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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRADLEY DANIEL, an individual, and MEDAPPROACH HOLDINGS, INC., a Delaware corporation, Defendants below, Appellants, v. SHARON HAWKINS, individually and derivatively on behalf of MEDAPPROACH, L.P., Plaintiffs below, Appellees.	)	Case No. 184,2022 Court Below: Court of Chancery of the State of Delaware C.A. No. 2021-0453-JTL

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This appeal is governed by controlling Delaware Supreme Court precedent. In *Genger v. TR Invs., LLC,* ("*Genger*") 26 A.3d 180 (Del. 2011), this Court affirmed then-Vice Chancellor Strine's determination that irrevocable proxies do not bind subsequent owners of stock absent plain and unambiguous language to that effect. *Genger*, 26 A.3d at 190. Here, the Court of Chancery faithfully followed *Genger* and *Genger v. TR Invs., LLC,* ("*Genger Trial*") 2010 WL 2901704 (Del. Ch. July 23, 2010), applied time-worn contract interpretation principles, and determined the Irrevocable Proxy, as a whole, did not bind subsequent owners of the Majority Shares.[1]

Beyond relying on *Genger* for the scope of review, defendants Bradley Daniel and MedApproach Holdings, Inc. (together, "Defendants") virtually ignore controlling precedent in their Opening Brief. Instead, Defendants argue that the Court of Chancery committed three outcome-changing errors when interpreting the Non-Termination and Assignment Provisions of the Irrevocable Proxy. OB at 2-3. Defendants' challenges are unavailing. Plaintiff Sharon Hawkins ("Plaintiff") respectfully submits that the Opinion should be affirmed.

[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Court of Chancery's April 4, 2022 post-trial opinion (the "Opinion"), as attached to Appellant's Opening Brief ("OB") as Exhibit A.

SUMMARY OF ARGUMENT

1. The Court of Chancery applied controlling Delaware Supreme Court precedent and well-established canons of contract interpretation to conclude, based on plain language of the whole document, that the Irrevocable Proxy does not unambiguously bind subsequent owners of the Majority Shares.

2. Plaintiff denies Defendants' first and second arguments. The Court of Chancery did not err when interpreting the Non-Termination Provision; rather, the trial court properly analyzed the phrase "any act of the Stockholder" against the backdrop of its earlier factual findings and common law (drawn from the Restatement (Third) of Agency) to concluded that the Irrevocable Proxy does not bind subsequent owners of the Majority Shares. The Court of Chancery also properly determined that the phrase "any other event or events" in the Non-Termination Provision did not unambiguously bind subsequent owners of the Majority Shares.

3. Plaintiff denies Defendants' third argument. The Court of Chancery properly applied the last antecedent canon in interpreting the Assignment Provision. The Court's interpretation of the Bound Parties clause harmonized the entire Assignment Provision and was the only reasonable interpretation. The Bound Parties provision does not unambiguously provide that the Irrevocable Proxy is binding on subsequent owners of the Majority Shares.

STATEMENT OF FACTS

I. FORMATION OF THE PROJECT.

This appeal involves a complex entity structure developed to manufacture and sell RU-486, an abortion pill (the "Project"). (B-345, at ¶4; B-093). Population Counsel, Inc. ("Popco") sublicensed RU-486 to Danco Labs, an entity formed by Joseph Pike. (B-091, 093-094). To raise capital, Pike formed Danco LP, which owns 100% of Danco Labs. (B-092, 148). Pike created N.D. Management, Inc. (referred to in the Opinion as "Danco GP") as Danco LP's general partner, and initially owned 100% of Danco GP's stock. (B-092, 148; B-345, at ¶6). Through Danco GP and Danco LP, Pike controlled Danco Labs. (B-092, 148). Pike raised approximately $13.35 million for the Project through Danco LP. (B-094).

In 1995, Daniel formed Old MedApproach for purposes of investing in the Project. (B-312, at 167:10-16). By 1996, non-party Gregory Hawkins had invested $1.5 million and held approximately 75% of the interests of Old MedApproach. (B-345, at ¶9). Old MedApproach invested those funds in Danco LP. (B-345, at ¶9). In 1998, Mr. Hawkins transferred his Old MedApproach investment to his wife, the Plaintiff. (B-347, at ¶17).

II. REVELATIONS ABOUT PIKE AND ENSUING SETTLEMENT.

In 1996, Popco discovered Pike had pled guilty to forgery charges. (B-346, at ¶¶10-11). Popco believed Pike's criminal background rendered his prior disclosures to investors misleading and sued to remove him from the Project. (B-115, 148-149; B-300, at 18:2-11; B-308, at128:7-23, B-313, at 171:13-16; B-346, at ¶11).

In December 1996, Pike's investors met with Popco (represented by Skadden Arps) to discuss a settlement. (B-366; B-291, at 63:1-64:17; B-308, at 126:21-127:15, 128:7-17; B-313, at 170:18-171:5; A541; A544). Popco demanded: (1) Pike no longer control the Project, and (2) Pike's investors be offered a recission of their investments. (B-346, at ¶12; B-301, at 22:7-14; B-314, at 174:6-175:6). The court below discredited Daniel's testimony that Popco "insisted on establishing a permanent control arrangement that could never change," finding instead that Popco desired "the Project eventually be owned by an entity with a conventional governance structure." Op. at 9 n.10.[2]

[2] Refences to the Opinion are cited as "Op. at __".

In January 1997, the LP Representatives[3] reached an agreement that met Popco's demands and allowed the Project to continue. (B-314, at 175:7-11; B-078; B-366). Under the resulting Settlement Agreement, Pike would sell 75 of his 100 shares in Danco GP (the "Majority Shares"), retaining 25 shares but surrendering his ability to vote them. (B-080-082).

The sale of the Majority Shares would take time, and Popco wanted Pike to surrender control as soon as possible, so the parties employed the Irrevocable Proxy to immediately transfer control. Op. at 11 (B-346, at ¶12; B-300, at 18-21; B-309, at 137:4-5; B-080-082). Per the Irrevocable Proxy, Pike appointed Daniel, Freeman, and Rush as his proxies to vote all 100 of his Danco GP shares. Op. at 11; (B-330). The Settlement Agreement also contemplated that the Participating Investors could later restructure the Project to establish a more conventional corporate structure. Op at 12; (B-081-082, 084-085).

III. THE REVISED SETTLEMENT.

The Settlement Agreement required approval of the limited partners. (B-078, 080). To obtain that approval, the LP Representatives circulated a Settlement Memorandum (B-366, 368), but it was problematic for many reasons and threatened

[3] Of five original LP Representatives, the Court of Chancery found only three–Daniel, Freeman, and Rush–played a substantive role in the Project. Op. at 9.

to delay implementation of the settlement. Op. at 13-14. Mr. Hawkins therefore proposed that Old MedApproach purchase the Majority Shares with the long-term plan of reorganizing the Project under a conventional corporate governance structure. *Id.* at 14; (B-305, at 37:18-38:6; B-292, at 90:15-91:7).

To accommodate Old MedApproach's purchase of the Majority Shares, the LP Representatives pivoted to a Revised Settlement. (B-166).[4] However, because the agency relationship Pike created in his capacity as Stockholder would terminate when Pike sold the Majority Shares, the effectiveness of the Irrevocable Proxy was threatened. Op. at 14. (B-330). To address this issue, Popco's attorney (working with Old MedApproach's counsel) added the Addendum, which bound Old MedApproach to the Irrevocable Proxy and imposed a limited transfer restriction. Op. at 14-15; (B-309, at 137:23-22, B-311, at 146:18-22, B-293, at 113:14-15, B-294, at 125:18-126:8; B-334-35).

