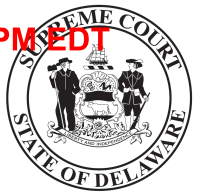
EFiled: May 24 2013 01:02PM EDT
Filing ID 52457014
Case Number 36,2013



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID F. MILLER III,	)	No. 36, 2013
Plaintiff-Below, Appellant,	)	Appeal from the Memorandum Opinion dated December 31, 2012, of the Court of Chancery of the State of Delaware in C. A. No. 7475-VCN
v.	)	
PALLADIUM INDUSTRIES INC.,	)	
Defendant-Below, Appellee.	)	

ANSWERING BRIEF OF PALLADIUM INDUSTRIES INC.

OF COUNSEL:
Kenneth R. Berman
Jonathan R. Allen
Nutter McClennen & Fish LLP
155 Seaport Boulevard
Boston, Massachusetts 02210
617-439-2000

POTTER ANDERSON & CORROON LLP
Stephen C. Norman (#2686)
Tyler J. Leavengood (#5506)
Hercules Plaza
1313 North Market Street, 6th Floor
P.O. Box 951
Wilmington, Delaware 19899
(302) 984-6000

Attorneys for Defendant-Below, Appellee Palladium Industries Inc.

Date: May 24, 2013

Table Of Contents

Page

Table Of Authorities ii

Nature Of Proceedings 1

Summary Of Argument 2

Counterstatement Of Facts 3

Argument 6

I. THE VICE CHANCELLOR CORRECTLY CONSTRUED THE BYLAW 6

A. Question Presented 6

B. Scope Of Review 6

C. Merits Of Argument 7

1. Principles Applicable To Interpretation Of Written Documents 7

2. Principles Applicable To Advancement 8

3. The Court Of Chancery Correctly Interpreted The Bylaw 9

4. Statutory History Supports Palladium's Interpretation 12

5. Miller Misreads The Bylaw 15

6. Miller Fails To Give A Sensible Meaning To The "Unless" Clause 21

II. THE CONTRA PROFERENTUM RULE DOES NOT APPLY 27

A. Question Presented 27

B. Scope Of Review 27

C. Merits Of Argument 27

1. Principles Applicable To Contra Proferentum Doctrine 27

2. Contra Proferentum Does Not Apply Here 28

Conclusion 30

Table Of Authorities

CASES

Pages

Advanced Mining Sys., Inc. v. Fricke,
623 A.2d 82(Del. Ch. 1992) 9, 13, 14

Bank of N.Y. Mellon v. Commerzbank Capital Funding Trust II,
___ A.3d ___, 2013 WL 1136821 (Del.) 28

Bernstein v. TractManager, Inc.,
953 A.2d 1003 (Del. Ch. 2007) 8

Brooks-McCollum v. Emerald Ridge Serv. Corp.,
2004 WL 1752852 (Del. Ch.) 8

Delta & Pine Land Co. v. Monsanto Co.,
2006 WL 1510417 (Del. Ch.) 16

Demetree v. Commonwealth Trust Co.,
1996 WL 494910 (Del. Ch.) 7

Desert Equities Inc. v. Morgan Stanley Leveraged Equity Fund II LP,
624 A.2d 1199 (Del. 1993) 6, 27

E.I. du Pont de Nemours & Co. v. Shell Oil Co.,
498 A.2d 1108 (Del. 1985) 27

Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.,
702 A.2d 1228 (Del. 1997) 8

Emerald Partners v. Berlin,
726 A.2d 1215 (Del. 1999) 28

Equitable Trust Co. v. Gallagher,
77 A.2d 548 (Del. 1950) 19

Gatz Props., LLC v. Auriga Capital Corp.,
59 A.3d 1206 (Del. 2012) 6

Havens v. Attar,
1997 WL 695579 (Del. Ch.) 9

Kaiser Aluminum Corp. v. Matheson,
681 A.2d 392 (Del. 1996) 28

Majkowski v. Am. Imaging Mgmt. Servs., LLC,
913 A.2d 572 (Del. Ch. 2006)...8

Malpiede v. Townson,
780 A.2d 1075 (Del. 2001) 21

Martin Marietta Materials, Inc. v. Vulcan Materials Co.,
56 A.3d 1072 (Del. Ch. 2012), *aff'd*, 45 A.3d 148 (Del. 2012) 16

O'Brien v. Progressive N. Ins. Co.,
785 A.2d 281 (Del. 2001) 7, 10

Osborn ex rel. Osborn v. Kemp,
991 A.2d 1153 (Del. 2010) 17

Paramount Commc'ns Inc. v. Time Inc.,
571 A.2d 1140 (Del. 1989) 24

Penn Mut. Life Ins. Co. v. Oglesby,
695 A.2d 1146 (Del. 1997) 28

Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.,
616 A.2d 1192 (Del. 1992) 7, 29

Rohe v. Reliance Training Network, Inc.,
2000 WL 1038190 (Del. Ch.)...25

Schoon v. Troy Corp.,
948 A.2d 1157 (Del. Ch. 2008)..15

SI Mgmt. L.P. v. Wininger,
707 A.2d 37 (Del. 1998) 28, 29

Smith v. Del. State Univ.,
47 A.3d 472 (Del. 2012) 19

Stockman v. Heartland Industrial Partners LP,
2009 WL 2096213 (Del. Ch.)...Passim

Tafeen v. Homestore, Inc.,
2004 WL 3053129 (Del. Ch.), *aff'd*, 888 A.2d 204 (Del. 2005) 24

