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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE FOX CORPORATION / SNAP INC. SECTION 242 LITIGATION	CONSOLIDATED No. 120, 2023 Court below: Court of Chancery of the State of Delaware C.A. No. 2022-1007-JTL C.A. No. 2022-1032-JTL

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS[1]

This appeal arises from the Court of Chancery's resolution of cross-motions for summary judgment against Appellants-Plaintiffs below ("Appellants" or "Plaintiffs") and for Appellees-Defendants below ("Appellees" or "Defendants") in two coordinated actions. Both actions involve controlled companies (Fox Corporation ("Fox") and Snap Inc. ("Snap")) that have multiple-class equity structures, controllers who also serve as officers, and a class of non-voting stock widely held by public investors.

The issue on appeal is whether separate class votes were required under Section 242(b)(2) of the Delaware General Corporation Law ("DGCL")[2] when the controlled companies' boards of directors proposed to amend their respective charters to adversely affect the power of stockholders to sue officers for breach of their fiduciary duty of care (the "Charter Amendments"). Notwithstanding the judgment entered by the Court of Chancery (the "Judgment"), the DGCL plainly requires a separate class vote.

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[1] Unless indicated, emphasis and alterations are added, internal quotations and citations are omitted, and certain clean ups are made.

[2] As used herein, "Section" refers to the relevant section of the DGCL.

What is remarkable about the trial court's 70-page transcript ruling ("Transcript")[3] is how comprehensively the Vice Chancellor articulated the reasons why the Judgment should have been for Plaintiffs and against Defendants. Between the Court's opening declaration of its ruling and conclusion reiterating the outcome, the Vice Chancellor painstakingly detailed the illogic of and indefensible policy underlying Defendants' interpretation of Section 242(b)(2). As the Court of Chancery pithily observed:

> [T]he interpretations of the statute that [Defendants] support are incoherent, because they create conflicting results in substantively identical circumstances. ***An incoherent interpretation of a statute should be an unpersuasive one***.[4]

The trial court nevertheless adopted Defendants' "incoherent interpretation" that a "power" is only cognizable under Section 242(b)(2) and triggers a class vote if it appears expressly in a company's certificate of incorporation. Accepting Defendants' position required the Court to override the statute's plain language, which mandates a class vote when a charter amendment curtails the power to sue:

> The holders of the outstanding shares of a class ***shall be entitled to vote as a class*** upon a proposed amendment … if the amendment would … alter or change the ***powers***, preferences, or special rights of the shares of such class so as to ***affect them adversely***.[5]

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[3] Telephonic Rulings of the Court on Cross-Motions for Summary Judgment, dated March 29, 2023 ("Tr.") (attached hereto as Exhibit A).

[4] Tr. at 48.

[5] 8 *Del. C.* § 242(b)(2).

"If the plain language [of the statute] is clear and unambiguous, the analysis ends."[6] As the trial court synthesized it, Plaintiffs' construction offers a straightforward, predictable, and inherently logical rule of law:

> There are three fundamental stockholder powers: to vote, to sell, and to sue. There are other rights set forth in the DGCL. And there are express rights. If you affect any of those adversely, you trigger a class vote for the affected class.[7]

The trial court also agreed with Plaintiffs that applying their interpretation would be good policy and would not cause collateral problems. For policy, after demonstrating that a class of stock wielding majority voting power cannot unilaterally amend a charter to eliminate another class's power to vote or sell, the Vice Chancellor observed that all powers and rights hinge on the power to sue:

> ***I think there is a strong argument that the power to sue is the foundational power***, meaning that it is the power that is essential to all others and on and on which the legal regime is built. Why? Because if you cannot go to court, then you cannot enforce your other rights. If you cannot obtain a judgment, backed by the power of the state, that allows you to invoke the power of the state on your behalf to enforce your other rights, such as the power to vote or the power to sell, ***you might as well not have those powers***.[8]

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[6] *AlixPartners, LLP v. Benichou*, 250 A.3d 775, 788 (Del. Ch. 2019).

[7] Tr. at 55.

[8] Tr. at 63-64.

This Court recently expressed a similar sentiment in *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, when it characterized the ability to "police corporate misconduct" as "fundamental."[9]

The lower court also rejected Defendants' heavy-handed "the sky-will-fall-and-the-corporate-world-will-be-destabilized" threats, observing:

> Now, what would the real-world consequences of this interpretation [*i.e.*, Plaintiffs'] of Section 242(b)(2) actually be? I would say not much. It would have no effect on new IPOs, where the issuing company can still put whatever it wants in its charter. It would have no effect on single-class corporations. ***The main effect would be to provide protection for stockholders in multi-class corporations where one or more issuances dominate the voting power and another issuance is vulnerable***.
>
> Even then, ***if the amendment is good for all stockholders, then the class votes should be easy to get.***[10]

If the trial court found that Plaintiffs' proffered rule of law is supported by the statute's plain language, reflects coherent and wise policy, and adoption would not cause market uncertainty or instability, why did it render judgment for Defendants? Plaintiffs infer that the Court of Chancery went out of its way to show deference to this Court's prerogative to distinguish "interpretive gloss[]"[11] versus the precedential

[9] 261 A.3d 1199, 1225 (Del. 2021).

[10] Tr. at 59-60.

[11] Tr. at 4.

effect of its 1942 ruling in *Hartford Accident & Indemnity Co. v. W. S. Dickey Clay Manufacturing Co*.[12]

The Vice Chancellor carefully parsed the underlying facts and legal question in that matter, and articulated why the language upon which Defendants in this Action rested their position did not answer the question currently posed. Yet, since Defendants posited that overbroad language in a few legal treatises and a 1993 Court of Chancery ruling established a "conventional wisdom" about the import of the *dicta* in *Dickey Clay*,[13] the trial court decided to respect this Court's role in finally deciding what the law really is.[14]

Whether such deference is commendable, the Judgment is incorrect. *Dickey Clay* stands for the black-letter-law proposition that no class vote is required merely because the creation of a new class of stock (or increasing the shares of an existing class) harms the ***relative*** economic or voting power of the complaining class. *Dickey Clay* ***did not*** involve any adverse change to the innate "powers" or "rights" of the stock itself, such as the narrowing or elimination of stockholders' power to sue. Simply put, *Dickey Clay* does not control here, and its *dicta* cannot supplant the plain language of Section 242(b)(2).

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[12] 24 A.2d 315 (Del. 1942).

[13] *Orban v. Field*, 1993 WL 547187, at *8 (Del. Ch. Dec. 30, 1993).

[14] *See* Tr. at 3 ("I am under no illusions that my ruling will be the last word on this subject.").

The Court of Chancery also purported to give "deference to long-standing practitioner expectation"[15] that Section 242(b)(2) would not require separate class votes under these facts. Doing so was error for at least two reasons. First, as discussed above, a triumph of ill-placed "conventional wisdom" over plain statutory language runs headlong into well-settled rules of interpretation.[16] Second, the procedural posture of this Action was cross-motions for summary judgment, yet Defendants did not provide ***any*** evidence of practitioner expectation as related to the question of the statutory need for class votes on an amendment to strip the power to sue. Neither the lower court nor this Court should give weight to Defendants' self-serving – and unsubstantiated – proclamation of practitioner expectation.

* * * * *

At bottom, the Vice Chancellor's substantive analysis, in a unique Transcript, provides a clear and persuasive roadmap for this Court to reverse. This Court can agree with the Vice Chancellor's logic and clarify that the operative language of *Dickey Clay* that Defendants latched onto was non-binding *dicta*, or it can reverse that 1942 opinion to avoid an "incoherent" statutory interpretation. Consistent with the reasoning of almost all of the lower court's ruling, the public investors of Snap

[15] Tr. at 68.

[16] *See Bd. of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 331 (Del. 2012) ("[W]hen a statute is clear and unambiguous there is no need for statutory interpretation.").

and Fox were entitled to a separate class vote before their respective controlling stockholder-officers imposed Charter Amendments adversely affecting the power to enforce fiduciary duties. The Judgment should be reversed.

SUMMARY OF ARGUMENT

Issue 1: The court below erred in holding that Section 242(b)(2) did not mandate separate class votes on the Charter Amendments.[17]

The statute's plain language compels that a charter amendment depriving stockholders of the ability to hold officers liable for certain breaches of the duty of care adversely affects the stocks "powers." Given well-settled rules of statutory interpretation, that should be the end of the analysis.

Adopting Appellees' proffered interpretation of Section 242(b)(2) leads to irrational outcomes and a rule that undermines the predictably of how Delaware law would treat substantively identical circumstances. Such an interpretation, as the lower court observed, is "incoherent" and "unpersuasive."[18]

Specifically, Appellees argued that a class vote is only required when a power, preference, or special right ***expressly set forth in the charter*** would be adversely affected by an amendment. According to Appellees, the holders of a class of stock representing a majority of all voting power can unilaterally eliminate a core substantive right of another class of stock implied by Delaware law – *e.g.*, the default of one vote per share – unless that power is needlessly repeated in the charter. There is no principled basis for this express versus unexpressed distinction, especially

[17] Tr. at 4, 68-69.

[18] Tr. at 48.

given that one of the virtues of the DGCL is it provides a foundation of baseline, default rules around which corporate drafters can work.[19]

Issue 2: The court below erred when it held that "fealty" to *Dickey Clay* and *Orban* "dictates the outcome" in this case.[20]

Dickey Clay and *Orban* merely hold that the relative position of stock in the capital structure is not a "power, preference, or special right" under Section 242(b)(2), so an adverse effect on such position does not trigger a class vote. Those decisions are inapposite to this Action, and the lower court's deference to irrational and inconsistent *dicta* in each was error.

Issue 3: The court below erred in crediting practitioners' supposed "long-standing … expectation" that a class vote was not required in these circumstances.[21]

Ill-founded expectations do not trump well-settled principles of statutory interpretation, namely, that the statute's unambiguous plain language prevails. Indeed, where practitioner expectations cannot be squared with Delaware law, courts should never hesitate to correct those misunderstandings. In any event, the

[19] *See* Leo E. Strine Jr., & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, HARVARD L. SCHOOL JOHN M. OLIN CENTER, DISCUSSION PAPER NO. 789, at 6 (Aug. 1, 2014) ("[T]he DGCL and its counterparts predominantly offer default rules that can be altered through private ordering via the corporation's certificate of incorporation and bylaws.").

[20] Tr. at 4, 68-69.

[21] Tr. at 68-69.

procedural posture below was summary judgment, and Appellants did not provide ***any evidence*** supporting their assertion of wide-spread market understanding that stripping the power to sue would not trigger a class vote under Section 242(b)(2).

STATEMENT OF FACTS

I. SNAP'S CHARTER AMENDMENT

Since Snap's initial public offering in March 2017, Snap has had a tri-class stock structure.[22] Holders of Snap's Class A Common Stock – which are widely held and publicly traded – generally do not have the power to vote, except in the circumstances set forth in the Snap's certificate of incorporation and as required under Delaware law.[23] Shares of Snap's Class B Common Stock are entitled to one vote per share and are not publicly traded.[24] Shares of Snap's Class C Common Stock are not publicly traded and are accorded ten votes per share.[25]

Snap's two co-founders hold all of Snap's Class C Common Stock. Primarily through this ownership of super-voting stock, the co-founders control 99.5% of Snap's total voting power.[26] The co-founders are both members of Snap's board and Snap officers, currently serving as its Chief Executive Officer ("CEO") and Chief Technology Officer.[27] In its annual report, Snap classifies each of these roles as

[22] A0042, A0106.

[23] A0106.

[24] *Id.*

[25] *Id.*

[26] A0157-A0159.

[27] A0134.

"Executive Officer" positions.[28] Thus, at a minimum, Snap's CEO qualifies as an "officer" for purposes of potential Section 102(b)(7) exculpation.[29]

On August 24, 2022, Snap's board approved the Snap Charter Amendment to provide exculpation for Snap's officers under the newly amended Section 102(b)(7).[30] The holders of Snap's Class C Common Stock (*i.e.*, the co-founders) executed written consents adopting the same.[31] Instead of soliciting the votes of each class of stock adversely affected by the Snap Charter Amendment, Snap purportedly effected the Snap Charter Amendment based solely on the written consent from Snap's Class C Common Stock.[32]

The Snap Charter Amendment is valuable to the two holders of Snap's Class C Common Stock, since they are Snap officers and benefit from such amendment because they no longer face the prospect of personal liability in many suits, even if they perform their managerial duties in a reckless or grossly negligent manner. In contrast, the Snap Charter Amendment deprives holders of Snap's Class A Common Stock of the value represented by the ability to enforce the fiduciary duty of care.

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[28] A0134, A0145-A0146.

[29] *See* 8 *Del. C.* § 102(b)(7); 10 *Del. C.* § 3114.

[30] A0134, A0145-A0146.

[31] A0264-A0268.

[32] *Id.*

II. FOX'S CHARTER AMENDMENT

Through a spin-off from its former corporate parent, News Corporation, Fox became a standalone, publicly traded company on March 19, 2019.[33] Since then, Fox has had a dual-class stock structure.[34] Holders of Fox's Class B Common Stock are entitled to one vote per share.[35] Holders of Fox's Class A Common Stock generally do not have voting rights, except in the circumstances set forth in Fox's certificate of incorporation and as required under Delaware law.[36]

Members of the Murdoch family hold approximately 42.9% of Fox's Class B Common Stock and serve as Fox officers and directors.[37] K. Rupert Murdoch ("R. Murdoch") is Fox's Chair and a member of Fox's board.[38] Lachlan K. Murdoch ("L. Murdoch") is Fox's Executive Chair, CEO, and a member of Fox's board.[39] Fox identifies R. Murdoch and L. Murdoch as "executives," and both are among Fox's highest paid executives, qualifying each of them as an "officer" under Delaware law.[40]

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[33] A0273.

[34] *Id*.

[35] A0398.

[36] *Id*.

[37] A0461-A0462.

[38] A0399, A0460.

[39] *Id*.

[40] A0451, A0460. *See* 8 *Del. C.* § 102(b)(7); 10 *Del. C.* § 3114.