The limited partners approved the Revised Settlement, but none became Participating Investors. (B-166; B-316-17, at 187:15-189:1). The only Participating Investors and counterparties to the Settlement Agreement were Old MedApproach, Freeman, and Rush, and each executed a funding commitment. (B-358-59; G. B-

[4] At trial, Daniel explained that he and the other LP Representatives "closed down" the offer to the limited partners to become Participating Investors because they were "running out of time" to complete the settlement. (B-315, at 181:1-182:24).

302, at 28-30, B-304, at 34; B-317, at 189-90, B-318, at 194). Mr. Hawkins agreed to backstop Old MedApproach's funding commitment and supplied the $3.5 million to purchase the Majority Shares. (B-358-59; B-301, at 21:18-22:6). In accordance with the Settlement Agreement, Pike transferred the Majority Shares to Old MedApproach. (B-166). Popco dismissed its lawsuit with prejudice. (B-167-68).

IV. THE RECISSION OFFER.

The Recission Offer was slated to close in 1997 but was delayed by a series of events until August 1998. (B-095). Among these events was Rush's resignation as a Proxy Holder. Op. at 17; (B-310, at 142:16-143:21; B-439; B-362-63).

Meanwhile, Daniel, Rush, and Freeman negotiated various compensation arrangements. (B-295-96, at 147:6-149:13). Daniel secured $300,000 annually from Danco LP to serve as a Proxy Holder. (B-271). Daniel's proxy fee increased with inflation and had reached $500,000 annually by 2020. (B-280). As of trial, Daniel had received approximately $10.3 million in proxy fees from Danco LP. (B-321, at 227:22-228:2; B-280). Daniel also receives $3,000 for each day spent handling litigation per an indemnification agreement with MedApproach, Danco GP, and Danco LP. (B-321, at 228:8-14; B-325-26). As of trial, Daniel had received at least $1.2 million for Project litigation. (B-321, at 228:12-17; B-370). Daniel also receives a 1% management fee and a 10% carried interest in the Partnership

(less expenses) through defendant MedApproach Holdings, the Partnership's general partner, which is wholly owned by Daniel. (B-321, at 225:9-14).

Danco LP launched the Recission Offer on August 5, 1998, by circulating the Offering Memorandum. Op. at 19; (B-091). The Offering Memorandum described the terms of the Revised Settlement, including the Irrevocable Proxy. (B-149, 166-68). Among other things, it stated:

> Pursuant to an Irrevocable Proxy and Power of Attorney, dated February 5, 1997, [Old MedApproach], *Mr. Pike and his wife granted Messrs. Daniel and Freeman and Rush … proxies to vote their respective interests in the General Partner*.

(B-139) (emphasis added). The Recission Offer closed in 1999 and ultimately raised $23,901,966. *See* (B-323, at 250:10; B-096). Mr. Hawkins believes he contributed approximately $5-6 million to the Recission Offer. (B-303, at 32:14-33:12, 40:7-16).

V. FREEMAN RESIGNS AS PROXY HOLDER.

Freeman resigned as a Proxy Holder by letter dated May 17, 1999, explaining that "upon the completion or termination of the current financing, restructuring, [and] recission efforts, the role of Proxy Holder is no longer necessary." (B-362). The trial court credited this statement as evidencing "the pre-litigation understanding of a party closely involved in the settlement" and "indicat[ing] that the Irrevocable Proxy was not intended as a permanent control arrangement." Op.

at 20. Freeman, a Harvard-educated lawyer, died in 2001 and was never replaced as a Proxy Holder, leaving Daniel and Rush as the remaining Proxy Holders. (B-308, at 126:2-9, B-320, at 209:21-23; B-306, at 57:20-58:6; B-298, at 178:8-14, B-299).

VI. THE OLD MEDAPPROACH RESTRUCTURING.

Daniel restructured Old MedApproach after the Recission Offer closed. (B-347, at ¶19-22). In the process, Old MedApproach dissolved and distributed its assets into three newly formed Delaware limited partnerships, including MedApproach, L.P. (the "Partnership"). (B-410-21). As part of the Restructuring, Old MedApproach transferred the Majority Shares to the Partnership. (B-411). As an affiliate of Old MedApproach, the Partnership was a "MedApproach Person" per the Addendum and therefore executed an "Agreement to Be Bound By Irrevocable Proxy and Power of Attorney." Op. at 21; (B-385).

VII. DISSOLUTION OF THE PARTNERSHIP.

Pursuant to the Agreement of Limited Partnership, dated January 1, 1999 (the "Partnership Agreement"), the Partnership would terminate on December 31, 2020. (B-042, 059). By consent, the Partnership's term was extended to February 28, 2021, and the Partnership dissolved on that date. (B-348, at ¶¶ 26-27; B-364; B-285-86). Pursuant to Sections 9.1 and 9.2 of the Partnership Agreement, Holdings

is now obligated to wind up the Partnership and distribute its assets. (B-059; B-364; B-285-86).

In connection with the Partnership's dissolution, Mr. Hawkins sent Daniel an offer to purchase the Majority Shares for $12 to $15 million, contingent on the sale being free and clear of the Irrevocable Proxy. (B-287-88). Daniel's response made clear his unwillingness to sell the Majority Shares free and clear of the Irrevocable Proxy. (B-282) (any offer must "take into account the terms of the Irrevocable Proxy."). Concomitantly, Daniel began working with Rush to buy the Partnership's assets including the Majority Shares for $5 to $6 million—half of Mr. Hawkins' offer. *Compare* (B-322, at 234:2-24) *and* (B-289, at 164:2-22) *with* (B-287).

Mrs. Hawkins filed this action on May 24, 2021. (B-032, D.I. 1). The Court of Chancery held a one-day trial on September 23, 2021, (B-005, D.I. 75), issued its Opinion on April 4, 2022, (B-002, D.I. 89), and entered an Order and Final Judgment in favor of Mrs. Hawkins on May 9, 2022. (B-002, D.I. 91). The Court issued the following declaratory relief: (a) the Irrevocable Proxy does not bind subsequent owners of the Majority Shares; (b) the Partnership is not obligated to demand that purchasers of the Majority Shares bind themselves to the Irrevocable Proxy; (c) the Transfer Restriction in the Addendum only applies to a transfers between MedApproach Persons; and (d) "MedApproach Person" does not include

third-parties. OB, Ex. B at 89-90. Defendants Daniel and Holdings appealed on May 31, 2022 and filed their Opening Brief on July 15, 2022. (Del. D.I. 1, 8).

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY APPLIED DELAWARE LAW IN DETERMING THAT THE PLAIN LANGUAGE OF THE IRREVOCABLE PROXY DOES NOT BIND SUBSEQUENT OWNERS OF THE MAJORITY SHARES.

A. Question Presented.

Did the Court of Chancery properly interpret the plain language of the Irrevocable Proxy as a whole in concluding that, under controlling Supreme Court precedent, it does not evidence a clear and unambiguous intent to bind subsequent owners of the Majority Shares? Op. at 27-78.

B. Scope of Review.

This Court reviews issues of contract interpretation *de novo*. *Exelon Generation Acquisitions, LLC v. Deere & Co.*, 176 A.3d 1262, 1266–67 (Del. 2017). Irrevocable proxies are contracts, making *de novo* review applicable to appeals concerning their interpretation. *Genger*, 26 A.3d, at 190. To the extent Defendants challenge any factual findings, those findings are assessed for clear error. *Id.* (citing *Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010)). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *The Bank of New York Mellon Trust Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011).

