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Case Number 274,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TRACEY WEINBERG,	:	
Plaintiff Below, Appellant,	:	No. 274, 2022
v.	:	Court Below: Court of Chancery of the State of Delaware
WAYSTAR, INC., DERBY TOPCO INC., DERBY TOPCO PARTNERSHIP LP and DERBY GP, LLC,	:	C.A. No. 2021-1023 SG
Defendants Below, Appellees.	:	

APPELLANT'S CORRECTED OPENING BRIEF

Dated: September 26, 2022

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NATURE OF PROCEEDINGS

This case presents the question of whether, as used in a contract, "and" means "and." Contrary to the commonly understood conjunctive meaning of the word, the appealed judgment declared that the word "and" unambiguously means "or," thereby raising the specter of judicial intervention every time that plain English conjunction is employed in Delaware contract law.

The trial court completely ignored well-settled Delaware precedent supporting the use of "and" in its conjunctive form absent a finding that an absurd result would accrue. Instead, the trial court based its holding that, in this case, "and" was unambiguously disjunctive on less than a handful of cases from other jurisdictions and an academic article from 1960. Even the author of the academic article himself admitted that his analysis was grounded from "personal observation" and that any application should "remain subject to honest skepticism."[1]

The trial court also held that "in context," the use of "and" to mean "or" is not ambiguous given a two-tiered repurchase price provision. However, this two-tiered Repurchase Price Provision is not present in the initial agreement representing 83% of the options at issue in this litigation. In fact, the repurchase price provision in the first option agreement is a completely different contract

[1] F. Reed Dickerson, *The Difficult Choice Between "And" and "Or,"* 46 A.B.A. J. 310, 313 (1960).

provision that was never amended or modified by the parties. It clearly provides for a one-tiered repurchase price, thereby eviscerating any "context" that the trial court relied on in the first place. The trial court also refused to apply the doctrine of *contra proferentum* against the Appellees, who drafted the form agreements that are at issue.

Appellant Tracey Weinberg ("Appellant") appeals the July 6, 2022, Memorandum Opinion denying Appellant's Motion for Judgment on the Pleadings in its entirety, while granting Defendants' Motion for Judgment on the Pleadings (the "Memorandum Opinion") (Ex. A hereto).[2] This appeal argues that the plain and conjunctive reading of "and" is not only supported by Delaware law, but also by logic and grammar rules. In context, "and" unambiguously means "and" for this case. And if there is any ambiguity, then the doctrine of *contra proferentum* applies because the three option agreements are contracts of adhesion.

On January 28, 2022, the parties moved for judgment on the pleadings and completed briefing on those motions on March 11, 2022. (Ex. A at 6). The parties filed cross-motions for judgment on the pleadings to resolve the sole remaining legal issue pertaining to Appellees' right to invoke the Call Right on the Converted Units. Oral argument was held on April 20, 2022, and the parties submitted supplemental letters to the trial court on April 29, 2022. (A789; A804).

[2] Capitalized terms not defined herein shall take the meaning ascribed in the Memorandum Opinion.

On July 6, 2022, the trial court issued the Memorandum Opinion, holding that the word "and" unambiguously meant "or" in the First Substitute Agreement, the Second Option Agreement and the Third Option Agreement. (Ex. A).

SUMMARY OF ARGUMENT

The Trial Court erred in the Memorandum Opinion by holding that:

1. "And" can unambiguously mean "or" even if the trial court does not find an absurd result, despite Delaware cases holding otherwise.

2. The Call Right Provision is a permissive sentence justifying the adoption of a disjunctive "and," despite the fact that the sentence "[*t]he Converted Units shall be subject to …*" is, indisputably, a mandatory sentence.

3. The context of a two-tiered Repurchase Price Provision supports an unambiguous reading of "and" to mean "or," even though this provision is not in the First Substitute Agreement, where a completely different contract clause governs the repurchase price for more than 80% of Appellant's options.

4. Because the word "and" unambiguously means "or," the trial court did not need to consider that the three option agreements are contracts of adhesion such that, to the extent ambiguity exists, they must be construed against Appellees (defined herein) as the drafters.

STATEMENT OF FACTS

Appellant Tracey Weinberg is the former Chief Marketing Officer ("CMO") of Appellee Waystar, Inc. ("Waystar"). Ex. A at 2.[3] Waystar is a portfolio company of the Derby Group and affiliated with Appellees Derby TopCo Partnership LP ("Derby LP"), Derby TopCo, Inc. ("Derby Inc."), and Derby GP, LLC ("Derby GP"). Ex. A at 2.[4]

A. To Attract And Retain Key Personnel, Waystar Awarded Appellant Stock Options Governed By Three Separate And Independent Contracts.

While employed as Waystar's CMO, Appellant was awarded stock options pursuant to the Derby Inc. 2019 Stock Incentive Plan (the "Plan"). *Id*. at 3. Appellant entered into three separate agreements that are the subject of this action: (i) a Substitute Option Agreement dated October 22, 2019 (the "First Substitute Agreement") (A52-A61); (ii) an Option Agreement Under the Derby Inc. 2019 Stock Incentive Plan dated October 23, 2019 (the "Second Option Agreement") (A63-A79); and (iii) an Option Agreement Under the Derby Inc. 2019 Stock

[3] The Memorandum Opinion, dated July 6, 2022 is attached hereto as Exhibit A.

