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IN THE SUPREME COURT OF THE STATE OF DELAWARE

OPTINOSE AS AND OPTINOSE, INC. Defendants Below, Appellants, v. CURRAX PHARMACEUTICALS LLC, Plaintiff Below, Appellee.	)	**PUBLIC VERSION** **FILED ON JUNE 9, 2021** No. 48, 2021 Court below: Court of Chancery C.A. No. 2020-0122

APPELLANTS' REPLY BRIEF

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Currax wrongly asserts that OptiNose's interpretation of the phrase "Device component of the Product" would give OptiNose "the right to approve every statement or filing, rendering meaningless Currax's right to control Prosecution and obligation to only 'reasonably consider' OptiNose's comments." (AB at 32.) This is not true. Rather, OptiNose's interpretation correctly gives OptiNose the right to approve prosecution decisions "relating to or characterizing the Device component of the Product" (*i.e.*, a Powder EDS device *without* sumatriptan) but not those that characterize only the Product (*i.e.*, a Powder EDS device *with* sumatriptan).

OptiNose's interpretation is compelled by the Agreement. The Agreement repeatedly distinguishes between the "Product" (the licensed ONZETRA® XSAIL®) and "the Device component of the Product." (OB at 10-11.) That distinction is highlighted in Section 2.01(b), which leaves OptiNose retains the right to "use, make, have made, sell, have sold, import or otherwise export products (including using the Device component of the Product) excluding the

Product." (A0044 (§ 2.01(b)).) Thus, OptiNose retains unfettered rights to use "the Device component of the Product," (*i.e.*, a Powder EDS Device without sumatriptan), but not the Product (*i.e.*, a Powder EDS Device with sumatriptan).

Because all rights in the "Device component of the Product," as distinguished from the Product, remain with OptiNose, the parties reasonably gave OptiNose consent rights for any filing that relates to or characterizes the "Device Component of the Product"—*i.e.*, for any filing that relates to or characterizes a Powder EDS device used for any purpose other than to administer sumatriptan. The '009 application in which Currax seeks to file a terminal disclaimer relates solely to the Device component of the product, claiming a "nasal delivery device," with a "supply unit," a "nosepiece unit," and "a mouthpiece unit." (A0317.) While the claims recite the use of a "powdered substance"—making the device a Powder EDS device—there is no mention whatsoever of sumatriptan. (*Id.*) Thus, the device as claimed in the '009 application is a generic Powder EDS device, not a Powder EDS device with sumatriptan. It is, therefore, the Device component of the Product and not the Product.

Because the '009 application claims a "Device component of the Product," a terminal disclaimer in the '009 application over its parent application relates to a "Device component of the Product," since it cuts short the term of patent

protection for a "Device component of the Product." Similarly, it characterizes a "Device component of the Product," because it is a "strong clue" that the applicant (OptiNose, with Currax standing in its shoes) thought that the Device component of the Product as claimed in the '009 application was not patentably distinct from the Device component of the Product as claimed in its parent application. *See SimpleAir, Inc. v. Google, LLC*, 884 F.3d 1160, 1168 (Fed. Cir. 2018). Although Currax notes that *SimpleAir* held that a terminal disclaimer is not an "admission regarding the patentability of the resulting claims," (AB at 38), that is a distinction without a difference. *SimpleAir* held that, although a terminal disclaimer was not a binding admission, it was still "a strong clue that the patent examiner and, by concession, the applicant, thought the claims in the continuation lacked a patentable distinction." (*Id.* at 1168.) Thus, by creating a "strong clue" that the applicant believed the claims are not patentably distinct, a terminal disclaimer relates to or characterizes both the disclaimed patent and the parent. OptiNose's consent is, thus, required.

