EFiled: Jan 11 2021 05:09PM EST
Filing ID 66242993
Case Number 354,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MANTI HOLDINGS, LLC, MALONE MITCHELL, WINN INTERESTS, LTD., EQUINOX I. A TX, GREG PIPKIN, CRAIG JOHNSTONE, TRI-C AUTHENTIX, LTD., DAVID MOXAM, LAL PEARCE, and **JIM RITTENBURG,**	:	
Petitioners-Below/ Counterclaim Defendants-Below/Appellants/ Cross-Appellees,	:	
v.	:	No. 354, 2020
AUTHENTIX ACQUISITION COMPANY, INC.,	:	Court Below: Court of Chancery of the State of Delaware
Respondent-Below/ Counterclaim Plaintiff-Below/Appellee/ Cross-Appellant.	:	C.A. No. 2017-0887-SG

APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

DATED: January 11, 2021

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NATURE OF PROCEEDINGS

In April 2008, as a condition to the Carlyle Group ("Carlyle") and J.H. Whitney & Co. ("J.H. Whitney") purchasing a majority of the outstanding stock of Authentix, Inc. ("Authentix, Inc."), Authentix Acquisition Company, Inc. ("Authentix" or the "Company') and all of its stockholders entered into the Stockholders Agreement of Authentix Acquisition Company, Inc. (the "Stockholders Agreement", "Agreement", or "SA"). Under the Stockholders Agreement, all stockholders of Authentix agreed that in the event of a Company Sale, they would (i) consent to and raise no objection against such transaction, and (ii) refrain from exercising appraisal rights.

An arms-length Company Sale (the "Merger") occurred in September 2017 when Authentix MergerSub, Inc. merged with and into Authentix, triggering the obligations of the signatories to the Stockholders Agreement. In contravention of the obligations to which they had agreed in the Stockholders Agreement, Manti Holdings, LLC, Malone Mitchell, Winn Interests, Ltd., Equinox I. A Tx, Greg Pipkin, Craig Johnstone, Tri C Authentix, Ltd., David Moxam, Lal Pearce, and Jim Rittenburg (collectively, the "Petitioners") refused to consent to the Merger, surrender their stock certificates, or execute the Letter of Transmittal required to obtain the merger consideration; purported to demand appraisal for their preferred stock and common stock; and filed a petition seeking appraisal. After Petitioners

refused, despite repeated requests, to comply with their agreement, Authentix filed an Answer and Counterclaims and moved for a Determination of Entitlement to Appraisal and Partial Summary Judgment on Entitlement Issues.

In a series of decisions, the Court of Chancery held that the Stockholders Agreement's unambiguous language obligated Petitioners to consent to and not oppose a Company Sale approved by the Board and the holders of at least 50% of Authentix's then-outstanding Shares and to refrain from exercising appraisal rights in such circumstances, and granted Authentix's Motion for Determination of Entitlement to Appraisal and Partial Summary Judgment.

Authentix then moved for Summary Judgment on its claim to enforce the fee-shifting provision, which entitles the prevailing party to recover attorneys' fees incurred in enforcing the rights and obligations of the parties under the Stockholders Agreement. On August 11, 2020, the Court of Chancery held Authentix entitled to recover its reasonable attorneys' fees under the Stockholders Agreement. Although the court concluded that Petitioners violated the Stockholders Agreement by refusing to refrain from exercising appraisal rights and dismissed the Petition, the court ruled, contrary to the plain terms of the Merger Agreement, which it did not address, that Petitioners were nevertheless entitled to an order directing Authentix to pay interest on the merger consideration available to Petitioners. The court later declined,

however, to award Authentix prejudgment interest on the attorneys' fees that it had been awarded.

The Court of Chancery correctly held that Petitioners' agreement not to exercise appraisal rights was enforceable by Authentix following the merger and that Authentix was entitled to an award of its attorneys' fees and expenses. Petitioners have not addressed on appeal any aspect of the award of fees and expenses. The Court of Chancery erred, however, in awarding interest to Petitioners and failing to award prejudgment interest to Authentix. The court's award of "prejudgment" interest on the merger consideration to Petitioners was error because Petitioners never pled any claim seeking payment of the merger consideration, had no ripe claim that they had ever been denied such merger consideration, and never sought the merger consideration under the Merger Agreement. Thus, Petitioners were never entitled to any judgment, much less prejudgment interest. The Court of Chancery's decision ordering Authentix, the non-breaching party, to pay Petitioners interest on the merger consideration from the time of the Merger as a matter of equity was irreconcilable with the express terms of the Merger Agreement and with the fact that Petitioners, not Authentix, intentionally breached the Stockholders Agreement by pursuing appraisal. The Court of Chancery's failure to award Authentix prejudgment interest on the attorneys' fees it incurred and paid in enforcing the Stockholders Agreement compounded this error. The final judgment should be

reversed and remanded insofar as it awards prejudgment interest to Petitioners and fails to award prejudgment interest to Authentix, and should be affirmed in all other respects.

SUMMARY OF ARGUMENTS

Answer to Petitioners' Summary of Arguments

I. Denied. The Court of Chancery correctly interpreted the Stockholders Agreement, holding that the Agreement obligated Petitioners to refrain from exercising appraisal rights and that Authentix could enforce this obligation post-merger.

A. The unambiguous language of Section 3(e) of the Stockholders Agreement provides that in the event of a Company Sale approved by the Board and the holders of at least 50% of Authentix's then-outstanding Shares, Petitioners were obligated to "consent to and raise no objection against such transaction" and, specifically, "refrain from the exercise of appraisal rights with respect to such transaction." A merger constituting a Company Sale under the Stockholders Agreement was approved by Authentix's Board of Directors and adopted by written consent of stockholders in September 2017. The Court of Chancery thus correctly held that Petitioners were obligated under the Stockholders Agreement to consent to and raise no objection against the 2017 Merger and to refrain from exercising appraisal rights in connection with it.

Petitioners' obligation to refrain from the exercise of appraisal rights did not terminate upon the consummation of the merger that triggered the obligation to refrain. As the court below correctly concluded, "[n]o contracting party,

agreeing to the quoted language, would consider itself free to exercise appraisal rights in light of the Board approval of a contractually compliant Company Sale." Petitioners' argument that the Stockholders Agreement only required them to refrain from exercising appraisal rights before the merger occurred is unreasonable, particularly given that appraisal rights did not arise until the merger occurred.

The Court of Chancery correctly held that Authentix, as a signatory to the Stockholders Agreement, has the ability to enforce the Agreement. Petitioners' argument that Authentix "in the hands of the buyer" should not be permitted to enforce the Stockholders Agreement is meritless. The Court of Chancery correctly found that "[w]here, as here, a Company Sale has taken place, none of the signatories to the SA, other than the Company itself via the purchasers, have an interest in enforcing the contract. Specifically, should a party violate the duty to refrain from seeking appraisal, the petition would be filed on, and any duty to pay would fall on, the Company." Since appraisal rights do not even exist until a Company Sale structured as a merger occurs, the surviving corporation, a signatory to the Stockholders Agreement, is the proper entity to enforce Petitioners' contractual obligation.

B. The Court of Chancery correctly held that the "Same Terms and Conditions" provision in Section 3(e) of the Stockholders Agreement was not

applicable to the Merger, as the Merger was not "structured as a sale of Equity Securities." The plain terms of the Stockholders Agreement impose the "Same Terms and Conditions" provision on the parties only where a sale is accomplished by an agreement by the Carlyle Group to sell its stock. The Court of Chancery correctly held that, because the transaction was structured as a merger as opposed to an agreement by Carlyle to sell its stock, the "Same Terms and Conditions" provision was simply not applicable. Even were it applicable, the plain language of the Stockholders Agreement would still require Petitioners to refrain from exercising appraisal rights where, as here, there was a Board-approved Company Sale. Further, the same terms and conditions in fact did apply to all shares because all shares within each class were treated equally and received the same price regardless of who held them. Petitioners' argument in the court below that the Same Terms and Conditions provision was not satisfied because common stock received different consideration than preferred stock was not a commercially reasonable interpretation and was correctly rejected.

II. Denied. The Court of Chancery correctly held that, as a party thereto, Authentix can enforce the Stockholders Agreement and that such enforcement did not contravene law or public policy.

A. The Court of Chancery correctly rejected Petitioners' argument that the Stockholders Agreement is the equivalent of a limitation on a class of stock

under 8 *Del. C.* § 151(a) because all stockholders had signed the agreement. The Stockholders Agreement "did not restrict the appraisal rights of the classes of stock held by Petitioners; instead, the Petitioners by entering into the Stockholders Agreement, agreed to forebear from exercising that right."

B. The Stockholders Agreement does not violate 8 *Del. C.* § 262(a). Petitioners argue that Section 262 appraisal rights are "mandatory" and that it is against public policy to allow corporations to enter into agreements affecting appraisal rights. However, Delaware is a freedom-of-contract state. Even mandatory rights can be foregone by clear and unambiguous agreement, as Petitioners' agreement not to exercise appraisal rights in the Stockholders Agreement was. Moreover, the Petitioners—all sophisticated parties in their own right—knowingly and voluntarily entered into the contract and assumed its obligations in exchange for consideration. They should be held to their bargain.

C. Authentix is not barred from enforcing the Stockholders Agreement for lack of statutory authorization in violation of 8 *Del. C.* § 218. Delaware law expressly permits corporations to make and enforce contracts, and there is no reasoned basis to prohibit corporations from enforcing agreements because stockholders are the counterparties. Indeed, the General Assembly expressly contemplates that corporations can enforce stockholders agreements: stockholders agreements are expressly carved out of the prohibitions in 8 *Del. C.*

§§ 102(f), 109(b), and 115. Moreover, Delaware courts have allowed corporations to enforce provisions in stockholders agreements that the General Corporation Law prohibits in certificates of incorporation or bylaws. Petitioners' tenuous analogy to situations involving voting trusts or the contested elections of directors under Sections 218 and 225 rests on a faulty premise. The Stockholders Agreement is not a voting trust, and the entrenchment concerns that animate Sections 218 and 225 simply are not present here.

