IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DAVID M. GOLDENBERG, Plaintiff, v. IMMUNOMEDICS, INC., Defendant.	)))))))))	C.A. No. 2020-0523-JTL

POST-TRIAL OPINION

Date Submitted: August 12, 2025
Date Decided: December 15, 2025

Catherine A. Gaul, ASHBY & GEDDES, P.A., Wilmington, Delaware; Eric W. Dittmann, Joshua M. Bennett, Barry G. Sher, Elizabeth A. Moore, PAUL HASTINGS LLP, New York, New York; Naveen Modi, PAUL HASTINGS LLP, Washington, D.C.; *Attorneys for Plaintiff*.

David J. Teklits, Alexandra M. Cumings, Rachel R. Tunney, MORRIS, NICHOLS, ARSHT & TUNNEL LLP, Wilmington, Delaware; Daniel T. Donovan, Judson Brown, Leah A. Hamlin, Neil A. Joseph, KIRKLAND & ELLIS LLP, Washington, D.C.; *Attorneys for Defendant*.

LASTER, V.C.

A scientist founded a pharmaceutical company and took it public. For three decades, the company pursued the scientist's research but never turned a profit.

The company's efforts eventually produced a powerful cancer treatment known as Trodelvy. In 2020, after the FDA approved Trodelvy to treat triple-negative breast cancer, a major pharmaceutical manufacturer bought the company for $21 billion. The scientist and his family members received approximately $700 million.

Under the scientist's pre-acquisition employment agreement, he was entitled to 1.5% of the company's annual net revenue in any year when the company generated positive net income (the "Revenue-Sharing Provision"). The Revenue-Sharing Provision remained in effect through July 1, 2023, so for about two years and eight months after the acquisition (the "Covered Period").

The employment agreement's definition of the company included affiliates. In this litigation, the scientist claims that the buyer is an affiliate, so the Revenue-Sharing Provision entitles him to 1.5% of the buyer's aggregate net revenue across all of its businesses. That would amount to some $365 million.

This decision rejects that expansive interpretation. The Revenue-Sharing Provision uses the term "affiliate" in a loose and ambiguous way, making extrinsic evidence relevant under Delaware law. The parties selected New Jersey law to govern the agreement, and New Jersey law permits a court to consider extrinsic evidence even when a provision might initially appear plain and unambiguous.

The extrinsic evidence makes clear that the parties intended for the Revenue-Sharing Provision to compensate the scientist with 1.5% of the net revenue generated from businesses related to the scientist's research, whatever the company's legal structure might be. The Revenue-Sharing Provision was never intended to give the scientist a share of the net revenue associated with unrelated businesses that a buyer might contribute.

That leaves the question of how much the scientist gets. The scientist is only entitled to a payment under the Revenue-Sharing Provision in a year when the company generated positive net income (the "Net Income Condition"). The Revenue-Sharing Provision assumes that the company has audited financial statements, prepared in accordance with GAAP, and calls for using audited figures in its calculations. When the company and the scientist entered into the employment agreement, the company's shares traded publicly, so the company prepared audited financial statements in the ordinary course of business.

After the acquisition, the buyer consolidated the company's business with its own. The buyer stopped preparing annual audited financial statements for the company. The buyer tracked Trodelvy-related revenue and expenses, but only for internal use and inclusion in its own consolidated financial statements. The buyer did not prepare carve-out financial statements for the company as if the Trodelvy business unit was a standalone reporting entity, much less have them audited.

The absence of audited figures raises a difficult issue. Under one view, because the buyer made it impossible to comply with the Net Income Condition as written, the buyer cannot enforce the condition. The scientist would receive 1.5% of the net revenue associated with the Trodelvy business, or $23.5 million. Under another view, the core business deal memorialized through the Net Income Condition was a requirement that the company's business generate positive net income. The lack of audited figures means that the buyer cannot rely on their absence to defeat the scientist's claim, but the requirement of positive net income still applies.

When read as a whole, the agreement and the extrinsic evidence support the latter interpretation. When negotiating the Revenue-Sharing Provision, the parties viewed the existence of positive net income as the key deal point. When the condition was added, the scientist and his spouse were the company's two top officers, and the company's negotiator wanted to ensure that the numbers were reliable. Using audited figures was a way to avoid disputes and protect the company.

The Revenue-Sharing Provision did not obligate the company to prepare audited figures. The parties simply assumed audited financial statements would exist. And even when the company had audited financial statements, they were not the final word. The agreement provided the scientist with a right to obtain information to verify and, if necessary, contest the audited figures. That right is inconsistent with audited figures being essential.

The key deal term was therefore the Net Income Condition, not the ways to establish whether it was met. Here, the buyer integrated the Trodelvy business into its internal systems and tracked revenue and expense associated with the Trodelvy business. The buyer incorporated those entries into its own consolidated financial statements, which were audited. Using those figures, the buyer proved at trial that the Trodelvy business did not generate positive net income, calculated in accordance with GAAP, during any fiscal year during the Covered Period. The scientist is therefore entitled to zero.

The scientist objects that if the buyer had not acquired the company, then the standalone business would not have incurred so many costs and would have generated net income. He then would have received compensation under the Revenue-Sharing Provision. Perhaps so. But the acquisition happened, and the buyer was not required to defer investing in Trodelvy so that the Revenue-Sharing Provision would generate payments. The buyer paid a handsome price for a company that had never made a profit precisely because the buyer believed it could invest in and develop Trodelvy into a profitable drug. Through the deal price, the scientist received consideration that incorporated those expectations. To let him recover under the Revenue-Sharing Provision as if the acquisition never took place would be a form of double dipping.

Judgment will be entered in favor of the defendant.

I. FACTUAL BACKGROUND

Trial took place over three days. The parties submitted 478 exhibits and lodged fourteen depositions. Twelve witnesses testified live. The parties agreed on just nineteen stipulations of fact, a disappointingly low number. The balance of the facts was proven by a preponderance of the evidence.[1]

[1] Citations in the form "[Name] Tr." refer to witness testimony from the trial transcript. Citations in the form "[Name] Dep." refer to witness testimony from a deposition transcript. Citations in the form "JX __ at __" refer to joint trial exhibits.

A. Goldenberg And The Company

Dr. David Goldenberg is a prolific scientist and cancer researcher. He has authored more than 1,200 peer-reviewed publications and served on the editorial boards of over twenty-five medical journals. He has won awards for his work in oncology and medical science.

Goldenberg is also an entrepreneur. In 1982, he founded Immunomedics, Inc. ("Immunomedics" or the "Company") to commercialize his discoveries. The Company went public in 1984. The Company originally focused on cancer diagnostics. In the early 2000s, the Company shifted to cancer treatment.

B. Goldenberg's Employment

Goldenberg served in various executive positions over the years, including Chief Executive Officer, Chief Scientific Officer, and Chief Patent Officer. He has also been a director and Chairman of the Board.

Beginning in 1983, Goldenberg entered into a series of employment agreements with the Company. Three agreements are relevant: a 1993 agreement, a 2007 agreement, and a 2015 agreement.

Citations in the form "PTO ¶ __" refer to paragraph in the pre-trial order. Citations in the form "Dkt. __" refer to docket entries in this action.

1. The 1993 Agreement

In 1993, Goldenberg entered into an employment agreement that superseded all of his earlier agreements (the "1993 Agreement").[2] The record does not reflect with whom Goldenberg negotiated the terms of the 1993 Agreement.

Under the 1993 Agreement, Goldenberg was entitled to (i) a base salary, (ii) a discretionary bonus, (iii) equity compensation under a long-term incentive plan, and (iv) various categories of "Additional Incentive Compensation."[3] The Revenue-Sharing Provision provided for one type of Additional Incentive Compensation. It called for Goldenberg to receive:

> (A) one-half of one percent (1/2%) of the first Seventy-Five Million Dollars ($75,000,000) of such Annual Net Revenue of Immunomedics; and (B) one-quarter of one percent (1/4%) of such Annual Net Revenue in excess of Seventy-Five Million Dollars ($75,000,000).[4]

The provision thus focused on the "Annual Net Revenue of Immunomedics."[5]

"Immunomedics" was a defined term. The 1993 Agreement framed it as "Immunomedics and all of its wholly owned subsidiaries which, for all purposes of this Agreement, shall be deemed to include subsidiaries which are wholly owned by

---

[2] *See* JX 4 [hereinafter 1993 Agreement].

[3] *Id.* §§ 4.1, 4.2.

[4] *Id.* § 4.2(a).

[5] *Id.* The provision also conditioned the payment on Goldenberg holding a minimum amount of Immunomedics stock. *Id.* § 4.2(a), (c).

Immunomedics, directly or indirectly."[6] The term thus extended only to wholly owned subsidiaries.

The definition of "Annual Net Revenue" in the 1993 Agreement was more complex. The base definition was "the sum of (1) Annual Net Sales and (2) any Consideration received by Immunomedics for any Disposition of any one or more of any of its assets other than Undeveloped Assets."[7] The definition of "Annual Net Sales" referred to sales "required to be reported in accordance with generally accepted accounting principles, consistently applied, on Immunomedics' annual financial statements."[8] The figures used to calculate Annual Net Sales and Annual Net Revenue therefore had to be GAAP compliant and drawn from the Company's annual financial statements. The provision did not mention an auditing requirement, although as a public company at the time, the Company prepared and filed audited financial statements.

2. The 2007 Agreement

In 2007, Goldenberg entered into another employment agreement that superseded his earlier agreements (the "2007 Agreement"). Goldenberg negotiated

---

[6] *Id.* § 4.2(d)(ix).

[7] *Id.* § 4.2(d)(i).

[8] *Id.* § 4.2(d)(ii). The formula contains a proviso that excludes from the definition of Annual Net Sales "(A) net sales of any Acquired Asset, or (B) any amounts which constitute Consideration for any Disposition." *Id.* The proviso is not pertinent to this decision.

the terms with Brian Markison, then serving as the Company's Chairman of the Board and chair of its compensation committee.[9] Each side had counsel: Douglas Zucker represented Goldenberg, and Andrew Gilbert represented the Company. All of the communications took place between the lawyers.

Only Goldenberg and Gilbert testified live at trial. As between the two, Gilbert offered the more persuasive account. He was directly involved in the exchanges, and although his memories from eighteen years ago had gaps, his testimony was credible and consistent with the contemporaneous documents.[10] Goldenberg was involved in the exchanges, but not to the same degree as Gilbert. He did attend one meeting, but he bounced in and out while attending to other matters and could not recall any of the substance.[11] He did not send or receive any of the emails, and although he was copied, the emails do not reference his substantive input.[12]

By 2007, Goldenberg and the Company were conducting some of their research and commercialization efforts through a joint venture called IBC Pharmaceuticals, LLC, ("IBC"). After buying out its joint venture partner in 2002, the Company owned a 72% interest in IBC. Goldenberg owned most of the remaining equity.[13]

---

[9] *See* JX 48; Goldenberg Tr. 29.

[10] *See* Gilbert Tr. 586–87; *see also id.* at 588, 610, 635–36.

