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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE/CROSS-APPELLANT'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS APPEAL

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NATURE OF PROCEEDINGS[1]

In June 2024, Aurion Biotech, Inc. ("Aurion") made a near-unanimous Board decision to pursue a Qualified IPO to fund its groundbreaking treatment for corneal blindness. This therapy, already approved in Japan and approaching FDA Phase 3 trials, requires immediate capital to reach U.S. patients. With audited financials expiring on February 14, 2025, and an IPO pricing date set for February 13, Aurion faces a critical deadline.

Alcon Research, LLC ("Alcon"), a minority preferred stockholder, stands as the sole obstacle. Alcon's opposition stems not from fiduciary concerns, but from a calculated attempt to force a fire-sale acquisition of Aurion's technology. Its litigation strategy relies on arguments divorced from established Delaware law, aiming to derail the IPO through delay and gain "maximum leverage" in negotiations.

To counter Alcon's obstructionist tactics, Aurion executed the Reverse Stock Split to create sufficient "headroom" for its Qualified IPO and mitigate market perception of litigation risks. While Alcon characterizes this as exploiting a

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[1] Unless noted, emphasis is added; internal citations, footnotes and quotation marks are omitted; deposition and trial testimony is cited "[appendix number].[page:line]"; the trial court's January 27, 2025 post-trial opinion ("Opinion") is cited "[Opinion].[page]"; Appellant/Cross-Appellee's Opening Brief is cited "[Alcon.Appeal.OB].[page]". Unless noted, this filing uses the Opinion's defined terms.

"loophole," the Delaware General Corporation Law ("DGCL") permits reverse splits, the Series C Consent Rights does not expressly apply to them, and Aurion was permitted to lawfully use one to navigate around preferred stock blocking rights (which are narrowly construed as derogations of common law).

Relying on established Delaware law, the trial court correctly rejected Alcon's arguments about Aurion's Charter. Alcon's appeal ignores decades of jurisprudence in favor of dictionary definitions (divorced from the DGCL). Contrary to Alcon's conclusory assertion, affirming the Opinion would uphold standard venture-capital practices by preventing a preferred stockholder—Alcon—from twisting Charter language to obtain unenumerated blocking rights.

Nevertheless, the trial court erred in interpreting the Voting Agreement. By fixating on the defined term "Voting Proxy," it overlooked the agreement's contractual nature and explicit restrictions on Alcon's voting rights, thereby violating basic principles of contract construction.

Time is of the essence. Every day this litigation persists jeopardizes Aurion's Qualified IPO efforts, which require investors to commit to buying over $90 million of Common Stock priced no less than $21 per share. Aurion is conducting "testing the waters" meetings and there has been overwhelming support for Aurion's IPO prospects, however, the uncertainty arising from this litigation is undermining pricing efforts and could prevent timely investor commitments. Aurion thus

respectfully suggests this Court could affirm the trial court's Charter rulings without oral argument. Alternatively, if oral argument proceeds on February 12, Aurion respectfully requests a same-day ruling about the Charter issues to clear the path for its Qualified IPO before the February 13 pricing deadline. A ruling on the Voting Agreement issues is not time sensitive.

SUMMARY OF ARGUMENT

1. **Denied**. The trial court correctly held that Aurion's Reverse Stock Split was not an acquisition of Aurion shares, directly or indirectly, based on plain DGCL language and related case law. Alcon's reliance on dictionary definitions, divorced from the DGCL, ignores Delaware law that the Charter's drafters are presumed to have understood. And Alcon's request to disregard the doctrine of independent legal significance conflicts with decades of case law that drafters of corporate instruments routinely rely on. Preferred stock rights and preferences are narrowly construed, requiring express statements of contractual features distinguishing preferred from common stock. Delaware courts will not imply unstated rights and preferences for preferred stock. Simply put, form prevails over alleged substance for preferred stock protective provisions. While *Avatex* and *Gunderson* support extending Series C Consent Rights to alternative transactions accomplishing a specified restricted action (*e.g.*, changing the number of authorized shares), they do not support Alcon's broader claim that Series C Consent Rights apply to "any transaction resulting in a [purportedly] similar outcome" as a specified restricted action. The doctrine of independent legal significant is dispositive.