C. Merits of the Argument.

Adhering to this Court's decision in *Genger* and then-Vice-Chancellor Strine's decision below in *Genger Trial*, the Court of Chancery correctly held that, for the Irrevocable Proxy to bind subsequent owners of the Majority Shares, it must plainly state such an intent. Op. at 2, 33. Reading the Irrevocable Proxy as a whole, the trial court properly concluded that the Irrevocable Proxy does not unambiguously express an intent to bind subsequent owners of the Majority Shares.[5]

1. The Court of Chancery Properly Articulated Delaware Law Regarding Whether Irrevocable Proxies Run with Shares.

The Court of Chancery began its analysis with an overview of Delaware law governing irrevocable proxy interpretation and the underlying concern courts long have held over the decoupling of voting power from stock ownership. Op. at 29-31. "Historically, proxies have been interpreted narrowly and when there is an ambiguity, read as not restricting the right to vote the shares." Op. at 30 (quoting *Genger Trial*, 2010 WL 2901704, at *20). The trial court observed "[a] proxy arrangement that purports to be irrevocable creates additional concerns" because

[5] Argument I focuses on the Court of Chancery's analysis of the entire Irrevocable Proxy except as to the Non-Termination and Assignment Provisions, addressed in Arguments II and III, respectively.

"[i]f the proxyholder has divergent interests, then the resulting non-terminable separation of ownership from voting power becomes 'mischievous…'" Op. at 31 (quoting *Haft v. Haft*, 671 A.2d 413, 422 (Del. Ch. 1995). Thus, "the terms of an irrevocable proxy must … be plain and unambiguous." *Id.* (citing *Genger Trial*, 2010 WL 2901704 at *20).

The Court of Chancery recognized the above principles "call for departing from ordinary rules of contract interpretation when interpreting the Irrevocable Proxy." *Id*. Specifically, when faced with an ambiguity, Delaware courts do not look to extrinsic evidence, but instead "construe[] the proxy strictly in favor of the rights of the owner and against the authority granted to the proxyholder." *Id.* at 32. In other words, "ambiguity is construed against the proxyholder." *Id.* (citing *Genger Trial*, 2010 WL 2901704, at *20).

The court below concluded, "[f]or a proxy arrangement to bind irrevocably not only the principal that creates it but also a subsequent principal, 'the language of the Proxy itself' must 'plainly indicate that the Proxy [is] to run with the [s]hares if they are sold.'" *Id.* at 33. Defendants do not challenge the trial court's analysis of Delaware law governing proxy interpretation. *See Roca v. E.I. du Pont de Nemours and Co.*, 842 A.2d 1238, 1242 (Del. 2004) (failure to challenge the lower court's determinations in argument section of opening brief waives those arguments).

2. The Trial Court's High-Level Analysis of the Irrevocable Proxy Refutes Any Intent to Bind Future Owners.

The Court of Chancery began with a high-level overview of the Irrevocable Proxy (Op. at 33-36), making several critical findings: (1) by "point[ing] to various snippets of language such as provisions addressing irrevocability, duration and non-terminability" and "resort[ing] to a series of assertions concerning the intent of the drafters", Daniel "tacitly concede[s] that there is no provision in the Irrevocable Proxy which expressly states that it runs with the Majority Shares" (*id*. at 33-34); (2) the recitals "define the 'Stockholder' who granted the Irrevocable Proxy solely as Pike" and "the operative provisions state that Pike granted the [Proxy] Holders the authority to vote the Proxy Shares, a term that includes the Majority Shares" (*id.* at 34-35); and (3) the fact that the parties felt it necessary to include the Addendum to bind Old MedApproach to the Irrevocable Proxy "provides powerful evidence against Daniel's argument that the Irrevocable Proxy runs with the Majority Shares" because "[i]f it did, there would not have been any need for the Addendum." *Id.* at 35. Defendants waive any challenge to these factual findings by failing to raise one. *Roca*, 842 A.2d at 1242.

3. The Trial Court's Scrutiny of the Preamble and Recitals Supports the Irrevocable Proxy not Running with the Majority Shares.

The Court of Chancery began its analysis of the Irrevocable Proxy with the preamble and recitals. Op. at 36-39. The Court noted "the most important aspect of the preamble is the definition of 'Stockholder'" which "only references Pike" and "does not include language defining 'Stockholder' to include subsequent holders of the Majority Shares." *Id.* at 36. The Court also addressed the definition of "Shares" in the first recital, finding that "[t]he plain language of the definition states that the 'Shares' are those 100 shares that 'the Stockholder is the sole beneficial owner of'" and "are thus the 'Shares' that were owned by Pike at the time he executed the Irrevocable Proxy." *Id*. at 37 (quoting B-330).

The Court of Chancery made two other critical findings: (1) "[t]he Irrevocable Proxy was intended to bridge the gap to a more permanent corporate governance solution" (*id*. at 38); and (2) the fourth recital "links any reliance by the Participating Investors to the obligations they undertook under the Settlement Agreement" and "all of those obligations have been satisfied." *Id*. at 39.

The Court concluded "there is nothing in the preamble and recitals standing alone that would suggest the Irrevocable Proxy runs with the Majority Shares." *Id*. Instead, "they show only that Pike granted the Irrevocable Proxy pursuant to the

Settlement Agreement, that Pike (and only Pike) granted voting authority over the Proxy Shares, and that the Irrevocable Proxy applied to all of the shares that Pike owned." *Id.*

4. The Court of Chancery Properly Found the Appointment Provision Does Not Bind Future Owners of the Majority Shares.

The Court of Chancery next analyzed the operative provisions of the Irrevocable Proxy, beginning with the Appointment Provision, which "[f]orm[s] the heart of the proxy relationship." Op. at 40. The Court correctly confirmed "the Appointment Provision closely resembles the grant of authority in *Genger Trial*":

> The critical language in [*Genger*] granted the proxyholder the authority "to vote as *its* proxy, all of the shares of common stock of TRI which are [now] or hereafter *owned by the Trust*" and to do so "in the same manner and to the same extent as *the Trust* might, were it present as said meeting." *Genger Trial*, 2010 WL 2901704, at *20. Here, the Appointment Provision empowers each Holder to vote as "*the Stockholder's* true and lawful proxy" JX 5 § 1 (emphasis added). It likewise grants each Holder the authority "to vote all of the Shares plus any additional Shares which *Stockholder may own or hold* as of the date of any such vote" and "which *the Stockholder* is entitled to vote … for and in the name, place and stead of *the Stockholder*." *Id.* (emphasis added).

Id. at 42 (emphasis in original). The Court rejected Defendants' attempts to distinguish *Genger*, concluding:

> There is no language in the Appointment Provision that would suggest that the grant of authority would bind subsequent owners. That absence is telling, because the Appointment Provision is the operative provision that creates the agency relationship. If the parties intended to establish

> an agency relationship that would bind subsequent owners, then the Appointment Provision would be the logical place to include the operative language.

*Id.*at 43-44.

The trial court's interpretation of the Appointment Provision aligns not only with the analysis in *Genger Trial*, but also this Court's interpretation on appeal. *Genger*, 28 A.3d, at 180 ("By its plain terms, the Proxy language only applied to the [] shares 'owned' by the [stockholder]. That is, the Proxy would attach only to those [] shares that were "now or hereafter *owned by* [the stockholder]") (emphasis original). Defendants do not challenge the trial court's interpretation, and under *Genger*, that interpretation alone warrants affirming the decision below.

