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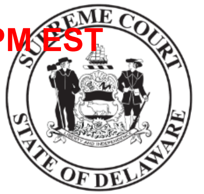

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STREAM TV NETWORKS, INC., Plaintiff below, Appellant, v. SEECUBIC, INC., Defendant below, Appellee.	**PUBLIC VERSION** **Filed on February 4, 2022** No. 360, 2021 Court Below: The Court of Chancery of the State of Delaware C.A. No. 2020-0766-JTL
SEECUBIC, INC., Counterclaimant and Third-Party Plaintiff below, Appellee, v. STREAM TV NETWORKS, INC., Counterclaim Defendant below, Appellant, and MATHU RAJAN, and RAJA RAJAN, Third-Party Defendants below, Appellants.	

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NATURE OF THE PROCEEDINGS

Appellant Stream TV Networks, Inc. ("Stream" or the "Company") initiated this action to enjoin Appellee Seecubic, Inc. ("SeeCubic") from implementing a May 6, 2020 "Omnibus Agreement" between Stream, its secured creditors and certain stockholders, pursuant to which Stream would transfer its assets into a newly formed entity, SeeCubic, to satisfy Stream's debts.

When the Omnibus Agreement was executed, Stream was insolvent. Among other things, Stream had defaulted on debt secured by all of its assets and faced a foreclosure suit in the Superior Court. Accordingly, a committee of Stream's independent directors negotiated a resolution with Stream's secured creditors. That resolution—the Omnibus Agreement—provided that Stream would transfer its assets, which had been pledged as collateral, to the secured creditors. In addition, Stream's debt was satisfied, the creditors agreed that Stream's stockholders could obtain shares in SeeCubic at no cost on a 1:1 basis, and the parties avoided the time and expense of foreclosure proceedings.

Appellants Mathu and Raja Rajan (the "Rajans")[1]—Stream directors, officers and controlling stockholders—immediately attempted to evade the

[1] For simplicity, this submission refers only to Stream when discussing the positions that Stream and the Rajans have advanced in their Corrected and Revised Opening Brief (the "Opening Brief" or "OB").

Omnibus Agreement, including by initiating the action below. Stream asserted that the Omnibus Agreement was invalid because the committee of independent directors lacked authority to bind Stream to the Omnibus Agreement, and because a stockholder vote was required but did not occur. SeeCubic counterclaimed, and the parties filed dueling motions for preliminary injunction after expedited discovery.

The Court of Chancery rejected Stream's factual and legal challenges, finding that the Omnibus Agreement was valid and binding. On December 8, 2020, the Court of Chancery granted SeeCubic's motion for preliminary injunction and entered a detailed opinion (the "Injunction Opinion" or "Inj. Op.") (OB Ex. C), which it later adopted in granting summary judgment to SeeCubic (the "Summary Judgment Order" or "OB Ex. A"). On November 10, 2021, the Court of Chancery entered a Rule 54(b) partial final judgment (the "Partial Final Judgment Order" or "OB Ex. B").

This appeal relates solely to whether the Omnibus Agreement—a board-approved transaction transferring an insolvent corporation's assets to its secured creditors—required approval by Stream's Class B stockholders (*i.e.*, the Rajans, who overwhelmingly hold such shares) under Stream's certificate of incorporation (the "Charter") or 8 *Del. C.* §271 ("Section 271"). The Court of Chancery meticulously analyzed these issues in both the Injunction Opinion and a

December 8, 2021 Memorandum Opinion denying Stream and the Rajans' request for a stay pending appeal (the "Stay Opinion" or "OB Ex. E"), correctly holding that neither the Charter nor Section 271 requires stockholder approval to effectuate the Omnibus Agreement.

Specifically, finding the definition of "Asset Transfer" in the Charter ambiguous and considering parallel language in Section 271, the Court of Chancery held that the Charter did not require approval of the Class B shares because the Omnibus Agreement did not effectuate an "Asset Transfer." Separately, the Court of Chancery correctly concluded that the Omnibus Agreement did not effectuate an "Acquisition." Further, the Court of Chancery held that Section 271 is ambiguous as applied to the Omnibus Agreement and determined that Section 271 does not require a stockholder vote when, as here, an insolvent corporation transfers assets to its secured creditors in lieu of formal foreclosure proceedings.

Through this appeal, Stream seeks to overturn the Summary Judgment Order and the Partial Final Judgment Order. As explained herein, the Court should adopt the Court of Chancery's thorough analysis and affirm.

SUMMARY OF ARGUMENT

(i) Denied. The Court of Chancery correctly held that the Charter did not require approval of the Class B shares to effectuate the Omnibus Agreement. *First*, the Court of Chancery correctly determined that the Omnibus Agreement did not effectuate an "Asset Transfer" under the Charter, correctly holding that the definition of "Asset Transfer" in the Charter is ambiguous and appropriately considering Section 271 when interpreting that definition. *Second*, the Court of Chancery correctly determined that the Omnibus Agreement did not effectuate an "Acquisition" under the Charter because it was more appropriately analyzed under the definition of "Asset Transfer"; was carved out of the definition of "Acquisition"; and did not effectuate a "stock exchange" or a "reorganization."

(ii) Denied. The Court of Chancery correctly held that Section 271 did not require stockholder approval to effectuate the Omnibus Agreement. The Court of Chancery correctly determined that Section 271 is ambiguous as applied to the Omnibus Agreement, and therefore appropriately considered its legislative history. Drawing upon this authority, the Court of Chancery correctly determined that Delaware law recognizes the common law insolvency exception.

(iii) Denied. Appropriately analyzing the legislative history and statutory scheme of Section 271, the Court of Chancery correctly concluded that the common law "insolvency exception" was not superseded by Section 271, and

therefore Section 271 does not require a stockholder vote when an insolvent corporation transfers all of its assets to its secured creditors in lieu of a formal foreclosure proceeding. The Court of Chancery also appropriately considered: (1) Section 271 does not include forgiveness of debt as a form of consideration; (2) Section 271 does not apply to mortgages or pledges of assets; and (3) the absence of case law on the issue.

(iv) Denied. Having found Section 271 ambiguous as applied to the Omnibus Agreement, the Court of Chancery appropriately considered public policy considerations and correctly held that public policy favors an insolvency exception to Section 271.

STATEMENT OF FACTS[2]

A. Stream.

Stream is a Delaware corporation, founded in 2009 to develop and commercialize technology enabling viewers to watch three-dimensional content without 3D glasses. (Inj. Op. at 5) The Rajan family controls Stream primarily through an investment vehicle owned by Mathu Rajan, his brother Raja Rajan and their parents, which holds 19,000,000 Class B shares carrying ten votes per share, giving the Rajans a majority of Stream's outstanding voting power. (*Id.*)

The Charter provides that the vote or written consent of a majority of Class B shares, voting as a class, is necessary to consummate "an Acquisition or Asset Transfer." (A124, §IV.D.2(d)) The Charter defines "Asset Transfer" as "a sale, lease or other disposition of all or substantially all of the assets" of Stream. (A126, §IV.D.4(b)(ii)) The Charter defines "Acquisition" as:

> (A) any consolidation, stock exchange or merger of [Stream] with or into any other corporation or other entity or person, or any other corporate reorganization,
>
> > other than any such consolidation, merger or reorganization in which the stockholders of [Stream] immediately prior to such consolidation, merger or reorganization, continue to hold a majority of the voting power of the surviving entity in substantially the same proportions (or, if the surviving entity is a

[2] The Statement of Facts is drawn from the Injunction Opinion, reported at *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 250 A.3d 1016 (Del. Ch. 2020). The Court of Chancery adopted the facts cited therein in its Summary Judgment Order (OB Ex. A ¶1) that is the subject of this appeal.

