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IN THE SUPREME COURT OF THE STATE OF DELAWARE

Michael Simons, *on behalf of himself and all other similarly situated former holders of Series A Convertible Participating Preferred Stock and AMC Preferred Equity Units of AMC Entertainment Holdings, Inc.*, Plaintiff Below, Appellant, *v.* AMC Entertainment Holdings, Inc., Defendant Below, Appellee.	No. 457, 2024 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2023-0835-MTZ

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This case arises from AMC's breach of important anti-dilution provisions intended to protect preferred stockholders who collectively invested hundreds of millions of dollars to help AMC raise capital and eliminate burdensome corporate debt. Plaintiff represents a putative class of these preferred stockholders whose interests were harmed by AMC's settlement of another class action, *In re AMC Entertainment Holdings, Inc. Stockholder Litigation*, Del. Ch. No. 2023-0215. In that case, AMC resolved claims by common stockholders seeking to block a reverse stock split and conversion of the preferred shares by distributing additional stock to the common stockholders (the "Distribution"). *Id.* However, AMC effectuated the Distribution in a way that violated Plaintiff's and the class of preferred stockholders' anti-dilution protections in the preferred stock's Certificate of Designations ("Certificate").

While the Court of Chancery (and this Court) approved the settlement and the Distribution, it only did so after the parties specifically amended the settlement to remove a term that would have released the preferred stockholders' claims that their own shares were being diluted. A030. The Court of Chancery recognized then that "[a]warding more shares to common stockholders necessarily comes at the expense of preferred units [due to dilution]; the settlement consideration harms preferred

unitholders.*" In re AMC Ent. Holdings, Inc. S'holder Litig.*, 299 A.3d 501, 508 (Del. Ch. 2023) ("*AMC I*"); *see also* A029–A030.[1]

This case represents preferred shareholders' effort to remedy the dilutive "harm" that the Chancery Court described. *AMC I* at 508. In approving the settlement with common stockholders, the Chancery Court understood that AMC would distribute shares "after the Reverse Split, ***but before the Conversion***." *Id.* at 534 (initial opinion rejecting settlement based on release of dilutive "harm" to preferred shareholders); *see also In re AMC Ent. Holdings, Inc. S'holder Litig.*, Del. Ch., 2023-0215, Zurn, V.C., 2023 WL 5165606 at *1 (Aug. 11, 2023) (settlement approval opinion that adopts settlement rejection opinion for "necessary background regarding the underlying transactions"). If AMC had acted consistently with the Chancery Court's understanding, the preferred shareholders' anti-dilution protections would have kicked in and altered the conversion rate applicable to their Preferred Units. A031.

After obtaining court approval, however, AMC deliberately timed the Distribution so it could exclude preferred shareholders and dilute their ownership stake in the company. A031–A032. Specifically, while AMC used a pre-conversion

[1] Unless otherwise noted, any quoted emphasis has been added and internal citations have been omitted.

"Record Date" to tabulate who was entitled to the Distribution, it did not *deliver* the Distribution until *after* conversion. A031–A034.

Plaintiff promptly brought this action and argued the Distribution's timing violated anti-dilution protections, which were supposed to prevent AMC from distributing additional shares only to common stockholders. A013–A083. Plaintiff argued that two provisions of the Certificate were violated: Section VI, which provided that any additional shares of common stock that were "issued (***or deemed to be issued***) . . . prior to the Conversion Date" would cause an adjustment to the formula for calculating conversion of preferred holdings; and Section III(a), which promised preferred shareholders "distributions" at the same time and terms as common stockholders. A024–A025. Plaintiff also argued that the covenant of good faith and fair dealing filled any gaps in these provisions to carry out their anti-dilutive purpose. A040–A041.

The Chancery Court granted AMC's motion to dismiss in an oral ruling on October 2, 2024. A215. The Court held: "deemed to be issued" in Section VI cannot apply because "the [D]istribution was simply issued, not deemed to be issued, and the issuance was after the conversion date." A209; *see* Oct. 2, 2024 Rulings of the Court on Defendant's Motion to Dismiss 7 ("Rulings")[2]. The Court also held that

[2] Attached hereto.

Section III(a) did not apply to post-conversion distributions and that the implied covenant does not fill any gaps. A212.

Plaintiff filed the Notice of Appeal on October 30, 2024. A217.

SUMMARY OF ARGUMENT

1. AMC violated its preferred shareholders' rights by diluting their ownership interest in the company. AMC raised millions of dollars from preferred shareholders based on repeated, express promises that they would be treated equally to common shareholders. Specifically, the Certificate of Designations ("Certificate") had language that was clearly and effectively designed to protect preferred shareholders from dilution. AMC broke that promise. It believed it found a loophole to issue a Special Distribution ("Distribution") to common shareholders while excluding preferred shareholders.

AMC's scheme was stark. First, it set a particular Record Date for the Distribution. On the Record Date, the common shareholders who would receive the Distribution were identified. This was the date on which, from a legal standpoint, all rights and responsibilities of the Distribution attached. Second, AMC set the Conversion Date—when preferred holdings would be converted into common—on the day after the Record Date. Third, the ministerial delivery of the Distribution to those who were common shareholders on the Record Date was set for the business day after conversion. AMC orchestrated this scheme based on what it believed was a technical mechanism to circumvent the anti-dilution provision it had guaranteed to its preferred investors.

There is one major problem for AMC: the purported loophole does not work. AMC proceeded *as if* it did—issuing the Distribution to the common shareholders but not the former preferred shareholders. In this litigation, AMC advanced a strained interpretation of the language of the Certificate that would have allowed it to subvert the anti-dilution provision. The Court of Chancery adopted a similar interpretation. But a careful reading of the Certificate unwinds AMC's interpretation.

There are four accepted methods for interpreting the Certificate's language. The language can be understood definitionally, contextually, grammatically, and as creating a legal fiction. Each approach yields the same conclusion—AMC's scheme violated the preferred shareholders' rights.

2. Plaintiffs' case is buoyed by four layers of preferential legal treatment—each of which AMC must overcome. First, any one of the four methods of interpretation is independently sufficient to overcome a motion to dismiss. Even if AMC were to discredit three of the four methodologies, Plaintiff would still prevail because one plausible reading supports its position that its rights were violated. Second, Plaintiff must merely introduce a reading that is reasonable, not unambiguously correct. So, each of Plaintiff's four interpretative methods is subject to a low bar to overcome the motion to dismiss. Third, even if there is ambiguity in the text, then not only is reversal required, but Plaintiff is entitled to present evidence

that resolves that ambiguity. Fourth, if there are multiple reasonable interpretations of the Certificate, the ambiguous language is interpreted against AMC as the drafter. This is not merely a presumption that gets Plaintiffs across the motion to dismiss line—this is how the language will ultimately be resolved on the merits. This decision rule is crucial for the functioning of the securities market. The market depends on investors risking their capital based on promises made by companies. It is incumbent upon the companies to ensure that those promises are clear and courts must step in to ensure that expectations based on reasonable interpretations are not dashed.

3. AMC was further compelled not to dilute preferred shareholders' interests by the covenant of good faith and fair dealing. If AMC's purported loophole exists, the covenant closes that gap. AMC promised that preferred and common shareholders would be treated equally, but then attempted an end-run around its own Certificate. AMC's scheme violated the Certificate's text (whether clear or ambiguous) multiple times over and equitable principles further demand that it be held accountable.

4. The Chancery Court further erred by failing to apply another provision of the Certificate that protected preferred shareholders. That provision guaranteed, either clearly or at least ambiguously, that the preferred shareholders should have been given the Distribution.

STATEMENT OF FACTS

AMC's improper dilution of preferred shareholders was the culmination of a years-long effort to squeeze every penny out of retail interest in AMC's stock. During the COVID-19 pandemic, AMC's movie theater business struggled as moviegoers stopped viewing movies at brick-and-mortar theaters. A019. After AMC's stock was heavily short sold, it garnered massive interest during the so-called "meme stock" craze of 2020 and 2021, wherein retail investors sought to rally behind AMC and induce a short squeeze that would cause the stock price to skyrocket. *Id.* AMC's stock increased by over 3,000% rapidly. So many retail investors came onboard that, collectively, they became AMC's majority stakeholders. *Id.* AMC's management directly engaged with its retail investor base. Retail investors received special offers and loyalty privileges at AMC locations. They were regularly praised on social media by AMC's executives.