2. **Denied**. Alcon misrepresents the DGCL's treatment of fractional interests in the Reverse Stock Split. They were canceled by operation of law per DGCL Section 155, not aggregated into whole treasury shares. Fractional shares

were never issued, so Aurion could not have purchased them. Charter Section 3.4.5 pertains to DGCL Section 160 (acquisition of Aurion shares), while the treatment of fractional interests falls under DGCL Section 155. Again, the doctrine of independent legal significant is dispositive. Contradicting its previous assertions, Alcon now affirmatively argues that "the operative provisions of Section 3.4 are ambiguous[.]" Even if true, however, trial produced no relevant extrinsic evidence supporting Alcon's interpretation.

3. **Denied**. Alcon's claim that "Aurion's Reverse Stock Split effected an indirect increase in the number of authorized shares of … Common Stock" is puzzling. Everyone agrees the number of authorized shares did not change, so that number necessarily was not increased (directly or indirectly). Delaware courts will not imply unstated rights and preferences for preferred stock. And copying "indirectly" from the NVCA form charter does not change that fact.

4. **Denied**. The trial court correctly held:

> [T]he closing of the Qualified IPO follows a process. First comes the mandatory conversion of the issued Preferred Stock. Second comes the filing of the amended and restated IPO charter. Because all shares of Series C Preferred Stock will have been automatically converted upon the Qualified IPO, no shares will remain outstanding upon the filing and effectiveness of the "IPO charter."

That holding was supported by Alcon's own expert testimony. And while Alcon suggests "[t]he 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[,]" Alcon's reasoning is unclear. A Qualified IPO requires investors to commit to buying over $90 million of Common Stock priced no less than $21 per share. If those conditions are met, the Series C consent rights disappear at closing, and Aurion can amend its Charter without Alcon's consent—exactly as the trial court found.

5. Regarding Aurion's cross-appeal, the trial court erred by interpreting Voting Agreement Section 7.20 as only a "revocable proxy." While that section uses a defined term that includes the word "Proxy," that is not determinative.[2] The trial court adopted an untimely argument—advanced by Alcon for the first time during Alcon's post-trial rebuttal argument; disregarded relevant contract language; and, ultimately, lost sight of the forest for a tree.[3]

[2] *Donegal Mut. Ins. Co. v. Tri-Plex Sec. Alarm Sys.*, 622 A.2d 1086, 1089 (Del. Super. Nov. 6, 1992).

[3] *See, e.g.*, *Heartland Payment Sys., LLC v. inTeam Associates, LLC*, 171 A.3d 544, 557 (Del. 2017) ("Before stepping through the specific contractual provisions it is helpful to look at the transaction from a distance, because '[i]n giving sensible life to a real-world contract, courts must read the specific provisions of the contract in light of the entire contract.'").

STATEMENT OF FACTS

A. Parties

Aurion, an early-stage pharmaceutical company,[4] is pioneering a revolutionary cell therapy to combat corneal endothelial disease, a prevalent cause of blindness.[5] The therapy can potentially treat thousands of patients using cells from a single donor, offering hope to roughly 32 million affected eyes globally.[6] While still awaiting full FDA approval in the United States, Aurion's product has been approved in Japan,[7] which has one of the highest regulatory standards in the world for approving biotech products.[8] Aurion is poised to begin Phase 3 trials later this year,[9] and FDA approval will result in market exclusivity for Aurion's first-in-class treatment.[10] Aurion needs cash to fund its development projects.[11]

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[4] Opinion.2.

[5] Opinion.2.

[6] A0743.36:8-10; A0800.261:11-23.

[7] Opinion.2.

[8] A0800.261:24-11, 264:10-17.

[9] Opinion.2.

[10] A0800.263:13-22.

[11] A0801.265:12-266:3.

Alcon is a prominent player in the ophthalmic market,[12] and owns Aurion Series C Preferred Stock.[13]

B. Series C Financing

In 2022, Aurion's financial outlook was favorable[14] and it raised funds through a Series C Preferred Stock offering, with Alcon acquiring about 36% and Deerfield acquiring about 50%.[15] Deerfield quarterbacked the Series C financing negotiations and was represented by McDermott Will & Emory ("MWE").[16] Deerfield (not Alcon) and MWE drafted the initial Term Sheet.[17] At trial, Deerfield's representative explained the "business terms" of the deal and testified that the Series C Consent Rights would "fall away" upon closing of a Qualified IPO.[18] The thresholds for a Qualified IPO were set forth in the Term Sheet.[19]

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[12] Opinion.3.

[13] A0140.

[14] A0745.44:18-21.

[15] Opinion.5.

[16] Opinion.2.

[17] A0140; B0154.44:12-24; B0244.53:8-19; B0245.56:17-23; A0803.274:9-13, 277:16-23; A0652.19:9-11; *see* Opinion.3.

[18] A0868.408.14-18.