[11] *See* Goldenberg Tr. 37–38, Gilbert Tr. 591.

[12] *See* JX 48 at 1; JX 49 at 1; JX 50 at 1; JX 51 at 1; JX 52 at 1.

[13] *See* Goldenberg Tr. 35, 144–45.

The negotiations began on April 2, 2007, when Zucker sent Gilbert a draft that updated the 1993 Agreement to incorporate subsequent amendments, simplified the language, and revised some of the terms.[14] Zucker provided a seven-page cover letter discussing the draft.[15] The letter explained that Goldenberg wanted (1) freedom to take on greater responsibilities at IBC and his non-profit research center, (2) a higher base salary, and (3) a richer incentive compensation structure.[16]

The draft's section on Additional Incentive Compensation included a modified version of the Revenue-Sharing Provision. Zucker replaced the two-tiered percentage structure in the 1993 Agreement with a flat right to 1% of Annual Net Revenue.[17] He removed the language about GAAP compliance and the references to the Company's annual financial statements that appeared in the definitions of Annual Net Revenue and Annual Net Sales.[18] In their place, he proposed that accounting treatment should not matter by providing that: "Each component of Annual Net Revenue shall be included in the calculation for the fiscal quarter during which it is received by the

---

[14] JX 48 at 2.

[15] *Id.* at 2–8.

[16] *See* JX 48 at 3–4, 20.

[17] *See id.*

[18] JX 48 at 23–24.

Company, regardless of how the Company may record the receipt of the Consideration for other accounting purposes."[19]

Zucker did not change the definition of Immunomedics. He did not add the term "affiliate" anywhere in the document.[20]

In his responsive markup, Gilbert revised the definition of "Immunomedics" by replacing "Immunomedics and all of its wholly owned subsidiaries" with "Immunomedics and all of its direct and indirect subsidiaries."[21] Gilbert made the change to pick up IBC, which was not a wholly owned subsidiary and would not have been included in the prior definition. Gilbert knew that Goldenberg wanted to be paid for any revenue that IBC generated.[22]

Gilbert also added the Net Income Condition. As revised, the Revenue-Sharing Provision stated:

> *With respect to any fiscal year during the Term of the Agreement in which the Company generates positive net income (determined by the Company in a manner consistent with generally accepted accounting principles ("GAAP") for the entire fiscal year as audited by the Company's independent registered public accounting firm*, Immunomedics will pay to Dr. Goldenberg a sum equal to one percent (1%) of Immunomedics'

---

[19] *Id.* at 23.

[20] *See id.* at 23–24, 29.

[21] *See* JX 50 at 16 ("'<u>Immunomedics</u>' means Immunomedics and all of its direct and indirect subsidiaries.").

[22] *See* Goldenberg Tr. 42 ("I mean, all I was concerned is that if we were ever to be fortunate to get revenue from IBC, that would be included in the annual revenues of Immunomedics."); Gilbert Tr. 574 ("David wanted to ensure basically he would be compensated for IBC revenue.").

> Annual Net Revenue (as defined in Section 4.2(d)) during each fiscal year . . . .[23]

Gilbert testified credibly that Markison directed him to add the Net Income Condition so that the Company only would have to an obligation under the Revenue-Sharing Provision if it had generated positive net income on a GAAP basis using audited figures.[24] Gilbert also testified credibly that he added the reference to audited figures because Markison "wanted to ensure basically it was the final numbers for the year and not management prepared."[25] Zucker accepted those changes.[26]

Gilbert also added back the language about GAAP compliance that Zucker had removed from the definitions of Annual Net Revenue and Annual Net Sales.[27] Zucker did not accept that change.[28]

After the initial exchange of drafts, Goldenberg, Markison, Zucker, and Gilbert met in person. Goldenberg did not recall any specifics about the meeting.[29] Gilbert

---

[23] JX 50 at 10 (emphasis added) (missing closing parenthesis in original). The inconsistent usage of "Company" versus "Immunomedics" is not significant. The draft used the terms interchangeably. *See id.* at 4.

[24] Gilbert Tr. 565–66.

[25] *Id.* at 566.

[26] *See id.* at 1, 10, 12–13; JX 51 at 1, 10–11, 14–15.

[27] JX 50 at 10, 12–13.

[28] JX 51 at 14.

[29] Goldenberg Tr. 37–39.

recalled the meeting as "largely a page flip of the document" that included "fine-tuning of the economics, but nothing significant."[30]

Weeks later, Zucker circulated a revised draft that he said contained "all of the changes discussed in [the] meeting" as well as "a few additional changes, which relate primarily to language, not economics."[31] For that draft, Zucker revised the definition of Immunomedics to refer to "Immunomedics and all of its direct and indirect subsidiaries or affiliates, including but not limited to IBC."[32] Zucker thus added the language "or affiliates" and included a specific reference to IBC. Gilbert accepted that change in all subsequent drafts.[33]

Gilbert testified credibly about what Zucker conveyed to him about those changes. He understood that Zucker's edit was primarily intended to ensure that Goldenberg "would be compensated for IBC revenue."[34] He also understood that IBC might raise additional capital and dilute the Company's ownership below a majority stake.[35] And he understood that the Company might create more entities to hold intellectual property or for other reasons. He therefore agreed to with Zucker on using

[30] Gilbert Tr. 574–75.

[31] JX 51 at 1.

[32] *Id.* at 18.

[33] *See* JX 52 at 1, 15; JX 53 at 1, 14.

[34] Gilbert Tr. 574.

[35] *Id.* at 575–76, 603–04.

general language that specifically called out IBC, resulting in the phrase "direct and indirect subsidiaries or affiliates, including but not limited to IBC."[36]

Zucker added the term "affiliates" elsewhere in the draft as well. In the provision discussing Goldenberg's ability to work contemporaneously for a non-profit research center and other entities, Zucker introduced the term.[37] He also added it in a provision listing entities that Goldenberg could work for without breaching his non-competition covenant, expanding the language from just "IBC" to "the Center, Immunomedics, and/or in IBC (or a subsidiary or affiliate of same)."[38]

At trial, Goldenberg offered a different account. He testified that Zucker added the word "affiliates" to pick up parent level entities in case a hostile bidder sought to acquire control of the Company.[39] He claimed that by encompassing an acquiror, the

---

[36] Gilbert Tr. 577, 606; *see* JX 67 at 159–63 (May 9, 2007 board meeting minutes showing Goldenberg "le[ading] a discussion concerning the potential for future inter-company development activities between the Company and IBC, including, among other things, allocation of assets and intellectual property among the entities."); *see also* JX 57 at 13 (Company's June 30, 2007 SEC filing touting the acquisition of IBC and ownership of its intellectual properties).

[37] *See* JX 51 at 7–8.

[38] *See id.* at 27–28; *see also id.* at 30.

[39] *See* Goldenberg Tr. 42–43 ("Q: Do you have a recollection as to why ["affiliate"] was added as well? A: I think that was the best they could do to protect me from a hostile takeover, because I had known that—I had seen that 'affiliates' was used in every single agreement that Immunomedics ever entered into that I can recall during my tenure of being chairman of the board. And it had certain meanings which would, with a change of control, implement remuneration to me that, in the best circumstances, could be good. In a poor circumstance, would be meaningless.").

2007 Agreement would force a bidder to think twice before buying the company and losing a portion of its revenue.

Although Goldenberg was generally a credible witness, his recollections on the takeover issue were disjointed, conclusory, and unpersuasive. The Company had adopted a rights plan five years earlier, in 2002,[40] so the 2007 Agreement would not have added meaningful protection against a hostile bid. Instead, a revenue-based compensation provision would have created a conflict of interest for Goldenberg by giving him an additional incentive to take a bid. It also would have given him a perverse incentive to reject bids from smaller companies with less revenue, while steering the company towards bids from bigger companies with more revenue, irrespective of what was best for the company.

Gilbert testified credibly that no one referenced takeover concerns during the discussions over the 2007 Agreement.[41] The Company's board minutes from that period also do not reference any takeover concerns.[42] Nor do the Company's public filings.[43] There are no references to the revenue-based theory of takeover defense that Goldenberg articulated at trial.

---

[40] *See* JX 428 at 29.

[41] Gilbert Tr. 575.

[42] *See* JX 67 at 2, 159–63.

[43] The Company's 2006 and 2007 filings on Form 10-K identified as defensive measures only the 2002 rights plan and provisions in its charter and by-laws and in the Delaware General Corporation Law. JX 43 at 29, 61; JX 57 at 31, 74. The

During the final back-and-forth over the 2007 Agreement, Zucker also added language giving Goldenberg a right to differently calculated payment in a year when the Company did not have positive net income.[44] Although he did not alter the requirement of GAAP compliance or the role of audit figures in the Net Income Condition, he again removed the requirement of GAAP compliance from the definitions of Annual Net Revenue and Annual Net Sales.[45] But Gilberg insisted on keeping the GAAP requirements and added them back again.[46]

In the executed version of the 2007 Agreement, the Revenue-Sharing Provision stated:

> With respect to any fiscal year during the Term of the Agreement in which Immunomedics records an annual net loss (determined by Immunomedics in a manner consistent with generally accepted accounting principles ("GAAP") for the entire fiscal year as audited by Immunomedics' independent registered public accounting firm), Immunomedics will pay to Dr. Goldenberg a sum equal to three quarters of one percent (.75%) of the total Consideration the Company receives from any third party transaction, excluding third party financing transactions and any Disposition of Undeveloped Assets.
>
> With respect to any fiscal year during the Term of the Agreement in which Immunomedics records positive net income (determined by Immunomedics in a manner consistent with GAAP) for the entire fiscal year as audited by Immunomedics' independent registered public

---

Company's 2008 filing on Form 10-K, issued just after the Company and Goldenberg executed the 2007 Agreement, used the exact same language and did not mention the agreement as a defense. *See* JX 64 at 29, 68.

[44] JX 51 at 11.

[45] JX 51 at 10–11, 14–15.

[46] JX 52 at 12–13.

> accounting firm, Immunomedics will pay to Dr. Goldenberg a sum equal to one and one-half percent (1.5%) of Immunomedics' Annual Net Revenue (as defined in Section 4.2(d)) for each such fiscal year (unless Dr. Goldenberg's employment terminates pursuant to Sections 10(a) or 10(e)), and thereafter throughout the non-competition period (as defined in Section 9(b));
>
> . . .
>
> "<u>Annual Net Revenue</u>" means Immunomedics total revenue determined for the fiscal year as determined by GAAP less (i) Consideration received upon Disposition of Undeveloped Assets, (ii) Product Royalties on Patented Products (as defined in Section 4.2(a)(ii)) and (iii) amounts recorded as revenue by Immunomedics during such fiscal year that are related to payments previously paid to Dr. Goldenberg under Section 4.2(a)(i) in any prior period.[47]

The agreed-upon language retained the GAAP requirement.

