, confirmed the error of that decision." Not so. The entirety of the discussion of *Stoms* in the Order was as follows:

> In *Stoms*, the high court technically did not apply the doctrine of *contra proferentem*. More importantly, *Stoms* did not change the application of the doctrine. The implicit reference to *contra proferentem* that appears in that decision is consistent with how I understood the doctrine to have operated historically.

Order ¶ 5(c).

The Third Circuit's decision is consistent with *Stoms*. As the court below observed, *Stoms* did not apply *contra proferentem* (because the relevant contract provision was unambiguous). The employee in *Stoms* undisputedly had some

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benefit to GS Group itself, not to employees who themselves have no ability to enforce the exercise of such discretion. *See NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 434 (Del. Ch. 2007) ("Mere incidental beneficiaries have no legally enforceable rights under a contract."). Thus, the trial court's dicta that "Aleynikov was a party to and entitled to benefits under the Bylaws in his capacity as an employee" was mistaken. Order ¶ 5(d)(xvi).

rights under the insurance policy—specifically, $30,000 of personal injury protection available to all employees. 125 A.3d at 1103. The question was whether the scope of his rights included the additional uninsured motorist insurance coverage available to directors and officers. *Id.* at 1105. Thus, *Stoms* did not undermine or even touch upon the Third Circuit's ruling that *contra proferentem* does not apply "to determine whether a person has rights and obligations under—*i.e.*, whether he or she is a party to or beneficiary of—a contract." *Aleynikov*, 765 F.3d at 366.

Aleynikov also claims (at p. 34) that it "could hardly be less equitable" to apply issue preclusion because future litigants—including a GSCo employee who filed an advancement action against GS Group that has since been resolved—would not be bound by the Third Circuit's ruling against Aleynikov. But the New Jersey Supreme Court has rejected this argument as a basis to avoid issue preclusion: "To equate the mere existence of another similar litigant . . . to the threat of inconsistency sufficient to serve as an equitable exception to the doctrine is not only plainly inconsistent with the principles of collateral estoppel but would effectively obliterate the doctrine." *Gannon v. Am. Home Prods., Inc.*, 48 A.3d 1094, 1109 (N.J. 2012).

As the court recognized, Aleynikov's argument boils down to a complaint that the Third Circuit was wrong. *See* Order ¶ 5(d). That is no basis to deviate

from the Third Circuit's ruling, and there is nothing inequitable about precluding Aleynikov from relitigating an issue the Third Circuit has already decided, particularly where he chose to file his initial advancement claim in New Jersey.[13]

### 3. ***Contra Proferentem* Is Inapposite Here.**

Given the preclusive effect of the Third Circuit's *contra proferentem* ruling, this Court need not address the court's dicta regarding the doctrine. *See Barley Mill, LLC v. Save Our Cty., Inc.*, 89 A.3d 51, 54, 64-65 (Del. 2014) (affirming on "narrow and case-specific grounds" while declining to reach other issues raised in appeal and "express[ing] no opinion on whether the Court of Chancery's statutory analysis was correct"). Should this Court reach the merits, however, there are two reasons why the dicta was misplaced and the Third Circuit correctly concluded that *contra proferentem* is inapplicable.

First, this Court has previously recognized that ambiguities in corporate governing instruments should be resolved where possible by reference to extrinsic evidence, without the need to resort to *contra proferentem*. In *Airgas, Inc. v. Air Products & Chemicals, Inc.*, 8 A.3d 1182, this Court found the provisions of a

[13] Even if the Court declines to apply issue preclusion, the Court should still defer to the Third Circuit's rulings under principles of comity. *See Pyott v. La. Mun. Police Emps. Ret. Sys.*, 74 A.3d 612, 616 (Del. 2013) (noting that issue preclusion is predicated on "comity" and that "the undisputed interest that Delaware has in governing the internal affairs of its corporations must yield to the stronger national interests that all state and federal courts have in respecting each other's judgments").

charter regarding director terms ambiguous, but rather than resorting to *contra proferentem*, considered extrinsic evidence of Delaware precedents, industry practice, and commentary to resolve the ambiguity. *Id.* at 1189-94.

Second, even if *contra proferentem* must be used to resolve all ambiguities in corporate instruments, the Third Circuit correctly held that it should not apply here because there exists a threshold question of whether Aleynikov was even a party to, or had rights under, the Bylaws. *Aleynikov*, 765 F.3d at 366. The Third Circuit aptly explained that "[a]pplying the doctrine of *contra proferentem* in this circumstance would put the cart before the horse. It would have us resolve ambiguities in favor of a non-drafting individual in order to determine whether that non-drafting individual was even subject to the agreement." *Id.* at 367. This conclusion is well-founded given that the purpose of the doctrine is to protect the "reasonable expectations" of a non-drafting party. *Stockman v. Heartland Indus. Partners, L.P.*, 2009 WL 2096213, at *5 (Del. Ch. July 14, 2009). As the Third Circuit determined, the "reasonable expectations" concerns are absent here, because it "is undisputed that Aleynikov did not review any part of the By-Laws before he began working at GSCo or during his time there"—nor would any typical mid-level employee. *Aleynikov*, 765 F.3d at 367 n.11. And in any event, as explained above, the parties' "reasonable expectations" are best protected by applying the plain or common law meaning of the word "officer."

## CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's judgment in favor of GS Group.

*/s/ Kevin G. Abrams*
Kevin G. Abrams (#2375)
John M. Seaman (#3868)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

*Attorneys for Defendant Below/ Appellee The Goldman Sachs Group, Inc.*

Of Counsel:

Christopher E. Duffy
Karen A. Chesley
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, New York 10022
(212) 446-2300

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