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Case Number 200,2023D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LONG DENG,	)	
	)	
Plaintiff Below,	)	No. 200, 2023
Appellant,	)	
v.	)	On Appeal from the Superior
	)	Court of the State of Delaware
HK XU DING CO., LIMITED,	)	
	)	C.A. NO. N21J-04630-AML
Defendant Below,	)	
Appellee.	)	

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This is a judgment enforcement action. Plaintiff-Appellant Deng ("Plaintiff" or "Deng") is the judgment creditor of Defendant-Appellee HK Xu Ding Co. Ltd. ("Defendant" or "Xu Ding").

Xu Ding is the record-owner of certain shares of a Delaware Corporation, iFresh, Inc. ("iFresh" and "Shares"). Seeking to execute upon these shares, Plaintiff domesticated his New York judgment against Xu Ding (the "Judgment") in Delaware. A commissioner of the Superior Court ordered attachment and an auction of the shares, and Xu Ding appealed the order to the Superior Court.

Below, Xu Ding contended that certificated shares had to be physically seized to be attached. However, because the Shares had been confiscated by the Chinese police and remains in Chinese police custody, the shares could not be attached in Delaware. Thus, "[t]he issue before the Court [wa]s whether it may order attachment and sale of certificated stock when the certificate itself cannot be physically seized ... ." May 8, 2023 Opinion (hereinafter "**Opinion**" or "**Op.**" and attached hereto as **Exhibit A**).

The court held that it may not. The same issue is now before this Court.

SUMMARY OF ARGUMENT

1. 8 *Del. C.* § 169 ("**Section 169**"), a part of the Delaware General Corporation Law ("**DGCL**"), states: "For all purposes of ... action, attachment, garnishment ... the situs of the ownership of the capital stock of all corporations existing under the laws of this State ... shall be regarded as in this State." This law, siting Delaware corporations' shares in Delaware, is sometimes known as the "situs rule." *U.S. Industries, Inc. v. Gregg*, 540 F.2d 142, 145 (3d Cir. 1976).

2. 8 *Del. C.* § 324(a) ("**Section 324**"), also a part of the DGCL, permits attachment and sale of "[t]he shares of any person in any corporation" to repay "debt," provided that "§ 8-112 of Title 6 has been satisfied" for certificated shares.

3. 8 *Del. C.* § 201 ("**Section 201**"), states:

> the transfer of stock and the certificates of stock which represent the stock or uncertificated stock shall be governed by Article 8 of subtitle I of Title 6. To the extent that any provision of *this chapter* is inconsistent with any provision of subtitle I of Title 6, *this chapter shall be controlling*.

(emphasis added)

4. 6 *Del. C.* § 8-112 ("**Section 8-112**"), a part of the Delaware Uniform Commercial Code ("**UCC**"), states that "[e]xcept to the extent otherwise provided or permitted by §§ 169 and 324 of Title 8 ... the interest of a debtor in a certificated

security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy."

5. The trial court concluded that, although Section 324 permits attachment of Delaware corporations' shares "for debt," and Section 169 sites such shares in Delaware regardless of where they are physically, "[a]fter the 1998 amendments to Section 324" to incorporate a reference to Section 8-112, "Delaware courts … *no longer* had the power to" attach certificated shares of Delaware corporations without physical seizure. This erred in several respects.

6. First, the plain text of all four statutes, read together, means that physical seizure is not required for attachment of a Delaware corporation's shares. Indeed, even the trial court itself agreed that the plain text of Section 8-112 does not require physical seizure, it therefore erred in concluding that the amendment of Section 324 to *reference* Section 8-112 somehow changed the effect of Section 8-112 itself.

7. Second, the trial court erred by reading Section 8-112's explicit reference to Section 169 out of existence in order to further its perceived legislative intent. But there is no textual basis for excising an explicit statutory clause in favor of unstated intent, especially where there is no ambiguity. What is more, the trial court's stated reasoning for ignoring Section 169—that it is merely a "jurisdictional" statute that does not cover attachments—is textually wrong. Section 169, by its

express terms, is not merely jurisdictional, and specifically states that it is for "all purposes" including "attachment ... *and* jurisdiction."

8. Third, to divine legislative intent, the trial court injected into its analysis recent legislative history and the "Synopsis" to the 1998 amendment of Section 324, even though it repeatedly stressed that the statutes at hand were "unambiguous." But these extraneous materials are unnecessary to interpreting unambiguous statutes whose express text is contrary to the trial court's holding.

9. Fourth, even assuming there is ambiguity, the trial court's statutory interpretation is divorced from the legislative history. For more than half a century, and consistently across multiple amendments of the DGCL and the Delaware UCC, Delaware has maintained a "unique" departure from the UCC's actual seizure requirement for attaching shares of Delaware corporation.

10. Indeed, today's Sections 169, 201, 324, and 8-112 are the culmination of decades of careful legislation, including affirmative repeal of prior statutes that *did* require actual seizure. Reflecting this unique position, the caselaw interpreting these statutes have uniformly held that actual seizure of Delaware corporations' shares is not necessary. Accordingly, this is the first time in Section 169's entire history that a Delaware court has affirmatively declined to give it effect in an attachment proceeding.

11. Lastly, the trial court appeared to have considered policy consequences of constructive seizure when ruling in favor of actual seizure. But the policy concerns it expressed, specifically for bona fide purchasers of certificated shares who do not register them with the issuer, are illusory. Section 324 itself makes clear that bona fide purchases of attached shares are void, and mandates that the attachment process be served upon the *issuer* alone. This was a deliberate legislative choice, made to incentivize prompt registration of shares with the issuer—not a failure to address an overriding need. For these reasons, this Court should reverse.

STATEMENT OF FACTS

On January 23, 2019, Deng agreed to sell and Xu Ding agreed to purchase 8,294,989 iFresh Shares for a sum of $7,050,741. Op. at 1.

All 8,294,989 Shares were certificated in a single stock certificate in Xu Ding's name. In breach of the Share Purchase Agreement, Xu Ding failed to pay the full amount of the purchase consideration for the Shares. *Id.* at 2.