3. The 2015 Agreement

In 2015, Goldenberg and the Company executed the agreement at issue (the "2015 Agreement").[48] The Revenue-Sharing Provision remained the same. The definitions of Immunomedics and Annual Net Revenue also remained the same.

C. The Proxy Contest

Although the Company produced scientific breakthroughs, it failed to achieve positive financial results. In 2017, after years of losses, a health-care-focused

---

[47] JX 55 at 6–7, 9 (first paragraph break added) (inconsistent use of parenthesis in original) [hereinafter 2007 Agreement].

[48] Goldenberg Tr. 139–40; *see* JX 99 at 9, 11, 12 [hereinafter 2015 Agreement].

investment fund (the "Fund") announced a proxy contest for control of the board.[49] In June 2017, the Fund prevailed in its proxy contest and seated a new board majority.[50]

During the proxy contest, the Fund and the Company sued each other.[51] On November 2, 2017, the parties reached a global settlement (the "Settlement").[52] Goldenberg resigned from all of his positions as an officer or employee of the Company but continued to serve as a director until April 2018. Pertinent to this case, the Company committed to comply with the 2015 Agreement, including the Revenue-Sharing Provision.[53]

D. The Acquisition

In April 2020, the FDA approved Trodelvy as a treatment of triple negative metastatic breast cancer.[54] That caught the interest of Gilead Sciences, Inc.

Gilead negotiated to acquire the Company, and the deal closed on October 23, 2020 (the "Acquisition"). Gilead paid total consideration of $21 billion.[55] Goldenberg

---

[49] JX 474.

[50] Goldenberg Tr. 145–46.

[51] *Id.* at 143–44; *see also VenBio Select Advisor LLC v. Goldenberg*, C.A. No. 2017-0108-JTL (Del. Ch. Feb. 13, 2017), Dkt. 1.

[52] Goldenberg Tr. 144–46; *see* JX 119.

[53] JX 119 at 30–34, 52, 183–213; *see also* Dkt. 36 at 3–7.

[54] PTO ¶ 38.

[55] *Id.* ¶ 39; *see* JX 184.

and his family held about "3 to 4 percent" of the Company,[56] so they received approximately $700 million for their equity.[57] After the Acquisition, the Company continued as a wholly owned subsidiary of Gilead.[58]

Gilead bought the Company with the goal of rapidly advancing the use of Trodelvy to treat "many other types of cancer" and leveraging Gilead's "established infrastructure and operations in Europe and Japan to support the launch of Trodelvy in those regions."[59] Gilead expanded its research and development efforts to pursue approvals for Trodelvy to treat other types of cancer.[60] Gilead also ramped up manufacturing, built out the Trodelvy salesforce for a global launch, and spent more on sales and marketing.[61] Gilead cancelled an agreement between the Company and Everest Medicines Limited ("Everest") that licensed Everest to commercialize Trodelvy in China, South Korea, and Southeast Asia.[62] Gilead wanted to pursue those markets itself.

---

[56] Goldenberg Tr. 75.

[57] *Id.* at 79.

[58] PTO ¶ 40.

[59] JX 176 at 3; *cf.* JX 116 (Gilead announcing acquisition of Kite Pharma with the target's research and development, manufacturing, and the commercialization operations remaining in their original locations).

[60] *See, e.g.*, Cheema Tr. 454–56; JX 217 at 36.

[61] *See e.g.*, Cheema Tr. 449–50; Cornett Tr. 511–12; JX 217 at 38; JX 199 at 2; JX 211 at 20.

[62] *See* JX 213 at 1.

Significantly for purposes of this litigation, Gilead delisted the Company and integrated the Trodelvy business into its financial reporting system. In the ordinary course of business, Gilead tracked revenue and expense associated with Trodelvy in its general ledger, and Gilead included those figures in its consolidated results.[63] Ernst & Young audited Gilead's consolidated financial statements, and Gilead reported its consolidated results in its public filings.[64] Gilead separately identified Trodelvy-related revenue but consolidated Trodelvy-related expenses with its other expenses.[65] Gilead did not maintain or account for the Company as a separate business unit that operated in the same manner it had when the Company was its own independent reporting entity. Gilead did not separately audit the financial figures for the Trodelvy business.

E. Gilead's Interactions With Goldenberg

After the Acquisition, the Company remained bound by the 2015 Agreement. Under the agreement, Goldenberg's rights under the Revenue-Sharing Provision continued through the Covered Period, *viz.* until July 1, 2023.[66]

---

[63] Wolpert Dep. 202–03 (JX 339); Wolpert Tr. 369.

[64] PTO ¶ 41.

[65] *See* JX 194; JX 217; JX 252; JX 286.

[66] *See* 2015 Agreement § 4.2(a)(i); Dkt. 93.

Gilead's public filings disclosed revenue from Trodelvy of $380 million in 2021, $680 million in 2022, and $1.063 billion in 2023.[67] Despite generating those impressive amounts, Gilead informed Goldenberg that the Trodelvy business had failed to generate positive net income each year. The Company therefore did not make any payments to Goldenberg under the Revenue-Sharing Provision.

F. This Litigation

In June 2020, Goldenberg sued the then-Fund-controlled Company for breach of the 2015 Agreement and the Settlement. The suit continued on after Gilead bought the Company. One year after the Acquisition closed, Goldenberg demanded that Gilead pay him 1.5% of its global revenue across all of its businesses. Goldenberg subsequently amended his complaint to add a claim for breach of the Revenue-Sharing Provision based on Gilead's failure to pay him 1.5% of its global revenue.

After years of litigation, the parties reached a partial settlement in which they released all claims against each other except for Goldenberg's claim under the Revenue-Sharing Provision.[68] The parties conducted discovery and proceeded to trial.

II. LEGAL ANALYSIS

This case presents two main issues. The first is whether the Revenue-Sharing Provision gives Goldenberg a right to 1.5% of Gilead's annual net revenue across all of its businesses, or whether he is entitled to 1.5% of the annual net revenue

---

[67] JX 217 at 37; JX 252 at 37; JX 286 at 40.

[68] Dkt. 95; *see* Dkt. 93.

associated with the Trodelvy business. The second is the amount to which Goldenberg is entitled.

A. The Scope Of The Revenue-Sharing Provision

Goldenberg claims that the Revenue-Sharing Provision entitles him to 1.5% of Gilead's annual net revenue. He reasons that the Revenue-Sharing Provision refers to the annual net revenue of "Immunomedics" and defines that term to mean "Immunomedics and all of its direct and indirect subsidiaries or affiliates, including but not limited to IBC." Goldenberg argues that a parent company like Gilead is an affiliate of its subsidiaries, so Gilead is part of "Immunomedics" for purpose of the Revenue-Sharing Provision.

That issue presents a question of contract interpretation. The 2015 Agreement contains a choice of law provision selecting New Jersey law.[69] The parties agree that New Jersey law applies.

To prevail on a claim for breach of contract under New Jersey law, "a party must prove a valid contract between the parties, the opposing party's failure to perform a defined obligation under the contract, and the breach caused the claimant to sustained [sic] damages."[70] No one disputes that the 2015 Agreement is a valid contract. The dispute concerns the scope of the Revenue-Sharing Provision.

---

[69] 2015 Agreement § 17.

[70] *EnviroFinance Gp. LLC v. Env't Barrier Co., LLC*, 113 A.3d 775, 787 (N.J. Super. Ct. App. Div. 2015); *accord Sheet Metal Workers Int'l Ass'n Loc. Union No. 27 v. E.P. Donnelly, Inc.*, 737 F.3d 879, 900 (3d Cir. 2013) ("To prevail on a breach of

1. The Meaning Of "Affiliate" In The Revenue-Sharing Provision

Under New Jersey law, a court may consider extrinsic evidence when interpreting an agreement. According to the Supreme Court of New Jersey,

> Evidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement, even where the contract is free from ambiguity, not for the purpose of changing the writing, but to secure light by which its actual significance may be measured. Such evidence is adducible simply as a means of interpreting the writing, [ ] not for the purpose of modifying its terms, but to assist in determining the meaning of what has been said. So far as the evidence tends to show, not the sense of the writing, but an intention wholly unexpressed, it is irrelevant. We are not at liberty to introduce and effectuate some supposed unrevealed intention. The actual intent of the parties is ineffective unless made known in some way in the writing. It is not the real intent but the intent expressed or apparent in the writing that controls.[71]

---

contract claim under New Jersey law, a plaintiff must establish three elements: (1) the existence of a valid contract between the parties; (2) failure of the defendant to perform its obligations under the contract; and (3) a causal relationship between the breach and the plaintiff's alleged damages.").

[71] *Newark Publ'rs Ass'n v. Newark Typographical Union, No. 103*, 126 A.2d 348, 353 (N.J. 1956) (citations omitted); *see also Conway v. 287 Corp. Ctr. Assocs.*, 901 A.2d 341, 346 (N.J. 2006) ("[New Jersey courts] consider all of the relevant evidence that will assist in determining the intent and meaning of the contract."); *id.* at 347 ("[New Jersey courts] permit a broad use of extrinsic evidence to achieve the ultimate goal of discovering the intent of the parties."); *accord SinoMab Biosci. Ltd. v. Immunomedics, Inc.*, 2009 WL 1707891, at *13 (Del. Ch. June 16, 2009) (Strine, V.C.) ("Under the Assignment Agreement, these questions are governed by New Jersey law. This means that I must interpret the Assignment Agreement in light of the 'intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded.' Even if an agreement is clear on its face, a court applying New Jersey law must consider other evidence that may shed light on the intentions of the parties." (footnotes omitted)).

In this case, the extrinsic evidence shows that the parties intended for the Revenue-Sharing Provision to encompass the annual net revenue that the Company generated from businesses associated with Goldenberg's research, regardless of the Company's corporate structure. The Revenue-Sharing Provision was one of several forms of Additional Incentive Compensation designed to reward Goldenberg for his "past and future integral involvement in and contribution to all aspects of Immunomedics' scientific and creative activities."[72] The parties did not intend to compensate Goldenberg for businesses that an acquiror might bring to a combined company, unrelated to Goldenberg's scientific and creative activities.

The Factual Background recounts the negotiating history. The Revenue-Sharing Provision first appeared in the 1993 Agreement, where it was limited to net sales generated by "Immunomedics and all of its wholly owned subsidiaries," whether owned "directly or indirectly."[73] The original provision did not contain language that could extend to parent entities, much less to the businesses that an acquiror might bring to a business combination.

During the negotiation over the 2007 Agreement, the parties expanded the Revenue-Sharing Provision to encompass "Immunomedics and all of its direct and

---

[72] 2015 Agreement § 4.2; *see also* 2007 Agreement § 4.2; 1993 Agreement § 4.2(a).

[73] 1993 Agreement § 4.2(a), (c), (d)(ix).

indirect subsidiaries or affiliates, including but not limited to IBC."[74] It was Gilbert, the Company's lawyer, who first modified the original language. The initial draft from Zucker, Goldenberg's lawyer, had not touched it.