[4] Together, Waystar, Derby LP, Derby Inc., and Derby GP are referred to as "Appellees."

Incentive Plan dated August 9, 2020 (the "Third Option Agreement") (A81-A99).[5] Ex. A at 3.

Appellant did not create or draft any of the aforementioned option agreements, nor was their wording subject to negotiation. Rather, the First Substitute Agreement, Second Option Agreement, and Third Option Agreement are form documents drafted by Appellees and provided to Waystar employees in connection with awards of stock options. (A237, ¶¶ 49-50) (admitting that at least five other Waystar employees had option agreements with "language identical or nearly identical" as Appellant). According to the Plan, option agreements "shall be delivered to the Participant to whom such Award was granted and shall specify the terms and conditions of the award and any rules applicable thereto[.]" (A39-A40 at § 10(a)).

B. Each Of The Three Option Agreements Unambiguously Stated That Converted Units Are Only Subject To Repurchase Following Termination ***And*** A Restrictive Covenant Breach.

While the three Option Agreements are separate and independent from each other, they share the same language for certain provisions. Each of the Option Agreements makes clear that Appellant's receipt of stock options was conditioned upon entry of a "Restrictive Covenant Agreement" and that the stock options were in "consideration of [Appellant's] continued compliance with the terms of such

[5] Together, the First Substitute Agreement, Second Option Agreement, and Third Option Agreement are referred to herein as the "Option Agreements."

covenants." (A55 at § 5(a)-(b); A67 at § 5(a)-(b); A85 at § 5(a)-(b)). All three Option Agreements, by their express terms, also automatically on exercise convert vested shares of Derby Inc. into economically equivalent "Class A-2 Units" of Derby LP ("Converted Units"). (A212, ¶ 27). Converted Units are governed by Derby LP's partnership agreement (the "Partnership Agreement") (A101-A174), which is incorporated by reference at Paragraph 17 of each of the Option Agreements. (A52; A63; A81).

Most importantly, each of the three Option Agreements contain identical language governing Appellees' limited right to repurchase or call Converted Units. For example, Section 10(a) of the First Substitute Agreement provides:

> The Converted Units shall be subject to the right of repurchase (the "Call Right") exercisable by Parent, a member of the Sponsor Group, or one of their respective affiliates, as determined by Parent in its sole discretion, during the six (6) month period following (x) the (i) termination of such Participant's employment with the Service Recipient for any reason (or, if later, the six (6) month anniversary of the date of the exercise of the Substitute Options in respect of which the Option Stock was issued, ***and*** (y) a Restrictive Covenant Breach. The Call Right shall expire on the earlier of (i) an Initial Public Offering ***or*** (ii) a Change of Control.

(A56 at § 10(a)) (emphasis added). The Second and Third Option Agreements contain identical Call Right provisions. (*See* A68 at § 10(b); A86 at § 10(b)).

C. The First Substitute Agreement Did Not Contain A Two-Tiered Repurchase Price Provision Or A Forfeiture Event Clause Found By The Trial Court To Support An "OR" Interpretation.

The First Substitute Agreement provides that, "[i]n the event the Call Right is exercised, the purchase price for the Converted Units … shall be their Fair Market Value (as defined in the [Derby LP] Partnership Agreement) per unit on the closing date of the repurchase." (A56 at § 10(b)). Critically, the First Substitute Agreement governs 89,318.96 of Appellant's stock options (representing 83% of the options at issue in this action). (A211 at ¶ 22).

The Second and Third Option Agreements, governing 18,000 Time-Vesting options (*see* A211 at ¶ 22), include the same Fair Market Value purchase price language as the First Option Agreement, but were modified to further state:

> provided that in the case of a Forfeiture Event, the purchase price for the Converted Units … shall be the lesser of (x) the per unit price paid by the Participant for the Converted Units, as adjusted to reflect any dividends or distributions paid in respect of such units and (y) the Fair Market Value … per unit on the closing date of the repurchase.

(A56, § 10(b); A86, § 10(c)). A "Forfeiture Event" is defined as "(A) the date of the Participant's Termination for Cause (or voluntary resignation by the Participant at a time when the Board reasonably determines that they Employer could have

terminated the Participant's employment for Cause) or (B) the date of a Restrictive Covenant Breach." (A64, § 2(c)(iv); A82, § 2(c)(iii)).[6]

The Second and Third Option Agreements evince no intent to amend the First Substitute Agreement, and the Plan itself specified that any amendment to any "Award Agreements" that "would materially and adversely affect the rights of any Participant or any holder or beneficiary of any Award theretofore granted s***hall require the consent of the affected Participant*** . . ." (A39 at § 9(b)) (emphasis added). Consent for such an amendment to the First Substitute Agreement was never sought by Appellees nor granted by Appellant.

