IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE VAALCO ENERGY, INC.: Consolidated
STOCKHOLDER LITIGATION : Civil Action No. 11775-VCL

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Chancery Courtroom No. 12B
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Monday, December 21, 2015
2 p.m.

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BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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ORAL ARGUMENT ON CROSS MOTIONS FOR SUMMARY JUDGMENT
and RULINGS OF THE COURT

- - -

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THE COURT: Welcome everyone.

Mr. Foulds, go right ahead. You got a step on Mr. Bissell there.

MR. FOULDS: Thank you, Your Honor.

Good afternoon. Chris Foulds from Friedlander & Gorris on behalf of the lead plaintiffs. With me today is Mark Lebovitch of Bernstein, Litowitz, Berger & Grossmann.

THE COURT: Good to see you.

MR. FOULDS: Mr. Lebovitch's pro hac papers have been entered and ordered. He'll be making the argument today. Beside him is C.J. Orrico from Bernstein Litowitz --

THE COURT: Good to see you.

MR. FOULDS: -- as well as Ned Weinberger and Christine Azar from Labaton Sucharow.

THE COURT: Good to see you all as well.

Mr. Bissell.

MR. BISSELL: I'll just make some introductions.

THE COURT: Sure.

MR. BISSELL: I'll be arguing today,

but helping me out will be Michael Holmes from Vinson & Elkins --

THE COURT: Good to see you.

MR. HOLMES: Good afternoon, Your Honor.

MR. BISSELL: -- Katie McCormick from Young Conaway, Elisabeth Bradley from Young Conaway, James Yoch from Young Conaway, Andy Jackson from Vinson & Elkins, and Ben Potts of Young Conaway.

THE COURT: Great. Welcome to all of you.

MR. LEBOVITCH: Good afternoon, Your Honor. Now is the time for the cross motions for summary judgment concerning VAALCO's charter and bylaw provisions that purport to make unclassified directors removable only for cause.

I think we should start with the decision tree before Your Honor because I think that two out of the three kind of initial answers for Your Honor make a lot of what's in the papers and a lot of the collateral arguments moot.

What I mean by that is we're going to start with the language of the statute itself. And if Your Honor finds that the General Assembly actually

intended to have charters override the grant of a removal right in 141(k), then I think the analysis ends and the defendants will win. Likewise, I think if Your Honor finds, as we think the language compels, that the General Assembly intentionally specified the two exceptions to an otherwise broad grant of removal right, then there's a conflict between the charter. And if there's a conflict in the words, I don't think we get to other issues like policy and a middle ground, and so on and so forth. So it's only if we find some question about the General Assembly's intentions do we get to debates about whether the rights at issue are fundamental and whatnot. And that, really, is the analysis that then-Vice Chancellor Strine followed in the Jones case.

I think -- however many arguments we go through and prepared for all of them, I think what we'll find is there's a sense I got in reading the briefs of a clinging at straws from the defense side. I mean, they kind of ask Your Honor to presume that the statute's permissive and then throw up a lot of very creative arguments about, you know, why you should change the charter, change, you know, what the

stockholders did. I'll get through all of that, but I think that we get to an easy answer here.

I think it's because the charter and bylaw provisions actually conflict with Section 141(k). Your Honor held in the Sinchareonkul case that there's a hierarchy. I think that's been well established.

THE COURT: I don't think I made that up.

MR. LEBOVITCH: No, I know. I mean, it's well-established, but, you know, the bylaw that conflicts with the charter is void, and both the bylaw and charter that conflicts with the DGCL is void.

And I think the problem with the defendants' broad argument is that by saying, in effect, that every provision of the DGCL is subservient to whatever is in the charter, they've turned the hierarchy upside-down. That's not the law, and nor should it be.

Now, if we look at the statute, I think I'm going to try to, for starters, juxtapose the actual language of the charter with what the defendants are really saying when they say you have to infer that the charter overrides the rest of the

provisions. If I may approach.

THE COURT: Sure.

MR. LEBOVITCH: And I think the initial argument from the defendants -- well, let's start with the language. I mean, from our perspective, the language of the actual statute as written is really pretty clear, is that stockholders have the option to remove directors "with or without cause, except as follows:" And then there's two subheadings that are the statutory exceptions. Because there's no classified board here and because there's no cumulative voting, those exceptions don't apply. That really could end the inquiry.

The question is, you know, can the charter vary. So implicit in what the defendants are saying, that the beginning of 141(k) should be read to include the words "unless the certificate of incorporation" -- I guess "and bylaws" because they're defending the bylaws as well -- you know, "otherwise provides."

The challenge in that is the legislature put those words into a subsection, and they did so in a way, I submit, that puts a limitation on the exception. What they're saying is there is

a -- give an option to stockholders -- an option given to stockholders to remove directors with or without cause. In the event there's a staggered board, then you presume they can only be removed for cause unless the charter otherwise provides, meaning the stockholders don't want to give up that right. And we're going to get to the legislative history of the statute in a minute that I think proves exactly how this came about.

I think that the choice to put the "unless the certificate otherwise provides" in one part, a subsection of the provision, actually means that the Court would do -- would be very significantly rewriting the statute if you also inferred that language applied to the whole provision.

Now, you have to give significance to the legislature's choice to make an exception, okay. We don't have to debate whether the Arnold case supports that. I'll start with the Sutherland treatise, but then we're going to exactly to what then-Vice Chancellor Strine said in Jones, which I think just is dispositive here.

You know, in the reply brief there was talk about the Sutherland treatise and whether we're

correct that Delaware will strictly construe exceptions. And I think there's a distinction that needs to be drawn, is whether you strictly construe the language of an exception; and then there's whether you create brand-new exceptions, meaning, you know, when someone wants to fit within an exception that's written, Delaware doesn't have to strictly construe the exception. It can say "Well, you know, this conduct is close enough, it fits within the exception. We're going to have an equitable, a broad view of what the exceptions say." That's not the argument the defendants can posit here. There is no question that charter does not fit within the enumerated sections, okay?

So here, what we have is an exception that they're advocating that is not even arguably within the language of exceptions in 141(k).

And we cited page 8 of our reply brief, our answer, the language from the Sutherland treatise that says "where there is an express exception that comprises the only limitation on the operation of the statute and no other exceptions will be implied." We cited the Active Asset Recovery case that acknowledges the same principle in Delaware. But

I think that the Jones case really makes this clear.

The premise of the Jones case is that the way to read the language "unless the charter otherwise provides" is to define it as a bylaw excluder; right? That's the gist of it. Well, what does that mean? I think what the Court is saying, where the General Assembly uses a specific exception -- in this case one that points to charters as the way to vary the default rule -- by necessity that is excluding an alternative way to vary from the charter, meaning the bylaws.

Likewise, when the Assembly says in Section 141(k) that, you know, essentially, "You can deviate from removal with or without cause if you have a staggered board or cumulative voting," then they mean to exclude other methods of deviating from the premise.

And in the Jones case there's a quote that, I mean, I think should be dispositive. I'm going to replace the word "one-year terms" from the Jones opinion with the words "removability without cause," okay? And the quote is this. It's at 883 A.2d at 849. "The extent to which a certificate provision could deviate from the default standard of

[removability without cause] for directors was itself set by statute, which limited the deviation to the adoption of a staggered board with members whose three-year terms expired on a rotating basis. Therefore, to permit a deviation beyond that expressly permitted by the statute would contravene Delaware public policy."

I think that in this case Vice Chancellor Strine acknowledged that the use of an exception by the legislature has import. If you give it import here, I think that should be dispositive.

I also note the use of exceptions in the provision Section 141 generally has to be given some weight. So Section 141(a), (b), and (f) use the words "unless otherwise provided in the charter." So I think it does an injustice to just imply that every other provision of 141 can be overridden by the charter.