STATUTES

8 *Del. C.* § 102(b)(3) 11

8 *Del. C.* § 110(g) 11

8 *Del. C.* § 141(a) 26

8 *Del. C.* § 145(e) ....Passim

8 *Del. C.* § 212(b) 11

8 *Del. C.* § 217(a) 11

OTHER AUTHORITIES

Black's Law Dictionary (5th ed. 1979) 9

Del. Sup. Ct. R. 3 11

Del. Sup. Ct. R. 4 11

Del. Sup. Ct. R. 9 11

Del. Sup. Ct. R. 10 11

Del. Sup. Ct. R. 10.2 11

Del. Sup. Ct. R. 12 11

Del. Sup. Ct. R. 14 11

Del. Sup. Ct. R. 18 11

Del. Sup. Ct. R. 25 11

Del. Sup. Ct. R. 26 11

Del. Sup. Ct. R. 30 11

Del. Sup. Ct. R. 32 11

Del. Sup. Ct. R. 41 11

Del. Sup. Ct. R. 42 11

Del. Sup. Ct. R. 43 11

Del. Sup. Ct. R. 51 11

Del. Sup. Ct. R. 52 11

Del. Sup. Ct. R. 56 11

Del. Sup. Ct. R. 57 11

Del. Sup. Ct. R. 66 11

Del. Sup. Ct. R. 68 11

Del. Sup. Ct. R. 69 11

Del. Sup. Ct. R. 72 11

Del. Sup. Ct. R. 81 11

Del. Sup. Ct. R. 86 11

R. Balotti & J. Finkelstein, THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 4.12[D] at 4-75 (2012 Supp.) 13

Synopsis: Commentary on Section 145(e), Senate Bill No. 533 (June 18, 1986) (adopted as 65 *Del. Laws*, c. 289 (1986)) 13

Nature Of Proceedings

This is an appeal from a well reasoned decision of the Court of Chancery granting judgment on the pleadings in favor of defendant Palladium Industries Inc. ("Palladium"). The Court of Chancery found, based on clear and unambiguous language, that Palladium's bylaw did not give Miller a mandatory right to advancement where they provide for advancement "unless otherwise determined by the Board of Directors in the specific case." Despite the plain language and intent of the bylaws, Miller has appealed the decision below.

Summary Of Argument

1. Denied. The provision states that advancement "shall be paid . . . unless otherwise determined by the Board of Directors in the specific case." The Vice Chancellor correctly held that Section 5 creates only a conditional or qualified, not mandatory, right to advancement: it empowers the board to deny advancement in specific cases. Miller's interpretation is contrary to the plain meaning of the words and of the document as a whole. Miller focuses only on the word "shall" to the exclusion of other operative terms. In violation of Delaware principles of contract construction, Miller assigns a meaningless interpretation to the phrases "unless otherwise determined by the Board of Directors in the specific case" and "subject to Sections 2 and 5 hereof."

2. Denied. Contra proferentum does not apply because (a) there is no ambiguity, as Miller's interpretation is not reasonable, and (b) the bylaw is not like an insurance contract or investor document that the insured or investor had no hand in crafting. Miller had a hand in crafting the bylaw as a director on the board that he claims approved it. He cannot assert ambiguity and invoke the doctrine against the corporation he was responsible for protecting.

Counterstatement Of Facts[1]

In the underlying lawsuit for which Miller seeks advancement, Palladium and its subsidiary VisionAid Inc. sued Miller for breach of his fiduciary duties, seeking to recover millions of dollars that Miller misappropriated and wasted when he was the CEO and a director. In March 2012, Miller demanded that Palladium advance his legal expenses for the underlying suit. (A45-46.) Within 30 days after Miller's demand, Palladium notified Miller that the board denied his request for multiple stated reasons, each one of which, according to the board, would have been sufficient. (A50-51.) Miller does not challenge the board's reasons or claim the board did not exercise its business judgment properly. Rather, he claims the by-laws left the board with no power to deny his request and instead granted him an unconditional right to mandatory advancement.

Miller rests his claim for advancement on Article X of the Palladium Bylaws. The relevant language from Article X – appearing in sections 1, 2, and 5 – provides as follows:

---

[1] As this appeal arises from the grant of a motion for judgment on the pleadings, the facts are taken from the complaint, which is included in the appendix to Miller's opening brief. Miller's appendix is cited as "A__." Palladium accepted the facts in the complaint as true only for purposes of its motion for judgment on the pleadings, but did not accept the complaint's legal conclusions. Palladium also reserved the right to contest Miller's allegations and to prove Palladium's defenses. For example, there is an issue as to whether the advancement bylaw was properly adopted. For purpose of its motion and this appeal only, Palladium has assumed in Miller's favor that it was, but this assumption does not aid Miller because, on its face, the bylaw empowered the board to deny advancement in specific cases.

> [From Section 1] The right to indemnification conferred in this Article X shall be a contract right and, ***subject to Sections 2 and 5 hereof,*** shall include the right to be paid by the corporation the expenses incurred in defending any such proceeding in advance of its final disposition. The corporation may, by action of the Board of Directors, provide indemnification to employees and agents of the corporation with the same scope and effect as the forgoing indemnification of directors and officers.
>
> [From Section 2] Any indemnification of a director or officer of the corporation under Section 1 of this Article X or advance of expenses under Section 5 of this Article X shall be made promptly, and in any event within thirty days, upon the written request of the director or officer…. If the corporation denies a written request for indemnification or advancing of expenses, in whole or in part, or if payment in full pursuant to such request is not made within thirty days, the right to indemnification or advances as granted by this Article X shall be enforceable by the director or officer in any court of competent jurisdiction.
>
> [From Section 5] Expenses incurred by any person described in Section 1 of this Article X in defending a proceeding shall be paid by the corporation in advance of such proceeding's final disposition ***unless otherwise determined by the Board of Directors in the specific case*** upon receipt of an undertaking by or on behalf of the director or officer to repay such amount if it shall ultimately be determined that he or she is not entitled to be indemnified by the corporation. Such expenses incurred by other employees and agents may be so paid upon such terms and conditions, if any, as the Board of Directors deems appropriate.

