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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALCON RESEARCH, LLC, Plaintiff/Counterclaim Defendant Below, Appellant/Cross-Appellee. v. AURION BIOTECH, INC., Defendant/Counterclaim Plaintiff Below, Appellee/Cross-Appellant.	No. 34, 2025 Court Below: Court of Chancery of the State of Delaware C.A. No. 2024-1102-KSJM

APPELLANT/CROSS-APPELLEE'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal concerns whether a corporate charter patterned after standard venture-capital terms and this Court's clear guidance in *Elliot Associates, L.P. v. Avatex Corp.*, 715 A.2d 843 (Del. 1988), contains an unforeseen but consequential loophole. The Court of Chancery held that the Certificate of Incorporation ("Certificate") of Appellee/Cross-Appellant Aurion Biotech, Inc. ("Aurion" or the "Company") does not require the consent of certain preferred stockholders, including Appellant/Cross-Appellee Alcon Research, LLC ("Alcon"), before Aurion may complete an unusual reverse stock split or an initial public offering ("IPO"). This decision overrides the plain language of the expansive protective provisions that the preferred stockholders secured, as well as the parties' common understanding of those protections' scope. Further, this decision sows significant uncertainty regarding the rights of venture-capital investors with existing, substantial investments in early-stage companies like Aurion.

Under the Certificate, Aurion "shall not, either directly or indirectly by amendment, merger, consolidation or otherwise" "increase . . . the number of authorized shares of Common Stock" or "purchase . . . or acquire any [Company] shares" without the consent of two-thirds of the Series C Stockholders ("Series C Consent"). The Certificate includes the specific language that the Supreme Court ("this Court") and the Court of Chancery ("the Court") have characterized as the

"path for future drafters" to "exalt substance over form"—that is, to ensure that protective provisions reach as far as their plain language specifies. *Avatex Corp.*, 715 A.2d at 855 (addressing the phrase "by merger, consolidation or otherwise"); *Gunderson v. Trade Desk, Inc.*, 326 A.3d 1264, 1287 (Del. Ch. 2024) (explaining interaction of *Avatex* and doctrine of independent legal significant).

The Certificate even expands on this *Avatex* language. It includes anti-circumvention protections that prohibit Aurion from "either directly or indirectly" taking specified actions without consent. "[I]nclusion of" the word "indirectly . . . is intended to reach situations in which the underlying economic reality of the completed transaction is the functional equivalent of [a specified action]." *Shenandoah Life Ins. Co. v. Valero Energy Corp.*, 1988 WL 63491, at *7 (Del. Ch. June 21, 1988).

Alcon invested $40 million for a roughly 36% stake in Aurion to ensure its consent was necessary to reach the two-thirds Series C Consent threshold. Series C investors in turn constrained Aurion's capital table so that Series C Consent was required to alter Aurion's capital structure in any way, including to complete an IPO. The provisions granting the Series C Consent, taken together with the drastically reduced total number of authorized shares negotiated in the Series C financing, reflected the investors' desire to "limit Aurion's headroom for future capital transactions," including an IPO. Exhibit A, Post-Trial Opinion ("Op.") 4.

The structure and substance of the Series C protections tracked standard terms in the National Venture Capital Association ("NVCA") template charter with one notable difference. The Certificate added certain broad language at issue here: that Aurion could not "acquire" Company shares without Series C Consent. It is therefore no surprise that Aurion, Alcon, and other preferred stockholders all understood that Series C Consent was required before Aurion could expand its capital table to complete an IPO.

The Court nevertheless concluded that, through "the transactional magic" of a reverse stock split devised after Alcon brought suit, Aurion made available millions of authorized shares for sale in an IPO without Series C Consent, Op.25, holding:

- The reverse stock split did not constitute a direct or indirect acquisition of stock—even though Aurion possesses more than 92,000 treasury shares and millions of previously reserved but now issuable shares that it did not previously have and now intends to offer to public investors, *id.* at 24-26;
- Aurion's agreement to pay investors cash for fractional interests created by the reverse stock split did not constitute a direct or indirect purchase, *id.* at 26-28;

- Aurion did not effectuate an indirect increase in its authorized shares through its atypical reverse-stock split, *id.* at 20-23; and
- The Certificate's mandatory conversion provision allows Aurion to sweep away Series C Consent rights, today, before any IPO closing—even though the Certificate specifies that conversion occurs only "[u]pon closing" (i.e., shortly after IPO shares are delivered), *id.* at 28-29.

Each of these conclusions contravenes the Certificate's plain language, the parties' common understanding, and decades of precedent that sought to provide a clear "path for future drafters." *Avatex*, 715 A.2d at 855. If affirmed, the Court's Opinion will "creat[e] enduring uncertainties," *id.*, as to (1) existing venture-capital investments based on standard NVCA protective provisions, and (2) the language that drafters can employ to sufficiently protect investments in early-stage businesses.

This Court should reinstate the Certificate's plain language, reaffirm the parties' common understanding, and restore the clarity provided by *Avatex* and its progeny. This Court should reverse Section B of the Post-Trial Opinion and Paragraph 3 of the Order Implementing the Post-Trial Opinion.

SUMMARY OF ARGUMENT

1. Aurion's Reverse Split Amendment effected a direct or indirect acquisition of Company stock and thus required Series C Consent. Aurion did not pair the reverse split with a proportionate reduction in the number of authorized shares. The Amendment thereby allowed Aurion to obtain possession of more than 92,000 shares that were previously issued and outstanding and that became treasury stock after the split. Under the Certificate's plain language and the operative DGCL provisions' history and structure, this constituted a direct or indirect acquisition of shares. The Court held otherwise based on the doctrine of independent legal significance. But where, as here, drafters adopt certificate language that both includes and expands upon certain clear language identified in *Avatex*, the doctrine does not artificially narrow the parties' agreement. The Court thus erred in concluding that the Amendment was permissible without Series C Consent.

2. Aurion's Reverse Split Amendment likewise effected a direct or indirect purchase of Company stock and thus required Series C Consent. Under the Amendment and DGCL Section 155, Aurion paid stockholders cash in return for all fractional interests resulting from the split's uneven division of whole shares. That cash-out constituted a direct or indirect purchase of stock by Aurion. The Court's conclusion to the contrary clashes with the Certificate's plain language and pertinent DGCL provisions. At a minimum, the operative provisions of Section 3.4 are

ambiguous, and the Court therefore erred in failing to consider clear extrinsic evidence of the parties' common understanding. As Alcon demonstrated, Aurion, Alcon, and other preferred stockholders understood that the Certificate precluded the Company from completing an IPO absent Series C Consent.

3. Aurion's Reverse Split Amendment effected an indirect increase in the number of authorized shares of Company Common Stock and thus required Series C Consent. The Court erred in holding that Aurion need not secure Series C Consent before pursuing an atypical reverse split intended to circumvent the required Series C Consent and create headroom in the capital table so that it can offer authorized shares that it did not previously possess for sale to the public.