After reviewing Zucker's draft, Gilbert replaced "wholly owned subsidiaries" with "direct and indirect subsidiaries," intending to pick up IBC. Gilbert understood the shared business goal: in a year when the Company generated positive net income, pick up all net revenue associated with Goldenberg's research, regardless of the Company's corporate structure.

After a "page flip" meeting, Zucker added "or affiliates, including but not limited to IBC." The parties were operating on the premise that "subsidiaries" required majority ownership, and Gilbert understood from Goldenberg and Zucker that IBC might raise equity capital and dilute the Company's stake below a majority. They also discussed potential spinouts.[75] By adding "affiliates," they ensured that the definition would pick up IBC so long as the Company controlled it. By making the term general, they ensured that the Revenue-Sharing Provision would pick up any entities that the Company formed to hold other intellectual property or pursue other businesses, as long as the Company controlled them.

There is no credible evidence suggesting that the parties sought to extend the provision to an acquiror's businesses that had no connection to Goldenberg's research.

---

[74] 2007 Agreement § 4.2(d)(viii).

[75] Gilbert Tr. 606.

The only evidence supporting it was testimony from Goldenberg and Cindy Sullivan, his spouse. Each asserted that the intent was to encompass acquiror revenue so that the Revenue-Sharing Provision would operate as a defense against takeovers, but that makes little sense. The Company already had a stockholder rights plan, and the Revenue-Sharing Provision would not add anything to that already potent defense. The Revenue-Sharing Provision also would function poorly as a defensive measure, because it would give Goldenberg an economic incentive to favor an acquisition. It would also cause Goldenberg to prefer a large acquiror with lots of revenue, no matter what was best for the Company. The board minutes between 2005 and 2008 do not reflect any discussion of a takeover threat or the role of the 2007 Agreement as a defensive measure.[76] Nor do the Company's public filings.

Goldenberg testified that he generally expressed concern about takeovers at board meetings and private dinners,[77] But he could not accurately date those discussions, and his desire to link his concerns to the Revenue-Sharing Provision was not persuasive.[78] Nor is there any evidence that he expressed any takeover-related

---

[76] *See* JX 67.

[77] Goldenberg Tr. 40–41.

[78] *Id.* at 39–41 ("Q: You were asked at your deposition whether you can specifically remember the dates of any of those discussions. Are you able to do so? A: . . . I have, some things, very good memory. But I think it was so repetitive and so often that I can't think of a specific date. I remember at board meetings it came up, and one particular—and I don't remember the date—I said to [Gilbert], how do we prevent hostile takeover? And he said, well, one way is to stagger the board . . . . And

purpose for the Revenue-Sharing Provision during the negotiations over the 2007 Agreement. A court interpreting a contract considers only "objective manifestations of intent"; "a party's subjective or secret intentions" are irrelevant.[79]

To support extending the Revenue-Sharing Provision to an acquiror's business, Goldenberg points to more than twenty Company agreements that use the term "affiliate." He claims they show that the Company always gave the term "affiliate" its customary meaning and included parent entities. But the agreements vary, with some defining or using the term "affiliate" more expansively than others.[80] The

---

he said, I'll think of other ways, try to create a poison pill. And I heard the word 'poison pill' and I was hoping there is such a thing.").

[79] *See Morgan v. Pfau*, 2014 WL 6861277, at *5 (N.J. Super. Ct. App. Div. Dec. 8, 2014); *see also Friedman v. Tappan Dev. Corp.*, 126 A.2d 646, 650 (N.J. 1956) ("We seek for the intention of the parties to the writing; and to that end the symbols of expression are to have a reasonable interpretation, taken and compared together in the context of the circumstances. It is not the real intent but the intent expressed or apparent in the writing that controls."); *Morgan,* 2014 WL 6861277, at *5 ("[E]xtrinsic evidence does not include a party's subjective or secret intentions; only a party's objective manifestations of intent are relevant."); *Hagrish v. Olson*, 603 A.2d 108, 110 (N.J. Super. Ct. App. Div. 1992) ("A contracting party is bound by the apparent intention he or she outwardly manifests to the other party. It is immaterial that he or she has a different, secret intention from that outwardly manifested.").

[80] *See* JX 5 at 18; JX 10 at 22; JX 12 at 6; JX 16 at 8; JX 20 at 16; JX 21 at 1; JX 22 at 2; JX 25 at 8; JX 32 at 5; JX 33 at 1–2; JX 37 at 1; JX 38 at 7; JX 39 at 80; JX 42 at 55; JX 44 at 7; JX 45 at 5; JX 58 at 5; JX 59 at 8; JX 61 at 11; JX 68 at 47; JX 70 at 9; JX 73 at 85; JX 75 at 12; JX 76 at 71; JX 77 at 6; JX 82 at 7; JX 90 at 6; JX 115 at 69; JX 117 at 4; JX 134 at 3; JX 139 at 3; JX 140 at 10; JX 151 at 3; JX 155 at 3–4; JX 162 at 67; JX 169 at 2; JX 213 at 71–72; JX 263 at 2; JX 272 at 24; JX 283 at 2; JX 284 at 2; JX 285 at 68.

agreements do not establish a consistent pattern of including parent entities such that the Revenue-Sharing Provision could encompass the net revenue of an acquiror.

Instead, Goldenberg's actions are a persuasive source of evidence. If including "affiliates" was meant to give Goldenberg a share of the revenue of an entity who controlled the Company, then Goldenberg should have sought a share of the Fund's revenue after it gained control. He didn't. He also did not introduce his current theory until a year after the Acquisition.[81] Before then, the Company sent Goldenberg reports that contained only financial information related to the legacy Trodelvy business, not the Fund or all of Gilead. Goldenberg received and commented on those reports. No one complained that the reports were limited to the Company's legacy revenue rather than including information about revenue for the Fund's or Gilead's other businesses.[82]

The extrinsic evidence establishes that the parties intended for the Revenue-Sharing Provision to ensure that Goldenberg received a percentage of the net revenue resulting from the Company's businesses and his scientific and creative efforts, regardless of the Company's corporate structure. The provision was not intended to encompass unrelated parent-level businesses that an acquiror brought to the combined entity.

---

[81] *See* JX 478; Goldenberg Tr. 170–76.

[82] *See* JX 148; JX 149; JX 150; JX 154; JX 157; JX 165; JX 170; JX 201; JX 206; JX 207.

2. The Plain Meaning Argument

Rather than relying on contemporaneous evidence, Goldenberg argues principally that the term "affiliate" has a clear and established meaning that includes parent corporations. Goldenberg first asserted this theory in November 2021, two years after suing the Company and one year after the Acquisition closed. It has the feel of an argument that someone dreamed up after reading the Revenue-Sharing Provision cold, seeing the term "affiliate," and thinking "Hey, what if we argued that the language picked up all of Gilead's businesses? That would be a big number!"

The objective theory of contracts makes it tempting to take a flier on that type of argument. Pointing to a dictionary definition or other source of ordinary meaning can support a litigation-driven interpretation that no one would have contemplated when the contract was formed. But resorting too readily to definitions can lead to errors. "In interesting cases, meaning is not 'plain'; it must be imputed; and the choice among meanings must have a footing more solid [than] a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of [drafters]."[83]

---

[83] Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61, 67 (1994), *quoted in In re Fox Corp./Snap Inc. Section 242 Litig.*, 312 A.3d 636, 647 n.54 (Del. 2024). In the original article, Judge Easterbrook was discussing plain meaning as a tool of statutory interpretation, and the word "legislatures" appears in the quotation where this decision has substituted "drafters." This decision has taken that liberty because Judge Easterbrook's insight applies equally to plain meaning as a tool of contract interpretation, and in both scenarios, plain meaning is a tool that a court uses to derive the drafters' intent.

For contract interpretation, definitions provide an important starting point for determining meaning, but they are not the inevitable endpoint. Words appear in sentences, and "the meaning of sentences depends critically on context."[84]

> The natural habitat of words is thus a larger text; words appear in phrases, in sentences, in paragraphs, and in entire provisions. Those provisions in turn appear within still-larger texts, such as a statute or contract. When interpreting those documents, a court cannot read words in isolation; the court must construe the document as a whole.[85]

The goal of contract interpretation is to enforce the parties' shared intent, not to risk changing the agreement by picking from competing dictionary definitions.[86]

New Jersey law takes this principle seriously. The Supreme Court of New Jersey has instructed courts to enforce contracts "based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract."[87] A court must "read the document as a whole in a fair and common sense manner."[88] When doing so, the court "must consider contractual language 'in the context of the circumstances' at the time of drafting and [ ] apply a rational meaning in keeping with the expressed general purpose."[89] "In the absence

---

[84] *United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012) (Posner, J.).

[85] *In re P3 Health Gp. Hldgs., LLC*, 282 A.3d 1054, 1066 (Del. Ch. 2022).

[86] *See* Restatement (Second) of Contracts § 201 (A.L.I. 1981).

[87] *In re Cnty. of Atl.*, 166 A.3d 1112, 1121–22 (N.J. 2017) (internal quotation marks omitted).

[88] *Hardy ex rel. Dowdell v. Abdul–Matin*, 965 A.2d 1165, 1169 (N.J. 2009).

[89] *Cnty. of Atl.*, 166 A.3d at 1222 (internal quotation marks omitted).

of explicit indication of a special meaning, words will be given their ordinary and well understood meaning."[90] But New Jersey law allows "evidence of the circumstances" to determine the true meaning of the terms "even where the contract is free from ambiguity."[91]

New Jersey generally follows the Restatement (Second) of Contracts.[92] That blackletter source likewise permits a court to consider extrinsic circumstances and the parties' purpose when interpreting an agreement. Section 202 identifies the following rules in aid of interpretation:

---

[90] *In re Schedule of Rates for Barnert Mem'l Hosp.*, 455 A.2d 469, 473 (N.J. 1983).

[91] *Newark Publ'rs Ass'n*, 126 A.2d at 353; *accord Manahawkin Convalescent v. O'Neill*, 85 A.3d 947, 958 (N.J. 2014) (explaining that New Jersey law seeks to "enforce contracts based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract." (internal quotation marks omitted)); *see also Schor v. FMS Fin. Corp.*, 814 A.2d 1108, 1113 (N.J. Super. Ct. App. Div. 2002) ("A word used in a contract is not a verbal form of kryptonite, rendering powerless one who would question whether it truly expresses the intent of a transaction.").

[92] *Roach v. BM Motoring, LLC*, 155 A.3d 985, 991 n.3 (N.J. 2017) ("Our adoption of Section 241 is in line with this Court's reliance on the Second Restatement of Contracts to decide breach-of-contract claims."); *see, e.g.*, *Town of Kearny v. Disc. City of Old Bridge*, Inc., 16 A.3d 300, 316 (N.J. 2011) (following section 202(1) of the Second Restatement of Contracts on rules of contract interpretation); *Owen v. CNA Ins./Cont'l Cas. Co.*, 771 A.2d 1208, 1217–20 (2001) (following the rules of the Second Restatement of Contracts to construe non-assignment provision); *St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden*, 443 A.2d 1052, 1056–57 (N.J. 1982) (following the rules of the Second Restatement of Contracts on mutual mistake); *Tilcon New York, Inc. v. Morris Cnty. Co-op. Pricing Council*, 2014 WL 839122, at *17–19 (N.J. Super. Ct. App. Div. Mar. 5, 2014) (following the rules of the Second Restatement of Contracts on frustration of purpose).