5. The Court of Chancery Appropriately Determined the Irrevocability Provision does not Cause the Irrevocable Proxy to Run with the Majority Shares.

The Court of Chancery next turned to the Irrevocability Provision and correctly observed that "Daniel's analysis conflates three different concepts: irrevocability, duration, and running with the shares," the first "concerns whether the grantor of the proxy can revoke it". Op. at 44. The Court concluded:

> The Irrevocability Provision makes clear that the Irrevocable Proxy was intended to be irrevocable. The Irrevocability Provision also addresses the duration of the Irrevocability Proxy, and it contracts out of the three-year default period that would apply under [8 *Del. C.* § 212]…But the Irrevocability Provision did not address what would happen if Pike transferred the Majority Shares.

Id. at 46. Defendants do not challenge the determination that the Irrevocability Provision fails to address transfer of the Majority Shares.

6. The Addendum Demonstrates that the Parties did not Believe the Irrevocable Proxy Bound Subsequent Owners.

Assessing the Addendum, the trial court observed that, under common law, "the Irrevocable Proxy would terminate upon the transfer of the Majority Shares" to Old MedApproach. Op. at 71. The Skadden lawyer representing Popco understood the need for "a mechanism for Old MedApproach to sign on to the Irrevocable Proxy once it acquired the Majority Shares," so he prepared the Addendum. *Id.* The Court found this fact compelling: "Popco's experienced legal counsel clearly did not think the Irrevocable Proxy extended to subsequent transferees, since he insisted on including the Addendum." *Id*. at 73; (B-319).

The Court of Chancery further determined that the Transfer Restriction was "the critical aspect" of the Addendum because, "[u]nlike the Irrevocable Proxy, the Transfer Restriction represents an obvious attempt to prevent a subsequent owner from selling the Majority Shares unless at least certain buyers agree to be bound by the Irrevocable Proxy." *Id*. at 73. Rejecting competing constructions of the Transfer Provision, the Court concluded: "[t]he best reading of the Transfer Provision is that (i) it applies to any transfer by one MedApproach Person to another MedApproach

Person, and (ii) a MedApproach Person means an entity or individual affiliated with Old MedApproach, not a third party." *Id.* at 77.

Defendants' failure to challenge this interpretation of the Transfer Provision leads to two critical concessions: (1) the parties to the Addendum did not believe the Irrevocable Proxy ran with the shares (*Id*. at 71, 75, 77); and (2) the parties knew how to restrict a transfer of the Majority Shares but only elected to apply that restriction to a narrow set of transfers *Id.* at 77. These concessions are fatal to Defendants' appeal.

7. The Court of Chancery Properly Concluded that the Irrevocable Proxy does not Run with the Majority Shares.

The Court of Chancery summarized its factual and legal conclusions as follows:

> The Irrevocable Proxy does not plainly provide that it binds a subsequent owner of the Majority Shares. There is language which might be construed in that fashion if read broadly and in Daniel's favor, but that is not sufficient. The Addendum demonstrates that the parties themselves did not believe that the Irrevocable Proxy would bind subsequent purchasers of the Majority Shares. The Addendum contains the Transfer Restriction, but that provision does not encompass a third party [owner] of Majority Shares.
>
> As a result, "the language of the Proxy itself does not plainly indicate that the Proxy [is] to run with the [s]hares if they are sold." *Genger Trial*, 2010 WL 2901704, at *20. Accordingly, the Irrevocable Proxy does not run with the Majority Shares.

Op. at 78.[6] Defendants do not argue the Court of Chancery misapplied *Genger* or *Genger Trial*. As discussed below, Defendants' discrete arguments do not warrant reversal. The trial court's detailed analysis of the entire Irrevocable Proxy should therefore be affirmed.

[6] Based on this conclusion, the trial court determined that extrinsic evidence was not relevant to its analysis and that, even if extrinsic evidence were to be considered, "[i]t does not establish that the parties intended for the Irrevocable Proxy to run with the Majority Shares" and instead, "the record reflects that the [Irrevocable Proxy] structure was not intended to be permanent." Op. at 78-79. Defendants do not challenge these factual determinations on appeal.

II. THE COURT OF CHANCERY CORRECTLY HELD THE NON-TERMINATION PROVISION DOES NOT BIND SUBSEQUENT OWNERS OF THE MAJORITY SHARES.[7]

A. Question Presented.

Did the Court of Chancery correctly hold that neither the (1) "any act of the Stockholder" language, nor (2) the "any other event or events" language in the Non-Termination Provision evidence a clear and unambiguous intent to bind subsequent owners of the Majority Shares? Op. at 49–57.

B. Scope of Review.

This Court performs a *de novo* review when considering issues of contract interpretation. *Exelon*, 176 A.3d, at 1266–67. Irrevocable proxies are contracts, making *de novo* review applicable to appeals concerning their interpretation. *Genger*, 26 A.3d, at 190. To the extent Defendants challenge the Court of Chancery's factual findings, those findings are assessed for clear error. *Id.* (citing *Osborn*, 991 A.2d, at 1158.

C. Merits of the Argument.

Defendants argued below that the Non-Termination Provision prevents termination of the Irrevocable Proxy by a sale of stock, which means the Irrevocable

[7] Plaintiff addresses Defendants' first and second arguments together, as they both concern the language of the Non-Termination Provision.

Proxy runs with the Majority Shares. Op. at 49, 51. The Court of Chancery rejected this argument, concluding:

> Read in context and against the backdrop of the common law, the more natural reading is that the Non-Termination Provision confirms that the Stockholder cannot terminate the Irrevocable Proxy while owning the Majority Shares. The provision does not say anything about whether the Irrevocable Proxy binds a subsequent owner.

Id. at 49-50.

Defendants argue the Court of Chancery erred in interpreting the Non-Termination Provision by (1) referencing common-law principles in the Restatement (Third) of Agency in its analysis, and (2) holding the "any other event or events" language in this provision did not reflect a plain and unambiguous intent that the Irrevocable Proxy run with the Majority Shares. OB at 20-31. Neither argument warrants reversing the ultimate determination that the Irrevocable Proxy does not run with the Majority Shares.

1. The "any act of the Stockholder" Language Does Not Bind Subsequent Owners of the Majority Shares.

The Court of Chancery correctly held the "any act of the Stockholder" language in the Non-Termination Provision does not bind subsequent owners of the Majority Shares. Op. at 55. For Defendants to prevail, they must show the "any act of the Stockholder" language evidences an unambiguous intent to bind subsequent owners. *See Genger Trial*, 2010 WL 2901704, at *2.

The Non-Termination Provision provides:

> The Stockholder agrees that such Irrevocable Proxy is coupled with an interest sufficient in law to support an irrevocable power and shall not be terminated by any act of the Stockholder (other than in the termination provisions of Section 4 hereof), by death or disability of the Stockholder, by lack of appropriate power or authority or by the occurrence of any other event or events other than as provided in Section 4 hereof.

(B-331).

The trial court credited Defendants' interpretation as "one possible reading," but found "[t]he better reading is that the concept of an 'act of the Stockholder' encompasses acts that the principle might take to terminate the agency relationship while remaining the owner of the Majority Shares." *Op.* at 51-52. In other words, when the Stockholder —defined *only* to mean Pike (B-330)—no longer owns the Majority Shares, his commitments associated therewith terminate.