AMC's stock price increased enough that it could raise significant capital by selling more stock. *Id*. This cash infusion would ameliorate AMC's troubled balance sheet. AMC issued as much stock as its charter allowed—in June 2020 it had approximately 104 million shares of common stock outstanding; by the end of 2021, over 500 million shares were outstanding. A019–020. AMC created a two-fold dilemma. First, its retail investors grew disillusioned with AMC diluting their holdings. Second, AMC ran out of authorized shares under its charter and could not

authorize more without a shareholder vote. Such a vote would prove difficult both because of shareholders' dilution concerns and because retail shareholders rarely vote their shares. *AMC I* at 509–10.

Preferred stock was AMC's creative solution to this problem. AMC's Certificate of Incorporation had long authorized 50 million shares of preferred stock that had never been issued. *Id*. at 511. AMC issued preferred shares that were convertible upon certain corporate events and had "mirror voting." A028. With mirror voting, preferred shares that were not voted would be automatically voted proportionately with votes cast by preferred shareholders who voted. *Id.* This was designed to facilitate passage of future issuances. If additional common shares were issued, preferred shareholders were protected by the strong anti-dilution provision.

On August 4, 2022, AMC announced it would issue 10 million new shares of "Series A Convertible Participating Preferred Stock." A020. The preferred stock carried super voting rights (100 votes per share compared to one for common stock). *Id*. AMC then created AMC Preferred Equity Units ("Preferred Units" or "APEs")—depositary share receipts representing one one-hundredth of a share of preferred stock. *Id.* Each Preferred Unit was designed to be equivalent to one share of common stock, both in economic and voting rights. A021–A022. AMC made repeated statements to this effect. A023. Each Preferred Unit was convertible into one share of common stock and would automatically covert when AMC received approval to

sufficiently increase outstanding common shares (because converting Preferred Units would increase the number of common shares). A021.

Preferred stock allowed AMC to access additional capital without violating its Certificate of Incorporation. AMC did not actually issue any shares of preferred stock and only issued Preferred Units. *Id.* The underlying shares of preferred stock were deposited with ComputerShare Inc., which listed the Preferred Units on the New York Stock Exchange. *Id.* AMC distributed preferred stock to common stockholders, who received one Preferred Unit for each common share they owned, in an effort to rally the investor base. A025. AMC raised an additional $272 million by selling preferred stock, with over $100 million in preferred stock being purchased by Antara Capital, an AMC creditor. AMC also reached an agreement with Antara to wipe away another $100 million in outstanding debt in exchange for more preferred stock. All told, AMC issued over 995 million Preferred Units. A026; A034.

As is typical for preferred stock, preferred shareholders enjoyed important anti-dilution protections. The preferred stock underlying the Preferred Units was established by a Certificate of Designations of Series A Convertible Participating Preferred Stock (the "Certificate"). A023. As noted above, Preferred Units were designed to convert automatically into AMC shares, one-for-one, immediately after stockholders approved issuance of enough shares. Preferred shareholders were

protected from new common shares being issued pre-conversion (which would otherwise dilute preferred shareholders' ownership). Or so AMC promised.

The Certificate's anti-dilution clause provided that the number of shares of common stock to be received by preferred shareholders upon conversion must be adjusted for any dilution of AMC's outstanding common stock that occurs "in the event the Corporation shall at any time prior to the Conversion Date issue Additional Shares of Common Stock." A024. The Certificate then defined "Additional Shares of Common Stock" in Section VI as "all shares of Common Stock issued (or deemed to be issued) by the Corporation . . . prior to the Conversion Date." *Id.* The phrase "deemed to be issued" and its placement before the phrase "prior to the Conversion Date" was important. It signified that actual issuance or distribution of the dilutive shares of common stock might take place *after* the Conversion Date, but in some circumstances the distribution could be "deemed to be issued" *prior* to conversion. Separately, Section III of the Certificate also provided that any "distributions" made to holders of common stock must also be made to holders of preferred stock at the same time and on the same terms. A047; A025.

After issuing nearly 1 billion Preferred Units, AMC proceeded toward converting Preferred Units into common shares. A026. AMC scheduled a special meeting of investors to be held on March 14, 2023, for shareholders to vote on proposals to (i) increase the number of outstanding shares of common stock

sufficient to convert all Preferred Units; and (ii) effectuate a 1-for-10 reverse stock split. A026–A028. The mirror voting mechanism meant that both proposals were very likely to be approved.

Certain common stockholders contended that the voting process was unfair and filed a class action lawsuit against AMC and its board in February 2023. A026–A027. The plaintiffs claimed that the issuance of Preferred Units improperly diluted common stockholders' voting rights and economic value. The Chancery Court permitted the vote to go forward in order to tabulate votes on the proposals but prohibited AMC from actually amending its Certificate of Incorporation to effectuate the conversion of Preferred Units. In March 2023, the vote passed. A027.

On April 3, 2023, AMC and the plaintiffs announced that they reached a settlement whereby the proposals would go forward, but common stockholders would receive a "Special Distribution" of one share of additional common stock for every 7.5 shares held. Preferred shareholders would not receive the Distribution. A028–A029. Despite preferred shareholders' interests being diluted by the Distribution and getting nothing in return, the settlement purported to release any future claims made by preferred shareholders in addition to those of common stockholders. *Id.* The parties presented the settlement to the Chancery Court for approval. On July 21, 2023, the court wisely rejected the settlement. A030. The court recognized that common stockholders were purporting to release not just common

shareholder claims but also preferred shareholders claims. *See AMC I* at 507–08, 523–36. The Chancery Court acknowledged the settlement would harm preferred shareholders, diluting their interest by giving common stockholders additional common stock:

- "The Proposed Settlement has the practical effect of reallocating the ownership of AMC's equity between its common stockholders and the APE [Preferred] unitholders. *If the settlement is approved, the existing common stockholders would own a slightly bigger slice of the AMC pie at the expense of the APE* [Preferred] *unitholders*. . . . Without the Proposed Settlement, the existing common stockholders would own 34.28% of AMC's equity after the Conversion and the former APEs unitholders would own 65.72%. With the Proposed Settlement, the existing common stockholders would own 37.15% of AMC's equity after the Conversion and the former APEs unitholders would own 62.85%." *AMC I* at 519.

- *"[T]he Proposed Settlement compensates common stockholders to the exclusion—and dilution—of APE [Preferred] unitholders*. The settlement consideration *offers common stockholders more AMC equity, which necessarily comes at the expense of the APE position*. . . . [W]hen the APEs convert to shares of common stock, *former APE unitholders will represent a smaller percentage of the total common than they would have if not for the Proposed Settlement consideration received by the class*." *AMC I* at 533–34.

- "Awarding more shares to common stockholders necessarily comes at the expense of preferred units; *the settlement consideration harms preferred unitholders*." *AMC I* at 508.

Indeed, the court predicted the very claims preferred shareholders ultimately asserted in the instant litigation:

> I will not speculate or hazard to guess what APE [Preferred] claims a class member who also owns APE, in their capacity as an APE unitholder, might bring, or what risk such claims might present to the

> Company. The parties bear the burden of demonstrating that the Proposed Settlement is fair, reasonable, and in accordance with due process. It is up to the parties to decide if the risk of unreleased APE claims is worth rejection of a settlement that might pave the way for the Conversion, which the parties have intimated is necessary to save the Company from financial ruin.

AMC I at 536. Notably, the court understood that even if the settlement were eventually approved, AMC "would pay that consideration after the Reverse Split, ***but before the Conversion***." *Id.* at 534.