On January 19, 2021, the Supreme Court for the State of New York, County of New York, entered a judgment by default in the amount of $2,424,469.68 plus post-judgment interest in favor of Plaintiff and against Defendant. *Id.*

Plaintiff domesticated the New York judgment in Delaware on June 11, 2021. A0001 (D.I. 1).[1] On June 3, 2022, Plaintiff filed a motion to have the Kent County Sheriff auction HK's iFresh stock in satisfaction of the Judgment. A0003 (D.I. 13).

By then, however, the Shares had been seized by the Chinese police. Op. at 1-2.

The Commissioner ruled in favor of Plaintiff on August 15, 2022. *Id.* at 3. Defendant appealed to the Superior Court on October 4, 2022, contending physical seizure was necessary. *Id.* at 3-4.

[1] Citations to "A__" refer to the Appendix to Appellant's Opening Brief.

Plaintiff opposed on November 11, 2022. A0010 (D.I. 42). Following a hearing on December 5, 2022, the Superior Court declared that Delaware law requires physical seizure of certificated shares for attachment and sale. Op. at 1. The Superior Court also held that, because seizure has not been accomplished in this case, Plaintiff's motion to sell the shares should have been denied, and the commissioner's order granting that motion must be vacated. *Id.*

The ruling *forecloses* the possibility of judgment enforcement in Delaware against any Delaware corporation's certificated shares so long as those shares are hidden or placed out of physical reach of a creditor.

Plaintiff timely appealed.

ARGUMENT

I. Question Presented.

Did the trial court reversibly err in holding that Delaware law requires physical seizure of a stock certificate before attaching and selling certificated shares?

Preserved at Opinion, at 5.

II. Scope of Review.

"Questions of statutory interpretation are questions of law reviewed de novo." *Delaware Bay Surgical Servs., P.C. v. Swier*, 900 A.2d 646, 652 (Del. 2006) (citation omitted).

III. Merits of Argument.

A. The Statutes At Issue.

This proceeding concerns four sections of the Delaware Code:

First, Section 169, stating that "For all purposes of ... attachment, garnishment *... the situs of the ownership of the capital stock of all corporations existing under the laws of this State ... shall be regarded as in this State*." 8 *Del. C.* § 169.

As the U.S. Supreme Court has observed, this "situs rule" is unique to Delaware, which "was the only State that treated the place of incorporation as the situs of corporate stock when both owner and custodian were elsewhere." *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 622 n.4 (1990).

Second, Section 324(a), which allows attachment and sale of shares "for debt." Section 324(a) was amended in 1998 to add that, for certificated shares, "the

attachment is not laid and no order of sale shall issue unless § 8-112 of Title 6 has been satisfied." 8 *Del. C.* § 324(a); Op. at 6-7.

Third, Section 8-112, providing that actual seizure of a security is required for attachment "[e]xcept to the extent otherwise provided or permitted by §§ 169 and 324," which "except" clause deviates from the American Law Institute's model UCC itself, as well as the UCC as adopted by all other states. A[Reitz article, at 88] ("Delaware stands alone in enacting [this] major substantive exception from the laws adopted in other states."). As one court observed:

> Unlike 49 other states that enacted the Uniform Commercial Code, Delaware did not enact s 8-317(1) which requires the actual seizure of stock certificates to effect a valid attachment or levy upon an interest in corporate stock. Rather, Delaware continued in force s 169 of its General Corporation Law which provides that the situs of ownership of stock in a Delaware corporation is Delaware regardless of the actual location of the stock certificates. In contrast to the Uniform Commercial Code procedure, Delaware nonresident sequestration practice permits the 'seizure' of a defendant's stock interest in a domestic corporation merely by giving notice to the corporation in Delaware.

U.S. Industries, Inc., 540 F.2d, at 143-44.

Like the Section 169 "situs rule" therefore, this statutory "§§ 169 and 324" exception from the physical seizure requirement of Section 8-112 is also unique to Delaware.

The interpretation of the "except" clause is straightforward. As the U.S. Supreme court noted when addressing a similar "except" clause in a federal statute, "[t]housands of statutory provisions use the phrase 'except as provided in ...' followed by a cross-reference in order to indicate that one rule should prevail over another in any circumstance in which the two conflict." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1070 (2018). Here, just like in Cyan, the "except clause—'except as provided in section [169] ...'—ensures that in any case in which § [8-112] and § [169] conflict, § [169] will control." *Id.* at 1063.

Fourth, 8 *Del. C.* § 201, the opening section of the DGCL's "Subchapter VI" governing "Stock Transfers," states:

> the transfer of stock and the certificates of stock which represent the stock or uncertificated stock shall be governed by Article 8 of subtitle I of Title 6. To the extent that any provision of *this chapter* is inconsistent with any provision of subtitle I of Title 6, *this chapter shall be controlling*.

"This chapter" is Chapter 1 of Title 8, the DGCL, which Chapter 1 includes 8 *Del. C.* §§ 169 and 324. These "shall be controlling" over "inconsistent [] provision[s] of subtitle I of Title 6," containing Section 8-112. 8 *Del. C.* § 201.

The trial court held that these statutes, read together, deprived Delaware courts of the power to make attachments of certificated shares without physical seizure of such shares. Op. at 7. As set forth below, this erred in numerous respects.

B. The Plain Language Of The Statutes Provides For Attachment *Without* Physical Seizure.

The Opinion concluded that "[t]he language of Sections 324 and 8-112 is not ambiguous ... . The statutory language requires that, to attach certificated shares of a corporation and obtain an order to sell the security to satisfy a judgment, the officer making the attachment must actually seize the certificate. There is no other reasonable way to read those two sections in harmony." Op. at 7.

But the plain language of §§ 324 and 8-112 is simple and directly contrary to this holding.

First, Section 169 creates the legal fiction that a Delaware corporation's shares are in Delaware, regardless of where they physically are.

Second, Section 324(a) states that shares of "any corporation" may be attached and sold "for debt," with subsection 324(b) providing that such attachment may be effectuated via service of "process" upon the issuing corporation. 8 *Del C.* § 324(b).