(1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.

(2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.

(3) Unless a different intention is manifested,

    (a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning;

    (b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.

(4) Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.

(5) Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.[93]

These rules apply "to all manifestations of intention and all transactions" and "are general in character."[94] "They do not depend upon any determination that there is an

[93] Restatement (Second) of Contracts § 202 (A.L.I. 1981). The New Jersey Supreme Court has followed Section 202 when interpreting contracts. *See, e.g.*, *Town of Kearny*, 16 A.3d at 316 (citing Restatement (Second) of Contracts § 202(1) (A.L.I. 1981)).

[94] Restatement (Second) of Contracts § 202 cmt. a.

ambiguity, but are used in determining what meanings are reasonably possible as well as in choosing among possible meanings."[95]

Delaware law also permits a court to consider the surrounding context when determining plain meaning.[96] Moreover, the court previously held that the term "affiliate" was ambiguous as used in the Revenue-Sharing Provision,[97] and that ruling is law of the case.[98] Even under Delaware law, extrinsic evidence is in play. As discussed, the extrinsic evidence demonstrates that the Revenue-Sharing Provision does not extend to an acquiror's businesses.

To advance his plain language argument, Goldenberg correctly observes that the most common definitions of "affiliate" include any entity that "controls, is

---

[95] *Id.*

[96] *See Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1045 (Del. 2023) ("[A]lthough 'and' typically bears a conjunctive meaning, that presumption can be overcome by context."); *id.* at 1057 ("The Call Right Provision is identical in all three Option Agreements and should be interpreted consistently. It would be illogical to conclude that the identical Call Right Provision in the First Option Agreement, signed the day before the Second Option Agreement, by the same parties, has a different and contradictory meaning than the one in the Second and Third Option Agreements."); *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 913–14 (Del. 2017) ("In giving sensible life to a real-world contract, courts must read the specific provisions of the contract in light of the entire contract.").

[97] Dkt. 93.

[98] *May v. Bigmar, Inc.*¸ 838 A.2d 285, 288 n.8 (Del. Ch. 2003) ("The 'law of the case' doctrine requires that issues already decided by the same court should be adopted without relitigation, and 'once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears.'"), *aff'd*, 854 A.2d 1158 (Del. 2004).

controlled by, or under common control with" the entity in question.[99] The most common definitions therefore would include parent-level entities. By making this argument, however, Goldenberg seeks to have the meaning of the Revenue-Sharing Provision turn on the customary definition of a single word.

Candidly, there might be settings where it would make sense to read the Revenue-Sharing Provision to encompass a parent-level entity. Assume the Company reorganized by adding a new parent-level entity but without a buyer bringing its own businesses to the table through an acquisition. A corporation might do that for many reasons. It might be part of a standalone recapitalization that added the top level entity so that new investors could buy into a clean corporation. Or the new topco might offer a means to domesticate in a new jurisdiction. Or there could be business reasons to restructure. Perhaps if IBC had taken off, it would have made sense for Goldenberg to have reorganized so that IBC would be the topco and the Company as a wholly owned subsidiary.

A reorganization like that could create interpretive problems under the Revenue-Sharing Provision. Envision that the consolidated entity generates some of its net revenue at the new topco level, but the revenue is attributable to Goldenberg's research. If a fight ensued over whether the Revenue-Sharing Provision extended to net revenue generated at the topco level, it could make sense to interpret the term

[99] Dkt. 275 at 6–10 [hereinafter Opening Br.] (citing definitions of "affiliate" in Black's Law Dictionary, SEC regulation, American Institute of Certified Public Accountants standard, and GAAP).

"affiliate" to extend to the new parent.[100] That result would fall squarely within what the parties intended for the Revenue-Sharing Provision to capture.

Thinking more broadly about the term "affiliate" suggests settings where Gilead could be treated as an affiliate of the Company. If a regulator had jurisdiction over the Company and its affiliates, it would be hard to envision Gilead successfully arguing that it was beyond the regulator's jurisdiction.[101] The Employment Agreement also built the concept of "affiliate" into Goldenberg's restrictive covenants. It might be possible to treat Gilead as an affiliate for purposes of those provisions.

These examples underscore why the term "affiliate" is ambiguous when used in the Revenue-Sharing Provision. "The objective of interpretation in the general law of contracts is to carry out the understanding of the parties rather than to impose obligations on them contrary to their understanding . . . . Ordinarily, therefore, the mutual understanding of the parties prevails even where the contractual term has

---

[100] That scenario is not too farfetched. In 2017, Goldenberg lost control of the Company to the Fund. If the Fund and Goldenberg had not settled their disputes, and if the Settlement had not reaffirmed the term of the 2015 Agreement, then the Fund might have sought to put pressure on Goldenberg by engaging in some form of reorganization and reshuffling the Company's businesses. A topco reorganization also could result from a take-private, and a new buyer who wanted to get rid of old management might terminate a CEO and then challenge the scope of his entitlement under a provision like the Revenue-Sharing Provision.

[101] *See, e.g.*, 17 C.F.R. § 240.12b-2 ("An 'affiliate' of, or a person 'affiliated' with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.").

been defined differently by statute or administrative regulation."[102] The extrinsic evidence demonstrates why stretching the term to encompass Gilead's revenues is contrary to the parties' agreement, while reading the term to encompass a topco reorganization would be consistent with the parties' agreement, and why a regulatory could readily treat Gilead as the Company's affiliate for securities law purposes.

The customary definitions of "affiliate" cannot support a reading of the Revenue-Sharing Provision that gives Goldenberg a share of the net revenue from all of Gilead's far flung businesses simply because Gilead acquired the Company. Just as Congress does not "hide elephants in mouseholes,"[103] negotiators do not document major economic points by adding a single generic word to a definition with no other manifestations of intent. Goldenberg wants $365 million based solely on the customary definition of a term that his lawyer added in a belt-and-suspenders effort to pick up controlled but less-than-majority-owned subsidiaries. That reading contradicts the contract when read as a whole and the weight of the extrinsic evidence.

Goldenberg claims that the court would be rewriting the parties' agreement if it did anything other than adopt his interpretation. Hardly. Goldenberg—not the court—is trying to rewrite the parties' agreement.

---

[102] Restatement (Second) of Contracts § 201 cmt. c (A.L.I. 1981).

[103] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

3. The Scope Of The Revenue-Sharing Provision

Goldenberg failed to prove that the Revenue-Sharing Provision gives him a right to a share of Gilead's aggregate net revenue from all of its businesses. The Revenue-Sharing Provision only entitles Goldenberg to a share of the net revenue from businesses based on his scientific and creative research. Here, that means the Trodelvy business.

B. How Much?

The next issue is how much Goldenberg gets. Goldenberg failed to prove that the Trodelvy business generated positive net income in any year during the Covered Period. Instead, the Company proved that the Trodelvy business incurred net losses throughout the Covered Period. Goldenberg is therefore not entitled to any recovery.

1. The Revenue-Sharing Provision's Requirements

The parties agree that the legacy Company's business and the Trodelvy business are the same. For Goldenberg to receive a payment under the Revenue-Sharing Provision, the Trodelvy business must have generated positive net income, determined in accordance with GAAP, using audited figures. The relevant language of the Revenue-Sharing Provision states:

> With respect to any fiscal year during the Term of the Agreement in which Immunomedics records positive net income (determined by Immunomedics in a manner consistent with GAAP) for the entire fiscal year as audited by Immunomedics' independent registered public accounting firm, Immunomedics will pay to Dr. Goldenberg a sum equal

> to one and one-half percent (1.5%) of Immunomedics' Annual Net Revenue (as defined in Section 4.2(d)) for each such fiscal year . . . .[104]

The Net Income Condition thus contemplates that net income is "determined by Immunomedics in a manner consistent with GAAP" and "as audited by Immunomedics' independent registered public accounting firm."

2. The Alleged Breach Due To A Lack Of Audited Figures

Goldenberg contends that the Company breached the Revenue-Sharing Provision because Gilead stopped preparing audited financial statements for the Company and did not otherwise provide audited figures. Whether that failure can support a claim for breach depends on whether the Revenue-Sharing Provision treats the existence of audited figures as a covenant or a condition.

"A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."[105] Under New Jersey law,

> The parties may make contractual liability dependent upon the performance of a condition precedent . . . . There is a fundamental distinction between a condition and a covenant. A condition in a promise limits the undertaking of the promisor to perform, either by confining

[104] 2015 Agreement § 4.2(a)(i).

[105] Restatement (Second) of Contracts § 224 (A.L.I. 1981); *accord Roche v. Aetna*, Inc., 2023 WL 8231738, at *3 (N.J. Super. Ct. App. Div. Nov. 28, 2023) ("A condition precedent is an event that must happen before a contractual right accrues or a contractual duty arises."), *cert. denied*, 310 A.3d 7 (N.J. 2024).

> the undertaking to the case where the condition happens, or to the case where it does not happen.[106]

"Generally, no liability can arise on a promise subject to a condition precedent until the condition is met."[107] But "[a] non-occurrence of a condition is not a breach unless a party is under a duty to maintain the condition."[108]

To support his claim for breach, Goldenberg points to the language in the Revenue-Sharing Provision stating that the Company must have "positive net income . . . as audited by Immunomedics' independent registered public accounting firm." He interprets that language as a covenant that requires the Company to have an independent registered public accounting firm audit its figures.

That interpretation is not persuasive. The language about audited figures lacks any signals of mandative language, such as "must," "shall," or "be required to." Instead, the language is part of the Net Income Condition, which starts with the

---

[106] *Duff v. Trenton Beverage Co.*, 73 A.2d 578, 604–05 (N.J. 1950) (citing Restatement (First) of Contracts §§ 295, 301 (A.L.I. 1932)) (other citations omitted); *accord Thompson St. Cap. P'rs IV, L.P. v. Sonova U.S. Hearing Instruments, LLC*, 340 A.3d 1151, 1167 (Del. 2025) ("A condition precedent is 'an act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises.'" (citing Restatement (Second) of Contracts § 224 (A.L.I. 1981)).

[107] *Duff*, 73 A.2d at 604; *accord* Restatement (Second) of Contracts § 225(1) (A.L.I. 1981) ("Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.").

[108] *Joan Frances Luciano Irrevocable Tr. v. Waste Mgmt., Inc.*, 2018 WL 3863611, *4, 8 (N.J. Super. Ct. App. Div. Aug. 15, 2018) (affirming unreported trial court decision that relies on the quoted proposition); *accord* Restatement (Second) of Contracts § 225(3) (A.L.I. 1981) ("Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.").

phrase "[w]ith respect to any fiscal year during the Term of the Agreement in which." That is a wordy way of saying "if" or "provided that," which are more customary introductory words for conditions.[109] Using "if," the drafters might have said:

> *If* Immunomedics records positive net income for any fiscal year during the Term of the Agreement (determined by Immunomedics in a manner consistent with GAAP) for the entire fiscal year as audited by Immunomedics' independent registered public accounting firm, *then* the Company will pay Goldenberg 1.5% of the Annual Net Revenue.