D. Appellant Validly Exercises Her Options, While Appellees Refuse To Honor Their Obligations.

Appellant served faithfully as Waystar's CMO until terminated without cause on August 16, 2021. Ex. A at 3. At the time of Appellant's termination without cause, Appellant held 89,318.96 fully vested options pursuant to the First Substitute Agreement and 18,000 fully vested "Time-Vesting" options, as defined in Section 1(a) of the 2019 and 2020 Option Agreements. *Id*. at 3-4.

On November 12, 2021, Appellant timely exercised all of her vested options under the Option Agreements by, among other things, paying $898,756.74 to purchase 107,318.96 shares of common stock of Derby Inc. *Id*. at 4. Appellees do

[6] A legal redline reflecting the changes of the relevant repurchase price provisions is attached hereto as Ex. C.

not dispute that Appellant took all necessary steps to timely exercise her option rights. (A212 at ¶ 26). Pursuant to the Option Agreements, Appellants 107,318.96 shares were immediately converted to economically equivalent "Class A-2 Units" of Derby LP. (A600 at ¶ 5).

By letter dated November 17, 2021, Appellees purported to invoke the Call Right under Section 10 of the relevant Option Agreements relating to the Converted Units. Ex. A at 5. Appellees purported to repurchase all of Appellants Converted Units "at a repurchase price equal to the Fair Market Value as of the Repurchase Date for a total purchase price of $1,824,422.32." *Id.*

ARGUMENT

I. THE WORD "AND" IN THE CALL RIGHT PROVISION UNAMBIGUOUSLY MEANS "AND" IN ACCORD WITH ITS COMMON CONJUNCTIVE MEANING.

A. Question Presented

Whether the Trial Court erred by ignoring Delaware precedent in reading the word "and" to mean "or" without first finding an absurd or unreasonable result. (A647-651; A656-661; A721-743; A824-29.)

B. Standard of Review

This Court reviews questions of contract interpretation and questions of law *de novo*. *Leaf Invenergy Co. v. Invenergy Renewables LLC*, 210 A.3d 688, 696 (Del. 2019).

C. Merits of the Argument

1. Delaware Courts Routinely Enforce "and" in its Conjunctive Sense When Interpreting Contracts

It is a cornerstone of Delaware law that the plain language of a contract will be respected. *See AT&T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008) (contracts should be interpreted pursuant to the "ordinary and usual meaning" of the words used.) Unsurprisingly, Delaware courts consistently enforce "and" in its conjunctive sense when interpreting contracts. *Concord Steel Inc. v. Wilmington Steel Processing Co.*, 2008 WL 902406, at *7 (Del. Ch. Mar. 17, 2008) ("and" is normally conjunctive, unless that reading would produce an absurd result); *see also*

Lipman v. GPB Capital Holdings LLC, 2020 WL 6778781, at *10 (Del. Ch. Nov. 18, 2020) (rejecting an interpretation of a partnership agreement that ignored the conjunctive nature of the provision at issue, which used "and" to link conditions precedent, and which argued for a disjunctive reading, by noting "that is not what the provision says."); *see also State v. Klosowski*, 310 A.2d 656, 657 (Del. Super. Ct. 1973) ("'And' is a connective, in its commonly accepted meaning, and is not generally used to express an alternative—unless it is followed by words which clearly indicate that intent."); *Blatt v. Concord Mall*, 1982 Del. Super. LEXIS 1049, *2-3 (Del. Super. Ct. Feb. 26, 1982) (rejecting an attempt to read a liability provision that used the word "and" disjunctively, as if "and" means "or," by holding that "the clause as written is not obviously ambiguous or open to interpretation. On its face the syntax appears straightforwardly to intend that the limitation to loss of life should modify all of the words in the preceding series," and "there appears to be no purpose to substituting 'or' for 'and…'"); *Le Tourneau v. Consol. Fisheries Co.*, 51 A.2d 862, 868 (Del. 1947) (construing a provision of the Delaware Code by noting "other states have substantially the same provision in their laws as in ours, except that the two elements in the provision are separated by the disjunctive 'or' rather than connected by the conjunctive 'and.' Because of the conjunctive word used in the provision in our law both conditions must concur, neither of itself being sufficient to constitute an exception.").

Of course, Delaware's courts are hardly unique in their strong preference in favor of interpreting "and" in accord with its common, ordinary meaning. "And" is unambiguously conjunctive in everyday speech—used to join things together. "Dictionary definitions, legal usage guides and case law compel [courts] to start from the premise that 'and' usually does not mean 'or'." *OfficeMax, Inc. v. United States*, 428 F.3d 583, 588 (6th Cir. 2005). Indeed, dictionaries consistently feature a conjunctive definition of "and" as the primary meaning of the word. *See e.g.*, *See And* Webster's Third New International Dictionary 80 (unabridged) (1981) ("and" is a conjunction meaning, *inter alia*, "along with or together with," "added to or linked to," "as well as," and "also at the same time"); *And* Oxford English Dictionary (2d ed. 1989) ("[i]ntroducing a word, clause, or sentence, which is to be taken side by side with, along with, or in addition to, that which precedes it)."