Now, if it's a close call, you ask whether this is a fundamental right. So if the language is ambiguous, you say, well, this is a fundamental right, so I have to infer that the legislature doesn't want to let charters override the presumption.

The defendants provided the Court with what I think is a bit of an alternative, maybe even a revisionist history, where they say that the right to remove with cause has always been deemed fundamental, but the right to remove without cause is somehow a collateral or a subsidiary right.

It's really just not true, and I want to highlight -- I know this all happened quickly. We provided the Court with a lot of the treatises and legislative history. There's one that's, I think, really important to review. It's tab 5 to the Foulds compendium. It's the Arsht and Black Business Lawyer article discussing the 1974 amendments. And there's really two paragraphs that, you know, I think you can just read those and get the history. I'll ... You know, Your Honor, if you don't have a copy --

THE COURT: I have it.

MR. LEBOVITCH: You have it, okay. So I'm going to go to page 1024 of the Business Lawyer article. And it's under the heading "REMOVAL OF DIRECTORS." So first there's a basic description of 141(k). And there's a paragraph that says, "Thus, under section 141(k), the stockholders are granted very broad authority to remove directors."

And what you see is Arsht and Black go on in that paragraph and the next one to explain an anomaly and how the 1974 amendments actually solved a problem that may not have needed solving and did so in a way that created a new concern for with-cause removal that didn't exist. And, specifically, I'll read from the end of that paragraph into the following one.

They say that "The rationale reflected in the broad power of removal with or without cause is that since the stockholders are the owners of the corporation, the right of removal should turn not on the propriety of a director's conduct but on the bare question whether stockholders want to retain him as their representative."

And then Arsht and Black, I think, you know, blow up or at least disagree with the defendants' assertion that removal for cause is the special right and that removal without cause is somehow collateral. They say, "There seems to be no good reason for the Delaware provision protecting directors elected to staggered terms against removal without cause. The exception carved out for classified boards purports to codify the holding in

Essential Enterprises Corp. v. Automatic Steel Products, ... where the Court of Chancery held invalid a by-law authorizing removal of directors, with or without cause, where the corporate charter, and the statute, provided for staggered terms of three years. But Essential Enterprises was decided prior to the ['67] amendment of section 141(b), which recognized, in the statute, that a director's term may be cut short by removal ...." Then they go on and explain that the prohibition found in the 1974 amendment results from a misreading of that case.

If I'm understanding this, Your Honor, correctly, what they're explaining is that pre-1967 there was no reference to removal in the act at all. And so the Essential Enterprises case rejected an act of removal because of the belief that there may be no power to remove. In 1967, the term of office of a director, the language relating to term of office was changed to not only say "the end of the term or resignation," it says "the end of the term, resignation, or removal." And so as of 1967, there was an absolutely broad granted right of removal to stockholders.

The criticism from Arsht and Black is

you don't really need to preserve staggered terms to be for cause. And that's because there's a difference between how long your term will last and when you get elected and the right to remove. That said, I mean, we accept 141(k) as a given. But we object to any suggestion that the removal for cause is some superior right and that the presumption of the ability to remove without cause is a subsidiary or collateral right.

And, in fact -- I mean, we cite some of the cases. I'll just quote one. Chancellor Allen in the Insituform versus Chandler case, after going through the history of 141(k) and citing some of the same commentaries that we cite, he explains that the principle thrust of Section 141(k) is "to recognize the power of [stockholders] to remove directors without justification unless, because of the existence of cumulative voting or staggered boards, protection of minority voting interest is thought to require such justification." And that's at 534 A.2d at 266 to 67.

Now, in the Jones case, when then-Vice Chancellor Strine was talking about 141 -- well, talking about 213 and contrasting it with fundamental rights, he pointed to his own opinion in

the Rohe case from 2000. And in discussing whether charter and bylaw provisions were valid in the Rohe case, he says at page *11 of that, "... 141(k) makes clear that the directors ... may be removed with or without cause by a majority of the shares of the company. Section 141(k) contains no limitation on the right of stockholders to remove ... member[s] of a non-classified board." "Delaware law considers the right to remove directors to be a fundamental element of stockholder authority."

Your Honor, again, I think that should be dispositive. Particularly combined with the Arsht precedent, I don't think the defendants can really argue that what the Vice Chancellor was discussing was the right to remove with cause. And, in fact, the proof is he never found that the removal in that case was for cause.

In the Rohe case there was an effort to remove directors with cause, and the removed directors challenged it. They said, "You can't do this because of the agreement." And Vice Chancellor Strine went out of his way to say "There's a collateral litigation which, for some reason, you haven't brought to me over whether the

removal is for cause." And the Vice Chancellor says, "The things that you're accused of would constitute cause, if true." But that "if true" really matters.

And so I don't think anyone can justifiably read Rohe to only say that the rights removed with cause is fundamental, because the fundamental ruling in Rohe from Vice Chancellor Strine is that there was a right to remove there, whether or not there was cause, because there had been no finding of cause.

And, in fact, that builds on, back to Chancellor Allen in Insituform. In Insituform you had a removal, and one of the defenses was there's been no showing of cause. The context in which Chancellor Allen was discussing the principal thrust of 141(k) was in his finding that he doesn't have to deal with whether the proper procedures were followed to remove someone for cause. And this is a quote from page 267. "As I conclude, however, that the incumbent B directors had no immunity to removal except upon cause," "had no immunity to removal except upon cause," "these subsidiary questions may be skipped over." And he says, "[Because the] shareholders" -- "... shareholders have the power to remove a director

without cause, their subjective motivation in exercising that power is irrelevant; thus plaintiff's argument that certain of the allegedly removed directors were, in reality, removed for cause (without required procedural steps) is itself irrelevant."

So both those cases involved upholding the right to remove as being fundamental and expressly say "I'm making no finding that there's been cause here."

The next argument from the defendants is that the statute uses the word "may" instead of "shall." You read the statute and you understand that, I mean, "may" makes sense there because, first of all, as we point out, the statute, as written, would make no sense if you just replaced the word "may be removed with or without cause" with the words "shall be removed with or without cause." That's one thing.

The other side is, you know -- I realized when I saw the reply brief from the defense, where they tried to rewrite the statute, that they can't just replace "may" with "shall." They have to rewrite the entire structure. That's because there's a fundamental difference between saying "I may have

the right to do something," okay, and saying "I may do X or Y," okay. A very, very big difference, fundamental difference.

And so in context in this statute, the General Assembly did not say stockholders may have the right to remove without cause, which, in their world, you could replace it with "shall" and say "Well, 'shall' would make it mandatory, but the use of 'may have the right' suggests it's permissive and they may not have the right." The General Assembly was very deliberate. You may remove with or without cause. It means it's your option how you want to remove people, with or without cause.

We cited, I guess, the Supreme Court case in Miller versus Spicer that points out that the use of "may" simply can suggest that you're creating a right, not that it's permissive.

So I think on that basis, really, the charter and bylaw provisions, I mean, there's a conflict with the actual language of 141(k), and there's no basis on which to read it otherwise.

But unless -- unless we are done here, I'll go on to the defendants' other arguments, the middle ground arguments.

I think it is a red herring, though. The statute -- they say that the statute, you know, intended to allow a nonclassified board to be removable only for cause. And there's a few problems with this middle ground theory.

The first is that the General Assembly could have said so and created a nonclassified board removal obviously for cause, but that's not the wording they did in 141(k). More so in 141(k), they identified a middle ground. I think this was the part of the Arsht and Black article. The premise is directors are removable with or without cause, but in the case of a staggered board, you presume that they're removable only with cause. But there's middle ground. And that's a staggered board which, if the stockholders unite and want a written consent solicitation or call a special meeting, they can remove without cause. That's allowed by the charter, and the General Assembly has specifically provided for that middle ground in the text of 141(k).