The "if . . . then" structure makes the condition all the more clear. The Revenue-Sharing Provision uses more words to create the same conditional obligation.

The language about audited figures is thus part of a condition precedent that turns on the presence of positive net income. The obligation to pay Goldenberg a percentage of Annual Net Revenue only arises if there is "positive net income (determined by Immunomedics in a manner consistent with GAAP) for the entire fiscal year as audited by Immunomedics' independent registered public accounting firm." Having audited figures is thus not a covenant the Company can breach.

The bigger question is whether the Net Income Condition fails due to the lack of audited figures. Under one interpretation, the Net Income Condition fails as a whole, meaning that Goldenberg is entitled to a payment under the Revenue-Sharing Provision regardless of whether the Trodelvy business generated positive net income

---

[109] *See* Restatement (Second) of Contracts § 226 cmt. a (A.L.I. 1981) ("No particular form of language is necessary to make an event a condition, although such words as 'on condition that,' 'provided that' and 'if' are often used for this purpose. An intention to make a duty conditional may be manifested by the general nature of an agreement, as well as by specific language.").

during the Covered Period. That reading treats the Net Income Condition as containing a series of requirements: (1) positive net income, (2) determined in accordance with GAAP, and (3) audited figures. Failing to meet any one of the three conditions causes the Net Income Condition to fail entirely.

Under a different interpretation, Gilead's failure to provide audited figures has a more limited consequence. It means Gilead cannot use the lack of audited figures to defeat Goldenberg's right to payment, but it does not eliminate the net-income requirement. Goldenberg still must show that the Trodelvy business generated positive net income, but he can make his case using any available and admissible evidence.

While others may think the answer springs readily from the page, I find this question difficult. From a policy perspective, it raises issues comparable to the problem of forfeiture and the concept of total breach. The common-law rule against forfeitures seeks to avoid disproportionate consequences (i.e., forfeitures) based on non-prejudicial failures to comply strictly with contractual terms. The common law concept of total breach likewise inherently recognizes that some breaches are not sufficiently significant to give rise to a full damages award. Here, too, forfeiting Gilead's ability to rely on the Net Income Condition seems disproportionate to failing to provide audited figures.

From a strictly textual standpoint, the total-failure interpretation is powerful. But it also equates a core business term—the existence of positive net income—with two requirements designed to enhance the accuracy of the determination. Having audited figures that are prepared in accordance with GAAP is not an end in its own right. It is a means to enable the net-income question to be answered reliably.

Moreover, the concept of having audited figures prepared in accordance with GAAP was added to protect the Company. It was not added to protect Goldenberg. During the negotiations over the 2007 Agreement, Gilbert added the language.[110] Goldenberg's lawyer, Zucker, had removed all language contemplating GAAP compliance and audited figures.[111] Gilbert restored those requirements..[112] He testified persuasively that he insisted on those requirements because the Company's chairman wanted to make sure the Company was profitable before it incurred any obligation to Goldenberg.[113] At the time, Goldenberg's spouse was the Company's CEO and President, and Goldenberg was the Company's Chief Scientific Officer. As senior officers, they were responsible for the Company's financial statements. Preparing financial statements requires judgment. Without impugning the officers' honesty in any way, both the Company's chairman and Gilbert could legitimately

---

[110] *See* JX 50 at 1, 10; *cf.* 1993 Agreement § 4.2(a)(i); 2007 Agreement § 4.2(a)(i), (d)(i).

[111] *See* JX 48 at 1, 3, 20; *cf.* 1993 Agreement § 4.2(a)(i).

[112] *See* JX 48 at 1, 4, 23; JX 51 at 1, 14–15; JX 50 at 1, 12–13; JX 52 at 1, 12–13; *cf.* 1993 Agreement § 4.2(d)(ii); 2007 Agreement § 4.2(d)(i).

[113] Gilbert Tr. 566–67.

want the safeguard of audited figures and GAAP compliance.[114] Gilbert also testified credibly that no one discussed a scenario where audited financial statements would not be available given the Company's listed status.[115]

In light of that background, to cause the Net Income Condition to fail because the Company did not prepare audited figures would turn the Company's shield into Goldenberg's sword. That consequence seems particularly disproportionate because the Company proved at trial that Gilead's internal records provide a sufficiently reliable basis to establish whether the Trodelvy business generated positive net income determined in accordance with GAAP. After the Acquisition, Gilead integrated the Company's legacy business into its internal financial systems. Gilead retained the ability to track the performance of the Company's legacy business because Trodelvy was the Company's only product. Gilead prepared consolidated financial statements that included results from the Trodelvy business, and Gilead's independent auditor signed off on the consolidated statements. Through discovery in this case, the parties had a full and fair opportunity to litigate whether the Trodelvy business generated positive net income determined in a manner consistent with GAAP.

---

[114] Gilbert Tr. 566 ("We wanted to ensure basically it was the final numbers for the year and not management prepared.").

[115] Gilbert Tr. 566–67 ("Q: Were you proposing here by this language 'as audited' that the company have an independent obligation under this employment agreement to provide audited financials to Dr. Goldenberg? A: The company was publicly traded, so it frankly wasn't a question that was addressed.").

New Jersey law stresses that courts should enforce the parties' shared intent in light of the purpose of their agreement:

> As a general rule, courts should enforce contracts as the parties intended. Similarly, it is a basic rule of contractual interpretation that a court must discern and implement the common intention of the parties. The court's role is to consider what is written in the context of the circumstances at the time of drafting and to apply a rational meaning in keeping with the "expressed general purpose." That is the backdrop of our inquiry.[116]

In this case, the parties' shared intent was clear: Goldenberg should receive 1.5% of Annual Net Revenue only if businesses associated with his scientific and creative efforts generated positive net income, calculated in accordance with GAAP, during that fiscal year. Having audited figures was not essential to that condition.

This shared understanding finds support in the removal of any mention of required reporting from the definition of Annual Net Revenue. It also finds support in Goldenberg's informational rights. The 2015 Agreement required that the Company provide quarterly and annual reports on Goldenberg's Additional Incentive Compensation. The quarterly reports could be based on unaudited financial figures, and the annual report had to be "based on audited financials."[117] If Goldenberg disagreed with the calculation, he could seek other documents from the Company that "Goldenberg deems reasonably necessary" to test the Company's "compliance with its

---

[116] *Pacifico v. Pacifico*, 920 A.2d 73, 77 (N.J. 2007) (citations omitted).

[117] 2015 Agreement § 4.2(f); *accord* 2007 Agreement § 4.2(f).

obligations."[118] The 2015 Agreement thus did not stop at audited figures. It envisioned that the parties could go beyond the audited figures and use other evidence to test the Company's compliance.

Thus, the Net Income Condition remains in play. Before Goldenberg can recover a payment, the Company must have positive net income, determined in accordance with GAAP.

3. The Alleged Payment Breach

Goldenberg contends that the Company breached the Revenue-Sharing Provision by failing to pay him $23.5 million, which he contends reflects 1.5% of the Annual Net Revenue generated by the Trodelvy business during the Covered Period. Goldenberg failed to prove that he is entitled to a payment. Instead, the Company proved that Goldenberg is not entitled to anything because the Trodelvy business did not generate positive net income in any fiscal year.

Ladd Howe, a financial analyst, and Todd Wolpert, a former Ernst & Young audit partner and current Assistant Controller at Gilead, testified credibly about how they had prepared financial statements for the Trodelvy business, independent of this litigation, so that Gilead's audit chair could evaluate Trodelvy's profitability. Howe explained that he extracted the Trodelvy-coded revenue and costs from Gilead's general ledger. When Trodelvy coding was not available or applicable for a specific subset of the general ledger entries, Howe applied reasonable allocation methods.

---

[118] 2015 Agreement § 4.2(f); *accord* 2007 Agreement § 4.2(f).

Wolpert then made adjustments to make the financial statements consistent with GAAP. For this litigation, Howe and Wolpert updated the Trodelvy financial statements using the same approach.

The testimony from Howe and Wolpert and their underlying work showed that when determined in accordance with GAAP, the Trodelvy business generated negative net income during the Covered Period. Howe and Wolpert's accounting shows that Trodelvy losses totaled $378 million in 2020, $1.36 billion in 2021, $4.2 billion in 2022, and $1.3 billion in 2023.[119]

Goldenberg disputes that conclusion. His challenges fall into three buckets: operating expenses, synergies, and purchase price accounting.

For the Company to have generated net income sufficient to support a payment under the Revenue-Sharing Provision, Goldenberg had to prevail on all three challenges. The Company proved that it properly accounted for operating expenses and properly declined to include the disputed synergies. The Company's accounting in those two categories means that the Trodelvy business did not generate positive net income. This decision therefore does not reach the more difficult issue of purchase price accounting.

[119] *See* JX 385 at 40–41 tbls. 2, 3, 4.

a. Operating Expenses

Goldenberg challenges a series of operating expenses that Gilead allocated to the Trodelvy business during the Covered Period. Each objections falls short. Gilead properly accounted for operating expenses associated with the Trodelvy business.

i. The Discovery Theory

For some of the operating expenses, Goldenberg asks the court to find in his favor because the Company refused to provide responsive discovery.[120] That argument is not persuasive.

During discovery, Goldenberg moved to compel the production of information from Gilead's general ledger. The court ordered Gilead to produce "the types of documents that would be provided to an executive, high level internal auditor, or external auditor who was trying to answer the cost issue."[121] The order stated that "if Gilead fails to comply, then Goldenberg can seek sanctions" including "deeming facts established in Goldenberg's favor."[122]

Goldenberg claims that the Company and Gilead failed to comply with the court's order, warranting rulings in Goldenberg's favor. Shortly after the order, the Company and Gilead produced all of the Trodelvy-related data in Gilead's general ledger, plus contemporaneous internal analyses of the Trodelvy business. The

---

[120] Opening Br. 53.

[121] Dkt. 152.

[122] *Id.*

Company complied with the court's order. Goldenberg's discovery-based argument thus does not carry the day.

ii. The Inventory Reserve

Goldenberg challenges an inventory reserve of $76 million in 2021 plus an aggregate inventory reserve of nearly $17 million for 2022 and the first half of 2023 put together.[123] Goldenberg argues that Gilead failed to explain the inventory reserves and that the size of the 2021 number alone makes the reserves inherently suspect.[124] Contrary to Goldenberg's claim, Gilead proved the legitimacy of the reserves. Gilead's head of program finance for the Trodelvy business, Mubasher Cheema, testified credibly that the 2021 inventory reserve accounted for bad batches of Trodelvy from a third-party contractor.[125] Contemporaneous internal documents corroborate his account.[126] Goldenberg complains that Cheema did not offer lab-level details,[127] but that level of support is not required. The 2015 Agreement does not give Goldenberg the right to dictate how the business or the labs should be run. It suffices to show that the accounting entries were real. The Company proved that it properly accounted for the full $93 million inventory reserve in accordance with GAAP

---

[123] JX 384 at 44–45; Lewis Tr. 684–87.