AMC chose to narrow the release and remove any release of preferred shareholder claims. Preferred shareholders attempted to intervene to stop the dilution of their ownership. A197. The court denied the intervention and approved the revised settlement. *Id.*

On August 24, 2023, AMC conducted the 1-for-10 reverse split. A030. This freed up enough common share space for conversion of Preferred Units to be possible. AMC then chose that same date, August 24, 2023 (at the end of the day), as the "Record Date" for the Special Distribution to common stockholders of one common share for every 7.5 shares held. A030–A031. Preferred shareholders did *not* receive the Special Distribution, because conversion had not yet occurred on the Record Date and so preferred shareholders only held Preferred Units, not common shares from which to calculate the one-for-7.5 distribution. *Id.*

One day later, on August 25, 2023 (the "Conversion Date"), AMC completed the conversion of Preferred Units into common stock. *Id.* To account for the 1-for-

10 reverse split, a holder of 100 Preferred Units traded them in for 10 shares of the post-reverse-split common (equivalent to 100 shares of common pre-reverse-split).

On August 28, 2023, one business day after the Conversion Date, AMC delivered the Special Distribution of one share of common stock for every 7.5 shares of common stock held on the Record Date. A031. By this date, preferred shareholders had become common shareholders. But, because they did not hold common shares on the Record Date, they did not receive the Special Distribution when it was ultimately issued. A031–A032. The timing of these events was deliberate—and inconsistent with Chancery Court's understanding that AMC would "pay that consideration after the Reverse Split, ***but before the Conversion***." *AMC I* at 534.

AMC timed the Distribution to exclude preferred shareholders and dilute their ownership stake in the company. AMC chose to compensate the common shareholders by knowingly harming the preferred shareholders (as the Chancery Court noted). Rather than adjusting the compensation to the preferred shareholders as it was required to do, AMC sought to subvert its Certificate's anti-dilution provision. AMC's purposeful timing intended to placate its base of largely retail investors holding common stock at the expense of preferred shareholders. This violated the important anti-dilution protections that preferred shareholders were promised.

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO ADOPT THE BEST READING OF THE CERTIFICATE OF DESIGNATIONS

1. Question Presented

Whether the Court of Chancery erred in failing to apply the best reading of the Certificate—including the phrase "deemed to be issued"—which protected preferred shareholders from dilution. A111–20; A178; A181–82; A191.

2. Scope of Review

This case poses the question of what a term in the Certificate of Designations in a securities issuance means. Contract interpretation is a question of law that this Court reviews de novo. *BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 414 (Del. 2012).

3. Merits of the Argument

a. The Dictionary Definition of "Deemed to Be Issued" Makes Clear that the Distribution was Deemed to Be Issued on or Before the Record Date.

"[D]ictionaries are the customary reference source that a reasonable person in the position of a party to a contract would use to ascertain the ordinary meaning of words not defined in the contract." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006).

Here, "deemed to be issued" in the anti-dilution provision of the Certificate is the critical phrase for definitional analysis. A049. The anti-dilution provision

provides that preferred shareholders will be compensated for "Additional Shares of Common Stock." *Id*. "'Additional Shares of Common Stock' shall mean all shares of Common Stock issued (or *deemed to be issued*) by the Corporation after the Closing Date and prior to the Conversion Date[.]" *Id*. The question in this case is whether the Distribution was deemed to be issued before the conversion of preferred shareholders into common shareholders. *Id*. If it was, then AMC was violating the Certificate when it excluded preferred shareholders from the Distribution. Definitional analysis clarifies that the Distribution was *deemed to be issued* on or before the Record Date, which pre-dated conversion.

The word "deem" is not defined in the contract, but there are countless dictionaries and courts that suggest the meaning is "to decide." The word "deem" comes from the Middle English word "demen," and the Old English word dēman. Merriam-Webster.com.[3] These words mean "to decide" or to "render a decision." Middle English Compendium.[4] The supreme courts of multiple states and numerous federal courts find that "deem" means "decide." "Bouvier['s Law Dictionary] defines 'deem' to mean 'To decide; to judge' and that certainly is its original meaning." *De Stefanis v. Zoning Bd. of Rev. of Town of N. Providence*, 84 R.I. 343, 346 (R.I. 1956); *Smith v. Missouri Pac. Ry. Co*., 143 Mo. 33 (Mo. 1898) ("The

[3] https://www.merriam-webster.com/dictionary/deem (last visited Dec. 19, 2024).
[4] https://quod.lib.umich.edu/m/middle-english-dictionary/dictionary/MED11023 (last visited Dec. 12, 2024).

ordinary meaning of the word 'deem,' according to the Century Dictionary, is: 'To think, judge, or hold as an opinion; decide or believe on consideration.'").

Having used the phrase hundreds of times in dozens of opinions over the last two centuries, this Court is aware that "to be issued" refers to a forthcoming conveyance. *See, e.g.*, *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1227 (Del. 2012). In this case, the forthcoming conveyance was the Distribution.

Understanding "deem" to function similarly to "decide" forces the Court to consider *when AMC's Board made its decision* about when and how to issue the Distribution.

The record makes clear that (a) there was a status quo order in place until August 11, 2023, (b) the Distribution plan's execution began on the Record Date, August 24, 2023. Therefore, the Board made its decision about the Distribution—meaning the Board did the deeming necessary to execute the plan—on or before the Record Date.

The dictionary definition is helpful in two ways. First, it focuses the analysis on determining when AMC made its crucial decision to proceed with the Distribution plan. Second, it resolves the Court of Chancery's misunderstanding of *whether* the Distribution was deemed to be issued at all. The court held that the Distribution was not deemed to be issued. A209; Rulings at 7 ("the distribution was simply issued, not deemed to be issued, and the issuance was after the conversion

date."). This is wrong because the Board *did* make a decision to issue the Distribution. That decision constituted the deeming at the heart of this inquiry. On or before the Record Date, AMC decided, or deemed, that there would be a Distribution and how it would take place.

b. The Word "Deem" Means "Decide" Elsewhere in the Certificate as Well.

Courts look to the way a word is used elsewhere in a text to assess its meaning. "The normal rule of statutory construction [is] that identical words used in different parts of the same Act are intended to have the same meaning." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 562 (1995).

The word "deemed" is used a number of other times in AMC's Certificate. It is regularly used to mean "decided" or "declared." For example, the Certificate discusses whether "any such action is deemed necessary or advisable by the Depositary[.]" A062. In this instance, as in "deemed to be issued," "deemed" is being used to mean "decided." The Certificate is discussing whether the Depository has decided that something is necessary or advisable. The Certificate also states: "The Corporation hereby agrees to take all reasonable action which may be deemed necessary by the Depositary[.]" A069. This, again suggests that deem is understood as a decision that can be made by a particular person or body. The Certificate also discusses "documents of title and other instruments as the Depositary may deem appropriate." A061. Again, a decisionmaker is deciding (or deeming) whether

something is appropriate. These instances reinforce the notion that the Distribution was "deemed to be issued" when the decisionmaker—AMC—made the decision that an issuance would occur. AMC made this decision, thereby deeming the stock to be issued, on or before the Record Date.

c. Grammatical Structure Compels a Finding that the Distribution was "Deemed to be Issued" on or Before the Record Date.

In interpreting contract or Certificate language, "[c]lear and unambiguous language . . . should be given its ordinary and usual meaning." *Lorillard Tobacco Co.*, 903 A.2d at 739. Courts look to the grammatical construction of a contractual provision to discern its ordinary and usual meaning. *See, e.g. Paul v. Deloitte & Touch, LLP*, 974 A.2d 140, 146 (Del. 2010) (resolving grammatical dispute to determine the clear and unambiguous meaning of a contractual provision); *see also Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, Del. Ch., No. Civ.A. 1465-VCS, Strine, V.C., 2007 WL 1207107 at *17 n.97 (Apr. 2, 2007, revised Apr. 13, 2007) ("[P]unctuation and grammatical construction are reliable signposts in the search for contractual intent."); *ITG Brands, LLC v. Reynolds Am., Inc.*, Del. Ch., No. 2017-0129, Bouchard, C., 2017 WL 5903355 at *6 n.34 (Nov. 30, 2017) ("Courts often pay attention to grammar and punctuation in determining the proper interpretation of a contract.") (quoting 11 Williston on Contracts § 32:9 (4th ed.)).

Grammatical analysis of a phrase begins by identifying and interrogating each component along with how they relate to each other. The phrase "deemed to be

issued" includes three different verbs. The three verbs are "deemed," "to be," and "issued." To determine *when* something occurred, it is important to determine which verb is "active" and which verbs are the "object" of the sentence. This is simple in a phrase with one verb. In assessing *when* "the stock crashed," the answer is straightforward because there is only one verb ("crashed"). The stock crashed on the day its value plummeted.