4. Until a Qualified IPO closes, Alcon's Series C Consent Rights remain effective, requiring Consent for each corporate action specified in Section 3.4 of the Certificate. A Qualified IPO cannot close until after a sufficient number of authorized, issued shares are sold pursuant to an effective registration statement, are listed and traded on an exchange, and generate $90,000,000 in gross proceeds to Aurion net of the underwriters' take. If those conditions are satisfied, only then will Section 5.1 of the Certificate effect an automatic conversion of Series C Stock into Common Stock, eliminating the Series C Consent. Until that time, Alcon retains Series C Consent rights, including consent rights over any change to Aurion's capital structure. The Court erred by misapprehending Alcon's argument and holding that

Section 3.4.1 does not give Alcon a consent right as to either IPO Charter amendments (which occur upon closing) or the mandatory conversion.

STATEMENT OF FACTS

A. Aurion's Lead Series C Investor, Deerfield, Secured Expansive Protective Provisions to Control Aurion's Capital Table

Aurion, an early-stage pharmaceutical company, is developing a therapeutic candidate to combat corneal endothelial disease. Op.2. To fund this development process, Aurion pursued a Series C fundraising round in 2022. *Id.* That financing secured Aurion $110 million spread over three closings. *Id.* 5.

Deerfield Management, a venture-capital investor, led Aurion's Series C round. Op.2. As lead investor, Deerfield took steps to give itself control over Aurion's future financial direction. Deerfield negotiated the number of authorized shares of Aurion Common Stock to limit Aurion's headroom for future capital transactions. *Id.* 4. Deerfield also negotiated a term sheet with Aurion that required consent of two-thirds of the Series C investors to create additional headroom or to sell the Company, whether by amendment, merger, consolidation or otherwise. *Id.* 2-3, 4. That term sheet provided that Aurion would not directly or indirectly create, increase, purchase, redeem, or otherwise acquire shares of its stock without Series C Consent. A0998. Deerfield then invested $55 million in exchange for 50% of the Series C shares, so its consent was required. Op.5. Thus, Deerfield intentionally limited Aurion's headroom in its capital table and ensured Aurion could not increase it without Series C Consent.

B. Alcon Obtained the Same Broad Preferred Stockholder Rights and Protections as Deerfield

Alcon joined Deerfield as a Series C investor, initially agreeing to purchase approximately 36% of the Series C shares for $40 million. *See* Op.5.[1] Alcon wanted to "invest enough" to secure "protective provisions that would protect its investment," A0751, as it was "concerned," like Deerfield, "about having a fixed cap table," to safeguard the investment, Scileppi 131:12-19.

On April 5, 2022, Aurion and the Series C investors executed a Preferred Stock Purchase Agreement. A0093-138. Aurion also amended its Certificate to facilitate the Series C round. A0326-357. The amendment included Section 3.4, which stated that Aurion "*shall not, either directly or indirectly by amendment, merger, consolidation or otherwise*, do any of the following" without Series C Consent:

> - 3.4.2 create, or authorize the creation of, or issue or obligate itself to issue shares of, or instruments or agreements convertible or exchangeable into, any additional class or series of share capital of this Corporation or reclassify any capital stock with voting, distribution or liquidation preferences that are pari passu with or senior to the Series C Preferred Stock, *or increase or decrease the number of authorized shares of Common Stock or Preferred Stock* …

[1] Alcon acquired additional shares from another Series C investor in October 2024, increasing its stake to approximately 40% on an as-converted basis. Op.11.

- 3.4.5 *purchase or redeem (or permit any subsidiary to purchase or redeem) or acquire any shares of share capital of this Corporation* ….

A0339-340 (emphasis added); A0487.

These Series C Consent Rights largely mirrored those in the then-current NVCA form charter, although that model did not include the "or acquire any shares" language from the term sheet included in Section 3.4.5. *Compare* A0959 *with* A0998; A0339-340.

Alcon's investment secured more than one-third of Aurion's Series C shares. Op.4. Thus, Alcon's consent was, like Deerfield's, required before Aurion could directly or indirectly take any of the actions enumerated in Section 3.4.5. *See* Op.4-5.

Deerfield did not intend to give Alcon Series C Consent. Op.5. In fact, Deerfield, Aurion, and other Series C investors did not realize until mid-2023 that Alcon had secured Series C Consent Rights. *Id.*; A0878. After discovering its "mistake," Op.5, Deerfield repeatedly attempted to eliminate Alcon's consent rights. Aurion's contemplated IPO would accomplish just that. *See* A0440-442; A1355; A0762.

C. The Parties to the Series C Financing Understood That Series C Consent Would Be Required for an IPO

After the Series C financing, Aurion had insufficient shares of issuable authorized Common Stock to complete an IPO. Op.13. The Certificate precluded

Aurion from creating additional shares or purchasing or acquiring extant shares to issue to the public without Series C Consent. A0339-340.

Aurion, Deerfield, and other Series C investors understood this. After realizing that Alcon, too, had Series C Consent Rights, Aurion and Deerfield evaluated how those Rights applied to various financing transactions. Both determined that Series C Consent was necessary before an IPO.

For example, in June 2023, Aurion's CFO and the Company's outside counsel at Wilson, Sonsini, Goodrich & Rosati drafted a PowerPoint intended for Aurion's Board that explained that an "[i]nitial public offering" could not be completed without "Requisite Series C (66 2/3%)" consent. A1345; A0673. In August 2023, Deerfield's designee on Aurion's Board (who "quarterback[ed]" Deerfield's investment in Aurion, Op.2) summarized the "key business terms" of the Series C investment. He, too, recognized that "66% Preferred" was the "[v]oting threshold[]" for an "IPO." A1353. And another director appointed by a Series C investor, testified that members of Aurion's Board were "concern[ed] that Aurion would not be able to initiate an IPO without Alcon's consent if Alcon kept the Series C consent rights that it had." A0602.

D. Aurion Nevertheless Plowed Forward with Its Planned IPO Without Series C Consent

Aurion's Board first voted to pursue a possible IPO during its June 2024 meeting. Op.10. The Board empowered a Special Committee—which excluded

Alcon-designated directors—to pursue financing transactions, including potentially an IPO. Op.10-11.

In July 2024, Alcon conveyed to Aurion that it would not consent to an IPO at this juncture. *Id.* 11. Because the Special Committee excluded Alcon directors, Alcon was kept in the dark in the months following the June Board meeting. *Id.* 11. It was not until mid-October 2024—when Aurion noticed a Board meeting and distributed a draft Registration Statement—that Alcon understood that Aurion intended to move forward with an IPO notwithstanding Alcon's objections. *Id.* 12. On October 18, 2024, Aurion submitted the Registration Statement to the U.S. Securities & Exchange Commission. *Id.* 13.

On October 28, 2024, Alcon filed suit seeking a declaration that Series C Consent was necessary to increase the number of authorized shares before an IPO. Op.13-14. Aurion filed its Answer and Counterclaims on November 4, 2024. *Id.* 14. Aurion sought a declaration that it does not need Alcon's consent for any actions taken in connection with a "Qualified IPO," "including any change in the authorized shares of capital stock." A0026-27. Aurion relied on Section 5.1 of the Certificate, which provides that Series C shares convert to Common Stock "upon . . . the closing of the sale of shares" in a "Qualified IPO." A0036-37; A0352. The Company contended it could expand the capital table by increasing the number of authorized shares without Alcon's consent by amending the Certificate immediately before

closing the IPO. Despite the sequence of an IPO's closing, Aurion's Counterclaims asserted that Series C Consent Rights vanished before Aurion would amend its Certificate to increase authorized shares if it was done to pursue a Qualified IPO. *See id.*

E. After Alcon Filed Suit, Aurion Devised the Reverse-Split Loophole

"Tacitly conceding that it needed Series C Consent to amend the [Certificate] to increase the number of authorized shares, Aurion abandoned that plan during litigation in favor of another means of securing more headroom in its capital structure—the 'Reverse Split Amendment.'" Op.14. There was no dispute about the purpose of that Amendment. At trial, Aurion's CEO admitted that the "the reverse split was designed for the IPO." A0798.