[124] Lewis Tr. 686.

[125] Cheema Tr. 446–47, 460–64.

[126] JX 214 at 11; JX 228 at 8; JX 245 at 10.

[127] *See* Cheema Tr. 460–64.

iii. COGS Expense

Goldenberg next argues that the Company unduly inflated its 2021 COGS expense by $200 million. That is part of a general challenge in Goldenberg's brief to $400 million in manufacturing-related expenses for 2021.[128] Both numbers in Goldenberg's brief deviate from his expert's report; the real numbers from the expert report are $144 million in challenged COGS expense, $102 million in challenged pharmaceutical development expense, and $93 million in inventory reserves, totaling $339 million for the entire Covered Period (not just 2021).[129] To get to the higher number, Goldenberg's brief mistakenly combines three years' worth of expenses into

[128] *See* Opening Br. 51 ("In 2021, Defendant contends that the costs of goods sold attributable to Trodelvy® more than doubled on a per-vial basis, from $250 per vial pre-acquisition to more than $550 per vial in 2021, resulting in more than $400 million of alleged costs, including (1) more than $200 million in increased COGS, (2) more than $100 million in increased R&D pharmaceutical development costs, and (3) nearly $100 million in inventory reserves").

[129] *See* JX 384 at 34–47 (Goldenberg's expert analyzing COGS and inventory reserve); *id.* at 110 (showing math). To calculate what the Company allegedly overcharged in terms of the COGS expense, Goldenberg's expert started with the Company's COGS expenses of $154 million in 2021, $204 million in 2022, and $103 million for the first half of 2023. JX 384 at 110. He then made adjustments. Excluding adjustments related to inventory reserve, his adjusted COGS expenses are $128 (= $154 − $59 + $33) million in 2021, $132 (= $204 − $62 − $10) million in 2022, and $57 (= $103 − $47 + $1) million in the first half of 2023. *See* JX 384 at 110. Subtracting his adjusted cost from the Company's COGS number yields the difference between what the Company claims to be the COGS expense and what Goldenberg's expert claims to be the COGS expense. The differences are $26 million in 2021, $72 million in 2022, and $46 million in 2023. *See id.* This in turn aggregates to what Goldenberg's expert claims to be $144 million in *total* increased COGS expense for the Covered Period, not just 2021.

one and double counts the inventory reserves.[130] The previous section addressed the inventory reserves. This section addresses the COGS expense. The next section addresses the pharmaceutical development expense.

The $144 million in the challenged COGS expense reflects the extra costs to manufacture Trodelvy that Goldenberg's expert considers to be illegitimate. That contention is not persuasive.

After Gilead acquired the Company, Gilead took steps to standardize and scale up the manufacturing process, resulting in the manufacturing cost increasing sharply in 2021 to $551 per vial, then decreasing significantly over the next two years. Before the Acquisition, Gilead prepared a projection that estimated the 2021 manufacturing

---

[130] Goldenberg's expert uses fully adjusted COGS expense of $52 million in 2021, $115 million in 2022, and $57 million in the first half of 2023. That represents a delta between his fully adjusted COGS expense—*which counts the inventory reserve*—and Company's figures, which were $102 million for 2021, $89 million for 2022, and $46 million for the first half of 2023. Aggregating all three years yields $237 million, which approximates the purported figure of $200 million in Goldenberg's brief that he portrays as the unduly increased 2021 COGS expense. *See* JX 384 at 110. Adding that to the $102 million pharmaceutical development costs and the $93 million inventory reserve approximates Goldenberg's purported $400 million in inflated manufacturing-related expenses.

Notably, the calculation in the brief counts all three years and the inventory reserve twice. To demonstrate, start with the fully adjusted COGS expense that Goldenberg's expert used for 2021, which is $52 million. That amount equals $154 million (Gilead general ledger Trodelvy COGS) − $59 million (expert's cost adjustment) + $33 million (expert's revaluation amortization reduction) − $76 million (expert's inventory reserve adjustment). *See* JX 384 at 39–43, 110. Te COGS expense calculation thus counts the inventory reserves. But the purported $400 million figure in Goldenberg's brief includes the inventory reserve already. Counting the inventory reserve *twice* is thus necessary to bridge from the expert's COGS expense to Goldenberg's assertion. *See* JX 384 at 39–43, 110.

cost at $251 per vial.[131] Goldenberg's expert took that projection as gospel truth and proposed to eliminate all of the cost increase exceeding that amount, resulting in a net reduction of $144 million in total COGS expense for the Covered Period.[132]

Goldenberg's expert did not justify that adjustment. He based the adjustment on the difference between projected and actual cost, which is an unreliable move. Gilead produced a presentation deck showing five projections of the future per-vial cost, with each projection prepared at a different times around the Acquisition. Each anticipated a significant front-loaded investment in the manufacturing process that would decrease over future years.[133] The existence of multiple projections, all of which anticipated near-term investment, broadly supports the legitimacy of the expenses in the Covered Period. The actual costs turned out higher than some projections and

---

[131] JX 384 at 39 (citing JX 199 at 2).

[132] Goldenberg's expert concluded that the per-vial cost was inflated by $300 (= $551 – $251). He then inferred that the entire COGS expense must have been inflated by the same percentage, which is 54% (= $300 ÷ $551). To generate his adjusted COGS expense, the expert simply removed 54% of each COGS entry in the general ledger. For example, for 2021, he adjusted the booked standard cost downward by $59 million, then offset that downward adjustment by $33 million in amortization. That calculation resulted in a net reduction of $26 million in 2021 COGS expense. *See* JX 384 at 39–44, 110. Doing that for all expense across all years yielded his aggregate adjustment of $144 million. *See* JX 384 at 110. The Company's expert persuasively explained why this crude methodology is not reliable. *See* JX 413 at 18–19.

[133] *See* JX 199 at 2.

lower than others, which also supports their reasonableness. Without justification, Goldenberg's expert picked the projection most conducive to his client's position.[134]

Beyond starting from a cherry-picked projection, the method used by Goldenberg's expert does not comply with GAAP. Under GAAP, the net income for the Trodelvy business must be determined using actual costs, not projected costs.[135] The increased costs were actual costs. At trial, Gilead witnesses testified convincingly about the need for the manufacturing ramp-up and the expenses incurred.

Goldenberg objects to the ramp-up as unfair, but he did not have the right under the Revenue-Sharing Provision to demand that Gilead continue to operate the business as he ran it before the Acquisition. Gilead paid roughly $21 billion for a business that had never generated a profit because Gilead planned to invest in and develop Trodelvy into a highly profitable drug. Through the deal price, Goldenberg received consideration for his equity that incorporated those expectations. He cannot now complain that Gilead acted to turn those expectations into reality.

Goldenberg also cannot fairly claim that he should be compensated under the Revenue-Sharing Provision as if Gilead never made those investments. The 2015 Agreement does not contemplate an imaginary stand-alone firm, and for Goldenberg to keep the full consideration he received for his equity *and* get paid under the

---

[134] At trial, Goldenberg's expert was not able to explain why he picked one projection over another. *See* Lewis Tr. 717–22.

[135] *See* JX 413 at 17.

Revenue-Sharing Provision as if Gilead had not invested in the Trodelvy business would be double dipping. Once the Company was sold, Gilead could make changes to its business. Goldenberg retained his rights under the 2015 Agreement, but his right to compensation under the Revenue-Sharing Provision depended on how Gilead ran the business, not on how Goldenberg might wish it had been run.

The Company proved that it properly accounted for the full COGS expense in accordance with GAAP.

iv. Reduced Pharmaceutical Development Costs

Goldenberg also challenges about $100 million in pharmaceutical development costs for 2021.[136] The number in Goldenberg's brief is again wrong; the real number from his expert's report is $57 million for 2021.[137] The figure for the entire Covered Period is $102 million.[138] Setting aside the error, the amount reflects costs Gilead spent to manufacture Trodelvy vials used for clinical trials.[139] Goldenberg's expert simply proposed to reduce the amount in parallel with his reduction in COGS expense.

[136] Opening Br. 51.

[137] The figures from Gilead's general ledger are $105 million in 2021, $87 million in 2022, and $13 million in first half of 2023. Goldenberg's expert proposed an adjusted 2021 number of $48 million. The difference between Gilead's and Goldenberg's 2021 number is $57 million. *See* JX 384 at 61. Likewise, the differences are $39 million in 2022 and $6 million in the first half of 2023. *Id.* Aggregating the differences for the entire Covered Period yields $102 (=$57 + $39 + $6) million.

[138] *See id.*

[139] JX 384 at 61–62.

This decision has rejected the COGS adjustment. It similarly rejects the same adjustment to pharmaceutical development costs.[140]

The Company proved that it properly accounted for pharmaceutical development costs in accordance with GAAP.

v. Sales and Marketing Expense

Gilead's general ledger reflects $552 million in Trodelvy-related sales and marketing expenses during the Covered Period. Goldeberg disputes them.[141]

Goldenberg first objects generally to any increase in Trodelvy-related sales and marketing costs beyond what the legacy Company would have spent. Goldenberg accepts the accuracy of the figures, but argues that the costs were unnecessary. As Goldenberg sees it, he should not have to bear any sales and marketing expense beyond what the legacy Company would have incurred without the Acquisition. He thinks the Trodelvy business would have generated the same revenue without expanded sales and marketing efforts.[142]

---

[140] *Id.*

[141] *See* JX 384 at 139. This figure excludes the charge of $406 million for terminating the Everest agreement. Technically, that charge was part of a total sales and marketing expense of $958 million. *See id.* This decision addresses the Everest charge in the next section.

[142] *See* Opening Br. 52 ("Gilead nevertheless incurred the costs of a massive S&M expansion not to sell more Trodelvy®, but rather for the purpose of 'driving Gilead's vision" to be "seen as a true oncology company.'" (citing Cornett Tr. 518–19)); JX 384 at 66 ("It is not clear that the expansion in the sales force planned by Gilead was necessary.").