Authentix's Summary of Arguments on Cross-Appeal

I. The Court of Chancery erred in ordering Authentix to pay prejudgment interest on the merger consideration to Petitioners as a matter of equity.

A. Petitioners' pleading—an appraisal petition—did not plead any claim seeking an award of the merger consideration afforded them under the Merger Agreement. Petitioners raised the issue for the first time in a proposed form of order that would direct Authentix to pay Petitioners the merger consideration and prejudgment interest thereon after the court below correctly concluded that Petitioners violated their obligation to refrain from exercising appraisal rights. As Petitioners failed to plead any claim that would entitle them to an award of the merger consideration, there is no basis (legal or equitable) to award Petitioners the merger consideration or any prejudgment interest thereon, and such relief is likewise unripe because Authentix has at all times been

prepared and willing to pay such merger consideration upon tender of the shares as the Merger Agreement provided.

B. The Court of Chancery further erred in awarding prejudgment interest on the merger consideration because Petitioners themselves chose not to receive the merger consideration, so they have not been deprived of the use of such sums during the pendency of this litigation.

C. Petitioners are not entitled to an award of prejudgment interest as a matter of equity. Equity does not support an award of prejudgment interest to Petitioners who were "unambiguously aware" of their obligation not to seek appraisal but did so anyway, gambling that the Court of Chancery would not enforce their obligation. Moreover, in awarding prejudgment interest as a matter of equity, the Court of Chancery ignored the relevant contractual language of the Merger Agreement, which expressly states that shares not entitled to appraisal "shall be converted into the merger consideration … without any interest thereon …." An award of prejudgment interest to Petitioners penalizes the non-breaching party and rewards the breaching parties for their decision to violate their agreement; but equity does not reward the wrongdoers and penalize the victim.

II. The Court of Chancery erred in denying Authentix—the prevailing party in the litigation — prejudgment interest on the attorneys' fees that it incurred

and paid to enforce its rights and Petitioners' obligations under the Stockholders Agreement.

A. Authentix was deprived of the ability to use funds expended to enforce its rights and Petitioners' obligations during the pendency of the litigation and should be made whole.

B. The failure of the court below to award interest to Authentix on its judgment contrasts notably and unfavorably with the award to Petitioners — the breaching parties — of prejudgment interest on a judgment that they did not pray for and had no contractual right to receive.

STATEMENT OF FACTS

A. Petitioners Entered into a Stockholders Agreement with Authentix in 2008

In 2007, Authentix, Inc. began exploring its financial and strategic options. Joint Stipulation of Fact ¶ 1 (Joint Appendix ("JA") 1600-01). All of the Petitioners held shares in Authentix, Inc. at the time; Manti Holdings, LLC and Manti Resources, Inc. held a majority of the shares. *Id.* ¶ 2 (JA1601). Ultimately, Authentix, Inc. entered into an Amended and Restated Agreement and Plan of Merger, dated March 12, 2008 (the "2008 Merger"), whereby Authentix, Inc. became a wholly-owned subsidiary of Authentix — a private company with a limited number of stockholders. *Id.* ¶ 3 (JA1601).

Through the 2008 Merger, Carlyle and J.H. Whitney acquired a majority of the shares of Authentix. *Id.* As a condition of entering into the merger, Carlyle and J.H. Whitney required that the company and all holders of stock enter into a Stockholders Agreement. *Id.* ¶ 4 (JA1601). All of the Petitioners chose to roll over or reinvest their equity interests in Authentix. As such, they had the opportunity to negotiate and have counsel review and comment on the Stockholders Agreement, which the Petitioners all ultimately executed. *Id.* ¶¶ 3-8 (JA1601-1604).

Section 3(e) of the Stockholders Agreement was specifically negotiated by the parties (JA1610 at JA1621-22) and provides:

> In the event that … (ii) a Company Sale is approved by the Board and either (x) the holders of at least fifty percent (50%) of the then-outstanding Shares or (y) the Carlyle Majority, each Other Holder shall consent to and raise no objections against such transaction …. Without limiting the generality of the foregoing, each Other Holder agrees that he, she or it shall … (iv) refrain from the exercise of appraisal rights with respect to such transaction[.]

JA0289 at JA0299-300. Petitioners thus agreed that in the event of a Company Sale approved by the Board and requisite holders, they would "refrain from the exercise of appraisal rights …."

B. A Company Sale Took Place on September 13, 2017

On September 13, 2017, Authentix entered into the Agreement and Plan of Merger by and among Authentix Guernsey Holdco Limited, Authentix MergerSub, Inc. ("Merger Sub"), Authentix, and TCG Ventures III, L.P. (the "Merger Agreement" or "MA"), whereby Merger Sub would be merged with and into Authentix, with Authentix being the surviving corporation (the "Merger"). MA § 2.1(a) (JA0471 at JA0493). The Merger was approved by the Authentix Board of Directors, and subsequently by Written Consent in Lieu of a Special Meeting of Stockholders of Authentix. JA0164-68 ("Written Consent"). Pursuant to the Merger Agreement, all stock within each preferred or common class was treated identically, regardless of whether such stock was held by the Carlyle Group, J.H. Whitney, or Other Holders. MA § 3.1(f)-(h) (JA0496-99); JA0463-66 (Transaction Summary).

Upon the Merger, each share of preferred or common Authentix stock was "canceled and retired and … cease[d] to exist," and non-dissenting shares became "the right to receive, subject to surrender of the share certificates evidencing such shares and a duly completed and executed [L]etter of [T]ransmittal … the applicable portion of the Merger Consideration." MA §3.1(a), (b) (JA0494-95). Dissenting Shares — *i.e.* shares for which stockholders chose to pursue appraisal under Section 262 of the DGCL — were also "cancelled" and "cease[d] to exist" at the time of the Merger. MA §3.1(a), (b) (JA0494-95); MA §3.8 (JA0506). The Merger Agreement further provided that any stockholder who failed to establish its right to appraisal would be entitled to "the portion of the Merger Consideration deliverable … as determined in accordance with … Article III, without any interest thereon." MA §3.8 (second emphasis added) (JA0506).

In connection with the Merger, Authentix Guernsey Holdco Limited, TCG Ventures III, L.P., Citibank, N.A., and Continental Stock Transfer & Trust Company also entered into a paying agent agreement to facilitate the payment of merger consideration to holders of Authentix stock (the "Paying Agent Agreement"). JA2481 at JA2486 (Supplemental Aff. of Andrew Hammond ¶ 7). Pursuant to the Paying Agent Agreement, Citibank (the Depository Agent) established a custodial account to receive, hold, and distribute merger consideration to holders of Authentix common and preferred stock, and Continental (the Paying Agent) requested funds

from that account to make those payments. Payment Agent Agreement, §§ 1.1(a), 1.5 (JA2502 at JA2503-05)). On the date of the Merger, Authentix deposited the initial merger consideration due to stockholders into the custodial account. JA2477 at 2479 (Aff. of Noreen Ang ("Ang. Aff.") ¶ 4). It also deposited additional consideration due to stockholders from time to time thereafter,[1] such that "[a]ll merger consideration due to Petitioners under the Merger Agreement [has been] paid" into the custodial account and has not been returned to Authentix since it was initially deposited. JA2479-80 (Ang. Aff. ¶¶ 4-5). Pursuant to Section 1.6 of the Paying Agent Agreement, the custodial account is a non-interest-bearing account. JA2505; *see* JA2487-88 (Ang Aff. ¶ 11). Accordingly, Authentix has not earned interest on or otherwise benefited from undisbursed merger consideration during the pendency of this litigation. JA2479-80 (Ang Aff. ¶ 5).

C. Petitioners Violate the Stockholders Agreement by Pursuing Appraisal

Petitioners do not dispute that the Merger constituted a "Company Sale" under the Stockholders Agreement. Appellant Br. at 12. Accordingly, the stockholders of Authentix—including all of the Petitioners—were expressly obligated to "refrain

[1] Under the Merger Agreement, additional consideration was due to stockholders out of certain post-merger payments to the Company by the Republic of Ghana. The timing of payment of these supplemental amounts was dependent on receipt from the Republic of Ghana. MA § 3.1(h) (JA0381)

from the exercise of appraisal rights with respect to" the Merger. SA §3.1(e) (JA0299-300).

The Confidential Information Statement and Notice of Action by Written Consent and Approval of the Merger (the "Information Statement') circulated in connection with the Merger advised Authentix stockholders that the Merger Agreement had been approved by Authentix's Board of Directors and adopted by stockholders by written consent. JA0459. The front page of the Information Statement provided: "The Company's Board of Directors … requests that you execute the Written Consent … pursuant to your obligations set forth in the Company's Stockholders Agreement to which you are a party and to which you are bound." *Id*. The Information Statement also included a section titled "Appraisal Rights of Stockholders," which provided in bold text: "**You are reminded that you have contractually agreed to refrain from exercising any appraisal rights pursuant to the Company Stockholders Agreement to which you are bound.**" JA0469.

Instead of complying with their unambiguous agreement under the Stockholders Agreement, Petitioners sent Authentix demands for appraisal. JA0585-603. Authentix then reminded Petitioners again of their obligation to refrain from exercising appraisal rights:

> As a party to the Stockholders Agreement … , you waived your right to exercise appraisal rights. Specifically, in

> Section 3(e) of the Stockholders Agreement you agreed as follows: … [to] refrain from the exercise of appraisal rights with respect to [a Company Sale .] …. Accordingly, the Company hereby demands that you comply with your contractual obligations under the Stockholders' Agreement and execute the Written Consent … and Withdrawal of Demand for Appraisal.…

JA0607-08; *accord* JA0609-665. Petitioners however filed this appraisal action, praying the court to (a) determine the fair value of Petitioners' shares at the time of the Merger, (b) direct Authentix to pay Petitioners that fair value for Petitioners' shares, and (c) tax costs and fees against Authentix. JA0027-31 (the "Appraisal Petition").