Everyday meaning aside, "and" also means "and" when one is interpreting a legal document. The words "and" and "or" "should not be considered interchangeable in construing a contract, absent strong supporting reasons." 11 Williston on Contracts § 30:12 (4th ed.). "In its ordinary sense, the word "and," as used in a contract, is strictly of a conjunctive nature, while the word "or" is of a disjunctive nature." 17A C.J.S. Contracts § 428 (Nov. 2021). *See also* 1A Sutherland Statutory Construction § 21:14 (7th ed.) ("Statutory phrases separated by the word "and" are usually interpreted in the conjunctive."). The word "and"

has even been described by the United States Supreme Court as a "coordinating junction" used to link independent ideas. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011). *See also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012) ("Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives.").

Each of the preceding authorities were cited to the trial court. Yet, the trial court's Memorandum Opinion did not distinguish or explain away *any* of those authorities. They were simply ignored. The trial court instead relied almost exclusively on a single law review article from 1960 to support its conclusion that "and" had a disjunctive meaning in this case. *See* Ex. A at 9-11 (citing F. Reed Dickerson, The Difficult Choice Between "And" and "Or," 46 A.B.A. J. 310, 313 (1960)). However, the author of the article himself warned readers that his analysis "ignores the many court decisions construing specific uses of "and" and "or" [because] [t]he answer is that such decisions (being concerned for the most part with misused language) are ***largely irrelevant*** to this [article.]"[7] (Ex. A at 9-11) (emphasis added.) The author also cautioned readers that "many of [his] foregoing generalizations are based only on [his] personal observation. So far as they have not (to [his] knowledge) been confirmed by exhaustive scientific

[7] F. Reed Dickerson, *The Difficult Choice Between "And" and "Or,"* 46 A.B.A. J. 310, 310 (1960).

investigation they remain subject to honest skepticism."[8] Nonetheless, the trial court adopted the theory proposed in the article while ignoring the rule announced in all of the cited authorities.

2. The Trial Court Erred by Ignoring the Plain Meaning of the Word "and," Opting Instead to Reform Section 10 the Option Agreements by Reading "and" to mean "or."

Not a single Delaware case was cited by the trial court's to directly support its conclusion that "and," as used here, must actually mean "or." Indeed, the trial court did not find or hold that Appellant's conjunctive interpretation of "and" in the Call Right provision would give rise to an absurd result, as required as a predicate to reinterpretation by *Concord Steel*, 2008 WL 902406, at *7. The trial court also overlooked the commonsense admonition in *Klosowski*, 310 A.2d at 657, which suggests that a court interpreting the meaning of "and" in a contract must assign its ordinary conjunctive meaning to the word unless it is followed by words that suggest a disjunctive construction. In fact, the trial court ignored the fact that the very next sentence in the Call Right Provision after the one that is at the heart of the dispute here uses "or" conjunctively, thus showing beyond any doubt that the Appellees—the undisputed drafters of the Option Agreements and

[8] Dickerson, *The Difficult Choice Between "And" and "Or,"* at 313. *See infra*, Argument Section II (discussing the Trial Court's misapplication of Professor Dickerson's article where the Call Rights provision is in fact a mandatory sentence, requiring the conjunctive use of "and.")

the Call Right Provision—understood the difference between "and" and "or," and knew how to use "or" when they intended a disjunctive meaning.

Moreover, while the trial court found that the Repurchase Price Provision presented *only* in the Second and Third Option Agreements would be "rendered meaningless" if the trial court were to adopt a traditional conjunctive reading of the word "and," the trial court never addressed the fact that the Repurchase Price Provision in the First Option Agreement (governing 83% of the options at issue) is different than the Repurchase Price Provision in the Second and Third Option Agreements. Instead, the trial court analyzed the three Option Agreements as though they were identical. *See* Ex. A at 11-13 (holding that "[o]nly Waystar's interpretation of the Call Right provision preserves the meaning of the Repurchase Price Provision in the Second and Third Option Agreements," and concluding its analysis without addressing the meaning or implications of the First Substitute Agreement's different repurchase price provision.)

The trial court also failed to address whether the First Substitute Agreement's repurchase price provision would yield an absurd result or not. Perhaps most importantly, the trial court failed to follow its own logic to an obvious conclusion: if the presence of the Repurchase Price Provision compelled a result in favor of the Appellee's interpretation of the Second and Third Option Agreements, then the *absence* of that provision from the First Option Agreement

must compel a contrary conclusion as regards the correct interpretation of that agreement. Despite that the First Substitute Agreement and its repurchase price provision governed 83% of Appellant's stock options, the significance of the crucial differences between the First Agreement and the Second and Third Agreements was completely ignored by the trial court in its ruling.