(A52-54 (emphasis added).) According to Miller's complaint, Article X was adopted by Palladium's board in December 2002, and Miller was a Palladium director at the time. (A7-8 (Compl. ¶¶ 2, 7).) In his opening brief, Miller excerpted some of the oral argument on the motion for judgment on the pleadings where Vice Chancellor Noble questioned Palladium about Section 1 of Article X, as if to imply that the decision was inconsistent with the Vice Chancellor's

comments. (Miller Br. 7-8 (citing A58-59).) In fact, the Vice Chancellor put numerous questions and comments to Miller's counsel as well:

> MS. MILLER: . . . the indemnity right granted [in Section 1] shall include the right to be paid in advance.
>
> THE COURT: But isn't that right subject to the language in Section 5 of Article 10? (A68.)
>
> . . .
>
> THE COURT: . . . Here, we have the "unless" language which is tied directly to the right to advancement. In other words, it seems to me that you can look at the two sentences in *Stockman* and read them as having separate purposes a lot more easily than you can here where the "unless" is in the same sentence and immediately follows the grant of the advancement right.
>
> In other words, it reads more clearly to be a condition on whether or not there is a right to advancement, while in *Stockman*, you can read that second sentence as simply going into the procedure that is used to actually make the payment, if you will. (A71-72.)[2]
>
> . . .
>
> THE COURT: Why can't I say the advancement here is conditioned upon whether the board wants to do it or not? (A74.)

The Court of Chancery granted Palladium's motion on December 31, 2012, entered judgment in favor of Palladium and against Miller, and dismissed Miller's complaint. Miller's appeal followed.

[2] *Stockman v. Heartland Industrial Partners LP*, 2009 WL 2096213 (Del. Ch.), on which Miller relies in his opening brief, is discussed in Section I.C.6. below.

Argument

I. THE VICE CHANCELLOR CORRECTLY CONSTRUED THE BYLAW

A. Question Presented

Does Palladium's bylaw grant the board the power to deny a director's request for advancement where the bylaw states that a director's defense costs shall be paid by the corporation in advance of a proceeding's final disposition "unless otherwise determined by the Board of Directors in the specific case . . . ."?

This issue was raised below in Palladium's opening brief in support of its motion for judgment on the pleadings (at 5-8) (Filing ID 44843209), in Miller's answering brief in opposition to that motion (at 6-15) (Filing ID 45223389), and in Palladium's reply brief in further support of that motion (at 1-7) (Filing ID 45357764).

B. Scope Of Review

On appeal from the grant of a motion for judgment on the pleadings, the "standard of review is to determine whether the court committed legal error in formulating or applying legal precepts." *Desert Equities Inc. v. Morgan Stanley Leveraged Equity Fund II LP*, 624 A.2d 1199, 1204 (Del. 1993) (citations omitted). As this is a question of law, the standard of review is *de novo*. *Id.* With respect to the interpretation of contracts, the standard of review is likewise *de novo*. *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1212 (Del. 2012).

C. Merits Of Argument

1. Principles Applicable To Interpretation Of Written Documents

When a bylaw or contract is unambiguous, the Court gives the terms the meaning that would be ascribed to them by a reasonable third party. *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992). *See also Demetree v. Commonwealth Trust Co.*, 1996 WL 494910, at *4 (Del. Ch.) ("Under the plain meaning rule of contract construction, if the contract is clear on its face, the Court will rely solely on the clear, literal meaning of the words."). Words of a written document are to be given their plain and ordinary meaning. *Rhone-Poulenc*, 616 A.2d at 1195. A contract is construed to give meaning to all its provisions. *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001).

A contract is not rendered ambiguous simply because the parties disagree over its proper construction. *Rhone-Poulenc*, 616 A.2d at 1196.

> Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings. Ambiguity does not exist where the court can determine the meaning of a contract without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends. Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty. The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.

Id. (citations and internal quotation marks omitted). Extraneous evidence cannot

be considered to find an ambiguity when none appears on the face of the document. *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

2. Principles Applicable To Advancement

Under Delaware law, there is no statutory right to advancement. *See* 8 *Del. C.* § 145(e) ("Expenses (including attorneys' fees) incurred by an officer or director . . . in defending any . . . action . . . ***may*** be paid by the corporation in advance of the final disposition of such action . . ." (emphasis added)). The statute merely *authorizes* a corporation to advance defense fees and expenses but does not mandate it. *Id.*; *Brooks-McCollum v. Emerald Ridge Serv. Corp.*, 2004 WL 1752852, at *2 (Del. Ch.) ("The Delaware General Corporation Law permits a corporation to advance the costs of litigation to a director. This allowance is ***permissive***, not mandatory. Thus, a corporation is free to limit the terms of advancement and even preclude advancement entirely." (emphasis in original)).

"[A]bsent a clearly worded bylaw or contract making advancement mandatory, Delaware law leaves the decision whether to advance expenses to the business judgment" of the entity's governing body. *Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1008 (Del. Ch. 2007). *See also Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 593 (Del. Ch. 2006) ("[A] limited liability company will only be obligated to advance litigation expenses to an officer when

its LLC agreement expressly states the company's intention to mandate advancement.") (citation omitted); *Havens v. Attar*, 1997 WL 695579, at *1 (Del. Ch.) ("[A]bsent a specifically worded by-law providing for mandatory advancement, 8 *Del. Ch.* § 145(e) leaves to the business judgment of the board the task of determining whether . . . advancement of expenses would on balance be likely to promote the corporation's interests."); *Advanced Mining Sys., Inc. v. Fricke*, 623 A.2d 82, 84 (Del. Ch. 1992) (denying motion to compel advancement of legal expenses; for advancement to be mandatory, the bylaw must "expressly . . . state its intention to mandate the advancement by the corporation . . .").