Currax's assertion that this interpretation gives OptiNose "the right to approve every statement or filing, rendering meaningless Currax's right to control Prosecution and obligation to only 'reasonably consider' OptiNose's comments," (AB at 32), is based on its failure to recognize the distinction between the Product

and the "Device component of the Product." Thus, in a misguided effort to show that OptiNose's interpretation would swallow the rule, Currax asserts that "each claim of every U.S. Product Patent listed in the Agreement—including the patent that OptiNose suggests does not relate to the Device Component of the Product—recites a 'nosepiece.'" (AB at 31.) But, that makes perfect sense. Both the "Product" and the "Device component of the Product" have a nosepiece, because both the "Product" and the "Device component of the Product" include a Powder EDS device. The difference between the two is not that one has a nosepiece and one does not; the difference between them is that one is a Powder EDS device ***with sumatriptan*** and one is a Powder EDS device ***of any other kind***.

This means, as OptiNose explained in its opening brief, that if Currax were making filings related to the "Sumatriptan Powder Delivery" patents, (A0078), those filings would likely relate to or characterize the Product, because they would likely relate to or characterize a Powder EDS device delivering sumatriptan. Thus, Currax's prosecution of those patents would involve few scenarios that require OptiNose's approval.

Currax's misunderstanding of the purpose of OptiNose's approval rights for filings relating to the "Device component of the Product," is further illustrated by its description of the supposedly "absurd[ ] scenario," in which "if Currax merely

amended the pending claims to recite 'wherein the substance comprises sumatriptan,' it then could (under OptiNose's argument) Prosecute them without OptiNose's prior approval." (AB at 32.) But, that scenario is not absurd, and Currax's description of it as "absurd" demonstrates its flawed understanding. If Currax made that hypothetical amendment, then the claims it was prosecuting would squarely cover the one area in which OptiNose has no rights—a Powder EDS device with sumatriptan, *i.e.*, the "Product." That's exactly the kind of prosecution the parties intended for Currax to be able to make without OptiNose's approval. But that's not what Currax is doing here. Instead it is prosecuting a patent that claims a Powder EDS device without sumatriptan—which is, therefore, a Device component of the Product for which OptiNose retains unfettered rights. OptiNose, thus, has a right to approve the filing.

B. Currax's Interpretation of Filings "Relating to or Characterizing the Device Component of the Product" Renders the Provision Meaningless

In contrast to OptiNose's interpretation of its approval right for filings "relating to or characterizing the Device component of the Product," Currax's interpretation would render that approval right meaningless. Currax asserts that "the plain meaning of 'Device component of the Product,' refers to a physical portion of a product, not to patents." (D.I. 30.) Even assuming, arguendo, that this

is true, it is irrelevant. Section 5.01(a)(i) does not grant OptiNose approval rights for any filing that *is* a "Device component of the Product"—which would be absurd—Section 5.01(a)(i) grants OptiNose approval rights for any filing "*relating to or characterizing* the Device component of the Product." This is extremely broad language that Currax agreed to and now wants to write-out of the Agreement.

Filings can relate to or characterize a physical device without actually *being* a physical device. Thus, for example, the '009 application claims a "nasal delivery device," used to administer a "powdered substance." (A0317.) A filing relating to or characterizing that claimed device relates to or characterizes a physical device—in this case a Powder EDS device without sumatriptan or, in other words, the Device component of the Product. This is unwittingly confirmed by Currax's own admission that the Product Patents—including the one over which Currax wants to file a terminal disclaimer—are listed in the FDA's Orange Book for ONZETRA® XSAIL® and product packaging, confirming the obvious that patents can and do "relate to" physical products or devices. (AB at 18.)

Currax's interpretation gives no meaning to OptiNose's approval rights for filings "relating to or characterizing the Device component of the Product" because, under Currax's interpretation, a filing would ***never*** relate to or

characterize the Device component of a Product. This can be seen in Currax's assertion that, for purposes of OptiNose's approval rights, the "Device component of the Product' must be an actual device," and that "statements or filings relating to or characterizing patents—not products—do not relate to or characterize the Device component of the Product." (AB at 30-31.) Section 5.01(a)(i), however, deals exclusively with filings for patent prosecution. Every filing ever made under Section 5.01(a)(i) is going to be one "relating to or characterizing patents." Currax's interpretation would, thus, render this provision meaningless, because it would never give OptiNose approval rights. Accordingly, this Court should reject Currax's interpretation.