D. The Court of Chancery Correctly Held that Petitioners Had Breached Their Obligations Under the Stockholders Agreement.

Authentix responded to the Appraisal Petition with an Answer and Verified Counterclaims. JA0032-45. In its Counterclaims, Authentix sought (i) a declaratory judgment that Petitioners were not entitled to seek appraisal with respect to the Merger, (ii) specific performance of Petitioners' obligations under Section 3(e) of the Stockholders Agreement, and (iii) attorneys' fees and expenses as provided for in Section 13(i) of the Stockholders Agreement. JA0042-45. Section 13(i) of the Stockholders Agreement provides: "In the event of any litigation or other legal proceeding involving the interpretation of this Agreement or enforcement of the rights or obligations of the Parties, the prevailing Party or Parties shall be entitled to

recover reasonable attorneys' fees and expenses in addition to any other available remedy." JA0317.

Petitioners moved to dismiss Authentix's Counterclaims and sought to "reserve their equitable and contractual rights to seek attorneys' fees should they prevail on th[e] motion, including their right to attorneys' fees pursuant to Section 13(i)" of the Stockholders Agreement. JA0050 at JA0051 ("Petitioners' Motion to Dismiss"). Authentix moved for (i) determination of entitlement pursuant to 8 *Del. C.* § 262(g) and (h), and (ii) partial summary judgment on all of its counterclaims except for the quantum of damages to be awarded to it and against Petitioners. JA0124-28 ("Authentix's Entitlement Motion").

After cross-briefing, oral argument, and supplemental briefing ordered by the Court of Chancery on new issues raised by Petitioners at oral argument (JA0016-24), the Court of Chancery issued a Letter Opinion denying Petitioners' Motion to Dismiss and granting Authentix's Entitlement Motion on October 1, 2018 (the "2018 Opinion" or "2018 Op."). The court below correctly held that Petitioners were bound by the unambiguous language of Section 3(e) of the Stockholders Agreement to "consent and not object to the [Merger], which general duty includes a duty [to] 'refrain from exercise of appraisal rights'" (2018 Op. at 9), and that Authentix was authorized to enforce the Stockholders Agreement (*id.* at 9-11).

In response, Petitioners filed a motion for reargument. JA1180-96 (the "Motion for Reargument"). After briefing, two teleconferences, and filing a joint stipulation of fact in response to questions posed by the court below, the court issued a Memorandum Opinion denying the Motion for Reargument on August 14, 2019 (the "2019 Opinion" or "2019 Op."). The court below correctly held that the General Corporation Law does not "forbid the sophisticated owners of a corporation from negotiating a term as part of a merger agreement that binds them to a future sale and waives statutory appraisal rights" (2019 Op. at 5), and that "the SA here is enforceable, including the provision that waives Petitioners' appraisal rights" (*id.* at 8).

E. The Court of Chancery Correctly Held that Authentix is Due Its Attorneys' Fees as the Prevailing Party Under Section 13(i) of the Stockholders Agreement.

Authentix and Petitioners then filed competing forms of order and letter briefs supporting their positions. JA0009-10. After argument and further briefing regarding whether Authentix was entitled to attorneys' fees (JA0002-09), the Court of Chancery issued a Memorandum Opinion on August 11, 2020 (the "2020 Opinion" or "2020 Op."), granting Authentix's request for reasonable attorneys' fees and expenses under Section 13(i) of the Stockholders Agreement.

Although the Court of Chancery correctly awarded Authentix attorneys' fees, the court below erred in holding that, as a matter of equity, Petitioners were entitled

to prejudgment interest on merger consideration even though they (i) had never pled any claim seeking the merger consideration, (ii) had no ripe claim of a contractual right to receive the merger consideration because they chose not to take the prerequisite contractual steps to receive it, (iii) were the parties found to have breached the Stockholders Agreement, and (iv) were expressly not entitled to interest under the terms of the Merger Agreement. 2020 Op. at 1, 24-25. The court below compounded this error by failing, without explanation, to award Authentix prejudgment interest on the attorneys' fees that it incurred and paid to enforce its rights and Petitioners' obligations under the Stockholders Agreement, even though Authentix was the non-breaching party. Final Order and Judgment (Oct. 15, 2020).

ANSWERING ARGUMENT ON APPEAL

I. The Court of Chancery Correctly Held that Petitioners' Agreement Not to Exercise Appraisal Rights Is Enforceable

A. Counterstatement of the Questions Presented (Response to Petitioners' Brief Points I-II)

Did the Court of Chancery err by enforcing the clear and unambiguous language of the Stockholders Agreement, which required the sophisticated parties who executed the Agreement to refrain from exercising appraisal rights in connection with an arms-length sale of the Company on certain specified terms? No. Preserved at JA0143-51, 0966-81, 1085-89, 1136-61, 1174-76, 1204-09, 1198-99, 1279-92, 1938-44, 2242-44, 2259-60, 2328-46, 2349-51, 2421-26, 2431-41, 2463-66.

B. Scope of Review

Motions to dismiss and motions for summary judgment generally are reviewed *de novo*. *See, e.g.*, *Chrin v. Ibrix Inc.*, 70 A.3d 205 (Del. 2012) (TABLE) ("This Court reviews the Court of Chancery's grant of a motion to dismiss *de novo*."); *Biddle v. Miller*, 234 A.3d 161 (Del. 2020) (TABLE) ("We review grants of summary judgment *de novo*."). Issues related to contract interpretation and Delaware policy considerations are also reviewed *de novo*. *See Exelon Generation Acqs., LLC v. Deere & Co.*, 176 A.3d 1262, 1266-67 (Del. 2017) ("'The proper construction of any contract … is purely a question of law,' so we review questions of contract interpretation *de novo*.") (footnote omitted); *Jones v. State Farm Mut.*

Auto. Ins. Co., 610 A.2d 1352, 1353 (Del. 1992) ("To the extent our decision turns on public policy grounds, it implicates purely a question of law over which *de novo* review is appropriate.").

C. Merits of the Argument

1. Petitioners Unambiguously Agreed Not to Pursue Appraisal in the Stockholders Agreement

"Delaware is a freedom of contract state, with a policy of enforcing the voluntary agreements of sophisticated parties in commerce." *Pers. Decisions, Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404 at *6 (Del. Ch. May 5, 2008), *aff'd*, 970 A.2d 256 (Del. 2009) (TABLE); *see also NAF Hldgs., LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 180 n.14 (Del. 2015) (quoting *NACCO Indus. v. Applica Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009) ("Delaware upholds the freedom of contract and enforces as a matter of fundamental public policy the voluntary agreements of sophisticated parties."); *Crown Books Corp. v. Bookstop, Inc.*, 1990 WL 26166, at *5 (Del. Ch. Feb. 28, 1990) (quoting *Rainbow Navigation, Inc. v. Yonge*, 1989 WL 40805, at *5 (Del. Ch. Apr. 24, 1989)) (applying this principle to stockholders agreements). In interpreting agreements, Delaware courts afford unambiguous contract language its "ordinary and usual meaning." *See Rhone-Poulenc Basic Chems. Co. v. Am Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992); *id.* at 1195-96 ("When the language of a [contract] is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none

exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented."); *see also Hill Int'l, Inc. v. Opportunity P'rs L.P.*, 119 A.3d 30, 39 n.29 (Del. 2015) (same). Summary judgment is properly employed for the interpretation and enforcement of unambiguous contracts. *See Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012).

In the Stockholders Agreement, Petitioners unambiguously agreed to refrain from exercising appraisal rights in the event of a Company Sale. Section 3(e) of the Stockholders Agreement states, in relevant part:

> In the event that … (ii) a Company Sale is approved by the Board and either (x) the holders of at least fifty percent (50%) of the then-outstanding Shares or (y) the Carlyle Majority, each Other Holder shall consent to and raise no objections against such transaction …. Without limiting the generality of the foregoing, each Other Holder agrees that he, she or it shall … (iv) refrain from the exercise of appraisal rights with respect to such transaction[.]

JA0299-300. There is no dispute that the Merger constituted a "Company Sale" (Appellant Br. at 12; 2018 Op. at 3; *see also* 2020 Op. at 6 & n.24) or that the Petitioners were "Other Holders," as defined in the Stockholders Agreement (SA, Preamble). The Company Sale was approved by the Board of Directors and the written consent "of at least fifty percent (50%) of the then-outstanding Shares" of Authentix on September 13, 2017. Written Consent (JA0164-68). Accordingly, approval of the Company Sale—here, the Merger—triggered Petitioners'

obligations under Section 3(e) of the Stockholders Agreement, including their obligations to "consent to and raise no objections against such transaction" (SA §3(e) (emphasis added) (JA0299-300)) and specifically to "refrain from the exercise of appraisal rights with respect to such transaction," *id.*[2]

The Stockholders Agreement requires Petitioners to refrain from exercising appraisal rights "with respect to such transaction." Thus, by its terms, if Petitioners' obligation "to refrain" is triggered by a transaction, Petitioners agreed to refrain from exercising appraisal rights with respect to "such transaction" regardless of whether the Stockholders Agreement terminates upon a Company Sale. Indeed, it would be an absurd result if Board approval of a Company Sale had the immediate effect of mooting the obligations that the parties expressly agreed would accrue in that scenario. *See Hampton v. Turner*, 2015 WL 1947067, at *3 (Del. Ch. Apr. 29, 2015) ("The Court also avoids interpretations that produce absurd results to which the parties would not have agreed.") Therefore, the Court of Chancery correctly held that Petitioners' obligation to refrain from exercising appraisal rights was triggered by and vested with the approval of the Merger and was thus enforceable and

[2] The language of Section 3(e)(iv) contains only one limitation, which relates to non-pro rata allocations of liabilities for representations, warranties, and certain other obligations, and Petitioners do not argue that the limitation applies here. JA0300.

necessarily continued to be enforceable after the Stockholders Agreement terminated. 2018 Op. at 4-5; 2019 Op. at 4; 2020 Op. at 6.