Third, Section 324(a) references Section 8-112, stating that, for certificated shares, an "attachment is not laid and no order of sale shall issue unless § 8-112 of Title 6 has been satisfied." 8 *Del C.* § 324(b).

Fourth, Section 8-112 states that "a certificated security may be reached by a creditor only by actual seizure of the security certificate," "*[e]xcept to the extent otherwise provided or permitted by [section] 169 ... of Title 8*," which sites Delaware corporations' shares in Delaware.

Put together, § 169 sites all Delaware corporate shares in Delaware; § 8-112 "except[s]" its own physical seizure requirement where § 169 applies; and § 324 simply makes a cross reference to, and requires satisfaction of § 8-112, which cross reference obviously includes § 8-112's exception for Delaware corporations under § 169. In other words, Section 8-112 itself makes clear that there is no need for physical seizure where the § 169 legal fiction of Delaware stock situs applies—and it applies for all Delaware corporations.

And this is without even mentioning 8 *Del. C.* § 201, the opening subsection of the "Stock Transfers" subchapter of the DGCL, which states that the DGCL, including §§ 169 and 324, "shall be controlling" over "inconsistent [] provision[s] of subtitle I of Title 6," containing Section 8-112. Thus, to the extent Section 8-112 can be seen as inconsistent with Section 169 (which it cannot be given its "except" clause), Section 169 takes precedence.

As such, the Opinion contradicts the plain language of the statutes it interprets and must therefore be reversed on this basis alone.

C. The Trial Court Recognized That § 8-112's *Itself* Allows Attachment Without Physical Seizure; The Addition Of A Reference To § 8-112 In § 324(a) Does Not Change That.

The Opinion *itself* acknowledged the above reading of § 8-112.

As it stated: "*before* the 1998 amendments to Section 324, *Section 8-112's combined reference to Sections 169 and 324* gave Delaware courts the jurisdictional

basis and power to order the sale of certificated shares *without physically* seizing the certificate." Op. at 10 (emphasis added); *see also id.* at 8 (citing *Castro v. ITT Corp.*, 598 A.2d 674, 681 (Del. Ch. 1991) for the same proposition.)

The only thing that changed in 1998 was the addition to Section 324(a) of a reference to Section 8-112. *Id.* at 6-7. On these facts, the trial court opined that although Delaware courts were free to attach certificated shares without physical seizure *prior* to 1998, "[a]fter the 1998 amendments to Section 324", "Delaware courts no longer had the power to do so without requiring physical seizure of the share certificate." *Id.* at 9-10.

In other words, the trial court concluded that the addition of a reference to Section 8-112 in Section 324 operated to undo Section 8-112's *own internal* exception to the physical seizure requirement, even though Section 8-112 *itself* did not change. *Id.* This holding is illogical.

Section 8-112 *did not* change in 1998, the *only* thing that changed was Section 324(a), and the *only* change was an added *reference to* an unchanged Section 8-112. An added *reference* to the same Section 8-112 could not have changed the meaning of an unchanged Section 8-112. Indeed, "merely referencing a previous statute by title and chapter does not suffice to amend or alter the meaning of the referenced statute." *Richardson v. UPS Store*, 486 Mass. 126, 137 (Mass. 2020). If anything,

a reference should be read as an *emphasis* of Section 8-112, echoing whatever it was meant to do independently. This warrants reversal as well.

D. The Trial Court's Textual Reading Erroneously Read Section 8-112's Reference To Section 169 Out Of Existence.

The holding that § 324 allowed attachment without physical seizure *before* 1998 is premised on a wholistic reading of all of §§ 169, 324, and 8-112. As the Opinion observed earlier on:

> Section 324(a) expressly states that certificated securities may not be attached or sold unless Section 8-112 has been satisfied … *Section 8-112 in turn provides that, subject to certain exceptions*, a debtor's interest in a certificated security only may be reached by a creditor upon "actual seizure" of the certificate. … Section 8-112 refers to *Sections 324 and 169 of the DGCL*. *Section 169 confirms the situs of capital stock in a Delaware corporation shall be regarded as being in Delaware for all purposes* of "title, action, *attachment*, garnishment and jurisdiction."

Op. at 5-6 (emphasis added).

In 1998, the legislature amended Section 324(a) to require compliance with § 8-112 before an attachment of certificated shares becomes valid. *Id.* at 6-7. The court "summarize[d]" that "the current version of Section 324(a) ... requires compliance with Section 8-112 for certificated securities." *Id.* This is correct. But the Opinion then concludes that such "require[d] compliance" unambiguously meant physical seizure—in effect reading Section 8-112's "except" clause and its reference to § 169 completely out of existence. *Id.*

The trial court's textual reasoning in support of this conclusion left out § 169 altogether. As it stated: "*[t]he language of Sections 324 and 8-112 is not ambiguous* ... . The statutory language requires that, ... the officer making the attachment must actually seize the certificate. *There is no other reasonable way to read those two sections in harmony*." *Id.* Even more explicitly, the Opinion states that "§ 8-112's cross-reference to Sections 169 and 324 of the DGCL ... is unavailing" because it:

> does not change the unambiguous meaning of those statutes as set forth above. To conclude otherwise would be to mire oneself in a circularity of reasoning from which there is no exit. Just because *Sections 324 and 8-112 reference each other* does not permit a conclusion that Section 324 does not mean what it expressly says.

Op. at 8 (emphases added).

But this description is simply wrong. Sections 324 and 8-112 do not just "reference each other." *Id.* Rather, Section 324 references Section 8-112, and Section 8-112, *in addition* to referencing Section 324, *also* references Section 169. The text of these statutes therefore includes Section 169. And, the Court must read more than "those two sections in harmony," but all three in harmony.

Indeed, the Opinion, in reading Section 324 as effectively modifying Section 8-112 to remove its reference to Section 169,

> runs afoul of a number of well-established principles of statutory construction. First, "[c]courts do not resort to other statutes if the statute being construed is clear and

> unambiguous … Second, principles of statutory construction instruct that statutes should not be superseded or altered by implication unless there is an irreconcilable conflict. The Appellee attempts to create a conflict between Section [324] and Section [8-112] by reading Section [324] as modifying Section [8-112]. But the two statutes do not conflict—at least not irreconcilably. Indeed, an interpretation that harmonizes the two—as opposed to one that puts them in conflict with each other—is readily available here.