The Court of Chancery elaborated that the Non-Termination Provision "reflects a common contractual practice of memorializing default principles of common law" indicating "[the Non-Termination Provision] is not a bespoke provision designed to make the Irrevocable Proxy run with the Majority Shares." Op., at 51. The trial court determined the "any act of the Stockholder" language reframed the common law precept that "an irrevocable agency arrangement cannot be terminated by 'a manifestation revoking the power or proxy made by the person

who created it[.]'" *Id*. at 52 (quoting the Restatement (Third) of Agency (Am. Law. Inst. 2006) (the "Restatement") § 3.13(2)(a)).

The trial court concluded that, "[a]gainst the backdrop of these common law rules, the reference to 'any act of the Stockholder' necessarily refers to any act the stockholder takes while still the owner of the Majority Shares," which "[t]he parties plainly understood [], because they entered into the Addendum to bind Old MedApproach…." *Id.* at 54. Thus, the trial court determined "only [Plaintiff's] reading is persuasive." *Id.* at 54. It further concluded that "the presence of an ambiguity alone is sufficient to defeat Daniel's argument." *Id.* at 55. Therefore, the "any act of the Stockholder" language does not cause the Irrevocable Proxy to run with the Majority Shares.

Defendants advance three arguments that the Court of Chancery erred in interpreting the "any act of the Stockholder" language. *First*, the Restatement's default common law principles are unavailable because "statutory provisions should not be used to interpret contract language where the contract at issue is different from the statute." OB at 23. *Second*, the parties did not intend to memorialize the Restatement's principles because they executed the Irrevocable Proxy a decade before the Restatement's publication. *Id.* at 24. *Third*, even if relevant, the Restatement's principles are counter to Delaware law. *Id.* at 25. Each argument fails.

a. The Court of Chancery Properly Read the Non-Termination Provision Against the Backdrop of Common Law.

Defendants muddle the Court of Chancery's analysis to suggest that reliance on the common law invalidates its conclusions as to the "any act of the Stockholder" language. OB at 22-23. Contrary to Defendants' argument, the trial court's determination was not "premised solely" on the Restatement (OB at 23); the court below also relied on the presence of the Addendum and the absence of any reference to a sale of the Majority Shares. The Court of Chancery's operative conclusions that (1) the "any act of the Stockholder" language is susceptible to two meanings "in the abstract," (2) "only [Plaintiff's] reading is persuasive," and (3) "the presence of ambiguity alone is sufficient to defeat Daniel's argument," are supported by the record, common law, and *Genger*. Op. at 49, 54-55, 57. None of Defendants' three sub-arguments warrant the opposite finding-that the "any act of the Stockholder" language demonstrates an unambiguous intent that the Irrevocable Proxy runs with the Majority Shares.

b. *Stream TV* does not Apply.

First, Defendants attempt to shoehorn the trial court's interpretation of the "any act of the Stockholder" language into this Court's analysis in *Stream TV Networks, Inc. v. Seecubic, Inc.*, 2022 WL 2149437 (Del. June 15, 2022) ("*Stream TV*") but fail to cite authority supporting their position. OB at 23. In *Stream TV*,

this Court held when contract language "differs materially" from statutory language, Delaware courts will not apply the statutory provision or related common law as an interpretative guide. *Stream TV*, 2022 WL 2149437, at *11-12.

Stream TV is distinguishable because the court below did not rely on a statutory analogy. Although Section 212(e) of the Delaware General Corporation Law enables parties to create irrevocable proxies, it is silent on their termination. The trial court, relying on Delaware law, articulated the non-controversial proposition that irrevocable proxies terminate upon the sale of the underlying stock absent clear language to the contrary. *Id*. at 51-53 (citing, *inter alia*, *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1050 (Del. Ch. 2015)). From this foundation, the Court of Chancery concluded:

> Read against the backdrop of the default common law rules concerning scenarios when irrevocable proxies terminate, given the presence of the Addendum, and without any explicit reference in the Non-Termination Provision to a sale of the Majority Shares, only [Plaintiff's] reading is persuasive. Regardless, for purposes of the Irrevocable Proxy, the presence of ambiguity alone is sufficient to defeat Daniel's argument. The reference in the Non-Termination Provision to "any act of the Stockholder" does not cause the Irrevocable Proxy tun with the Majority Shares.

Op. at 54-55.

There was nothing untoward about the Court of Chancery's reliance on common law as framed in the Restatement (in addition to Delaware law) to resolve a potential ambiguity. Unlike statutes, which often modify or override common

law, Restatements (eponymously) restate common law. *See Samson v. Smith*, 560 A.2d 1024, 1027–28 (Del. 1989) (Restatements are "merely a formulation of well established common law principles"). Delaware courts routinely interpret contract provisions against the backdrop of common law. *See, e.g., Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, 2019 WL 4927053, at *12 (Del. Ch. Oct. 7, 2019) (stating the structure of a section to a limited partnership agreement "must be interpreted against the backdrop of the common law."). Accordingly, Defendants' argument on this point fails.

c. The Restatement's Publication Date does not Warrant Reversal.

Second, Defendants argue the Court of Chancery committed reversable error by relying on the Restatement because it "was not published until 2006." OB at 24. This argument also fails.

While the Irrevocable Proxy was executed in 1997, the trial court relied upon a common law principle more than a century old. That principle is:

> After a sale, the grantor no longer has the right to vote the shares that are the subject of the proxy. Instead, the right belongs to the subsequent owner. The proxyholder cannot exercise the grantor's right to vote because the grantor no longer possesses that right. Consequently, absent specific and express language to the contrary, an irrevocable proxy terminates "when it is no longer possible for the proxyholder to vote because the grantor of the proxy no longer owns the … interest."

Op. at 53 (quoting Restatement § 3.13 cmt. b). This "generally accepted" common law principle, dates back to at least 1852. *Webster v. Upton*, 91 U.S. 65, 70 (1875)

(citing JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 534 (4th ed. 1852)).

Delaware common law has long recognized that voting rights are integral to stock ownership. *See Norton v. Digital Applications, Inc.*, 305 A.2d 656, 659 (Del. Ch. 1973) ("The right to vote shares of stock issued by a Delaware corporation is an incident of legal ownership."); *In re Resorts Int'l S'holders Litig.*, 1988 WL 92749, at *10 (Del. Ch. Sept. 7, 1988), *aff'd sub nom.*, 570 A.2d 259 (Del. 1990) (acknowledging the rights to payment or obligations to pay resulting from lawsuits follow the shares). Accordingly, Restatement's 2006 publication date is immaterial because the common law upon which the Court of Chancery relies predates both the Restatement and the Irrevocable Proxy.

d. Delaware Follows the Common Law's Default Principle that Shareholder Rights Travel with the Shares.

Finally, Defendants incorrectly argue that the common law principle—by default, rights associated with shares travel with the shares—conflicts with Delaware law. *See e.g. Urdan v. WR Cap. Partners, LLC*, 2019 WL 3891720, at *11 (Del. Ch. Aug. 19, 2019), *aff'd*, 244 A.3d 668 (Del. 2020) ("If a seller wishes to retain a subset of the rights associated with the transferred shares . . . then the parties to the transaction must provide specifically for that outcome."); *Activision*, 124 A.3d, at 1050 ("When a share of stock is sold, the property rights associated

with the share . . . travels with the shares."). Again, Defendants fail to provide a basis for reversal.

2. The Court of Chancery Correctly Interpreted the "any other event or events" Language in the Non-Termination Provision.