Petitioners raise two arguments as to why they should escape their agreement. First, Petitioners claim that because Section 3(e)(iv) uses the term "refrain" rather than "waive," the stockholders only agreed to refrain from exercising appraisal rights between the approval of the Merger and the effectuation of that Merger the same day. Appellant Br. at 6, 17-19, 22-23 (citing SA, § 12). Second, Petitioners claim that Authentix "in the hands of a buyer" was not an "intended beneficiary" of the Stockholders Agreement and, therefore, cannot enforce its provisions. Appellant Br. at 21. These arguments are meritless.

a. Petitioners' "Refrain" Versus "Waive" Argument is Meritless

Petitioners' argument that they only agreed to refrain from exercising appraisal rights until the Merger occurred, not to "waive" those rights (Appellant Br. at 19), is a semantic quibble. Any claim that the obligation to refrain from exercising appraisal rights terminated upon the Merger is illogical on its face, because appraisal rights only arise when a merger becomes effective. *See* 8 *Del C.* § 262(a); *see also* 2018 Op. at 6; 2020 Op. at 13. As the court below said, "the 'exercise of appraisal rights' with respect to a transaction is meaningless until the transaction is accomplished[.]" 2018 Op. at 6. Petitioners' interpretation that the obligation to refrain from exercising appraisal rights terminated upon consummation of the very

transaction (the Merger) giving rise to them would render the obligation to refrain from exercising appraisal rights in Section 3(e)(iv) a nullity, contrary to fundamental interpretational precepts. *In re Verizon Ins. Coverage Appeals,* 222 A.3d 566, 575 (Del. 2019) ("Contracts are to be interpreted in a way that does not render any provisions illusory or meaningless.") (internal quotation marks omitted); 2018 Op. at 6.[3]

Second, Petitioners' reading of the Stockholders Agreement is commercially unreasonable. Agreements not to exercise appraisal rights are included in stockholders agreements because they are valuable. As the court below observed, a provision not to exercise appraisal rights in connection with an arms-length transaction "make[s] the Company more attractive to potential buyers."[4] 2018 Op.

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[3] Petitioners also argue that Authentix could have structured the 2017 Merger to include a stockholder vote, such that Petitioners' demand for appraisal would have been required before the Merger (presumably pursuant to 8 *Del. C.* § 262(d)(1)). However, when a demand is made is irrelevant because the appraisal rights do not come into existence until the merger occurs. It is the exercise of those rights—once they exist—that is at issue.

Petitioners' citation to *Riverstone* is also inapt. The "drag-along" provision analyzed in *Riverstone* required that the company give written notice of a proposed change-in-control transaction "at least ten days in advance of the date of the transaction." *See Halpin v. Riverstone Nat'l, Inc.*, 2015 WL 854724, at *2 (Del Ch. Feb. 26, 2015). There is no such advance notice requirement in Section 3(e) of the Stockholders Agreement. Moreover, the stockholders agreement in *Riverstone* did not include an express agreement to refrain from the exercise of appraisal rights, in contrast to the Stockholders Agreement here. *See* 2015 WL 854724, at *2.

[4] "The Company was made a party to the SA, presumably because of a determination by the Board that attracting capital was in the interest of the Company.…

at 10. This provides a benefit to the stockholders, because a future buyer can offer a price that is not discounted for appraisal risk. However, Petitioners' interpretation would provide no attraction to a prospective buyer or corresponding benefit to selling stockholders because it would still subject the buyer to the risk of an appraisal proceeding. Such a commercially unreasonable reading should not be adopted. *Nationwide Emerging Managers, LLC v. NorthPointe Hldgs., LLC*, 112 A.3d 878, 894 n.58 (Del. 2015) ("[A] court will not adopt [an] interpretation of a contract that leads to unreasonable results, but instead will adopt the construction that is reasonable and that harmonizes the affected contract provisions."). "An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010). So here: semantic games aside, "[n]o contracting party, agreeing to the quoted language [of Section 3(e)], would consider itself free to exercise appraisal rights in light of Board approval of a contractually-compliant Company Sale." 2018 Op. at 5-6.

Presumably, the ability to avoid appraisal would make the Company more attractive to potential buyers, a consideration surely contemplated by the parties to the SA." 2018 Op. at 9-10; *see also* 2019 Op. at 4; 2020 Op. at 3, 5 & n.17, 6, 13, 14.

b. Petitioners' "Intended Beneficiary" Argument is Meritless

Petitioners' argument that post-Merger Authentix cannot enforce the Stockholders Agreement because it was not an "intended beneficiary" is likewise illogical. Authentix is not a stranger to the contract. Authentix signed the Stockholders Agreement and survived the Merger. (SA (JA0319); MA §2.1(a) (JA0493); *see also* 2018 Op. at 9-10. Authentix, as a signatory to the Stockholders Agreement, has the right to enforce that Agreement. *See, e.g.*, *Triple C Railcar Serv., Inc. v. City of Wilm.*, 630 A.2d 629, 633 (Del. 1993) ("It is axiomatic that either party to an agreement may enforce its terms for breach thereof." (citing RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 1:1 (4th ed. 1990))). In fact, Authentix is the proper party to enforce the Stockholders Agreement, because it is the only signatory with an interest in enforcing the agreement post-Merger:

> Where, as here, a Company Sale has taken place, none of the signatories to the SA, other than the Company itself via its purchasers, have an interest in enforcing the contract. Specifically, should a party violate the duty to refrain from seeking appraisal, the petition would be filed on, and any duty to pay would fall on, the Company.

2018 Op. at 9-10; *see also* 2019 Op. at 4; 2020 Op. at 3, 5 & n.17, 6, 13, 14. The Stockholders Agreement contemplates a future sale, sought to maximize the value of that sale by eliminating appraisal risk, and thus plainly contemplated that the mechanism providing that benefit (the agreement to refrain) could be enforced post-

merger by the signatory with an interest in enforcing it. It would fly in the face of 8 *Del. C.* § 259 to conclude otherwise.[5]

2. Petitioners' Other Arguments Also Are Meritless

a. Petitioners' Obligations Under Section 3(e) Survived the Termination of the Stockholders Agreement

Under the Stockholders Agreement, Petitioner's obligation to refrain from exercising appraisal rights was triggered when a Company Sale was approved by the Board. The Court of Chancery correctly concluded that the "Board approved the transaction at issue at a time when the SA was unquestionably in effect." (2018 Op. at p. 5) As such, Petitioners' obligation to refrain from exercising appraisal rights with respect to "such transaction" arose prior to the termination of the Stockholders Agreement. Petitioners' contention that all restrictions in the Stockholders Agreement terminated upon consummation of the Merger is incorrect. (App. Br. at 19). As Petitioners' obligation to refrain from exercising appraisal rights was fixed before termination of the Agreement, that obligation remained enforceable post-termination. *William Blair & Co., L.L.C. v. Meizler UCB Biopharma S.A.*, No. N13C-01-068 FSS, 2014 Del. Super. LEXIS 3466, at *11 (Del. Super. Ct. July 28, 2014) ("The expiration of a contract does not release parties from 'obligations

[5] As Petitioners concede in their own briefing, under 8 *Del. C.* § 259 (*see* Appellant Br. at 21), the surviving corporation in a merger retains the "rights, privileges, powers, and franchises" of all merged entities.

already fixed under the contract but as yet unsatisfied.'") (quoting *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.*, 501 U.S. 190, 206 (1991)).

Moreover, Petitioners' obligation to refrain from exercising appraisal rights – an obligation not to pursue litigation — was triggered by the Board's approval of a Company Sale. Contractual provisions that relate to the settlement of disputes or the manner in which disputes are resolved survive the termination of a contract. 13 Corbin on Contracts § 67.2 (2020) ("Although termination and cancellation of an agreement extinguish future obligations of both parties to the agreement, neither termination nor cancellation affect those terms that relate to the settlement of disputes or choice of law or forum selection clauses."); *see Silverpop Sys., Inc. v. Leading Mkt. Tech., Inc.*, 641 Fed. App'x 849 (11th Cir. 2016) (provision limiting damages enforceable post-termination); *3850 & 3860 Colonial Blvd., LLC v. Griffin,* 2015 WL 894928, at *5 n.51 (Del. Ch. Feb. 26, 2015) ("Generally, a broad arbitration clause in an agreement survives and remains enforceable for the resolution of disputes arising out of that agreement subsequent to the termination thereof and the discharge of obligations thereunder…." (quoting *Primex Int'l Corp. v. Wal-Mart Stores, Inc.*, 679 N.E.2d 624, 626 (N.Y. 1997))); *Payne v. N. Tool & Equip. Co.*, 2013 WL 6019299, at *3 (N.D. Ind. Nov. 12, 2013) ("In the absence of contractual language expressly or implicitly indicating the contrary, a forum selection clause survives termination of the contract.… The intent of the parties as

to the continued applicability of a forum selection clause controls." (alteration in original)); *Star Pac. Invs., Inc. v. Oro Hills Ranch, Inc.*, 176 Cal. Rptr. 546, 554 n.11 (Cal. Ct. App. 1981) (While "cancellation nullifies that part of the contract which remains unperformed and while future obligations are terminated, all prior accrued rights remain enforceable.").

b. Petitioners' "Same Price" Argument is a Red Herring

The Petitioners argue that their obligation "to refrain from the exercise of appraisal rights" was never triggered because the acquisition of Petitioners' stock was not on the "Same Terms and Conditions" (defined as "same price") as that of the Carlyle Stockholders. Appellant Br. at 24. The argument fails for three reasons, including the one stated by the court below, which correctly held that "the plain terms of the SA impose the '[S]ame Terms and Conditions' provision, and the resulting affirmative duty of cooperation, on the parties only where a sale is accomplished by an agreement by the Carlyle Group to sell its stock" but the Company Sale here was accomplished by merger rather than a sale of Equity Securities, such that "the 'Same Terms and Conditions' provision is inapplicable." 2018 Op. at 9.