On November 3, 2022, Fox held its 2022 annual meeting of stockholders.[41] Proposal No. 4, which had already been approved and recommended by the board, proposed a charter amendment that would provide Fox's officers – including R. Murdoch and L. Murdoch – with exculpation from personal liability for breaches of the duty of care under Section 102(b)(7).[42]

Fox only solicited votes in favor of the Fox Charter Amendment from holders of Fox's Class B Common Stock, 43% of which is owned, directly or indirectly, by the Fox executive officers (and their families) who personally benefit from insulating themselves from personal liability even if they perform their jobs in a grossly negligently or reckless manner.[43] Without soliciting any Class A Common Stock vote, Fox purported to effect the Fox Charter Amendment.[44]

[41] A0473-A0475.

[42] A0456; A0473-A0475.

[43] A0398; A0473-A0475.

[44] A0473-A0475.

III. THE COURT OF CHANCERY'S JUDGMENT

On March 29, 2023, the Court of Chancery entered its Judgment, granting Defendants' motions for summary judgment and denying Plaintiffs' cross-motions. The Vice Chancellor linked the ultimate ruling to "the interpretive glosses"[45] of *Dickey Clay* and *Orban*, *i.e.*, *dicta*,[46] as well as purported "long-standing practitioner expectation."[47] What is extraordinary about the Transcript is the pains that the lower court took to explain why the grounds for so linking the Judgment simply do not make sense. The lower court's analysis (as opposed to the Judgment itself) strongly supports Appellants' arguments on this appeal and, Appellants respectfully submit, deserves this Court's careful attention.

First, the Vice Chancellor identified three sources of stocks' rights: (i) the "three basic rights" to vote, sell, and sue "appurtenant to and associated with the shares," which the lower court also referred to as "baseline rights"; (ii) default rights under the DGCL, which are also baseline rights that apply by operation of law; and (iii) rights expressly set forth in the charter, which may differ from or be the same as baseline or default rights.[48] Express rights might be better than, or "superior" to,

[45] Tr. at 4.

[46] *See, e.g.*, Tr. at 33, 38.

[47] Tr. at 68.

[48] Tr. at 8-16.

baseline rights, *e.g.*, stock that carries ten votes per share.[49] Express rights might be worse than, or "inferior" to, baseline rights, *e.g.*, nonvoting stock.[50] In the lower court's parlance, a "special" right is an express right that is either superior to or inferior to a baseline right.[51]

Multiple sources could establish the same substantive baseline right. For instance, by default under Section 212(a), a share of stock carries with it one vote per share.[52] Nothing prevents a charter from expressly delineating that very same right.[53] Similarly, by default under Section 159, a share of stock is freely alienable personal property.[54] Again, the charter can expressly provide that same right. Thus, the source of baseline rights is a matter of form, rather than substance.[55]

Next, the trial court assessed the below language of Section 242(b)(2):

> The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, ***whether or not entitled to vote thereon by the certificate of incorporation***, if the amendment would … ***alter or change the powers***, preferences, or special rights of the shares of such class so ***as to affect them adversely***.

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[49] Tr. at 12-13.

[50] Tr. at 14-16.

[51] Tr. at 18-19.

[52] Tr. at 9.

[53] Tr. at 12.

[54] Tr. at 9.

[55] *See* Tr. at 19 ("The right has been made express, but it is no different than a baseline right."); *id*. at 20 ("Baseline rights, therefore, can either be unexpressed rights or express rights.") .

The Vice Chancellor zeroed in on the key question in this Action: "What does 'powers' mean?"[56] The lower court observed:

> ***The plaintiffs offer a logical answer. It means baseline rights.*** From the plaintiff's standpoint, the analysis does not even need to go so far as to include all baseline rights. All that "powers" has to include is one particular baseline right: the power to sue.[57]

The trial court thus concluded: "Once the plaintiff has framed the right to sue as a power, ***the officer exculpation amendment easily falls within Section 242(b)(2)***."[58] Put differently, "[t]he plaintiffs advance a straightforward argument based on the plain meaning of the statute,"[59] buttressed by the fact that the DGCL repeatedly refers to the ability to sue as a "power."[60]

The trial court then delved into the facts and rulings of *Dickey Clay* and *Orban*. As the Vice Chancellor notes, the holding in those cases is simply that a class of stocks' ***relative*** position in the overall capital structure is not a "power, preference or special right" under Section 242(b)(2). So, increasing the number of shares of, or creating, a superior class of stock does not trigger a class vote.[61] The

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[56] Tr. at 21.

[57] *Id.* The lower court also observed that Delaware authorities use the terms "powers" and "rights" interchangeably. Tr. at 22-23.

[58] Tr. at 24.

[59] Tr. at 20.

[60] Tr. at 23.

[61] *See* Tr. at 29, 33-34, 36, 38.

Vice Chancellor observed: "In my view, that was a relatively easy conclusion to reach, ***since the amendment did not make any change to the rights of the common at all***."[62]

Employing a series of hypotheticals, the trial court then pressure-tested Defendants' proffered rule of law, derived from their view of certain *dicta* in *Dickey Clay*,[63] *i.e.*, "Section 242(b)(2) only applies to power or rights expressly set forth in the certificate of incorporation."[64] The Vice Chancellor concluded that Defendants' "express right argument" was "incoherent,"[65] because it provided for a class vote when a baseline right coincidentally set forth expressly in a charter is affected adversely by an amendment, but not when that very same substantive right arose by default.

For instance, under Defendants' interpretation, a class vote would be required if a proposed amendment would denude a class of single-vote stock of voting power only if the baseline power was expressly set forth in the charter of the multi-class corporation, but not if that voting power arose implicitly and by default under

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[62] Tr. at 29; *see also* Tr. at 36 (substantially the same).

[63] Tr. at 33-34.

[64] Tr. at 32-33, 39. The lower court also tested, and dispensed with as incoherent, various other interpretations derived from *dicta* in *Dickey Clay* and *Orban*, as discussed further in Argument, Sections I.C.2 and II.C, *infra*.

[65] Tr. at 47-48.

Section 212(a).[66] The lower court bluntly stated that this distinction "does not make sense."[67] The Vice Chancellor continued:

> [T]he express right argument results in the exact same charter amendment operating differently, depending on whether the right is expressed in the charter or established by law. ***That suggests a degree of incoherence in the express right argument that should fatally undermine it***.[68]

With respect to the baseline power to sue, "another right established by law,"[69] the lower court explored a hypothetical involving a company with two classes of stock, Class A and Class B. The lower court posited that the board proposed a charter amendment requiring Class B stockholders to hold a preset amount of stock to sue for breach of fiduciary duty.[70] The Vice Chancellor observed that "the power to sue is being affected adversely" and that "[t]he plain language of Section 242(b)(2) would seem to call for the Class B common stock to receive a separate class vote to protect its power to sue."[71] By parity of reasoning, the lower court

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[66] Tr. at 42-44.

[67] Tr. at 44. The trial court also explored analogous hypotheticals concerning amendments that would restrict alienability and reached the same conclusion. *See* Tr. at 44-48.

[68] Tr. at 54.

[69] Tr. at 48.

[70] Tr. at 48-49; *see also* 8 *Del. C.* §§ 365(a), 367.

[71] Tr. at 49.

observed: "***The analysis of the officer exculpation amendment should be identical*** to the litigation threshold amendment."[72]

Finally, the Court of Chancery turned to policy and practical considerations of Plaintiffs' interpretation of Section 242(b)(2). The Vice Chancellor rejected Defendants' posited concern about uncertainty when a class vote would be needed, articulating Plaintiffs' proffered rule of law:

> I don't think there would be any great mystery. There are three fundamental stockholder powers: to vote, to sell, and to sue. There are other rights set forth in the DGCL. And there are express rights. If you affect any of those adversely, you trigger a class vote for the affected class.[73]

Next, the lower court addressed the "real-world consequences" of Plaintiffs' reading of Section 242(b)(2).[74] The Vice Chancellor noted that there might be more class votes, but that could be a salutary result since a proposed charter amendment

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[72] Tr. at 49.

[73] Tr. at 55.

The DGCL ***does*** recognize and protect the power to sue, albeit implicitly through Section 102(b)(7)'s permissive exculpation carveout. *See* Tr. at 65 ("If anything, the fact that the amendment to the DGCL under 102(b)(7) was deemed necessary to validate officer exculpation suggests the limitation is a big deal. And therefore, while now permissible as a statutory matter, it could be a sufficient impairment to a power associated with stock to require a class vote under Section 242(b)(2).").

[74] Tr. at 59.

would have to benefit ***all*** classes in order to pass, instead of merely benefitting the class that holds a majority of the voting power.[75] The Vice Chancellor summarized:

> The main effect would be to provide protection for stockholders in multi-class corporations where one or more issuances dominate the voting power and another issuance is vulnerable.
>
> Even then, if the amendment is good for all stockholders, then the class votes should be easy to get. And if the corporation times the amendment to coincide with its annual meeting, there is no need for significant additional expense.[76]

Before repeating its ultimate ruling for Defendants, the lower court concluded its litany of reasons for the law to support Plaintiffs' interpretation of Section 242(b)(2) by stressing the bedrock importance of the power to sue:

> ***I think there is a strong argument that the power to sue is the foundational power***, meaning that it is the power that is essential to all others and on which the legal regime is built. Why? Because if you cannot go to court, then you cannot enforce your other rights. If you cannot obtain a judgment, backed by the power of the state, that allows you to invoke the power of the state on your behalf to enforce your other rights, such as the power to vote or the power to sell, ***you might as well not have those powers***.[77]

The Vice Chancellor continued:

> If I were writing on a blank slate, therefore, I would say that the power to sue is the foundational power which, while not express, ***is the most important baseline power***, essential for the others to exist, and

[75] Tr. at 57-59. The trial court noted that class-by-class approval is required in other contexts, such as approval of a plan of reorganization under the Federal Bankruptcy Code and bond restructurings. *See* Tr. at 58 ("***This [i.e., requiring class votes] is not heresy. Nor is it novel.***").

[76] Tr. at 59-60.

[77] Tr. at 63-64.

> therefore, ***less subject to modification*** than other powers and preferences and special rights, not more so…. ***I would suggest that it is so important, so fundamental, that no one needed to provide for it expressly, and therefore it is not readily modifiable.***[78]

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Appellees respectfully submit that this Court should embrace the Vice Chancellor's reasoning while reversing the lower court's Judgment, which appears to be consciously uncoupled from its underlying analysis.

[78] Tr. at 65-66.

ARGUMENT

I. THE TRIAL COURT ERRED BY HOLDING THAT THE CHARTER AMENDMENTS DID NOT REQUIRE SEPARATE CLASS VOTES UNDER SECTION 242(B)(2)

A. Question Presented

Does Section 242(b)(2) mandate separate class votes on a proposed charter amendment that would deprive stockholders of the ability to hold officers liable for certain breaches of fiduciary duty?

B. Scope of Review

This Court reviews the Court of Chancery's Judgement *de novo*.[79]

C. Merits of Argument

Appellants presented a straightforward interpretation of the plain language of Section 242(b)(2), which unambiguously mandated class votes on the Charter Amendments. The court below recognized as much.[80] Appellees, on the other hand, offered an incoherent reading requiring conflicting outcomes in substantively identical circumstances. The court below also recognized as much.[81] The Court of

[79] *See Croda Inc. v. New Castle Cnty.*, 282 A.3d 543, 547 (Del. 2022) ("We review the court's summary judgment ruling *de novo*. We also review questions of statutory interpretation and constitutional law *de novo*.").

[80] *See, e.g.*, Tr. at 4 ("Were I writing on a blank slate and being asked to determine the plain meaning of Section 242(b)(2) without the interpretive glosses of *Dickey Clay* and *Orban*, I think the plaintiff's position would be a quite strong one.").

[81] *See* Tr. at 48, 54.

Chancery should have accepted Appellants' interpretation, and rested its analysis and entered judgment based on the statute's plain language.

1. The Plain Language of the Statute Mandated Class Votes

This Court has explained, "[t]he rules of statutory construction are well settled."[82] Specifically:

> First, we must determine whether the statute under consideration is ambiguous. It is ambiguous if it is susceptible of two reasonable interpretations. ***If it is unambiguous, then we give the words in the statute their plain meaning***. If it is ambiguous, however, then we consider the statute as a whole, rather than in parts, and we read each section in light of all others to produce a harmonious whole. We also ascribe a purpose to the General Assembly's use of statutory language, construing it against surplusage, if reasonably possible.[83]

"If the plain language [of the statute] is clear and unambiguous, the analysis ends."[84] Thus, "when a statute is clear and unambiguous there is no need for statutory interpretation,"[85] and the court applies the statute's plain language.

The statute at issue here is Section 242(b)(2), which provides, in pertinent part:

> The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, ***whether or not entitled to vote thereon by the certificate of incorporation***, if the amendment would

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[82] *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011).

[83] *Id.*

[84] *AlixPartners*, 250 A.3d at 788.

[85] *Verleysen*, 36 A.3d at 331.

> … ***alter or change the powers***, preferences, or special rights of the shares of such class so ***as to affect them adversely***.

The dispositive question is whether the Charter Amendments "adversely" "affect[ed]" the "powers" of Fox's and Snap's Class A Common Stock. The answer to that question must be "yes" – dictionary definitions, common usage, caselaw, and other provisions of the DGCL confirm that a stock's "powers" necessarily includes the ability of the holder to "sue to enforce the corporation's compliance with the corporate law and the directors' [and, presumably, officers'] compliance with their fiduciary duties."[86]

When interpreting a statute, "[d]ictionary definitions serve as an important starting point when determining plain meaning,"[87] *i.e.*, whether the statute is unambiguous. Black's Law Dictionary defines "power" as "[t]he ability to act or not act," as well as "[t]he legal right or authorization to act or not act."[88] Similarly, Merriam-Webster defines "power" as the "ability to act or produce an effect," as well as the "legal or official authority, capacity, or right."[89] Delaware law's historic recognition of the fundamental nature of a stockholder's ability to sue for breaches

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[86] Leo E. Strine, Jr. *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 453-54 (2014).

[87] *In re P3 Health Group Holdings, LLC*, 282 A.3d 1054, 1066 (Del. Ch. 2022).

[88] *Power*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[89] *Power*, MERRIAM-WEBSTER (last visited May 31, 2023), https://www.merriam-webster.com/dictionary/power.

of fiduciary duty[90] comfortably satisfies these dictionary definitions of "powers."[91] Therefore, adversely affecting the ability to sue for duty of care violations constitutes a diminution of the stock's "powers," requiring separate class votes under Section 242(b)(2).