The Court of Chancery correctly determined the "any other event or events" language in the Non-Termination Provision did not plainly and clearly manifest an intent that the Irrevocable Proxy run with the Majority Shares. Specifically, the trial court found that the "any event or events" language was, "[i]n the abstract," susceptible to two readings; however, "[c]onsidered against the backdrop of the common law rules, in the presence of the Addendum, and in the absence of any reference to a transfer of the Majority Shares," the only reasonable reading is that the language does not apply to a sale of the Majority Shares. Op. at 57. The Court of Chancery determined "it is enough that this aspect of the Irrevocable Proxy does not expressly address a sale of the Majority Shares" and "[i]t is not possible to read the reference to 'any other event' as plainly providing that the grant of proxy authority runs with the Majority Shares." *Id.*

Defendants challenge this aspect of the ruling on two grounds. First, they argue the trial court erred by not finding Defendants' reading of "any other event or events" the only reasonable one. OB at 28. Second, they argue the court below erred in referring to the Addendum. *Id.* at 29-30. Both arguments fail.

a. The Court of Chancery Properly Found that the "any other event or events" Language did not Clearly Bind Subsequent Owners of the Majority Shares to the Irrevocable Proxy.

Defendants argue the Court of Chancery impermissibly read the words "while the stockholder owns the shares" into the "any other event or events" language when finding that, "[i]n the abstract," the clause was susceptible to more than one meaning. OB at 28; Op at 57. Defendants misread the Opinion and the Non-Termination Provision itself. The entire Non-Termination Provision is a commitment by "[t]he Stockholder," which the Irrevocable Proxy defines as Pike only. Op at 57; (B-330). Moreover, as previously discussed (*supra* pages 12-21), the recitals and Appointment Provision make clear that the Irrevocable Proxy only applies to the Proxy Shares when held by the Stockholder. Op. at 43; (B-330-31). It was therefore reasonable for the Court of Chancery to read the "any other event or events" language as applying only when the Stockholder owns the Proxy Shares.

The issue presented by Defendants—properly framed—is whether the "any event or events" language unambiguously reflects the parties' intent that the Irrevocable Proxy runs with the Majority Shares. *Genger Trial*, 2010 WL 2901704, at *20. A contract provision is ambiguous if "reasonably susceptible of two or more interpretations or…two or more different meanings." *Twin Cities Fire Ins. Co. v. Delaware Racing Assoc.*, 840 A.2d 624, 627 (Del. 2003). Defendants provide no

explanation for why the "any other event or events" language can only mean the Irrevocable Proxy runs with the Majority Shares.

As the Court of Chancery correctly determined, "it is enough that the Irrevocable Proxy does not expressly address a sale of the Majority Shares." Op. at 29. Despite Defendants' contrary protestations (OB at 29), the Court of Chancery's determination is firmly supported by this Court's decision in *Genger*. *See Genger*, 26 A.3d, at 198 (to bind subsequent owners, an irrevocable proxy must plainly provide that the right to vote runs with the shares). Accordingly, the Court of Chancery properly found that the "any other event or events" language fails to unambiguously bind subsequent owners of the Majority Shares to the Irrevocable Proxy.

b. The Court of Chancery did not Err in Relying on the Addendum.

Defendants argue the Court of Chancery erred in relying on the Addendum in analyzing the "any other event or events" language. Defendants contend that the court below construed the Addendum "as somehow creating a negative inference that the Irrevocable Proxy terminates when stock is transferred." OB at 29 (citing Op. at 57). Defendants' argument again fails.

First, Defendants fail to address the applicable standard of review. The Court of Chancery factual determined that the presence of the Addendum reflected the parties' understanding that the Irrevocable Proxy did not run with the shares. Op. at

3, 35, 40, 54, 56-57, 72, 78. As such, Defendants are required to demonstrate that the trial court's determination was clearly erroneous. *Wilson v. Eastern Electric & Heating, Inc.*, 550 A.2d 35, 1988 WL 113131 at *1 (Del. 1988) (ORDER) ("Intent of the parties is a fact question"). Defendants fail to make this showing.

The evidence fully supports the trial court's factual findings. In addressing the Addendum, the trial court reiterated "Pike acted in his capacity as the Stockholder to grant the authority conferred in the Appointment Provision to each of the Holders, with the Irrevocable Proxy acting as a bridge to an eventual governance structure in which the Majority Shares would be widely held." Op. at 70. Defendants do not challenge this factual finding, which is fully supported by the record. (B-330-31; B-081, 084).

The trial court also found that experienced counsel from Skadden "did not believe…the Irrevocable Proxy, standing alone, was sufficient to bind Old MedApproach" and therefore insisted upon the Addendum. Op. at 71. Defendants erroneously argue there is no record support for this finding. *See* OB at 30. Daniel himself admitted at trial that the Skadden lawyer drafted the Addendum (B-295, at 146:18-147:10). Indeed, at trial and during his deposition, Daniel, who signed the Addendum, claimed that MedApproach's counsel contributed to the drafting of the Addendum. (B-293, at 113:14-15, B-294, at 126:4-8; B-309, B-309, at 137:12-23; B-335-36).

Based on this evidence, it was reasonable, and therefore not clearly erroneous, for the court below to conclude that "the very existence of the Addendum undercuts Daniel's argument that the parties expected the Irrevocable Proxy to run with the Majority Shares" because "[i]f the Irrevocable Proxy clearly provides for that outcome, then there would have been no need to draft the Addendum." Op. at 72 (*Wilson*, 1988 WL 113131, at *1). It was therefore appropriate for the court below to rely on them to resolve an abstract ambiguity.

Second, Defendants' position on appeal is opposite to their position below. In the court below, Defendants argued strenuously that the Addendum caused the Irrevocable Proxy to run with the Majority Shares. S*ee* Op. at 70-77 (addressing and rejecting Defendants' numerous arguments based on the Addendum). On appeal, Defendants ask this Court to disregard the Addendum entirely. *See* OB at 30. Defendants should be estopped from taking a directly contradictory position on appeal. *See e.g. Shawe v. Elting*, 157 A.3d 152, n.31 (Del. 2017), Cassidy v. Cassidy, 689 A.2d 1182, n.7 (Del. 1997) (declining to hear issue raised on appeal for the first time because there was no plain error when an appellant takes a contradictory position at trial). Accordingly, this argument fails to support reversing the Court of Chancery.

III. THE COURT OF CHANCERY'S INTERPRETATION OF THE ASSIGNMENT PROVISION IS FREE FROM LEGAL ERROR.

A. Question Presented.

Whether the Court of Chancery erred as a matter of law in holding the Assignment Provision does not plainly provide for the Irrevocable Proxy to run with the Majority Shares.