Section 3(e) of the Stockholders Agreement provides that the "Same Terms and Conditions" provision only applies to sales "structured as a sale of Equity Securities":

> In the event that (i) any Carlyle Stockholders exercise their rights pursuant to this Section 3 or (ii) a Company Sale is approved by the Board and either (x) the holders of at least fifty percent (50%) of the then-outstanding Shares or (y) the Carlyle Majority, each Other Holder shall consent to and raise no objections against such transaction, and if any such transaction is structured as a sale of Equity Securities, each Other Holder shall take all actions that the Board and/or the applicable Carlyle Stockholders reasonably deem necessary or desirable in connection with the consummation of such transaction; provided that the acquisition of the Equity Securities held by each Other Holder in connection with such transaction shall be on the Same Terms and Conditions as the acquisition of the Equity Securities held by the Carlyle Stockholders in connection with such transaction.

JA0299-300 (emphasis added).

Petitioners' assertion that a merger is a "sale of Equity Securities" is inconsistent with the Stockholders Agreement as written, and with Delaware law. In connection with a Company Sale, the Stockholders Agreement distinguishes between a merger, which occurred here, and a "sale or transfer of the Company's capital stock," which did not. JA0292 (a Company Sale can be "effected by merger, consolidation, recapitalization, sale or transfer of the Company's capital stock or otherwise"). The conclusion that the Merger was not structured as a sale of Equity Securities is consistent with Delaware law, which recognizes a distinction between a merger and an acquisition of all of a corporation's stock. *See Orzeck v. Englehart*,

192 A.2d 36, 38 (Del. Ch. 1963), *aff'd*, 195 A.2d 375 (Del. 1963).[6] Furthermore, the Merger Agreement itself makes clear that the Merger was not structured as a sale of Equity Securities, as each share of common or preferred stock was "canceled and retired and cease[d] to exist" and "bec[a]me the right to receive, subject to surrender of the share certificates evidencing such shares and a duly completed and executed letter of transmittal … the applicable portion of the Merger Consideration." MA §§ 2.3, 3.1(a), (b) (JA0493-94).

Petitioners' arguments would categorize every transaction within the definition of "Company Sale" as a "sale of Equity Securities." Such an interpretation would be wholly inconsistent with the structure of Section 3(e), which discusses "sale[s] of Equity Securities" as a subset of possible deal structures ("and if any such [Company Sale] is structured as a sale of Equity Securities …."). As fundamentally, Petitioners' argument overlooks the underlying purpose of imposing a same-price rule specifically on share sales, which is to protect against the risk that a majority holder will negotiate a higher price for its shares than for the minority's — which

[6] The cases Petitioners cite to argue that a merger is a sale of equity securities (*see* Appellant Br. at 26 n.5) are wholly irrelevant to this question. *Mader v. Armel*, 402 F.2d 158, 159 (6th Cir. 1968) addressed whether a stock-for-stock merger fell within the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)(5) thereunder. *Murphy v. Stargate Def. Sys. Corp.*, 498 F.3d 386, 388 (6th Cir. 2007) addressed whether an actual exchange of shares fell within Ohio's Blue Sky laws.

can be accomplished where shares are sold but would be highly uncommon in a merger transaction converting all shares.[7] In this Merger, of course, all shares of each class received the same consideration regardless of holder, as Petitioners have conceded. JA0989 (June 20, 2018 ltr. at 6)); MA § 3.1(a), (b) (JA0493-95).

In any event, the Stockholders Agreement obligates the Petitioners to refrain from exercising appraisal rights regardless of whether the transaction was structured as a sale of Equity Securities. Section 3(e) requires each Other Holder to "consent to and raise no objections against such transaction," and only then imposes additional obligations relating to share sales through the added clause: "and if any such transaction is structured as a sale of Equity Securities …." JA0299-300. The obligations stated in the "and if" clause are additive to, not substitutive of, the other, more universally applicable obligations imposed by Section 3(e), which include:

> Without limiting the generality of the foregoing, each Other Holder agrees that he, she or it shall (i) consent to and raise no objections against such transaction; … (iii) vote the shares of Common Stock held by such Other

[7] Petitioners also argue incorrectly that the second sentence of Section 3(e) — requiring that Other Holders shall "execute any … merger agreement" that is also executed by each Carlyle Stockholder — suggests that a merger is a "sale of Equity Securities" under the Stockholders Agreement. Appellant Br. at 27. There are numerous deal scenarios where it could be helpful to require stockholders to sign a merger agreement in a share sale context, for example, to obligate a deep pocket on an indemnity, or to effect a combination of businesses prior to a Company Sale. The fact that Other Holders could be asked to sign a merger agreement in the context of a share sale does not mean that the parties contemplated that every merger was definitionally a transaction "structured as a sale of Equity Securities."

> Holder in favor of such transaction …; and (iv) refrain from the exercise of appraisal rights with respect to such transaction.

SA § 3(e) (emphasis added) (JA0300). These obligations apply regardless of whether the Company Sale is structured as a "sale of Equity Securities."

Moreover, even were Petitioners' obligation to refrain from exercising appraisal rights triggered only by a transaction on the Same Terms and Conditions as those applicable to Carlyle, Petitioners would still be obligated to refrain from exercising appraisal rights. Petitioners were not "wiped out" in the Merger (Appellant Br. at 12), but instead were entitled to exactly the same consideration share-for-share as everyone else, including Carlyle and J.H. Whitney. Petitioners conceded below that "each class of [Authentix] stock received the same price within that class pursuant to the Merger Agreement" (JA0989 (June 20, 2018 ltr. at 6)), but fail to explain on appeal how a merger that paid all stockholders the same per share consideration was not on the Same Terms and Conditions. *See* MA § 3.1(f)-(h) (JA0496-99) (all stock within each class treated identically); JA0463-66 (Transaction Summary) (same).[8]

[8] In the court below, Petitioners argued that because "the mix of preferred and common shares held by the parties was dissimilar" the Petitioners did not receive the same price as the Carlyle Stockholders. 2018 Op. at 7; *see, e.g.*, JA0908-10. The Court of Chancery recognized that this was a "doubtful" reading of the Stockholders Agreement. *Id.* at 7. At other points Petitioners suggested that common shares should have received the same per-share consideration as preferred shares regardless of the rights and preferences of the different classes in the

c. There Is No Public Policy Precluding Enforcement of Petitioners' Agreement

Unable to avoid the unambiguous language of the Stockholders Agreement, Petitioners resort to arguing that Authentix cannot enforce the Stockholders Agreement as a matter of public policy, citing 8 *Del. C.* §§ 151(a), 262(a), and 228. Each argument fails.

(i) The Stockholders Agreement Limits the Rights of Stockholders, Not the Stock

Petitioners argue that enforcement of the Stockholders Agreement would violate 8 *Del. C.* §151(a) because "the rights and obligations run with the stock" but are not in the certificate of incorporation. Appellant Br. at 28. This argument fails because restrictions in the Stockholders Agreement bind the stockholders, not the stock. As the Court of Chancery correctly held, "[E]nforcing the SA is not the equivalent of imposing limitations on a class of stock under Section 151(a)." 2018 Op. at 11. Rather than creating a "new restricted class via the SA," "individual stockholders took on contractual responsibilities in return for consideration …." *Id.*

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certificate of incorporation. JA0988-89; JA1186-87. These arguments, abandoned on appeal, would not be commercially reasonable nor what the parties intended in any event. *See, e.g.*, *Hampton v. Turner*, 2015 WL 1947067, at *3 (Del. Ch. Apr. 29, 2015) (the court "avoids interpretations that produce absurd results to which the parties would not have agreed").

Petitioners' argument is founded on the fact that the Stockholders Agreement "binds *all* outstanding shares of Authentix stock," not just some stockholders. Appellant Br. at 28. This argument must fail because, taken to its logical conclusion, stockholders agreements could never include all stockholders, whether or not the corporation was a party. This would contradict 8 *Del. C.* § 218(c), which imposes no limit on the total percentage of stockholders that may join in a stockholders agreement. It would also be wildly inconsistent with Delaware practice.

Stockholders and companies commonly enter into stockholders agreements containing *ex ante* waivers of appraisal rights, expecting that they will be enforceable. *See, e.g.*, JA1307 at 1316 (National Venture Capital Association Model Voting Agreement §3.2(e) (stockholder agrees "to refrain … from exercising any dissenters' rights or rights of appraisal ….")). To hold that corporations cannot enter into stockholders agreements with their stockholders, as Petitioners suggest, would upend decades of established practice and the clear expectations of innumerable parties, not to mention contradict the understanding of the General Assembly. *Infra* at 48-49.

(ii) Delaware Law Does Not Prohibit Sophisticated Stockholders from Agreeing to Refrain from Exercising Appraisal Rights

Petitioners argue that Delaware law creates a hierarchy of authorities in which lower components cannot conflict with higher components. Appellant Br. at 35.

The General Corporation Law is at the top, followed by a corporation's certificate of incorporation, and then a corporation's bylaws. *Id.* Petitioners argue that because appraisal rights are "mandatory" under Section 262, they cannot be eliminated in a corporation's organizational documents, and jump from that to a conclusion that a corporation is also prohibited from enforcing an agreement to refrain from exercising appraisal rights signed by the stockholder to be bound. *Id.* at 9, 30-32, 36-41. Petitioners are wrong. *Id.*

The court below correctly held that the Stockholders Agreement is enforceable, "including the provision that waives the Petitioners' appraisal rights." 2019 Op. at 8. As the court correctly observed, "the DGCL [including Section 262] does not explicitly prohibit contractual modification or waiver of appraisal rights, nor does it *require* a party to exercise its statutory appraisal rights." *Id.* at 10. Accordingly, the court concluded that because a party's agreement to refrain from exercising appraisal rights in a stockholders agreement "serves to supplement the DGCL, and is not inconsistent with, nor contrary to, the DGCL," it should be enforced. *Id.* at 10.