As discussed in a prior section, Goldenberg did not have the right under the Revenue-Sharing Provision to demand that Gilead continue to operate the business as it was run before the Acquisition and defer investing in growth. Goldenberg quibbles about whether any dollar amount spent beyond the pre-Acquisition level was necessary, but the record does not support an inference that Gilead incurred excessive expenses in bad faith in an effort to avoid making a payment to Goldenberg. Gilead established that it made rational—even reasonable—decisions about the sales and marketing spending that would grow the business.[143]

Goldenberg also challenges $318 million in sales and marketing expense that was coded as "Shared_TA" in Gilead's general ledger, with "TA" meaning "therapeutic area."[144] Goldenberg contends that this coding shows that Gilead commingled

---

[143] *See* Stockalper Tr. 517, 534 ("Q: So when the sales force was 50 reps [which was the pre-Acquisition number], in your view, do you think you could have reached the same number of healthcare providers? [Gilead's Executive director of U.S. marketing for Trodelvy in breast cancer indications] A: I don't know the math on that. I think we could have reached them. I think that the critical piece is the frequency. Part of breast cancer is it's a very competitive, very active space, and frequency matters. So it's not only getting in there, but it's getting in there—how frequently you get in there. And these community physicians, they treat across a lot of different types of cancers. It's hard for them to keep up with the latest. So it's really critical that our sales reps are in there making sure that they're providing that level of support."). Goldenberg selectively quotes this testimony from Gilead's executive director for the Trodelvy marketing effort to argue that the pre-Acquisition number of sales representative was sufficient to achieve the post-Acquisition results. Opening Br. 53. That is not a fair reading of the testimony. She said only that they might have reached the same number of doctors, not that they could have achieved the same number of visits or produced the same results.

[144] *See* JX 384 at 64–65; JX 338.

expenses from other businesses with the Trodelvy business. At trial, Gilead witnesses disproved that theory. Howe testified credibly that these costs were coded for Trodelvy and were properly included.[145] Consistent with that testimony, each allegedly comingled charge was coded "Trodelvy (PR_TRODELVY)" in a separate column of the spreadsheet.[146]

Goldenberg nevertheless argues that 99 out of 103 entries in the "Shared_TA" category share "exact name and account number" with expense entries that are coded "TDY_TA" and "Products (PR_PRODUCTS)."[147] Goldenberg argues that the identical entries suggest duplication and undermine the reliability of Gilead's records. That objection is not persuasive. Each entry has unique accounting details.[148] It is also not problematic for an entity's books to have shared account names and account numbers for different categories.[149] Goldenberg's expert admitted that this shared coding was "not surprising."[150]

The Company proved that it properly accounted for sales and marketing costs in accordance with GAAP.

---

[145] Howe Tr. 307–09.

[146] *See* JX 338.

[147] *See* JX 384 at 27; JX 338.

[148] *See* JX 413 at 23; JX 338.

[149] *See* JX 413 at 22–23.

[150] Lewis Tr. 759.

vi. The Everest Agreement

Goldenberg objects to a $406 million expense associated with Gilead's termination of a pre-Acquisition license agreement that authorized Everest to commercialize Trodelvy in major Asian markets. Goldenberg seeks to exclude the charge because (1) the Company would not have terminated the agreement as a standalone company and (2) the termination reduced Goldenberg's entitlement to right to lifetime patent royalties. Neither objection justifies removing the charge.

As with other expenses that Gilead incurred, Gilead paid for the right to decide whether to terminate the Everest contract when it acquired the Company. The compensation Goldenberg received for his shares necessarily incorporated the benefits Gilead expected to generate. Goldenberg has no right to get paid twice, once in the form of consideration for his equity that incorporates the value of Gilead's expectations, and a second time in the form of a hypothetical standalone Company that excludes Gilead's investments.

In light of its global ambition for Trodelvy, Gilead established that it made a rational—even reasonable—business decision to terminate the Everest agreement. The fact that Gilead's termination decision reduced Goldenberg's compensation under both the Revenue-Sharing Provision and a provision addressing lifetime patent royalties does not warrant excluding the charge. After it bought the Company, Gilead could operate the business as it saw fit, irrespective of the impact on Goldenberg's compensation under the 2015 Agreement.

vii. Internal Research And Development

Goldenberg objects to Gilead allocating $468 million to the Trodelvy business for internal research and development costs.[151] Goldenberg contends that the cost should be excluded because the legacy business would not have incurred it. That is not a valid argument. As already discussed, Goldenberg does not have a contractual right here to second guess Gilead's business decision.

Goldenberg also argues that the Company's general ledger does not support its internal R&D number. Before mid-2023, internal Gilead R&D employees did not consistently code their time to particular products or projects. Gilead nevertheless incurred internal R&D costs by allocating employees to support Trodelvy clinical trials. Their salaries were real costs that the business otherwise would incur. GAAP requires their inclusion.

To address that issue, Gilead used a proportional allocation methodology where it first determined the ratio between Gilead-wide internal and external R&D costs in the general ledger, then used that same ratio to allocate Trodelvy's share of total internal R&D costs based on the recorded external R&D costs attributable to

---

[151] *See* JX 384 at 63 ("Gilead, with its significant profits and desire to establish itself in the oncology market, chose to accelerate R&D. As a result, a large portion of these expenses could have been delayed to future years in which profits were available to fund them."); *id.* at 114. Goldenberg's expert objects to a total of $626 million in R&D-coded expenses, but that number includes the $102 million in pharmaceutical manufacturing costs, which this decision has addressed in a prior section. This section addresses the remaining $468 million.

Trodelvy.[152] That was the same method that Gilead has used for other products and for internal valuation of the Trodelvy business in the ordinary course.[153] The Company's expert persuasively demonstrated that the method is common, reasonable, and GAAP compliant.[154]

Goldenberg complains that Gilead never tested or audited its method, but Gilead's witnesses explained its use. Gilead's expert also tried alternative allocation methodologies, and those methods resulted in the Trodelvy business bearing higher costs.

Goldenberg failed to prove that the method was contrary to GAAP. Goldenberg did not persuasively challenge the internal R&D expense allocation.

viii. Stock-Based Compensation

Last, Goldenberg disputes Gilead's allocation of $122 million in stock-based compensation expense to the Trodelvy business.[155] To allocate that expense, Gilead first determined how much stock-based compensation expense it incurred across its major cost categories (e.g., COGS, S&M, R&D, and G&A) company-wide. Gilead then determined what percent of total costs within each category were attributable to

---

[152] *See* JX 385 at 27.

[153] *See* Howe Tr. 305–14; JX 385 at 27 n.132; *see, e.g.*, JX 258; JX 319; 338.

[154] *See* JX 385 at 25–27; JX 413 at 25–30.

[155] *See* JX 384 at 73–74, 101.

Trodelvy and used those percentages to allocate stock-based compensation expense to the Trodelvy business.

Goldenberg challenges the legitimacy of the stock-based compensation expense, but the Company incurred that expense when operating independently. He also disputes the allocation methodology, but Gilead used a reasonable approach that was consistent with GAAP.[156] Goldenberg failed to prove that the method was contrary to GAAP or otherwise violated the Revenue-Sharing Provision.

b. Synergies

Shifting from operating expenses to synergies, Goldenberg argues that Gilead generated $1 billion in synergies from the Acquisition and that a share of those synergies must be used to offset some of the expenses associated with the Trodelvy business. Goldenberg bases his contention on nothing other than a comment about synergies that appears in a financial projection in an internal analysis.[157] The trial record showed that the actual synergies consisted primarily of cost savings that were already reflected in the financial data for the Trodelvy business.[158] Without them, the Trodelvy-associated costs would have been higher. The synergies referenced in the financial projection also envisioned a potential oncology franchise that can extend

---

[156] *See* JX 385 at 36.

[157] *See* JX 258 at 8; Howe Tr. 355.

[158] *See* Howe Tr. 350–51; 368.

beyond Trodelvy.[159] Gilead's failure to allocate synergies to the Trodelvy business was not contrary to GAAP and did not otherwise violate the Revenue-Sharing Provision.

4. Corroborative Evidence

The Trodelvy business failed to generate positive net income during the Covered Period. Goldenberg generally questions how that could be true given Gilead's statements about the value of its Trodelvy-related portfolio, but there is no conflict. Gilead could view the future revenue streams from Trodelvy as a crown-jewel asset, while making significant near-term investments to in pursuit of that rosy future. Other evidence in the record corroborates the failure of the Trodelvy business to generate positive net income during the Covered Period.

One source of corroborative evidence is the 2023 Lookback Analysis. Gilead's audit chair asked Howe to evaluate selected acquisitions, including the acquisition of the Company. To fulfill that request, Howe created an "illustrative profit and loss statement" for Trodelvy for 2021 and 2022 using the same queries he later used for this litigation and the same methods for allocating costs. The 2023 Lookback Analysis was prepared in the ordinary course of business and independent of this litigation. It showed that Trodelvy business generated net losses in 2021 and 2022.[160]

---

[159] *See* Howe Tr. 350–51; JX 176 at 3 (Gilead describing Trodelvy as a cornerstone product).

[160] *See* JX 258; JX 333. Goldenberg points out that the 2023 Lookback Analysis relied on data entries coded as "non-GAAP." That is a fair point, and the court has therefore not uncritically relied on the 2023 Lookback Analysis to establish that the Trodelvy business failed to generate net income on a GAAP basis. The 2023 Lookback

A second source of corroborative evidence is the Company's projections. In a pre-Acquisition public filing, the Company disclosed that it expected "to continue to incur operating losses while funding commercial launch efforts for Trodelvy" and expected "its future cash requirements to be substantial due to commercialization of Trodelvy."[161] The Company did not expect to generate positive net income either.

Gilead's projections shortly before and after the Acquisition aligned with the Company's expectations.[162] For the Trodelvy business to suffer losses during the Covered Period was not unexpected.

A third source of corroborating evidence consists of financial performance presentations that Gilead prepared in the ordinary course of business for its management team.[163] They all showed net losses for the Covered Period.

Finally, the Company's accounting expert provided a source of corroborative evidence by independently calculating the Company's net income for the Covered

---

Analysis provides corroborative evidence that the Trodelvy business was not profitable. The data was part of an objective evaluation of Trodelvy's performance and prepared in the ordinary course of business. Furthermore, Gilead marked some of the data as "non-GAAP" because GAAP-required adjustments were not included, such as adjustments for purchase price accounting and certain impairment charges. Those adjustments would have made the Trodelvy business significantly less profitable, not more profitable. *See* Howe Tr. 359; Boudouris Tr. 807.

[161] JX 171 at 8.

[162] *See, e.g.*, JX 199 at 2.

[163] Boudouris Tr. 807–10; *see, e.g.*, JX 212; JX 252; JX 271.

Period. He concluded that the Company's net income was negative in all fiscal years when calculated in accordance with GAAP.

The entire body of evidence shows that when measured in accordance with GAAP—even without including downward adjustments for purchase price accounting—the Trodelvy business did not generate positive net income during the Covered Period.[164] The Net Income Condition failed, and Goldenberg is not entitled to payment under the Revenue-Sharing Provision.

III. CONCLUSION

Goldenberg failed to prove that he is entitled to payment under the Revenue-Sharing Provision. Judgment will be entered in favor of the Company.

Within thirty days, the parties must submit a proposed final order, agreed as to form. If there are issues that need to be addressed before a final order can be entered, then the parties must submit a joint letter identifying those issues and proposing a path forward. This instruction is not an invitation to seek a do-over.

---

[164] Excluding purchase price accounting, the Trodelvy business incurred net losses of $413 million in 2021, $604 million in 2022, and $244 million in 2023. JX 385 tbls. 2, 3, 4.