C. Currax's Interpretation of "Other OptiNose Intellectual Property" Ignores the Plain Meaning

After arguing that the Court of Chancery "correctly determined that 'other intellectual property' must mean intellectual property other than Product Patents because the 'only mentioned OptiNose intellectual property in the sentence is the Product Patents," Currax makes the remarkable assertion that "OptiNose identifies no flaw in the Court's reasoning." (AB at 33.) To the contrary, OptiNose's brief clearly identifies the "flaw in the Court's reasoning." In fact, OptiNose identifies the "flaw in the Court's reasoning," immediately after describing that reasoning, stating:

> Contrary to the Court of Chancery's conclusion, however, the reference to "Product Patents" is *not* the only "OptiNose intellectual property in the sentence" that is "mentioned ***or implied***." To the contrary, that provision's identification of "filings or statements in any filing" plainly refers to a filing for a patent application being prosecuted by Currax. That patent application is a piece of "OptiNose intellectual property," and, critically, is the piece of OptiNose intellectual property most immediately "mentioned or implied," before the phrase "other OptiNose intellectual property."
>
> (OB at 30.)

Thus, the phrase "other OptiNose intellectual property," should be interpreted as OptiNose intellectual property other than the intellectual property being prosecuted.

Currax's responsive arguments are unpersuasive. First, Currax argues that "other OptiNose intellectual property" cannot mean the intellectual property for which the filing was made, because that phrase does not "refer only to a single 'filing,' as it expressly encompasses 'filings' in general." (AB at 33.) It's unclear why that would present an impediment to OptiNose's interpretation but, in any event, despite what Currax says, the phrase expressly refers to "statements in any ***filing***," singular, plainly encompassing statements made in any individual filing.

Next, Currax asserts incorrectly that OptiNose did not make this argument below and, thus, was wrong to "fault[] the Court of Chancery for purportedly 'not address[ing]' an argument that OptiNose did not make." (AB at 34.) But, OptiNose *did* make the argument below. OptiNose argued that the reason a terminal

disclaimer relates to "other OptiNose intellectual property," is because it "relates to and characterizes both the disclaimed patent"—*i.e.*, the intellectual property for which the filing is being made—"and the patent over which the patent is disclaimed"—*i.e.*, the "other OptiNose intellectual property." (A0292.) OptiNose further argued below that "[i]t is that characterization of OptiNose intellectual property that triggers the approval provision of the Agreement." (A0292.) Thus, because Currax is making a statement in a filing for one piece of OptiNose intellectual property (the '009 application) that relates to or characterizes another piece of OptiNose intellectual property (the '009 application's parent, over which it is being disclaimed), the filing is one "relating to or characterizing other OptiNose intellectual property." This argument was never addressed by the Court of Chancery.

OptiNose's interpretation also does not ask this Court to add a contract term by implication, as Currax claims. (AB at 34.) The provision giving OptiNose approval rights over filings relating to or characterizing "other OptiNose intellectual property," is express. There is a disagreement, however, about what the word "other" means. Using the dictionary definition, the Court of Chancery found that "other" means "something distinct from that or those first mentioned ***or implied***." Within Section 5.01(a)(i), any "filing" is part of a patent application,

which is a piece of intellectual property. Thus, a "filing" plainly implies a piece of "OptiNose intellectual property"—the application being prosecuted.