Further reinforcing this conclusion is the DGCL's repeated reference to the ability to sue as a "power."[92] Section 122 describes the "Specific powers" of a Delaware corporation, and provides that "[e]very corporation created under this chapter shall have ***power to: … [s]ue and be sued*** in all courts…."[93] Given that Section 122 enumerates the ability to sue as one of the "powers" of a Delaware

[90] *See, e.g.*, Tr. at 8 ("It is often said that a share of stock carries three basic rights: the right to vote, the right to sell, and the right to sue."); *Rivest v. Hauppauge Dig., Inc.*, 2022 WL 3973101, at *24 (Del. Ch. Sept. 1, 2022) ("Modern corporate law recognizes that stockholders have three fundamental, substantive rights: to vote, to sell, and to sue."); *Strategic Inv. Opportunities LLC v. Lee Enters., Inc.*, 2022 WL 453607, at *8 n.100 (Del. Ch. Feb. 14, 2022) (same); *Williams Co. Stockholder Litig.*, 2021 WL 754593, at *20 (Del. Ch. Feb. 26, 2021) (same); *Strougo v. Hollander*, 111 A.3d 590, 595 n.21 (Del. Ch. 2015) (quoting William T. Allen, *et al., Commentaries and Cases on the Law of Business Organization* 177 (2d ed. 2007)) (same); *Choupak v. Rivkin*, 2015 WL 1589610, at *19 n.3 (Del. Ch. Apr. 6, 2015) (same).

[91] *See P3 Health*, 282 A.3d at 1067 ("In addition to relying on dictionary definitions, a court may look to how a term or phrase is used in a particular legal context.").

[92] *See* Tr. at 23 ("The plaintiffs have advanced a strong argument that the right to sue associated with a share is also a power. The plaintiffs have identified a series of sections of the DGCL in which the ability to sue is referred to as a power.").

[93] *See* Tr. at 23 (noting that Section 122 and Section 291 "support the proposition that the ability to sue is technically a power").

corporation, a harmonious reading of the DGCL compels that the "powers" of stock under Section 242(b)(2) includes the ability to sue for breach of fiduciary duty.

Relatedly, Section 121(a) describes "General powers":

> In addition to the powers enumerated in § 122 of this title, every corporation, its officers, directors ***and stockholders shall possess and may exercise all the powers*** and privileges granted by this chapter or by any other law or by its certificate of incorporation, ***together with any powers incidental thereto, so far as such powers and privileges are necessary or convenient to the conduct, promotion or attainment of the business or purposes set forth in its certificate of incorporation***.

The statute's plain language makes clear that stockholders' "powers" include those granted by the DGCL and the relevant company charter, ***as well as*** "any powers incidental thereto" so long as such powers "are necessary or convenient to the conduct, promotion or attainment of the business." As this Court made clear in *Manti*, the ability to "police corporate misconduct" is "fundamental."[94] It follows that the power to sue for breaches of duty is at least "necessary or convenient" to the "conduct" of Fox's and Snap's "business[es]," such that Section 242(b)(2) required class voting for the Charter Amendments.

Other provisions of the DGCL support the conclusion that Section 242(b)(2)'s "powers" includes the ability to sue. The "powers" of trustees or receivers for dissolved corporations, under Section 279, include the "power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be

[94] 261 A.3d at 1225.

necessary or proper." Likewise, the "powers" of receivers for insolvent corporations, under Section 291, include the "power to prosecute and defend, in the name of the corporation or otherwise, all claims or suits."

Put simply, in the context of the DGCL, "powers" – whether wielded by a corporation, its directors, or its stockholders – necessarily includes the ability to sue. The lower court's analysis should have ended there, and the Vice Chancellor should have rendered judgment for Plaintiffs.

2. Appellees' Interpretation of the Statute Yields Irrational Outcomes

Unlike Appellants' interpretation of Section 242(b)(2), Appellees' proposed reading of the statute is, as the Vice Chancellor observed, "incoherent" and "should be an unpersuasive one."[95] Appellees argued that "Section 242(b)(2) only applies to power or rights expressly set forth in the certificate of incorporation."[96] According to Appellees, Section 242(b)(2)'s class voting requirement is only triggered where the adversely affected power expressly appears in the subject company's charter, regardless of whether the right exists by operation of law.

Appellee's interpretation cannot withstand scrutiny because it leads to irrational outcomes.[97] As discussed above in Statement of Facts, Section III, the Vice Chancellor observed that Appellees' reading of the statute "create[s] conflicting results in substantively identical circumstances."[98] Appellees' interpretation irrationally elevates the source of the stock's power over the substance for when a statutorily required class vote is triggered.

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[95] Tr. at 48.

[96] Tr. at 39.

[97] *See, e.g.*, *Hunt v. Div. of Fam. Servs.*, 146 A.3d 1051, 1063 (Del. 2015) (Delaware courts avoid interpreting statutes in a way that "would lead to an irrational result that is incongruent with the statute's clear focus"); *Home Ins. Co. v. Maldonado*, 515 A.2d 690, 696 (Del. 1986) ("The Legislature could not have intended such an illogical result.").

[98] Tr. at 48.

Moreover, as a practical matter, adopting Appellees' proffered rule would undermine a key virtue of the DGCL – that it provides a foundation of baseline, default rules around which corporate drafters can work.[99] Under Appellees' construct, multi-class companies that want to provide their stockholders with the class-voting protections of Section 242(b)(2) would need to adopt prolix and lengthy charters that expressly lay out all of the default rights and powers already given to stockholders under Delaware law. Conversely, companies that want to be free of Section 242(b)(2)'s constraints could take pains not to even reference the most important of stockholder rights – like the power to sue – just to preserve the ability to adversely affect those rights with a later charter amendment. That result, simply put, would be irrational.

[99] *See* footnote 19, *supra*.

II. THE TRIAL COURT ERRED BY HOLDING THAT "FEALTY" TO *DICKEY CLAY* AND *ORBAN* "DICTATE[] THE OUTCOME" HERE

A. Question Presented

Does "fealty" to *dicta* in *Dickey Clay* and *Orban* "dictate[] the outcome" in this case?

B. Scope of Review

See Argument, Section I.B, *supra*.

C. Merits of Argument

The lower court should have ended its analysis upon correctly concluding that: (i) Appellees' plain language interpretation of Section 242(b)(2) is "straightforward," "logical," and "strong"; and (ii) Appellants' "express rights" argument "should be an unpersuasive one" because it "create[s] conflicting results in substantively identical circumstances."[100] Instead, the Court of Chancery subordinated its own logic and legal reasoning, asserting that "[f]ealty" to *Dickey Clay* and *Orban* "dictates the outcome."[101]

The actual holdings of *Dickey Clay* and *Orban* are limited and inapposite. The Vice Chancellor relied on *dicta* to support the Judgment, which clearly does not bind

[100] *See In re Adoption of Swanson*, 623 A.2d 1095, 1097 (Del. 1993) ("Regardless of one's views as to the wisdom of the statute, our role as judges is limited to applying the statute objectively and not revising it.").

[101] Tr. at 4.

the lower court.[102] Ultimately, despite enumerating several reasons why that *dicta* should not dictate the outcome here, the Court of Chancery inappropriately deferred to this Court to determine the precedential effect of "the interpretive glosses of *Dickey Clay* and *Orban*."[103]

1. *Dickey Clay* Is Inapposite

Dickey Clay involved a company with three classes of stock: (i) preferred stock that carried a mandatory dividend and a liquidation preference; (ii) Class A stock that carried a cumulative dividend but was generally non-voting; and (iii) common stock that had no right to dividends until the preferred stock had received a specified amount of dividends and the Class A stock had been retired.[104] The company proposed a charter amendment to increase the number of authorized shares of Class A stock (limiting the right of common stock to receive dividends because forecasted excess capital would be absorbed by the superior classes of stock). The company sought and obtained only two votes, from (i) the preferred and common stock, voting together, and (ii) the Class A stock.[105]

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[102] *See Humm v. Aetna Cas. & Sur. Co.*, 656 A.2d 712, 716 (Del. 1995) ("This language is *obiter dicta* and is, therefore, not binding as legal precedent.").

[103] Tr. at 4.

[104] 24 A.2d at 317.

[105] *Id*.

A common stockholder sued, arguing that Section 242(b)(2)'s predecessor statute mandated a separate class vote.[106] The plaintiff argued that the amendment adversely affected the common stock's "relative position in the capital structure, their right to dividends, and to a share of the corporate assets upon dissolution or in a liquidation, and the right to vote."[107]

On appeal, this Court began by observing: "Obviously, the ***relative position*** of the common shares will be altered by the proposed amendment."[108] After dilating briefly on the use of the word "special" to modify the word "rights" in the statute, the Supreme Court based its holding on a clear distinction between rights attendant to the shares of stock themselves, versus the affected class's relative position in the capital structure:

> Where the corporate amendment does no more than to increase the number of the shares of a preferred or superior class, ***the relative position of subordinated shares is changed in the sense that they are subjected to a greater burden***. The peculiar, or special, quality with which they are endowed, and which serves to distinguish them from shares of another class, remains the same.[109]

Rejecting the "relative position" argument, the Court held:

> Stripping from the appellant's argument its garnishments, ***it is found to be based on the misconception that a position of a class of shares, as related to other shares in the capital structure, is a relative and,***

[106] *Id*.

[107] *Id*. at 318.

[108] *Id.*

[109] *Id.* at 318-19.

> ***therefore, a special right of the shares*** …. If the Legislature had intended to afford protection against the effects of an amendment generally by requiring a class vote of shares in all cases where, by the amendment, the relative position of shares would be disturbed, as by an increase of subordination, apt language easily could have been found. ***But it is entirely clear that the statute in its mention of relative rights of shares did not refer to the position of shares in the plan of capitalization, but to the quality possessed by the shares; and it is only by a refinement of interpretation that it can be said that a relative position is a relative right***.[110]

That is all that Dickey Clay holds, *i.e.*, adverse changes to the "relative position" of one class in the capital structure through a charter amendment authorizing the issuance of additional, superior shares does not require a separate vote of the inferior class. The lower court recognized as much.[111] Defendants did not and cannot turn the holding of *Dickey Clay* (regarding amendments that alter the relative position of classes of stock in the overall capital structure) into binding authority for their position (*i.e.*, that a fundamental power or right inherent to the shares of stock themselves, like the power to vote, sell, or sue is only protected from adverse amendments if that power or right is expressly articulated in the charter). Nor can Defendants turn the opinion's *dicta* about "special" rights being unique to a class into the case's actual precedential holding.[112]

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[110] *Id*. at 320.

[111] *See* Tr. at 33-34 ("The holding of *Dickey Clay* is thus that relative position in the capital structure is not a right of the shares").

[112] The *Dickey Clay* Court's discussion about rights making one class "special" as distinct from other classes does not mean that rights shared amongst classes are not

The Court of Chancery went further, exploring the "language that could support three different interpretations."[113] The first two possible interpretations that the lower court identified are subsets of Appellees' express right argument: the "superior" right argument[114] (*i.e.*, a class vote is triggered only if an express right ***superior to*** a baseline right would be adversely affected)[115] and the "special" right argument[116] (*i.e.*, a class vote is triggered only if an express right ***superior or inferior to*** a baseline right would be adversely affected).[117] Using a hypothetical discussed above (Class A and Class B common stock, one vote per share voting power expressly provided in the charter, and a proposed amendment to strip Class B's voting power) and accepting Appellees' contention that a class vote would be required under these circumstances, the Vice Chancellor dismissed the superior right argument and special right argument as "nonviable":

> But this means that ***neither the superior right interpretation nor the special right interpretation can be accurate interpretations of Section***

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entitled to the statute's protections. *See* pages [40-42], *infra*. Rather, the Court seems to have been saying that every class of a corporation's shares are necessarily different from others, and that the statute only protects the rights inherent to the shares themselves — whether they are shared among classes or not — but does not protect the relative position in the capital structure.

[113] Tr. at 29. *See also id.* at 33 ("It bears noting that none of these interpretations represent the bottom-line holding of *Dickey Clay*").

[114] Tr. at 29-31 (quoting *Dickey Clay*, 24 A.2d at 318).

[115] *See* pages 15-16, *supra*.

[116] *See* Tr. at 31-32 (quoting *Dickey Clay*, 24 A.2d at 318-19).

[117] *See* pages 15-16, *supra*.

> ***242(b)(2)***, because in this hypothetical, ***a class vote is triggered by the modification of a baseline right that has been made express***. That right is not "special" in the sense of being different than baseline. It is not "superior" because it is the same as the baseline. ***We can thus exclude those interpretations as nonviable***. That also means we have to exclude, or at least discount, the language in *Dickey Clay* and *Orban* which suggests that those interpretations are viable.[118]

The third possible interpretation arising from *dicta* in *Dickey Clay* is the express right argument, *i.e.*, Appellees' proffered rule of law.[119] Yet, as discussed above and as recognized by the Court of Chancery, that interpretation also is nonviable.[120]

To summarize: the holding of *Dickey Clay* is inapposite to this Action, as the Court was only asked to answer, and answered in the negative, an unrelated question, which is whether a separate class vote is required when a charter amendment increases the number of shares of a different class and pushes the complaining class lower in the corporate hierarchy. The Court did not even have to grapple with whether a right is "special," since no rights of the individual shares of common stock were altered other than through relative subordination of class-wide voting power and expectation of dividends. The *dicta* in *Dickey Clay* regarding "special rights" as distinct from other classes of stock is either not pertinent or, if interpreted as

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[118] Tr. at 43.

[119] Tr. at 32-33.

[120] *See* Argument, Section I.C.2, *supra*.

Defendants did below, leads to nonviable interpretations of Section 242(b)(2). *Dickey Clay* should not have mandated the Judgment. This Court should reverse and grant summary judgment for Appellants.