B. Scope of Review.

The Supreme Court reviews pure questions of law and interprets contracts *de novo*. *Osborne,* 991 A.2d, at 1158 (Del. 2010). As to mixed questions of law and fact, this Court will not disturb the trial court's factual findings unless they are clearly erroneous. *Genger,* 26 A.3d, at 190 (citation omitted).[8]

C. Merits of the Argument.

Defendants argue the Court of Chancery erred "as a matter of law in holding that the Assignment Provision does not plainly provide for the Irrevocable Proxy to run with the Majority Shares." OB at 32. They argue similarly that the Court of Chancery erred "by not giving effect to all of the terms of the Irrevocable Proxy and improperly limiting the assignment clause of the Irrevocable Proxy so as not to bind assigns of the Stockholder." *Id.* at 3. These errors, say Defendants, resulted in an

[8] Plaintiff incorporates the Standard of Review stated *supra* at I.B as to the "clearly erroneous" standard.

interpretation of the Irrevocable Proxy that the evidence "unequivocally showed was the opposite of the parties' intent." *Id.*

They are wrong. The court below correctly found that, "the Assignment Provision does not clearly provide for the Irrevocable Proxy to run with the Majority of the Shares." Op. at 58. To reach this conclusion, the trial court applied the "special principles of contract interpretation that apply to proxy arrangements," dictating that any ambiguity is construed strictly in favor of the rights of Plaintiff, as the owner of the Majority Shares, and against the authority granted to the proxyholder. *Id.* at 35. Defendants ignore this strict presumption by relying on ordinary contract interpretation principles. For this reason, and others below, the Assignment Provision does not unambiguously provide that the Irrevocable Proxy runs with the Majority Shares.

1. The Substance and Structure of the Assignment Provision.

The Assignment Provision "address[es] the extent to which the rights granted under the Irrevocable Proxy could be assigned[.]" Op. at 57. It states:

> This Irrevocable Proxy and the rights of the Holders under this Irrevocable Proxy may not be assigned, except that (a) any Holder may, without the consent of the remaining Holders, transfer such Holder's rights to any person who is, or is affiliated with, a limited partner of the Partnership, and (b) the Holders may act pursuant to this Irrevocable Proxy, in voting the Proxy ***Shares*** or otherwise, through any duly authorized officer or employee of the Company. *This Irrevocable Proxy shall be binding upon and inure to the benefit of*

> ***Stockholder*** *and* ***the Holders*** *and* ***their*** *respective heirs, devises, legatees, personal representatives, agents, and* ***permitted assigns****.*

Id. at 58 (quoting (B-333)) (emphasis added);.[9] Nothing in the above text "expressly provides for the Irrevocable Proxy to run with the Majority Shares[.]" *Id.*

The Court of Chancery distilled the Assignment Provision into three, integrated parts:

> It starts with a blanket prohibition on any assignment of either the Irrevocable Proxy as a whole or any of the rights that the Holders received under the Irrevocable Proxy (the "No-Assignment Clause"). It then creates two exceptions to the No-Assignment Clause, each of which identifies a circumstance in which the Holders could assign their rights (the "Holder Exceptions"). Finally, it ends with a sentence identifying who benefits from and will be bound by the Irrevocable Proxy (the "Bound Parties Clause").

Id.

The No-Assignment Clause: "prohibits the Holders from assigning the Irrevocable Proxy in its entirety, and … any of the rights they possess under the Irrevocable Proxy. [It] does not place any restrictions on the Stockholder's ability to transfer the Majority Shares." *Id.* at 59-60. The Holder Exceptions "identif[ies] two narrow exceptions to the prohibition against the assignment of the Irrevocable

[9] "'Stockholder' "only references Pike" and does not "include subsequent holders of the Majority Shares." Op. at 36. "Shares" refers to the 100 shares that "were owned by Pike at the time he executed the Irrevocable Proxy." *Id.* at 37. Originally, "the Holders" referred collectively to Daniel, Freedman, and Rush. *Id.* at 36. Neither "permitted assigns" nor "their" is defined in the Irrevocable Proxy.

Proxy or the rights that the Holders enjoy under it." *Id.* at 60. And the Bound Parties Clause identifies "permitted assigns" to whom the Holders can assign their rights." *Id.* at 61. "Notably, the list of parties identified…does not refer to transferees." *Id.*

The parties' divergent interpretations of the Assignment Provision center on the Bound Parties Clause, namely the meaning of the postpositive modifier "their" and the undefined phrase "permitted assigns." *Id.* Although "[a]t first blush, both readings are reasonable, resulting in ambiguity," ultimately, the trial court correctly found Plaintiff's reading of the Assignment Provision "the only reasonable one." *Id.* at 63. This Court should uphold this conclusion.

2. In Finding "their" Modified only "the Holders," the Court of Chancery Correctly Applied the Last Antecedent Rule and Other Canons of Construction.

The Court of Chancery credited Plaintiff's interpretation of the Assignment Provision "as the only reasonable one" because "[i]t applies the rule of the last antecedent…a settled principle of interpretation." Op. at 63. Applying this rule, the court below found "that the word 'their' only modified 'the Holders,' and thus "the Assignment Provision only bound assigns of the Holders, not [] Stockholder." *See id.* at 32. Defendants complain that this interpretation reads "Stockholder" out of the Bound Parties Clause. OB at 33-34. Again, they are wrong.

The last antecedent rule provides that "[a] pronoun, relative pronoun, or demonstrative adjective within a statute generally refers to the nearest antecedent."

Op at 63 n.63. 73 Am. Jur. 2d. Statutes § 129. *Accord Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (last antecedent rule "should ordinarily be read as modifying only the noun or phrase that immediately follows[.]"). Applying this rule to the Bound Parties Clause, the court below correctly found that the postpositive use of the plural possessive "their" does not reach back—and thus through—its nearest antecedent "the Holders" to the first antecedent "Stockholder."

Additionally, the Court of Chancery highlighted two drafting errors notorious for producing ambiguity: The placement of a modifying adjective and the omission of an oxford comma. Referring to the position of "their" in the Bound Parties Clause, the court below noted that "the nature of the ambiguity created by the placement of an adjective is a known issue that experts advise drafters to avoid." Op. at 63 (citations omitted). To illustrate, the trial court reconstructed the Bound Parties Clause using a correctly positioned oxford comma:

> If 'their' applied to both 'Stockholder' and 'the Holders,' then the natural way to write the sentence would be to say that '[t]his Irrevocable Proxy shall be binding upon and inure to the benefit of Stockholder, the Holders, and their respective heirs, devises, legatees, personal representatives, agents and permitted assigns.

Id. at 63-64 (citing BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE 748 (4th ed. 2016).

Reconstructing the text, applying the last antecedent rule and the Grammar Canon, produces the "more natural reading" of the Bound Parties Clause, as the

court below correctly concluded. Op at 63. Moreover, applying the last antecedent rule brings the Bound Parties Clause in compliance with the grammatical rule of pronoun-antecedent agreement such that the plural possessive "their" agrees with the plural antecedent "the Holders."[10]

The last antecedent rule also squares the Bound Parties Clause with grammatical rules governing determiners. "With postpositive modifiers, the insertion of a determiner before the second item [antecedent] tends to cut off the modifying phrase so that its backward reach is limited[.]" Antonia Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 17 at 149 (2012). *Accord Wallace v. Mt. Poso Cogeneration Co., LLC*, 2019 WL 7290946, at *2 (Del. Ch. Dec. 30, 2019). Applied here, the determiner "the" in "the Holders" cuts off the modifier "their," such that it does not reach back to the first antecedent "Stockholder."

Still, Defendants argue that the Court of Chancery's use of the last antecedent rule "rendered the term 'Stockholder' meaningless." OB at 5. They contend the "Irrevocable Proxy was already binding upon the Stockholder that executed the proxy; the only possible purpose in including a reference to 'Stockholder' in [the

[10] "A pronoun must agree with its antecedent in number, person, and gender." BRYAN A. GARNER, THE CHICAGO MANUAL OF STYLE, Ch. 5, §§ 5.31, 5.32 (17th ed.) ("A pronoun's number is guided by that of its antecedent or referent – that is, a singular antecedent, and a plural antecedent, and a plural antecedent takes a plural noun of the same person as the antecedent …").