Salzberg v. Sciabacucchi, 227 A.3d 102, 118–19 (Del. 2020)

Taking all three statutes together, "circularity" only results by *ignoring* Section 169 as the trial court did. Without it, we are left with Sections 324 and 8-112 each internally referencing each other, ad nausea, without knowing which takes precedence. With it, we have Sections 324 referencing 8-112, and 8-112 referencing 169—which does not reference any other statute, and where the analysis ends with Delaware situs for a Delaware corporation's shares. In short, Section 169 *itself* is the exit from any circularity problem.

By skipping over the reference to § 169 textually, the Opinion jumps from the undeniable fact that § 324(a) made a reference to § 8-112 to the conclusion that § 324(a) requires physical seizure of certificated shares in spite of (the *also* referenced) § 169. The Opinion notably offered no *textual* reason for doing so. Indeed, between the transition from recognizing Section 169 on pages 5-6 to expunging it on page 8, the Opinion repeatedly emphasizes that Sections 324 and 8-112 are "not ambiguous"

and susceptible of "no other reasonable way to read those *two sections*" other than that they require physical seizure. *Id.* at 7 (emphasis added).

But it cannot be disputed that Section 324(a) unambiguously references Section 8-112, and that Section 8-112 unambiguously references Section 169. No textual reading of Sections 8-112 and 324 can ignore Section 169. "Any different reading would render part of [Section 8-112] meaningless, a result foreclosed by generally accepted principles of statutory construction." *Shy v. State*, 459 A.2d 123, 125 (Del. 1983) (citing Am. Jur. 2d Statutes § 250, at 423-24); *Keeler v. Harford Mut. Ins. Co.*, 672 A.2d 1012, 1016 (Del. 1996), as amended (Mar. 11, 1996) ("In determining legislative intent in this case, we find it important to give effect to the whole statute, and leave no part superfluous.").

The court's affirmative expungement of Section 169 requires reversal too.

E. The Trial Court's Legal Reasoning For Overlooking Section 169 Was Erroneous.

Moving beyond the plain text, which should be dispositive, the trial court relied on legislative history and policy to rationalize its holding that "Section 8-112's reference to Section 169 does not create an exception to the seizure requirement for certificated shares." Op. at 9.

First, it reasoned that Section 169 is a "jurisdictional statute" that:

> [P]erforms two functions: (1) it gives Delaware courts jurisdiction to decide disputes regarding incidents of stock ownership like title, validity, and voting rights; and (2) it

> supplies the jurisdictional basis for attachment and sequestrations of stock in Delaware corporations. Nothing in Section 169, however, addresses the requirements of attaching or selling certificated stock
>
> Contrary to [Plaintiff's] argument, Section 169's reference to the situs of capital stock *does not create a legal fiction* that a share certificate is physically located in Delaware for purposes of Section 8-112's seizure requirement. There is no language in either Section 169 or Section 8-112 that reasonably could be read in that manner. To the contrary, Section 169 does not distinguish between certificated and non-certificated stock. Accordingly, the reference to Section 169 in Section 8-112 does not change the plain meaning of Section 8-112's physical seizure requirement.

Op., at 9 (emphasis added).

As a threshold matter, the holding that "Section 169 is a jurisdictional statute" is textually wrong. *Id.* Section 169 opens by stating that it was "[f]or all purposes of title, action, attachment, garnishment and jurisdiction." 8 *Del. C.* § 169. It unambiguously serves not only a jurisdictional purpose, but "all purposes", including "attachment ... *and* jurisdiction."

For the same reason, the trial court erroneously held that "[n]othing in Section 169 ... addresses the requirements of attaching or selling certificated stock." *Id.* at 9. The statute expressly states that it was for the "purpose[]" of "attachment."

Even ignoring Section 169's opening "purposes" clause and assuming that it does not expressly address "attaching or selling certificated stock," Sections 324 and 8-112 both *do* address it, and *they reference* Section 169 when doing so. Ignoring

this, the trial court arbitrarily excised Section 169 out of Section 8-112 and concluded that, in *isolation*, it does not mention attachment of *certificated* stock, while ignoring the fact that the operative statutes referencing it *do*.

The court therefore ignored Section 169 when interpreting Sections 326 and 8-112, then ignored Section 8-112's reference to it when interpreting Section 169—erring twice.

Furthermore, the trial court's legal reasoning that "Section 169's reference to the situs of capital stock *does not create a legal fiction* that a share certificate is physically located in Delaware" is irreconcilable with well settled law. Op. at 9 (emphasis added).

In *Heitner v. Greyhound Corp*., the Court of Chancery rejected an identical argument that the Section 169 situs rule "is a pure fiction" that cannot operate to allow seizure of Greyhound stock "since it is not property actually located in Delaware" and "Delaware has no 'control' over the property seized, *i.e.*, the stock certificates." 1975 WL 417, at *3 (Del. Ch. May 12, 1975), *aff'd,* 361 A.2d 225 (Del. 1976). As the Court of Chancery observed:

> *Sequestration [of a defendant's stock] seeks to seize his ownership interest in the corporation, not merely his documentary indicia of ownership*. Thus the fact that a shareholder has the right to transfer his ownership interest in the corporation to another by endorsement and delivery of the certificate offers no foundation for the proposition that the property interest represented by it departs this State's jurisdiction when the certificate crosses the border.

> *Under this theory, a judgment debtor could avoid attachment of his auto, for instance, by simply mailing his title across the state line.* Likewise, I presume, a stockholder who lost his certificate could not have his stock interest attached by any court, any where in the event he chose not to seek a new one ... *I cannot conclude that the sequestration of defendants' stock and stock interests is invalid here simply because the stock certificates themselves may be beyond the Court's jurisdiction.*

Id. (emphasis added)[2]

As such, the trial court erred both: (i) in the way it conducted its interpretation of Section 169 independent of its explicit reference *by* Section 8-112; and (ii) in its legal conclusion about the effect of Section 169—which *does* create the legal fiction that all Delaware corporations' shares are deemed to be in Delaware, regardless of their actual physical location. These errors also warrant reversal.