There are other ways that the defendants or that any corporate board can achieve something close to the result that defendants are seeking here, while doing no injustice to 141(k). I

mean, you could ask the shareholders to give up the right to act by written consent and call special meetings. That's permitted. Now, I don't think that makes the directors removable with cause, only because there's always the ability to either, if you can't call a special meeting, pressure the board and urge the board and, you know, try to force the board to call a special meeting. That can happen and then you're removable without cause, but you're getting pretty close to the nonclassified staggered board that is very highly protected. And there are companies that get rid of written consents. Fundamental difference.

I'm going to get to the 141(d) example right away, Your Honor; but if Your Honor accepted the concept that 141(d) allows a one-class classified board that is therefore removable only for cause, well, that's an option. That's just not an option that was ever presented to these stockholders. That's a different structure.

And so I think that Your Honor can find that there were many legitimate ways for a Delaware corporation to achieve some, you know, balance, some level of protection without offending

141(k). The fact that this company did is no excuse for them to back into any of these potentially permissible alternatives.

Now, 141(d), the reason it doesn't work is because the stockholders, first, in 2009, they were asked if they wanted to declassify the board. You can't ask stockholders to declassify a board and then back into 141(d) and say secretly what we intended or what they intended is to actually have a one-class board permitted by 141(d).

We also cited, I guess, the Drexler treatise and some other sources that point out that the use of the word, you know, "one class" in 141(d) may be a bit of an anomaly because you talk about dividing the board into a class of one, two, or three. You can't divide anything into one. And the concept of a one-class staggered board doesn't really make a lot of sense. But, you know, if it can happen, maybe you can have one class that simply runs for election once every three years. I don't know. It's not what happened here, and it does seem to be a very unusual situation, this one-class theory. Just a theory, at best.

And I think that the -- I think --

third and maybe most important, I think this structure has been rejected as well. And I go back to the Insituform case with Chancellor Allen. He looks at the whole statute, not just the exceptions by the following paragraph that deals with special directors, right, a class where a preferred or someone, some other class of stock gets to elect a director. That's its own class, even though it's not staggered.

And Chancellor Allen is struggling with how to interpret the provision. He says, "The only way" -- this is also at page 267. He says -- I'm paraphrasing a bit, but he just says it in more words. "The way to read 141(k), inclusive of all of its language, is to conclude there is a general rule that specially-designated directors, like those elected by a preferred holder, are also subject to removal without cause, and that the only directors not subject to removal without cause are those on a staggered board pursuant to Section 141(d)."

So in his view, you have the general rule. You have an exception that includes the staggered board and cumulative voting, and then you have an extra provision at the bottom that makes clear if there's a special director, they can also be

removed without cause. He makes it makes sense, but he also says that way the only people who cannot be removed without cause are those on a staggered board.

Their next argument is the 175 companies. I think Your Honor knows firsthand that the everybody-else-does-it defense or justification doesn't and shouldn't carry the day. I mean, I guess, just a couple examples. We know dead hand poison pills proliferated until they were stopped. Dead hand proxy puts proliferated. To be a little more up-to-date, until Your Honor took a stand against disclosure-only settlements, it was a bad habit that proliferated.

THE COURT: But the pushback was the Airgas bylaw decision.

MR. LEBOVITCH: What's that?

THE COURT: The pushback was the Airgas bylaw decision.

MR. LEBOVITCH: The Supreme Court's opinion in that. You know, that's one argument, among others, in the Supreme Court's decision. And I don't think -- I mean, arguably, Amylin, you know, could have gone there, too. The defense was made in Amylin as well, "everybody has it."

I don't want to tell the Court what's dicta and what's not, but I think that there's enough precedent where the Delaware courts have said if something's wrong, it's wrong, and it doesn't matter if people have copied it without any litigation.

But what I want to show you about the 175 -- and I'll call Your Honor to a comment you made in the Healthways case, something to the effect of, you know, if there's a riot, that may be market, but that doesn't make it right.

Your Honor, we took a look at the 175. There's no riot here. There's, like, a mild disturbance. What I mean by that is we became suspicious. The November 23rd press release from the company to the stockholders made a representation that there's 248 other companies that have this structure. Then we get to court and we're told there's 175. We saw that press release. We were really curious, wow, that's a big number. And then what they tell the Court is there's potentially 175 companies. That got our ears up even more so.

We -- this has been tight. We didn't have a lot of time. We decided to take a random sample. The random sample was going to be the first

20 companies on the list and the last 20. So there's no cherry-picking. We were going to check for is it a staggered board, do they have written consent, everything we could come up with. And it's a very -- unfortunately, a very labor-intensive process.

But what we found is kind of surprising to me. I knew we'd find a couple exceptions. I didn't know we'd find this many. Out of the 40, right -- we checked 40 out of 175. What what's that? Like 20 percent that we actually checked. That's sufficient for our sample there.

First, many of these companies have staggered boards. The removal -- whether there could be removal for cause is just immaterial, and those companies, by our check, is Ashford, Affiliated Managers Group, AGCO Corp., Ballantyne of Omaha, BankUnited, U.S. Steel, and Valero. Those, we believe, have staggered boards. We can't find any proof that they've destaggered.

Second, some of the charters do not mandate removal only for cause. They have provisions that talk about how to remove for cause. Okay. They talk about the procedures to remove; but in light of 141(k), I think the Court would interpret a charter or

bylaw provision that talks about removal for cause without saying only for cause as being coterminous with 141(k). And those companies are Williams-Sonoma, I think Ambassadors Education Group, I think American Capital Agency Corp. Veritiv actually allows for removal without cause at a special meeting. Vitamin Shoppe has a provision that says if directors are removed for cause, that has to happen at a meeting. Again, inferring -- we think that actually might make some sense, because if you're going to remove someone for cause, there has to be some form of due process, some ability to speak, and a meeting is maybe more fair to the directors than removing for cause through written consent.

But, in any event, I don't think those companies have barred removal without cause. A number of companies, Your Honor, have controlling stockholders. Your Honor is familiar with The Mosaic Company because I think a few years back there was a litigation. Amtrust Financial Services, Vince McMahon and Hulk Hogan and the World Wrestling Federation. Totally different considerations. A bunch of the companies allow action by written consent -- oh, I'm sorry -- do not allow action by

written consent. I'll just give a couple of those. I guess from the back of the list, Vitamin Shoppe, Webster Financial, Western Asset. We have a list of, it looks like, 10 of those companies that bar written consent, and a couple of these companies are bankrupt or have been deregistered years ago. So the list is even stale. Verado Holdings appears to be one of those. In any event, I meant what I said. This is no riot. There's no reason to draw any inference from the defendants' list.

I mean, really quickly. I think I dealt with the intent. I just want to point out that in terms of the structure of analyzing the statute, I don't understand why the defendants are talking about stockholder intent other than in their reformation claim. And that's because when you do statutory construction, you look at intent if the legislature is unclear and you try to figure out the legislature's intent. You could look at shareholder intent if there's ambiguity in the operative agreements, the charter, the bylaws. We've never asserted ambiguity. We don't think there is. I mean, it says that directors are removed only for cause. So I don't really know why we're going to intent.

But to maybe jump to the reformation argument, Your Honor's obviously familiar with the Lions Gate case. I think Chancellor Chandler was all but mocking the idea that you could reform agreements based on knowledge of what every current and former stockholder intended. And we cite that from Lions Gate. I think that's dispositive, really, of the intent argument, to the extent that it applies to the legislative construction; and I think it's also dispositive as to the availability of reformation.

You know, one comment about the idea that stockholders maybe should have understood that when they were getting rid of the staggered board, they were keeping in the for-cause removal provision. Well, if you're going to infer they knew it's in the charter, you have to infer they also knew what's in the statute, which is 141(k).