Petitioners' argument that "the DGCL does not authorize a Delaware corporation to do to its own stockholders by separate agreement what it cannot do to them in the charter and bylaws" (Appellant Br. at 30, 35) is incorrect. As an initial matter, the premise of Petitioners' argument is flawed. The Stockholders Agreement

was not imposed on Petitioners by the corporation. Rather, Petitioners knowingly and freely accepted their obligations in order to obtain an investment from a third party. Joint Stipulation of Fact ¶¶1-4 (JA1600-01); JA0322-25, -27-29, -33, -41, -43 (Petitioners' signatures on the SA).

Moreover, the General Corporation Law is a broad enabling act that welcomes private ordering, rather than a rigid set of mandatory provisions. *See, e.g.*, *Salzberg v. Sciabacucchi*, 227 A.3d 102, 116 (Del. 2020) ("Delaware's corporate statute … leaves the parties to the corporate contract (managers and stockholders) with great leeway to structure their relations, subject to relatively loose statutory constraints …."); *Shintom Co. v. Audiovox Corp.*, 888 A.2d 225, 227 (Del. 2005) ("The [DGCL] is an enabling statute that provides great flexibility for creating the capital structure of a Delaware corporation."). Delaware courts have recognized that this flexible and accommodating design serves to grant parties the latitude they need to meet specific business needs. *Sciabacucchi*, 227 A.3d at 116.

That the General Corporation Law does not expressly permit an action does not mean that such action is prohibited. *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1351 (Del. 1985) ("Merely because the General Corporation Law is silent as to a specific matter does not mean that it is prohibited." (quoting *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 957 (Del. 1985)); *see also Sciabacucchi*, 227 A.3d at 119-20 (rejecting argument "that a forum-selection provision not expressly

permitted by Section 115, is implicitly prohibited"). Instead, the court below correctly recognized that "freedom of contract is the rule and restraints on this freedom the exception." 2020 Op. at 11 (quoting *Libeau v. Fox*, 880 A.2d 1049, 1057 (Del. Ch. 2005)). Thus, "[w]hen parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect the[] agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract." *Libeau*, 880 A.2d at 1056.

In recognition of Delaware's strong public interest in freedom of contract, our courts have held that an individual may waive constitutional as well as statutory rights. *See, e.g.*, *In re Appraisal of Ford Hldgs., Inc. Preferred Stock*, 698 A.2d 973, 976-77 (Del. Ch. 1977)*, Juul Labs, Inc. v. Grove*, 238 A.3d 904, 919-20 & n.15 (Del. Ch. 2020) (collecting cases illustrating "Delaware's broad recognition of parties' ability to waive … important rights, whether constitutional or statutory"); *cf. Baio v. Commercial Union Ins. Co.*, 410 A.2d 502, 508 (Del. 1979) ("Clearly, our legal system permits one to waive even a constitutional right…; and, [a] fortiori, one may waive a statutory right.") (internal citations omitted). The inclusion of "shall" in a relevant provision does not mean that the right can never be foregone in advance by

the individual whose right is in question.[9] *Compare* Del. Const., art. I, § 4 ("Trial by jury shall be as heretofore.") (emphasis added), *with Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 912 (Del. 1989) (concluding the right to trial by jury "is not absolute but subject to waiver if the parties so intend"); *see also CIT Commc'ns Fin. Corp. v. Level 3 Commc'ns, LLC*, 2008 WL 2586694, at *5 (Del. Super. Ct. June 6, 2008) (waiver of right to civil jury trial valid and enforceable, even without an arbitration provision). And even rights categorized as "mandatory" can be waived. *See Red Clay Educ. Ass'n v. Bd. of Educ. of Red Clay Consol. Sch. Dist.*, 1992 WL 14965, at *6 (Del. Ch. Jan. 16, 1992) (collective bargaining agreement terms waived statutory right that employees "shall" have right to negotiate certain matters); *Ford Hldgs.*, 698 A.2d at 976-77. Thus, cases like *Libeau* — in which the Court held that a statutory right to partition (25 *Del. C.* § 721) was waived by contract, analogizing to waivers of 8 *Del. C.* § 273 — are also instructive. *Libeau*, 880 A.2d at 1057-58.

Moreover, that it may be impermissible for a certificate of incorporation to restrict a particular right does not *ipso facto* prohibit a sophisticated stockholder from

[9] Petitioners' cases do not hold to the contrary, as they did not involve questions of waivers by unambiguous contract language. *Arnold v. State*, 49 A.3d 1180 (Del. 2012) (no waiver or contract at issue); *Lexecon Inc. v. Millberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (same); *Krieger v. Wesco Fin. Corp.*, 30 A.3d 54 (Del. Ch. 2011) (no waiver at issue, as plaintiffs lacked appraisal rights under statute).

agreeing in exchange for bargained-for consideration not to exercise that right. *Bonanno v. VTB Holdings, Inc.*, 2016 WL 614412, at *15 (Del. Ch. Feb. 8, 2016) is illustrative. In *Bonanno*, the court considered whether a corporation could enforce a forum selection provision in a stockholders agreement even though 8 *Del. C.* § 115 expressly precludes placing such provision in a certificate of incorporation or bylaw. The court observed that the Synopsis of the bill enacting Section 115 expressly stated that "Section 115 is not intended … to prevent any such provision in a stockholders agreement … signed by the stockholder against whom the provision is to be enforced," *Bonanno*, 2016 WL 614412, at *15, and held that the corporation had the right to enforce the stockholders agreement even though the forum selection provision at issue would not be permissible in bylaws or the certificate of incorporation, *id.* at *16; *see also Klaassen v. Allegro Dev. Corp.*, 2013 WL 5739680, at *25 (Del. Ch. Oct. 11, 2013) (enforcing an agreement in a stockholders agreement to only remove a director for one of two reasons, despite a potential conflict with 8 *Del. C.* § 141(k)), *aff'd*, 106 A.3d 1035 (Del. 2014) & 82 A.3d 730 (Del. 2013) (TABLE).[10]

[10] As Petitioners also conceded before the Court of Chancery, "[Y]ou can do all kinds of things against each other as stockholders that you can't do in a charter or bylaws." JA1133 (June 13, 2018 Hr'g Tr. 43:11-16).

Likewise here, that Section 262 permits stockholders to exercise appraisal rights does not express a public policy that would prohibit stockholders from agreeing to limit their exercise of those rights. Given the ease with which stockholders who wish to exercise appraisal rights can (and do) inadvertently lose them, and the fact that no statute requires appraisal rights to be pursued (*see* 8 *Del. C.* § 262), it would be anomalous for the Court to hold them so fundamental that they could not be bargained away by a sophisticated stockholder for consideration he or she deems worthy — such as the benefits available under a stockholders agreement, or the prospect of maximizing the value received in a future sale.[11] *Cf. Tang Capital P'rs, LP v. Norton*, 2012 WL3072347, at *7 (Del. Ch. July 27, 2012) ("The Plaintiffs argued that even if the NAC by its terms bars or serves as a waiver of the right to seek a receivership, such waiver is void as against public policy. Upon request, the Plaintiffs were unable to cite any case law holding that sophisticated commercial parties may not contractually alter their rights to pursue statutory remedies. DGCL Section 291 allows a creditor or stockholder of an insolvent corporation to apply for a receivership; it does not mandate the appointment of a receiver, and nothing in the statute suggests that this right cannot be waived contractually.") (footnote omitted).

[11] There is also no language in Section 262 expressly prohibiting waiver of appraisal rights, whether in certificates of incorporation or bylaws, or otherwise.

In fact, the Court of Chancery has already recognized that — whether or not Section 262 rights are categorized as "mandatory" (*e.g.*, based on the presence of the word "shall" in the statute) — preferred stockholders can waive their appraisal rights by contract: "The rights of holders of preferred stock are largely contractual, and this Court has found that such stockholders may waive appraisal rights *ex ante* by contract." *Halpin v. Riverstone Nat'l, Inc.*, 2015 WL 854724, at *1 (Del Ch. Feb. 26, 2015); *accord Ford Hldgs.*, 698 A.2d at 976-77 (Del. Ch. 1997) (categorizing Section 262 as a "mandatory" right, posing questions about whether "mandatory provisions are ever desirable in corporation law," and concluding Section 262 "may be effectively waived" by preferred stockholders).[12] *Riverstone* does not limit this conclusion to *ex ante* waivers that set a specific circumstance or amount that constitutes "fair value," and even if it or *Ford Holdings* did so, this Stockholders Agreement is specific as to when its obligation arises.[13] In light of the common

[12] Each of *Metromedia*, *Shiftan*, and *Hintmann*, cited by Petitioners, recognized the principle of *Ford Holdings* that appraisal rights could be bargained away by contract (in those cases the preferred stock terms themselves). *Shiftan v. Morgan Joseph Hldgs., Inc.*, 57 A.3d 928, 942 n.39 (Del. Ch. 2012); *In re Appraisal of Metromedia Int'l Grp., Inc.*, 971 A.2d 893, 900 (Del. Ch. 2009); *Hintmann v. Fred Weber, Inc.*, 1998 WL 83052, at *10 (Del. Ch. Feb. 17, 1998). In this case, the contract is crystal clear: Petitioners shall "refrain from the exercise of appraisal rights."

[13] Notably, the definition of "Company Sale" does not include a sale to insiders like Carlyle, Manti, or Whitney. SA at 4 (JA0292) ("Company Sale" is defined as "[T]he consummation of any transaction or series of transactions pursuant to which one or more Persons or group of Persons (other than any initial Carlyle Stockholder, Manti,

understanding that agreements not to pursue appraisal rights are permissible, Delaware law practitioners include provisions of this nature in sample and actual stockholders agreements.[14]

There is no public policy why the small number of sophisticated stockholders in this case should not be held to their bargain. As the court below correctly observed, the Stockholders Agreement is not a contract of adhesion. 2019 Op. at 3.[15] It was the result of sophisticated parties negotiating particular language with the

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Whitney or any of their respective Affiliates acquires … all or substantially all of the assets of the Company ….").