[2] This case led to the Supreme Court's landmark holding in *Shaffer v. Heitner*, 433 U.S. 186 (1977), which reversed *Heitner v. Greyhound Corp. sub. nom*, on other grounds, without disturbing the portions of the holding relevant to the attachment issue here.

F. The Trial Court's Erred In Relying On The Legislative Synopsis And Legislative History.

i. <u>The statutory text is unambiguous; the court erred in injecting legislative history into the textual analysis</u>.

Besides its erroneous textual reading, which excised Section 169 from a textual reading of Sections 324 and 8-112, the Opinion primarily relied on the Synopsis and legislative history, specifically the sequence of the most recent amendments to Sections 324 and 8-112. Op. at 7-8.

Yet as the Opinion repeatedly emphasized, the statutes were unambiguous. Op. at 7-8. "In the absence of any ambiguity, the language of the statute must be regarded as *conclusive* of the General Assembly's intent. The judicial role is then limited to an application of the *literal* meaning of the words." *State v. Cooper*, 575 A.2d 1074, 1076 (Del. 1990) (emphasis added, cleaned up).

Here, as the Opinion *itself* recognized, Section 8-112's plain text reference to Section 169 meant that, standing alone, it allowed attachment without physical seizure. Op. at 10. As such, the only way to give effect to the plain text of Section 8-112 *and* Sections 169 and 201 of the DGCL, is consistently maintain that reading absent a change of Section 8-112 *itself*.

Instead, the trial court mistakenly injected the Synopsis and legislative history into what it emphasized was a literal reading of "unambiguous" statutes. *Id.* at 7-8. In doing so, it "bypasse[d] a logical step in statutory analysis," that of finding an

ambiguity. *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1287 (Del. 1994) (citation omitted).

This is reversible error even assuming the trial court is right on the Synposis (it is not).[3] This is because although "[a] synopsis is a proper source for ascertaining legislative intent," "the Court may only look to the synopsis if the Court finds that the statutory language is ambiguous and requires interpretation." *Bd. of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 332 (Del. 2012) (reversing the trial court's decision and concluding that "[a] statutory synopsis cannot change the meaning of an unambiguous statute," and that "notwithstanding the synopsis … [u]ntil such time as the General Assembly amends the plain language of the statute, … the courts must enforce it as written."); *see also Chrysler Corp. v. State*, *457 A.2d 345*, 351 (Del. 1983) ("A statutory synopsis cannot change the meaning of an unambiguous statute. In light of our conclusion that the pertinent provisions of § 391 are unambiguous, the State's reliance upon the Synopsis is, therefore, misplaced.").

Here, the court did not find ambiguity and gave no reasoning for its expungement of § 169 from the unambiguous statutes at issue other than the legislative history, which it characterized as revealing what the "General Assembly expressly intended" for the unambiguous statutes. Op. at 7. But its very reliance on

[3] The trial court's erroneous interpretation of the Synopsis is addressed *infra*.

such extraneous materials to get at legislative intent, without first finding a textual ambiguity that warrants ignoring the plain text reference to § 169 itself, was erroneous.

ii. Assuming the text is ambiguous, the legislative history the trial court cited does not support its statutory interpretation.

Aside from presenting the Synopsis as self-explanatory, the Opinion primarily relied on Sections 324 and 8-112's recent legislative history, which it described thusly:

> Before it was amended in 1998 ... Section 324(a) expressly permitted [seizure of] certificated stock without physically seizing the certificate. Accordingly, when Delaware adopted the uniform version of Section 8-112 in 1997, the General Assembly added the "except as otherwise provided language" to Section 8-112 to make clear that Section 8-112 was subordinate to Section 324. Less than a year later, however, the General Assembly amended Section 324 to require compliance with Section 8-112 in order to attach and sell certificated stock. After that amendment, Section 8-112's reference to Section 324 no longer stood as an exception to the actual seizure rule, since Section 324 now expressly required compliance with Section 8-112.

Op. at 8-9.

The Opinion supported these conclusions with a footnote, which cited 8 *Del C.* § 201 and an article by Professor Curtis R. Reitz, who "urged the Delaware State Bar Association to endorse changes to the DGCL to adopt Section 8-112's seizure requirement." *Id.* fn. 22. Without referencing any legislative records other than the

Synopsis, the Opinion concludes that "[t]he General Assembly did just that in 1998 by adding compliance with Section 8-112 to the requirements of Section 324." *Id.*

This footnote reflects two errors in the trial court's analysis.

First, 8 *Del. C.* § 201 *was not amended* in 1998. As it makes clear, Section 169 is "controlling" over "inconsistent" provisions of the Delaware UCC. As even Prof. Reitz's article stated, "section 208 of the DGCL itself" "declares the primacy of Delaware General Corporation Law over the Uniform Commercial Code over all matters having to do with transfers of stock issued by Delaware corporations." A0050. That is still the case today. Overlooking Section 201 is reversible error. *See State Dep't Nat. Res. & Env't Control v. Murphy*, 2001 WL 282817, at *3 (Del. Super. Ct. Mar. 19, 2001) ("the Court must consider all pertinent statutory language and find the most harmonious result therefrom. Likewise, each section of a particular chapter must be construed in relation to every other section to produce a consistent whole. Thus, a court cannot interpret a term or phrase in one statute in a manner that nullifies the plain intent of another statute in the same chapter.").