On December 16, 2024, Aurion's Board (over Alcon's designated directors' objections) approved the Reverse Split Amendment. Op.14; A1424. Under the Amendment, "every 1.395 shares of Common Stock" were to be "combined . . . into one share of Common Stock" that would be "issued." Op.15. Certificates representing shares of Common Stock "prior to" the Amendment had to be "promptly surrender[ed] to the Corporation" "in exchange for a certificate" representing new "shares of common stock." *Id.* "No fractional shares" would be "issued." *Id.* Instead, the Board resolved that "under Section 155 of the [DGCL],

the Company *shall pay cash equal to the fair value of such fractional interests*." *Id.* (emphasis added).

In a significant departure from the norm, the Reverse Split Amendment did not proportionately decrease the number of authorized shares. Op.16. "That was by design." *Id.* "By reducing the number of issued and reserved shares but maintaining the number of authorized shares," the split allowed Aurion to obtain headroom—millions of shares of authorized Common Stock for sale in an IPO. *Id.*

Specifically, before the Reverse Split Amendment there were 325,011 Common Stock shares issued and outstanding. A0392. Dividing that total by the 1.395 factor and then subtracting it from the previously outstanding 325,011 shares results in approximately 92,000 whole shares of Common Stock—the "Acquired Shares"—formerly held by stockholders and now held by Aurion. *Id.* In addition, roughly 7,000,000 authorized shares that were previously reserved for conversion of Preferred Stock into Common Stock and for Aurion's employee stock options are now also available to Aurion for sale in an IPO. A0555-556; A0342-343. That is, Aurion now has millions of additional shares to raise equity financing and dilute Alcon's equity and voting interests.

In mid-December 2024, Alcon amended its Complaint to seek a declaration that the Reverse Split Amendment violated multiple Series C Consent Rights. Op.17.

F. After Trial, the Court Held That the Reverse Split Amendment Did Not Violate Alcon's Series C Consent Rights

The parties tried their claims on an expedited basis on January 2 and 14, 2025. Op.16. On January 27, 2025, Chancellor McCormick issued the Opinion.

The Court concluded that Alcon's consent was not necessary to adopt the Reverse Split Amendment. Op.23. The Court held that "through the transactional magic of a reverse stock split, Aurion did not acquire" additional shares. Op.25. Instead, according to the Opinion, the Amendment merely "reclassifi[ed] . . . existing shares." *Id.*

Similarly, the Court held that although Aurion paid for the fractional interests resulting from the reverse split, Aurion did not "purchase" those interests. *Id.* 27. Rather, according to the Opinion, "the fractional overage was canceled and converted into the right to receive equivalent value in cash." *Id.*

The Court also held that the Reverse Split Amendment did not result in an increase in authorized shares, Op.22-23, that Aurion does not need Alcon's consent to "consummate a Qualified IPO in all scenarios," *id.* 28, and that the Series C Consent does not apply to mandatory conversion, *id.* 29.

ARGUMENT

I. Aurion's Reverse Split Amendment Effected an Acquisition and Purchase of Its Shares

A. Question Presented.

Did the Court err in concluding that Aurion did not "directly or indirectly" "acquire" or "purchase" Company shares, as those terms are used in Aurion's Certificate, by means of the Reverse Split Amendment? Alcon raised this question below, A0550-558, and the Court addressed it, Op.23-28.

B. Scope of Review.

The trial court's interpretation of the Certificate is a legal issue, which is reviewed de novo. *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998). An appeal from a bench trial decision "is upon both the law and the facts" and therefore this Court "has the authority to review the entire record and to make its own findings of fact in a proper case." *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

C. Merits of Argument.

The Certificate requires Series C Consent before Aurion may "either directly or indirectly by amendment, merger, consolidation or otherwise . . . purchase . . . or acquire any shares of share capital." A0339-340. The Reverse Split Amendment effected both an acquisition and a purchase of shares under the plain meaning of those terms—and nothing in the pertinent DGCL provisions requires the Court to displace the parties' agreement.

1. Delaware Principles for Construing Charters Bolster Alcon's Interpretation of Section 3.4.5

The construction of preferred stock provisions are matters of contract interpretation for the courts. *Matulich v. Aegis Comm's Grp., Inc.*, 942 A.2d 596, 600 (Del. 2008). "When [a] contract is clear and unambiguous," a court must "give effect to the plain-meaning of the contract's terms and provisions without resort to extrinsic evidence." *Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019) (quotation marks omitted). Contract terms must be read "as a whole," no terms may be rendered "mere surplusage," and "general terms of the contract must yield to more specific terms." *Id*. (quotation omitted). Because contracts are not formed in a vacuum, the "commercial context" and "basic business relationship between [the] parties must be understood to give sensible life to any contract." *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 927 (Del. 2017).

Absent the parties' agreement on language that expands consent rights, the doctrine of independent legal significance may prevent the extension of those rights to any transactions not facially prohibited by a charter. *Gunderson*, 326 A.3d at 1275-77 (citing *Warner Commc'ns Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962 (Del. Ch. 1989), *aff'd*, 567 A.2d 419 (Del. 1989) (table decision)); *see also Avatex*, 715 A.2d at 853 ("absent the [contractual language] at issue," independent legal significance would apply to preclude consent rights over the contested merger).

This Court provided "clear guidance for practitioners" as to the language parties may use if they wish to broaden the reach of preferred stockholder consent provisions. *Gunderson*, 326 A.3d at 1277, 1238-34 (citing *Avatex*, 715 A.2d at 855); *see also Greenmont Cap. Prs. I, LP v. Mary's Gone Crackers, Inc.*, 2012 WL 4479999, at *5 (Del. Ch. Sept. 28, 2012) ("In *Avatex*, the Court provided a 'path for future drafters,'" which is a "safe harbor." (quoting *Avatex*, 715 A.2d at 855)); *Benchmark Cap. Prs. IV, L.P. v. Vague*, 2002 WL 1732423, at *10 n.44 (Del. Ch. July 15, 2002) ("[D]rafting guidance, such as that provided in *Avatex*, may be read as creating a 'safe harbor' or as a prudential suggestion[.]").

Thus, language requiring a vote on any "amendment, alteration or repeal, whether by merger, consolidation or otherwise," "entirely changes the [independent legal significance] analysis." *Avatex*, 715 A.2d at 845, 854. Preferred stockholder consent provisions with this language have a "broader effect" than the doctrine might otherwise permit. *Gunderson*, 326 A.3d at 1284.