[14] *See, e.g.*, JA1307 at 1316 (National Venture Capital Association Model Voting Agreement) §3.2(e) (stockholders agree "to refrain … from exercising any dissenters' rights or rights of appraisal…"); JA 1344 at 1358 (Lexis Nexis Stockholders' Agreement (Portfolio Company, Pro-Buyer) (DE)) § 2.5(c) (stockholder shall "waive all dissenters' or appraisal rights"); JA 1412 at 1531 (Thomson Reuters Practical Law Corporate & Securities Stockholders Agreement (Multi-Party), § 4.05(b)(ii)) (stockholder shall "refrain from taking any actions to exercise, and shall take all actions to waive, any dissenters', appraisal, or other similar rights …."); *see also* The Corporation Law Committee of the Association of the Bar of the City of New York, *The Enforceability and Effectiveness of Typical Shareholders Agreement Provisions*, 65 BUS. L. 1153, 1182-84 (Aug. 2010) (providing drafting advice on terms commonly found in stockholders agreements under New York and Delaware law, including appraisal-waiver provisions); *Stockholders Agreement of Laureate Education, Inc.*, SEC (Dec. 30, 2016) https://www.sec.gov/Archives/edgar/data/912766/000104746918001893/a2234890zex-10_30.htm (example of form in actual use).

[15] *See also* 2018 Op. at 11 ("Here, the corporation determined it was in the corporate interest to entice investment. It, and its stockholders individually, all entered an agreement with the Carlyle Group that was presumably to the benefit of all parties.… [I]ndividual stockholders took on contractual responsibilities in return for

advice of counsel to secure capital contributions from Carlyle and J.H. Whitney. In this way, the Stockholders Agreement aligns closely with the principles that animate the decisions recognizing the enforceability of *ex ante* waivers of appraisal rights for preferred stockholders. Here there is no concern with "asymmetrical information and rational apathy on the part of widely disaggregated shareholders of public companies." *See Ford Hldgs.*, 698 A.2d at 977 n.8. This Court need not decide that appraisal rights can always be waived by common stockholders, or that agreements not to exercise appraisal rights are always permissible, but can instead limit its holding to the undisputed facts of this case. *See, e.g.*, 2019 Op. at 5 ("Does the DGCL forbid the sophisticated owners of a corporation from negotiating a term as part of a merger agreement that binds them to a future sale and waives statutory appraisal rights? I conclude that it does not."); 2019 Op. at 10 ("Petitioners are sophisticated investors who were fully informed and represented by counsel when they signed the SA, under which they obtained some rights and relinquished others, and then accepted the benefits of that contract for seven years. The SA clearly and unambiguously waives appraisal rights; therefore it should be enforced. I need not decide whether a waiver of appraisal would be upheld in other circumstances."); 2020 Op. at 7.

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consideration.… Those obligations include the obligation to refrain from appraisal …." (emphasis added)).

The court below correctly held that this contractual agreement to refrain from exercising appraisal rights "serves to supplement the DGCL, and is not inconsistent with nor contrary to the DGCL." *Id.* at 8. To hold otherwise would turn Delaware law — which is premised on freedom of contract — on its head.

(iii) Petitioners' Reliance on 8 *Del. C.* § 218 is Misplaced

Petitioners seek to equate a corporation's ability to enforce a stockholders agreement with its ability to enforce a voting trust or pursue litigation to determine the validity of a corporate election arguing, by way of analogy, that it is "illegal" for Authentix to enforce the Stockholders Agreement. Appellant Br. at 41-44. Petitioners' reliance on Sections 218 and 225 is misplaced.

First, Petitioners simply ignore that Delaware law permits corporations to make and to enforce contracts, and there is no reasoned basis to prohibit corporations from enforcing stockholder agreements. Section 121 provides that:

> In addition to the powers enumerated in §122 … every corporation … shall possess and may exercise all the powers and privileges granted by this chapter … together with any powers incidental thereto, so far as such powers and privileges are necessary or convenient.…

8 *Del. C.* § 121. Likewise, Section 122(13) vests corporations with the power to "make contracts." Petitioners have failed to identify any principle of equity, public policy, or case law that would prohibit a corporation from entering into or enforcing a stockholders agreement (as they routinely do). Indeed, it would undermine

Delaware public policy if sophisticated investors like Petitioners were permitted to renege on carefully crafted contractual obligations.

Moreover, Petitioners' blanket assertions that corporations cannot enter into stockholders agreements or enforce agreements containing provisions that cannot be included in a certificate of incorporation or bylaw contradict authority acknowledged by the General Assembly. In adopting Sections 102(f) and 109(f) prohibiting the imposition of fee-shifting obligations in certificates of incorporation and bylaws respectively, 8 *Del C.* §§ 102(f), 109(f), the General Assembly expressly specified that even though prohibited in a certificate or bylaw, such prohibition did not reach stockholders agreements signed by the party affected. As the General Assembly's legislative Synopsis to the bill enacting Sections 102(f) and 109(b) provided:

> In order to preserve the efficacy of the enforcement of fiduciary duties in stock corporations, however, new subsection (f) would invalidate a provision in the certificate of incorporation of a stock corporation that purports to impose liability upon a stockholder <u>for the attorneys' fees or expenses of the corporation</u> or any other party in connection with an internal corporate claim, as defined in new Section 115. <u>New subsection (f) is not intended, however, to prevent the application of such provisions pursuant to a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced.</u>

Original Synopsis § 2, Del. S.B. 75, 148th Gen. Assem. (2015) (emphasis added). Of course, only the corporation (or a stockholder derivatively in the right of the

corporation) would have standing to enforce an agreement to recover the corporation's own fees and expenses.

It is thus clear that the General Assembly contemplates that corporations can enter into and enforce a stockholders agreement against stockholders, even where the agreement includes a term not permissible for a certificate or bylaw. The courts likewise enforce stockholders agreements on behalf of corporations. *See, e.g.*, *Bonanno*, 2016 WL 614412, at *15-16 (applying same logic when permitting corporation to enforce forum selection clause providing for internal corporate claims to be litigated in New York); *Mitchell Assocs. v. Mitchell*, 1980 WL 268106 (Del. Ch. Dec. 5, 1980).

Second, Petitioners' efforts to compare the enforcement of a stockholders agreement to situations involving voting trusts or the contested elections of directors are inapt. The policy concerns that animate Sections 218 and 225 — "prevent[ing] those in control of a corporation from using corporate resources to perpetuate themselves in office" — are simply not present in this context. *See, e.g.*, *Insituform of N. Am., Inc. v. Chandler*, 534 A.2d 257, 270 n.12, 272 (Del. Ch. 1987) (in addressing corporate plaintiff's pursuit of claim under Section 225(a), the court observed that "[a] harm similar to that which § 160(c) seeks to guard against is threatened where an incumbent board may exercise its control over a corporation to cause the corporation to seek to enforce a contract such as the Voting Agreement

which secures the tenure of the incumbent board."); *see also Abercrombie v. Davies*, 130 A.2d 338, 344 (Del. 1957). As Petitioners do not suggest, much less argue, that Authentix was using the Stockholders Agreement to entrench an incumbent board, Petitioners' analogy fails.

Moreover, Petitioners' argument that the "statutory language used in Section 218" requires the court to find that it is "illegal" for a corporation to enforce a stockholders agreement is baseless. Appellant Br. at 44. Petitioners argue, based on the reasoning of *Insituform*, that because Section 218 does not specifically state that corporations can be a party to or have standing to enforce an "agreement among stockholders," corporations cannot enforce stockholders agreements. This argument rests on the faulty premise that all stockholders agreements are voting trusts. However, voting trusts are a rare species of stockholders agreement that raised unique concerns regarding the separation of ownership from voting power for early Delaware courts, and those early concerns have little current vigor. *See* 2 David A. Drexler, et al., *Delaware Corporation Law and Practice* §26.01 (2019 supp.). This Stockholders Agreement is not a voting trust and such concerns are not present here.

AUTHENTIX'S ARGUMENT ON CROSS-APPEAL

I. The Court Below Erred in Ordering Authentix to Pay Interest on Petitioners' Merger Consideration and Denying Authentix Prejudgment Interest.

A. Questions Presented

Did the court below err in ordering Authentix to pay interest on merger consideration to Petitioners where (a) Petitioners failed to plead any claim seeking to recover the merger consideration and (b) it is undisputed that Petitioners voluntarily chose to forego receiving their merger consideration, which has at all times been and remains available to them, so that they could pursue this appraisal action? Yes. Preserved at JA1883-87, 2237-41, 2260-61.

Did the court below err in ordering Authentix to pay Petitioners interest on merger consideration "as a matter of equity" where (a) the Merger Agreement expressly provides that shares not entitled to appraisal "shall be converted into the merger consideration … without any interest thereon," (b) Petitioners intentionally breached their obligations under the Stockholders Agreement in pursuing appraisal, wrongfully forcing Authentix to incur fees and expenses, and (c) the court refused to award prejudgment interest on the attorneys' fees and expenses incurred and paid by Authentix? Yes. Preserved at JA1883-87, 2241-42, 2260-63, 2462-63, 2472-76.

Did the court below err in failing to award Authentix prejudgment interest on its attorneys' fees award, where Authentix has been deprived of the productive use of such funds during the pendency of this litigation? Yes. Preserved at JA2472-76.