Second, professor Reitz's article, which was published shortly before the 1998 amendment to Section 324, reinforces this conclusion. As it states:

> The whole scheme of DGCL Section 324 is founded on the situs-of-ownership principle of DGCL Section 169. An interpretation of Section 324 that affords protection to the property rights of transferees of certificates is inconsistent with Section 169. It follows, therefore, that Section 324 is not intended to afford such protection, but rather is

> intended to vindicate the property rights of persons whose claims are grounded in the situs-of-ownership principle. In the context of Section 324, those persons are judgment creditors that attached property defined entirely by the situs-of-ownership principle and purchasers of that property at public sale. This is very different from the scheme of property rights in the official text of Revised Article 8, and particularly Section 8-l12(a).
>
> …
>
> Delaware's version of UCC Section 8-l12(a) provides that the *DGCL displaces the Uniform Commercial Code requirement of actual seizure of a certificate to effect an attachment of a certificated security*. Both *DGCL Sections 169 and 324* are cited in an exception to the uniform text, which supersedes that provision: "to the extent otherwise provided or permitted by Sections 169 and 324 of Title 8." DGCL Section 324 "permits" attachment of shares of certificated stock without seizure of the certificates by a public official. The exception thus has the effect of substituting the procedures of DGCL Section 324 for the Commercial Code's actual-seizure requirement in attachment of shares of stock in Delaware corporation. Actual seizure of the certificates, under Delaware's version of UCC Section 8-112, would be appropriate only for certificated stock of non-Delaware corporations or for other certificated securities that are not Delaware corporate stock.

A0047-48 (emphasis added). This interpretation of the statutes at issue is straightforward and the exact interpretation that Plaintiff advocated.

The court concluded that Prof. Reitz "urged" changes to the law to rid Delaware of this unambiguous departure from model UCC's uniform text, which it concluded led to the 1998 amendment of Section 324(a). Op. fn. 22. And indeed he

did, urging in the "Conclusion" of his article that: "Delaware stands alone in enacting a major substantive exception from the laws adopted in other states. Non-uniformity in the field of investment securities law is especially inimical to the functioning of national and international securities markets. ... Hopefully the Delaware legislature will act soon to harmonize its law with the law of the uniform text." A0055.

Assuming the legislature did read this article, and did want to effectuate Prof. Reitz' recommendations, the article itself spelled out exactly what had to be done. As it makes clear, Section 8-112 cannot require physical seizure because "*[b]oth DGCL Sections 169 and 324* are cited in an exception to the uniform text" of Section 8-112. A0048. It identified Section 201 as a further impediment to the same, lest the legislature only think to delete the "except" clause from Section 8-112 itself. A0050.

All in all, to do what Professor Reitz advocated, the legislature simply had to remove the "except" clause contained in Section 8-112 and further add a similar "except" clause for the cleaned-up Section 8-112 to Section 201.

The legislature did neither, choosing instead to *add* a reference to the unchanged Section 8-112 into Section 324 while leaving Sections 8-112 and 201 intact. The legislature's action and inaction speaks for itself.

iii. <u>The actual, extensive history behind Section 8-112 supports Plaintiff's reading—that physical seizure is not required</u>.

While the Opinion relied on the most recent single amendment to Section 324(a) alone, the complete history of these statutes show that *maintaining* the

fictional Delaware situs of Delaware corporate stock has always been the General Assembly's intent. As Professor Reitz further observed:

> The exception to UCC Section 8-112(a) carries forward exceptions that Delaware has made to the official text of Article 8 since the Uniform Commercial Code was *first adopted* by that state. Indeed, the exception can be traced back to the *Delaware version of the Uniform Stock Transfer Act [USTA], which preceded Article 8 of the Uniform Commercial Code*.

A0049 (emphasis added).

When Delaware first adopted the USTA as a part of the DGCL 1945, it did put a blanket ban on attaching shares without physical certificates:

> In 1945 the Legislature amended [the General Corporation Law] by adding ... sections ... of the Uniform Stock Transfer Act (U.S.T.A.). [These] provided:
>
> > *... No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined.*
>
> The effect of [this] … was to require *the seizure of the certificates* of stock of a Delaware corporation *as a condition* to the valid attachment of the shares and to eliminate the prior practice of attaching shares simply by serving a certified copy of the process upon an officer or resident agent of the corporation. In short, it was to change the law as to the manner in which shares could be attached.

Baker v. Gotz, 387 F. Supp. 1381, 1392-93 (D. Del. 1975) (cleaned up).

However, in 1951, the legislature amended the USTA, and the "provisions which had required the seizure of the certificates as a condition to the valid attachment of shares was eliminated, and the prior practice of permitting the attachment of stock by the service of a certified copy of process upon an officer or resident agent of the corporation was reinstated." *Id.* Next:

> In 1967, the General Corporation Law of Delaware as it then existed was then repealed in its entirety and a general revision of the law was adopted … . [This had the effect of] repealing effective July 5, 1967, the Uniform Stock Transfer Act, which had been a part of the prior general corporation law, and replac[ing] it with the Uniform Commercial Code ... effective July 1, 1967.

Id. However, in implementing the Uniform Commercial Code in 1967, the legislature inserted into Section 8-317, the predecessor to today's Section 8-112, an exception for Sections 169 and 324 that had the same effect as the "except" clause to today's Section 8-112. A0048-50 (describing the 1967 and 1983 amendments to Section 8-317, which by 1983 resulted in Section 8-317 containing the identical "except" clause that has carried through into today's Section 8-112).

As the *Baker* court thus summed up:

> From the foregoing it is apparent that section 8-317 of the Uniform Commercial Code [*the predecessor to Section 8-112*] as enacted in Delaware only had the effect and no other, of *perpetuating the procedures for attaching shares of stock* as the same had existed under the terms of the Delaware law prior to the enactment of the Uniform Commercial Code, that is *without a seizure of the certificate.*

Baker, 387 F. Supp., at 1392-93 (emphasis added).

Given the consistent exceptions in Section 8-112 and its predecessors mandating the primacy of Section 169's situs rule—which exceptions have carried through since July 1, 1967—Delaware courts have consistently held that physical seizure of stock certificates for attachment are not required under Delaware law as a result of the situs rule. *Id.*; *see also Castro v. ITT Corp*, 598 A.2d 674, 681-82 (Del. Ch. 1991).