> wholly-owned subsidiary, its parent) immediately after such consolidation, merger or reorganization; or
>
> (B) any transaction or series of related transactions to which [Stream] is a party and in which in excess of fifty percent (50%) of [Stream's] voting power is transferred;
>
> provided that an Acquisition shall not include …
>
> (y) any transaction or series of transactions principally for bona fide equity financing purposes in which cash is received by [Stream] or any successor or indebtedness of [Stream] is cancelled or converted or a combination thereof.

(A126, §IV.D.4(b)(i) (formatting added))

From July 2019 until March 2020, Mathu and Raja Rajan were Stream's only directors. (Inj. Op. at 5-6) Mathu Rajan is Stream's CEO. (*Id.*)

B. Stream Obtains Investors, Pledging Its Assets As Collateral On Its Debt.

From 2009 to 2020, Stream raised approximately $160 million through debt and equity issuances. (*Id.*) Stream's senior secured creditor, SLS Holdings VI, LLC ("SLS"), loaned it $6 million through secured notes (the "SLS Notes"). (*Id.*) Stream pledged all of its assets as security for the SLS Notes, and executed a security agreement which authorized SLS to take control of Stream's assets to satisfy the SLS Notes if Stream defaulted. (*Id.* at 6-7)

Stream's junior secured creditor, Hawk Investment Holdings Limited ("Hawk"), loaned it more than £50 million, plus $1.336 million, through junior secured notes (the "Hawk Notes"; with SLS Notes, the "Notes"). (*Id.* at 7) Subject to SLS's senior security interest, Stream pledged all of its assets as security

for the Hawk Notes, and executed a security agreement which authorized Hawk to take control of Stream's assets to satisfy the Hawk Notes if Stream defaulted. (*Id.*)

Stream did not seek approval of the Class B shares to pledge all of its assets as collateral on the Notes, nor did the security agreements state that Class B approval was required to transfer Stream's assets pledged as collateral in the event of default.

In late 2019, with default looming, SLS, Hawk and certain equity investors negotiated with Stream (through the Rajans) over forming a "NewCo" that would receive Stream's assets and have a more transparent, investor-friendly governance structure. (*Id.* at 7-8) When the Rajans refused, discussions ceased. (*Id.* at 8)

In January 2020, certain of Stream's equity investors filed fraud and breach of fiduciary duty claims against the Rajans in the Court of Chancery. (*Id.*)[3]

C. Stream Is Insolvent And Failing.

By early 2020, Stream was insolvent and failing. (*Id*. at 1) In February 2020, Stream defaulted on the SLS Notes and Hawk Notes. (*Id.* at 8) On March 23, 2020, SLS filed suit against Stream in the Superior Court (Case No. N20C-03-225 MMJ CCLD) to foreclose upon the assets pledged as collateral.

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[3] Stream vaguely references this suit in the Opening Brief, but mischaracterizes it. (*See* OB at 8 n.6)

Stream also carried significant trade debt and failed to pay employees. (Inj. Op. at 8)

D. The Rajans Appoint Independent Directors In Response To Investor And Creditor Demands.

With Stream insolvent and failing, SLS, Hawk and certain equity investors urged the Rajans to appoint outside directors. (*Id.*) On March 12, 2020, the Rajans—Stream's only directors—acted by unanimous written consent to expand the Board and appoint four independent directors (the "Outside Directors"). (*Id.* at 8-9)

E. The Outside Directors Form The Resolution Committee.

After joining the Board and learning about Stream's financial difficulties, the Outside Directors concluded that the only path forward was to negotiate a resolution (not a "reorganization" (OB at 7)) with Stream's secured creditors. (Inj. Op. at 9) In April 2020, the Outside Directors resumed the prior resolution discussions. (*Id.*)

On May 4, 2020, the Board established a Resolution Committee with "the full power and authority of the full Board of Directors to resolve any existing or future debt defaults or claims." (*Id.* at 9-10)

F. The Resolution Committee Executes The Omnibus Agreement.

On May 6, 2020, the Resolution Committee approved the Omnibus Agreement, binding Stream thereto. (*Id.* at 11; A135) The counterparties to the Omnibus Agreement are SLS, Hawk and certain equity investors. (*Id.*)

The Omnibus Agreement provided that SLS and Hawk would not pursue the foreclosure action. (*Id.*) Instead, the assets would be transferred to a newly formed entity controlled by SLS and Hawk, later identified as SeeCubic. (*Id.*) SLS and Hawk would then extinguish the Notes. (*Id.*; A137, §1.1(a))

The Omnibus Agreement contemplated that SeeCubic would issue shares on a one-to-one basis to holders of Stream's Class A common stock (excluding the Rajans and affiliates) at their election at no cost. (*Id.* at 11; A139, §1.1(d)) The Omnibus Agreement also provided that Stream would receive one million shares of SeeCubic common stock. (*Id.*; A139, §1.1(f)) Because the Rajans own Stream shares, they will benefit from Stream's ownership interest in SeeCubic. (Inj. Op. at 11-12)

Through these "give-backs" negotiated to avoid formal foreclosure proceedings, Stream's stockholders will share in the future success of Stream's assets. (*Id.* at 11, 45) Without the Omnibus Agreement, Stream's creditors would have foreclosed on Stream's assets, leaving its stockholders with nothing, or

Stream would have filed for bankruptcy, and its stockholders likely would have been wiped out. (*Id*. at 12)

On May 6, 2020, SLS, Hawk and certain of Stream's equity investors also entered into a separate letter agreement concerning SeeCubic's internal affairs (the "Letter Agreement"). (A157) The Letter Agreement contemplates the issuance of 48,000,000 shares of Stream stock, but Stream is not a signatory to the Letter Agreement and has never issued such shares. (OB Ex. D ¶10)

G. The Rajans Attempt To Evade The Omnibus Agreement.

Following execution of the Omnibus Agreement, the Rajans began trying to evade it. Among other efforts, *after* the Omnibus Agreement was signed, the Rajans executed a stockholder written consent purporting to remove three Outside Directors, backdating the consent to May 6 in an effort to preempt the Omnibus Agreement. (Inj. Op. at 12-13) The Rajans also argued that the Outside Directors never "formally accepted" their Board memberships, or that they were "advisors" and not directors. (*Id.* at 13) Contrary to these arguments, the Outside Directors were validly appointed or *de facto* directors with authority to execute the Omnibus Agreement. (*Id*. at 16-25)

The Rajans refused to comply with the Omnibus Agreement, including by trying to change who managed certain Stream subsidiaries and purporting to

license Stream's technology to the Rajans' newly formed entity, Glasses-Free Technologies, Inc. (*Id.* at 14)

H. The Court Of Chancery Grants SeeCubic's Motion For Preliminary Injunction.

On September 8, 2020, Stream filed its complaint in the Court of Chancery, seeking expedition and a temporary restraining order ("TRO") prohibiting SeeCubic from enforcing the Omnibus Agreement. (*Id.*; A001, Dkt. 1) On September 15, 2020, SeeCubic filed counterclaims and third-party claims, requesting expedition and a TRO. (A002-3, Dkt. 8) The Court of Chancery entered a *status quo* order and ordered expedited discovery. (A007, Dkts. 27-29) Thereafter, "[c]reating litigation chaos seemed to be one of the Rajans' strategies." (OB Ex. E at 3)

Following a November 30 hearing, on December 8, 2020, the Court of Chancery issued the Injunction Opinion, which granted SeeCubic's motion for preliminary injunction and denied Stream's competing motion, holding that the Omnibus Agreement was valid and binding. The preliminary injunction prohibited Stream, the Rajans and anyone acting in concert with them from interfering with SeeCubic's rights under the Omnibus Agreement. (*See* Inj. Op. at 4; *see also* A040, Dkt. 111)

I. SeeCubic Moves For Summary Judgment And The Rajans Engage In A Series Of Efforts To Escape From The Injunction Decision And Interfere With SeeCubic's Rights.