3. The Call Right Provision Requires the Occurrence of Both a Termination *and* a Restrictive Covenant Breach

The common, ordinary language of the Call Right Provision unambiguously establishes a six-month period for Appellees to exercise their Call Right following the occurrence of both (x) a termination *and* (y) a restrictive covenant breach. The Call Right Provision of the Option Agreements is unambiguously conjunctive:

> The Converted Units shall be subject to the right of repurchase (the "Call Right") exercisable by Parent, a member of the Sponsor Group, or one of their respective Affiliates, as determined by Parent in its sole discretion, during the six (6) month period following (x) the (i) the Termination of such Participant's employment with the Service Recipient for any reason (or, if later, the six (6) month anniversary of the date of the exercise of the Options in respect of which the Option Stock was issued, ***and*** (y) a Restrictive Covenant Breach. The Call Right shall expire on the earlier of (i) an Initial Public Offering ***or*** (ii) a Change of Control.

(A56 at § 10(a); A68 at § 10(a); A86 at § 10(b)) (emphasis added). The conjunctive/disjunctive canon of interpretation holds that the use of the conjunctive "and" in a list such as the list of conditions precedent that trigger the Call Right

means that all of the events in the list are required. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012.) The plain language of the Call Right Provision provides Appellees with a Call Right if, and only if, two events occur—(x) termination of employment for any reason, and (y) a restrictive covenant breach. There is nothing in the Call Right provision which suggests that "and" was meant to be read disjunctively such that only one event—(x) termination of employment for any reason, *or* (y) a restrictive covenant breach—can trigger the Call Right's existence.

4. Appellant's Conjunctive Interpretation of the Call Right Provision Does Not Produce an Illogical or Absurd Result under any of the Option Agreements

As addressed above, the trial court ignored that the Repurchase Price Provision in the First Substitute Agreement is different than the Repurchase Price Provision in the Second and Third Option Agreements. *See* Ex. A at 11-13 (holding that "[o]nly Waystar's interpretation of the Call Right provision preserves the meaning of the Repurchase Price Provision in the Second and Third Option Agreements," and concluding its analysis without addressing the meaning of the First Substitute Agreement's different repurchase price provision.). However, the Option Agreements are separate and independent contracts, each of which deserves to be analyzed independently. And the First Substitute Agreement, which governs more than 80% of Appellant's stock options at issue in this litigation, is certainly

worthy of separate consideration because of its outsized importance. Moreover, the terms of each of the three award agreements, including the First Substitute Agreement, could not be amended without Appellant's consent, which never was given. (A39 at §9 (b)) (prohibiting any amendment "that would materially and adversely affect the rights" of Appellant without first obtaining her consent.)

As a general matter, Appellant's conjunctive interpretation of the word "and" in the Call Right Provision is entirely consistent with ordinary executive compensation arrangements and serves a fulsome, rational contract purpose: to incentivize Appellant to abide by her Restrictive Covenant obligations, on pain of forfeiting her future upside participation in Appellees' companies. Indeed, each Option Agreement unambiguously expresses Appellees' intent to make enjoyment of the options' upside to go hand-in-hand with continued loyalty to Waystar. *See* (A55 at § 5(a)-(b); A67 at § 5(a)-(b); A85 at § 5(a)-(b)). In fact, each Option Agreement attached a newly executed Restrictive Covenant Agreement as Exhibit A and incorporates each fully by reference.[9]

Given the connection between option awards and restrictive covenants and the premium that Waystar placed on restrictive covenant compliance, the Second

[9] The Third Substitute Agreement even required Appellant to executed a revised Restrictive Covenant Agreement, as a condition to receive those options, that increased the previously agreed-to restriction period of the non-compete and non-interference provisions from twelve months to eighteen months.

and Third Substitute Agreements created a structure of graduated sanctions culminating with Appellees' limited Call Right. For instance, termination for any reason (*i.e.*, without cause) requires the forfeiture of only unvested options, while termination for cause (*i.e.*, a "Forfeiture Event") requires the forfeiture of vested (but not exercised) options. The Call Right is the most severe sanction and allows Waystar to claw-back Converted Units (*i.e.*, vested options that had been properly exercised). As the plain text of the Call Right sets forth, this harsh penalty is reserved for circumstances where a termination occurs for any reason *and* a restrictive covenant is breached. Stock options are used as an incentive and retention tool for a company that anticipates substantial growth and for the individuals whose performance has a direct impact on the company's stock price. Stock Options: Overview, *Practical Law Practice Note Overview* w-008-0930. A two-tiered repurchase pricing system allows for an option agreement to reward 'good leavers' with a higher purchase price and 'bad leavers' with a lower purchase price. A739-A740 at 23-24. This structure of graduated sanctions is hardly absurd; indeed, it makes perfect sense.

The plain language use of the conjunctive "and" in the Call Right provisions has the effect of creating a promise to employees that they can "acquire and maintain" options, and thus bet that the value of those options will increase over time, so long as they are loyal to Waystar (as exemplified by their adherence to the

terms of the Restrictive Covenant Agreement). Cf. *Forman v. Chesler*, 167 A.2d 442, 445 (Del. 1961) (considering 8 Del. C. § 157, which authorizes the issuance of stock options by Delaware entities, and observing that "[i]t is clear that the statute contemplates that the warrant holder or optionee may, at least under ordinary circumstances, lawfully expect to enjoy the future value of the shares, as if he had invested in the stock itself.").