2. *Orban* Correctly Applied *Dickey Clay* but Adds Non-Viable *Dicta*

In *Orban*, a company called Office Depot was in financial distress and had outstanding classes of Series A preferred stock, Series B preferred stock, and common stock.[121] The preferred stockholders wanted to sell Office Depot to Staples, but the attainable value would be paid entirely to cover the preferred stock's liquidation preferences.[122] To avoid giving common stockholders holdup power to block the deal while still satisfying the merger agreement's requirement that 90% of the common stockholders approve the transaction, Office Depot engaged in capital structure re-engineering by issuing a new class, Series C convertible preferred stock, that ultimately diluted the single largest common stockholder, Orban, from 96% of the common stock to below 10%.[123]

Many months ***after the merger that saved Office Depot from bankruptcy closed***, Orban sued, bringing breach of fiduciary duty claims and arguing, under Section 242(b)(2), that "the issuance of Series C preferred reduced the voting power

[121] 1993 WL 547187, at *2.

[122] *Id*. at *1.

[123] *Id*. at **2-4.

of the common stock below 10% and this adversely affected the common stock in a foreseeable way, justifying or mandating the special protection of a class vote."[124]

Critically, Chancellor Allen ***upheld the breach of fiduciary duty claims on disclosure and improper purpose grounds***, because the board allegedly misled Orban, was conflicted, and engaged in the recapitalization for an improper purpose.[125] Thus, the Court had a means to address the inequity of the recapitalization by awarding post-closing money damages, if provable.

The statutory claims posed a peculiar judicial challenge, however, since a ruling for the plaintiff would require unwinding a stock-for-stock merger of two public companies. In that context, the Court of Chancery framed the legal question as: "whether the common stock (which prior to the recapitalization constituted 14.32% of the Company's voting power) had a right to a class vote with respect to the amendment to the certificate of incorporation required to issue the new Series C Preferred Stock."[126] Deciding the question was easy, since:

> [T]he statute and existing authorities are fully sufficient to compel the conclusion that Section 242 afforded to the Office Mart common stock no right to a class vote with respect to any element of the recapitalization. The language of the statute makes clear that it affords

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[124] *Id.* at *8. Notably, Chancellor Allen articulated the difficulty in providing a coherent opinion in light of the relative lack of coherence of the complaint itself. *Id.* at *2.

[125] *Id.* at **5, 9.

[126] *Id.* at *7.

> a right to a class vote when the proposed amendment *adversely affects the peculiar legal characteristics of that class of stock*.[127]

The Chancellor rejected Orban's argument for a class-wide vote, because "no special rights of common shareholders were adversely affected by those changes,"[128] and concluded his Section 242(b)(2) analysis by stating that *Dickey Clay* "directly refutes plaintiffs' claim that an effect of a proposed amendment on the voting power of the common ***as a class*** gives rise to a right to a class vote."[129]

In assessing the import of *Orban*, the Court of Chancery below noted:

> ***As in Dickey Clay, that was an easy argument to reject because the creation of a senior security does not effect any change or amendment to the rights or powers of the common stock***. Nothing about the legal rights or powers associated with the common stock changed in any way.[130]

Appellants recognize that despite the ease with which the *Orban* court could have ruled, the Chancellor's analysis is uncharacteristically muddled with discussion about whether rights are "special" or "peculiar" to a class of stock. The distinction drawn could not conceivably have driven or even altered the outcome of that case. The only change in the capital structure was the creation of a new class of preferred

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[127] *Id.* at *8 (emphasis in original).

[128] *Id.* at **8-9.

[129] *Id.* at *8.

[130] Tr. at 36. *See also id.* at 38 ("The issuance of the Series C and additional shares of common stock did not alter any characteristic of the common, whether or not they were peculiar or special and whether or not they were express or implied.").

stock, which then converted into common stock, without actually changing any rights or powers of the common stock—regardless of whether they are "special" as compared with other classes of stock.

In addressing the *dicta* or lack of clarity in the *Orban* ruling, the Vice Chancellor below engaged with two possible interpretations of Section 242(b)(2).[131] Again, these interpretations are internally inconsistent and do not lead to a coherent rule of law.

First, the Vice Chancellor identified language appearing to support the special rights argument.[132] As discussed above,[133] that interpretation is "nonviable."

Second, the trial court identified *dicta* that appears to support a new interpretation of Section 242(b)(2)— no class vote is required when an amendment affects all shares equally, which the lower court called the "equal treatment exception" or the "same treatment exception."[134] This interpretation, however, also fails under the statute's plain language and as a matter of logic.

With respect to Section 242(b)(2)'s plain language, the Vice Chancellor noted, "[t]here is nothing in the plain language of Section 242(b)(2) that supports

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[131] *See* Tr. at 38 ("As in *Dickey Clay*, the reference to the peculiar or special characteristics of the common stock was not necessary to the holding in *Orban*.").

[132] Tr. at 36-37 (quoting *Orban*, 1993 WL 547187, at *8).

[133] *See* Argument, Section II.C.1, *supra*.

[134] *See* Tr. at 37-38 (quoting *Orban*, 1993 WL 547187, at *8).

that assertion."[135] The trial court rejected the equal treatment exception based on the statute as written: "For purposes of a series vote, the statute expressly includes the concept of same or different treatment [in the second sentence of the provision]. There's nothing similar for a class vote under the first sentence. ***If an amendment affects all classes and the effect is adverse as to each class, then each class gets a class vote***.[136]

A hypothetical presented by the Vice Chancellor also fatally undermines the equal treatment exception.[137] Assume the following:

- A charter provides for two class of common stock, Class A and Class B;
- One holder owns all of the Class A common stock and controls a majority of the total voting power;
- The Class A stockholder has personally guaranteed the company's debt; and
- The company proposes an amendment imposing *pro rata* personal liability on stockholders for the company's debts.

This amendment would dilute the Class A stockholder's potential liability and affects all stockholders equally. Under these facts, the Vice Chancellor submitted that Class A stockholders should get a separate class vote despite all classes receiving nominally the same treatment:

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[135] Tr. at 51.

[136] Tr. at 51.

[137] *See* Tr. at 51-53.

> This amendment represents an adverse change to a baseline and unexpressed right of the shares, under which the owners are not personally liable for the debts of the corporation. Yet the amendment nominally treats all stockholders equally. ***If the same treatment exception were correct, then there would be no class vote in this situation. Yet the amendment is plainly and obviously adverse to each class. I would suggest that, based on this example, we can rule out the same treatment exception***. In this setting, each class gets a class vote….
>
> [W]hat it means is we have to discount the language in *Orban* that supports the same treatment exception, ***because the same treatment exception doesn't work under Section 242(b)(2)***.[138]

To summarize: the core holding of *Orban* is inapposite because it only addresses the same question answered by *Dickey Clay* decades prior, *i.e.*, whether issuance of new shares of a different class that harms the existing class's relative position in the capital structure requires a class vote. The *dicta* in *Orban* regarding "special" rights leads to nonviable interpretations of Section 242(b)(2). Thus, *Orban* does not dictate the outcome here – a reading of the plain language of the statute should.

[138] Tr. at 53-54.

III. THE TRIAL COURT ERRED IN HOLDING THAT MARKET EXPECTATIONS MANDATED ITS HOLDING

A. Question Presented

Does deference to practitioners' supposed "long-standing ... expectation[s]" mandate that a class vote was not required in these circumstances?

B. Scope of Review

See Argument, Section I.B, *supra*.

C. Merits of Argument

The Vice Chancellor erred by deferring to Appellees' *ipse dixit* argument that practitioners' "conventional wisdom" shows that Section 242(b)(2) required a class vote on the Charter Amendments.

First, as discussed above, well-settled rules of interpretation mandate that, if a statute is unambiguous, courts must apply the plain language as written.[139] Indeed, the lower court expressly acknowledged the strength of Appellees' plain-language argument.[140]

Second, as the Vice Chancellor noted, deference to practitioners' expectations is inappropriate where the interpretation is "fundamentally wrong":

> My deference to long-standing practitioner expectation in this case does not mean that a court will always defer to practitioner views. The

[139] *AlixPartners*, 250 A.3d at 788; *Verleysen*, 36 A.3d at 331.

[140] *See* Statement of Facts, Section III and Argument, Section I.C, *supra*.

> Delaware Supreme Court did not do so in *CML v. Bax*.[141] I did not do so in *Vaalco*.[142] Then-Chancellor Strine did not do so in *Sandridge*.[143] And the recent SPAC apocalypse brought on by *Garfield v. Boxed*[144] shows that the fact that many transactions deploy a particular structure does not mean it is right. ***Indeed, it can be fundamentally wrong***.[145]

Here, the trial court itself demonstrated that supposed practitioners' expectations, *i.e.*, Appellants' express rights argument, is "fundamentally wrong" as a matter of logic and application of the holdings of the relevant precedent.[146] The lower court also laid out the various policy rationale for accepting Appellants' interpretation of Section 242(b)(2), including (i) safeguarding the power to sue, "***the*** foundational power," and (ii) protecting stockholders in multi-class corporations where one or more issuances dominate the voting power and another issuance is vulnerable.[147] Simply put, this Action epitomizes an instance where practitioners' expectations ***should*** be disregarded. Conventional wisdom – including among

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[141] *See CML V, LLC v. Bax*, 28 A.3d 1037 (Del. 2011) (holding the LLC Act deprives creditors standing to bring derivative actions).

[142] A0542 ("Just as 'all the other kids are doing it' wasn't a good argument for your mother, and just as 'all the other drivers are speeding' still isn't a good argument for the highway patrolman, the idea that 175 other companies might have wacky provisions isn't a good argument for validating your provision.").

[143] *See Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242 (Del. Ch. 2013) (enjoining enforcement of a proxy put).

[144] *See Garfield v. Boxed, Inc.*, 2022 WL 17959766 (Del. Ch. Dec. 27, 2022) (holding Section 242 required class votes in connection with a de-SPAC transaction).

[145] Tr. at 68-69.

[146] *See* Statement of Facts, Section III and Argument, Section I.C.2, *supra*.

[147] *See* pages 20-22, *supra*.

highly intelligent and rational people – was once that the earth was flat. It would be absurd for jurists to continue to rule that the earth was flat even after reason and logic (and the emergence of new information) established that conventional wisdom had been wrong.

Third, and finally, the Vice Chancellor erred by crediting Defendants' supposed evidence of practitioners' expectations on summary judgement.[148] Neither forms of "evidence" support Defendants' assertion of wide-spread market practice that class votes are not required in connection with exculpation amendments.

In their briefs below, Appellees merely cited general treatise passages concerning Section 242(b)(2)'s class vote requirement that did not engage with the specific facts of this Action or the adoption of exculpation amendments in general.[149] The treatises, at most, parroted a general and broad summary of *Dickey Clay* and *Orban*. None of the treatises remotely explored the question of whether a separate class vote is required when a charter amendment eliminates one of the core foundational powers attendant to a share of stock.

For their more "specific" evidence, Appellees pointed to nine examples of public multi-class corporations that adopted Section 102(b)(7) director exculpation

[148] Tr. at 66-68.

[149] A0591 at 31.

charter amendments in the wake of *Smith v. Van Gorkom*.[150] A handful of examples from the 1980s are hardly evidence of wide-spread market practice and, in any event, two of them are misplaced.

The Washington Post Company, one of Defendants' nine examples, correctly solicited separate class votes.[151] The relevant proxy statement expressly disclosed: "Approval of the proposed charter amendment ***will require*** the affirmative vote of the holders of a majority of each of the two classes of the Company's Common Stock, ***voting as separate classes***."[152] Although, as Defendants argued below, The Washington Post Company said in its proxy that it did not believe a class vote was necessary, it made that disclosure in connection with its description of the ***second*** of two charter amendments, the first of which provided for director exculpation and the ***second*** of which provided for indemnification.[153] Appellants concede that Section 242(b)(2) does not require class votes in connection with a charter amendment providing for ***indemnification*** of fiduciaries. But a class vote was required for the exculpatory provision, which The Washington Post obtained.

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[150] 488 A.2d 858 (Del. 1985).

[151] *See* A0617; A0907-A0919.

[152] A0917.

[153] *Id*.

Another of Appellees' examples – A.O. Smith Corporation – is facially irrelevant. ***New York law*** governed the stockholder vote on a merger, the result of which would be reincorporation from New York to Delaware.[154] Although the resulting company's charter would provide for director exculpation, the relevant vote was ***not governed by Delaware law*** and was not a charter amendment pursuant to Section 242(b)(2).

In sum, Appellees' purported evidence of market practice is hardly persuasive in the interpretation of an ambiguous statute, and plainly insufficient to overcome a fair reading of the unambiguous language of Section 242(b)(2).

[154] A0808.

CONCLUSION

The Judgment should be reversed.

Dated: May 31, 2023

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Exhibit A

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ELECTRICAL WORKERS PENSION FUND, LOCAL 103, I.B.E.W.,	:	
Plaintiff,	:	
v.	:	C. A. No. 2022-1007-JTL
FOX CORPORATION,	:	
Defendant.	:	
IN RE SNAP INC. SECTION 242 LITIGATION	:	CONSOLIDATED C.A. No. 2022-1032-JTL

- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Wednesday, March 29, 2023
11:00 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

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TELEPHONIC RULINGS OF THE COURT ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

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THE COURT: Good afternoon, everyone. This is Travis Laster joining. Do we have a court reporter on?

THE COURT REPORTER: It's Juli, Your Honor.

THE COURT: Great, Juli. Thank you for being here.

I'm not going to ask for appearances. Folks can deal with Juli directly. I'm going to go ahead and give you my ruling.

We're here today for a matter captioned *Electrical Workers Pension Fund Local 103, I.B.E.W. v. Fox Corporation*, Civil Action No. 2022-1007-JTL. There is a coordinated case involving Snap that is Civil Action No. 2022-1032-JTL. That case is substantively identical to the *Electrical Workers* case involving Fox, so for simplicity, I'm going to focus on the *Fox* case.

The parties have filed cross-motions for summary judgment on a discrete legal issue under Section 242(b)(2) of the Delaware General Corporation Law. There are no facts in dispute.

I am under no illusions that my ruling will be the last word on this subject. However I

rule, the adversely affected party can be expected to appeal. Under the circumstances, I think the best path is to provide you with my ruling orally. You then can move on to the Delaware Supreme Court to obtain a definitive answer.

To provide my bottom line up front, I am granting the defendant's motion and denying the plaintiff's motion. All of you can now listen without being in suspense.

I view this case as controlled by two precedents. The first is *Hartford Accident & Indemnity Co. v. W.S. Dickie Clay Manufacturing Co.*, 24 A.2d 315 (Del. 1942), which is generally known in the corporate world as *Dickie Clay*. The second is *Orban v. Field*, 1993 WL 547187 (Del. Ch. April 1, 1997).