On January 19, 2021, SeeCubic moved for summary judgment and filed its opening brief. (A041, Dkt. 117) On February 17, 2021, Stream filed its answering brief. (B7)

Before briefing was completed, Stream and the Rajans "engaged in a series of efforts to escape from the Injunction Decision and interfere with SeeCubic's rights." (OB Ex. E at 2) On February 24, 2021, two days before SeeCubic's reply brief was due, Mathu Rajan caused Stream to file for Chapter 11 bankruptcy, staying proceedings. *In re Stream TV Networks, Inc.*, Case No. 21-10433 (KBO) (D. Del. Bankr.). The Bankruptcy Court dismissed the case as a bad faith filing designed "to gain a tactical litigation advantage that is a part of a continued pattern of effort to nullify, undermine, and/or interfere with the [O]mnibus [A]greement." (B36-37, *In re Stream TV Networks, Inc.*, Case No. 21-10433 (KBO), at 13:16-14:1 (D. Del. Bankr. May 17, 2021) (TRANSCRIPT), *aff'd*, *In re Stream TV Networks, Inc.*, No. 21-723-RGA (D. Del. Dec. 16, 2021) (ORDER)) Unsecured creditors later filed a Chapter 7 petition, which Stream sought to convert into a Chapter 11 proceeding to make the same arguments as in the earlier-dismissed Chapter 11 case. *In re Stream TV Networks, Inc.*, No. 21-10848 (KBO). The

Chapter 7 petition was also dismissed. *In re Stream TV Networks, Inc*., No. 21-10848 (KBO) (D. Del. Bankr. June 10, 2021) (ORDER).

On May 22, 2021, SeeCubic filed its reply brief in further support of its motion for summary judgment. (A045, Dkt. 131) Thereafter, the Rajans made numerous filings raising new arguments about the issues presented in the summary judgment motion.[4]

J. The Court Of Chancery Issues The Summary Judgment Order.

On September 23, 2021, the Court of Chancery issued the Summary Judgment Order, which granted in part SeeCubic's motion, holding that the Omnibus Agreement is valid and converting the preliminary injunction into a permanent injunction. (OB Ex. A ¶¶6-7) The Court of Chancery denied summary judgment on SeeCubic's conversion claim. (*Id.* ¶8)

On September 28, 2021, Stream and the Rajans moved for entry of a partial final judgment and to stay SeeCubic's conversion claim (A060-62, Dkt. 195), which the Court of Chancery granted on November 10, 2021 in the Partial Final

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[4] Mathu Rajan filed a *pro se* letter application and a motion to set aside the Injunction Opinion. The Rajans also moved to modify the preliminary injunction and, at the Rajans' behest, a third party sought to intervene to file additional motions. (OB Ex. E at 3) These requests were denied.

Judgment Order. (OB Ex. B) On November 12, 2021, Stream and the Rajans noticed this appeal.

Also on November 12, 2021, Stream and the Rajans moved to modify or stay the permanent injunction pending appeal (A411), which the Court of Chancery denied in the Stay Opinion on December 8, 2021, reiterating its reasoning supporting the Injunction Opinion. (OB Ex. E at 13-34)

Appellants' Opening Brief challenges the Summary Judgment Order and the Partial Final Judgment Order. (OB at 1)

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT THE CHARTER DID NOT REQUIRE APPROVAL OF THE CLASS B SHARES TO EFFECTUATE THE OMNIBUS AGREEMENT.

A. Questions Presented.

Did the Court of Chancery err in holding that the Omnibus Agreement did not effectuate an "Asset Transfer" under the Charter, such that a vote of Stream's Class B shares was not required to effectuate the Omnibus Agreement, because the definition of "Asset Transfer" is ambiguous and tracks Section 271, thereby warranting the same interpretation?

Did the Court of Chancery err in holding that: (1) the Omnibus Agreement did not effectuate an "Acquisition" under the Charter, such that a vote of Stream's Class B shares was not required to effectuate the Omnibus Agreement, because the Omnibus Agreement is more appropriately analyzed under the definition of "Asset Transfer"; (2) even if analyzed as a potential "Acquisition," the Omnibus Agreement falls under one or more carve-outs to the definition of "Acquisition"; (3); the Omnibus Agreement did not effectuate a "stock exchange"; and (4) the Omnibus Agreement did not effectuate a "reorganization"?

B. Scope Of Review.

Questions of law, including the interpretation of corporate charters, are reviewed *de novo*. *See Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012).

C. Merits Of Argument.

1. The Court of Chancery correctly determined that the Omnibus Agreement did not effectuate an "Asset Transfer" under the Charter.

Stream argues that the Omnibus Agreement effectuated an "Asset Transfer"—defined to include a "sale, lease or other disposition of all or substantially all of the assets or intellectual property of the Company"—requiring approval by Stream's Class B shares under the Charter. According to Stream, the Court of Chancery "analyzed this case upside down" by considering Section 271 without first "f[inding] the Charter to be ambiguous,"[5] and erred by considering parallel language in Section 271 when interpreting the Charter's meaning. (OB at 13) This argument is meritless because the Court of Chancery correctly held that the definition of "Asset Transfer" is ambiguous as applied to the Omnibus

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[5] Having affirmatively raised Section 271 as a basis to invalidate the Omnibus Agreement (A209-212), Section 271 was Stream's—not the Court of Chancery's—"chosen battleground." (OB at 26)

Agreement, and appropriately considered parallel language in Section 271 to interpret its meaning.

(a) The Court of Chancery correctly held that the definition of "Asset Transfer" is ambiguous.

On appeal, Stream argues that "[t]he Omnibus Agreement is … an Asset Transfer." (OB at 20) Below, Stream initially argued that the Omnibus Agreement effectuated an "Asset Transfer," but later argued that it did not. (*See* A380 ¶4 ("The Omnibus Agreement with its integral Letter Agreement was not an Asset Transfer; it was an Acquisition."))

Now, Stream argues that the Court of Chancery never determined that the definition of "Asset Transfer" in the Charter is ambiguous, and that the "plain text" of the Charter unambiguously requires approval by Stream's Class B shares to effectuate the Omnibus Agreement. (OB at 14; *see also* Inj. Op. at 38-41) Stream is wrong.