After a second verb is introduced, the analysis gets more complicated. Consider the phrase "Barack Obama won the 2008 election and became President." The two verbs ("won" and "became") occurred on different dates. Obama *won* the election in November 2008, but he did not *become* president until he was inaugurated in January 2009. A comprehensive answer to the question "when did Barack Obama win the 2008 election and become president" is "he won the election in November and became president in January." The inclusion of "and" makes clear that the two verbs are separate, neither is the object of the other, and they could have happened at different times.

When verbs are grouped together, however, the focus is on the first verb. Consider the phrase "Obama decided to run for President." There are two verbs "decided" and "to run" but the second verb is the object of the first verb. The core of the sentence is that Obama *decided* something. "To run" is merely what he decided. The answer to "when did Obama decide to run for President" is 2006,

according to reporting about when he made his decision.[5] This is true even though he didn't run for President until 2007–2008. The first verb—the active verb—not the second verb—the object—is the key verb for assessing the appropriate date.

Here, the verb "deemed" is the active verb, while "to be" and "issued" are the objects. The core of the phrase is that something was *deemed*. "To be issued" is merely what was deemed. So, assessing when something was "deemed to be issued" requires a focus on when the deeming took place. As discussed throughout, the deeming took place on or before the Record Date.

The first verb—"deemed"—in "deemed to be issued" is the past tense form of the verb "deem." To understand its role in the phrase and the broader context, it is necessary to ask "what" is being deemed, "who" is doing the deeming, and "when" are they doing it.

The first question is *what* was deemed. The board deemed there to be a Distribution that would issue stocks to common shareholders. The Distribution is what was deemed to be issued. In grammatical terms, the Distribution is the functional object of the word "deemed."

The next question is the "subject" of the verb—in other words, *who* did the deeming. The text of the Certificate and the broader context reveal that AMC—its

[5] https://www.npr.org/2007/11/19/16364560/rare-national-buzz-tipped-obamas-decision-to-run (last visited Dec. 19, 2024).

board and/or corporate agents—took the action. The trial court understood the importance of determining "who or what would have deemed it issued" but failed to refer to the text of the Certificate or Plaintiffs' briefing on the question. Rulings at 6. As Plaintiffs quoted repeatedly in the briefing below, the Certificate refers to "shares of Common Stock issued (or deemed to be issued) *by the Corporation*[.]" A101. The text makes clear that the relevant agent who did the deeming was the corporation—AMC.

This is reinforced by an analysis of AMC's corporate documents. AMC's Certificate makes clear that its board of directors or officers were (subject to constraints in the governing documents) able to decide if and how stocks would be issued. A044–50. So, the corporation is the agent (subject) that did the deeming (verb). In other words, AMC's board or key decisionmakers declared their approval of the Distribution.

Analyzing the tenses of the word "deem" is instructive. Assume, for simplicity's sake, that AMC's board gathered in person to decide to issue the Distribution. The day before the meeting where the Distribution was approved, a board member would have said "tomorrow we *will deem* a Distribution to be issued." At the start of the meeting, the board member could say "we are *about to deem* a Distribution to be issued." During the vote, a board member would say "we are *deeming* the Distribution to be issued." And, after the vote, it would be accurate to

say that the board "*deemed*" the Special Distribution to be issued. A third-party could say "earlier today, a Distribution was *deemed to be issued* by the board."

Properly specified, the factual question of when AMC took the act of deeming in this context is straightforward. The question is, when did the board or the key decisionmakers make the last decision necessary to proceed with the Distribution as it was ultimately effectuated? At the moment when AMC made the last decision necessary for its agents to proceed with executing the Special Distribution, it completed the act of deeming.

In this case, AMC deemed there to be a Distribution on or before the Record Date. The court lifted the status quo order on August 11, 2023. After this, AMC needed to decide what dates each component of its scheme would take place on. This must have occurred on or before August 24, when the Record Date was officially declared and the scheme was fully in motion. A030. For the purposes of this appeal, the critical point is that the Distribution was deemed to be issued prior to the conversion.

Because AMC took the act of deeming on or before August 24, the preferred shareholders were entitled to either receive the Special Distribution or have the conversion rate be adjusted accordingly. In other words, AMC's gambit to violate its own anti-dilution provision (by sandwiching the Conversion Date between the record and distribution dates) was precluded by the text of the Certificate.

d. The Distribution Took Place on or before the Record Date Given that "Deemed" Can Create a "Legal Fiction."

In legal terminology, the word "deemed" or "deemed to be" can be understood as creating a legal fiction. *Shi Liang Lin v. U.S. Dep't of Just.*, 494 F.3d 296, 307 n.9 (2d Cir. 2007). The word "deem" can create a legal fiction when there is value in pinning down a specific date for operation of law. *See, e.g., E. Tennessee Grading, Inc. v. Bank of Am., N.A.*, 338 S.W.3d 506, 514 (Tenn. Ct. App. 2010) ("us[ing] the word 'deem' [] to create the legal fiction that an improvement is to be considered abandoned as of the last day of work if the work was not resumed for [60 days]."). This is similarly to how "constructive notice" can exist even when there is no actual notice or a "quasi contract" can exist when there is no actual contract. A board can "deem" that a stock is issued on a Monday even if a document asserts that it is not actually delivered until Wednesday. For example, AMC's Certificate states that delivery of a notice sent by mail "shall be deemed to be effected at the time when a duly addressed letter" is deposited in the "post office box." A081.

Using the legal fiction framework, the Distribution was "deemed to be issued" on or before the Record Date. This makes the most sense given the possible dates and is consistent with AMC's and investors' interests when the Certificate was issued.

First, the most appropriate dates for the Distribution to have been "deemed to be issued" all predated conversion. The key dates for a stock issuance are when: the

company obtains approval for issuance (decision date), the company announces the forthcoming delivery (the declaration date), the Record Date, or the delivery date. As discussed above, the stock can be considered deemed to be issued when the company obtained final approval for issuance (the decision date). An argument could also be made that a stock dividend is deemed to be issued on the declaration date because that date creates a valuable expectation of a future issuance. On the declaration date, the future distribution becomes more than speculative—it alters the legal relationships between the company and its stockholders based on the company's binding commitment.

The Record Date is the latest date on which a stock is deemed to be issued. This date represents the critical moment when ownership rights crystallize and the specific stockholders entitled to receive the distribution become fixed. This date has unique legal significance—it definitively establishes who has the right to receive the shares, transforming a general corporate obligation into specific rights accrued by identifiable stockholders. A Record Date is, by definition, "the date on which a corporation determines the identity of its shareholders and their holdings (as for determining who is entitled to notice of a shareholder meeting or who is entitled to vote at such a meeting or to receive dividends)." Merriam-Webster.com.[6] The

[6] https://www.merriam-webster.com/legal/record%20date (last visited Dec. 19, 2024).

Record Date marks the precise point when beneficial ownership interests attach to particular stockholders.

The date of actual delivery or issuance is not a strong candidate for when a stock is deemed to be issued. First, in the context of this case, it does not make sense given the phrase as a whole. In particular, the word "or" is disjunctive in the phrase "issued (or deemed to be issued)," signaling that there is a different meaning assigned to "deemed to be issued." Second, no legal fiction is necessary to characterize something as deemed to be issued on the day it is actually issued.

Here, the first three options—the decision, declaration, and record dates—all occurred before conversion and would render AMC liable. Collectively, these are the best candidates for a legal fiction in this context. Because the stock was "deemed to be issued" on one of those dates (regardless of which one), preferred shareholders were entitled to the Distribution.

Second, AMC benefitted ex ante from using the phrase "deemed to be issued" in the Certificate to create a legal fiction associated with the Record Date. In deeming a stock to be issued on a Record Date, AMC benefits from the certainty of a defined date on which all rights and obligations flow to the shareholders that were accounted for on that day. Even if a technical error prevented AMC from effectuating the transfer of stock promptly, there would be a date certain when the stock was deemed to be issued. AMC can decide the date in advance and not expend unnecessary

resources preventing possible delays. Accounting may be more straightforward if delays drag actual delivery to shareholders across different days.