3. The Court Of Chancery Correctly Interpreted The Bylaw

Article X, Section 5 of the bylaw states:

> Expenses incurred by any person described in Section 1 of this Article X in defending a proceeding shall be paid by the corporation in advance of such proceeding's final disposition ***unless otherwise determined by the Board of Directors in the specific case*** upon receipt of an undertaking by or on behalf of the director or officer to repay such amount if it shall ultimately be determined that he or she is not entitled to be indemnified by the corporation . . . .

(A9 (emphasis added).) The emphasized words – introduced by the word "unless" – create an exception.[3] The plain, obvious, and common sense meaning of this

[3] The standard dictionary definition of "unless" is "except under the circumstances that." http://dictionary.reference.com/browse/unless?s=t. Black's Law Dictionary (5th ed. 1979) defines "unless" as follows: "If it be not that; if it be not the case that; if not; supposing not; if it be not; except. A reservation or option to change one's mind provided a certain event happens, a conditional promise." *Id.* at 1378.

sentence, applying conventional principles of grammar and syntax, is that expenses shall be paid in advance of the underlying proceeding's final disposition unless the board, on a case by case basis, determines not to do so. This is the meaning that would be apparent to an ordinary reader, just as it was to the Court of Chancery:

> The only reading of Palladium's advancement provision is that advancement shall be paid (*i.e.*, up to this point it is mandatory) unless Palladium's board specifically determines not to pay a specific advancement. In other words, Palladium must advance legal fees and expenses if the board does not adopt a contrary directive. This is the only fair reading of the pertinent provision (Art. X) of Palladium's Bylaws.

(Opinion at 8.)[4] No language limits what the board may or may not consider in making this determination. An interpretation making advancement mandatory, as Miller argues, would make the "unless" clause meaningless and therefore would be improper. *O'Brien*, 785 A.2d at 287.

Contrary to Miller's argument, neither the lower court nor Palladium have assigned unusual meanings to the words shall and unless. Shall means shall and unless means unless. The two words can co-exist in the same sentence, and, when they do, the "unless" clause creates an exception to the "shall" clause. Phrases or clauses often create exceptions to what otherwise could be unconditional obligations, using the convention "shall . . . unless." One need only look to

---

[4] The Court of Chancery opinion is attached as Exhibit 1 to Miller's opening brief and is cited here as "Opinion."

Delaware General Corporation Law for numerous examples. *See, e.g.*, 8 *Del. C.* § 102(b)(3) ("All such rights in existence on July 3, 1967, ***shall*** remain in existence unaffected by this paragraph ***unless*** and until changed or terminated by appropriate action which expressly provides for the change or termination"); 8 *Del. C.* § 110(g) (in emergencies, officers who are present "***shall*** . . . be deemed . . . directors for such meeting" "***unless*** otherwise provided in emergency bylaws"); 8 *Del. C.* § 212(b) ("no such proxy ***shall*** be voted or acted upon after 3 years from its date, ***unless*** the proxy provides for a longer period"); 8 *Del. C.* § 217(a) ("Persons whose stock is pledged ***shall*** be entitled to vote, ***unless*** . . . the pledgor . . . has expressly empowered the pledgee to vote . . ."). Similar examples appear in the rules of this Court, which contain no fewer than 34 instances where something "shall" or "shall not" happen "unless" this Court orders otherwise or something else occurs.[5] This linguistic convention is so common that Miller's logic, if credited, would render ambiguous countless legislative enactments and court rules while inexplicably presuming that those who write our laws and rules mean to create no exceptions when they use a phrase introduced by "unless" after a phrase introduced by "shall." Both below and here, Miller has failed to explain

[5] *See, e.g.*, Del. Sup. Ct. R. 3 (a); 4 (c), (d), (f); 9 (b)(ii), (bb), (e); 10 (b); 10.2 (3), (9); 12 (a)(i); 14 (e), (h); 18; 25 (a); 26 (d)(3); 30 (c); 32 (c)(iii), (d); 41 (c)(v); 42 (d); 43 (b)(iii), (b)(vi); 51 (a); 52 (a)(8)(iv), (e); 56 (b)(2); 57 (c)(5); 66 (b)(vii); 68 (c)(1), (e); 69 (g)(i); 72 (c); 81 (d); 86 (f).

how Section 5 can be ambiguous when the legislature and courts have repeatedly used these terms together.

4. Statutory History Supports Palladium's Interpretation

The statutory history of Section 145 provides context for the language at issue and makes clear that, when a Delaware board is empowered to act on an advancement request "in the specific case," the board is limited only by the business judgment rule and its fiduciary duties to the corporation. In 1983, the advancement statute provided:

> Expenses incurred by an officer or director in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding ***as authorized by the board of directors in the specific case*** upon receipt of an undertaking by or on behalf of such director or officer to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the corporation as authorized in this section . . . .

8 *Del. C.* § 145(e) (1983) (current version at 8 Del. C. § 145(e) (2013)) (emphasis added). As the statute was drafted, advancement was to be provided only if the board of directors affirmatively authorized it in the specific case. Absent such authorization, advancement could not be provided. As worded, the statute also precluded corporations from having bylaws providing for mandatory advancement. The decision had to be made on a case by case basis, i.e. in each specific case.

In 1986, the legislature amended the statute and deleted the words "as authorized by the board of directors in the specific case," making the statute read:

> Expenses incurred by an officer or director in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking . . . .

8 *Del. C.* § 145(e) (1986) (current version at 8 Del. C. § 145(e) (2013)). The amendment's purpose was "to permit general authorization of advancement of expenses including a mandatory certificate of incorporation or bylaw provision to that effect." Synopsis: Commentary on Section 145(e), Senate Bill No. 533 (June 18, 1986) (adopted as 65 *Del. Laws*, c. 289 (1986)). With this amendment, advancement could now "be made automatically pursuant to a resolution, by-law, or agreement . . . , subject to the officers' and directors' undertaking to repay." R. Balotti & J. Finkelstein, THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 4.12[D] at 4-75 (2012 Supp.). However, where the corporation had not undertaken to provide for automatic advancement in such a resolution, bylaw, agreement, or certificate of incorporation,

> Section 145(e) leaves ***to the business judgment of the board*** the task of determining whether the undertaking proffered in all of the circumstances, is sufficient to protect the corporation's interest in repayment ***and whether, ultimately, advancement of expenses would on balance be likely to promote the corporation's interests***.

Advanced Mining, 623 A.2d at 84 (emphasis added). Absent a provision mandating advancement, it remains the board's "function under Section 145(e) to evaluate the corporation's interest with respect to advancement of expenses." *Id.* at 84-85.

According to the complaint, the asserted bylaw amendment was adopted in 2002. (A8.) If the board had intended to create a mandatory right of advancement for officers and directors in every case, not subject to the business judgment of the board in the specific case, it was statutorily free to do so. However, it would not have done so by the language it chose. It particularly would not have adopted language empowering the board to make advancement determinations "in the specific case" when the legislature had previously used the phrase "in the specific case" to ***preclude*** mandatory advancement and to provide for ***permissive*** advancement on a case by case basis, and when case law indicated that, absent provisions mandating advancement in every case, a board is to consider whether "advancement of expenses would on balance be likely to promote the corporation's interests." *Advanced Mining*, 623 A.2d at 84-85 (the words "in the specific case" make it "extremely unlikely that a reasonable person could then have assumed that a right to advancement ***in every case*** had been created . . .") (emphasis added). Instead, the board would have omitted the "in the specific case" phrase altogether and said simply:

> Expenses incurred by any person described in Section 1 of this Article X in defending a proceeding shall be paid by the corporation in advance of such proceeding's final disposition upon receipt of an undertaking by or on behalf of the director or officer to repay such amount if it shall ultimately be determined that he or she is not entitled to be indemnified by the corporation.

5. Miller Misreads The Bylaw

To interpret the bylaw as providing mandatory advancement, Miller tortures its plain language, ignores key provisions, and applies flawed logic. Miller's first flawed argument is that the word "shall" creates an absolute mandatory obligation that cannot be subordinated to or limited by any other phrase or words in the bylaws. (Miller Br. 13-14.) Miller supports his theory with several cases that he claims stand for the proposition that use of "[t]he word 'shall' indicates a mandatory obligation to provide advancement." (*Id.*) Notably, none of those cases involved advancement provisions containing an "unless" or "subject to" clause or any other exceptions or qualifications. And the *Schoon* case on which Miller relies supports Palladiums' position, not Miller's. *See Schoon v. Troy Corp.*, 948 A.2d 1157, 1169 (Del. Ch. 2008) ("'shall' in section 9 establishes a right to mandatory advancement . . . ***so long as the right is not limited by other terms in the bylaws***") (emphasis added).

Miller's second, and related, flawed argument is that, if Section 5 gives the board power to deny advancement in the specific case, then Section 5 would be "inconsistent" with Section 1 as it would "take[]. . . away" the "mandatory advancement granted in Section 1." (Miller Br. 15-16.) But Miller's argument ignores the "subject to" language in Section 1 and the plain, ordinary, and only possible meaning of the "unless" clause in Section 5.

The "subject to" language appears immediately before and in the very sentence as the words he claims grant him an unconditional advancement right:

> The right to indemnification conferred in this Article X shall be a contract right and, ***subject to Sections 2 and 5 hereof*****,** shall include the right to be paid by the corporation the expenses incurred in defending any such proceeding in advance of its final disposition.

(A52-53 (emphasis added).) The phrase "subject to Sections 2 and 5" eliminates any alleged inconsistency between Sections 1 and 5: whatever advancement rights are discussed in Section 1 rise no higher than the rights discussed in Section 5. *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 56 A.3d 1072, 1129 (Del. Ch. 2012) (where paragraph 3 stated it was "subject to" paragraph 4, this language prevents any reading of paragraph 3 that would permit escape from paragraph 4; there is "no reasonable way of concluding that the addition of words expressly subjecting ¶ 3 to ¶ 4 made ¶ 4's scope narrower . . . and weaker [than ¶ 3;] . . . it was making ¶ 4 more powerful than ¶ 3 and subordinating ¶ 3 to ¶ 4"), *aff'd*, 45 A.3d 148 (Del. 2012) (TABLE). Section 5 is thus superior to and more powerful than Section 1, and nothing in Section 1 can trump, temper, qualify, condition, or limit the board's power under Section 5 to deny advancement in the specific case. *Id. See also Delta & Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417, at *3 n.15 (Del. Ch.) (stating that when one provision is "subject to another," the latter controls the former). Otherwise, Section 5 would be subject to Section 1, which the words of Section 1 do not permit.