First, the Court of Chancery did determine that the term "Asset Transfer" is ambiguous. Analyzing parallel phrasing in Section 271, the Court of Chancery explained that "[v]irtually no Delaware authority addresses what constitutes a 'sale'" in this context, nor does the statute define "sale." (Inj. Op. at 38) The definition of "Asset Transfer," which similarly does not define "sale," is ambiguous for the same reasons. (*See* Section I(C)(1)(b), *infra* (explaining why

the definition of "Asset Transfer" tracks Section 271); Section II(C)(1), *infra* (explaining why Section 271 is ambiguous))

Second, Stream argues that the "plain text" of the Charter unambiguously requires approval by Stream's Class B shares to effectuate the Omnibus Agreement. Stream points out that the Charter refers not only to a "sale" or "lease," but also an "other disposition." (OB at 19) Stream does not, however, explain how including the undefined term "other disposition" renders the definition of "Asset Transfer" unambiguous. (*See id.* at 18-20) Although Stream contends "[t]he contextual phrase 'other disposition' is well-plowed ground in Delaware precedent" (*id.* at 19-20), neither *Ford v. VMware, Inc.*, 2017 WL 1684089 (Del. Ch. May 2, 2017), nor *In re Loral Space & Commc'ns Inc. Consol. Litig.*, 2008 WL 4293781 (Del. Ch. Sept. 19, 2008), interpreted the term "other disposition," particularly in this context. Here, the undefined term "other disposition" is limited to a similar meaning as the terms "sale" and "lease." *See, e.g.*, *Smartmatic Int'l Corp. v. Dominion Voting Sys. Int'l Corp.*, 2013 WL 1821608, at *12 (Del. Ch. May 1, 2013) (quoting *Delaware Bd. of Nursing v. Gillespie*, 41 A.3d 423, 427-28 (Del. 2012) ("[W]ords grouped in a list should be given related meaning.")). With those terms in mind, an "other disposition" does not unambiguously include a transfer of assets to secured creditors in satisfaction of debt.

Further, if "other disposition" were intended to encompass all dispositions of Stream's assets without limitation, the terms "sale" and "lease" – which are dispositions – would be superfluous. *See Progressive N. Ins. Co. v. Mohr*, 47 A.3d 492, 495 (Del. 2012) Additionally, pledging all of Stream's assets as collateral would constitute "other disposition[s]," but Stream did not seek Class B approval in connection with the Notes.

Moreover, while Stream argues that the Charter is unambiguous, it undercuts this position by describing the Charter's supposed purpose (*see, e.g.*, OB at 16) and by relying on affidavits to attest to that purpose, effectively conceding ambiguity. (OB at 10)

Stream also argues that ambiguity in the Charter "must be resolved against shareholder disenfranchisement." (OB at 18) To be clear, it is the Rajans, not Stream's common stockholders, who purportedly have been disenfranchised. This argument was not raised on summary judgment below and is waived. *See Aikens v. State*, 147 A.3d 232, 2016 WL 4527578, at *3 (Del. 2016) (ORDER); Del. Sup. Ct. R. 8. Moreover, Stream's cases do not support its argument. In *Salamone v. Gorman*, 106 A.3d 354, 370 (Del. 2014), the Court addressed a presumption against disenfranchising stockholders in connection with their fundamental right to select directors, which is not in dispute here. In *Airgas, Inc. v. Air Products &*

Chemicals, Inc., 8 A.3d 1182, 1189 (Del. 2010), the Court determined that a bylaw was ambiguous and considered extrinsic evidence to interpret its meaning.

(b) The Court of Chancery appropriately considered Section 271 when interpreting the definition of "Asset Transfer."

Stream incorrectly argues that the Court of Chancery erred by using Section 271 as "parol evidence" when interpreting the definition of "Asset Transfer." (OB at 18) To the contrary, the Court of Chancery correctly determined that the ambiguous definition of "Asset Transfer" tracks the language of Section 271 and therefore appropriately considered the statute.

As the Court of Chancery explained, when interpreting a charter provision that closely resembles a section of the DGCL, Delaware courts apply the same meaning as the statute. *See Warner Commc'ns Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 969 (Del. Ch. 1989), *aff'd*, 567 A.2d 419 (Del. 1989) (TABLE).

Here, the Charter requires approval by the Class B shares for any "Asset Transfer," *i.e.*, "a sale, lease or other disposition of all or substantially all of the assets" of Stream. (Inj. Op. at 47-48) Section 271 uses parallel phrasing, allowing a corporation to "sell, lease or exchange all or substantially all of its property and assets …." (*Id.* at 48) Because the language in the Charter "tracks the text of Section 271," it "warrants the same interpretation"—namely, that stockholder approval is not required. (*See* Section II(C)(2), *infra*)

Although the Court of Chancery held in the Injunction Opinion that the Charter tracks Section 271, rather than disputing that holding on summary judgment, Stream rested on prior briefing. (*See* B15) This argument is therefore waived. *See Aikens*, 147 A.3d 232, 2016 WL 4527578, at *3; Del. Sup. Ct. R. 8.

On the merits, Stream challenges the Court of Chancery's analysis on two fronts. *First*, Stream notes that the language in the definition of "Asset Transfer" and Section 271 are not identical—"Asset Transfer" refers to a "sale, lease *or other disposition*," while Section 271 authorizes a corporation to "sell, lease *or exchange*." (OB at 18 (emphasis in original)) This misses the mark. In *Warner*, the court held that a charter provision with language paralleling the statute should be interpreted consistent with the statute, explaining:

> [I]t is extraordinarily unlikely that the drafters of Section 3.3(i), who obviously were familiar with and probably expert in our corporation law, would have chosen language *so closely similar* to that of Section 242(b)(2) had they intended a merger to trigger the class vote mechanism of that section.

Warner, 583 A.2d at 970 (emphasis added) (holding class vote was not triggered). The Court looked to "parallel" or "closely similar"—not identical—language to inform its interpretation. *See id.* at 969 ("The parallel language …."); *id.* ("The parallel is plain."); *id.* ("The language of Section 3.3(i) is closely similar …."). Here, Stream does not dispute that Section 271 and the Charter use "parallel phrasing" or "closely similar" language. (OB at 18)

Stream further argues that "[t]he choice of Charter language different from a statute is material *per se*." (OB at 19) Rather, as the Court of Chancery explained, the differences between Section 271 and the Charter "cut[] against Stream" … because "[i]f the drafters of the Class Vote Provision wanted to require a class vote before a secured creditor could foreclose on pledged or mortgaged assets, then the definition of 'Asset Sale' should have referred to that type of transaction." (Inj. Op. at 49)

In short, because the definition of "Asset Transfer" tracks Section 271, the Court of Chancery appropriately considered Section 271 to interpret the Charter as not requiring approval of Stream's Class B shares here. (*See* Section II(C)(2), *infra*)

2. The Court of Chancery correctly determined that the Omnibus Agreement did not effectuate an "Acquisition" under the Charter.

Stream also contends that the Omnibus Agreement effectuated an "Acquisition," defined to include (among other things) "any … stock exchange … or any other corporate reorganization," subject to certain carve-outs, requiring approval by Class B shares. This argument fails because: (1) it was waived; (2) the Omnibus Agreement is more appropriately analyzed under the definition of "Asset Transfer"; (3) even if analyzed as a potential "Acquisition," the transaction contemplated by the Omnibus Agreement falls under one or more carve-outs; and

(4) the Omnibus Agreement did not effectuate a “stock exchange” or “reorganization.”

(a) Stream waived the argument that the Omnibus Agreement effectuated an “Acquisition.”

Stream failed to properly assert below that the Omnibus Agreement effectuated an “Acquisition” under the Charter.

As the Court of Chancery explained, in support of its motion for preliminary injunction, “Stream claim[ed] in conclusory fashion that the Omnibus Agreement qualifies as an Acquisition, but d[id] not explain what noun might apply.” (Inj. Op. at 47-48 n.24; *see also* A199, 207) Nevertheless, Stream’s summary judgment briefing rested entirely on its preliminary injunction briefing. (*See* B15) The argument is therefore waived. *See Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004) (“‘[C]asual mention of an issue in a brief is cursory treatment insufficient to preserve the issue for appeal.’”) (citation omitted); Del. Sup. Ct. R. 8.

(b) The Court of Chancery correctly determined that the Omnibus Agreement should be analyzed as a potential “Asset Transfer” rather than a potential “Acquisition.”

Stream argues that the Court of Chancery “erred by holding that the Omnibus Agreement was *only* an Asset Transfer and not an Acquisition qua the Charter’s definitions.” (OB at 20 (emphasis in original)) This argument also fails.

Although Stream failed to make its "Acquisition" argument on summary judgment, the Rajans subsequently raised it in their motion to modify the preliminary injunction. (A378 (the "Modification Motion"); OB Ex. E at 3) In its order denying the Modification Motion, the Court of Chancery noted that it could deny the motion on procedural grounds (OB Ex. D ¶3), but also held that the Omnibus Agreement did not effectuate an "Acquisition."

Among other reasons, the Court of Chancery explained that "[s]pecific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one." (*Id.* ¶8 (citing *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005)) "The definition of Asset Transfer … is more specific than the definition of an Acquisition." (OB Ex. D ¶8)

The Court of Chancery held that "[t]he Omnibus Agreement contemplated an Asset Transfer. It provided for Stream to transfer all of [its] assets in exchange for SLS and Hawk 'stay[ing] the [f]oreclosure [of Stream's assets] and satisfy[ing] and extinguish[ing], in their entirety, the SLS Notes and the Hawk Notes, respectively.'" (*Id.*) Even if the transaction contemplated by the Omnibus Agreement also fell "within the broader definition of an Acquisition," "the more specific definition of an Asset Transfer would control." (*Id.* (citing *AM General*

Holdings LLC v. Renco Grp., Inc., 2020 WL 3484069, at *5 (Del. Ch. June 26, 2020)))

Stream largely ignores this canon of contractual interpretation. Further, the Rajans actually conceded below that an "Acquisition," which encompasses, among other things, a "reorganization," is broader than an "Asset Transfer." (*See* A387 ¶14 (arguing "the term 'reorganization' has a different, broader meaning than 'asset transfer'"))

(c) The Court of Chancery correctly determined that the Omnibus Agreement was carved out of the definition of "Acquisition."

The Court of Chancery also correctly determined that even if the Omnibus Agreement would have otherwise effectuated an "Acquisition," two carve-outs applied.

First, the Court held that the exception in the Charter for a transaction resulting in the cancellation or conversion of debt would apply:

> The Charter states that an Acquisition shall not include "any transaction or series of transactions principally for bona fide equity financing purposes in which cash is received by [Stream] or any successor or indebtedness of [Stream] is cancelled or converted or a combination thereof." [] The Transaction cancelled indebtedness of Stream. In the Omnibus Agreement, SLS and Hawk agreed that the Transaction would discharge Stream's indebtedness to them. Consequently, even if the Transaction otherwise qualified as an Acquisition, it fell within the exception and did not require the approval of the Class B stockholders.

(OB Ex. D ¶9)

Stream argues that the debt carve-out does not apply because "[t]he Omnibus Agreement does not purport to be a transaction 'principally for bona fide equity financing' of Stream," since the Court of Chancery "defined the Omnibus Agreement as a 'private foreclosure,' not a financing effort." (OB at 21) Stream is incorrect. By de-leveraging Stream, the Omnibus Agreement had the same effect as raising cash (since Stream would no longer need cash to pay its debts), and eliminating debt on Stream's balance sheet would also benefit Stream's continual equity financing efforts. (B3-5, M. Rajan Dep. Tr. at 54:16-56:24 (testifying that [redacted]))

Stream's position is also internally inconsistent. Stream argues, on one hand, that the Omnibus Agreement effectuated an "Acquisition" because it was *more* than a foreclosure (*see* OB at 20-21), but simultaneously claims that the Omnibus Agreement only effectuated a "private foreclosure" so as to avoid the debt carve-out in the same definition of "Acquisition." (*Id.* at 21) Stream cannot have it both ways.

Second, the Court of Chancery correctly held that the Omnibus Agreement did not effectuate an "Acquisition" "because it did not result in a material change in the voting power of the pre-[t]ransaction stockholders of Stream," explaining:

> Under the Charter, a reorganization will not constitute an Acquisition if "the stockholders of [Stream] immediately prior to such ...

> reorganization, continue to hold a majority of the voting power of the surviving entity in substantially the same proportions … immediately after such … reorganization." [] Although the Letter Agreement referred to Stream issuing forty-eight million shares, … Stream was not a party to the Letter Agreement. Therefore, the Letter Agreement was not binding on Stream and could not have resulted in the share issuance. Consistent with that reality, SeeCubic has represented that "the stock issuances contemplated by the Letter Agreement have not occurred and will not occur." [] Assuming the Transaction otherwise qualified as an Acquisition, it fell within the exception and did not require the approval of the Class B stockholders.

(OB Ex. D ¶10)

Stream's argument that the Letter Agreement contemplated the issuance of Stream shares (OB at 25) ignores the Court of Chancery's explanation that, as a non-party, the Letter Agreement was not binding on Stream and could not have compelled the share issuance. Further, Appellant's argument that the Court of Chancery "blindly accepted Seecubic's oral representations that it does not 'presently intend' to exercise the option rights of the Side Letter" (*id.*) challenges a factual finding, reviewed for abuse of discretion. *Rsrvs. Dev. LLC v. Crystal Props., LLC*, 986 A.2d 362, 367 (Del. 2009).

(d) The Omnibus Agreement did not effectuate a "stock exchange."

Stream argues that Section 1.1(f) of the Omnibus Agreement, providing that Stream "shall be entitled to receive 1,000,000 shares of Class A Common Stock

of" SeeCubic, constitutes a "stock exchange" under the definition of "Acquisition." (OB at 21-22; A139)

The Court of Chancery did not reach the Rajans' arguments that the Omnibus Agreement effectuated a "stock exchange" or "reorganization." (OB Ex. D ¶11) In any event, these arguments are meritless. While "stock exchange" is undefined, applying the canon of *noscitur a sociis*, the term "stock exchange" must be given a meaning similar to the other listed transactions: a "consolidation, stock exchange or merger of [Stream] with or into any other corporation." *See, e.g.*, *Smartmatic Int'l*, 2013 WL 1821608, at *12 (quoting *Delaware Bd. of Nursing*, 41 A.3d at 427-28 ("[W]ords grouped in a list should be given related meaning.")).

The only reasonable interpretation of "stock exchange" here is a stock-for-stock merger like this Court often encounters. *See, e.g.*, *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 704 (Del. 2020) (describing stock-for-stock merger). Other jurisdictions have interpreted "stock exchange" to mean just that. *See, e.g.*, D.C. Code Ann. §29-309.01 ("'Share exchange' means a business combination …."); Md. Code Ann., Corps. & Ass'ns §1-101 ("'Share exchange' means a transaction: (1) In which a corporation acquires all the issued or all the outstanding shares of stock of one or more classes of another corporation…."); N.C. Gen. Stat. Ann. §55-11-02 (North Carolina Commentary) (defining "share exchange" as "a transaction by which a corporation becomes the

owner of all the outstanding shares of one or more classes of another corporation by an exchange that is compulsory on all owners of the acquired shares”).