Third, shareholders also benefit ex ante from this approach. Having stock deemed to be issued on the date of approval or the Record Date would avoid the possibility of a firm seeking to take advantage of a gap between a decision date, a Record Date, and a delivery date to break anti-dilution promises. This case is perfectly illustrative.

e. The Chancery Court Adopted an Implausible Interpretation of "Deemed to Be Issued."

The Chancery Court held that "'Deemed to be issued' cannot be referring to stock that is actually issued; it must be referring to stock that someone, some authority or instrument, has considered or judged to be issued even though it was not." Rulings at 5. In other words, stock can only be "deemed to be issued" if it was never issued at all. This reading has four major problems.

First, it fails to account for the possibility that stock can be *both* issued and deemed to be issued. The Chancery Court identifies dictionary definitions defining "deem" as to consider, judge, or regard and then concludes that "'deemed to be issued' cannot be referring to stock that is actually issued." *Id.* But the conclusion does not logically follow from the premise. A stock can be actually issued on a particular date *and* be deemed to be issued on another date. The analysis above

shows how—there is good reason to consider a stock to be issued on the delivery date and deemed to be issued on the Record Date.

Second, the dictionary definitions used by the trial court do not support its reading. The definitions cited by the Chancery Court are consistent with the notion that the phrase "deemed to be" creates a legal fiction. The legal fiction framework does not compel a holding that a stock can only be deemed to be issued if it is not actually issued. Instead, the most compelling reasoning suggests that a stock is "deemed to be issued" (by way of a legal fiction) on the Record Date. *See supra* (I)(d). Per the Chancery Court's Dictionary.com definition, the Distribution is deemed to have been issued on the Record Date because that is when "it is considered to" have been issued for the purpose of determining which shareholders were entitled to receive it. Per the Chancery Court's Collins definition, the "particular quality" at issued is *the date* on which it was deemed to be issued, not *whether* the stock was issued at all.

Third, the trial court's reading is inconsistent with the text and structure of the Certificate. The Certificate would not deal with stocks that are never issued in the anti-dilution provision because it deals with those scenarios in the next section. Section VI(d) of the Certificate expressly provides that if any "distribution" of common stock is "declared or announced, but not so paid or made," then the

conversion rate is readjusted back to restore the *status quo ante* had the distribution "not been declared or announced." A050.

Fourth, there is no scenario in which the Chancery Court's reading should affect the conversion rate. The court does not identify a scenario where preferred stockholders must ever be protected against dilution because of a stock that is never issued.

II. PLAINTIFF'S PROPOSED DEFINITION OF "DEEMED TO BE ISSUED" PREVAILS EVEN IF THE TERM IS AMBIGUOUS.

1. Question Presented

Whether the Court of Chancery erred when it concluded that Plaintiff's proposed interpretation—that the Special Distribution was "deemed to be issued" on the Record Date—was not a reasonable interpretation. A111–A120.

2. Scope of Review

Matters of contract interpretation, including resolving ambiguity, are questions of law to be reviewed *de novo*. *BLGH Holdings LLC*, 41 A.3d at 414.

3. Merits of the Argument

a. Even If the Chancery Court Viewed AMC's Position as the Best Reading of the Certificate, It Still Erred in Granting the Motion to Dismiss.

"Ambiguity exists 'when the provisions in controversy are reasonably or fairly susceptible of different interpretations.'" *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003) (quoting *Vanderbilt Income and Growth Assocs. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996)). In other words, as long as a provision has at least two reasonable interpretations, the provision is ambiguous. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).

As established above, the Distribution was clearly "deemed to be issued . . . prior to the Conversion Date[.]" A049. The Court of Chancery erred in holding that

this was inconceivable. Even if this Court were to deem AMC's proposed definition reasonable, however, it is not the only reasonable definition.

Plaintiff's proposed definition easily meets a reasonableness standard, even if the Court were to conclude that AMC's definition is also reasonable. That Plaintiff's reading of a contractual provision is "reasonable" simply means that "a reasonable person could conclude" that Plaintiff's reading is correct. *VLIW Tech.*, 840 A.2d at 615; *see also Osborn*, 991 A.2d at 1160 ("An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract."). To find Plaintiff's proposed definition unreasonable, the Court would need to conclude that it would produce an absurd result if stock "deemed to be issued . . . prior to the Conversion Date" referred to stock claimed to be delivered after conversion that was constructively issued before conversion because of the Record Date. This is not absurd or unreasonable.

The Court of Chancery did not analyze whether Plaintiff's proposed definition is reasonable. It did not consider any potentially absurd results if Plaintiff is correct, nor did it find that no reasonable person would have entered into the agreement were Plaintiff correct. Instead, the Chancery Court held in a conclusory fashion that "'deemed to be issued' . . . is not [ambiguous]— it has a plain meaning." But it never found, as it needed to, that "*a* plain meaning" it found reasonable precluded all *other* possible reasonable meanings. Rulings at 6. Courts regularly find that "the plain

meaning of the statute is open to two reasonable, yet opposing, interpretations." *Expedia, Inc. v. D.C.,* 120 A.3d 623, 632 (D.C. 2015). In other words, "more than one plain meaning could be appropriate." *Deutsche Bank Nat'l Tr. Co. v. Old Republic Title Ins. Grp., Inc.*, 532 F. Supp. 3d 1004, 1013 (D. Nev. 2021). Text can be "susceptible to two or more reasonable constructions despite the plain meaning of its terms." *Zurich Am. Ins. Co. v. New York Marine & Gen. Ins. Co*., Del. Super. Ct., No. N19C-09-288 PRW CCLD, Wallace, J., 2021 WL 424007 at *7 (Feb. 8, 2021).

It is well-settled that "[i]n deciding a motion to dismiss, a [judge] *cannot choose* between two differing reasonable interpretations of ambiguous provisions." *VLIW Tech.*, 840 A.2d at 615. Indeed, dismissal "is proper only if the defendants' interpretation is the *only* reasonable construction as a matter of law." *Id.* (emphasis in the original). Again, all ambiguity means here is "reasonably or fairly susceptible of different interpretations." *Id.* Here, Plaintiff's proposed definition was clearly at least reasonable. As such, Chancery was not permitted to rule for AMC at the pleading stage.

b. Analysis of the Phrase "Deemed to Be Issued" as Trade Language Makes Clear that Stocks are "Deemed to Be Issued" on Their Record Dates.

In construing an ambiguous contractual provision, a court may consider evidence of trade usage (though, as noted, this is most appropriate after the Motion

to Dismiss is denied). *See, e.g., Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 (Del. 1997).

Here, the phrase "deemed to be issued" is a term of art, which must also be understood based on its trade usage. In the context of securities contracts, the date on which something is "deemed to be issued" is generally the Record Date. When putting a term of art into a contract, parties understand the term to have the same meaning that the identical term of art has in analogous contexts.

Contracts of other public companies incorporated in Delaware specifically state that stocks are "deemed to be issued" on the Record Date. For example, consider the Certificate of Designation of convertible preferred stock for the company American Virtual Cloud Technologies, Inc. Its anti-dilution protection provision, which was provided to the trial court, states:[7]

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[7]A118 (citing American Virtual Cloud Technologies, Inc., *Certificate of Designations of Preferences, Rights, and Limitations of Series A Convertible Preferred Stock*, available at https://www.sec.gov/Archives/edgar/data/1704760/000121390021064882/ea152213ex4-1_americanvirt.htm (last accessed Dec. 17, 2024)).