The trial court attempted to distinguish *Castro*, stating that it "held the pre-1998 version of Section 324 permitted attachment of stock without physical seizure of the stock certificate," meaning it is not persuasive as to the post-1998 version of Section 324(a). Op. fn. 36. But the *Castro* court *separately* analyzed Section 8-317 (Section 8-112's immediate predecessor), which contained the same exception for Section 169. As it held, in requiring physical seizure:

> The UCC thus rejected the traditional rule that permitted the seizure of stock for adjudication purposes by attachment served upon the issuer at its corporate domicile. Delaware had long accepted and implemented this traditional approach. The stock of corporations created under Delaware law had from an early date been deemed to be in this jurisdiction. Section 169 of the General Corporation Law continues to fix the situs of all stock of a Delaware corporation in this State for all purposes other than taxation … *When it enacted Article 8 of the Uniform Commercial Code, Delaware did not repeal its situs statute, Section 169. Rather it preserved it … In all events the provision of amended Section 8-317(1) are introduced*

> *by the following: "Except to the extent otherwise provided or permitted by §§ 169 and 324 of Title 8, §§ 365, 366 and Chapter 35 of Title 10. . . ."* Thus, it would seem apparent that the amendment of Section 8-317 in 1983 was not intended to modify the effect or operation of the situs statute (Section 169) or the attachment mechanisms employed to bring stock into court.

Castro, 598 A.2d, at 681-82. Again, the very statute requiring physical attachment, Section 8-112, remains the same today as it did when *Castro* was decided. The legislature could have, but did not, remove Section 8-112's "except" clause.

iv. The Synopsis Does Not Require Physical Attachment Of A Delaware Corporation's Shares.

The last piece of legislative history is the 1998 amendment's Synopsis, which stated that:

> [t]he amendments to Section 324 establish that the execution process it provides is available only for securities of a debtor identified on the books of the corporation and, as to certificated securities, only upon satisfaction of the requirements of Section 8-112 of Title 6, including presentation of the stock certificates. The amendment is intended to enhance the utility of stock of a Delaware corporation as collateral.

Op. at 7.

As Plaintiff argued below, this enhances the utility of *Delaware* corporations' shares as collateral by requiring that *non*-Delaware corporations' certificated shares

be physically seized for execution, while exempting creditors holding collateral in the form of Delaware corporations' shares from this burden. Op. at 10.[4]

Thus, someone holding an undertaking of Delaware corporation's shares as collateral can attach and sell such shares without physical seizure. Nor can a debtor simply place his shares in a Delaware corporation beyond his creditor's reach by "certificating" such shares and "mailing" them somewhere beyond physical reach, as the *Heitner* court hypothesized. *See Heitner v. Greyhound Corp.*, 1975 WL 417, at *3 (Del. Ch. May 12, 1975), *aff'd,* 361 A.2d 225 (Del. 1976).

The trial court rejected this proffered distinction between Delaware and non-Delaware corporate stock because Section 324 *itself* does not literally state the distinction. Op. at 10.

But the Opinion relies on the Synopsis as an integral part of its analysis, and the Synopsis says that the amendment was meant to "*enhance* the utility of stock of a *Delaware* corporation as collateral." *Id.* at 7. An *enhancement* of the utility of a *Delaware* corporation's stock as collateral, by definition, can only be achieved vis-a-vis *non-Delaware* corporations' stock (*i.e.* by reducing their utility when compared

[4] Lest Defendant argue that collateral in the form of stocks may only be possessed physically, Delaware law is clear that "[c]onstructive delivery remains effective to validate a transfer of corporate stock in Delaware unless it has been displaced by the Uniform Commercial Code ... Article 8 of the UCC ... did not displace common law constructive delivery." *Kallop v. McAllister*, 678 A.2d 526, 530 (Del. 1996).

to a Delaware corporation's stock). Moreover, such an enhancement necessarily requires advancing *creditors*' ability to act against Delaware stock as opposed to non-Delaware stock. Reducing the effort required to attach Delaware corporations' shares serving as collateral as compared to the effort required to attach non-Delaware shares achieves this purpose. The situs rule does exactly that.

Indeed, distinguishing between Delaware and non-Delaware corporations is also the only way to give effect to the legislature's 1998 amendment to Section 324(a). Before 1998, Section 324(a) allowed attachment of "the shares of ... any corporation" and section 324(b) allowed such attachment to be effectuated constructively via "process" served on the issuer. Neither section referenced Section 8-112.

Thus, prior to 1998, with Section 201 making clear that Section 324 takes precedence over Section 8-112, the statutory framework could plausibly have been interpreted to allow constructive seizure of the shares of "any corporation," Delaware or not.

After 1998, however, Section 324's added reference to Section 8-112 at least makes clear that the legislature wanted 8-112 respected in *some* manner during the Section 324 attachment process. Given that Section 169 continues to state that the shares of Delaware corporations are sited in Delaware, the *only* way the 1998 amendment would not be surplusage is for it to no longer allow the constructive

seizure of the shares of "any corporation" as Section 324(a) provides, but to apply Section 8-112 and require physical seizure for *non*-Delaware corporations' shares.

As this court observed in *Salzberg*:

> It is assumed that when the General Assembly enacts a later statute in an area covered by a prior statute, it has in mind the prior statute and therefore statutes on the same subject must be construed together so that effect is given to every provision unless there is an irreconcilable conflict between the statutes, in which case the later supersedes the earlier.

227 A.3d, at 119. Here, the only way all statutes and each act of amendment can be given effect is via Plaintiff's reading.

v. The Trial Court's Policy Rationale Was Wrong Too.

While this is not explicit in the Opinion itself, the trial court's rationale for requiring physical seizure appeared to have been partly policy-based.

Relying on Professor Reitz's article, the trial court stated during oral argument that Section 324 voids transfers made by debtors to a bona fide purchaser *after* constructive attachment via service of process, but "[w]ith regard to transfers made by debtors *before* the attachment, Section 324 is utterly silent. The possibility is not even considered. Nothing is provided with respect to the property rights of such transferees." A0081(26:18-28:19) (emphasis added).