What I would say is if pretty smart people like, you know -- sorry. If the conventional wisdom, right, among these kind of people like Folk, Arsht, Black, Balotti, Drexler -- and I'll even give you Welsh and Saunders. If the conventional wisdom is that 141(k) will override a charter provision that says removal only for cause, then I don't think

there's any basis for the Court to accept defendants' invitation to assume that shareholders just inferred that the charter provision would override the statute. I think the opposite would be the more logical outcome.

And, in fact, to go back to Rohe, when the defendants tried to create some inference of intent based on reading a couple of the vacancy and the removal provisions together,
Vice Chancellor Strine blew that out of the water. He says, "I'm not going to curtail shareholder franchise rights based on some inference." He says -- and he ends -- "Most important, one wonders why the parties did not state in Article 2.14," which deals with removal, "that directors cannot be removed except for reasons set forth in 2.15(a)," which was what defendants were referring to. He says, "I'm not going to infer it. It's way too much of a leap."

Finally, you know, look, the board put out disclosures that they didn't have to. This gets to the consents and the revocations. There is a consent solicitation happening. If Your Honor agrees with us about the construction of the statute, then they should not be allowed to solicit revocations

until and unless they've put out factual disclosures. They said that this written consent solicitation is itself null and void, that any effort to remove directors without cause would be invalid. They didn't have to say that, okay.

I tried to put myself in the position of a independent board member facing a situation like this. And you know what, you look at the statute. You get advice, and you say there's a high likelihood that this provision is not valid. And there are ways to pass a resolution. You know, whether it's through Section 204 or 205, you could pass a resolution that either says "Look, a majority can remove us," and then you seek some sort of relief where there's no real dispute; but you're saying we're passing a resolution, we want to ratify the resolution that the charter doesn't control this vote."

Alternatively, you could even stick to your guns and say "We think there should be reformation." They could say that you in 2009 and 2010 intended to create a classified board removable only for cause. And then they could have sought relief or let shareholders seek relief. That's not what they did. They said that it's invalid, the

written consents.

So I think that, you know, they intentionally made some disclosures to shareholders to influence the consent solicitation. So it is important and ripe to correct that.

Unless Your Honor has questions, that's it for me.

THE COURT: I don't. Thank you.

MR. LEBOVITCH: Thank you, Your Honor.

MR. BISSELL: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. BISSELL: First, I want to thank you for hearing us on such an expedited schedule. We really appreciate it. This is a issue of great concern to VAALCO and its board, and the interests of directors throughout is to get this right, and we're hoping you can help us do that.

Just three cleanups before I get into the body of my argument. There are two things I thought I heard Mr. Lebovitch say that I think I agree with. I think he said the Jones case is dispositive. I think we agree with that.

And I think he also suggested,

although I guess he has some quibbles about how you would do it, there would be a legitimate way to achieve a single-class board that would be removable only for cause.

The third cleanup item I want to hit is the issue of the compendium, because -- and I -- the way it started in the SEC disclosures, 248 companies were identified using shark repellent, and the disclosure's very clear about that. For the compendium we submitted to the Court, we went and looked at each of them to make sure we thought they were fairly described, and the number ended up at 175.

You know, I do not want to fault Mr. Lebovitch for not providing us with his sample analysis in advance of the hearing. Maybe there was some we would agree with, but I suspect there's some we would not. I mean, I'm sure they were very rushed and pressed to get through them, as we are.

But, in any event, the point of the sample is not that everybody does it. That's not what I'm here today to say, "everybody does it, so it must be okay." What the sample shows is that there is some group of practitioners out there who look at our statute and say "I can do this." And what that

suggests, just like maybe there's some treatise authority that suggests that maybe you can't, is that some people look at this and say "maybe I can."

So, really, what the sample does is it doesn't create an excuse of "everybody does it"; but it shows that there is a practice out there, and that if you invalidate this, you may affect a large number of corporations.

Okay. With that little windup, let me give you a roadmap of where I'm going to go today, unless you tell me it's time to drive off-road, in which case we'll go there.

I'm going to talk a little bit about standard of review and rules of interpretation. I think, by and large, at least the first issue -- and it's the issue we cross-moved on -- is, this is about facial validity of a charter provision. No discovery. Pure legal question challenge. That is a very hard argument for a plaintiff to win under Boilermakers and other cases.

Rules of construction for Section 141(k). You look at policies that support the construction you are arguing for. So, yeah, we're going to talk a lot about policy today, but we're also

going to talk about what we think the plain words mean. But policy is not just a fallback thing that you go to when you construe a statute. It is in some ways the main event.

Finally, rules of construction for bylaws. There is the presumption of validity -- the plaintiffs don't talk about it -- and you are to construe the bylaw or charter amendment in a way that is consistent with the law and that avoids striking it down.

Okay. The second thing I'm going to get into is going to be interpretative issues. And just headlines, plaintiffs need to win on three interpretive issues. They need to show that 141(k) is a mandatory rule with a list of exceptions. We say it isn't. We say that the first part of 141(k) is a series of three default rules for three different situations.

Second, even if you agree with the plaintiffs that 141(k), its first part, is a mandatory rule with two exceptions, you have to apply *inclusio unius exclusio alterius* to say that another exception can't exist. We don't think they've made a case for that, given the interpretive processes.

Three, even if you decide that it is a list of exceptions, plaintiffs need to show that the de facto single classified board we've suggested without for-cause removal is just not something you could get to as a way to cure a tension between the statute and the charter.

Then I'm going to talk a little bit about remedies, what the Court should do if it determines that the 2009 amendment is inconsistent with the law. We think the plaintiffs are suggesting that the charter be rewritten. What the defendants want is we want a stockholder vote. That is something we called for before this lawsuit started. A stockholder vote is the most sensible way to determine the intent of the stockholders, and the board proposed it, as I said, several weeks ago.

And with that roadmap, unless you want me to go someplace else, I'll go to the top of the argument.

THE COURT: Okay.

MR. BISSELL: Okay. Standards of decision and rules of interpretation. And standard of decision here is how do you win a per se challenge. The plaintiffs aren't saying what standard they're

trying to meet, but it's clear what standard they have to meet. It's laid out in detail in Boilermakers, and it's echoed in ATP. And the cornerstones of that standard decision are bylaws and charters are presumed to be valid. So this is a legal question. So it's just a facial challenge to the charter and bylaw.

So really what the plaintiffs have to show here is that this charter can never be permitted. If it is permitted in some case and they just don't like the way it's having effect here or they don't like the way it was voted on in 2009, that's not a facial challenge. That's an as-applied challenge. Then you go look at a bunch of other stuff, which would take discovery. It's not the sort of thing you can do on a two-week timetable, but we believe you can figure out the legal issue today.

Next, rules of construction for the Delaware general corporation law. Again, I think I heard Mr. Lebovitch say that he thinks Jones is dispositive here. Jones, together with Boilermakers, gives a good explanation of the interpretational philosophy of this court when it comes to the Delaware general corporation law. And that is, if there is a conceivable basis to validate, then the charter

provision is valid. This reflects that the DGCL is a broad and enabling and not prescriptive statute. The Court doesn't want to invalidate charter provisions because a statute is unclear or ambiguous. That would be a very bad thing for Delaware. If we are confusing people out in the United States, lawyers in the United States about what our statute means and they're going to find out that, "Oh, my God, I didn't intend to but I've created an invalid charter amendment," that is a bad thing. That is very undesirable thing. And it's not a necessary thing, because one of the reasons this court can take a liberal view towards construction is, this court always stands ready to prevent inequitable use of a charter provision or bylaw. Also, our corporate law gets revised annually. And to the extent it turns out that there's a charter provision or a bylaw provision that the legislature comes to see is unwise, it can revise that, and the fee-shifting applies. And the forum selection bylaws that have been both litigated and been legislated in the last few years are fine examples of that.