Fealty to those precedents dictates the outcome.

That said, I am sympathetic to the plaintiff's arguments. Were I writing on a blank slate and being asked to determine the plain meaning of Section 242(b)(2) without the interpretive glosses of *Dickie Clay* and *Orban*, I think the plaintiff's position would be a quite strong one.

But I am not writing on a blank slate. The Delaware Supreme Court interpreted 242(b)(2)'s predecessor statute in *Dickie Clay*, and this Court interpreted the current statute in *Orban*. I hew to those precedents.

Let's start with the pertinent facts, which are mercifully few. Fox Corporation has three classes of stock: high-vote stock, low-vote stock, and non-voting stock. I will call Fox Corporation the "company."

The company proposed to amend its charter to adopt an exculpation provision covering officers, as contemplated by the recent amendment to Section 102(b)(7). Let's call that the "officer exculpation amendment."

As required by Section 242(b)(1), the company secured the affirmative vote of holders of a majority of the outstanding voting power of all classes of stock entitled to vote thereon, voting together as a single class. Holders of shares carrying a majority of the outstanding voting power associated with the high-vote stock voted in favor of the amendment. So did holders of a majority of the outstanding voting power associated with the low-vote

stock. Thus if either the high-vote stock or the low-vote stock had voted separately as a class, then the class vote would have been obtained.

The company did not seek or obtain a vote from the non-voting stock, whether as a class or otherwise.

The plaintiff contends that under Section 242(b)(2) of the Delaware General Corporation Law, the officer exculpation amendment required the affirmative votes of holders of a majority of the outstanding non-voting stock, voting as a separate class. In my view, the same reasoning would mean that the amendment also required a separate class vote of the high-vote stock and a separate class vote of the low-vote stock. Had those votes been sought, they would have been obtained. But because no one polled the non-voting stock, we do not know how they would have voted.

The company argues strenuously that the officer exculpation amendment is in the best interest of the stockholders and, according to the company, quite obviously so. I personally think that reasonable minds could disagree on that question, with the outcome depending on one's empirical assumptions

about the degree to which lawsuits enforcing an officer's duty of care provide a valuable oversight mechanism, particularly for purposes of ensuring full disclosure where the officers often are more informed than the directors. Arguments can be made both ways, and the outcome would depend on empirical data that I don't think we currently have.

Regardless, in light of the company's confidence, one might wonder why the company did not simply put the issue before the non-voting stock and obtain their approval. One might also wonder why the company would not simply do so at the next convenient opportunity, such as in connection with the company's annual meeting, so as to save the costs of a separate solicitation.

But that has not happened. Instead, this case has been fought on the battle ground of Section 242(b)(2).

With that background, let's turn to the legal analysis. The parties agree that the issue can be presented on cross-motions for summary judgment, and I apply the familiar summary judgment standard contemplated by Rule 56.

Let's begin with some legal

level-setting.

A share of stock represents a bundle of rights. It is often said that a share of stock carries three basic rights: the right to vote, the right to sell, and the right to sue. As the Delaware Supreme Court discussed in *Urdan v. WR Capital Partners, LLC*, and as I have discussed previously in *In re Activision Blizzard Stockholders Litigation*, those rights are not personal to the stockholder. Those are rights that are appurtenant to and associated with the shares, that transfer with the shares when the shares are sold.

In particular, those cases make clear that the ability to sue as a stockholder under Delaware law is not a personal right of the individual owner. It is a right appurtenant to the shares that travels with the shares. That is why Delaware courts readily grant broad, class-wide releases of Delaware claims challenging mergers. The claims travel with the shares so that the class need only consist of the shares at the effective time. The *Activision Blizzard* case discusses those matters in detail.

By default, the right to sue appurtenant to a share includes the ability to sue for

breach of fiduciary duty in any jurisdiction where the defendant can be found and to seek any remedy provided by law.

As a matter of default law, a share of common stock carries other rights as well. By default, under Section 212(a) of the DGCL, a share carries voting power equal to one vote per share. By default, under Section 159 of the DGCL, a share is personal property, alienable as such, and can be transferred freely in accordance with Article 8 of the UCC. We thus have the three principal rights that everybody talks about: to vote, to sell, and to sue.

But that's not all. A basic share of common stock also carries other default rights. It carries the right to the residual distribution of the value of the corporation in a liquidation under Sections 280 or 281, after payment of creditors and the satisfaction of any liquidation preferences held by more senior stock paid out in order of priority.

It carries the right to receive dividends when and as declared by the board.

It carries the right to seek books and records under Section 220.

It carries the right under

Section 211(c) to compel an annual meeting if a corporation has not held one in the last 13 months or otherwise fulfilled the requirement through action by written consent.

It carries the right to seek a determination of the rightful directors or officers of the corporation under Section 225, to sue for a receiver or custodian under Sections 226 and 291, and to sue to enforce other provisions of the DGCL.

All those rights exist by default under the DGCL. Some of those rights may well be mandatory statutory rights that cannot be modified in the charter. I list them not to imply that they can be modified in the charter, but only to make clear that not all stockholder rights appear expressly in the charter.

In fact, under Section 102(a)(4), if the corporation is authorized to issue only one class of stock, then the charter need only specify the total number of shares of stock which the corporation shall have authority to issue and the par value of each of such shares, or a statement that all such shares are to be without par value. Even if the charter says only that, all of the foregoing rights that I have

identified remain established by law and are rights associated with the shares. They exist even if the charter states only that the corporation can issue X number of shares of stock without par value, and nothing else.

In fact, the charter need not say much, even if the corporation is authorized to issue multiple classes or series of stock. If the charter does not specify the rights of those additional classes or series, then they have the same basic rights.

Section 102(a)(4) states that "[i]f the corporation is to be authorized to issue more than 1 class of stock, the certificate of incorporation shall set forth the total number of shares of all classes of stock which the corporation shall have authority to issue and the number of shares of each class and shall specify each class the shares of which are to be without par value and each class the shares of which are to have par value and the par value of the shares of each such class."

That is all Section 102(a)(4) requires: an identification of the number of shares of each class and their par value.

A certificate of incorporation thus could provide for multiple classes of stock, such as Class A Common, Class B Common, and Class C Common, all with identical default rights. Why might someone do that? Perhaps three founders each want to a separate class of common, rather than simply participating in the ownership of a single class of common.

Let's call the rights that a share of stock carries by default the "baseline rights." In terms of our three principal rights, that means one vote per share, freely alienable in accordance with Article 8 of the UCC, and able to sue to enforce the rights the stock carries, including to sue for breach of fiduciary duty and seek any remedy available at law or in equity.

A charter can give a class of shares rights that are better than the baseline rights. These are rights generally associated with preferred shares, and this is what we usually think of when we imagine the powers, privileges, and rights of shares that are spelled out in a charter. Let's refer to those type of rights as "superior" rights.

Now let's consider some examples of

superior rights. By default, a share has voting power equal to one vote. A superior right would be voting power of more than one vote per share, like ten votes per share. The company's high-vote shares have this type of superior voting right. Or a superior voting right might be a special vote or consent, like a class vote on a merger. We often see that type of superior right associated with preferred shares.

For purposes of the right to sell, by default, a share is freely alienable. But the owner has no right to force the corporation to buy it. A superior right might be a redemption put right by which the corporation can be forced to redeem the share, assuming it had both the surplus and funds legally available to do so. Section 151(b) makes clear that a redemption put right is an attribute of the shares. We often see that type of superior right associated with preferred shares.

There can be superior versions of other default rights. By default, a share receives dividends when and if declared by the board. A superior right might be a right to a regular quarterly or annual dividend. We often see that type of superior right associated with preferred shares.

By default, a share participates *pro rata* in the residual assets available in dissolution. A superior right might be a liquidation preference that enables the share to participate in dissolution ahead of other classes of stock and then to participate with the common in the residual distribution. We often see that type of superior right associated with preferred shares, and it's called a participating preferred with a liquidation preference.

We've now talked about baseline rights and superior rights. A charter can also give a class of shares rights that are worse than baseline rights. Those rights are generally associated with classes of common stock that are deprived of some or all of their default rights. To keep things simple, let's refer to these types of rights as "inferior" rights, which creates a contrast with the superior rights.

Let's consider some examples of inferior rights. By default, a share has voting power of one vote per share. An inferior right would be no voting power per share, or voting power of a fraction of a vote per share, or the ability to exercise voting power on only certain issues. The company's

non-voting shares are an example of disfavored shares that carry inferior voting rights.

By default, a share is freely alienable and the corporation has no right to redeem the share. An inferior right would be a redemption call right by which a corporation can force the stockholder to sell at a given price such as fair market value or par value.

By default, a share receives dividends when and if declared by the board. An inferior right would be a class of shares that cannot receive dividends or can only receive dividends conditioned on other events happening, such as a prior level of payments to a more-senior class of stock.

By default, a share participates *pro rata* in the residual assets available in dissolution, however much might be available. There's no cap. An inferior right would be a liquidation cap that limited the share's ability to participate in liquidation to a maximum amount. Stock with a liquidation cap is generally called "nonparticipating preferred." The preferred only gets to participate up to the liquidation cap. Now, usually that type of preferred has a conversion right, but focusing on the rights

available in liquidation, the share has a liquidation cap.

Sections 102(a)(4) and 151(a) require that any departure from the baseline rights appear in the certificate of incorporation. Superior rights must appear in the certificate of incorporation. Inferior rights must appear in the certificate of incorporation.

In the language of Section 102(a)(4), "The certificate of incorporation shall set forth a statement of the designations and the powers, preferences and rights, and the qualifications, limitations or restrictions thereof, which are permitted by Section 151 of this title in respect of any class or classes of stock or any series of any class of stock of the corporation and the fixing of which by the certificate of incorporation is desired, and an express grant of such authority as it may then be desired to grant the board of directors to fix by resolution or resolutions any thereof that may be desired but which shall not be fixed by the certificate of incorporation."

That's a mouthful. But it reduces to this: Section 102(a)(4) contemplates designations,

powers, preferences, rights, qualifications, limitations, and restrictions.

From the perspective of a stockholder, there are three types of good, positive things. Those are powers, preferences, and rights. From the perspective of a stockholder, there are three types of not-so-good, negative things. Those are qualifications, limitations, and restrictions.

There's also this concept of "designations," which I think of as a neutral thing referring to a certificate of designations, which is what allows the board to implement blank-check preferred. Thus "designations" encompasses all of the types of specific things that one could put into a charter to create superior or inferior rights. They could be good things -- powers, preferences, and rights -- or they could be not-so-good things -- qualifications, limitations, and restrictions.

Section 151(a) uses similar language. It states, "Every corporation may issue 1 or more classes of stock or 1 or more series of stock within any class thereof, any or all of which classes may be a stock with par value or a stock without par value and which classes or series may have such voting

powers, full or limited, or no voting powers, and such designations, preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof, as shall be stated and expressed in the certificate of incorporation or of any amendment thereto, or in the resolution or resolutions providing for the issuance of such stock adopted by the board of directors pursuant to authority expressly vested in it by the provisions of its certificate of incorporation."

Once again you have the types of good, positive things that lead to superior rights. You also have the types of not-so-good, negative things that lead to inferior rights.

So far we have divided the rights the shares carry into three categories: baseline rights that the share has even if the charter is silent, superior rights that are better than baseline rights, and inferior rights that are worse than baseline rights.

Section 151(a) gives us another term: "special rights." That term refers to rights that are different from baseline rights. Special rights can be superior or inferior. They can be good things, like

preferences. They can be relatively superior or inferior rights. Or they can be rights with qualifications, limitations, or restrictions thereon.

Now let's introduce a final distinction. This distinction is between express rights and unexpressed rights. Recall that shares have certain baseline rights even if the certificate of incorporation is silent. When the charter is silent, those baseline rights are unexpressed rights.

One can, however, as a drafter of a charter or a certificate of designations, make those baseline rights express. A certificate of incorporation can say that each share of stock of a class carries voting power of one vote per share, just as would be implied by Section 212(a) of the DGCL if the charter were silent. The right has been made express, but it is no different than a baseline right.

A certificate of incorporation can say that each share of stock is freely alienable, just as it is under Section 159 if the charter is silent. That right has been made express, but it is no different than the baseline right.

A certificate of incorporation can say that each share of stock participates *pro rata* in

dissolution after all the debts of the corporation and any liquidation preferences are paid, just as Delaware law implies if a charter were silent. The right has been made express, but it is no different than the baseline right.

Baseline rights, therefore, can either be unexpressed rights or express rights. Special rights are always and necessarily express rights.

With that terminology in hand, let's turn to Section 242(b)(2). The first sentence of Section 242(b)(2) provides as follows: "The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the certificate of incorporation, if the amendment would increase or decrease the aggregate number of authorized shares of such class, increase or decrease the par value of the shares of such class, or alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely."

The plaintiffs advance a straightforward argument based on the plain meaning of the statute. They argue that Section 242(b)(2) provides for a class vote when an amendment would

alter or change powers, preferences, or special rights. The plaintiff's reading gives meaning to each of these terms. Special rights means rights that are different than baseline rights. They can be superior rights or inferior rights, but they are special. They are not baseline.

Preferences are a type of special right. They are generally what preferred stock has. It's a type of superior right.

That leaves powers. What does "powers" mean? The plaintiffs offer a logical answer. It means baseline rights. From the plaintiff's standpoint, the analysis does not even need to go so far as to include all baseline rights. All that "powers" has to include is one particular baseline right: the power to sue.

Here, we encounter a skirmish between the parties. The company argues that the ability to sue isn't a power, it's a right. The company also says that the ability to sue doesn't belong to a share, it belongs to some type of jural actor who is the owner of the share — namely, the stockholder. The second point does not survive *Urdan*.

On the first point, my big-picture

sense of the authorities is that concepts of "rights" and "powers" are used relatively interchangeably. We live in a world today that is filled with rights talk, so rights is the logical word that a modern speaker would resort to.

Not surprisingly, the company can find cases, including some of my own, that refer to the right to sue, the right to sell, and the right to vote, rather than the power to sue, the power to sell, or the power to vote.