Currax's purported concern that OptiNose's interpretation would allow it to "veto every statement," because "any statement or action could affect claims of other Product Patents," (AB at 37), is misguided. While it is true that statements made when prosecuting one patent can impact other patents in the same family—which is why the parties gave OptiNose approval rights for filings that relate to or characterize other OptiNose intellectual property—that does not mean that *every* statement will do so. Some statements made during prosecution will impact other patents in the same family, and some won't. When they do, OptiNose's approval is required. When they don't OptiNose can provide comments for Currax to consider, but its approval is not required. Thus, OptiNose's interpretation does not allow it to "veto every statement" or render any provision meaningless, and is consistent with the agreement's evident purpose as a whole—the grant of a limited license to Currax for the Product, and OptiNose's broad retained rights in the Device component of the Product and other IP.

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II. Currax Overstates the Breadth of Its Prosecution Rights under the Agreement

Many of the flaws in Currax's brief stem from a single source: Currax's failure to acknowledge the actual scope of its prosecution rights. Although Currax describes the Agreement as "broadly granting Currax the right to control Prosecution of the 'Product Patents,'" (AB at 32), this is not true. The Agreement gives Currax *limited* prosecution rights. That limited nature of Currax's rights is starkly revealed by its juxtaposition to the expansive prosecution rights given to OptiNose for the Platform Patents.

For example, whereas OptiNose is given the broad "sole right" to prosecute the Platform Patents, Currax is given only the limited "first right" to prosecute the Product Patents. (*Compare* A0051 (§ 5.01(a)(i)) *with* A0051 (§ 5.01(a)(ii)).) Whereas OptiNose is given the broad "ultimate decision-making authority with respect to the Prosecution of the Platform Patents," Currax is not given any "ultimate" authority whatsoever, and, instead, is expressly required to obtain OptiNose's consent for certain classes of filings. (*Id.*) And, whereas OptiNose need only consider Currax's point of view regarding the Platform Patents one time per year, Currax is required to provide OptiNose with advance copies of *every single filing*, which requirement allows OptiNose to make sure that Currax is abiding by the limitations in its authority. (*Id.*) Thus, the terms of the Agreement reveal that

the parties knew how to "broadly grant" prosecution rights, but chose not to do so for Currax.

Currax's failure to accept its limited prosecution rights permeates its brief. Almost universally, when Currax discusses the rights granted under Section 5.01(a)(i), Currax quotes it as granting a "right to control Prosecution," failing to include the key qualifier that Currax received only the "***first*** right to control the Prosecution" of the Product Patents and failing to so-much-as acknowledge that this "first right" is subject to OptiNose's defined approval rights. (*See, e.g.,* AB at 2, 4-7, 14-15, 19-23, and 43.) Currax addresses the "first right" language only briefly, arguing, incorrectly, that the reference to a "first right" was intended to "signal[] that OptiNose possess certain secondary rights if Currax foregoes its rights." (AB at 19.) But the case Currax relies on *Immunex Corp. v Sandoz Inc.*, 964 F.3d 1049 (Fed. Cir. 2020), supports the opposite conclusion.

In *Immunex,* the court was not tasked with interpreting the phrase "first right." Rather, *Immunex* addressed a wholly different issue of whether a patentee had transferred all substantial rights in its patent through an agreement that gave a licensee the "first right to rectify an alleged infringement," and left the patentee the "secondary right to sue if [the licensee] fails to rectify any infringement within 180 days." *Id.* at 1061. The court concluded that such a conveyance did not transfer all

substantial rights in the patent. *Id.* at 1063. *Immunex* contains no discussion of the meaning of "first right," and there was no dispute about the meaning of "first right," because the agreement expressly distinguished between a "first right" and a "secondary right."