So that's it for interpretive principles. I'll move on to our basic interpretive position, if you'd like, Your Honor.

Our basic position is that 141(k) sets a series of default rules for three different scenarios. Its first sentence lays out the general default rule. That sentence does not include a prohibition against the default rule being changed in the charter or the bylaws. Then it gives two instances in which there are different default rules. 141(k)(1) provides a default rule for classified boards. Removal is only for cause unless the charter says otherwise. And it's "charter says otherwise" is what I believe this court and certainly the Jones Court called a bylaw excluder. In other words, you can't flip that burden with a bylaw. It has to be with a charter provision.

Section 141(k)(2) gives you the default rule for cumulative voting.

And, finally, last sentence of 141(k), which I don't think gets much discussion or love, it discusses how the default rules are applied to class or series voting.

Now, plaintiffs argue that the sentence 1 of 141(k) is a mandatory prohibition of a for-cause removal limitation. We don't think the language of 141(k), nor the policy that animates its

enactment, support that argument. First, the language -- and I don't want to make too much of this because it's not an invariable rule of interpretation. But the language -- the first sentence uses "may" and not "shall." That is usually an indication that the statute is permissive and not mandatory.

Now, I will just address Mr. Lebovitch's argument that it makes the statute make no sense because it creates a mandate that the stockholders always must remove the directors. I don't think that's a fair reading of the "shall." If that is the correct reading of the "shall," then that would create some real problems with Section 141(e), which is a couple of sections earlier, also uses "shall."

But I don't think anyone reads 141(e) to be a command to boards to have to hire experts and to have to protect themselves. I think they read it as something the directors can or cannot do, even though it is "shall." And it describes what effect will happen if they do do so.

Same thing's true with the "may" in 141(k).

Now, our big help in this case is

certainly the Jones case, because Jones pretty much rejects the argument that you need to make it implicit that a section of the DGCL can be amended by charter or bylaw. What Jones stands for is the proposition that it is implicit and you need to look for reasons why that would not be the case.

So, I mean, both sides sort of have the flip side of the argument. You know, the plaintiffs say, "Well, nowhere does it exclude this." And we say, "Well, nowhere does it prohibit this."

So how do you decide who wins on something like that? Well, Jones answers that question. When discussing Section 213(b), it rejected the argument that you have to make it explicit. It says, "By its plain terms, Section 102(b) does not in any way indicate that its grant of authority may not be altered by a certificate provision." In other words, then-Vice Chancellor Strine said the fact that it doesn't say it's prohibited means it's probably not. That's at page 849.

A little bit later on page 850, around Note 34, Vice Chancellor Strine is discussing the Stroud case, and he makes the same observation about Vice Chancellor Hartnett's ruling in that case. He

says, "In his view," talking about Vice Chancellor Hartnett, "Section 102(b)(1) authorized the charter provision because section 161 did not contain any language stating that the powers granted in it could not be altered by a certificate provision." That's, again, 850, around Note 34.

So Jones has rejected the idea that the absence of a limitation prevents the amendment by the charter and the bylaw.

Now, the policy behind the enactment of 141(k) certainly supports our reading. And I think Mr. Lebovitch believes I've engaged in revisionist history. I think far from it. I think it's very clear that at common law there was a right to remove for cause but no right to remove without cause. We contend that 141(k) was intended to preserve the latter and permit removal for cause and make it the default. And that is consistent with the language in Insituform, which Mr. Lebovitch discussed.

If you look at ... Just give me a second. If you look at the words the plaintiffs quote at page 14, in discussing Insituform, they say, "see also Roven ...." And they say, "(discussing that Section 141(k) was enacted in 1974 to settle the

'issue of removal' and 'permit removal with or without cause).'"

We're not challenging that. We fully understand that it is permitted to have removal -- to limit removal -- or to have removal with or without cause. What we don't see in the statute and we don't believe should be implied is that an unclassified board can never limit removal to for cause.

The policy also supports us because it's clear that there's other ways you could get there. The idea of limiting removal to for cause for a director who's elected to a one-year term is not something that's repugnant to Delaware policy. In fact, I forget how Mr. Lebovitch described it. I think he called it our middle ground argument. We sometimes call it our Goldilocks argument. If you can have a three-year staggered board that has only for-cause removal, what is the policy reason for not having a term of one year that is only removable for cause? There is none. It comes down to a technical argument that you could do it under 141(d), but if you don't do it exactly right under 141(d), you can't do it at all. And to us, that makes no sense.

In addition, there's lots -- the right

to removal is very important, but it's never been unfettered. For example, there's no immediate right to removal. You can, as Mr. Lebovitch pointed out, you can limit how special meetings are called. You can limit consents. Sometimes special meetings can't be called for 90, 120 days under advance notice bylaws. So there's other ways you could have a removal right without cause that is only exercisable on a shorter -- or longer period than instantaneously. So having one for one year doesn't seem to be onerous. It doesn't seem to conflict with any policy.

Now, if you agree with the plaintiffs' argument on how 141(k) works, that it is a single mandatory rule with two exceptions, that gets us to the law of how you interpret exceptions. I think this is very well covered in our answering brief. *Inclusio unius exclusio alterius* is not a doctrine that gets mechanically applied in this court. This court has said that several times, including Your Honor in the Concord case actually refused to apply it in connection with a bond indenture. If you're not going to apply it to a bond indenture, why you would apply it to the Delaware general corporation law is even more hard to see. The Delaware general corporation

law, as I said, is a liberally interpreted statute, one that is interpreted not to cause charter invalidations.

So if Your Honor agrees that it's a mandatory rule with exclusions, you can apply another exclusion here, one that we think is very well based, given the permissibility of doing the single-class classified board with a removal limitation. And so there's no reason to apply *inclusio unius* mechanically here and invalidate the charter.

Third interpretive point -- and I'm going to be brief on this because I get the sense maybe we're wearing out your patience today, Your Honor. Okay. Very good.

You can also get to the same result and avoid invalidating the charter but just deeming what the stockholders and board did in 2009 to have created a de facto single-class classified board with for-cause removal. And that would save you from invalidation here.

Now, if, despite everything I've said, you think this charter provision or the amendment was invalid, then there comes the question of what should be done about it. The company position here is to let

the stockholders vote. There's no better indication of their intent. They may vote to have the for-cause limit removed, in which case the job is over. I hear what they're saying about disclosures, but we stand by our disclosures. I think we accurately describe what the contents of the charter are. Certainly the folks from Group 42 let the stockholders know what they thought the Delaware law was. And it could be that disclosures need to be updated to reflect the wisdom we will get from the Court today. But there is no reason to not have -- there's no reason to prevent a stockholder vote. The board may wish to update its resolution on the advisability of charter amendments depending on what the Court says, but we think a stockholder vote about what the proper contents of the charter are far preferable to a judicial rewriting of the charter.

And we feel that, in part, because we think reformation -- and we think this is reformation or if there's some other verb or doctrine you call it when you take out some parts of a written agreement and maybe put in others -- that this is a reformation, and it's an extreme and unsupported remedy.

Reformation requires the plaintiffs to

meet a very high standard of proof. It requires clear and convincing evidence. And they haven't even tried to meet that standard of proof here in their papers and, quite frankly, there's not a record out there to do so.

And what they've asked instead is, they've asked this court to presume certain things. They've asked this court to presume "Oh, this couldn't be what the stockholders meant. They must have been confused. The lawyers who worked on this back in 2009, they must have been, you know, ill-researched or they must not have known their stuff. They must have gotten this wrong."

But these are the exact opposite presumptions that the law tells you to make when you're interpreting a charter or a bylaw. You presume validity. You don't presume that people didn't know what they were doing.

So there's no record right now to support a reformation, much less the clear and convincing evidence.