By contrast, the strained "and means or" interpretation of the Call Right provisions urged by Appellees would mean that the future value of the options earned by its employees could be seized by Waystar at will simply by terminating the employee in question for any reason. For example, Appellee's reading of their Call Right would allow them to revoke the future value of earned options in the face of an expected increase in value of the stock due to an anticipated merger or public offering simply by firing their at-will employees. For that reason, Appellee's interpretation is contrary to the intent of the Call Right Provision's last sentence, which provides that "The Call Right shall expire on the earlier of (i) an Initial Public Offering ***or*** (ii) a Change of Control." (A56 at § 10(a); A68 at § 10(a); A86 at § 10(b)) (emphasis added). In that way, Waystar promised that the Call Right would not be used to revoke the future value of earned option in the face of an anticipated increase in value. But the interpretation of the Call Right now advance by Appellees would allow Waystar to do exactly that, so long as the

employee was terminated for any reason before the date of an Initial Public Offering or a Change of Control.

Similarly, a decision to terminate an employee for reasons wholly unrelated to disloyalty (such as a layoff during a business downturn, as the result of a personality clash, or for whim and caprice) would also have the effect of revoking the earned future value of the employee's options for reasons wholly unrelated to disloyalty. Those readings are contrary to both the plain language of the Call Right and its stated purpose. That being so, it simply cannot be said that the plain language, conjunctive reading of the Call Right which permits that right to be exercised only in the event of a termination *and* restrictive covenant breach is "absurd." Instead, Appellant's straightforward interpretation makes perfect sense.

The First Substitute Agreement differs because all 89,318.96 options (representing 83% of the options at issue in this action) were fully earned by Appellant and vested when issued on October 22, 2019. There was no future vesting schedule that required a corresponding graduated sanction structure. The only mechanism under which Appellees' could claw-back or recoup equity awarded under the First Substitute Agreement was through the Call Right Provision, which applied only after Appellant exercised her options and they became Converted Units. Again, it makes perfect sense that the Call Right in the First Substitute Agreement required a breach of a restrictive covenant given the

premium that Waystar placed on compliance with restrictive covenants, and the lack of any other way to recoup equity, even for a termination with cause, without a restrictive covenant breach.

Critically, Appellees correctly acknowledged that the Call Right is not exercisable against an employee who breaches a restrictive covenant, but whom the company decides to not terminate at all. (*See* A694 at n.7). But because they had no argument in opposition, they simply labelled this scenario as "highly unlikely." (*See id.*) Whether or not the scenario is likely to occur misses the point. Appellee's statement is a tacit admission that their advocated-for disjunctive reading of the word "and" is incompatible with the plain language of the Call Right Provision in the Second and Third Option Agreements.

Appellant respectfully asks this Court to enforce the plain text of the First Substitute Agreement, the Second Option Agreement and the Third Option Agreement, by ruling that the word "and" used in the Call Right provision is conjunctive, and does not mean "or," which is disjunctive because no absurd result has been found by the trial court.

II. THE CALL RIGHT PROVISION IS A MANDATORY SENTENCE, REQUIRING THE WORD "AND" TO BE READ CONJUNCTIVELY.

A. Question Presented

Whether the trial court erred by finding that the Call Right Provision is a permissive sentence, supporting the several and disjunctive use of the word "and." (A824-29; A850-855.)

B. Standard of Review

This Court reviews questions of contract interpretation and questions of law *de novo*. *Leaf Invenergy*, 210 A.3d at 696.

C. Merits of the Argument

Respectfully, the trial court made a basic grammar mistake and misidentified the subject of the sentence that is at the heart of this dispute. Relying on an academic article from 1960, the trial court reasoned that "whether 'and' is 'several' or 'joint'" depends in part upon whether it is used in a "permissive" or "mandatory" sentence. Ex. A at 9.[10] The trial court then held that the Call Right Provision is "permissive" because "Waystar may exercise it 'in its sole discretion.'" *Id.* at 11.

Even assuming *arguendo* that the purported "rule" proposed in the article makes sense and should be followed (*see supra*, Argument Section [I] (discussing

[10] *Citing* F. Reed Dickerson, *The Difficult Choice Between "And" and "Or,"* 46 A.B.A. J. 310, 310 (1960).

the author's warning regarding the use of his analysis)), the critical sentence in the Call Right Provision is *not* permissive. Waystar is ***not*** the subject of that sentence. Rather, the subject is "the Converted Units," and the application of the Call Right Provision to the converted units is *mandatory*. The predicate of the Call Right Provision clearly expresses a mandatory sentiment: "*shall* be subject to …."[11]

The subject of a sentence is what (or whom) the sentence is about; it is "the noun or noun phrase about which something is said in the predicate of [the sentence]." Bryan A. Garner, *Garner's Modern American Usage* 918 (2009). For example, in the sentence "the cat must sleep in the sun and outside," the word "cat" is the subject. A predicate is the part of a sentence, or a clause, that tells what the subject is doing. The clause "must sleep in the sun" is the predicate; it is dictating what the cat is doing. Similarly, in the relevant Call Right Provision sentence: "[t]he ***Converted Units shall be subject to*** the right of repurchase … exercisable by