Where the "[p]referred stock rights granted by the corporate drafters . . . *are the functional equivalent of a provision that would expressly require such consent*" for the corporate action at issue, the doctrine of independent legal significance does not narrow the scope of those rights. *Id.* at 853-54 (emphasis added). In other words, under *Avatex*, if a certificate's preferred stockholder consent provisions incorporate the *Avatex* language described above *and* require consent for the resulting act, then

consent is required. And this is true *despite* the doctrine of independent legal significance. *See id.*

Using the anti-circumvention term "indirectly" further expands the reach of preferred stockholder consent provisions. "Indirect" transactions are transactions "in which the underlying economic reality of the completed transaction is the functional equivalent of a direct [action prohibited by the contract]." *Shenandoah*, 1988 WL 63491, at *7.

"Any rights, preferences and limitations of preferred stock that distinguish that stock from common stock must be expressly and clearly stated, as provided by [DGCL Section 151(a)]." *Matulich*, 942 A.2d at 601 (quotation omitted). So while preferred stockholder rights "will not be presumed or implied," *id.*, Delaware courts have recognized that parties may "expressly and clearly state[]" preferred consent rights even over specific corporate actions not explicitly named in the charter. They may do so by including the *Avatex* language and prohibiting "indirect" actions. *See, e.g.*, *Avatex*, 715 A.2d at 853 (concluding preferred stockholder rights were "expressly and clearly stated in the . . . certificate" where the "rights granted by the corporate drafters [were] the functional equivalent of a provision that would expressly require such consent").

If a court determines that a contractual provision is ambiguous, the court may consider extrinsic evidence to determine the parties' intent. *Sunline*, 206 A.3d

at 847. "[A]fter plain meaning, the most persuasive evidence of the parties' agreement is the course of its performance." *Pers. Decisions, Inc. v. Bus. Plan. Sys., Inc.*, 2008 WL 1932404, at *5 (Del. Ch. May 5, 2008), *aff'd*, 970 A.2d 256 (Del. 2009) (table decision); *see* Restatement (Second) of Contracts § 202 cmt. g (Am. L. Inst. 1981). A court also may consider "overt statements and acts of the parties, the business context, prior dealings between the parties, [and] business custom and usage in the industry." *Williams Field Servs. Grp., LLC v. Caiman Energy II, LLC*, 2019 WL 4668350, at *16 (Del. Ch. Sept. 25, 2019) (alteration in original), *aff'd*, 237 A.3d 817 (Del. 2020).

Where language is ambiguous, Delaware courts will accept the preferred stockholders' interpretation where "the parol evidence resolves the ambiguity with clarity in favor of the preferred stock." *Shiftan v. Morgan Joseph Hldgs., Inc.*, 57 A.3d 928, 937 (Del. Ch. 2012); *see also Cedarview Opportunities Master Fund, L.P. v. Spanish Broad. Sys., Inc.*, 2018 WL 4057012, at *11 (Del. Ch. Aug. 27, 2018).

2. Aurion Acquired Shares of Its Common Stock Through the Reverse Stock Split

The Certificate requires Series C Consent before Aurion may "either directly or indirectly by amendment, merger, consolidation or otherwise . . . acquire any shares of share capital." A0339-340. Although the NVCA model certificate served as the starting point, the parties added the phrase "or acquire any shares" to Section 3.4.5. *Compare* A0959 *with* A1179-1180.

That addition, when coupled with the limited headroom in Aurion's capital structure, demonstrates clear intent to expand the reach of Series C Consent and encompass measures, such as Aurion's reverse split, that might be used to obtain additional shares. Accordingly, the Reverse Split Amendment, adopted without Alcon's consent, violates both the plain language of Section 3.4.5 and the parties' common understanding as to the scope of the Series C Consent. Each of the Court's reasons for reaching a contrary conclusion cannot withstand scrutiny.

a. The Plain Meaning of "Acquire" Establishes that Aurion Directly Acquired Shares

Based on the plain meaning of the term "acquire," the Reverse Split Amendment effected a direct acquisition of shares. "Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract"—like the term "acquire" here. *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006). "Acquire" means "[t]o gain possession or control of; to get or obtain by any means," Black's Law Dictionary (12th ed. 2024), or "to come into possession or ownership of," *Acquire*, Dictionary.com, https://www.dictionary.com/browse/acquire (last visited Feb. 3, 2025).

By adopting the Reverse Split Amendment, Aurion came to possess 92,000 additional Common Stock shares that were outstanding immediately before the split. The split's atypical mechanics establish this: subtracting the combined shares from

the previous outstanding total results in 92,000 Acquired Shares now held by Aurion for sale in the IPO. Based on a plain-language interpretation of Section 3.4.5's "acquire" provision, Aurion directly acquired shares of Common Stock.

The substantive corporate law effects of the reverse split also support this plain-language interpretation. Through the split, the previously outstanding Acquired Shares became shares of treasury stock. Treasury stock is "stock which has been [(i)] issued as full[y] paid to stockholders and [(ii)] subsequently acquired by the corporation to be used by it in furtherance of its corporate purposes." *In re Public Serv. Hldg. Corp.*, 24 A.2d 584, 586 (Del. 1942); *see also In re Coffee Assocs.*, 1993 WL 512505, at *4 (Del. Ch. Dec. 3, 1993) ("[U]nder settled Delaware law, the acquisition by a corporation of its own common stock *ipso facto* renders such shares treasury." (quotation omitted)); 59 Del. Laws, c. 106 § 8 (1973) (shares that come into the corporation's possession as a result of an acquisition, including via an "exchange," were, by default, treasury shares unless capital was applied). Aurion's pre-trial brief conceded this point. A0394 (quoting Usha Rodrigues, *The Hidden Logic of Shareholder Democracy* (Mar. 11, 2024), U. of Ga. Sch. of L. Research Paper No. 2024-2, available at http://dx.doi.org/10.2139/ssrn.4755251, at 47 ("[A] reverse stock split free[s] up . . . authorized shares . . . that [are] returned as treasury stock."). Before the Amendment, Aurion did not possess the Acquired Shares. Now, it does. Aurion thus acquired those shares.

The history of the DGCL demonstrates this conclusion. The legislative history indicates that reverse-split shares are possessed in the treasury because they are not automatically retired. They are obtained by the corporation as issued shares (with statutory capital allocated to them) until they are retired; further, they are available for corporate uses.

The 1973 version of Section 243(a), which addresses the retirement of treasury stock, provided:

> [I]f [(i)] a corporation acquires any of its shares, whether by purchase or redemption or by their having been *converted into or exchanged* for other shares of the corporation, *and* [(ii)] capital, as computed in accordance with Section 154, 242 and 244 of [the DGCL], is applied in connection with such acquisition, the shares so acquired, upon their acquisition and without other action by the corporation shall have the status of retired shares.

59 Del. Laws, c. 106, § 8 (1973) (emphasis added). Although the 1987 DGCL deleted this sentence, the legislature did not intend to effect a substantive change. Synopsis, Del. Senate Bill No. 93 (1987) (stating the sentence of was "surplusage and has been deleted"). In other words, it was obvious to the legislature that a reverse split results in a corporation's acquisition of shares.