Miller mistakenly asserts that "[n]either Palladium nor the Court of Chancery provided any reason why the Bylaws would grant mandatory advancement in Section 1 and then take it away in Section 5." (Miller Br. 16.) Apart from that Miller's major premise is wrong – Section 1 does not grant mandatory advancement but only conditional advancement – Miller is also wrong that neither Palladium nor the Court of Chancery explained why the bylaws would be structured as they are. Palladium and the Court of Chancery gave the "subject to" and "unless" clauses their plain and ordinary meanings and read Sections 1, 2, and 5 as a harmonious whole, as case law requires. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010). Section 1 provides a right to advancement that is qualified by and subordinate to Sections 2 and 5. Section 2 creates a 30-day period for the board to act on an advancement request, and Section 5 states that advancement will be made unless the board determines otherwise in the specific case. When read as a whole, these sections establish an orderly process for handling advancement requests: if the board denies a request for advancement under Section 5 within the time provided by Section 2, then there is no right to advancement. This strikes an appropriate balance and gives the board a reasonable period to decide, on a case by case basis, whether providing advancement is in the company's best interest, while not leaving the officer or director waiting interminably for a decision. The lower court acknowledged this:

> Palladium's board, as it was authorized to do, adopted an advancement regime which assured its covered officers, directors, and employees of advancement unless the board acted to deny the right in a particular case.

(Opinion at 9.)

Miller attempts to support his interpretation by making comparisons to provisions dealing with employees, which use the words "may be indemnified" or "may be . . . paid" expenses in advance. (Miller Br. 17.) He argues that, if officers or directors were granted only "permissive advancement," the word "may," not "shall," would have been used for officers and directors too. Miller's reasoning is flawed: he continues to read the words "may" and "shall" in isolation and fails to appreciate the two different paradigms the bylaws create – one for employees and one for directors and officers. An employee has no right to advancement unless and until the board of directors determines to advance the employee's expenses, and then only on "such terms and conditions, if any, as the Board of Directors deems appropriate." (A54 (Section 5 (last sentence)).) This is expressed using the "may" clause. By contrast, an officer or director is entitled to advancement unless the board takes the affirmative step of determining otherwise. If the board denies the officer's or director's request under Section 5 within the time allotted by Section 2, there is no right to advancement, but failure to deny will create that right without further board action. Thus, unlike employees who must await affirmative action by the board, which might never occur, officers and directors become

entitled to advancement if the board does not conclude otherwise within a relatively short time, assuming the officer or director has provided the statutorily-mandated repayment undertaking. This conditional right to advancement is expressed by using the "shall" and "unless" clauses. The difference in language between the applicable sentences is because the sentences provide for different treatment. The difference in treatment, however, is not between permissive and mandatory advancement but between permissive and conditional advancement.

Miller also tries to conjure up an "absurd result" if the lower court were affirmed. (Miller Br. 19.) He argues a director could incur substantial expenses before making a demand on the board and, by waiting, be entitled to repayment of all expenses incurred up until the board denies the request (Miller Br. 19) as if the right to reimbursement is vested for all expenses incurred before the denial and as if the denial applies only prospectively to later incurred expenses.

Miller did not make this argument below, so this Court should not consider it here. *Smith v. Del. State Univ.*, 47 A.3d 472, 479 (Del. 2012) (declining to consider argument not raised by appellant below); *Equitable Trust Co. v. Gallagher*, 77 A.2d 548, 550 (Del. 1950) (declining to consider legal theory not presented by appellant below). In all events, the argument has no merit. The lower court did not interpret the bylaw as creating a vested right to advancement of all expenses incurred up to the time the board denies an advancement request, and

such an interpretation does not logically follow from the lower court's reasoning or the language of the bylaw. Perhaps Miller is seizing on the lower court's parenthetical comment in this sentence: "The only reading of Palladium's advancement provision is that advancement shall be paid (*i.e.*, up to this point, it is mandatory) unless Palladium's board specifically determines not to pay a specific advancement." (Opinion at 8.) The court was clearly referring to "up to this point" *in the analysis of the bylaw*, not "up to this point" *in time*. Nor is Miller's imagined temporal vesting scheme supported by the bylaw's language, which contains no suggestion that an officer or director could thwart the power of the board to deny an advancement request by the simple expedient of waiting for expenses to build up before making a demand. If a director submits a bill for already-incurred legal expenses and asks the company to pay it, the bylaw gives the board authority to determine in the specific case not to pay it, just as it gives the board authority to determine not to pay future expenses either.[6]

Miller makes another argument – also not presented to the lower court – to this effect (Miller Br. 20):

1. Under the lower court's interpretation, only two types of board response could ripen into a right to advancement: inattention to the advancement request or conscious approval of it.

[6] The bylaw uses the word "unless," not "until," to introduce the words "otherwise determined by the Board of Directors in the specific case."

2. Inattention would be a breach of fiduciary duty, and it should not be presumed that the bylaw meant for advancement to be contingent on a breach of fiduciary duty.

3. Since the bylaw therefore must have envisioned a conscious consideration of each request, then, as interpreted below, it was purposely providing for discretionary advancement.

4. If the bylaw purposely intended to provide for discretionary advancement, it would have used the word "may," not "shall."

Like Miller's other arguments, this syllogistic argument is also flawed. Miller merely presumes that inattention is the only reason the board might not affirmatively vote to approve an advancement request. This is clearly not the case. The board can consider an advancement request, deem it appropriate, and then affirmatively decide not to deny it, knowing this will result in advancement.[7] Thus, a director's right to advancement is not "contingent upon the Palladium board breaching its duties." (Miller Br. 20.)

6. Miller Fails To Give A Sensible Meaning To The "Unless" Clause

To avoid a rejection of his interpretation, Miller must assign some meaning to the "unless" clause, or else run afoul of the rule that a construction must be

[7] Miller cites no authority for his premise that mere inattention to an advancement request is a breach of fiduciary duty. It would take *gross* negligence before inattention becomes a breach of fiduciary duty. *Malpiede v. Townson,* 780 A.2d 1075, 1089 (Del. 2001). Given that the advancement statute authorizes, but does not compel, a corporation to provide for advancement in every case even without board approval, there would be nothing untoward or amiss in a bylaw granting a right to advancement if the board failed to act on an advancement request after a reasonable time.

avoided if it would render a provision meaningless. The meaning Miller assigns to the "unless" clause is that it gives the board simply a limited ministerial role to assess whether conditions for advancement have been satisfied. (Miller Br. 21-24.)