Despite addressing a different issue, *Immunex* illustrates the flaw with Currax's argument: whereas the agreement in *Immunex* distinguished between a "first right" and a "secondary right," the Agreement here distinguishes between a "first right" and a "sole right." (A0051 (§ 5.01(a)(i)-(ii)).) That juxtaposition clearly indicates that the word "first" was intended to be limiting. The Agreement also makes clear *how* it is limiting: Currax gets to make all initial prosecution decisions—it's "first right" to control prosecution—but it must then run all those decisions by OptiNose and, in some circumstances, obtain OptiNose's approval. Thus, a "first right" but not a "sole right," or the "ultimate" right. (*Id.*)

The limited nature of Currax's prosecution rights is also reinforced by another of the cases Currax cites, *GlycoGenesys, Inc. v. Platt*, No. 11 133 00541 04 (A.A.A. Nov. 10, 2014) (an unpublished arbitration decision included in the Appendix at A0268). As Currax acknowledges, the arbitrator in the case held that a licensee was not entitled to a power of attorney, because there was "no express provision regarding who—between licensor and licensee—has the final word

regarding prosecution decisions." (A0276.) Here, notably, with respect to the *Platform* Patents, there *is* an express provision that OptiNose "has the final word regarding prosecution decisions," as the Agreement expressly grants OptiNose "ultimate decision-making authority" for those patents. (A0051 (§ 5.01(a)(ii)).) The parties' conspicuous choice *not* to give Currax "ultimate decision-making authority" with respect to the Product Patents confirms that they did not, in fact, want Currax to have the "final word" with respect to those patents. Rather, they wanted Currax to have the "first right to control the Prosecution," which would be subject to providing each and every filing to OptiNose ahead of time so that OptiNose could exercise its right to approve any filing "relating to or characterizing the Device component of the Product or other OptiNose IP." (A0051 (§ 5.01(a)(i)).)

To put it simply: the parties Agreement confirms that they knew how to give a party the "final word" to control prosecution. They chose instead to give Currax only the "first right to control prosecution." There is an ocean of difference between having the final word and having the first word. Currax has the latter. They get to set the direction, and for many decisions their first word may become final. But for many others, that first word is subject to OptiNose's approval rights. By exercising those rights, OptiNose is not exercising "improper control," as

Currax asserts, (AB at 46). Rather, OptiNose is exercising rights the parties intended to give it when they chose to give Currax only the "first right to control prosecution."

III. Currax Repeatedly Mischaracterizes or Misrepresents OptiNose's Arguments

A surprising portion of Currax's brief is spent disputing arguments that OptiNose never made. Currax repeatedly mischaracterizes or misrepresents what OptiNose supposedly argues or asks this Court to do, only for Currax to boldly refute the fictitious argument it has credited to OptiNose. The most egregious examples are addressed below.

A. Contrary to Currax's Assertions, OptiNose Asks this Court to Apply the Unambiguous Text of the Agreement

To start, Currax wrongly asserts that "OptiNose asks the Court to depart from the text of the Agreement and decide the case based on vague insinuation about 'commercial context.'" (D.I. 17.) Not so. Rather, OptiNose Opening Brief explains in detail why "the language of Section 5.01(a)(i) unambiguously grants OptiNose the right to approve any terminal disclaimer." (OB at 27, 30-38.) OptiNose additionally argues that this "conclusion is made even more sure when considering the 'commercial context between the parties.'" (*Id.* at 27.) The commercial context shows why it would be unreasonable for Currax to have final say in prosecution decisions impacting areas where OptiNose maintains exclusive rights, which is consistent with the text of the Agreement that confirms it does not. And, as OptiNose brief notes, this Court has explained that a contract must be

"read in full and situated in the commercial context between the parties." (*Id.* citing *Chicago Bridge & Iron Co. v. Westinghouse Electric Co.*, 166 A.3d 912, 926-27 (Del. 2017).) Thus, far from "ask[ing] the Court to depart from the text" or to rely on "vague insinuation about 'commercial context," as Currax wrongly states, OptiNose asks the Court to enforce the text exactly as it is written and further explains how the "commercial context" that this Court requires to be considered reinforces the text.