Plaintiff requests that the Court take judicial notice of this document publicly filed with a federal agency (the U.S. Securities and Exchange Commission) and all other SEC-filed documents referenced herein. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006) ("This Court has recognized that, in acting on a Rule 12(b)(6) motion to dismiss, trial courts may consider hearsay in SEC filings 'to ascertain facts appropriate for judicial notice under [Delaware Rule of Evidence] 201.'"); *In re Vaxart, Inc. S'holder Litig.*, Del. Ch., No. 2020-0767-PAF, Fioravanti, V.C., 2021 WL 5858696 at *2 (Nov. 30, 2021) ("I take judicial notice of this and

> g) **Adjustment Upon Issuance of Shares of Common Stock**. If . . . the Company grants, **issues or** sells . . . , or . . . **is deemed to have** granted, **issued** or sold, **any shares of Common Stock** . . . then immediately after such Dilutive Issuance, the Conversion Price then in effect shall be [revised].
> . . .
> (v) Record Date. If the Company takes a record of the holders of shares of Common Stock for the purpose of entitling them . . . to receive a dividend or other distribution payable in shares of Common Stock . . . , then such **Record Date will be deemed to be the date of the issuance** or sale **of the shares of Common Stock deemed to have been issued** or sold.

This standard anti-dilution provision states that adjustments must be made (to the conversion price) after additional stock is deemed to be issued. Section (v) makes clear that the "Record Date will be deemed to be the date of the issuance[.]" *Id.*

American Virtual's Certificate is not an outlier. A186. The preferred stock designations of numerous other Delaware public companies have comparable language, including, LMP Automotive Holdings, Amedica Corporation, iBio, Inc., and Truli Technologies, Inc.[8] This common trade usage makes clear that "deemed to be issued" in AMC's Certificate refers to the Record Date.

The trial court contended that this common trade usage "does not mean that all Record Dates" are when stocks are deemed to be issued, particularly because AMC's Certificate does not include a specific definition. A209. The court may be

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other SEC filings cited in this Opinion to the extent they are 'matters that are not subject to reasonable dispute.'").

[8] A118–19.

right that this, on its own, may not *necessarily* mean that Plaintiff's interpretation is correct, but it is a strong thumb on the scale. A term of art's meaning does not exist in a vacuum. The best way to understand it is from its use in comparable contexts. *See Eagle Indus.*, 702 A.2d at 1233. It is incumbent upon AMC to demonstrate that the numerous instances corporations that deem stock to be issued on the Record Date are extreme outliers. They are not. So preferred stockholders had a reasonable expectation that the language of AMC's Certificate had the same meaning it had in comparable contracts.

AMC argued below that the presence of these definitions in other Certificates proves, by negative implication, that AMC's reading is correct. For that argument to hold any water, AMC would need to make two showings. First, that there was an undisputed baseline definition of "deemed to be issued" that these companies were expressly contradicting. AMC argued that one sentence in an unreported 1987 Court of Chancery opinion establishes that baseline. *Danvir Corp. v. Wahl*, Del. Ch., No. 8386, Berger, V.C., 1987 WL 16507, at *5 (Sept. 8, 1987)). *Danvir* does not analyze the phrase "deemed to be issued" and merely stands for the proposition that "deem" can create a legal fiction, which *supports* Plaintiff's position. *Id.* As the trial court here held, *Danvir* does not bear on this case. A208.

Second, AMC must explain why companies would choose the phrase "deemed to be issued" to express the opposite of what AMC calls the only plausible

reading. It is more reasonable to assume that the Certificates were seeking to clarify what was already the most natural reading to remove any doubt. Corporations regularly define largely obvious, nearly-unambiguous terms for the avoidance of all doubt. For example, the American Virtual Certificate quoted above defines "GAAP" as "United States generally accepted accounting principles." That is not an unnatural or surprising definition. The same applies to the American Virtual Certificate's definition of "business day," "trading day," and other definitions that are regularly included in Certificates. AMC follows the same standard practice of defining otherwise-obvious terms, such as "Common Stock" and "Board" (as "Board of Directors"). A044.

Further, to find that AMC's reading is unambiguously correct, this Court would need to find that the other Certificates were giving the phrase "deemed to be issued" an unreasonable and unnatural reading of the phrase. They were not. As used in AMC's Certificate as well as the others cited, it is straightforward and intuitive to understand that stock is "deemed to be issued" on the Record Date.

c. Traditional Canons of Contract Interpretation Favor Plaintiff's Proposed Definition.

The relevant canons of contract interpretation also strongly weigh in Plaintiff's favor. Courts must "give priority to the parties' intentions as reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all its provisions.'" *In re Viking Pump, Inc.*, 148 A.3d 633, 648 (Del. 2016).

"In so doing, the court evaluates the relevant provision's semantics, syntax, and context, aided by interpretive canons." *JJS, Ltd. v. Steelpoint CP Holdings, LLC*, Del Ch., No. 2019-0072, McCormick, V.C., 2019 WL 5092896 at *5 (Oct. 11, 2019).

The canon against surplusage "operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court." *NAMA Hldgs., LLC v. World Mkt. Ctr. Venture, LLC,* 948 A.2d 411, 419 (Del. Ch. 2007), *aff'd,* 945 A.2d 594 (Del. 2008). The Certificate describes the effect of distributions that are "issued (or deemed to be issued) . . . prior to the Conversion Date." A049. "[D]eemed to be issued" and "issued" must mean two different things. If they both referred to the Issue Date, the phrase "(or deemed to be issued)" would be surplusage. Further, "Issued" and "deemed to be issued" are described as alternatives with a disjunctive "or."

"Deemed to be issued" must refer to a different date because there is no dispute that (as with any distribution triggering dilution concerns) the Distribution was *actually* "issued" on August 28, 2023.

The Chancery Court sought to give a separate meaning to "deemed to be issued." A207; Rulings at 6. But, as explained, its definition strains credulity. *See supra* (I)(e).

Next, the "whole-text canon" provides that "the meaning which arises from a particular portion of an agreement cannot control the meaning of the entire

agreement where such inference runs counter to the agreement's overall scheme or plan." *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985). Here, the Certificate has anti-dilution as one of its central purposes. By its very nature, preferred stockholders own an asset that is, in every way, equal or superior to common stock. AMC and the Chancery Court's interpretations contravene the overall document by allowing common stockholders to receive more benefits than preferred holders via AMC's instant scheme.

Finally, the doctrine of *contra proferentem* provides that ambiguous provisions should be applied against the drafting party and in favor of the non-drafting party. The Certificate was drafted by AMC and must be interpreted against the company with respect to any ambiguous terms. *See Twin City Fire Ins. Co. v. Delaware Racing Ass'n*, 840 A.2d 624, 630 (Del. 2003). Preferred shareholders acquired their Preferred Units on the reasonable expectation that they were entitled to all of the benefits of common shareholders. AMC cannot profit from shareholders' investments and then deprive them of the promised benefits.

III. AMC VIOLATED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

1. Question Presented

Whether the Court of Chancery erred in declining to apply the covenant of good faith and fair dealing to fill a contractual gap that AMC exploited to short-change preferred shareholders. A124–34.

2. Scope of Review

Matters of contract interpretation, including the duty of good faith and fair dealing, are *de novo* questions of law. *Tekstrom, Inc. v. Savla*, 918 A.2d 1171 (Table) (Del. 2007).

3. Merits of the Argument

a. The Duty of Good Faith and Fair Dealing Can Fill Gaps that Neither Party Anticipated.

If the Certificate had a loophole whereby AMC could deprive preferred shareholders of the Distribution, the implied covenant of good faith and fair dealing fills this gap. The implied covenant "is best understood as a way of implying terms in a contractual agreement, whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions." *Boston Consulting Grp., Inc. v. GameStop Corp.*, 2023 WL 2683629, at *13 (D. Del. Mar. 29, 2023).

The anti-dilution provision's purpose and effect was to ensure preferred shareholders were given the same rights as common stockholders until conversion,

when preferred shareholders would themselves become common stockholders (making the provision moot). This is reinforced by AMC's unambiguous statements made to set investor expectations, including: "[s]hould AMC institute a dividend in the future, each AMC Preferred Equity Unit and each share of common stock participate equally in any dividend."[9] A022–23. Here, common stockholders were given the Distribution, and preferred shareholders were given nothing. As the trial court noted, the parties settling the litigation "agreed the distribution was designed to give equity to the common but not the preferred." A206. While the actual issuance happened after conversion, the entitlement to the Distribution was only given to the common stockholders before conversion. This violated the antidilution principles.