Further, it would be illogical to interpret the Charter to allow the Rajans to determine whether other stockholders could exchange their shares, since the Charter does not restrict transfers by common stockholders.

(e) The Omnibus Agreement did not effectuate a “reorganization.”

Stream also argues that the Omnibus Agreement is a “‘reorganization,’ as codified in the IRS Code at 26 *U.S.C.A* §368(a)(1)(D).” (OB at 21-24) This is incorrect. A “Type D reorganization” (OB at 24) requires common control between the transferor corporation (Stream) and the transferee corporation (SeeCubic). *See* 26 U.S.C. §368(a)(1)(D) (requiring transferor(s) stockholders to be “in control of the corporation to which the assets are transferred”); *see also* 26 U.S.C. §§368(a)(2)(H) (“For purposes of determining whether a transaction qualifies under paragraph 1(D) – [for an acquisitive D reorganization] the term ‘control’ has the meaning given such term by section 304(c).”); 304(c) (“[C]ontrol means the ownership of stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote, or at least 50 percent of the total value of shares of all classes of stock.”). SeeCubic is controlled by Stream’s secured creditors, *not* by Stream or its stockholders.

*   *   *

For these reasons, the Omnibus Agreement did not effectuate an "Asset Transfer" or "Acquisition."

II. THE COURT OF CHANCERY CORRECTLY HELD THAT SECTION 271 DID NOT REQUIRE STOCKHOLDER APPROVAL TO EFFECTUATE THE OMNIBUS AGREEMENT.

A. Question Presented.

Did the Court of Chancery err in concluding that: (i) Section 271 is ambiguous as to whether the transaction contemplated by the Omnibus Agreement is a "sale" or "exchange"; and (ii) the legislative history and statutory scheme of Section 271 indicate that it did not require a stockholder vote to effectuate the Omnibus Agreement?

B. Scope Of Review.

"Statutory interpretation is a question of law," reviewed *de novo*. *Salzberg v. Sciabacucchi*, 227 A.3d 102, 112 (Del. 2020).

C. Merits Of Argument.

1. The Court of Chancery correctly determined that Section 271 is ambiguous as applied to the Omnibus Agreement.

Stream argues that Section 271 is unambiguous, and the Court of Chancery erred by analyzing Section 271's legislative history and statutory scheme to interpret its meaning. (OB at 27-28) The Court of Chancery correctly held, however, that "the language of Section 271 is ambiguous as to whether it applies to transactions like the Omnibus Agreement." (Inj. Op. at 40-41) (*See* Section I(C)(1) *supra*)

Section 271 provides that "[e]very corporation may at any meeting of its board of directors or governing body sell, lease or exchange all or substantially all of its property and assets … when and as authorized by a resolution adopted by the holders of a majority of the outstanding stock of the corporation entitled to vote thereon." 8 *Del. C.* §271(a).

As the Court of Chancery correctly explained, "[w]hether Section 271 applies to a transaction like the Omnibus Agreement presents an issue of statutory interpretation." (Inj. Op. at 38) "If the statute is unambiguous, there is no room for interpretation, and the plain meaning of the words controls. If the statute is ambiguous," "the statute must be read as a whole in a manner that will promote its purposes," and "courts should consider the statute's history and examine the text of the statute and draw inferences concerning the meaning from its composition and structure." (*Id*. at 39 (citation omitted))

As the Court of Chancery further explained, when interpreting an undefined statutory term, courts start with "its commonly accepted meaning." *Freeman v. X-Ray Assocs., P.A.*, 3 A.3d 224, 227 (Del. 2010).

The Court of Chancery correctly observed that "[v]irtually no Delaware authority addresses what constitutes a 'sale' or 'exchange,'" and "Section 271 does not define either term." (Inj. Op. at 38). After analyzing dictionary definitions of

the terms "sale" (including distinctions between a "sale," "foreclosure sale" and "foreclosure") and "exchange," the Court of Chancery observed:

> Those [dictionary] definitions [of "sale" and "exchange"] envision a buyer and seller, acting in those capacities, and transferring or exchanging property or services. One could conceive of SeeCubic as a buyer and Stream as a seller, but it is more accurate to regard SeeCubic as a vehicle for Stream's creditors and Stream itself as a debtor. … [I]t is more accurate to view SLS and Hawk as levying on their security. In substance, the transaction contemplated by the Omnibus Agreement functions as a private foreclosure. It is a contractual substitute for the legal proceeding through which SLS and Hawk otherwise would have obtained Stream's assets.

(*Id.* at 39-40) Accordingly, the Court of Chancery concluded that Stream's interpretation that the Omnibus Agreement effectuated a "sale" or "exchange" under Section 271 was "plausible but not mandated." *Id.*

On appeal, Stream does not identify any authority suggesting that the undefined terms "sale" and "exchange" in Section 271 are not, in fact, ambiguous. Instead, it argues in conclusory fashion that "[t]he statute contains no exceptions of any kind, including insolvency exceptions." (OB at 28) This does not explain why Section 271 unambiguously applies to the Omnibus Agreement or otherwise undermine the Court of Chancery's finding. Moreover, while Stream argues that Delaware's "bedrock policies" of "certainty and predictability" require a finding that Section 271 is unambiguous (OB at 29), when, as here, a statute is ambiguous,

certainty and predictability arise from properly applying statutory rules of construction.

2. The Court of Chancery correctly determined that Section 271 does not require a stockholder vote when an insolvent corporation transfers its assets to its secured creditors in lieu of a formal foreclosure proceeding.

Stream argues that the Court of Chancery "erred by holding that Delaware common law adopted a version of the insolvency exception that entirely dispensed with shareholder approval, and that such exception still exists." (OB at 30 (capitalization altered)) Stream's arguments are unavailing.

Stream notes that the Court of Chancery "raised the insolvency exception issue *sua sponte*" (OB at 43), but cites no authority suggesting that was improper. The Court of Chancery correctly concluded that Section 271 does not require a stockholder vote when "an insolvent and failing firm transfers its assets to its secured creditors in lieu of a formal foreclosure proceeding." (Inj. Op. at 41) In so holding, the Court of Chancery considered that: (a) the common law "insolvency exception" was not superseded by Section 271; (b) Section 271 does not include forgiveness of debt as a form of consideration; (c) Section 271 does not apply to mortgages or pledges of assets; and (d) if Section 271 applied when an insolvent and failing firm transfers its assets to its secured creditors in a private foreclosure, this issue would have arisen before. (*Id.* at 41-45)

(a) The Court correctly applied the common law insolvency exception, which was not superseded by Section 271.

(i) Delaware law recognizes the common law insolvency exception.