[11] *Id*. at 311 (discussing the subject and predicate of a sentence in analyzing the word "and" and it's conjunctive usage). *See also id*. at 313 (using sentence "[h]e may contribute to charitable and educational institutions" as an example of a permissive sentence, where the subject is "he" and the predicate is "may contribute to …" Conversely, if the sentence is changed to "he must contribute to charitable and educational institutions at the institution's sole discretion," the word "and" would retain its conjunctive meaning, even if it allows another party to have sole discretion. Even in the trial court's example, "You can take a doughnut, a danish, and a bagel," the subject is "[y]ou" and the predicate, in a permissive form, is "can take a …" If one were to change the sentence to "you ***shall*** take a doughnut, a danish, and a bagel at the company's sole discretion," the sentence becomes mandatory and does not turn into permissive form because there is the phrase "sole discretion."

Parent, a member of the Sponsor Group, or one of their respective affiliates, as determined by Parent in its sole discretion . . .," the subject of the sentence is the "Converted Units" and the predicate of the sentence is the phrase "shall be subject to…" Further, the predicate is in a mandatory form: "[t]he Converted Units ***shall be subject to*** …"[12] (Emphasis added.)

The subject of the Call Right provision sentence is ***not*** the "Parent" or Waystar, as the trial court reasoned. The sentence is about the Converted Units, and it describes the scenarios in which the Converted Units are subject to being called. Moreover, what is determined by Waystar "in its sole discretion" is whether the "Parent, a member of the Sponsor Group, or one of their respective affiliates" should be the entity exercising the call Right. Ex. A at 11. The "sole discretion" modifier phrase has nothing to do with whether or when the Converted Units are subject to Call Right following (x) termination and (y) a Restrictive Covenant Breach. In other words, even assuming the Converted Units are subject

[12] *See also, Mason v. Range Res. Appalachia LLC,* 120 F. Supp. 3d 425, 430 (W.D. Pa. 2015) (discussing the mandatory versus permissive rule in the contract clause "[t]he Lessor … does hereby grant the exclusive right in the Lessee to…," where the predicate "hereby grant…" expresses a permissive verb usage.) While the Trial Court relied on this singular case to support the use of Professor Dickerson's 'rule,' the predicate in the *Mason* case ("hereby grant…") is clearly permissive where the predicate "shall be subject to…" in the Call Right Provision is unmistakably mandatory.

to the Call Right, Waystar or "Parent" could still determine, in its sole discretion, whether or not to repurchase the Converted Units.[13]

Accordingly, even if the correct analytical framework for the purpose at hand was the trial court's preferred methodology of 'permissive versus mandatory sentence' rule, the conjunctive use of "and" is *still* the only correct meaning for the Call Right provision, because the sentence at issue is a mandatory.

[13] *See also* Kenneth A. Adams, *Weinberg v. Waystar, Inc.: The Delaware Court of Chancery Considers an Ambiguous "And,"* Adams on Contract Drafting, July 6, 2022 (noting the trial court's finding that the Call Right provision being a permissive sentence "doesn't make sense.")

III. THE TRIAL COURT ERRED WHEN IT HELD THAT "AND" COULD BE READ UNAMBIGUOUSLY AS "OR" IN CONTEXT, AND THAT *CONTRA PROFERENTUM* DID NOT APPLY.

A. Question Presented

Whether the Trial Court erred by finding that the word "and" unambiguously meant "or" in the three option agreements. Ex. A at 14. (A652-662; A733-45; A830-31.)

B. Standard of Review

This Court reviews questions of contract interpretation and questions of law *de novo*. *Leaf Invenergy*, 210 A.3d at 696.

C. Merits of the Argument

The "context" the trial court relied upon to hold that "and" unambiguously meant "or" in the Option Agreements was the two-tiered Repurchase Price Provision found in the Second and Third Option Agreements. As addressed above, however, the Repurchase Price Provision in the First Substitute Agreement is different. Indeed, the First Substitute Agreement contains a one-tiered Repurchase Price Provision that works perfectly with the natural, conjunctive reading of the word "and." Accordingly, the use of "and" in the Call Right Provision in the First Substitute Agreement cannot be read unambiguously as "or."

The "context" the trial court relied on also does not work for the Second and Third Option Agreements. *See supra*, Argument Section [I.C.4] (discussing that the two-tiered Repurchase Price Provision would be rendered ineffective in the

scenario where an employee is not terminated after a Restrictive Covenant Breach. Thus, even "in context," the two-tiered Repurchase Price Provision does not support an unambiguous reading of the word "and" to mean "or." Moreover, the trial court conceded that the "several" meaning of "and" ***is*** ambiguous assuming the sentence is permissive. Ex. A at 10.