AMC cannot contend that the delivery date is the only relevant date. If it were, preferred shareholders would themselves have converted into common stockholders by the delivery date and they would have received the Distribution. But that is not what happened: only *pre-conversion common stockholders* received the Distribution. AMC's unmistakable intent and effect was to contravene anti-dilution by relying on a gap in the Certificate. The implied covenant exists for scenarios like this.

[9] AMC 8-K dated Aug. 4, 2022; *see also* AMC 8-K dated Aug. 12, 2022 ("[t]he AMC Preferred Equity unit is designed to have the same economic value and voting rights as a share of common stock[.]").

b. The Court Should Not Countenance Evasion of Anti-Dilution Provisions.

Blessing AMC's scheme to deprive preferred unitholders of the benefits of the anti-dilution provision would encourage gamesmanship and disincentivize investment. If AMC is immunized here, it will signal to other companies that they can subvert their antidilution provisions if there is a somewhat-conceivable loophole. This pits companies and investors against one another and increases the cost (on both sides) of raising capital.

IV. SECTION III OF THE CERTIFICATE PROVIDES ADDITIONAL GROUNDS FOR REVERSAL.

1. Question Presented

Whether the Court of Chancery erred in failing to give force to Section III(a) of the Certificate. A120–24.

2. Scope of Review

Matters of contract interpretation are *de novo* questions of law. *BLGH Holdings LLC*, 41 A.3d at 414.

3. Merits of the Argument

AMC violated Section III(a) of the Certificate. Section III(a) promised preferred shareholders the same "cash dividends ***or distributions***" that common stockholders would receive:

> (a) [Before conversion] AMC Preferred Equity Units shall be entitled to receive, . . . all cash dividends ***or distributions*** (including, but not limited to, regular quarterly dividends) declared and ***paid or made*** in respect of the shares of Common Stock, at the same time and on the same terms as holders of Common Stock[.]

A047.

Section III(b) made clear that the Record Date would be used to determine whether a distribution was payable to preferred shareholders:

> (b) Each dividend or distribution . . . will be payable to Holders of record of Preferred Stock as they appear in the records of the Corporation at the close of business ***on the same day as the Record Date[.]***

Id.

Because the Distribution's Record Date was pre-conversion, preferred shareholders were entitled to receive it under Section III.

The term "cash" in "cash dividends or distributions" in Section III(a)(i), can be read to only modify "dividends," not "distributions." Therefore, "distributions" includes non-cash distributions like the stock Distribution here. This reasonable reading precludes 12(b)(6) dismissal. *VLIW Tech.*, 840 A.2d at 615. The Certificate's drafters could have referred to "cash dividends and cash distributions" but did not. *Twin City Fire Ins.*, 840 A.2d at 630.

Plaintiff's reading is supported by the Certificate as a whole. Section VI defines "Additional Shares of Common Stock" to include "a distribution, dividend, stock split, stock combination or other similar recapitalization[.]" A049. Additionally, the definition of "Record Date" refers to "any dividend, distribution or other transaction or event" including "cash, securities or other property[.]" A045. A "distribution" can be made in stock.

Moreover, Section III(a)(ii), immediately following Section III(a)(i), provides that AMC "may not declare and pay any such cash dividend or make any such cash distribution in respect of Common Stock" unless AMC has paid the Common Equivalent Dividend Amount referred to in Section III(a)(i). Below, AMC argued that the phrase "such cash distribution" unambiguously clarified that Section III(a)(i) only refers to cash distributions, but a more reasonable reading goes the opposite

way. The use of "such cash distribution" in Section III(a)(ii) confirms the unremarkable fact that cash distributions are *one subset* of "cash dividends or distributions" but it does not preclude the fact that other types of distributions, such as stock, are included in "cash dividends or distributions[.]" Indeed, the existence of "such cash distribution" in Section III(a)(ii) demonstrates that the COD's drafters knew how and when to include the two-word phrase "cash distribution" rather than simply "distribution," and could easily have limited Section III(a)(i) to "cash dividends or *cash* distributions" if they wished.

Plaintiff's reading of "cash dividends or distributions" to include stock distributions is reasonable and does not produce an absurd result, so the motion to dismiss should have been denied. *VLIW Tech.*, 840 A.2d at 615; *Osborn*, 991 A.2d at 1160. It accords with the Certificate's express purposes. *See* A048 ("With respect to any dividends or distributions . . . [the preferred stock shall rank] on parity with the Common Stock").

CONCLUSION

For the foregoing reasons, the Court of Chancery's decision should be reversed.

Respectfully submitted, Dated: December 20, 2024

BERGER MONTAGUE PC

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

Michael Simons, *on behalf of himself and all other similarly situated former holders of Series A Convertible Participating Preferred Stock and AMC Preferred Equity Units of AMC Entertainment Holdings, Inc.*, Plaintiff Below, Appellant, *v.* AMC Entertainment Holdings, Inc., Defendant Below, Appellee.	No. 457, 2024 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2023-0835-MTZ

CERTIFICATE OF COMPLIANCE WITH THE TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 365 version 2402.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 9985 words, which were counted by Microsoft Word 365 version 2404.

Dated: December 20, 2024

/s/ Russell D. Paul
Russell D. Paul

EFiled: Dec 20 2024 03:16PM EST
Filing ID 75283400
Case Number 457,2024

Attachment 1

Order Granting Defendant's Motion to Dismiss the Verified Amended Complaint

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICHAEL SIMONS, Plaintiff, v. AMC ENTERTAINMENT HOLDINGS, INC. Defendant.	))))))))))	C.A. No. 2023-0835-MTZ

[PROPOSED] ORDER GRANTING DEFENDANT'S MOTION TO DISMISS THE VERIFIED AMENDED COMPLAINT

WHEREAS, this Court having considered Defendant AMC Entertainment Holdings, Inc.'s Motion to Dismiss the Verified Amended Complaint (the "Motion") and the briefs submitted in support thereof and in opposition thereto, and for good cause shown,

IT IS HEREBY ORDERED, this ___ day of _____, 202_, that:

1. The Motion is GRANTED; and

2. The Amended Complaint is DISMISSED WITH PREJUDICE.

_____
Vice Chancellor Morgan T. Zurn

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

Court:	DE Court of Chancery Civil Action
Judge:	Morgan Zurn
File & Serve Transaction ID:	71770407
Current Date:	Oct 02, 2024
Case Number:	2023-0835-MTZ
Case Name:	Michael Simons v. AMC Entertainment Holdings, Inc.
Court Authorizer:	Morgan Zurn

Court Authorizer Comments:

See transcript from October 2, 2024 oral argument.

/s/ Judge Morgan Zurn

EFiled: Dec 20 2024 03:16PM EST
Filing ID 75283400
Case Number 457,2024

Attachment 2

Rulings of the Court on Defendant's Motion to Dismiss

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICHAEL SIMONS, on behalf of himself and all other similarly situated former holders of Series A Convertible Participating Preferred Stock and AMC Preferred Equity Units of AMC Entertainment Holdings, Inc.,	:	
Plaintiff,	:	
v	:	C. A. No. 2023-0835-MTZ
AMC ENTERTAINMENT HOLDINGS, INC.,	:	
Defendant.	:	

- - -

Chancery Courtroom No. 12A
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Wednesday, October 2, 2024
1:30 p.m.

- - -

BEFORE: HON. MORGAN T. ZURN, Vice Chancellor

- - -

RULINGS OF THE COURT ON DEFENDANT'S MOTION TO DISMISS

APPEARANCES:

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Weil, Gotshal & Manges LLP
for Defendant

- - -

THE COURT: Thank you. Please be seated.

I do have a bench ruling to share with you. For the reasons that I will explain, the motion to dismiss is granted.

A holder of AMC's preferred APE units has filed a class action contending that the settlement consideration given to AMC's common stockholders in exchange for the release of their claims in Civil Action 2023-0215 breached the actual or implied terms of the APE units' Certificate of Designation. In particular, AMC distributed common shares and paid cash in lieu of fractional shares to AMC's common stockholders.

The record date for that distribution was August 24, 2023; the APE conversion occurred on August 25; and the special distribution was delivered on August 28th. Plaintiff contends that the distribution violated the APEs' antidilution provision and right to equal distributions, or the implied covenant of good faith and fair dealing.