B. Scope of Review

The Court of Chancery's determination that Petitioners were entitled to interest on the merger consideration and denial of prejudgment interest to Authentix for its reasonable attorneys' fees and expenses should be reviewed *de novo*. *See Chrysler Corp. (Del.) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024 (Del. 2003) (reviewing *de novo* matters of law, including a demand for prejudgment interest); *Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, 822 (Del. 1992) (court's scope of review of a prejudgment interest dispute was "plenary" where a contractual provision was at issue); *id.* at 826 (though a lower court has some discretion in fixing the date prejudgment interest begins to accrue, it is ordinarily "a question of law subject to plenary review"); *see also Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999).

C. Merits of Argument

1. The Court of Chancery Erred in Ordering Authentix to Pay Petitioners Merger Consideration and Interest on the Merger Consideration

The 2020 Opinion of the court below held that "interest at the legal rate applies to the 2017 merger consideration from the date of the merger" as a matter of equity, notwithstanding that (i) Petitioners failed to plead any claim seeking the merger

consideration and voluntarily chose not to seek it so they could pursue appraisal, which they were "unambiguously aware" violated the express terms of the Stockholders Agreement, and (ii) the Merger Agreement expressly provided that interest was not payable on merger consideration. In the Final Order and Judgment, the Court of Chancery ordered "that Petitioners shall accept the merger consideration provided for in the Merger Agreement in respect of Petitioners' former interests in Authentix, with prejudgment interest in the aggregate amount of $371,344.72, plus $581.66 per day from October 13, 2020 until the entry of this Final Order and Judgment."[16] These holdings were in error and should be reversed.

As an initial matter, the Final Order and Judgment ordering Authentix to pay prejudgment interest on the merger consideration assumes that Petitioners were entitled to a judgment awarding merger consideration. However, Petitioners did not assert a claim to the merger consideration in any pleading. *Brinckerhoff v. Enbridge Energy Co.*, 2012 WL 1931242, at *4 (Del. Ch. May 25, 2012) ("Where there is no claim, there can be no remedy, equitable or otherwise."), *aff'd*, 67 A.3d 369 (Del.

[16] While the Final Order and Judgment did not specifically state that Authentix was obligated to pay merger consideration to Petitioners, this issue was argued at length in the January 6, 2020 conference. Following that conference, the court below issued its 2020 Opinion holding that "interest at the legal rate applies to the 2017 merger consideration from the date of the merger." 2020 Op. at 25. There would be no reason to order Authentix to pay Petitioners prejudgment interest on the merger consideration unless the court had ordered Authentix to pay the merger consideration to Petitioners.

2013). Rather, after the Court of Chancery ruled in favor of Authentix and requested that the parties confer and submit a proposed form of order, Petitioners proposed a form of order that would direct Authentix to pay Petitioners the merger consideration and prejudgment interest thereon. *See* JA1878 at JA1881. As Authentix explained to the court below, there was no basis for an order awarding merger consideration because Petitioners failed to file any pleading that would entitle them to an award of the merger consideration. *See, e.g.*, JA1883 at JA1884 (Nov. 14, 2019 ltr. from S. Nolen to V.C. Glasscock, at 2 ("[A]n order directing Authentix to pay Petitioners the merger consideration – with or without interest – is not responsive to any claim that has ever been made in this case")); JA2233 at JA2238-40 (January 6, 2020 Hr'g Tr. at 6-8).

Without the benefit of legal pleadings, Authentix had no notice as to whether Petitioners were seeking an award of the merger consideration on legal or equitable grounds. *In re Benzene Litig.*, 2007 WL 625054, at *6 (Del. Super. Feb. 26, 2007) (the purpose of notice pleading is to give defendants "fair notice of the claims against them at the outset of the litigation before [so] they can thoughtfully respond to the allegations and map out their defense"). In either case, they are not entitled to such an award. Petitioners voluntarily eschewed receipt of the merger consideration so that they could pursue this lawsuit. Petitioners could at any time have surrendered their share certificates under a Letter of Transmittal to obtain the merger

consideration. Had they done so, and had Authentix then refused to pay them, there would have been a ripe claim to plead. But Petitioners chose not to do so and there was accordingly no ripe claim upon which the court below could award judgment for the merger consideration or prejudgment interest thereon.[17]

Nevertheless, the court below held that Petitioners were entitled to recover prejudgment interest on the merger consideration as a matter of equity. This ruling was error. First, the court below entirely failed to address the express contractual provision in the Merger Agreement that shares found not entitled to appraisal "shall be … converted … into … the merger consideration … without any interest thereon …." MA § 3.8 (JA0506). Having not addressed that provision, the court below articulated no ground as to why equity should be employed to override the clear terms of the contract.

Further, there was no equitable basis to award interest. Certainly it was not necessary to reallocate benefits from the use of money *pendente lite*, because Authentix did not benefit from or earn any interest on the merger consideration during the pendency of the litigation, (JA2478-80 (Ang Aff. ¶¶ 3-5); Paying Agent

[17] Authentix has always been, and remains, willing and able to cause the merger consideration to be paid to Petitioners in accordance with the Merger Agreement (JA 2239 (Jan. 6, 2020 Hr'g Tr. 7:12-16)), and accordingly there was no ripe dispute for which an order of payment was necessary. JA2240 (*Id.* at 8:7-21).

Agreement § 1.5(a) (JA2542)),[18] and Petitioners voluntarily chose not to accept the consideration for their own tactical litigation purposes. Further, that "[t]he litigation required the resolution of several novel issues at the intersection of contract and corporate law," 2020 Op. at 24, would seem a reason to impose the opportunity cost of Petitioners' failed enforceability gamble on Petitioners, who voluntarily chose to litigate but lost, rather than on Authentix, which sought to avoid litigation but prevailed. Equity ought not shield parties from the consequences of their own decisions. *See O'Brien v. State*, 1984 WL 137714, at *2 (Del. Ch. July 3, 1984) (a court of equity "cannot permit the plaintiffs to knowingly create their own crisis then take advantage of it…."); *Scotton v. Wright*, 117 A. 131, 137 (Del. Ch. 1922) (recognizing that equity ought not "sav[e] the offender from the consequences of his own wrong."). *Compare In re Appraisal of Dell, Inc.*, 2016 WL 3077828, at *1 (Del. Ch. May 31, 2016) (ORDER) ("[T]he petitioners knew, at a minimum, that there was a significant risk that they would not qualify for appraisal …. The petitioners could decide to accept that legal risk in the hope that their arguments would prevail …. What they are not entitled to at this point is compensation for taking that risk in the form of an interest award that the statute does not authorize and the merger agreement did not contemplate."). As a matter of equity, the court below should not

[18] The court below seems to have assumed the opposite. 2020 Op. at 24.

have rewarded the breaching Petitioners with prejudgment interest on merger consideration that Authentix (a) did not hold, (b) did not benefit from, and (c) made available to Petitioners, but which Petitioners voluntarily declined to receive.

The existence of any equitable basis for the award of interest to Petitioners on sums they voluntarily chose not to receive is further undermined by the unexplained denial of prejudgment interest to Authentix. Unlike Petitioners' voluntary choice to breach and litigate, Authentix was forced involuntarily to incur substantial fees and expenses to vindicate its contractual rights. This deprived Authentix of the productive use of such funds. The court below did not address the contrast between awarding interest to the contract breachers and denying interest to the aggrieved in any opinion or in its final judgment. Whether reviewed de novo or for abuse of discretion, the award of prejudgment interest to Petitioners was error and should be reversed.

2. The Court Below Erred in Failing to Award Authentix Pre-Judgment Interest on Its Attorneys' Fees

Authentix was properly awarded damages below for the attorneys' fees and expenses it incurred as a result of Petitioners' contractual breach under Section 13(i) of the Stockholders Agreement. Petitioners have not presented on appeal any argument challenging the judgment below insofar as it granted Authentix judgment for the documented attorneys' fees and expenses it incurred in enforcing its rights against Petitioners' breach. Rather, Petitioners conceded below that "loser pays"

provisions survive termination of the underlying contract. JA2275. The only issue for appeal is whether the court below erred in failing to award Authentix prejudgment interest on its award.[19]

Having correctly concluded that Authentix was entitled to recover its reasonable attorneys' fees, the court below should have allowed Authentix to recover pre-judgment interest on that award, given that Authentix was wrongfully deprived of the ability to use funds expended to enforce its rights and Petitioners' obligations during the pendency of the litigation. *See, e.g., Trans World Airlines Inc. v. Summa Corp.*, 1987 WL 5778, at *1 (Del Ch. Jan. 21, 1987), *aff'd*, 540 A.2d 403 (Del. 1988); *Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316, at *19 (Del. Ch. May 30, 2008); *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 508 (Del. 2001). The court's failure to do so is irreconcilable with the equity that seeks to make victims of contract breach whole, and stands in sharp and unflattering contrast with its award of interest to Petitioners on merger consideration that they chose to forego in the hope that the court would not enforce their unambiguous agreement to refrain

[19] Although Petitioners state in several places in their Opening Brief that "nothing" survived the termination provision (*see, e.g.*, Appellants Br. at 18), they present no arguments tying this to Section 13(i), Authentix's entitlement to its attorneys' fees, or the quantum of the fees awarded. Accordingly, such arguments are waived. *See* Supr. Ct. R. 14(b)(vi)(A)(3) (arguments not presented in opening brief deemed waived) and 14(c)(i) ("Appellant shall not reserve material for reply brief which should have been included in a full and fair opening brief.").

from exercising appraisal rights. The final judgment of the court below should be reversed on this point and the case remanded for determination and award to Authentix of prejudgment interest at the legal rate.

CONCLUSION

For the foregoing reasons, the Supreme Court should affirm the Court of Chancery's final judgment in all respects except that the Supreme Court should (i) reverse the award of interest to Petitioners pursuant to paragraph 6 thereof and the denial of interest to Authentix pursuant to paragraph 7 thereof, and (ii) remand to the court below for (a) an award of fees and expenses of Authentix incurred on this appeal and (b) entry of judgment directing payment of prejudgment interest to Authentix in respect of its fees and expenses in the litigation below and this appeal.

DATED: January 11, 2021

/s/ Samuel A. Nolen

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