Miller rests his interpretation not on the words of the bylaw – as none point to the meaning Miller claims – but on *Stockman v. Heartland Industrial Partners, L.P.*, 2009 WL 2096213 (Del. Ch.), where the operative language was quite different from the language at issue here. In *Stockman*, the court needed to reconcile two standalone unqualified sentences. The first one stated:

> Expenses reasonably incurred by an Indemnitee in defense or settlement of any claim that may be subject to a right of indemnification hereunder shall be advanced by the Partnership prior to the final disposition thereof upon receipt of an undertaking by or on behalf of the Indemnitee to repay such amount to the extent that it shall be determined ultimately that such Indemnitee is not entitled to be indemnified hereunder.

Id. at *3 (emphasis omitted). The second stated:

> No advances shall be made by the Partnership under this Section 4.4(b)(i) without the prior written approval of the General Partner or (ii) in connection with an action brought against an Indemnitee by a Majority in Interest of the Limited Partners.

Id. The partnership argued that the two sentences should be read together as creating a right to advancement only if the general partner, in the exercise of its sole discretion, gave written approval. The court disagreed because it viewed the first statement as creating a self-contained unqualified right to advancement upon the submission of the undertaking, and therefore viewed the partnership's

interpretation of the second sentence as conflicting with the first sentence. Having rejected the partnership's interpretation, the court reconciled the two sentences by construing the second as giving the general partner only a limited non-discretionary role of policing the express preconditions to advancement in the partnership agreement. *Id.* at *7.

The Chancery Court rejected Miller's reliance on *Stockman*. (Opinion at 9-11.) Distinguishing Palladium's bylaws from those in *Stockman*, the court wrote:

> [T]here is no way to isolate the "unless" provision from the advancement grant provision. There is no way to give separate and independent meaning to the "unless" clause except as Palladium has interpreted it. Section 1 of Article X of Palladium's Bylaws is expressly made subject to Section 5. The "unless" language is an integral part of Section 5. Ultimately, the difference between Miller's claim and *Stockman*'s claim is that Miller has not conjured up a way to give meaning to the "unless" phrase.

(*Id.*)

Setting aside whether *Stockman* was correctly decided, Miller's interpretation of the "unless" clause is unreasonable because no language in Article X remotely references the limits Miller seeks to impose on the Palladium board. Unlike in *Stockman*, the only two Palladium sentences that speak to whether an officer or director may obtain advancement are both qualified and conditional. The sentence in Section 1 that provides for advancement says that it is "subject to Sections 2 and 5." The sentence in Section 5 says that advancement shall be provided "unless otherwise determined by the Board of Directors in the specific

case." By using this language and expressly making the right to advancement subordinate to the board's power to make a contrary determination, the Palladium language creates no conflict between provisions: a right to advancement is not discussed without immediate reference to the conditions placed upon it. Hence, there is no reason to search for a harmonizing interpretation as the court did in *Stockman*, much less one that places artificial limits on the board's power. Indeed, under the guise of construing the bylaw, Miller is asking the Court to rewrite the bylaw to provide that "the board, in exercising its policing powers," may only "determine[] that the individual seeking the advancement is not qualified." (Miller Br. 22-23.) The bylaws are not so limited and Miller's attempt to rewrite them is improper. *Tafeen v. Homestore, Inc.*, 2004 WL 3053129, at *3 (Del. Ch.) ("[I]t is not this Court's role to rewrite a company's bylaws."), *aff'd*, 888 A.2d 204 (Del. 2005).

Moreover, it defies common sense that, in reserving to itself the power to deny advancement in the specific case, the board was, by silence, placing limits on how it could exercise that power or vote on an advancement request. *Cf. Paramount Commc'ns Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989) ("Delaware law imposes on a board of directors the duty to manage the business and affairs of the corporation" and confers a "broad mandate . . . to enhance corporate profitability;" "directors, generally, are obliged to chart a course for a

corporation which is in its best interests . . .”). If the board had intended, in Section 5’s “unless” clause, to tie its hands and limit the scope of its consideration, it surely would have said so. *See Rohe v. Reliance Training Network, Inc.*, 2000 WL 1038190, at *15 (Del. Ch.) (it seems strange that parties would be bound to cast a corporate vote in a particular way; “if such a voting obligation was intended,” the corporate documents would be expected to so state). It is also illogical that the bylaws would assign mere ministerial tasks to the board of directors, a deliberative body that operates by majority vote.

And if the “unless” clause were to have the meaning Miller assigns to it – i.e., that the board would only have “policing powers to ensure that the other conditions of mandatory advancement have been satisfied,” Miller Br. 22 – then the clause would be rendered meaningless in violation of established canons of construction.[8] With or without the “unless” clause, every request for advancement requires the corporation to determine, at a minimum, whether the conditions for advancement have been satisfied. If they have not been satisfied, then the request would not be granted and advancement would not be provided. The officer or director might, of course, sue for advancement, but if the conditions have not been satisfied the suit would fail. Under Miller’s interpretation, nothing would turn on

[8] A contract should not be interpreted to “‘render any provision or term illusory or meaningless.’” *Stockman,* 2009 WL 2096213, at *6 n.24.

the board's decision because either the conditions are satisfied or they are not. Accordingly, there would be no reason to provide in the by-laws that the board has the power to ensure whether the conditions for advancement have been satisfied. It already has that power. 8 *Del. C.* § 141(a).[9]

[9] Another point distinguishes this case from *Stockman*. In *Stockman,* there could be no advancement absent a written sign-off by the general partner. The court viewed the general partner's sign-off role as performing an administrative function, i.e., to make sure the conditions to advancement were satisfied. By contrast, the Palladium language does not require a written sign-off from the board of directors or anyone else.