In 1996, the legislature amended Section 242 to expressly state that stock splits "subdivide[e] or combin[e] the outstanding shares of any class or series of a class of shares into a greater or lesser number of outstanding shares." Before then, the "authority to effect stock splits ha[d] been located in the penumbra of

amendments contemplated by Section 242(a), such as . . . 'exchanges,'" which are also addressed by Section 243. Lewis S. Black, Jr. & Frederick H. Alexander, Analysis of the 1996 Amendments to the Delaware General Corporation Law 314 (1996). The legislative history thus supports the conclusion that shares no longer outstanding as a result of a reverse split (i.e., an "exchange") automatically become treasury stock unless capital is applied to the transaction. Here, no capital was applied, and therefore the Acquired Shares remain treasury stock.

Rather, the Acquired Shares (i) were previously issued as fully paid and (ii) are now available for Aurion's use. Those Shares are treasury stock, and they may—and will—be re-sold if the IPO occurs. *See Public Serv.*, 24 A.2d at 586; 8 *Del. C.* § 153(c). Accordingly, Aurion directly acquired the Acquired Shares in violation of Section 3.4.5.[2]

[2] This result was not accidental. *See* Op.16. Aurion structured the Amendment to avoid directly increasing authorized shares because that (too) is prohibited by Section 3.4 absent Series C Consent. At trial, Alcon's expert witness confirmed that reverse splits typically are accompanied by a corresponding increase in the number of authorized shares and therefore adjust the share price without resulting in additional treasury stock. *See* A0808 (observing that he has "[n]ever seen a reverse stock split where the company also did not reduce the total number of authorized shares"). Thus, Aurion's Amendment was not only atypical, it resulted in an acquisition.

b. At a Minimum, Aurion "Indirectly" Acquired Shares

The Certificate expressly bars Aurion from resorting to indirect means to accomplish what it cannot do directly. Here, Aurion at a minimum indirectly acquired shares in violation of Section 3.4.5.

As Chancellor Allen reasoned in *Shenandoah*, "indirect" transactions are those that "reach situations in which the underlying economic reality of the completed transaction is the functional equivalent of a direct [action]." *Shenandoah*, 1988 WL 63491, at *7. The Reverse Split Amendment is just such a transaction. Aurion, through the Amendment, gained the ability to dispose of the previously outstanding Acquired Shares and sell them in the IPO. This is at a minimum the "functional equivalent of a direct" acquisition. *Id.*

Aurion also indirectly acquired approximately 7 million other shares that are now available for sale in the IPO. Before the Amendment, Aurion did not have authority to use those shares for an IPO because they were part of approximately 28 million pre-Amendment shares reserved for employee equity awards or preferred stock conversion. *See* 8 Del. C. § 161 (permitting a corporation to issue shares unless all authorized shares have been "issued, subscribed for or otherwise committed to be issued"). After the split, the number of shares that Aurion needed to reserve was smaller, leaving Aurion in possession of roughly 7 million shares to sell. This is similarly the "functional equivalent" of a direct acquisition, and thus *Shenandoah*

warrants reversal of the Court's Opinion. *See Shenandoah*, 1988 WL 63491, at *7. (Notably, although Alcon relied heavily on *Shenandoah* in its trial briefing, the Court's Opinion does not mention it.)

Aurion improperly acquired shares without Series C Consent, and the Reverse Split Amendment is void.

c. The Court Erred in Holding that the Reverse Split Did Not Effect an Acquisition

Despite the foregoing, the Court ruled that the Reverse Split Amendment did not effect an acquisition of shares for several reasons. None has merit.

The doctrine of independent legal significance does not foreclose Alcon's interpretation of Section 3.4.5. Specifically, the Court held that DGCL Section 242 applied to the Amendment rather than Section 160. Op.25.

As explained above, however, this Court recognized in *Avatex* that drafters may use certain language to expand preferred stockholder consent rights beyond the default under the doctrine of independent legal significance. 715 A.2d at 852-54. There, the defendant corporation proposed a merger that would convert preferred stock into common stock, eliminating the preferred stock's rights. *Id.* at 844. The preferred stockholders had an express right to consent to any "amendment, alteration, or repeal, whether by merger, consolidation or otherwise" that "materially and adversely" affected the preferred stockholders' rights. *Id.* This Court determined that the language "whether by merger, consolidation or otherwise"

meant that the proposed merger triggered the consent rights. *Id.* at 852-54. In so holding, the Court noted that where the "[p]referred stock rights granted by the corporate drafters . . . are the functional equivalent of a provision that would expressly require such consent," independent legal significance does not preclude consent rights. *Id.* at 853-54. "The drafters of the [certificate] could not reasonably have intended any consequence other than granting [preferred consent rights] to any merger that would result in the elimination of" preferred protections. *Id.* at 853-54. So too here. The Aurion Certificate drafters could not reasonably have intended any consequence other than requiring Series C Consent to any amendment resulting in the acquisition of shares.

In *Gunderson*, the court reaffirmed that the *Avatex* language matters. 326 A.3d at 1282-84. There, it considered whether a preferred stock consent right over an action to "amend or repeal, or adopt any provision" of the certificate "inconsistent with" certain provisions in the certificate applied to the company's reincorporation through a conversion absent preferred stock consent. *Id.* at 1286. Applying the doctrine of independent legal significance, the court concluded the absence of "the *Avatex* language [corporate drafters employ] . . . to extend special voting rights beyond Section 242" was fatal. *Id.* at 1284.

Here, the parties followed this Court's clear guidance and used the language specified in *Avatex*. Section 3.4 states that Series C Consent is required to perform

any of the enumerated actions in that Section, whether implemented "by amendment, merger, consolidation or otherwise." The doctrine of independent legal significance therefore does not require this Court to hold that the Reverse Split Amendment is exempt from Series C Consent requirements simply because the enumerated consent rights in Section 3.4 do not explicitly refer to reverse splits.

The parties here went further, broadening the scope of the Series C Consent Rights by adding expansive anti-circumvention language. Any transaction enumerated in Section 3.4 implemented "directly *or indirectly*" is prohibited absent Series C Consent. A0339 (emphasis added). Thus, even assuming that reverse stock splits are solely addressed by Section 242, the Certificate's language requires Series C Consent where those splits indirectly achieve the same result, or "economic reality," as transactions governed by other DGCL provisions. *See Shenandoah*, 1998 WL 63491, 7.

Ignoring *Shenandoah*, the Court failed to interpret, or give effect to the inclusion of, the term "indirectly." Instead, the Court analyzed only whether Aurion's actions directly achieved an enumerated act in Section 3.4, rendering the term "indirectly" "mere surplusage." *Avatex*, 715 A.2d 851.

The Reverse Split Amendment does not solely combine or reclassify shares. The Court concluded that the reverse stock split was a "reclassification" or "combin[ation]" of shares, rather than an acquisition of them. Op.15, 22 n.123, 25.

Even assuming this is true as to a traditional reverse stock split, it does not compel the Court's conclusion here.

A typical reverse split is accompanied by a corresponding decrease in the number of authorized shares. *See, e.g.*, A0808 ("[I]t's typical to reduce [the total number of authorized shares]" in a reverse split). This adjusts the share price without resulting in additional treasury stock usable in furtherance of the company's corporate purposes.

But Aurion chose to adopt an atypical reverse split designed to acquire shares of Common Stock to be used in the IPO. *See, e.g.*, A0798 (agreeing that "the reverse split was designed for the IPO"). Aurion conjured, according to the Post-Trial Opinion, "transactional magic" to circumvent the Series C Consent it had otherwise agreed to. Thus, Aurion's reverse split was not solely a reclassification or combination precisely because it resulted in Aurion having shares for sale that it did not have before.