Finally, if the Court is of a mind to revise the charter, we suggest it should do so in the way that causes the least amount of adjustment. This

charter has no severability clause. So I think striking large sections out is a problematic exercise. The least amount of adjustment would mean treating the charter as creating a single-class classified board with a removal restriction.

Finally, there has been a lot of stuff in the papers -- and, thankfully, not so much today -- about the motives of the current VAALCO board and, in particular, that they are trying to do something nefarious, maybe bad faith, and that they're trying to entrench themselves. I just want to say a few words about that.

The 2009 amendments were adopted over six years ago by a board where there's only two continuing members that serve today. It defies credulity to suggest those amendments were part of an entrenchment plan. The amendments were voted on by 93 percent of the votes cast at the time. I think if you use total shareholder vote, it drops into the 80s, but yeah, they got -- nearly everybody voted for this.

The board here does not believe that it can ignore elements of the charter just because somebody has come up with a colorable argument about the charter's provision's validity. That would -- to

adopt a doctrine like that I think would be dangerous for our directors. I think it would be bad for Delaware. If directors can all of a sudden start blue-lining their charters and bylaws -- I don't know whether to call it pocket veto or whatever -- different provisions of their charters and bylaws because they think there's an argument that it's legally invalid, that's not a good thing. That may be a good thing for me, but that's not a good thing for Delaware. It's not a good thing for directors.

It's been suggested that what the board should have done here was sued under 205 as an initial matter. The board is not interested in a litigated resolution of this matter. It wants this to go to the stockholder, hear their voice and follow their will.

In addition, we think the Genelux or Genelux -- I don't know how exactly to pronounce it -- the case that Vice Chancellor Parsons decided shortly before he left the bench -- pretty much tells us that route does not work. So we don't understand how that's meant to work.

They criticize the 66 supermajority provision in the charter that requires a 66 percent

vote to amend that. That's not our rule. That's the charter's rule. It's been there forever. The board is not trying to use that for some nefarious purpose.

They criticize the adoption of the poison pill in face of a potential creeping takeover by the Group 42. But that's clearly permissible. And as cases like Fertitta, the board would be roundly criticized if it just allowed a potential controller to come in and just wipe out everybody else and do nothing to make sure that the other stockholders' interests were represented. That's all the board is trying to do here.

We did not oppose expedition in this case to get it resolved. In fact, we agreed to a very expedited schedule so this could get resolved with a minimum of time and expense. So the argument that the board is trying just to hold onto its job, it's not only just a little irrelevant for today, it's kind of insulting.

So it also creates the ultimate irony that the purported champions of stockholder franchise are trying to prevent a stockholder vote here. We want the stockholder vote. We can have the stockholder vote. We don't need to invalidate the

charter.

Unless the Court has something more, I will sit down.

THE COURT: Thank you.

MR. LEBOVITCH: Your Honor, I'll try to be brief.

One of the last things we heard is that the charter is not severable. Sections 121 and 394 of the statute, read together, make clear that every charter's governed by the statute and that every charter incorporates the statute. So I don't think there's any basis for the Court to be unable to essentially invalidate a provision because there's no severability clause.

I also don't think there's a basis to say that shareholders have to seek reformation to invalidate a provision. There's cases through the decades that have invalidated provisions. I'm not aware of any one that said the only way you get relief is if you actually provide some way to reform. We're not reforming a contract. We're taking a charter that's subject to the DGCL and saying a provision is invalid.

I want to be clear -- and Your Honor

can stop me if this was clear, but my friend, Mr. Bissell, I think suggested at the front that I had said that there was a legitimate way to have this one-class classified board that's removable only for cause. I started out by saying why I don't think it makes sense, and the commentator said it doesn't make sense.

But I then cited Insituform. I'll just read the full quote, because I do think it's really very clear, and I do not believe there can be a one-class classified board removable for cause. This is from page 267. This is in the context of a lengthy discussion of the wording, etymology, and the language of 141(k). And Chancellor Allen writes: "... I am of the view that the phrase 'classified as provided in subsection (d)' which is used in subsection (k)(1) but not in the last sentence of subsection (k), was meant to refer only to the staggered boards (pursuant to the first section of subsection (d)) and not to specially-designated directorships. This construction not only avoids an interpretation that would render the last sentence of subsection (k) pointless but, equally important, is consistent with the principal thrust of subsection (k): to recognize the power of

shareholders to remove directors without justification ...."

And that goes on to the quote I previously gave to the Court, and it cites "Compare Essential Enterprises Corp. ...," the Arsht case that may have been misconstrued but that would not allow shareholders to remove directors, "with Everett v. Transnation Develop. Corp. ...," which did allow removal.

And so I think Chancellor Allen has already ruled that the exception to the rule of removal without cause applies to staggered boards, and he read 114(k)(1) to specifically exclude the situation of a nonstaggered board from the, you know, exceptions created in the statute. So I think that language, it's a little bit dense in the case itself, but I think that really is dispositive. I don't think you can do this middle ground. I will call it the middle ground. The Goldilocks, fanciful, whatever. I don't think it's available.

On the Chevron question of what we have to prove, we don't have discovery here. I mean, we are proving that this charter, you know, in the undisputed facts here, doesn't survive. I don't think

Chevron intends to let defendants come up with a wide range of hypotheticals, like maybe the shareholders intended to do something different from what they did to say stockholders can't get relief. I think what we have is a whole bunch of, you know, inapposite hypotheticals.

It was very interesting, because Mr. Bissell said that, you know, there's no language in 141(k) that prohibits a charter from varying. And I sat there and I thought and I asked my colleagues, what language would do that? Because I'm not aware of anything in the DGCL that really says, you know, the charter cannot possibly change this. And then I realized there's three simple words that the General Assembly can use in any aspect of the DGCL that would make clear the charter can't do this. It would say "Here's the general rule," and it would say "except as follows." Those are the words, the magic words that would fit Mr. Bissell's example of excluding the charter and the bylaws.

That was the point that I was trying to draw from my quote from Jones. If the words "unless the charter otherwise provides" is a bylaw excluder, which is the ruling in Jones, well, then,

the words "stockholders have the right to remove directors with or without cause, except as follows" is an excluder of anything but the "except as follows" paragraphs.

On "may" versus "shall" -- well, I guess that flows. That's the Jones point.

You know, the facts of Jones -- I know Your Honor is familiar with it, but I do just want to point out the issue at stake there was the board trying to invalidate its own charter provision with setting a record date because they didn't like how the charter provision worked. And ultimately Vice Chancellor Strine found enough question about the statute and whether it was in conflict with the complicated corporate structure for that company, he looked to whether those are fundamental rights. I don't think you have to go there.

However, the Vice Chancellor seemed, you know, almost to mock -- which, you know, not that you would ever mock any argument -- but he kind of seemed entertained by the idea that the directors have a fundamental right to set a record date a certain way. I mean, it's clearly a procedural issue. He said, "This is not one of your fundamental rights.

This is not you approving a merger agreement, for example." He used that example.

So I don't think that, you know, the conclusion in Jones can be read without the analysis, frankly.

And, again, the proof is that having said that the right for directors to select a record date is not fundamental, he says, "This is not to mean, and no one should read this case to mean, that charters are superior to the DGCL. For example, certain rights are fundamental." And he cites Rohe, which talks about 141(k). So I think that does it.

The idea that removal for cause is the default, you know, it's funny. You read these briefs and sometimes the light bulb goes off, like that really is their argument and then you think about it. The statute would read completely different if that was the case. The legislature could have said very simply "directors are always removable for cause unless the charter otherwise provides." Or they could have said "unless the board is destaggered." That's not the way the statute's written. And so this premise that removal for cause is the holy default, it just doesn't follow the language at all.

Policy issues. You know, look, there's a balance -- and we cited this -- accountability versus continuity. I respect that stockholders could decide they want continuity, they could want a staggered board removable with cause. Stockholders could want some measure of continuity and, you know, they could say "Pursuant to 141(k)(1), we want three-year terms; but if they're so mad that we're going to act in a written consent, then we have the right to remove without cause." Perfectly reasonable judgment to make.