As the Court of Chancery explained, "[a]t common law, before the directors could sell all of the assets of a prosperous corporation, they had to obtain unanimous stockholder approval." (OB Ex. E at 15) There were at least two common law exceptions to the unanimity requirement, one of which was that to sell all the assets of a failing and insolvent corporation, ***only board approval was required*** (the so-called "insolvency exception"). (OB Ex. E at 16, 19-20 & nn.5-6 (collecting authorities))

Stream argues that no Delaware case (other than then-Vice Chancellor Strine's decision in *Gunnerman* (A077), which Stream largely ignores) has expressly addressed the insolvency exception. (OB at 28-29) Notably, Stream's argument elides the numerous treatises cited by the Court of Chancery describing the common law insolvency exception:

- 1 Charles Fisk Beach, Jr., *Company Law: Commentaries on the Law of Private Corporations* §357, at 582 (1891) (for "a failing company the rule is different, and sale of the whole property may be made by the directors");

- Thomas Conyngton & R. J. Bennett, *Corporation Procedure* 232 (rev. ed. 1927) (footnote omitted) ("The directors may, however, without authorization of the stockholders, sell the corporate assets if necessary to pay the corporate debt, and they may, in the absence of statutory or other prohibitions, make an assignment for the benefit of creditors.");
- Henry Winthrop Ballantine, *Ballantine on Corporations* §281, at 667 (1946) (footnote omitted) ("If a corporation is insolvent or in failing condition[,] the board of directors have authority to sell the entire assets in order to pay the debts and avoid the sacrifice of an execution sale[,] even without the vote or consent of the shareholders."); and
- 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations & Business Organizations* §10.7, at 10-34 (3d ed. 1998 & 2011 Supp.) (noting the "failing business" exception to the common law rule).

(Inj. Op. at 30-32)

Stream acknowledges, as it must, that the treatises cited by the Court of Chancery recognize the insolvency exception. (OB at 36-37 n.13; *see also* OB at 38 n.14 (citing R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* §10.7 (4th ed. Supp. 2021-22), acknowledging "the failing business doctrine" but suggesting it is unclear whether

it was superseded by Section 271); (OB at 39 (noting that commentators recognize "the former common law insolvency exception," but arguing that it was superseded)))

Rather than addressing these treatises, Stream raises a straw man, claiming that the cases cited in the Injunction Opinion are "bad law." (OB at 35-37) This ignores the context in which the decisions were cited. The Court of Chancery simply identified some cases cited in treatises, by way of example, to show that the common law insolvency exception existed when Section 271 was enacted in 1917. (Inj. Op. at 31) Whether those cases remain good law in other jurisdictions is irrelevant. The point is that the common law recognized an exception to requiring unanimous stockholder approval when a corporation was insolvent.

Stream also claims that the Court of Chancery miscited *Butler v. New Keystone Copper Co.*, 93 A. 380 (Del. Ch. 1915), in holding that Delaware has recognized the common law insolvency exception. (OB at 31) That is wrong. The Court of Chancery cited *Butler* "to demonstrate that Delaware law recognized … the existence of exceptions to the common law requirement of unanimous stockholder approval." (OB Ex. E at 22) "*Butler* did not specifically involve the insolvency-based exception that permits directors to sell all of a corporation's assets without stockholder approval." (*Id.*) Rather, "[t]he Injunction Decision cited *Butler* because Chancellor Curtis both acknowledged the baseline common

law rule of unanimity and recognized that it had exceptions. The Injunction Decision relied on other authorities to demonstrate that one of the exceptions to the common law rule permitted the directors of a failing and insolvent firm to transfer assets without stockholder approval." (*Id*. at 25)

Similarly, Stream cites *Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590 (1921), which, according to Stream, "explained the common law rule allowing a simple majority of shareholders to approve asset sales for failing corporations …." (OB at 33) But, "[a]s with *Butler*, the fact that *Geddes* recognized one exception—the ability of the directors to sell the assets of an unprofitable but still valuable corporation with majority stockholder approval—did not negate the existence of others." (OB Ex. E at 27-28) Like *Butler*, "the Supreme Court in *Geddes* cited authorities in support of its summary of the law that describe the full scope of the common law rule and its exceptions"—namely, treatises "that each … also recognized that directors could sell the assets of an insolvent or failing firm without stockholder approval." (*Id.* at 27) Similarly, *Allied Chemical & Dye Corp. v. Steel & Tube Co*., 120 A. 486 (Del. Ch. 1923), like *Butler* and *Geddes*, addressed a sale of assets that was approved by a majority, but less than all, stockholders, and therefore "did not need to delve into … exceptions." (OB Ex. E at 26-27)

(ii) Section 271 did not supersede the common law insolvency exception.

The Court of Chancery correctly held that "[t]he General Assembly did not intend for [Section 271] to govern a transfer of assets by a failing firm," such as the transfer of Stream's assets to SeeCubic in satisfaction of Stream's debts under the Omnibus Agreement. (Inj. Op. at 41)

As the Court of Chancery explained, "[t]here is no indication that the General Assembly intended to restrict or eliminate authority that already existed at common law, such as the power of the directors of an insolvent corporation to sell its assets." (*Id.* at 34) "The General Assembly enacted the statutory predecessor to Section 271 to make clear that the board of directors of a corporation, with the approval of a majority of its stockholders, could sell all of the firm's assets, even if the corporation was profitable and solvent." (*Id.* at 41) "Th[is] statutory change was intended to eliminate the veto power of minority stockholders and ***not to limit the powers of the directors to manage the business of the corporation***." (*Id.* at 34 n.12 (citing 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations & Business Organizations* §10.1, at 10-4 (3d ed. 1998 & 2011 Supp.)) (emphasis added)) Because the board of an insolvent or failing firm already had authority to transfer assets to creditors without stockholder approval, "the General Assembly did not need to establish that point by statute." (*Id.* at 41)

"It follows that the statutory change was not intended to eliminate the ability of the directors of an insolvent and failing firm to sell its assets without stockholder approval, thereby giving stockholders a right to vote that they did not previously possess." (OB Ex. E at 30)

Stream claims that because Section 271 "superseded the common law unanimity rule," it also must have superseded "any and all common law exceptions to that rule." (OB at 38) Again, as the Court of Chancery explained, "Section 271 limited stockholder voting rights. It did not expand them. Given the directional thrust of Section 271, it would be strange to interpret the statute as granting stockholders a voting right that they did not possess at common law." (OB Ex. E at 31) *Hollinger Inc. v. Hollinger Int'l, Inc.*, upon which Stream relies in support of its policy argument, makes the same point. 858 A.2d 342, 376 (Del. Ch. 2004).

Further, as the Court of Chancery also explained, "repeal by implication is disfavored." (OB Ex. E at 31) Stream's unsupported argument that Section 271 superseded all common law exceptions fails to address this aspect of the Court's ruling.

For these reasons, the Court of Chancery correctly concluded that the common law insolvency exception was not superseded by Section 271.

(iii) The common law insolvency exception was not rendered "unnecessary" by changes in bankruptcy law.

Stream also argues, for the first time, that the common law insolvency exception was rendered "unnecessary" by the passage of the Bankruptcy Act of 1898. (OB at 38-40) "[F]ailure to raise [an] issue below constitutes a waiver of the claim on appeal." *Aikens*, 147 A.3d 232, 2016 WL 4527578, at *3. *See also* Del. Sup. Ct. R. 8.

Stream's position ignores authorities acknowledging the insolvency exception post-dating the Bankruptcy Act. (*See, e.g.*, Inj. Op. at 30-31 (citing Thomas Conyngton & R. J. Bennett, *Corporation Procedure* 232 (rev. ed. 1927) and Henry Winthrop Ballantine, *Ballantine on Corporations* §281, at 667 (1946))) In addition, Stream argues that the insolvency exception only made sense under the "long … rejected" trust fund doctrine under which directors owed fiduciary duties to creditors. (OB at 40) In fact, "creditors of an *insolvent* corporation have standing to maintain derivative claims against directors on behalf of the corporation for breaches of fiduciary duties" because "[t]he corporation's insolvency 'makes the creditors the principal constituency injured by any fiduciary breaches that diminish the firm's value.'" *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101-02 (Del. 2007) (citation omitted). This actually supports the insolvency exception.