I don't see any meaningful distinction in those cases between those two terms. The cases don't seem to be using the terms with any intent to convey or imbue them with different legal meaning. They seem to be used interchangeably, and when I look at the scholarship on this subject, it also seems to use the terms interchangeably.

Perhaps the best example of this is the right to vote. We usually refer to that framing -- namely, the "right to vote" -- but in Section 151(a), the vote is referred to as a power. Consistent with that, we refer to the voting power associated with the shares, and when we refer to the denominator in the vote calculation, we use the word

"power," such as a majority of the outstanding voting power. We may colloquially refer to voting rights, and we usually do, but the corporate concept is really voting power.

The plaintiffs have advanced a strong argument that the right to sue associated with a share is also a power. The plaintiffs have identified a series of sections of the DGCL in which the ability to sue is referred to as a power. One is Section 122, which lists specific powers of a corporation, including under subsection (3), the power to sue or be sued. Section 291, dealing with the powers of receivers, is another example. It is true that those sections generally refer to the power of a corporation or another jural actor to sue, but those sections nevertheless support the proposition that the ability to sue is technically a power.

Section 123 suggests that, just as the rights/powers distinction isn't a major issue for the right to vote, it shouldn't be a major distinction for the right to sue. Section 123 addresses the extent to which a corporation can exercise powers, rights, and privileges associated with the shares it owns. The section states: "A corporation while owner of such

securities may exercise all the rights, powers and privileges of ownership, including the right to sue." That passage uses the words "right to sue," but it follows "rights, powers and privileges." "Sue" is one of that subset. Whether the noun is "right" or "power" just doesn't seem to be driving the analysis.

The plaintiffs thus conclude that the reference to "power" in Section 242(b)(2) at minimum means the power to sue. Once the plaintiff has framed the right to sue as a power, the officer exculpation amendment easily falls within Section 242(b)(2).

Stepping back a level, the plaintiff perceives a baseline in which the company's non-voting stock had the power to sue and to assert claims and seek remedies across a particular domain. That domain included the right to assert direct claims against officers for breach of the duty of care and to recover damages.

The officer exculpation provision reduced the scope of that right by eliminating the ability to recover damages for breach of the duty of care. However one views the extent of the area covered by the domain of the power to sue before the amendment, the domain covered after the amendment is

less than it was before.

For an analogy, imagine a football field. That domain is the original area of coverage for the right to sue. For over a hundred years, the traditional football field has been 360 feet long, including the end zones, and 160 feet wide, with a playing field that is 300 feet long. Imagine a rules change that reduces the size of that field. We can debate about the size of the area that is cut out of the field, but we know the football field no longer has its original dimensions. Maybe it's now 95 yards, maybe it's 99 yards, but something has been taken out of it.

To bring this concept home even more, let's compare the reduction in the scope of the default right to sue to amendments that reduce other default rights. Take an amendment that reduces the voting power associated with a share from the statutory default of one vote per share to a lower figure of half a vote per share, or perhaps a tenth of a vote per share. That is a reduction that is adverse. The two amendments are analogous in terms of reducing the scope of the default right.

The officer exculpation amendment is

also analogous to an amendment that reduces the default right to participate *pro rata* with all stockholders in a dissolution to a capped right to a liquidation amount and nothing more. And it's analogous to an amendment that changes the power to sell a share freely to anyone into a power to sell subject to a redemption call right triggered by the sale that gives the corporation the ability to redeem.

Each of the rights I just discussed is a baseline power or right. In each case, the amendment is adversely affecting the baseline power or right.

An amendment can do the same thing with special rights that are either superior or inferior. It can happen with a special voting power. An amendment can reduce a superior special voting power equal to ten votes per share to five votes per share. Or an amendment can reduce an inferior special voting power, like .5 votes per share, to .1 vote per share.

It can happen with alienability. An amendment can reduce a superior power of alienability, like the ability to sell freely plus the right to exercise a redemption put right exercisable by the

stockholder by reducing the redemption price to a lower amount. Or an amendment can reduce an inferior power of alienability, like the ability to sell subject to a redemption call right exercisable by the corporation, and again reduce the redemption price to a lower amount.

Returning to the first sentence of Section 242(b)(2), the plaintiffs say that the officer exculpation amendment altered or changed a power of the shares of the non-voting stock so as to affect them adversely. I think if one were to interpret the plain language of Section 242(b)(2) on a blank slate, that would be a fairly persuasive plain-meaning analysis. It would be a strong argument.

Now let's take the other side of the argument. The problem with the plaintiff's plain-meaning theory is how the statute has evolved over time and how it has been interpreted during its evolution.

The principal authority is the Delaware Supreme Court's decision in *Dickie Clay*, which is an opinion from 1942. The company in *Dickie Clay* had three classes of stock: preferred stock that carried a mandatory dividend and a liquidation

preference, Class A stock that carried a cumulative dividend but was generally non-voting, and common stock that had no right to dividends until the preferred stock had received a specified amount of dividends and the Class A stock had been retired. Note that all three classes of stock had a mix of superior rights, inferior rights, and baseline rights.

The corporation proposed an amendment that would increase the number of authorized shares of Class A. By increasing the authorized number of Class A shares, the corporation could issue more Class A shares, and those shares would be ahead of the common stock for purposes of its ability to receive dividends. The corporation sought and obtained a vote of the preferred and common voting together plus a class vote of the Class A. The corporation did not obtain a class vote of the common.

At the time, the governing statute of was Section 26 of the DGCL. It only addressed preferred stock, and it provided for a class vote for any amendment that would alter or change "the preferences, special rights or powers given to one or more classes of stock held by the certificate of incorporation, so as to affect such class or classes

of stock adversely."

One of the common stockholders sued, arguing that the amendment adversely affected the common and required a class vote under Section 26 precisely because the increase in the authorized number of Class A shares meant that the corporation could issue more Class A that would be ahead of the common for purposes of its ability to receive dividends.

The Delaware Supreme Court rejected that argument. The Court held that increasing the authorized number of the shares of the Class A did not alter or change adversely the privileges or special rights and powers of the common. In my view, that was a relatively easy conclusion to reach, since the amendment did not make any change to the rights of the common at all.

But the Court in *Dickie Clay* did not rest on that basic point. It, rather, used language that could support three different interpretations.

The first interpretation is that a class vote is only triggered if it affects a superior right of the shares. That interpretation rests initially on the observation of the *Dickie Clay* court

that the language of Section 26 permits an amendment to change the "number, par value, designations, preferences, or relative, participating, optional, or other special rights of the shares, or the qualifications, limitations or restrictions of such rights."

Interpreting this language, the *Dickie Clay* court stated: "The statute, in listing the amendable rights, or rights and powers, attached to stock, first speaks of preferences. It then speaks of rights, and employs specific descriptive words, followed by the general and embracive words, 'other special'. Whatever may be said with respect to the necessity for the use of the word 'special', as applied to a right attached to stock, in view of the prior descriptive words, it is clear enough that the word was used in the sense of shares having some unusual or superior quality not possessed by another class of shares." That's a quote from page 318 of the decision.

The important language is the reference to some "unusual or superior quality not possessed by another class of shares." The reference to "superior quality" means, in the parlance that I am

using, a superior special right. I will call this the "superior right interpretation" or "superior right argument."

That interpretation finds support in the fact that, at the time, Section 26 was focused on preferred stock, which was understood to have superior rights. Under the superior right interpretation, a class vote is only required if the change affects a special right that is better than what the baseline right would be — i.e., only if it changes a superior right.

A second interpretation supported by *Dickie Clay* requires a special right distinct from baseline rights, but it does not matter whether the special right is superior or inferior. That interpretation fixates on the word "unusual," rather than the word "superior." So the emphasis for purposes of this interpretation is on the reference in the decision to an "unusual ... quality not possessed by another class of shares."

The *Dickie Clay* court later explained that a class vote was not required for the amendment at issue because "Where the corporate amendment does no more than to increase the number of shares of a

preferred or superior class, the relative position of subordinated shares is changed in the sense that they are subjected to a greater burden. The peculiar, or special, quality with which they are endowed, and which serves to distinguish them from shares of another class, remains the same." That's from pages 318 to 319.

Under this view, the reference to "analogous peculiar, or special, quality" with which the shares are endowed, and which serves to distinguish them from the shares of another class, means something that is different from baseline. In my parlance, I have described that as a "special right." So I will call this the "special right interpretation" or the "special right argument."

There is a third interpretation of *Dickie Clay* which reads the decision as not requiring that a right be special or superior at all, only that it be express in the certificate of incorporation. This reading is different because an express right could be the express manifestation of a baseline right. For example, instead of being silent regarding voting, a charter could say that each share of a particular class of shares carries voting power of one

vote, which is the same as the default baseline right under Section 212(a).

Or the charter could say that the class of shares is freely alienable, which is the same as the default baseline right under Section 159. What matters under this interpretation of *Dickie Clay* is that the right, whether superior, inferior, or baseline, is made express. I will call this the "express right interpretation" or "express right argument."

It bears noting that none of these interpretations represent the bottom-line holding of *Dickie Clay*. The statement that supported the actual holding is as follows: "It is entirely clear that the statute in its mention of relative rights of shares did not refer to the position of shares in the plan of capitalization, but to the quality possessed by the shares; and it is only by a refinement of interpretation that it can be said that a relative position is a relative right."

The holding of *Dickie Clay* is thus that relative position in the capital structure is not a right of the shares or, in the language of the decision, a quality of the shares such that

authorizing more of a senior class or series or adding a senior class or series does not make an adverse change to the rights of the junior class or series.

That's the holding. The superior right interpretation, the special right interpretation, and the express right interpretation all flow from various adjectives in the decision's discussion of the statute but not from the actual holding.

We now move forward 55 years to 1997 and the decision in *Orban v. Field*. In the interim, in 1969, the General Assembly amended Section 242(b)(2) to change the order of the terms. In lieu of referring to "preferences, special rights and powers," the language now refers to "powers, preferences, and special rights." Where there was ambiguity about whether "special" modified just rights or both rights and powers, the reference to "powers" now stands alone.

In *Orban*, a corporation named Office Depot had issued common stock, Series A preferred stock, and Series B preferred stock. The preferred stockholders wanted to sell Office Depot to Staples, a third-party acquirer, and to effectuate the

transaction by merger. The preferred stock carried liquidation preferences, and the value of the deal was such that the preferred stock would soak up all of the consideration and the common stockholders would receive nothing.

The merger agreement required that the merger receive the approval of holders of 90 percent of the outstanding share of each class of stock voting separately. The opinion does not dilate on why the merger agreement contained that requirement, but it did.

One common stockholder -- the plaintiff Orban -- held 96 percent of the common stock and, therefore, had the ability to block the deal. To create a path to approve the merger, the board redeemed certain outstanding notes in exchange for shares of common stock and Series C preferred stock. The issuances of those shares of common stock sufficiently diluted Orban's holdings in the common and the associated voting power from 96 percent to 42 percent of the class.

The corporation then redeemed the Series C stock for cash, and the holders used the funds to exercise warrants to purchase additional

shares of common stock. Those shares of common stock further reduced Orban's holdings in the common and his associated voting power to less than 10 percent of the class, eliminating his ability to block the deal.

Orban sued. The deal had closed and a class vote, if it had been recognized, could have required rescinding the whole ball of wax. The decision evidenced the Court's skepticism of Orban's lawsuit as a holdup play.

For his class vote theory, Orban alleged that the creation of the Series C preferred was an essential part of the recapitalization and required a class vote under 242(b)(2). As in *Dickie Clay*, that was an easy argument to reject because the creation of a senior security does not effect any change or amendment to the rights or powers of the common stock. Nothing about the legal rights or powers associated with the common stock changed in any way. The same was true for the issuance of additional shares of common stock.

But as in *Dickie Clay*, the opinion went further. The *Orban* court interpreted *Dickie Clay* to stand for the following proposition: "The language of the statute makes clear that it affords a right to

a class vote when the proposed amendment adversely affects the peculiar legal characteristics of that class of stock. The right to vote is not a peculiar or special characteristic of common stock in the capital structure of Office Mart. All classes of stock share that characteristic; the voting power of each class of stock would be pro-rata diluted by the issuance of Series C Preferred Stock and thus we're all entitled to vote equally (in one general class)."

The language in *Orban* thus appears to provide strong support for the special right interpretation of *Dickie Clay*. That interpretation focuses on the use of the words "peculiar, or special," and distinguishes those types of rights from characteristics that all classes of stock share.

The language of *Orban* also provides support for yet a fourth interpretation, or at least another aspect of the interpretation, which is that Section 242(b)(2) does not provide a class vote when all shares are affected equally by the amendment. That interpretation draws on the language in *Orban* which states "the voting power of each class of stock would be pro-rata diluted by the issuance of Series C Preferred Stock and thus all were entitled to vote

equally (in one general class)."

I will call this the "equal treatment exception" or the "same treatment exception," because the language seems to suggest that if an amendment treats all shares equally or in the same way, then there is no class vote.

As in *Dickie Clay*, the reference to the peculiar or special characteristics of the common stock was not necessary to the holding in *Orban*. The issuance of the Series C and additional shares of common stock did not alter any characteristic of the common, whether or not they were peculiar or special and whether or not they were express or implied.

The holding was thus that a class vote was not required when nothing about the rights or powers associated with the common stock was changed. But the Court went further and included language supporting the special right interpretation and the equal treatment exception.

The company did a great job canvassing all this law in their briefs. They were very thorough, and I appreciate it. As a result, however, it was not clear to me whether they were advancing the superior right argument, the special right argument,

the express right argument, or the same treatment exception.

Based on a combination of a letter I sent to the parties before argument and helpful dialogue that I had with counsel during argument, I now understand that the company is only relying on the express right argument — i.e., the express right interpretation.

They say that the officer exculpation amendment cannot trigger a class vote under Section 242(b)(2) because the right to sue is not a power or right expressly set forth in the certificate of incorporation, but rather, is a power or right established or implied by law. The generalized proposition is that Section 242(b)(2) only applies to power or rights expressly set forth in the certificate of incorporation.

Let's engage with that argument. And because *Dickie Clay* and *Orban* also provide support for the superior right argument, the special right argument, and the same treatment exception, let's engage with those arguments too and try to figure out how this statute operates.

Let's start out with the express right

argument and the two narrower versions that are included within it, because both the superior right argument and the special right argument are more specific versions of the express right argument that only apply to a subset of those express rights.