Or there's accountability. You know, you could say "I want to get the vote all the time and I want to remove you with or without cause." The fact is stockholders make that choice here under our law. Here, that choice wasn't made.

On the exclusions, I don't know what else -- I mean, I cited Sutherland and Jones and the other cases, including Arnold. You don't infer exceptions when exceptions are specified.

At the end, talked about kind of "This board, let's just let them vote." I purposely am not trying to, you know, get into, you know, good and bad and good and evil. And so this is the analogy that

comes to mind. I know it's a little bit high. But I can't believe this board, this board is saying that they're pro democracy because they're saying if the shareholders want to exercise their right to remove, which should be done by a majority, they, in effect, have to get a supermajority to make that happen. That's not pro democracy. And the analogy that comes to mind, I'm sorry, is, it's like you have Vladimir Putin who says "I'm pro democracy in Syria. Let's have a vote for Assad." Well, that's not pro democracy. Everybody knows that that's not real.

And here, the shareholders don't have to vote by a 66 2/3 vote to remove these directors. And there's no reason for Your Honor -- I don't understand the basis -- to find a violation of the statute, an inconsistency with the statute and say, "Ah, but it's okay, let them vote." Because the ground rules you set matter. I know that from my time on corporate deals. I'm sure Your Honor knows that, too.

And I think that -- that covers it.

THE COURT: All right, great. Let's take a 10-minute break and then we'll come back.

Stand in recess until then.

(A short recess was taken from 3:13 p.m. until 3:33 p.m.)

THE COURT: All right. Thank you, everyone. Welcome back.

This is one of those occasions where you-all did an excellent job on the briefs, and that allowed me to formulate my thoughts coming in. Sometimes the oral argument, indeed, is a swing. Today it wasn't. That's not because you didn't do a very fine job. It's just because I felt like people did an excellent job in the briefing, and so I understood where both sides were.

I am granting the plaintiffs' motion for summary judgment. I do believe that Article V, Section 3 of the charter and Article III, Section 2 of the bylaws, which provide for only for-cause removal in the context of a nonclassified board, conflict with Section 141(k) of the Delaware General Corporation Law and are, therefore, invalid.

This analysis is driven by the plain language of 141(k). 141(k) states affirmatively "Any director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an

election of directors ...." That is the rule. It then continues. So technically it's a comma and identifies two exceptions: "except as follows:" One exception is "... a corporation whose board is classified as provided in subsection (d) ...." Another exception is subsection 2, "In the case of a board of directors having cumulative voting ...."

For better or for worse, those are the two statutory exceptions. It is not the case that there is some normative policy rationale, I think, driving that. Could you have a combination of a single-class or nonstaggered or straight board and for-cause removal in theory? Yeah, I don't think it's something that would be against human nature or a crime against humanity or otherwise imponderable by any means. But we have a legislative statement of what Delaware law permits. And that's what I just stated. That's historically how this statute has been interpreted. It's how it was interpreted in the Rohe versus Reliance Training case. It's how it was interpreted in various treatises, et cetera.

By invalidating these provisions, I am not engaging, nor is the plaintiff seeking, reformation of the charter and bylaw. Reformation is

when you have a prior antecedent agreement that is not accurately reflected in the written instrument. This isn't that situation. This is a situation where there is a provision that is contrary to law. Something that is contrary to law is invalid, not because somebody intended something else and didn't scriven it accurately, but because you can't have a provision in your charter that is contrary to law.

There has been arguments made about whether this implicates the resistance to severability that is expressed to C&J and Toys "R" Us. The general default common law rule is that provisions of an agreement, provisions in a charter and bylaws, even provisions of a statute are severable. When people agree to this in an agreement and include an affirmative severability provision, it means that they are emphasizing that. It's the same way that under default common law you can get a decree of specific performance, but if you then agree that somebody can be granted specific performance, you're emphasizing that. You're saying "In addition to all the default doctrines, here you can get specific performance to enforce this contract."

So when somebody puts in a

severability provision, that's what they're saying. The absence of a severability provision, while it might be a factor that one would consider, does not preclude severability.

Now, I understand that C&J and Toys "R" Us cut against that and discourage severability in the deal when you're dealing with preclosing injunctions. C&J is obviously a decision of the Supreme Court, so I'm going to follow it. Even if there's a severability clause, we're now not doing that. We're doing the sort of all-or-nothing-type enforcement contemplated by C&J. And, as I say, obviously I'm going to go with that. But I don't think that that speaks to severability in general or invalidity in general or sort of making everything an inevitable package deal in general. If I'm wrong about that, I'm wrong about that; but I don't think, at least based on the language of those cases, that they cut more broadly than the deal context, the negotiated acquisition context in which C&J and Toys seem to have been decided. They certainly were decided in that context, but on which they seem to have been focused.

What I think is the defendants'

strongest argument against the plain language of 141(k) and this reading is the language in 141(d), which, for better or for worse, says that "The directors of any corporation organized under this chapter may, by the certificate of incorporation or by an initial bylaw, or by a bylaw adopted by a vote of the stockholder, be divided into 1, 2 or 3 classes ...."

This creates, at least on its face, the somewhat oxymoronic concept of a single-class classified board. As the defendants see that, that single-class board would be classified and, hence, the directors only would be subject to removal for cause.

That, I think, is a pretty novel reading of 141(d). I don't think anybody out there has ever touted the idea of single-class classified boards triggering removal for cause. Now, that doesn't mean that the defendants haven't hit upon some new discovery about company law. One of the things that we discovered about company law in CML was that, notwithstanding otherwise seemingly analogous provisions to corporations, creditors can't sue derivatively. And I played some role in discovering that.

So are people discovering new things about corporate law and company law? Sure, they are. But you ought to have some really good reason for suddenly discovering something new about a section like 141, particularly when that interpretation of 141(d) would cut against what I think has been the standard analysis of 141(k).

Actually, what I think that reference is about -- and this is all part of plumbing the depths of the legislative history of this -- but what I thought was most telling on that was a document that was provided to me for another purpose, and, namely, that's "The 1974 Amendments To the Delaware Corporation Law," the comment by Arsht and Black.

And one of the things that they talk about in there about 141(d) is that part of the goal of including this language "divided into 1, 2 or 3 classes" was to make clear in combination with the language about "The certificate of incorporation may confer upon holders of any class or series of stock the right to elect 1 or more directors," et cetera, that that second half of 141(d), those special directors, special stock directors, were not an additional class of directors. So there was

uncertainty about whether that would be an additional class of directors, such that if you had a three-class classified board plus special stock directors, do you suddenly have four classes? And what Arsht and Drexler explain is no, that's not the case. You then still only have three classes.

I suspect that this 1, 2 or 3 classes was getting at the idea that if you only have a straight board, you only have one class of directors, even if you have special stock directors. I don't think that it's not designed to create the somewhat oxymoronic idea of a one-class classified board. It's, rather, saying that if you have special stock directors, they're just part of the board along with everybody else.

In saying that, I'm not going against Insituform and what Chancellor Allen talked about there about 141(k). What I'm talking about is the reference to "1, 2 or 3" in 141(d).

So, as I say, I think that's the best argument that the defendants have. It's not one that I find persuasive. And it's also, I don't think, what they did. I think it's one thing if you went out to your stockholders and said "We are declassifying, and

we are declassifying from three classes into one class, and our newly re-classified one-class board will have all the attributes of a classified board under Delaware law and, therefore, will not allow removal except for cause." That at least would squarely present the issue of what "1, 2 or 3 classes" means under (d). Here, what we have is a declassified straight board. We have a declassified straight board that does not try to get into 141(k)(1) that way but, rather, admits that it is a straight board and simply looks to that 141(d) example by analogy as to say "Hey, there's another way we could have done this. We didn't do it, but you ought to let us do it, anyway."