This conclusion finds further support in Section 242's history. Reverse splits were historically included in the types of "conver[sions]" or "exchange[s]" that resulted in an acquisition of shares as contemplated by Section 243, and accordingly Section 160 of the DGCL. Section 160 therefore still applies to permit that

acquisition unless the parties expressly agree to preferred shareholder consent to acquisitions, as they did here.[3]

Aurion's accounting treatment of the treasury shares is irrelevant. The Court concluded that the Reverse Split Amendment was "not an acquisition from an accounting perspective." Op.26. But a transaction need not have particular accounting effect to qualify as an acquisition under DGCL Section 160.

Neither Aurion nor the Court cited any law to support the conclusion that an "acquisition" under Section 160 must increase corporate assets. Nor could they. Delaware courts have defined treasury stock as stock that has been "acquired by the corporation." *In re Public Serv. Hldg. Corp.*, 24 A.2d at 586; *see also In re Coffee Assocs.*, 1993 WL 512505, at *4. The fact that "treasury shares . . . are [not] shown as assets on the books of the corporation," Op.26 n.134 (quoting 1 R. Franklin Balotti & Jesse A. Finkelstein*, Balotti and Finkelstein's Delaware Law of Corporations and Business Organizations* § 5.17 (4th ed. Supp. 2024-2)), does not foreclose the

[3] The Court stated that "if Section 160 governed reverse stock splits, then [they] could not be undertaken by corporations that are insolvent or lack surplus." Op.25 n.133. It is unclear why this would be the case. An acquisition under Section 160 does not require a corporate expenditure, and thus, unlike purchases or redemptions, is not subject to the DGCL capital impairment test. *See* 8 *Del. C.* §160(a)(1) (prohibiting a corporation from "purchas[ing] or redeem[ing] its own shares" when its capital is impaired or such action would impair capital). Acquisitions under Section 160 historically encompassed acquisitions through reverse splits (even though splits are combinations or exchanges as defined in Section 242).

conclusion that they are acquired shares. Treasury shares are shares held by the corporation and may be resold for a value "greater or less than, or equal to, the par value (if any) of such shares." 8 *Del C.* § 153(c).

Alcon's interpretation of Section 3.4 does not rely on "presumed or implied" rights. The Court also erred in concluding that Delaware's rule against "strict construction" of preferred stockholder preferences precludes Alcon's interpretation of Section 3.4. Op.19 n.112, 22 n.121 (quoting *Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990)). According to the Court, when "combine[d]" with the doctrine of independent legal significance, the principle that preferred stock preferences "must be strictly construed" "force[s] the court to treat different forms of corporate action authorized by the DGCL as independently permissible, regardless of any similarities in their substantive outcomes."

This was error. In *Avatex*, this Court stated that it did "not approve the continued use of the term 'strict construction'" used in *Waggoner*, noting that the term does not "appropriately describ[e] the judicial process of analyzing the existence and scope of the contractual statement of preferences in certificates of incorporation." 715 A.2d at 853 n.46. The appropriate standard is found in *Rothschild*, which stated that "[p]referential rights are contractual in nature and therefore are governed by the express provisions of a company's certificate of incorporation," and "[s]tock preferences must also be clearly expressed and will not

be presumed." *Id.* (quoting *Rothschild Int'l Corp. v. Liggett Grp. Inc.*, 474 A.2d 133, 136 (Del. 1984)). The Court thus applied the incorrect standard.

The consent rights at issue here were "clearly expressed," as required by the Delaware courts. *Rothschild*, 474 A.2d at 136. Whether "strictly construed" or not, Section 3.4 expressly states that Series C Consent is required for any "amendment, merger, consolidation, or otherwise" that "directly or indirectly" "acquire[s]" shares. A0339. The Series C Financing parties "could not reasonably have intended" to create a loophole, permitting the Company to acquire shares by means of a Reverse Split Amendment or any consolidation of shares. *Avatex*, 715 A.2d at 853.

The Court thus erred in concluding that a strict construction of the Certificate precludes Alcon's understanding of the breadth of the Series C Consent.

3. Aurion "[P]urchase[d]" Shares of Common Stock by Paying for Fractional Interests as Part of the Reverse Stock Split

Section 3.4.5 states that Aurion "shall not, either directly or indirectly . . . purchase or redeem . . . any shares of share capital of th[e] Corporation" without Series C Consent. A0339-340. By failing to seek Series C Consent, Aurion violated this section as well.

The Certificate does not define "purchase." Merriam-Webster's Dictionary, however, defines "purchase" as "obtain[ing]" something "by paying money or its equivalent." *Purchase*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/purchase (last visited Feb. 3, 2025). Black's Law

Dictionary likewise defines "purchase" as "[t]he acquisition of an interest in . . . personal property by . . . any . . . voluntary transaction." *Purchase*, Black's Law Dictionary (12th ed. 2024).

Here, the reverse split divided outstanding shares by a factor of 1.395. Because of the math, investors had "fractional interests" in addition to "whole shares." *Applebaum v. Avaya, Inc.*, 812 A.2d 880, 886 (Del. 2002). Section 155 therefore required that Aurion either "issue fractions of a share," 8 *Del. C.* § 155, to "recognize" stockholders' "fractional interests," *Applebaum*, 812 A.2d at 887, or "compensate its stockholders" for those fractional interests, *id.* To satisfy this obligation, Aurion could, *inter alia*, "pay [investors] in cash the fair value [(i.e., a specific price)] of [their] fractions of a share, as of the time when" investors would otherwise receive the fractional shares under Section 155. 8 *Del. C.* § 155(2). As the Court correctly held, if corporations select this option, they "must 'pay fair value' to stockholders who are cashed out for their fractional interest[s].'" Op.12 (quoting *Samuels v. CCUR Hldgs., Inc.*, 2022 WL 1744438, at *4 (Del. Ch. May 31, 2022)). Such payments resulted in a direct, or at minimum indirect, purchase of such fractional interests.

a. Aurion Directly (or at Minimum Indirectly) Purchased Fractional Share Interests

The parties agree that Aurion paid investors cash fair value in return for the fractional interests that were created by the Reserve Split Amendment under 8 *Del.*

C. § 155(2). This cash payment for fractional shares was a "purchase" under Section 3.4.5.

Through this cash-out transaction, Aurion clearly obtained something: investors' fractional ownership interests in the Company. Unless their stockholdings were divisible exactly by 1.395, each investor would have received a fractional interest in addition to whole shares. It is well-settled that such fractional interests may be aggregated into whole shares. *Applebaum*, 812 A.2d at 886. By paying money to the investors for these fractional interests, Aurion secured all the fractional shares, which aggregated into whole shares of treasury stock, by paying money to investors for them. That falls squarely within the definition of a purchase. *See, e.g.*, 1 F. Hodge O'Neal & Robert B. Thompson, *O'Neal's Oppression of Minority Shareholders*, § 5:15, Reverse stock split ("[A] reverse stock split almost certainly creates fractional shares which the corporation, in its discretion, may *purchase for cash*, thus separating those shareholders from continuing ownership in the enterprise.") (emphasis added).