Currax also tries to distinguish *Chicago Bridge* by asserting that it "merely lent additional support to the Court's analysis of the express provisions," and that "courts have repeatedly rejected attempts to seize upon the 'commercial context' language to modify the express terms of the agreement." (D.I. at 17.) But, as described above, the use of commercial context that OptiNose's brief makes is exactly what was done in *Chicago Bridge*: explaining why "the language of Section 5.01(a)(i) unambiguously grants OptiNose the right to approve any terminal disclaimer" and that this "conclusion is made even more sure when considering the 'commercial context.'" (OB at 27.)

It is also both remarkable and ironic for Currax to accuse OptiNose of failing to apply the "express terms of an agreement." By the time Currax makes this argument, on page 17 of its brief, Currax has not so much as mentioned "the

express terms of the agreement" for the central provision in this dispute: section 5.01(a)(i)'s requirement "that filings or statements in any filing relating to or characterizing the Device component of the Product or other OptiNose intellectual property shall require OptiNose's prior approval." Were one to have read only Currax's brief, one would not know that the provision existed by the time it reached Currax's argument about the importance of applying the "express terms of the agreement," on page 17. One would not learn that the provision existed until page 29. And, one would likely be surprised to discover on page 29 that OptiNose was given the right to approve any filing "relating to or characterizing the Device component of the Product or other OptiNose intellectual property," because in the portion of Currax's "Statement of Facts" in which it identifies and describes the "provisions of the Agreement [that] are material to the case," Currax doesn't even mention the ***existence*** of Section 5.01(a)(i)'s provision giving OptiNose approval rights. (AB at 7.) Currax doesn't even hint at such a provision. Instead, Currax selectively quotes portions of Section 5.01(a)(i) to omit the approval provision entirely. (*Id.*) Thus, it is not OptiNose that has failed to apply "the express terms of the agreement."

B. Contrary to Currax's Assertion, OptiNose Does Not Argue that this Court Should Interpret the Agreement by "Weigh[ing] th[e] rights to figure out which party had more"

Currax also mischaracterizes OptiNose as arguing for a "majority of rights" standard which, as best OptiNose can tell, Currax envisions as a standard in which the court decides which party controls prosecution of a patent by "assign[ing] value to each right under an agreement, and then weigh[ing] those rights to figure out which party had more." (AB at 18.) Nowhere does OptiNose make any such argument. Although OptiNose discusses its retention of the "majority of rights" in the Product Patents, it does so to provide context for why the parties gave OptiNose the right to approve filings that relate to a Device component of the Product or to other OptiNose intellectual property. (OB at 26-30.) It is the plain text of the agreement that gives OptiNose the right to approve those filings, however, and there is no need for this court to "assign value to each right" or "weigh those rights," to apply that plain meaning.

C. Contrary to Currax's Assertion, OptiNose Asks this Court to Interpret the Agreement According to Its Objective Meaning, not Any Subjective Intent

Next, Currax incorrectly asserts that OptiNose's analysis focuses on "its subjective intent, contending that it meant to retain any rights that it 'may still want to use.'" (AB at 20.) But, again, this is not so. OptiNose never suggests that the

contract should be interpreted according to what either party subjectively wanted or intended. Rather, OptiNose explains that the objective meaning of the Agreement's division of prosecution rights makes sense because it would "ensure that Currax cannot give up patent rights that OptiNose has the right to use and may still want to use." (OB at 41.) That's *why* the parties unambiguously gave OptiNose the right to approve filings that relate to or characterize the Device component of the Product or other OptiNose IP. But *how* they did it is through the objective language of Section 5.0(a)(i), which unambiguously gives OptiNose that right. Applying that unambiguous language does not require this court to determine what any party subjectively wants. But, understanding the context of the agreement—including the parties' incentives in negotiating the agreement—affirms that the objective meaning does, also, make good business sense.