II. THE CONTRA PROFERENTUM RULE DOES NOT APPLY

A. Question Presented

Did the Court of Chancery correctly refuse to apply the contra proferentum doctrine where the bylaw is unambiguous and where Miller seeks to apply it to a document that he was involved in creating?

This question was raised below in Miller's answering brief in opposition to the motion for judgment on the pleadings (at 18-20) and in Palladium's reply brief in further support of that motion (at 12-14). The Chancery Court expressly declined to consider the contra proferentum doctrine because it determined that Article X is not ambiguous. (Opinion at 8 n.19.)

B. Scope Of Review

As stated in Section I.B., this Court's review of the Chancery Court's grant of Palladium's motion for judgment on the pleadings "is to determine whether the court committed legal error in formulating or applying legal precepts." *Desert Equities Inc.*, 624 A.2d at 1204. As such, the standard of review is *de novo*. *Id.*

C. Merits Of Argument

1. Principles Applicable To Contra Proferentum Doctrine

The rule of contra proferentum is one of last resort, such that a court will not apply it if the provision can be construed by applying more favored rules of construction. *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108,

1114 (Del. 1985). For the rule to apply, there must be an ambiguity in the document, one of the parties must have controlled the drafting, and the other party must have had very little say about its terms except to take them or leave them or to select from limited options offered by the dominant party. *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 42 (Del. 1998). Historically, the doctrine has only been applied to benefit insureds who had no control in drafting an insurance policy or investors who had no control in drafting documents governing the rights of investors. *Id.* at 42-43.[10]

2. Contra Proferentum Does Not Apply Here

Miller hopes that, if the Court can somehow see its way to finding the language ambiguous, then the principle of contra proferentum – resolving ambiguities against their drafters – will result in a victory for Miller. Miller's reliance on contra proferentum is unavailing.

As the analysis above shows, Miller's interpretation of the bylaws ignores whole phrases, ignores the plain and ordinary meaning of the words, fails to read the document as a whole, renders the "unless" clause unnecessary, and is contrary

---

[10] *See, e.g.*, *Bank of N.Y. Mellon v. Commerzbank Capital Funding Trust II*, ___ A.3d ___, 2013 WL 1136821, at *9 (Del.) (applying the "'reasonable expectation of investors' principle[, which] is a specialized application of the *contra proferentum* doctrine"); *Emerald Partners v. Berlin*, 726 A.2d 1215, 1222 (Del. 1999) (proxy statements); *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149–50 (Del. 1997) (insurance policy); *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 398 (Del. 1996) (bond contracts that created preferred shares).

to common sense. Thus, there is no basis to find that Miller's interpretation is a reasonable alternative, which is a necessary condition to finding ambiguity, which itself is a condition to invoking contra proferentum. The mere fact that Miller has adopted a different interpretation does not render the bylaw ambiguous. *Rhone-Poulenc*, 616 A.2d at 1196.

Miller also erroneously seeks to apply contra proferentum in lieu of a factual inquiry into the bylaw's intent. Substituting contra proferentum for a factual inquiry would work for insurance contracts (when invoked by insureds) or to "certain corporate documents involving the rights of investors" (when invoked by investors). *SI Mgmt. L.P.*, 707 A.2d at 42-43. *See also* cases cited *supra* note 10.

The policy of contra proferentum has no traction when invoked by a director – particularly one like Miller – who claims that a bylaw adopted while he was the CEO and on the board (A7-8) is ambiguous and should be construed in his favor and against the company he was leading. Companies are inanimate. They can only act through others. In the case of a director voting on a proposed bylaw, it is the director's responsibility to inform himself that the proposed wording sets forth the obligations he wishes the corporation to assume. Otherwise, he cannot make an informed and responsible decision. The director is himself in a position to identify any ambiguities, call them out to his fellow directors, and propose modifications to eliminate them.

If contra proferentum is to be applied to a bylaw in a dispute between the corporation and a director who had a hand in adopting it, contra proferentum works against the director and in favor of the corporation, because the corporation cannot negotiate the terms of its own bylaws. It receives the bylaws as the directors enact them. Thus, ambiguities, if any, should not be resolved, as Miller seeks to do, by construing them against the corporation he was responsible for protecting.

Conclusion

For the foregoing reasons, the judgment of the Court of Chancery should be affirmed. In the event this Court holds that the Court of Chancery's interpretation was in error, then this case should be remanded for further proceedings, including adjudication of Palladium's defenses.

POTTER ANDERSON & CORROON LLP

By /s/ Stephen C. Norman
Stephen C. Norman (#2686)
Tyler J. Leavengood (#5506)
Hercules Plaza
1313 North Market Street, 6th Floor
P.O. Box 951
Wilmington, Delaware 19899
(302) 984-6000

Attorneys for Defendant-Below, Appellee Palladium Industries Inc.

OF COUNSEL:
Kenneth R. Berman
Jonathan R. Allen
Nutter McClennen & Fish LLP
Seaport West
155 Seaport Boulevard
Boston, Massachusetts 02210
617-439-2000

Date: May 24, 2013
1107663

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2013, a copy of the foregoing document was served electronically via *File & ServeXpress* upon the following counsel of record:

Kathleen M. Miller, Esquire
SMITH, KATZENSTEIN & JENKINS LLP
800 Delaware Avenue
Wilmington, Delaware 19801

/s/ Tyler J. Leavengood
Tyler J. Leavengood (#5506)