As the trial court commented, requiring actual seizure of certificates for share attachment "resolves the issue" since no bona fide purchaser's property rights in certificated shares may be disturbed without physical attachment. *Id.*

As a predicate matter, "it is not for the Courts to adjudge the wisdom or practicality of a clear and plain statutory provision, or to restructure a statute by interpretation." *State v. Cooper*, 575 A.2d 1074, 1078 (Del. 1990) (holding the trial court erred by engaging in statutory interpretation of an unambiguous text in order to avoid what it perceived to be the unjust result). So, even if the General Assembly did indeed leave unresolved the scenario envisioned by the trial court, it is not for the trial court to encroach on what "was within the General Assembly's prerogative." *Id.*; *Colonial Sch. Bd. v. Colonial Affiliate, NCCEA/DSEA/NEA*, 449 A.2d 243, 248 (Del. 1982) ("If this strict construction [] is deemed incorrect or unjust today, it is a matter for the General Assembly to rectify by clear and unambiguous statutory language requiring no interpretation and construction.")

But, even if the trial court were allowed to surmise what the policy objectives may be, its effort to protect bona fide purchasers who purchase shares "before" an attachment is misplaced.

First, adopting, for policy reasons, a physical seizure rule to protect such purchasers takes *away* the possibility of constructive attachment at all for all creditors—like Plaintiff—who cannot physically seize shares. In the world created

by the Opinion, a shareholder-debtor, with knowledge of an impending attachment by a creditor holding, for example, an undertaking of certificated Delaware shares, could simply hand the shares over to another party and foreclose all recourse to them. Contrary to the Synopsis' stated intent to "enhance the utility of stock of a Delaware corporation as collateral" (Op. at 7), this *decreases* that utility.

In short, the trial court's policy choice over the literal language of the statute *deprives* creditors, just as much as it rewards bona fide purchases who purchase "before" an attachment.

Second, the last sentence of Section 324(a) *explicitly* deprives those who purchase certificated shares *after* they were constructively attached (obviously without knowledge of such attachment). By leaving *pre*-attachment bona fide purchasers unaddressed, the legislature can only have meant to not address them in this statute, making the court's concern about the statute's non-mention of such purchasers superfluous.

Indeed, the legislature had no need to address pre-attachment bona fide purchasers because the law already provides for them. For example, a bona fide purchaser who purchases before an attachment can avoid suffering an unknown attachment and resulting potential adverse claims by promptly "surrender[ing] those certificates to the issuers and obtain new certificates in [their] names," instead of

holding on to certificates not in their names all while knowing that Delaware law allows constructive attachment. A0048.

If they do so before an attachment, the issuer would promptly hand them shares registered in their name, as "UCC Article 8 provides that an issuer must register such a transfer without unreasonable delay. UCC § 8-401." *Id.* Once registered in the pre-attachment bona fide purchaser's name, the shares would *no longer be attachable* as the debtor's. And, given that attachment is done by service upon the issuer under Section 324(b), the issuer would promptly inform any inquiring party whether an attachment process has been received as to certain shares. A prospective purchaser can therefore easily discover attachments from the issuer.

In sum, the flip side, and the *necessary* logical result of the legislature's explicit vitiation of bona fide purchases made *after* attachment is that any transfers *before* attachment are presumptively valid until attachment. In combining this with constructive seizure, Delaware law affirmatively *refused* to afford protections to those who take certificated shares but do not register them. This incentivizes prompt registration, and at least pre-purchase confirmation of non-attachment with the issuer. The Delaware legislature had made its policy choice.

G. The Caselaw Is Unanimously Against Physical Seizure.

The Opinion states that "[t]here is no Delaware caselaw directly addressing the statutory interpretation issue raised in this case." Op. at 11.

But as recently as 2021, in *Crystallex Int'l Corp. v. Bolivarian Republic of Venez.*, 2021 WL 12980 (D. Del. Jan. 14, 2021), *aff'd* 24 F.4th 242 (3d Cir. 2022), the District of Delaware federal court cited 8 *Del. C.* § 169's "situs" provision to allow constructive—as opposed to physical—attachment of certificated shares. In doing so, it squarely rejected the judgment debtor's argument that Section 8-112 precluded attachment and sale absent physical seizure. *Id.*

The court based its decision on judicial estoppel, which the trial court found was sufficient to distinguish *Crystallex*. Op. at 12. But this ignores the fact that "[j]udicial estoppel cannot … override a statutory requirement." *United States v.* Scott, 180 F. Supp. 3d 88, 93 (D. Mass. 2015); *see also F.A.S.A. Const. Corp. v. Vill. of Monroe*, 789 N.Y.S.2d 175, 177 (N.Y. App. Div. 2005) ("[E]quitable estoppel cannot be invoked to relieve a party from the mandatory operation of a statute.") (cleaned up); *Worley v. Harris*, 666 F.2d 417, 422 (9th Cir. 1982) ("The doctrine of equitable estoppel may not be used to contradict a clear Congressional mandate.").

Statute trumps common law; had the statute unambiguously required physical seizure, no amount of judicial, equitable, or any other estoppel could have allowed the *Crystallex* court to order constructive attachment and sale of the certificated shares at issue there; nor could the third circuit affirm.

Crystallex comes at the end of a long line of cases going back to the 1960s that make clear that Delaware corporations' shares, certificated or not, are owned in

Delaware because of Section 169. These include *Castro* and *Batz*, cited above. They also include *Alberta Securities Commission v. Ryckman,* 2015 WL 2265473, at *10 (Del. Super. Ct. May 5, 2015) ("any shares that Ryckman owns in Studio One—a Delaware corporation—are owned in Delaware."); and *Nastro v. D'Onofrio*, 263 F. Supp. 2d 446, 453 n.4. (D. Conn. 2003) ("Delaware law [] expressly rejects the UCC's rule regarding the situs of shares.").

Against this ample authority, and as the Opinion implicitly acknowledges, there is not a single case in the entire history of Sections 169, 201, 324, and 8-112, that held physical seizure to be necessary.

CONCLUSION

In sum, the Opinion goes against the express wording of the statutes, multiple secondary sources interpreting the statutes, and decades of case law, to erroneously strip all Delaware courts of the power to attach Delaware corporations' shares based on their situs in Delaware under Section 169. It should be reversed.

Respectfully submitted,

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