It is also noteworthy that, after refuting this fictional argument about subjective intent that OptiNose never made, Currax again asserts the importance of adhering to the text of the Agreement, stating that "courts must read the words for what they say." (AB at 21.) Yet, by this point in Currax's brief—now reaching page 21—Currax still has not so much as mentioned what the "words say" in the central provision on which OptiNose's appeal is based: Section 5.01(a)(i)'s grant of approval rights for certain filings.

D. Contrary to Currax's Assertion, OptiNose's Interpretation Does Not Allow it to Take Control of Prosecution for Product Patents

Currax wrongly suggests that, under OptiNose's interpretation, OptiNose gains "control" of prosecution of Product Patent filings that fall within the scope of its consent rights. For instance, Currax describes OptiNose's argument as leading to "control passing back and forth between Currax and OptiNose as claims evolve through Prosecution." (AB at 32-33.) It further describes OptiNose's assertion of a consent right as an "improper exercise of control." (*Id.* at 11.) Under OptiNose's interpretation, however, OptiNose *never* controls prosecution of the Product Patents. OptiNose has a consent right, not a control right. It can stop Currax from making a filing that falls within the scope of that right, but it can't take over.

Under OptiNose's interpretation, OptiNose never gets to decide to pursue a particular claim, to make a particular amendment, or to present a particular argument. Only Currax will ever get to make affirmative prosecution decisions. Thus, under OptiNose's interpretation, Currax isn't deprived of prosecution powers even for those Product Patent filings that require OptiNose's approval. Rather, for any such filings, the parties, as a practical matter, must reach agreement. OptiNose can't make filings that Currax doesn't want, because OptiNose can't make any Product Patent filings at all. This is consistent with the language of the agreement and scope of rights. Filings that relate to the Device component of the Product or

other OptiNose intellectual property are almost certain to impact both parties' rights. So, both parties have a role in prosecution decisions. In contrast, prosecution decisions that relate *solely* to the Product and no other OptiNose intellectual property are unlikely to impact OptiNose's rights, so OptiNose's consent is not required.

E. Contrary to Currax's Assertion, OptiNose Does not Argue that "the agreement 'as a whole' nullifies the provisions granting Currax the right to control Prosecution"

Perhaps Currax's most blatant misrepresentation is that "OptiNose cites *Fletcher v. Feutz*, 246 A.3d 540, 555 (Del. 2021) (Br. at 7) in support of its notion that the agreement 'as a whole' nullifies the provisions granting Currax the right to control Prosecution and requiring OptiNose to execute any forms necessary to transfer that right to Currax." (D.I. at 21.) OptiNose never argues, suggests, hints, or otherwise implies that the agreement "as a whole" nullifies any provision. And OptiNose certainly does not cite *Fletcher* for that proposition. OptiNose cites *Fletcher* as a *see also* for this Court's statement in *Salamone v. Gorman*, 106 A.3d 354 (Del. 2014), that "a contract must be interpreted 'as a whole' so as to 'give priority to the parties' intentions as reflected in the four corners of the agreement.'" (OB at 27.) This is an uncontroversial statement of Delaware law—not a suggestion that some portion of the Agreement should be "nullified."

Currax's brief also provides a wonderful demonstration for why it is so important to interpret an agreement "as a whole." When making its misrepresentation about OptiNose's reliance on *Fletcher*, Currax *still* hasn't mentioned Section 5.01(a)(i)'s grant of approval rights to OptiNose, and won't do so until page 29. It is, thus, evident, that Currax does not want this Court considering the agreement "as a whole." Currax wants to rely on provisions in isolation. Currax wants this Court to simply focus on its "right to control the Prosecution," without reading the whole provision to see that it is a "*first* right to control the Prosecution," that expressly requires OptiNose's approval for any filing "relating to or characterizing a Device component of the Product or other OptiNose intellectual property."