Bound Parties Clause] is to bind the Stockholders' assigns and others who later stand in their shoes." *Id.*

This argument clashes with the trial court's thorough analysis detailing the myriad reasons—grounded in the record, canons of contract interpretation, and the presumption of strict construction governing irrevocable proxies—that the Assignment Provision does not unambiguously provide that the Irrevocable Proxy runs with the Majority Shares. As the Court of Chancery aptly put it: "At best for Daniel, the language of the Bound Parties Clause *could* be construed to encompass a transferee of the Majority Shares." Op. at 68 (emphasis original).[11]

In short, the Court of Chancery did not commit legal error in applying the last antecedent rule or other canons of interpretation to construe the Assignment Provision.

[11] Defendants cite several cases to support their criticism of the Court of Chancery's use of the last antecedent rule. None of those cases is on point. In *Lockhart v. U.S.*, 577 U.S. 347 (2016), the Supreme Court upheld the lower court's application of the rule. In *E.I. du Pont de Nemours & Co. v. Green,* 411 A.2d 953, 955-56 (Del. 1980), the last antecedent rule was inapplicable mainly because it resulted in a reading "at odds" with the act's legislative purpose. Likewise for: *U.S. v. Bass*, 404 U.S. 336, 341 (U.S. 1971); and *Porto Rico Railway, Light & Power Co. v. Mor.*, 253 U.S. 345 (1920).

3. The Court of Chancery Correctly Found that the Undefined term "permitted assigns" Refers Only to "the Holders," not "Stockholder".

Defendants also contend the Court of Chancery erred in holding that "[t]he proper term to designate a subsequent owner of the Majority Shares would be a transferee, not an assignee." OB at 34-35. They say the Court of Chancery was wrong to reject their argument "that the terms 'assigns' and 'transferees' are interchangeable" such that the "phrase 'permitted assigns' encompasses subsequent owners of the Majority Shares." Op. at 64. In this way, say Defendants, the court below violated the principle that courts must interpret contract terms according to their plain, ordinary meaning. OB at 33-34. Defendants' argument collapses under the weight of the trial court's well-reasoned analysis.

Drawing from various reliable sources, the Court of Chancery observed that, "[a]lthough 'assign' and 'transfer'…have similar meanings, they are not equivalent." Op. at 64. "[T]ransfer is the broader term, and it generally refers to a change involving all aspects of ownership[,]" the Court of Chancery explained, while "assignment is the narrower term, and it generally refers to a change involving specific rights." *Id.* at 65.[12]

[12] *See also* Op at 65 n.37 & n.38, 66 n.39 (citing Black's Law Dictionary (11th ed. 2019); Restatement (Second) of Contracts § 316; 6 *Del. C.* § 18-401; 6 *Del. C.* § 17-1702(a); 6 *Del. C.* § 15-503(a)-(b)).

Notwithstanding the above, Defendants complain that the Opinion "nowhere explains why it would make sense in the context of interpreting the Irrevocable Proxy to define assigns differently than transferee such that the Stockholder's assigns would be bound but its transferees." OB at 35.

Engaging in a contextual analysis, the Court of Chancery observed: "[i]n other sections, the drafters of the Irrevocable Proxy recognized a distinction between transferees and assignees, and they used the verb 'transfer' to refer to the acquisition of shares." Op. at 68. This analysis is consistent with the "Contextual Canon of Presumption of Consistent Usage," which provides that "[a] word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggest a variation in meaning." Scalia & Garner, *supra*, § 25, at 170; *see also Alta Berkeley VI C.V. v. Omneion, Inc.*, 41 A.3d 381 (Del. 2012) ("[A]ny contractual provision … must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument").

The Court of Chancery also viewed the Bound Parties Clause from a textual perspective. It concluded, based on the placement of the Bound Parties Clause, and "[b]ecause only the Holders had limitations on their ability to assign their rights under the Irrevocable Proxy,…the phrase 'permitted assigns' only makes sense if it applies to the Holders and not to the Stockholder." Op. at 62-63.

Drawing again from *Genger Trial*, the Court of Chancery found that, if the parties had wanted the Assignment Provision to cause the Irrevocable Proxy to bind a subsequent owner, then they should have stated clearly that the Irrevocable Proxy binds the Stockholder and the Stockholder's transferees.'" OB at 68. Defendants say this was legal error because neither "*Genger*" nor any other Delaware case has "held [] that drafters of an irrevocable proxy need to use the magic word 'transferee' for an irrevocable proxy to run with the shares and be binding on a subsequent owner." *Id.* at 35-36. The Court of Chancery did not point to *Genger Trial* as mandating that an irrevocable proxy will only run with the shares and bind subsequent owners if—*and only if*—the instrument includes the term "transferees" in reference to subsequent owner(s). Rather, the Court of Chancery looked to *Genger Trial* as an instructive analogue for interpreting the Assignment Provision and the operative provisions of the Irrevocable Proxy. If anything, it would have been legal error not to apply *Genger Trial's* teachings.

Simply put, the Court of Chancery did not err in finding that "[t]he reference to 'permitted assigns' in the Bound Parties Clause logically refers to permitted recipients of contract rights from the Holders, not a subsequent owner of the Majority Shares." Op. at 67.

4. The Court of Chancery Correctly Resolved the Ambiguities in the Assignment Provision According to the "special principles of contract interpretation that apply to proxy arrangement."

Having correctly found ambiguity, the Court of Chancery construed the Assignment Provision "strictly in favor of the rights of the owner of the shares and against the authority granted to the proxyholder." Op. at 32-33 (citing *Genger Trial*, 2010 WL 2901704, at *20). In challenging this holding, Defendants resort to the commercial reasonableness principle of contract interpretation. They argue it "is unreasonable to conclude" that the drafters "intentionally did not include any language to restrict the Stockholder's ability to transfer or bind subsequent owners" because "that effectively gives MedApproach the unilateral ability to jeopardize the governance structure" by "terminat[ing] the Irrevocable Proxy with a single transfer of the Majority Shares." OB at 36. This outcome, claim Defendants, is "the opposite of the parties' intent," as the "[record] unequivocally showed." *Id.* at 3.

Defendants' commercial-reasonableness argument is grounded solely in ordinary contract interpretation principles, with no regard for the presumption of strict construction applicable to proxy arrangements. Their argument fails for this reason alone.

It also fails because an inquiry into commercial reasonableness is only warranted where a contract is ambiguous. *Fundamental Long Term Care Holdings,*

LLC v. Cammeby's Funding LLC, 20 N.Y.3d 438 (N.Y. 2013). Hence, by inviting this Court to take up the inquiry of commercial reasonableness, Defendants effectively admit the ambiguity of the Assignment Provision. That admission, in turn, gives rise to the presumption of strict construction, sealing Defendants' fate.

Defendants' commercial-reasonableness argument fails for yet another reason – it rests on the fallacy the Irrevocable Proxy was intended as a permanent governance structure. The Court of Chancery properly rejected this contention. *See, e.g.*, Op. at 37 (rejecting Defendants' assertion that "Shares" encompasses "all of the shares of Danco GP"); *cf. id*. at 37 (finding the "record evidence" showed the Irrevocable Proxy was intended as a gap-measure). Defendants make no attempt to argue that these factual findings were clearly erroneous.

The Court of Chancery's interpretation of the Assignment Provision is free of error.

CONCLUSION

For all the foregoing reasons, Plaintiff below, Appellee respectfully requests that the Court enter an Order affirming the Court of Chancery's Opinion in all respects.

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