The obvious purpose of Section 242(b)(2) seems to be to protect a class of stock against having its powers, preferences, and special rights adversely affected. That's what it says.

Why would that concern only apply to express rights, and not to rights established by law when the charter is silent? And why would that concern only apply to superior rights or special rights, and not to baseline rights?

Let's start with a hypothetical that stress tests the superior right interpretation and the special right interpretation. I note at the outset that the hypotheticals that I am presenting in this ruling are not the same as the hypotheticals provided to counsel in my letter, which were intended to help focus discussion on particular issues for the hearing.

The company raised objections to aspects of those hypotheticals that introduce other

legal issues. For example, in the hypotheticals in my letter, I followed the plaintiff's lead and treated a right of first refusal that was baked into the charter as a special right of the shares.

The company cited a 2001 decision involving a nonstock member corporation, *Capano v. Wilmington Country Club*, 2001 WL 1359254 (Del. Ch. Nov. 1, 2001), to argue that a transfer restriction is not a special right of the shares even if it's baked into the charter.

There's more that could be said on that issue, but since the purpose of the hypothetical is to stress test Section 242(b)(2), objections like that are distracting. So I've shifted in these hypotheticals to using a redemption right, which, under Section 151, is necessarily and expressly by statute an attribute of a class of shares.

Before proceeding further, let me acknowledge that there may well be other arguments against the amendments that are the subject of my hypotheticals. Most notably, every corporate act is twice tested, and none of these hypotheticals address the Berle'ian second test. The point of these hypotheticals is to explore the contours of 242(b)(2),

not to issue-spot for any and all arguments that might possibly be made.

Here is Hypothetical No. 1: Assume that a certificate of incorporation provides for two classes of common stock, Class A and Class B, specifies expressly that they each carry one vote per share, and is otherwise silent on the powers, preferences, and rights of each class.

Each share thus has the same number of votes that the shares would have by default under Section 212(a), which provides that "[u]nless otherwise provided in the certificate of incorporation and subject to Section 213 of this title, each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder."

The power to vote in this hypothetical is thus not a special right. It is not a superior right. It is simply the baseline voting right made express. Assume that the corporation has issued shares of both classes of common. Assume that the corporation proposes a charter amendment to reduce the voting power of the Class B common from voting power of one vote per share to zero votes per share.

It seems to me that Section 242(b)(2)

gives the Class B common a class vote in this situation. The charter expressly gave the Class B common voting power of one vote per share. That vote is being taken away and reduced to zero. My impression at oral argument was that the company agreed that the Class B would have a class vote under an analogous hypothetical that was in my letter.

But this means that neither the superior right interpretation nor the special right interpretation can be accurate interpretations of Section 242(b)(2), because in this hypothetical, a class vote is triggered by the modification of a baseline right that has been made express. That right is not "special" in the sense of being different than baseline. It is not "superior" because it is the same as the baseline. We can thus exclude those interpretations as nonviable. That also means we have to exclude, or at least discount, the language in *Dickie Clay* and *Orban* which suggests that those interpretations are viable.

Now let's move to Hypothetical 2 and stress test the express power interpretation. Assume the same facts as in my first hypothetical, but now the voting power is not express. It is implied by law

under Section 212(a).

This scenario, therefore, does not satisfy the express power interpretation. But why should there be any difference? The amendment is still eliminating the voting power associated with the Class B common. The fact that the power is not express should not matter. Yet under the express power interpretation, no class vote is available in this instance simply because the right is not express.

It does not make sense to me why a class vote would be available in Hypothetical 1 and not in Hypothetical 2 when the amendment is exactly the same, the effect is exactly the same, and the only difference is that in Hypothetical 1 the voting power is specified in the charter, while in Hypothetical 2, it is established by default under Section 212(a).

These two hypotheticals addressed the power to vote. We can create a similar test for the power to sell.

So let's try Hypothetical No. 3. Assume the same facts as in Hypothetical 1, except that the charter provides that "[a]ll shares of stock of this corporation are freely alienable and may be transferred in accordance with Article 8 of Title 1 of

subchapter 6." For those of you who don't recognize it immediately, that was a direct quote from Section 159. In our hypothetical, that language is expressly included in the charter.

Assume that the corporation proposes a charter amendment which provides that if any share of Class B common is sold to a party that the board determines is a competitor, then the corporation can redeem the shares at 10 percent below fair market value. Again, Section 151(b) provides expressly that shares can be made redeemable as an attribute of the shares.

Section 151 also provides that a qualification, limitation, or restriction like a redemption call "may be made dependent upon facts ascertainable outside the certificate of incorporation ... provided that the manner in which such facts shall operate upon the voting powers, designations, preferences, rights and qualifications, limitations or restrictions of such class or series of stock is clearly and expressly set forth in the certificate of incorporation." Section 151(a) explains that "[t]he term 'facts,' as used in this subsection, includes, but is not limited to, the occurrence of any event,

including a determination or action by any person or body, including the corporation." A board determination that a buyer was a competitor thus could trigger a redemption right.

The analysis of the amendment in Hypothetical 3 is the same as in Hypothetical 1, but with the power to sell substituted for the power to vote. In this scenario, the power to sell is an express power, but it's not a superior power or a special power because its language tracks the language of Section 159. It is a baseline power made express.

The competitor redemption right amendment will reduce the scope of the express power to sell by imposing the competitor redemption call right in favor of the corporation. It seems to me that Section 242(b)(2) should give the Class B common a class vote in this situation. The charter expressly gave the Class B common a power to sell, and the amendment is reducing the scope of that power by adding a redemption right in favor of the corporation. An express power of the class is being adversely affected.

But now let's try Hypothetical 4, where we tweak the hypothetical so that the power to

sell is no longer express. Assume the same facts as in Hypothetical 1, but the charter is silent on the issue of alienability. The corporation's shares are nevertheless still freely alienable under Section 159 and to exactly the same degree. Assume that the corporation proposes the same charter amendment to impose a competitor redemption call right in favor of the corporation on the Class B stock.

The analysis under Section 242(b)(2) is the same as in Hypothetical 2, but with the power to sell substituted for the power to vote. The power to sell is now no longer express. It is implied by law by Section 159.

The scenario, therefore, no longer satisfies the express right argument. But again, so what? The amendment is still reducing the scope of the Class B common's power to sell by making the shares subject to the competitor redemption call right. That is an adverse effect on a power appurtenant to a class of stock, and Section 242(b)(2) should provide the Class B common with a class vote.

We have now seen through the lenses of the power to vote and the power to sell that the express right argument, the special right argument,

and the superior right argument treat like circumstances differently. That suggests that the interpretations of the statute that they support are incoherent, because they create conflicting results in substantively identical circumstances. An incoherent interpretation of a statute should be an unpersuasive one.

Those arguments, those interpretations, should not have any more force for purposes of the power to sue, which is another right established by law.

To understand that, let's try Hypothetical 5. Assume the same facts as in Hypothetical 1. Assume that the corporation proposes to adopt an amendment which provides that any holder of Class B common stock who wishes to sue for breach of fiduciary duty, whether through an individual or derivative action, must own individually or collectively with other plaintiffs, as of the date of instituting such action, at least 2 percent of the corporation's outstanding shares or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of the corporation with a market value of at

least $2 million.

Let's call this the "litigation threshold Amendment." For those who don't immediately recognize the language, it's drawn verbatim from Section 367 of the DGCL, which includes a provision of that sort to limit the ability of stockholders to file any action to enforce the balancing-of-interests requirement found in Section 365(a) of the public benefit corporation statute.

In this hypothetical, the power to sue is being affected adversely. Before the litigation threshold amendment, any holder of Class B common stock could sue individually or derivatively. After the amendment, a Class B common stockholder could sue only by meeting the requirements of the litigation threshold amendment. For purposes of Section 242(b)(2), the amendment adversely affects a power that the Class B common stock otherwise would have. The plain language of Section 242(b)(2) would seem to call for the Class B common stock to receive a separate class vote to protect its power to sue.

The analysis of the officer exculpation amendment should be identical to the litigation threshold amendment. The restrictions on

the power to sue differ in degree, but not in kind.

I should note as an aside that when I floated a similar litigation threshold amendment with the parties, the company responded that this type of provision would be invalid. Perhaps. But as I noted, a version of the litigation threshold amendment is expressly authorized for public benefit corporations under Section 367, so it's difficult to say that it's contrary to Delaware public policy. One would have to posit some fundamental difference between C corps and public benefit corps to support an argument as to why a provision like this is warranted for a public benefit corporation but beyond the pale for a traditional C corp.

Regardless, the point of this exercise is not to ask whether some other doctrine or source of law might provide a constraint. The point is to assess whether Section 242(b)(2) provides a constraint by imposing a class vote when an amendment modifies the power to sue. And the idea is to use the concept of this amendment to pressure test the validity of the various interpretations of 242(b)(2).

Now let's talk briefly about the same treatment exception. Recall that the language of

Orban suggests that Section 242(b)(2) does not apply when an amendment affects all classes in the same way.

There is nothing in the plain language of Section 242(b)(2) that supports that assertion. In fact, the contrast between the first and second sentence of Section 242(b)(2) negates it. The second sentence states, "[i]f any proposed amendment would alter or change the powers, preferences, or special rights of 1 or more series of any class so as to affect them adversely, but shall not so affect the entire class, then only the shares of the series so affected by the amendment shall be considered a separate class for purposes of this paragraph."

For purposes of a series vote, the statute expressly includes the concept of same or different treatment. There's nothing similar for a class vote under the first sentence. If an amendment affects all classes and the effect is adverse as to each class, then each class gets a class vote.

Let's test the same treatment exception with our last hypothetical, and I'm sure you're thrilled to hear we've reached the end. It's Hypothetical 6. Start with the same facts as Hypothetical 1. This time, assume that one holder

owns all of the Class A common stock and that there are enough Class A common shares to comprise a majority of the outstanding voting power.

The Class A holder causes the corporation to propose to amend its charter to adopt a provision contemplated by 102(b)(6), which authorizes a provision "imposing personal liability for the debts of the corporation on its stockholders to a specified extent and upon specified conditions; otherwise, the stockholders of a corporation shall not be personally liable for the payment of the corporation's debts except as they may be liable by reason of their own conduct or acts."

Assume that this amendment makes all stockholders liable for a *pro rata* share of the corporation's liability on a senior bank loan in the event the corporation defaults. Assume that the holder of the Class A common personally guaranteed that loan. Imposing this amendment on all shares is rational from the Class A stockholders' perspective, because the holder of the Class A common is already on the hook personally. This amendment puts all the other stockholders on the hook proportionately as well, diluting the Class A holder's potential

liability.

This amendment represents an adverse change to a baseline and unexpressed right of the shares, under which the owners are not personally liable for the debts of the corporation. Yet the amendment nominally treats all stockholders equally. If the same treatment exception were correct, then there would be no class vote in this situation. Yet the amendment is plainly and obviously adverse to each class. I would suggest that, based on this example, we can rule out the same treatment exception. In this setting, each class gets a class vote.

During oral argument, I was eventually able to discern that the company is not relying on the same treatment exception. I did have the impression at oral argument that the company agrees that if a corporation has multiple classes of stock and an amendment makes an adverse change to each of these classes, even if it is the same adverse change, then each class gets a class vote.

That's all helpful. It's nice to be on the same page as to that. But what it means is we have to discount the language in *Orban* that supports the same treatment exception, because the same

treatment exception doesn't work under Section 242(b)(2).

The company has said that it's not relying on the superior right argument or the special right argument. The company says it is only relying on the express right argument. The company is not asserting that a right must be superior, nor that the right must be special and different from the rights held by the other shares. The company agrees that all shares could have the same exact right, or even that it could be an express version of a baseline right. The company says only that to trigger a class vote, the right must appear expressly in the charter.

As I have noted, the express right argument results in the exact same charter amendment operating differently, depending on whether the right is expressed in the charter or established by law. That suggests a degree of incoherence in the express right argument that should fatally undermine it.

In response, the company argues that the express right argument is necessarily the answer under *Dickey Clay* and *Orban*. As I have discussed, there's actually language in those cases that support multiple different interpretations. The express right

interpretation is one of them, but it is not indisputably clear that *Dickey Clay* and *Orban* necessarily lead to the express right argument.

As a fallback, the company argues that the express right argument is necessarily the answer because, otherwise, how would a corporation know whether a class vote was necessary. I don't think there would be any great mystery. There are three fundamental stockholder powers: to vote, to sell, and to sue. There are other rights set forth in the DGCL. And there are express rights. If you affect any of those adversely, you trigger a class vote for the affected class.

The company argues that without the express right interpretation, more charter amendments would require class votes. That undoubtedly is true. For example, in a multi-class company, class votes could be required for charter amendments eliminating the right to act by written consent or approving a conversion to a private benefit corporation.

In my experience, corporate planners would like to avoid class votes. But that does not mean more class votes is a bad thing. By my lights, whether more class votes is good or bad is another

debatable proposition that depends on your underlying empirical assumptions.

Let's start from a theoretical standpoint. From that perspective, granting a class vote to each class in a particular setting ensures the transaction that triggers the class vote is what economists call Kaldor-Hicks efficient, because the class can block the amendment unless it receives sufficient consideration to outweigh any loss.

For anyone who doesn't immediately recall the concept of Kaldor-Hicks efficiency from your law and economics class -- and there's no reason why you necessarily should -- the idea is that a transaction is efficient if one side is sufficiently better off that it can compensate the other side for its losses so that everyone is at least not worse off.

The concept is distinct from Pareto optimality, where everyone in a transaction necessarily is made better off. The idea under Kaldor-Hicks efficiency is that, on net, the transaction makes everyone better off, so that even if one side loses, society gains. If the adversely affected side has a blocking right, it will veto transactions that are not Kaldor-Hicks efficient, and

it will withhold approval under conditions of Kaldor-Hicks efficiency until those who benefit from the transaction and want it to go forward share some of the benefit to offset the detriment.

A class vote has that effect. A class vote thus ensures that amendments go through that will be value creating rather than value destroying.

A less theoretical way of framing the problem is that midstream amendments enable both permanent and temporary majorities to impose their will on minority classes of stock and potentially reallocate value through amendments. It is easy to imagine settings where one or more classes dominate the total voting power and seek to make adverse changes to a right that one of the classes would want to preserve. Hypothetical 6 provided an example of that with the amendment that sought to impose personal liability for a corporate debt on all stockholders.