IV. "Abandon" as Used in the Agreement Is not Limited By Statutory Definitions of "Abandon"

Currax's brief makes much of the fact that the CFR and MPEP include specific codified forms of "abandonment." (AB at 26.) OptiNose has never disputed that point, but it doesn't resolve the question of what the parties meant by "abandon" within the Agreement. As explained in *Viking Pump, Inc. v. Liberty Mutual Insurance. Co.*, 2007 WL 1207107 (Del. Ch., Apr. 13, 2007) a court should be "hesita[nt] to read a technical definition into [an agreement] when that definition could have been, but was not, used by its drafters." *Id.* at *16.

The parties could have expressly given "abandon" a technical statutory definition, but they chose not to. And, as described in OptiNose's opening brief, courts have recognized that "the effect of [disclaimer] is the same as dedication of the patent to the public or abandonment." *3V Inc. v. CIBA Specialty Chems. Corp.*, 587 F. Supp. 2d 641 (D. Del. 2008); *see also W.L. Gore & Assocs., Inc. v. Oak Materials Group, Inc.*, 424 F. Supp. 700, 702 (D. Del. 1976) (holding same); *Leading Edge Tech. Corp. v. Sun Automation, Inc.*, 1991 WL 398682, n. 4 (D. Mar. Sep. 24, 1991) ("In these terminal disclaimers, Staley abandoned the terminal part of any patents issued. . . .")

Currax points to the statement in *Bayer AG v. Barr Labs, Inc.*, 798 F. Supp. 196, 199 (S.D.N.Y. 1992) that "terminal disclaimers 'do[] not abandon' a claim."

(AB at 25-26.) That is beside the point. OptiNose has never argued that a terminal disclaimer abandons *a claim*. As OptiNose's brief expressly points out, a *statutory* disclaimer abandons a portion of a patent's claims. By contrast, a *terminal* disclaimer abandons a portion of a patent's term.

Currax's efforts to distinguish *3V* and *W.L. Gore*, (AB at 26-27), are similarly unpersuasive. Although those cases dealt expressly with statutory disclaimers, statutory disclaimers and terminal disclaimers both arise from the same statutory authority, which describes both just as "disclaimers." *See* 35 U.S.C. § 253. And, that statute states that, with a terminal disclaimer, the latter portion of a term is "dedicated to the public," which is what *3V* says makes a disclaimer the same as abandonment. 587 F. Supp. 2d at 641 ("[T]he effect of [disclaimer] is the same as dedication of the patent to the public or abandonment."). Whether a disclaimer is statutory or terminal, a portion of the patent protection afforded by the patent has been abandoned. The only difference is that a statutory disclaimer abandons a portion of the patent's *breadth* of protection while a terminal disclaimer abandons a portion of the patent's *length* of protection.

Despite the assertion in Currax's brief, OptiNose did not "fault[] the Court of Chancery for citing the C.F.R. and MPEP in recognizing that 'abandonment' is a patent law term of art." (AB at 27.) OptiNose argued only that this technical

"term of art" definition was not the meaning intended in the Agreement. (OB at 41 ("Although the Court of Chancery noted that 'abandonment' is a patent law term of art, the context of the Agreement does not support that the parties intended 'abandon or not maintain' to be limited to statutorily defined forms of abandonment.") Likewise, because OptiNose has never argued that "abandonment does not constitute a term of art," it cannot have "waived," that argument, as Currax asserts. OptiNose's argument is not that abandonment doesn't have a technical "term of art" meaning; rather, it is that nothing in the Agreement indicates that the parties intended to give "abandon" that meaning within the Agreement. Rather, the Agreement as a whole conveys the parties' intention of ensuring that OptiNose could maintain patent rights that Currax might be willing to give up. That rationale is equally applicable whether Currax is abandoning a patent immediately or scheduling a patent for future abandonment through a terminal disclaimer.

CONCLUSION

For the foregoing reasons and the reasons expressed in OptiNose's Opening Brief, OptiNose respectfully requests that the Court of Chancery be reversed.

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