(b) Section 271 does not include forgiveness of debt as a form of consideration.

As the Court of Chancery explained, Section 271 has evolved to specify types of permissible consideration—adding stock or other securities as permissible consideration in one amendment, and money or other property in another—but "[t]he statute has never referred to forgiveness of debt as a form of consideration." (Inj. Op. at 42)

Stream does not challenge this aspect of the Court of Chancery's ruling.

(c) Section 271 does not apply to mortgages or pledges of assets.

Further, the Court of Chancery explained that Section 271 does not apply to mortgages or pledges of assets, which are covered by Section 272. (*Id.* at 43-44)

The Court's interpretation of Sections 271 and 272 is supported by public policy, as then-Vice Chancellor Strine explained in *Gunnerman v. Talisman Cap. Talon Fund, Ltd.*:

> I don't think you can have a situation where there's the original financing transaction that pledges the collateral [that] is outside 271's reach and then say when the creditor exercises rights under that that are within the four corners or arguably a … lesser-included option, that that somehow then triggers a stockholder vote. I think that would be bad for … equity investors in general, because I think it would raise the cost of capital, because it would … create sort of a [hijack] situation ….

C.A. No. 1894-VCS, at 33-34 (Del. Ch. July 12, 2006) (TRANSCRIPT). (A109-110)

Citing *Gunnerman*, the Court of Chancery further explained:

> [I]nterpreting Section 271 as applying to a creditor's efforts to levy on its security would undercut the value of the security interest. If stockholders were asked to approve the transfer of an insolvent or failing corporation's assets to a secured creditor, they might well vote to reject the transfer, if only to create bargaining leverage against the creditor. To avoid this problem, a creditor would have to insist that the corporation comply with Section 271 up front, as part of the process of obtaining credit. The result would be a regime that, as a practical matter, required the corporation to comply with Section 271 before mortgaging or pledging its assets. That result would be contrary to the plain language of Section 272, which states that such authorization "shall not be necessary."
>
> As *Gunnerman* suggests, a regime of this sort would have detrimental effects for everyone. Creditors would suffer the first-order effects when they tried to foreclose on collateral. Corporations and stockholders would suffer the second-order effects as creditors adjusted to the new reality, insisted on additional protections, and raised the cost of capital. Section 271 should not be interpreted to produce such a mischievous and harmful result.

(Inj. Op. at 43-44)

In response, Stream argues in a footnote that "Sections 271 and 272 do not conflict" because "Section 271 does not deprive secured creditors of foreclosure rights; it merely states that shareholders get to approve any non-judicial workout agreement." (OB at 28 n.10) Stream offers no authority for this reading, which runs far afield from the language of Section 271. Moreover, rather than addressing the merits of *Gunnerman*, Stream incorrectly characterizes then-Vice Chancellor Strine's dismissal holding as "*dicta*." (A109)

(d) The Court of Chancery correctly concluded that if Section 271 applied when an insolvent and failing firm transfers its assets to its secured creditors in a private foreclosure, this issue would have arisen before.

Finally, the Court of Chancery noted that if Section 271 applied to the transfer of assets of an insolvent corporation, this issue would have surely arisen before. Referring to the "dog that has not barked," the Court of Chancery explained that:

> Given the prevalence of security interests and the fact that Section 271 and its predecessor have been around since 1917, this issue surely would have arisen if Section 271 applied in such a setting. The absence of cases implicating the issue indicates that virtually no one thinks that Section 271 would apply in that context.

(Inj. Op. at 44-45)

Stream argues that this reasoning "proves the opposite," suggesting "[t]he reason that the insolvency exception seems not to have been litigated anywhere since 1948 is that all modern corporation statutes, including the DGCL, superseded it." (OB at 37) Notably, Stream cites no authority supporting its position. Respectfully, the Court of Chancery's conclusion is more reasoned and logical.

* * *

For these reasons, the Court of Chancery appropriately determined that Section 271 did not require a stockholder vote here.

III. THE COURT OF CHANCERY CORRECTLY HELD THAT PUBLIC POLICY FAVORS AN INSOLVENCY EXCEPTION TO SECTION 271.

A. Question Presented.

Did the Court of Chancery err in holding that public policy considerations support an insolvency exception to Section 271?

B. Scope Of Review.

This Court reviews questions of public policy *de novo*. *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 902 (Del. 2021).

C. Merits Of Argument.

Stream argues that the Court of Chancery "erred by grasping for a policy rationale," and that even "if public policy were relevant the [Court of Chancery] erred upon it." (OB at 41) Not so.

Having found Section 271 ambiguous as applied to the Omnibus Agreement, the Court of Chancery appropriately considered public policy. *See Progressive N. Ins. Co.* 47 A.3d at 496 ("Where … the statutory text is ambiguous, the court will resort to other sources, including relevant public policy, 'for guidance [as] to [the statute's] apparent purpose.'") (citation omitted).

The Court of Chancery correctly noted that interpreting Section 271 as requiring a stockholder vote under these circumstances "would have detrimental effects for everyone. Creditors would suffer the first-order effects when they tried

to foreclose on collateral. Corporations and stockholders would suffer the second-order effects as creditors adjusted to the new reality, insisted on additional protections, and raised the cost of capital." (Inj. Op. at 43-44)

Nevertheless, Stream argues that the Court of Chancery's ruling will "upset the predictable application of Section 271." (OB at 42) Far from it, as the Court explained, "[t]he absence of cases implicating the issue indicates that virtually no one thinks that Section 271 would apply in [this] context." (Inj. Op. at 45)

Stream also argues that the Court of Chancery's analysis disincentivizes founders from incorporating in Delaware. (OB at 44-45) Not so. Founders can choose whether to take on debt and pledge assets as collateral. When they do (as the Rajans did), there is nothing unfair about creditors enforcing their contracts. Indeed, Delaware public policy favors enforcing contractual rights, including creditors' rights. *See Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 173 (Del. Ch. 2006), *aff'd*, 931 A.2d 438 (Del. 2007) ("Delaware public policy is strongly supportive of freedom of contract, thereby supporting the primary means by which creditors protect themselves …."); *see also RSUI Indem.*, 248 A.3d at 903. Permitting stockholders to evade secured creditors' contractual rights by vetoing their ability to foreclose on collateral would be contrary to that fundamental public policy.

Further, as the Court of Chancery explained, founders can also choose to adopt charter provisions granting stockholders the right to veto transfers of assets to secured creditors, provided that such provisions are "clear" and "give fair notice to all corporate constituencies, including creditors, that the pertinent stockholders would possess that right." (OB Ex. E at 34)

Finally, the Court of Chancery's ruling preserved value for Stream's stockholders (including the Rajans), incentivizing investments in Delaware corporations: "Without the Omnibus Agreement, 'Stream's creditors would have foreclosed on Stream's assets, leaving its equity investors with nothing … [or] Stream would have filed for bankruptcy, and its equity investors likely would have been wiped out.'" (OB Ex. D at ¶12 (quoting Inj. Op. at 11-12))

CONCLUSION

For all of the foregoing reasons, the Summary Judgment Order and the Partial Final Judgment Order should be affirmed.

Respectfully submitted,

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