Well, once framed that way, that argument runs afoul of the venerable principle of independent legal significance. And while in equity we might look at the substance of things, in statutory interpretation we value formality. And the fact that you did not go one route means you did not go that route. It means that for purposes of validity, for invalidity, for what votes apply, et cetera. So the fact that you might theoretically have gone some heretofore unforeseen path towards a single-class classified board for which directors would be

removable only for cause doesn't mean that because you ended up with something that you'd like to say is the functional equivalent of that you get the benefit.

So, as I say, A, I don't think the argument works. I think that "1, 2 or 3 classes" concept is geared to something else. B, I don't think there's any way to believe that that's what people did here in this case.

To the extent that this upsets expectations at some give-or-take 175 public companies that may have some strange combination of provisions that attempts to achieve the same result, that is just a consequence of people not reading the statute. And I think defendants, quite appropriately, backed away from this argument today. 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.

And I would note that there used to be around 6,000 public companies out there. By conservative measures, that number has dropped to

around 4,000. So what we're talking about is less than 5 percent. Even giving the defendants the best number, we're talking about, what, 3-ish, 4-ish percent. There's 3-ish or 4-ish percent that will do pretty much anything. I mean, we as a human species, as we know now from the Internet, there is 3-ish, 4-ish percent that would dare to be different pretty much no matter what. So I am not one who would be swayed by those examples. And if people have to go and fix things, so be it.

So I'm going to enter an order granting a declaratory judgment as to the validity of Article V, Section 3 of the charter and Article III, Section 2 of the bylaws.

I'm not going to do anything more than that. I think what people do next is up to the actual actors involved. So, you know, one might think that the board would potentially issue some new disclosures and do whatever it thought it had to do as a matter of Delaware disclosure law and the federal securities laws. That's why the board has the excellent counsel it has. And it will do whatever it feels that it needs to do in that regard. And once we have seen whatever it does, we'll deal with it. I'm not going

to sort of preemptively try to sketch out today what happens in terms of revocations or validity of consents or all that type of stuff. I'll deal with it once we have a concrete situation on down the road.

That's really all I had for you-all.

Questions. Mr. -- oh, Mr. Bissell, your hand shot up. You're eager. I was going to start with Mr. Lebovitch because it was his application.

MR. BISSELL: I think you should.

THE COURT: All right. Well, Mr. Lebovitch I think is being gracious and yielding to you.

MR. LEBOVITCH: (Indicating)

MR. BISSELL: Okay. Your Honor, thank you for your ruling. It sounds like it is not a final order --

THE COURT: Well --

MR. BISSELL: -- which -- and I only ask that for -- to make sure we understand our appeal paths, should we choose to go down that road.

THE COURT: So, look, I think that's something we ought to talk about, because, you know, Lord knows, I am not -- I don't mean -- I don't say

that to be discriminatory of anyone else's faith. I am not the final word on these things. It would seem to me, because I'm granting summary judgment, to be a partial judgment. I can certify it as a 54(b) order. I can -- I mean, maybe the parties would dismiss their other claims and then it would be immediately appealable. It's the type of thing that it would be odd from my standpoint if I did anything to inhibit your ability to seek an appeal. I think that would be a misguided effort on my part.

So that would be my view of it. If you guys want to talk in the first instance. But it seems to me this is like a clean legal issue that would seem to me to meet 54(b) requirements.

MR. BISSELL: Okay. Your Honor, we'll confer with our clients and with our friends. And if we need to talk to you about a certification, we'll come back to you promptly.

THE COURT: Yeah. If you just want to put in -- I mean, I'm happy to have you-all take the first draft, Mr. Lebovitch. It can be a very tight order, declaratory order. Mr. Lebovitch can take the first crack at it and run it by you. If you just want to put in there that this is a partial judgment as to

Count such and such and there's no just reason for delay of an appeal and it's severable and distinct and all that good stuff, I'm happy to enter that.

MR. BISSELL: Thank you, Your Honor.

THE COURT: Any other questions?

MR. BISSELL: No. Still a lot to digest.

THE COURT: Okay. Mr. Lebovitch, how about you?

MR. LEBOVITCH: Well, Mr. Bissell's question raised a question for me. We will take a crack at the order. Hopefully defendants will be able to craft one amicably.

Maybe I'm not thinking through the rules, but I just want to leave a placeholder. If there's some agreement that this becomes a final order, I just want to point out -- because I didn't raise it in the argument, but it's in our briefs -- I mean, right now there's a vote on January 5th. We pointed out that the board had not made any recommendation. We pointed out that that seems to violate Section 242. We were, frankly, trying to keep this focused and wait to present the clean issue to the Court.

If by some chance, because Your Honor is leaving it to the board to figure out their next step, if they are going to go forward with some sort of a vote on January 5 on, I don't really know what, after this charter's been, I think, invalidated or the provision has been invalidated, we have a placeholder. We just want there to be a clear ability to come to the Court quickly to enforce whatever rights stockholders have under 242 to get a recommendation. I don't know whether the order Your Honor contemplates would somehow deprive the Court of jurisdiction, but I want to have a very quick ability to come in and, you know, stop that vote if they don't comply with the statute.

THE COURT: The beauty of 54(b) is you just go up on the thing that is the partial final judgment as to that issue. So this court would still have jurisdiction over the things that weren't severed and sent up.

And, as I say, I don't want to do any speculating today about what happens on January 5th because, you know, you got smart people over there. They're smart people with views about the world that differ from yours, but at least in the first instance,

they should get the ability to figure out what to do.

MR. LEBOVITCH: Absolutely.

THE COURT: And you-all can figure out what to do in response.

So here's what I will do, though. My availability will get limited after the 26th. So after the 26th, the time difference to reach me will be about 12 hours. I'll be reachable. I'll be in a fine city for most of that time. So I'm sure we can figure out something. And, you know, it may be something where you guys can just submit papers or whatever, but it will become difficult to reach me after the 26th.

So what I would propose is this: It is right now 4 o'clock on the 21st. I think that scrivening this order should be a pretty easy task. Like, I'm envisioning essentially four numbered paragraphs. Maybe one paragraph for Article V, Section 3, one paragraph for Article III, Section 2; and then if you want to throw in these paragraphs for 54(b) certification, that probably gets you up to four or five paragraphs.

The legal talent that we have here ought to be able to get me that by noon on Wednesday,

particularly if you get Ms. Azar and Mr. Foulds involved for your side and if Mr. Bissell puts Ms. McCormick on it.

So, I mean, if you and Mr. Bissell are involved, then you guys will get arguing.

MR. LEBOVITCH: Go forever.

THE COURT: You'll want to revisit and reprise portions of your argument.

MR. LEBOVITCH: Yes.

THE COURT: So that's why I'm suggesting that that --

MR. LEBOVITCH: We'll delegate it, Your Honor.

THE COURT: That way I can put this at least in place. And if we need to talk on the afternoon of Wednesday, we can do so. But as to this issue, I can then leave you-all either in a position where you've got what you need or you've got what you need for going down and getting a final decision from the people who matter. And then as to January, we'll just have to see what happens.

MR. LEBOVITCH: Thank you, Your Honor.

THE COURT: All right. Anything else?

MR. LEBOVITCH: That's it.

THE COURT: Anything else from your side, Mr. Bissell?

MR. BISSELL: No, Your Honor.

THE COURT: All right. Thank you, everyone, for your time today. I appreciate it.

We stand in recess.

(Court adjourned at 3:50 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Chief Realtime Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 75 contain a true and correct transcription of the proceedings 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 for the rulings at pages 59 through 75, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 23rd day of December 2015.

/s/ Neith D. Ecker

Chief Realtime Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public