[19] A0868.408:5-13; A0994.

C. Relevant Documents

The Charter and Voting Agreement are central to this dispute.

The Charter was initially drafted by Wilson Sonsini to reflect the Term Sheet,[20] and is based on the then-current National Venture Capital Association form ("NVCA Form").[21] Relevant here are the: (1) Series C Consent Rights in Charter Section 3.4; and (2) mandatory conversion upon a Qualified IPO in Charter Section 5.1. Neither were heavily negotiated.[22] And the negotiations that did occur were largely between Aurion and Deerfield (not Alcon).[23] Although the Charter language at issue is unambiguous, trial revealed no relevant extrinsic evidence.[24]

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[20] B0887; A0804.277:5-15.

[21] Opinion.4.

[22] B0755.46:3-49:22; A0782.190.1-4, 191:15-18; A0783.194:2-12; A0784.199:12-16.

[23] B0669.78:17-24; *see also* A0652.19:6-8; A0764.120:16-23; A0767.131:20-24; B0752.36:2-37:7; B0755.47:17-48:14.

[24] A0804.279:11-280:6 (no communications); B0662.53:24; B0670.85:3-12; B0691.168:11-171:12; B0763.81:21-B076482:5, 82:6-83:12; A0782.189:21-24.

The Voting Agreement was also initially drafted by Wilson Sonsini.[25] In late 2022, at Alcon's request,[26] it was amended to add the Voting Limitations,[27] which: (1) prohibit Alcon from voting more than 19% of Aurion's fully diluted stock; (2) give a voting proxy to Aurion officers over any stock Alcon owns above that 19% threshold; and (3) identify how Alcon's stock above that threshold must be voted.[28] The Voting Limitations allowed Alcon to avoid reporting "Aurion's losses on Alcon's books,"[29] and also protected Deerfield's position.[30] Although the Voting Agreement language at issue is unambiguous, trial revealed no extrinsic evidence suggesting the parties intended to give Alcon the right to unilaterally amend, modify or terminate any part of the Voting Limitations.[31]

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[25] B0964; A0804.278:2-9.

[26] A0805.281:4-14 (explaining the amendment "came out of a request of Alcon relative to their accounting treatment of their investment.").

[27] B1045; B0289.232:4-233:5; A0804.280:11-15.

[28] B1066.

[29] B0166.90:8-15; A0752.70:19-71:4; B0260.114:2-13; B0290.234:8-235:1; A0589.31:19-22; A0662.61:13-A0663.62:2, 64:5-6; B0671.88:17-19, 89:14-20; A0768.133:24-134:9; B0767.97:10-12.

[30] B0568.157:2-17.

[31] A0805.281:15-20; B0662.53:24; B0670.85:3-12; B0674.101:14-24, B0676.106:9-20; B0691.168:11-171:12; B0763.81:21-82:5; B0764.82:6-83:12; B0769.103:25-104:11; B0770.107:4-108:5, 109:13-17.

D. Alcon's Overtures And Aurion's IPO

Following its Series C Preferred Stock investment, Alcon made multiple attempts to acquire or control Aurion—all of which were rejected by the Board due to unfavorable terms.[32] Despite its previous unsuccessful attempts, Alcon continues to pursue Aurion.[33] Blocking Aurion's planned Qualified IPO would give Alcon "maximum leverage."[34]

As an early-stage pharmaceutical company, Aurion needs funds to continue its work and (hopefully) obtain market exclusivity.[35] Aurion is pursuing a Qualified IPO to raise the funds[36] necessary to continue its pharmaceutical development and for other benefits associated with being a public company.[37] Aurion began exploring a Qualified IPO over three years ago, with formal discussion starting in late 2023.[38] At that time, J.P. Morgan advised that Aurion was "in rarefied air in biotech" and

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[32] *E.g.*, A0794.238:23-240:7, A0801.268:6-17, A0805.281:21-282:12; A0761.107:4-15.

[33] A0746.47:22-48:1, A0747.51:15-18; A0805.281:21-282:12.

[34] A0805.282:20-24.

[35] A0800.263:20-22.

[36] A0747.51:22-52:1; A0801.266:1-13.

[37] A0801.265:12-265:18, 267:22-267:5.