Aurion's cash payment for investors' fractional interests (resulting in aggregated treasury shares) was, at the very least, an indirect purchase barred by Section 3.4.5. Again, "indirect" transactions are those that "reach situations [where] the completed transaction is the functional equivalent of a direct [action prohibited by the contract]." *Shenandoah*, 1988 WL 63491, at *7. And once again, that

encapsulates the cash-out transaction at issue here. Through the Reverse Split Amendment and accompanying cash-out transaction, Aurion paid cash and obtained certain aggregated whole shares, which are now available for Aurion to sell in the IPO. That is the "functional equivalent" of a purchase. *Id.*

b. The Court Erred in Holding That the Reverse Split Amendment Did Not Effect a Purchase of Shares

The Court's Opinion relied on an incorrect distinction between "cancelling" fractional interests and purchasing them. Citing no authority, the Court ventured that "the fractional overage was canceled and converted into the right to receive equivalent value in cash," and then concluded that "[c]anceling is not purchasing." Op.27-28.

That, too, was misguided. For one thing, nothing in Sections 242 or 155 states that a reverse split or a cash-out "cancels" fractional interests or otherwise authorizes the "cancellation" of those fractional interests while they are held by investors. Rather, Section 242 clearly distinguishes between "combinations" and "cancellations." 8 Del. C. §242(b) (authorizing certificate amendments to effect "an exchange, reclassification, subdivision, combination or cancellation of stock"). Further, the word "cancel" does not appear in Section 155, and there is no basis in the DGCL or caselaw for the conclusion that the cash-out of fractional interests involves a cancellation of those interests. Instead, a reverse split merely results in fractional interests along with whole shares, and Section 155 requires that

corporations pay investors for their fractional interests if those corporations elect not to issue fractional shares. *Applebaum*, 812 A.2d at 886.

4. The Reverse Split Amendment Undermines the Intent and Understanding of the Parties to the Series C Financing

To the extent there is any ambiguity in the Certificate's language, however, the extrinsic evidence presented at trial unequivocally demonstrates the parties' intent as to the Series C Consent Rights.

When language providing a preferred stockholder right is ambiguous, Delaware courts will accept the preferred stockholders' interpretation where "the parol evidence resolves the ambiguity with clarity in favor of the preferred stock." *Shiftan*, 57 A.3d at 937; *see also Cedarview*, 2018 WL 4057012, at *11.

Alcon introduced extensive evidence that Alcon, Aurion, and Deerfield each understood, until very recently, that the Series C Consent provisions constrained corporate acts necessary to accomplish a Qualified IPO. Aurion's CFO and experienced external counsel who advised Aurion on the transaction documents conceded in a draft Board presentation that Series C Consent was required for an IPO. A0673; A1345. Several Company directors, appointed by other Series C investors, shared this understanding that the Series C Consent barred an IPO without Series C Consent. A1345; A0673; A1353; A0602. Thus, to the extent there is any ambiguity in Section 3.4's language, the extrinsic evidence presented at trial "resolves the ambiguity with clarity in favor of" Alcon. *Shiftan*, 57 A.3d at 937.

This Court should conclude, whether on the basis of the Certificate's plain language or after factoring in extrinsic evidence, that the Reverse Split Amendment is void *ab initio*.

II. The Reverse Split Indirectly Increased Aurion's Authorized Shares

A. Question Presented.

Did the Court err in holding that Aurion's Reverse Split Amendment did not result in an "indirect" increase in the number of authorized shares of the Company's Common Stock? Alcon raised this question below, A0558-0567, and the Court addressed it, Op.20-23.

B. Scope of Review.

This Court reviews the trial court's interpretation of the Certificate de novo. *SI Mgmt. L.P.*, 707 A.2d at 40.

C. Merits of Argument.

The Certificate states that Aurion "shall not, either directly *or indirectly* by amendment, merger, consolidation or otherwise … *increase* or decrease *the number of authorized shares of Common Stock*" of Aurion. A0339 (emphasis added). Delaware law mandates that the word "indirectly" must have some effect. *See, e.g.*, *Pasternak v. Glazer*, 1996 WL 549960, at *4 (Del. Ch. Sept. 24, 1996) (concluding that defendant's interpretation of a provision was "deficient" because "it would render that provision essentially ineffective").

In *Shenandoah*, the Court of Chancery explained that use of the word "indirectly" is intended "to proscribe some forms of transactions which, when viewed formally, would not be otherwise proscribed by the provision"—that is,

"functional equivalent[s]" of such transactions. 1988 WL 63491 at *7. Further, Chancellor Allen treated inclusion of the term "indirectly" as expressly incorporating the implied covenant of good faith and dealing into the agreements' terms, *id.*, at *7, which prohibits a contract party engaging in "arbitrary or unreasonable conduct which . . . prevent[s] the other party to the contract from receiving the fruits' of the bargain." *Prof. Investigating & Consulting Agency, Inc. v. Hewlett-Packard Co.*, 2014 WL 4627141, at *6 (Del. Super. Sept. 3, 2014) (quoting *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441-42 (Del. 2005)).

Here, the parties agree—and the Court found—that the Reverse Split Amendment did not directly increase the number of Aurion's authorized shares. Under *Shenandoah* and the Certificate's terms, this does not end the inquiry. Rather, the "underlying economic reality" of Aurion's atypical reverse split is that it accomplished "the functional equivalent" of such an increase. Before the Amendment, Aurion lacked authority to issue enough shares of Common Stock to close a Qualified IPO because the Series C financing constrained its capital table. After the Amendment, Aurion functionally increased the number of authorized shares (by reverse splitting issued and outstanding authorized shares without a proportionate decrease in the total number of authorized shares).

The Court found that Aurion intentionally structured the Reverse Split Amendment to accomplish this specific end. *See* Op.16. Thus, the Amendment is,

in all respects, a "scheme[] to do indirectly that which the parties proscribed by agreement." *Shenandoah*, 1988 WL 63491 at *8.

The Court erred in holding that "Alcon's functional-equivalent argument runs headlong into the doctrine of independent legal significance" because DGCL Section 242(d)(2) differentiates between an amendment to increase the authorized number of shares of a class of capital stock and an amendment to reclassify issued shares by combining them. Op.22. Section 242(d)(2) does mention both "[a]n amendment to increase or decrease the authorized number of shares" and "an amendment to reclassify by combining the issued shares . . . into a lesser number of issued shares of the same class of stock." But Section 242(a) lumps those actions into the same category. It lists "subdividing or combining the issued shares of any class … into a greater or lesser number of issued shares" as one way of *increasing*, decreasing, or reclassifying *a corporation's authorized capital stock*. *See id.* § 242(a)(3) (emphasis added). Thus, even if the doctrine of independent legal significance applies here, it does not support the Court's conclusion.

An amendment effecting a reverse stock split without a proportionate reduction in authorized shares has the same functional effect of a direct increase in authorized capital stock and thus violates Section 3.4.2.

III. Aurion Cannot Extinguish Alcon's Series C Consent Rights Before the Closing of a Qualified IPO

A. Question Presented.

Did the Court err in failing to address Alcon's argument that its Series C Consent Rights are not extinguished before the "closing" of a Qualified IPO, as those terms are used in the Certificate? Alcon raised this question below, A0570-572, and the Court addressed it (in part), Op.28-29.