The parties agreed the distribution was designed to give equity to the common but not the preferred, and that is why the record date preceded

the conversion and the conversion preceded the distribution.

The question on AMC's motion to dismiss is whether under that design the APE COD's express or implied terms required a conversion rate adjustment or distribution to the preferred as well.

Nothing in the plain terms of the COD required a distribution to the preferred or conversion rate adjustment because the distribution to the common occurred after the preferred converted. Section VI of the COD states that the conversion rate would be adjusted "in the event the Corporation shall at any time prior to the Conversion Date issue Additional Shares of Common Stock." "Additional shares of Common Stock" is defined as "all shares of Common Stock issued (or deemed to be issued) by the Corporation ... prior to the Conversion Date."

To circumvent the repeated and metaphysically necessary requirement that the issuance predate conversion in order for the conversion rate to be adjusted, plaintiff argues the settlement distribution was "deemed to be issued ... prior to the Conversion Date" because the record date was prior to the conversion date. This argument hinges on the

meaning of "deemed to be issued."

It must mean something other than "issued," as the phrase is there in the alternative to "issued" and cannot be surplusage.

The plain dictionary meaning is "to consider or judge something in a particular way," per Cambridge, or to "regard as," per Dictionary.com. And Collins dictionary calls it a transitive verb — "if something is deemed to have a particular quality or to do a particular thing, it is considered to have that quality or do that thing."

"Deemed to be issued" cannot be referring to stock that is actually issued; it must be referring to stock that someone, some authority or instrument, has considered or judged to be issued even though it was not.

Defendants point to sources like *Danvir*, which used the phrase "deemed issued" to resolve a dispute about whether stock was delivered. The Court explained that actual possession is not the only way delivery may be accomplished because stock is "deemed issued" when it "actually or constructively comes into possession of the owner by delivery to the stockholder or some person acting as his agent." The

Court's use of the phrase "deemed issued" in *Danvir* speaks to actual issuance. It does not shed light on the meaning of "deemed to be issued" as distinct from actual issuance.

Plaintiff contends that the distribution, which of course was actually issued, "may be deemed issued" as of the record date, without offering any textual basis as to why this would be so, or who or what would have deemed it issued. The fact that other companies' CODs specifically provide that record dates are to be the date of issuance does not mean that all record dates, or any record date, may or must be deemed to be the date of issuance. AMC's APE COD does not make such a statement.

Plaintiff then contends the phrase "deemed to be issued" is ambiguous. It is not — it has a plain meaning. A distribution is deemed to be issued when an authority or instrument says it was issued, even and especially if it was not actually issued. Plaintiff has not pled a circumstance in which anyone or anything deemed the distribution to be issued, and what such a circumstance might entail or who might do the deeming. But that does not mean the provision is ambiguous or that we must go hunting for

an applied meaning of that phrase. Here, as pled, the distribution was simply issued, not deemed to be issued, and the issuance was after the conversion date.

Section III(a)'s dividend rights also speak to distributions to which APE holders are entitled "from and after the Closing Date to but excluding the Conversion Date." That language is also clear and unambiguous. Section III(a)'s exclusion of distributions with record dates before the preferred issuance does not inform the meaning of "deemed to be issued" or make the distribution record date the distribution issuance date.

Section III(b) states that dividends or distributions declared or paid "pursuant to" Section III(a) are payable to preferred recordholders as of the record date used for the common distribution. The AMC distribution occurred after conversion. The preferred are not entitled to a dividend or distribution under Section III(a), so the question of to whom it is payable based on the record date in Section III(b) is not reached. The record date is, again, irrelevant to when the distribution was issued.

As a fallback to a breach of the COD's plain terms, plaintiff contends the structure of the distribution breached the implied covenant of good faith and fair dealing because it was designed to avoid triggering the antidilution and dividend provisions.

The bedrock principles underlying the implied covenant are well known. The implied covenant asks what the parties would have agreed to themselves had they considered the issue at the time of contracting. Fair dealing and good faith require fairness and faithfulness to the terms and purpose of the parties' agreement.

The covenant cannot properly be applied to give the parties contractual provisions that they failed to secure for themselves at the bargaining table. If the contract addresses the conduct challenged by the implied covenant, then the implied covenant does not apply.

The Court thus must first engage in the process of contract construction to determine whether there is a gap that needs to be filled. The implied covenant cannot infer language that contradicts a clear exercise of an express contractual

right.

The implied covenant is referred to as a cautious enterprise because it infers contractual terms to handle developments or contractual gaps that the asserting party pleads neither party anticipated. The implied covenant is a limited and extraordinary legal remedy.

Plaintiff first argues that the implied covenant fills the gap of a definition of "deemed to be issued." Even if the implied covenant could serve that function, there is no gap there, as the words' plain meaning supplies a definition. We are missing an application, but not a definition.

Plaintiff also argues Section III(a) contains a gap in that it does not address a record date before conversion and a distribution date after conversion. But that is not a gap; the record date is irrelevant to post-conversion distributions, for which APE holders are simply not entitled to a distribution.

Plaintiff is correct that Section III(a) makes clear APE holders are not entitled to preconversion distributions where the record date precedes the issuance of APE units. But this clarification does not mean that there is a gap as to

the relevance of record dates after APE units converted. They are not relevant at all.

Plaintiff then turns to the fact that the distribution was designed to avoid the APE antidilution and distribution rights, and contends this was "arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the contract" as forbidden by the implied covenant.

Plaintiff equates it to the alleged dodging of a liquidation preference right in *Quadrangle* by quietly progressing towards liquidation and then continuing it after the liquidation preference right was eliminated. After trial, the *Quadrangle* court found the board proceeded the way it did not in bad faith to avoid the liquidation preference, but in response to practical obstacles.

Plaintiffs essentially argue that the implied covenant prohibits AMC from making any common distribution without also adjusting for or distributing to the preferred. But that is not what the COD says. The COD puts clear, unambiguous, and comprehensive boundaries on the APE units' antidilution and distribution protections. They

provide that the APE units must be protected from dilution and receive distributions for every common distribution only before the APE units' conversion and not after; that is, only while the APE units still exist and while the conversion formula can still be adjusted.

They specify that post-conversion distributions would not trigger the APE units' protections. Because the CODs afford antidilution and distribution rights only for preconversion distributions, the implied covenant cannot supply those rights for post-conversion distributions.

And the implied covenant does not forbid a party from structuring their actions to avoid specific contractual obligations to another. To the contrary, the implied covenant cannot supply rights that could have been included in the contract but were not. Because the CODs specify an antidilution adjustment and a distribution are only triggered by preconversion distributions, there is no room for the implied covenant.

That specificity in the COD makes this case unlike *Quadrangle*, in which the company was allegedly conducting liquidation on stealth mode to

avoid a liquidation preference where, to quote, "the Certificate does not address the process by which [the company] was to liquidate." *Quadrangle* does not stand for the proposition that timing corporate action around a conversion to avoid having to pay stockholders is always a breach of the implied covenant.

Here, the COD required antidilution adjustments to the conversion rate, and equalizing distributions, only before any conversion of APE units — not after. The preferred got exactly what they were entitled to under the COD, and AMC did not subvert the COD's purpose in making a distribution that did not trigger the preferred's rights.

Plaintiff has failed to state a claim for breach of the COD's express terms and its implied covenant. It follows plaintiff has failed to state a claim for declaratory judgment based on a breach of the COD, and cannot secure an injunction. The motion to dismiss is granted, and this bench ruling will stand as my ruling on the matter with an order to follow.

Any questions? Is anything unclear.

ATTORNEY NEUWIRTH: No, Your Honor.

THE COURT: Anything unclear? Have any questions?

ATTORNEY PAUL: No.

THE COURT: Thank you very much. Good to see everyone today. Take care. We're adjourned.

(Court in recess at 3:16 p.m.)

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CERTIFICATE

I, KAREN L. SIEDLECKI, Official Court Reporter for the Court of Chancery for the State of Delaware, Registered Diplomate Reporter, and Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 13 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except as revised by the Vice Chancellor.

IN WITNESS WHEREOF I hereunto set my hand at Wilmington this 2nd day of October, 2024.

/s/Karen L. Siedlecki

Karen L. Siedlecki
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter