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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 REPLY BRIEF

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INTRODUCTION

HK Xu Ding's ("Appellee" or "Xu Ding") response is wrong on every issue it addresses.

First, calling this an issue of first impression, Xu Ding attempts to conjure a new interpretation out of a well-settled statutory scheme. But this is far from the first time the Delaware legislature and courts have addressed the statutes at issue. Indeed, more than a half-century of statutory amendments and caselaw have made clear that constructive attachment is the law in Delaware.

Second, Xu Ding attempts to grasp onto the trial court's distinction between book-form (*i.e.*, stock registered on the issuer's books) and certificated stock (*i.e.*, paper stock certificates) when interpreting Section 169. But this "distinction" finds no support in the plain text of Section 169 of the Delaware General Corporation Law, and has been repeatedly rejected by well-reasoned caselaw.

Third, Xu Ding's physical seizure interpretation amounts to an amendment of unambiguous statutes by implication. But amendment by implication is not permitted under well-settled rules of statutory construction.

Finally, Xu Ding claims that the trial court relied on policy, the Synopsis, and recent legislative history to resolve "ambiguity." Assuming there is any (there isn't), the history and Synopsis is best reconciled with the statutory text through *Appellant's* interpretation.

ARGUMENT

I. THIS IS NOT A MATTER OF FIRST IMPRESSION.

Xu Ding posits that "[t]here is no Delaware caselaw directly addressing the statutory interpretation issue raised in this case." Opp. at 23.

Below is the complete history of the relevant statutes:

<table>
<tr><th colspan="3">History Of The Delaware Code's Constructive Seizure Scheme</th></tr>
<tr><td>Section 169, the Situs Statute
(Title 8, Corporations)</td><td colspan="2">(1953 – now) § 169

"For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State."[1]</td></tr>
<tr><td>Section 8-112 Creditor's Right Of Attachment
(Title 6, UCC)</td><td>(1983 – 1997) § 8-317

"(1) Except to the extent otherwise provided or permitted by Section 169 and Section 324 … no attachment … [of] a certificated security or any share or other interest represented thereby which is outstanding is valid <u>until the security is actually seized</u> in this state by the officer making the attachment …"</td><td>(1997 – present) § 8-112

"(1) Except to the extent otherwise provided or permitted by §§ 169 and 324 … the interest of a debtor in a certificated security may be reached by a creditor <u>only by actual seizure of the security certificate</u> by the officer making the attachment or levy."</td></tr>
</table>

[1] All emphases added unless otherwise indicated.

Section 324(a) Attachment Process (Title 8, Corporations)	**(1973 – 1998) § 324** "(a) **The shares of any person in any corporation** with all the rights thereto belonging, or any person's option to acquire the shares, or such person's right or interest in the shares, **may be attached under this section for debt, or other demands, if such person appears on the books of the corporation to hold or own such shares, option, right or interest**. … ."	**(1998 – present) § 324** "(a) **The shares of any person in any corporation** with all the rights thereto belonging, or any person's option to acquire the shares, or such person's right or interest in the shares, **may be attached under this section for debt, or other demands, if such person appears on the books of the corporation to hold or own such shares, option, right or interest.** … **Except as to an uncertificated security as defined in § 8-102 of Title 6, the attachment is not laid and no order of sale shall issue unless § 8-112 of Title 6 has been satisfied … .**"
Primacy Statute (Title 8, Corporations)	**(1967 – 1983) § 201** "Except as otherwise provided in this chapter, the transfer of stock and the certificates of stock which represent the stock shall be governed by Article 8 of Title 5A."	**(1983 – present) § 201** "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.**"

Interpreting these statutes, the *Baker* Court concluded in 1975 that "it is apparent that section 8-317 [the predecessor of section 8-112] of the Uniform Commercial Code 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 v. Gotz*, 387 F. Supp. 1381, 1392-93 (D. Del. 1975).

The same year, the *Heitner* court drew the same conclusion. *Heitner v. Greyhound Corp*. 1975 WL 417, at *3 (Del. Ch. May 12, 1975), *aff'd*, 361 A.2d 225 (Del. 1976) *rev'd on other grounds sub. nom Shaffer v. Heitner*, 433 U.S. 186 (1977).

In 1991, the *Castro* Court observed that "[u]nder Section 169 (and Section 324 which authorizes attachment process) of the General Corporation Law, one seizes stock not by actual seizure of a certificate but by attachment process served at the corporate domicile." *Castro v. ITT Corp.*, 598 A.2d 674, 682 (Del. Ch. 1991).

In 2015, *Alberta Sec. Comm'n v. Ryckman*, citing 8 *Del. C.* §§ 169 and 324, concluded that "[f]or attachment and garnishment purposes, the situs of ownership in a Delaware corporation is Delaware. Shares in a Delaware corporation may be attached for debt or other demands. Thus, any shares that [Defendants] owns in … a Delaware corporation [] are owned in Delaware." 2015 WL 2265473, at *10 (Del. Super. Ct. May 5, 2015), *aff'd*, 127 A.3d 399 (Del. 2015).

Finally, 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. Xu Ding offers no response to Appellant's point that judicial estoppel, which *Crystallex* relied upon, cannot override statute. Opening Br. at 36-37; *cf.* Opp. at 24.[2]

In short, there is a long and well-settled history behind the relevant statutes that mandate constructive seizure. This is not an issue of first impression.

[2] Although the *Crystallex* court relied on judicial estoppel to uphold constructive attachment; the statutory issue (*i.e.*, the interaction between Sections 169, 324, and 8-112) was briefed specifically in that case. Ex. B (Crystallex reply brief), at 7-10. Accordingly, the *Crystallex* was made aware of the statutory scheme.

II. SECTION 169 AUTHORIZES CONSTRUCTIVE SEIZURE.

As Xu Ding recognizes, although actual seizure is generally required for a creditor to reach a certificated security under Section 8-112, the statute also provides "certain exceptions." Opp. at 9. These exceptions, as the plain text of Section 8-112 unambiguously states, are Section 169 and Section 324. 6 *Del. C.* § 8-112.

Section 169 makes Delaware the "situs of the ownership of the capital stock of all corporations existing under the laws of this state" and does so "[f]or all purposes of title, action, attachment, garnishment and jurisdiction of all courts." 8 *Del. C.* § 169. The trial court recognized its effect when it held that: "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." Opinion, at 10. It is therefore undisputed (and indisputable) that Section 8-112's carveout of Section 169 provides an exception to the "actual seizure" requirement.

Nonetheless, the trial court erroneously adopted to Xu Ding's view that Section 169 is merely "a jurisdictional statute that … gives juridical basis for attachment of sequestrations of stock of Delaware corporations" without excepting Delaware corporations from the actual seizure requirement in Section 8-112. *Id.* at 15. As it held, "[n]othing in Section 169 … addresses the requirements of attaching

or selling *certificated* stock." *Id.* (emphasis added); *see also id.* at 13 ("Section 169 refers to 'capital stock,' while Section 8-112 refers to 'certified securities.'").

Seizing now upon this non-textual distinction, Xu Ding claims that "Deng cites no authority interpreting Section 169 to make Delaware the fictional location of all paper stock certificates of Delaware corporations." *Id*. at 17. But that is precisely what the precedents hold.

The Court of Chancery's decision in *Eckman Corp. v. Malchin*, 297 A.2d 446, 449 (Del. Ch. 1972) is illustrative. There, the Court recognized that the term "capital stock" under 8 *Del. C.* § 169 includes "stock certificates." 297 A.2d 446, 449 (Del. Ch. 1972). Similarly, in *Heitner v. Greyhound Corp*., the defendants made the identical argument that Xu Ding makes now, that "there can be no valid seizure of corporate stock *unless* the *certificates* themselves are within this Court's jurisdiction." 1975 WL 417, at *2 (Del. Ch. May 12, 1975) (emphasis added).

Vice Chancellor Brown responded that:

> A shareholder owns a proportionate interest in his corporation which is represented *by a stock certificate as well as being reflected on the corporate stock ledger*.
>
> *Sequestration 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.

Id. at *3 (emphasis added).[3]

Xu Ding's attempt to distinguish *Heitner* reflects an error of comprehension. It quotes *Heitner*'s observation that the legislature, when adopting Section 8-317 (the predecessor to 8-112), "intentionally omitted the recommended language of the act which would have mandated the conclusion [that the stock could not be validly seized by the sequestration order since it is not property in Delaware]." Opp. at 15-16 (hard brackets original). According to Xu Ding, this quote means "*Heitner* provides no support for Deng's argument." *Id.* But in making clear that the legislature *specifically declined* to adopt the uniform recommended language of the UCC that "would have mandated" physical seizure, which declination carries through to today's Section 8-112, *Heitner* does provide explicit support for Deng's reading.

Likewise, in *Castro v. ITT Corp.*, Chancellor Allen held that "[u]nder Section 169 (and Section 324 which authorizes attachment process) of the General Corporation Law, one seizes stock not by actual seizure of a certificate but by attachment process served at the corporate domicile." 598 A.2d 674, 682 (Del. Ch.

[3] *Cf.* Opening Br. at 25 (*citing* Reitz article A0047-48, stating that: "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[.]")

1991) (emphasis added); *see also U. S. Indus., Inc. v. Gregg*, 457 F. Supp. 1293, 1295 (D. Del. 1978), *aff'd*, 605 F.2d 1199 (3d Cir. 1979) ("8 Del. C. s 169 provides that the situs of the stock of a Delaware corporation is Delaware, regardless of the actual physical location of the stock certificates.") (cleaned up).

Ignoring this settled authority, Xu Ding cites not a single case to support its purported distinction between "certificates" and "capital stock." Indeed, the only textual distinction in Section 169 is that it only applies to "corporations existing under the laws of this State," not to foreign corporations. This, when textually imported into Section 8-112, means that the Section 8-112 constructive seizure exception does not apply to non-Delaware corporations, whose shares must be seized physically. Opening Br. at 25, 30-33.

This—constructive seizure—is the only interpretation that can be squared with the Synopsis as well. As it made clear, the 1998 amendment to Section 324 was "intended to *enhance* the utility of stock of a Delaware corporation as collateral," which necessitates the juxtaposing Delaware against *non*-Delaware corporations. *Id.* And it also unravels Xu Ding's position that "[i]f the reference to Section 169 in Section 8-112 eliminated the physical seizure requirement, there would be no circumstance in which physical seizure is required." Opp. at 13. As Professor Reitz also explained, "[a]ctual 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..

III. THE 1998 AMENDMENTS MADE NO CHANGE TO THE CONSTRUCTIVE SEIZURE SCHEME IN DELAWARE—THERE WAS NO "AMENDMENT BY IMPLICATION."

The 1998 amendments made no change to the "combined reference to Sections 169 and 324" in Section 8-112. Opinion, at 10. The only change the 1998 amendments made to these provisions was to add a cross-reference to Section 8-112 in Section 324(a).

Xu Ding's position is fundamentally that this cross-reference in Section 324 is not a re-emphasis of 8-112, but erased *both* textual exceptions to Section 8-112, effectively upending Delaware's long-standing constructive attachment statutory regime. Opp. at 10.

But the legislature could have done that simply by deleting Section 8-112's exceptions and excepting Section 8-112 from 8 *Del C.* § 201. It did not do so. And it is well settled that "amendment of existing law by implication is disfavored." *State v. Sharon H.*, 429 A.2d 1321, 1329 (Del. Super. Ct. 1981); *see also Wilmington Housing Auth. v. Greater St. John Baptist Church*, 291 A.2d 282 (Del. 1972) (same); *Dambro v. Meyer*, 974 A.2d 121, 133 (Del. 2009) ("Repeal or modification of a statute by implication is disfavored unless the provisions of the later statute 'relating to the same subject are so inconsistent with, and repugnant to, the prior Act that they cannot be reconciled on any reasonable hypothesis.' It is not enough that the later statute is different; 'it must be contrary to the prior Act.'"); *Richardson v. UPS Store*,

486 Mass. 126, 137 (Mass. 2020) ("merely referencing a previous statute by title and chapter does not suffice to amend or alter the meaning of the referenced statute.")

Xu Ding's amendment by implication argument also fails as it essentially requires the Court to do what it "cannot ... [which is to] nullif[y] the plain intent" of other statutes, including two "in the same chapter," *i.e.*, Sections 169 and 201. *State of Delaware Dep't Nat. Res. and Envtl. Control v. Murphy*, 2001 WL 282817, at *1 (Del. Super. Ct. Mar. 19, 2001).

IV. THERE IS NO AMBIGUITY—THE SECTION 324 AMENDMENT, TO THE EXTENT IT DID ANYTHING, *ELIMINATED* ANY PRIOR AMBIGUITY.

Xu Ding claims that the trial court looked to the legislative history only "to the extent the cross-reference between Sections 324 and 8-112 creates ambiguity." Opp. at 8. But the trial court *itself repeatedly* stated that the statues were "unambiguous." Op. at 6-7. Yet, because the language of the statutes clearly excepts Delaware corporations' stock from the physical seizure requirement, it also worked backwards from the Synopsis and (recent) legislative history, deriving an interpretation from these, which it then applied to the unambiguous statutory language. This was in error. Opening Br. at 19-21.

Even assuming, *arguendo*, that the additional cross-reference from Section 324 to Section 8-112 in 1998 requires additional interpretation at all beyond its plain meaning—which is to clearly indicate that Section 8-112 is implicated where the older Section 324 did not—the better interpretation is that the additional cross-reference was meant to reemphasize the constructive seizure exception for Delaware corporations.

The question boils down to whether the 1998 amendment clarified or substantively changed the existing scheme. *See Robinson v. State*, 2017 WL 1363894, at *1 (Del. Super. Ct. Apr. 11, 2017), *aff'd*, 176 A.3d 1274 (Del. 2017) ("Delaware has recognized "clarification" as a way to assess an amendment to an

existing law."); *see also* *Grimes v. Donald*, 1995 WL 54441, at *8 (Del. Ch. Jan. 11, 1995), *aff'd*, 673 A.2d 1207 (Del. 1996) ("the 1974 amendment to DGCL § 141(a) ... was *simply a refinement that clarified a point hardly in need of very much clarification*. … The 1974 Amendment *did not change the substantive law*.") (cleaned up) (emphasis added); *Kaufman v. Crist*, 50 Del. 108, 112 (1956) ("All of these changes relate entirely to an effort to *clarify and simplify* the language of the statute; there is no substantial change in the body of the law.") (emphasis added).

Multiple principles of statutory interpretation support clarification. To begin with, "it is a basic rule of statutory construction that an amendment to an existing statute is to be interpreted in accordance with an already-established statutory scheme unless there is a clearly expressed intention to alter the scheme" or "there is an *irreconcilable inconsistency* between the amended statute and its previous form." *In re Citadel Indus., Inc.*, 423 A.2d 500, 505 (Del. Ch. 1980) (holding that amendments did not "add anything new to the second sentence of [section] 278 as it previously existed" and "all the amendatory language to [section] 278 seems to do is *make it explicit* that the statute is still self-executing in this respect" "*just as it is now*.") (emphasis added).

Indeed, there is a "strong presumption" that alterations to statutory language do not effect a substantive change, unless "the new language in fact makes such a change in clear unambiguous terms." *Ins. Com'r of State of Delaware v. Sun Life*

Assur. Co. of Canada (U.S.), 21 A.3d 15, 22 (Del. 2011) (holding that the plain meaning of a statute stays the same pre- and post-amendment); *see also Graffagnino v. Amoco Chem. Co.*, 389 A.2d 1302, 1303 (Del. 1978) (where "[the] language can arguably be read" in either [the old or newly proffered] way, it is better to adopt a construction "in accord with the already established statutory-scheme."); *Amoco Chem. Co. v. Graffagnino*, 1977 WL 185692, at *2 (Del. Super. Ct. May 5, 1977), *aff'd*, 389 A.2d 1302 (Del. 1978) (construing an amendment in accord with the already established statutory scheme and finding *no irreconcilable inconsistency*).

Here, neither a "clearly expressed intention to alter the scheme," nor "an irreconcilable inconsistency" exists. *In re Citadel Indus., Inc.*, 423 A.2d, at 505. Rather, all that the 1998 amendment did was to "make it explicit" that Section 8-112 was implicated when applying Section 324, without altering the existing statutory scheme's effect. *Id.*; *cf.* Opening Br. at 24-25 (Professor Reitz describing the "whole scheme" of the statutes at issue as not requiring actual seizure).

First, there is no clearly expressed intention to alter the scheme. Section 324(a) applies to "any corporation," not just Delaware corporations. 8 *Del C.* § 324(a). Section 201 of Title 6 makes Section 324 controlling over Section 8-112.

In light of this text, prior to 1998, the statute may have been (wrongly) interpreted to allow constructive seizure of the shares of foreign corporations as well. In 1998, the statute was amended, with the Synopsis stating an intention to "enhance

the utility of stock of a Delaware corporation as collateral." Opening Br. at 30. That intent—to elevate Delaware corporations' shares' value as collateral above that of non-Delaware corporations—is specific, limited, and achieved by Appellant's reading (*id.* at 31-33); it does not "clearly express" an intention to alter the entire statutory scheme.

Courts refuse to construct a schematic revision from a minor amendment to statutory language particularly where, as here, the amendment's legislative history makes no mention of such a change. *Chisom v. Roemer*, 501 U.S. 380, 396 (1991) ("Congress' silence in this regard can be likened to the dog that did not bark."). That is to say, if the legislature had intended to do away with the constructive seizure scheme underpinned by the situs statute, one would expect to find some clear expression of that intent in the legislative history of those amendments. There was none. And, to read that intent into a single cross-reference would mean that the cross-reference would simultaneously eliminate a long line of cases, Section 169, Section 8-112's exception clause, and 8 *Del. C.* § 201.

Second, there is no "irreconcilable inconsistency" between the amended statute and the then-existing statutory scheme. Then, as now, certificated stock of Delaware corporations are not subject to the physical seizure requirement as a result of Section 169, whereas those of non-Delaware corporation are.

Xu Ding argues that "there is no support for Deng's policy concern" that under a physical seizure scheme, a debtor could "simply hand the shares over to another party and foreclose all recourse to [the creditor]," whereby "decreasing the utility of stock of a Delaware corporation as collateral." Opp. at 35. But this is *exactly* the danger Vice Chancellor Brown identified. *Heitner*, 1975 WL 417, at *3 ("Under this theory, a judgment debtor could avoid attachment of his auto, for instance, by simply mailing his title across the state line. 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.") That is not to mention that this is the precise predicament that Appellant finds himself in.

Xu Ding raises its own policy concern that "[n]o lender would accept certificated shares of stock in a Delaware corporation as security for a loan if those same shares could be reached by a separate judgment creditor." Opp. at 21. But this is a gross oversimplification that ignores the well-hewn path for secured creditors to ensure a priority claim to collateral.

For starters, any lender can consult a transfer agent or the issuer (who must be served attachment notice) about whether stock certificates have been constructively attached, and register themselves as the holder of the certificated security to prevent constructive attachment of their collateral. Opening Br. at 35-36. Xu Ding has no response to this.

Moreover, the UCC itself also allows a collateral holder to "perfect" its interest in collateral by filing a UCC-1 financing statement. *See* 6 *Del. C.* §§ 9-310 & 9-328(5) (The security interest in a "certificated security" may be perfected by "filing a financing statement" under § 9-310(a), obtaining "control" under § 9-314 or "delivery of the security certificate to the secured party" under § 9-313(a)). And it is black letter law that a "perfected security interest takes priority over [the] unperfected judgment [lien]." *Walmart Stores, Inc. v. First Am. Corp.*, 2012 WL 3957184, at *7 (S.D.N.Y. Aug. 30, 2012) (interpreting N.Y. U.C.C. Law § 9-322(a)(2) identical to 6 *Del. C.* § 9-322(a)(2)) (collecting cases); *see also In re TSAWD Holdings, Inc.*, 601 B.R. 599, 608 (Bankr. D. Del. 2019) ("Under section 9-322(a), conflicting perfected security interests rank according to priority in time of UCC-1 filings.").

In short, any secured creditors' rights in certificated shares can be made superior to those of later attaching judgment creditors so long as they make a UCC–1 filing prior to perfection of any judgment lien. A so-perfected security interest cannot be "cut off" by "the disposition [of the certificated shares]" and any buyer would take subject to the perfected security interest. 6 *Del. C.* 317 ("… *a buyer*, other than a secured party, of … *a certificated security takes free of a security interest* … if [1] the buyer gives value and receives delivery of the collateral *without knowledge* of the security interest or agricultural lien *and* [2] *before* it is *perfected*.")

Indeed, although a later judgment creditor is permitted to "pursue remedies against, foreclose on, and liquidate collateral that is subject to a superior interest; [t]he senior security interest *persists and attaches to* the sale proceedings." *Hawk Inv. Holdings Ltd. v. Stream TV Networks, Inc.*, 2022 WL 17258460, at *13 (Del. Ch. Nov. 29, 2022) (citing 6 *Del. C.* §§ 9-617(a), 9-610, cmt. 5 & 9-617).

In sum, Xu Ding's made-up policy concern betrays an ignorance of elementary lender-creditor law.

CONCLUSION

For the forgoing reasons, Appellant/Plaintiff Below, Long Deng, respectfully submits that this Court should reverse.

Respectfully submitted, **BERGER HARRIS LLP**

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