B. Scope of Review.

This Court reviews the trial court's interpretation of the Certificate de novo. *SI Mgmt. L.P.*, 707 A.2d at 40.

C. Merits of Argument.

Section 5.1 of the Certificate provides that "all outstanding shares of Preferred Stock shall automatically be converted into shares of Common Stock" "[u]pon . . . the closing of" a Qualified IPO. A0352. Aurion asserted that it could complete a Qualified IPO even absent Series C Consent because the Preferred Stock will convert into Common Stock upon closing of a Qualified IPO. A0036-37. According to Aurion, before it must increase its pool of Common Stock to close an IPO, Section 5.1 will extinguish Alcon's right to consent to that increase. *See id.*

The issue, then, is whether "[u]pon … the closing of" a Qualified IPO in Section 5.1 means—as Alcon argued—that the Series C Consent Rights exist up to the point that preferred shares are automatically converted to Common Stock. This

does not happen until Aurion delivers the IPO shares and meets the Certificate's conditions for a Qualified IPO. Until that point, Alcon's consent is required before Aurion may alter its capital structure, including by increasing the number of authorized shares.

Alcon raised this question below. *See* A0558-0567. But the Court misapprehended the parties' dispute on this issue. *See* Op.28-29. The Opinion instead addresses whether Aurion must have Alcon's consent (1) "to consummate a Qualified IPO in all scenarios . . . because, at closing of the planned Qualified IPO, Aurion intends to amend" its Certificate, and/or (2) for a mandatory conversion to occur. *Id.* This Court should reverse the Court of Chancery's decision and hold that the Series C Consent is not extinguished until shortly after the closing of a Qualified IPO.

1. Under Section 5.1, Series C Consent Rights Do Not Terminate Until After Aurion Delivers IPO Shares and a Qualified IPO Closes

Section 5.1 provides for automatic conversion "[u]pon … the closing of" a Qualified IPO. A0352. The Certificate does not define the term "upon." But dictionaries define "upon" as "immediately or very soon after," *Upon*, Dictionary.com, https://www.dictionary.com/browse/upon (last visited Feb. 3, 2025), or "thereafter," *Upon*, Merriam Webster, https://www.merriam-webster.com/dictionary/upon (last visited Feb. 3, 2025). The term's plain meaning

confirms that the automatic conversion will occur just after the closing of a Qualified IPO, not during the closing process—much less before the closing.

If the parties intended the mandatory conversion to occur earlier, they knew how to say so. For example, the Certificate permits preferred stockholders the option to convert their preferred shares "immediately prior to" a "Deemed Liquidation Event" or "the closing of" an IPO. A0341. And the Certificate provides that in a Deemed Liquidation Event, Preferred Stockholders must give up their certificates "[o]n or before" a set date. A0336.

Yet in Section 5.1 the parties instead used the term "upon." The Court should give meaning to that choice. *See Skye Min. Invs., LLC v. DXS Cap. (U.S.) Ltd.*, 2020 WL 881544, at *16 (Del. Ch. Feb. 24, 2020). The term "closing" means the exchange and delivery of IPO shares for payment. It is well-established that an IPO does not "close" without the exchange and delivery of IPO shares for payment. *See, e.g.*, *What Does Closing an IPO Mean?*, Winston & Strawn LLP, bit.ly/4fp4c66 (last visited Feb. 3, 2025) ("Closing is the culmination of the IPO process in which the company delivers its securities to the underwriter and receives payment therefor.").

Alcon's common-sense understanding of the word "closing" is well-supported. The Purchase Agreement defines "closing": a specific moment in time involving "purchase and sale of the Shares … via the exchange of documents and signatures" and requiring the Company "[a]t each Closing" to "deliver to each

Purchaser a certificate representing the Shares being purchased by such Purchaser[.]" A0098; *see also In re Nat'l Collegiate Student Loan Trs. Litig.*, 251 A.3d 116, 144 (Del. Ch. 2020) (court must "give a consistent reading" to "interrelated documents" (quotation omitted)).

Black's Law similarly defines "closing" as "[t]he consummation of a deal or transaction, usu. by signing binding documents *concurrently with the exchange of money*[.]" Black's Law Dictionary (12th ed. 2024) (emphasis added). Industry practice also reflects this understanding of the term "closing." *See* A1373-A1374 ("[T]he shares to be sold in an IPO must have already been authorized, issued, and outstanding prior to the closing of the IPO."); A1389-1390 ("[A]utomatic conversion . . . does not occur until the completion of the IPO closing, as there would otherwise be the risk of an IPO failing but conversion having already occurred.").

Section 5.1 also imposes multiple prerequisites for the closing of a Qualified IPO: (1) a "sale" of Common Stock; (2) pursuant to an "effective registration statement"; (3) "resulting in at least $90,000,000 gross proceeds, net of the underwriting discount"; and (4) "listed for trading." A0352. Plainly, Aurion must obtain shares of Common Stock before, *inter alia*, they are sold, listed, traded, and generate $90 million in proceeds. And all of these events must occur before Aurion's shares of Preferred Stock are automatically converted. That is why Section 5.1

indicates that "[u]pon" the satisfaction of these prerequisites, "*then*" mandatory conversion of Preferred Stock will occur. *Id.* (emphasis added).

In sum, Aurion cannot collapse distinct steps in the sequence of the Qualified IPO process and thereby rid itself of Alcon's Series C Consent.

2. The Court's Opinion Misapprehended this Dispute and Failed to Address the Issue

The Court misconstrued Alcon's argument as an assertion that Alcon has a freestanding Series C Consent right over a Qualified IPO because IPOs result in charter amendments, which implicate Section 3.4.1. Op.28. But Alcon merely argued that certain actions (authorizing, acquiring, or purchasing stock) must necessarily occur before a Qualified IPO can close, and thus while preferred stockholders still hold preferred stock and attendant consent rights. A0432-435, A0451-462.

The Court also erred in conflating the "IPO charter[']s]" amendments with any pre-IPO amendment to the Certificate that would authorize, acquire, purchase, or increase shares available to sell at the IPO. Op.29. The IPO certificate would include "provisions that customarily appear in public company charters, such as a restriction on the stockholders' power to act by written consent." *Id.* at 28. According to the Court, this means that an IPO certificate amendment merely conforms the Company's Certificate to the requirements of a public company after closing has occurred. *Id.*

But that is irrelevant to the pertinent question: whether Aurion can extinguish Alcon's Series C Consent because it anticipates meeting the definition of a Qualified IPO that would then trigger mandatory conversion. *See* A0036-37 (the relevant question is whether "Alcon's rights … to block changes in Aurion's capital structure . . . will be inoperative at the requisite time"). As the Court recognized, the Certificate "requires Series C Consent to increase the number of authorized shares." Op.13, 14. The Court likewise recognized that Aurion "[t]acitly conced[ed] that it needed Series C Consent to amend the Certificate to increase the number of authorized shares." *Id.* at 14. In light of those two points, the Court should have held that Aurion must secure Series C Consent before it can authorize, acquire, or purchase shares even if the Company ultimately closes a Qualified IPO.

CONCLUSION

For the reasons above, this Court should reverse Section B of the Post-Trial Opinion and Paragraph 3 of the Order Implementing the Post-Trial Opinion.

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