If the word "and" is deemed to be somehow ambiguous, then Appellant must win in accordance with the doctrine of *contra proferentum*. Delaware's doctrine of *contra proferentum* requires that any ambiguity in a form contract must be construed against its drafter, and in favor of the innocent non-drafter. *See Twin City Fire Ins. Co. v. Delaware Racing Ass'n*, 840 A.2d 624, 630 (Del. 2003); *see also Quereguan v. New Castle Cty*. 2006 WL 1215193, at *5 (Del. Ch. Apr. 24, 2006) ("If an ambiguity exists, the court must construe the contract language against the drafter."); Restatement (Second) of Contracts § 206 (1981) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."). The doctrine has enhanced applicability against a drafter who presents "form" or "standard" contracts on a take-it-or-leave-it basis, as opposed to the circumstance of a negotiated terms by parties with comparable bargaining power. *Zimmerman v. Crothall*, 62 A.3d 676, 698 (Del. Ch. 2013); *accord Tenneco Auto. Inc. v. El Paso*

Corp., 2004 WL 3217795, at *8 (Del. Ch. Aug. 26, 2004). *Cf. State Farm Mut. Auto. Ins. Co. v. Johnson*, 320 A.2d 345, 347 (Del. 1974) (insurance contracts are to be read from the perspective of a reasonable purchaser of insurance because the terms are not truly bargained for). That is precisely the circumstance in this case.

The Court of Chancery's decision in *Stockman v. Heartland Indus. Partners, L.P.*, 2009 WL 2096213, at *5 (Del. Ch. July 14, 2009) is particularly apt, and expressly requires that sloppy or imprecise contracts be read to favor employees against employers qua *contra proferentum*. In *Stockman*, two former employees sought advancement and indemnification from a Delaware limited partnership. *Id.* at *1. The employer asserted that an ambiguous advancement clause was discretionary. *Id.* at *8. The employer further asserted that a disjunctive "or" in the indemnification provision's good faith conduct requirement should be reformed to a conjunctive "and," to avoid an absurd result. *Id.* at *14. The employer lost both arguments. Then-Vice Chancellor Strine noted the "normal approach to interpretation is to treat 'and' as conjunctive and 'or' as disjunctive[.]" *Id.* Vice Chancellor Strine then went on to rule on the advancement claim:

> Thus, where an entity's governing instruments are involved, the onus is on the drafter to be clear. As discussed by our Supreme Court, in the context of discussing both insurance contracts and operative entity documents:
>
> The insurer or the issuer, as the case may be, is the entity in control of the process of articulating the terms. The

other party, whether it be the ordinary insured or the investor, usually has very little say about those terms except to take them or leave them or to select from limited options offered by the insurer or issuer. Therefore, it is incumbent upon the dominant party to make terms clear. Convoluted or confusing terms are the problem of the insurer or issuer—not the insured or investor.

The same concerns are equally applicable to the directors, officers, and employees of limited partnerships who, like limited partners, typically must base their decision to serve on the terms of the limited partnership agreement as written. That is, in the case of an entity with ongoing operations, key constituents, including directors, officers, and employees, look to the governing instrument's words, and not some obscure archive of parol evidence. As a result, any ambiguities in Heartland's Partnership Agreement should be resolved in favor of the reasonable expectations of Heartland's Indemnitees regarding their indemnification and advancement rights.

***

Moreover, to the extent there is any ambiguity in the Advancement Provision, that ambiguity must be resolved against Heartland in favor of the reasonable expectations the terms of the Provision engender in those they affect. Delaware courts resolve ambiguities in governing instruments in order to provide uniform, predictable interpretations of the documents that officers, investors, and other constituencies who provide benefits to the entity rely on in making their decisions about whether to participate in the entity's activities. This principle of interpretation protects the participants' reasonable expectations, which in turn benefits the entity by encouraging participants to provide their capital, be it human or financial, at a lower cost than they would if they faced greater uncertainty.

Id. at *5, *8 (internal quotes, citations, and format omitted).

Vice Chancellor Strine then *rejected* the employer's argument to reform the word "or" into "and," applying the doctrine *contra proferentum* to dictate that the "lack of clarity" in the indemnification agreement be read against the company and in favor of indemnification for the employees. *Id.* at *18 (internal cites omitted).

Similar to the circumstances in *Stockman*, the Option Agreements are contracts of adhesion such that, to the extent ambiguity exists, they must be construed against Appellees as the drafters. Indeed, the Option Agreements were presented on a take-it-or-leave-it basis; Appellant had no bargaining power. Appellees concede this fact by claiming that the Option Agreements were standard form contracts offered to many employees. (*See* A237-A241 at ¶¶ 48-73). Having conceded that the Option Agreements are standard form contracts that they imposed upon their employees (including Appellant), the enhanced rule of *contra proferentum* applies if "and" is somehow found to be ambiguous, and all ambiguities must be construed against Appellees.

CONCLUSION

For the foregoing reasons, this Court should reverse the Memorandum Opinion.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of September, 2022, a true and correct copy of the **Appellant's Corrected Opening Brief** was served via File & ServeXpress on the following counsel of record:

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