For an example, using the power to sue, envision a group of venture capital funds who own all the preferred stock and, through it, the bulk of the corporation's outstanding voting power. They might well seek to impose amendments on the common stock that alter unexpressed rights, such as the right

to sue.

For a concrete example, let's assume the preferred stockholders foresee having to engage in the type of transaction at issue in *Orban* and later in *Trados*, where their liquidation preferences will soak up all the consideration and the common will receive nothing. As an advance-planning measure, the preferred might well seek to impose something like the litigation threshold amendment. If the corporation were privately held after the amendment, only a stockholder who owned, individually or collectively with other plaintiffs, at least 2 percent of the class would be able to sue.

For purposes of Section 242(b)(2), the amendment would adversely affect a power that the common otherwise would have, and the plain language of the statute would seem to call for a class vote by the common on that type of amendment to protect its power to sue. With a class vote, the common could reject the amendment unless the amendment was part of a transaction in which they received something in return, such as a modification of the preferred's liquidation preference.

This is not heresy. Nor is it novel.

It's how restructurings happen in bankruptcy, where multiple classes in the capital structure receive class votes. It's also how bond restructurings happen, because a class of bondholders often receive some form of consideration for agreeing to modifications in their contract rights.

It is not unthinkable to envision that the same type of structure would happen in this type of setting and that 242(b)(2) would be intended to protect the powers of a class of stock so that they could not be adversely affected and value reallocated.

Now, what would the real-world consequences of this interpretation of Section 242(b)(2) actually be? I would say not much. It would have no effect on new IPOs, where the issuing company can still put whatever it wants in its charter. It would have no effect on single-class corporations. The main effect would be to provide protection for stockholders in multi-class corporations where one or more issuances dominate the voting power and another issuance is vulnerable.

Even then, if the amendment is good for all stockholders, then the class votes should be easy to get. And if the corporation times the

amendment to coincide with its annual meeting, there is no need for significant additional expense.

And, as is often the case, in Delaware there is still a workaround. Recall that the merger statute, Section 251, permits a corporation to amend its charter and does not require a class vote. That's the landmark decision of *Federated United Corporation v. Havender*, a case from 1940, decided just two years before *Dickey Clay*, as well as *Warner Communications v. Chris-Craft,* a decision from Chancellor Allen in 1989, just seven years before *Orban*. There's a nice symmetry there. The only likely real-world effect of providing a class vote would thus be to channel corporations to use mergers to amend their charters rather than charter amendments under Section 242.

Now for a contrary policy argument. During the hearing, the company argued that when stockholders purchase no-vote shares, like the non-voting shares issued by the company, the buyers know they have no right to vote and cannot object to not receiving a class vote on the officer exculpation amendment. But that begs the question. Stockholders who buy non-voting stock know they have no right to vote unless required by law. Namely, unless required

by Section 242(b)(2). If Section 242(b)(2) provides a vote in this setting, then they bought shares with that baseline understanding — in other words, the baseline expectation that they would have a vote.

This points to a larger problem with arguments about the baseline expectations of buyers. One cannot assume a baseline expectation and then use it to answer the question that the case poses which actually determines the nature of the expectation. That is circular reasoning.

To reiterate, the issue presented by the officer exculpation amendment is identical to the litigation threshold amendment. It affects a power that is not express, but that should not matter. It affects a power that is not special or superior, but that should not matter either. I personally view the officer exculpation amendment as reasonable, so it's hard to see out of the box the implications of the underlying rule. Analytically, however, the issue is the same.

Given the foregoing analysis, there's a lot to be said for the plaintiff's plain-meaning argument. But I cannot adopt it.

The company has been able to trace a

textual argument that links powers, preferences, and special rights to the powers, preferences, and special rights made express in a charter under Section 102(a)(4).

My discussion has shown that the express rights interpretation breaks down for the baseline right to vote and the baseline right to sell. My discussion suggests that the law should imply a similar outcome for the baseline right to sue.

But one could address the inconsistencies created by the baseline right to vote and the baseline right to sue and steel-man the express right interpretation by framing it as not just encompassing any power or preference or special right that is stated expressly in the charter, but also, any power, preference, or special right that is stated expressly in the DGCL.

That version of the express rights argument would flow from Section 394 of the DGCL, which states -- and I'm quoting -- "[t]his chapter and all amendments thereof shall be a part of the charter or certificate of incorporation of every corporation."

The Delaware Supreme Court noted this reality in *STAAR Surgical v. Waggoner* in 1991, when it

stated: "[I]t is a basic concept that the General Corporation Law is a part of the certificate of incorporation of every Delaware company." Coincidentally, that statement also appears in *Dickey Clay*, where the Court said, at page 321, "[T]here is impliedly written into every corporate charter as a constituent part thereof the pertinent provisions of the State Constitution and statutes."

So under this steel-man version of the express rights interpretation, the power to sue for breach of fiduciary duty would be an attribute of the shares, but it would be different from the right to vote or the right to sell, because there is no express provision in the DGCL that addresses the right to sue. Except for Section 327, which imposes the contemporaneous ownership requirement for derivative claims, the DGCL says nothing about the power to sue.

It follows that, under this steel-man version of the express rights argument, the power to sue would not be protected by Section 242(b)(2).

I have to admit that if I were writing on a blank slate, I would be inclined to add in the power to sue. I think there is a strong argument that the power to sue is the foundational power, meaning

that it is the power that is essential to all others and on which the legal regime is built. Why? Because if you cannot go to court, then you cannot enforce your other rights. If you cannot obtain a judgment, backed by the power of the state, that allows you to invoke the power of the state on your behalf to enforce your other rights, such as the power to vote or the power to sell, you might as well not have those powers. Unless you have some ability to coerce compliance from the corporation on your own, whether through violence or economic power, those powers become just words on a page.

Interestingly, the company seems to acknowledge the importance of the power to sue as a foundational power. When I circulated the earlier versions of my hypotheticals to the parties by letter, the company responded to some of them by saying that a particular amendment that affected the power to sue would be invalid as a matter of public policy because Delaware law will not permit certain limitations on the power to sue.

That is doubtless true. And the superficial distinction for the officer exculpation amendment is that the Delaware General Assembly has

specifically authorized it. But while that fact makes clear that the amendment is permissible, it does not answer whether the amendment sufficiently impairs a power associated with a class of stock such that the class should receive a class vote under Section 242(b)(2).

To reiterate, an amendment that imposes a reduction in voting power is plainly permissible. Section 242(a)(3) says that. But it still may implicate a class vote under Section 242(b)(2). An amendment that imposes a redemption right is plainly permissible under Section 151(b). But it still may implicate a class vote under Section 242(b)(2). If anything, the fact that the amendment to the DGCL under 102(b)(7) was deemed necessary to validate officer exculpation suggests the limitation is a big deal. And therefore, while now permissible as a statutory matter, it could be a sufficient impairment to a power associated with stock to require a class vote under Section 242(b)(2).

If I were writing on a blank slate, therefore, I would say that the power to sue is the foundational power which, while not express, is the most important baseline power, essential for the

others to exist, and therefore, less subject to modification than other powers and preferences and special rights, not more so. Indeed, I would suggest that one could flip the argument about the power to sue being readily modifiable because it is not an express power. I would suggest that it is so important, so fundamental, that no one needed to provide for it expressly, and therefore it is not readily modifiable.

Under this approach, the power to sue would only be modifiable to the same degree as any special right appearing in the charter or identified in the DGCL. And that would mean that the officer exculpation provision would require a class vote.

That said, I do not think that such an interpretation reflects the language of *Dickey Clay* and *Orban*. I think the language of those cases supports the company's version of the express rights interpretation.

I also think, consistent with the company's showing in its briefing, that Delaware practitioners have long viewed *Dickey Clay* as supporting the express rights interpretation. The company has cited treatise passages to that effect.

The company has pointed to the absence of any commentary saying anything different over the past decades.

The company also cited the experience with the director exculpation amendments that were adopted after the original enactment of Section 102(b)(7). Those amendments pose the same issue as the officer exculpation amendments, yet there is no evidence of any commentary suggesting that in a multi-class structure, a class vote would be required.

The company has identified nine examples of multi-class companies that adopted director exculpation amendments where no class vote was required. One corporation was a New York company, true, but no one has suggested that New York's law is different from Delaware in this respect.

Another corporation, The Washington Post Company, provided a class vote voluntarily on the joint adoption of both a director exculpation amendment and a director indemnification provision, believing that the latter could be viewed as an interested transaction such that a class vote would be helpful.

In the nearly 40 years since 1986 and

the adoption of Section 102(b)(7) for directors, no one has taken the position until this case that an exculpation amendment requires a class vote.

Speaking for myself, I never previously thought that an exculpation amendment required a class vote. Until I read the plaintiff's briefs, I thought this case was a no-brainer and an easy call.

Once I read the plaintiff's briefs, I decided they had a good plain-language argument. As I noted at the outset, if this were the first case to consider section 242(b)(2), then there might be a good reason to adopt it.

But this is not the first case to consider 242(b)(2). The decisions in *Dickey Clay* and *Orban* have paved the way, and there's an established understanding as to how Section 242(b)(2) works.

My deference to long-standing practitioner expectation in this case does not mean that a court will always defer to practitioner views. The Delaware Supreme Court did not do so in *CML v. Bax*. I did not do so in *Vaalco*. Then-Chancellor Strine did not do so in *Sandridge*. And the recent SPAC apocalypse brought on by *Garfield v. Boxed* shows

that the fact that many transactions deploy a particular structure does not mean it is right. Indeed, it can be fundamentally wrong.

Here, however, the company's interpretation is deeply settled, and it draws on *Dickey Clay*, which is a Delaware Supreme Court decision. I therefore do not feel at liberty to adopt a different interpretation of Section 242(b)(2). Accordingly, under *Dickey Clay* and *Orban*, the officer exculpation amendment does not require a class vote of the company's non-voting stock because the officer exculpation amendment does not affect a power, preference, or special right that appears expressly in the charter.

As I noted, there is a companion case involving *Snap* that presents the same issues. Its motion for summary judgment is granted on the same basis.

To reiterate, for the reasons that I've stated, the plaintiff's motion for summary judgment is denied, and the company's motion is granted.

I will enter an order to that effect.

It is my intention for that order to

be my last act in the case, such that it constitutes a final judgment, from which the aggrieved party can appeal as of right.

Thank you for listening to this ruling. I appreciate everyone bearing with me. And I hope everyone has a good day. Goodbye.

(Proceedings concluded at 12:18 p.m.)

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CERTIFICATE

I, JULIANNE LABADIA, Official Court Reporter for the Court of Chancery for the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 70 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except as revised by the Vice Chancellor.

IN WITNESS WHEREOF I hereunto set my hand at Wilmington, this 30th day of March, 2023.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public

Exhibit B

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ELECTRICAL WORKERS PENSION FUND, LOCAL 103, I.B.E.W. Plaintiff, v. FOX CORPORATION, Defendant.	C.A. No. 2022-1007-JTL
IN RE SNAP INC. SECTION 242 LITIGATION	CONSOLIDATED C.A. No. 2022-1032-JTL

[PROPOSED] ORDER GRANTING DEFENDANT FOX CORPORATION'S MOTION FOR SUMMARY JUDGMENT

WHEREAS, Defendant Fox Corporation, having moved the Court for an order entering summary judgment in its favor and dismissing the Verified Complaint filed in C.A. No. 2022-1007-JTL, pursuant to Court of Chancery Rule 56 (the "Motion"), and the Court having found good cause therefor;

IT IS HEREBY ORDERED, this ___ day of _____, 2023, that the Motion is GRANTED.

_____
Vice Chancellor J. Travis Laster

This document constitutes a ruling of the court and should be treated as such.

Court:	DE Court of Chancery Civil Action
Judge:	Multi-Case
File & Serve Transaction ID:	68948449
Current Date:	Mar 31, 2023
Case Number:	Multi-Case
Case Name:	Multi-Case
Court Authorizer:	J Travis Laster

Court Authorizer Comments:

For the reasons stated in the court's oral ruling on March 29, 2023, the plaintiff's motion for summary judgment is DENIED, and the defendant's motion for summary judgment is GRANTED. The court intends for this order to be its last act in the case, and hence a final order for purposes of the right to appeal.

/s/ Judge J Travis Laster

Exhibit C

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ELECTRICAL WORKERS PENSION FUND, LOCAL 103, I.B.E.W. Plaintiff, v. FOX CORPORATION, Defendant.	C.A. No. 2022-1007-JTL
IN RE SNAP INC. SECTION 242 LITIGATION	CONSOLIDATED C.A. No. 2022-1032-JTL

[PROPOSED] ORDER GRANTING DEFENDANT SNAP INC.'S MOTION FOR SUMMARY JUDGMENT

Defendant Snap Inc. ("Defendant"), having moved for entry of an order of summary judgment, and the Court having found good cause therefore:

IT IS HEREBY ORDERED, this ___ day of _____, 2023 that Defendant's Motion is GRANTED.

_____
Vice Chancellor J. Travis Laster

This document constitutes a ruling of the court and should be treated as such.

Court:	DE Court of Chancery Civil Action
Judge:	Multi-Case
File & Serve Transaction ID:	68948017
Current Date:	Mar 31, 2023
Case Number:	Multi-Case
Case Name:	Multi-Case
Court Authorizer:	J Travis Laster

Court Authorizer Comments:

For the reasons stated in the court's oral ruling on March 29, 2023, the plaintiff's motion for summary judgment is DENIED, and the defendant's motion for summary judgment is GRANTED. The court intends for this order to be its last act in the case, and hence a final order for purposes of the right to appeal.

/s/ Judge J Travis Laster

Multi-Case Filing Detail: The document above has been filed and/or served into multiple cases, see the details below including the case number and name.

Transaction Details

Court: DE Supreme Court

Document Type: Opening Brief

Transaction ID: 70114830

Document Title: Appellants' Opening Brief, with Exhibits A - C. (eserved) (jkh)

Submitted Date & Time: May 31 2023 2:36PM

Case Details

Case Number	Case Name
120,2023C	In re Fox Corporation/Snap Inc. Section 242 Litigation
121,2023C	In re Fox Corporation/Snap Inc. Section 242 Litigation