[38] A0748.53:5-8; A0757.91:15-19; A0801.266:14-18, 268:18-23.

that late 2024 would be an ideal time for Aurion to go public.[39] In June 2024, Aurion's Board authorized pursuit of a Qualified IPO, with all directors except Alcon's nominee (Bankes) voting in favor.[40] Just after the vote, however, Bankes notified Alcon of Aurion's plans.[41]

At first, Alcon did not suggest the Series C Consent Rights were implicated by a Qualified IPO.[42] But in July 2024, Alcon's lawyers asserted that Alcon would not consent to any IPO—providing no clear basis for its position.[43] Alcon delayed initiating this litigation until October 28, 2024, four months after Aurion's Board formally voted to pursue a Qualified IPO.[44] No Alcon witness could justify the four-month delay[45] and, by the time Alcon commenced litigation, Aurion had spent

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[39] A0801.266:14-267:5.

[40] A0749.59:3-11.

[41] A0750.62:5-11; B1082.

[42] B0148.19:14-18; B0176.130:12-13; B0179.143:14-44:4; A0749.59:24-60:4.

[43] B1117; B1121.

[44] A0001; A0750.63:22-64:2.

[45] *See, e.g.*, B0157.57:15-58:9; B0178.140:5-6; A0750.63:22-64:2; B0487.123:7-17.

millions pursuing a Qualified IPO.[46] Aurion perceived Alcon as negotiating through litigation.

Aurion filed a confidential Form S-1 with the SEC that allowed it to discuss the planned Qualified IPO with large funds.[47] Those discussions yielded extremely positive feedback.[48] Presently, Alcon is on the cusp of moving forward with the Qualified IPO and intends to price its IPO on February 13, 2025.[49] To date, the IPO marketing process garnered strong public investor support, however, resolution of this litigation has been a gating issue undermining Aurion's efforts. To ensure successful pricing and achieve the thresholds necessary to consummate a Qualified IPO, Aurion needs a resolution of this appeal before February 13. And should Aurion fail to go public by February 14, its audited financial statements will become outdated—requiring a delay in the IPO process until after Aurion completes an audit of its next quarterly financial statements.[50] If a Qualified IPO does not timely proceed, Aurion will "be out of cash late May, early June" 2025.[51]

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[46] B0176.132:5-133:7; *see also* A0757.92:13-16.

[47] A0801.268:24-8.

[48] A0801.268:24-8.

[49] B0141.

[50] A0802.269:13-270:1.

[51] A0802.270:2-6.

E. Aurion's Reverse Stock Split

Because Alcon's litigation cast a cloud over Aurion's efforts to achieve a Qualified IPO, Aurion approved the Reverse Stock Split on December 16, 2024.[52] It did not change the number of authorized Common Stock shares (which was, and remains, 33,185,455),[53] but it did increase the per share offering price necessary for a Qualified IPO to $20.99.[54] This price fits market expectations,[55] and there is no evidence that Aurion's underwriters raised concerns with that price.[56] Following the split, Aurion has sufficient shares for a Qualified IPO.[57]

Alcon's attempt to enjoin Aurion's Reverse Stock Split failed, and the trial court cast doubt on Alcon's Charter claims.[58] But Alcon pressed forward to trial—perpetuating a cloud over Aurion's IPO efforts.

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[52] A0494 ¶ 44; B1165; A1423; A0798.253:18-24, 254:9-11, A0806.285:8-286:4.

[53] B1168.

[54] B1165; B1168; A0758.93:17-21; A0806.288:12-16, 285:5-7; A0808.296:13-16; A0774.157:13-17.

[55] A0806.285:8-19 (noting price is like Glaukos IPO); A0812.312:19-313:10.

[56] A0806.286:15-287.6.

[57] A0806.286.11-14.

[58] B1160-B1163; *see also* A0786.206:11-207:2, 208:20-24.

While Alcon has characterized the Reverse Stock Split as "exploiting a loophole,"[59] it was designed to clear the cloud Alcon's litigious conduct created.[60]

F. The Trial Court Found Series C Consent Rights Are Eliminated During A Qualified IPO Closing

On January 14, 2025, the trial court issued its Opinion. The trial court found that the Series C Consent Rights do not apply at a Qualified IPO closing:

> Moreover, the closing of the Qualified IPO follows a process. First comes the mandatory conversion of the issued Preferred Stock. Second comes the filing of the amended and restated IPO charter. Because all shares of Series C Preferred Stock will have been automatically converted upon the Qualified IPO, no shares will remain outstanding upon the filing and effectiveness of the "IPO charter." Without any Series C Shares outstanding, there is no blocking right to exercise. Thus, the Series C Consent Rights will not apply to a Qualified IPO.[61]

The trial court also found that Alcon validly revoked the Voting Limitations. Rather than moving to expedite this appeal, Alcon moved for an injunction pending appeal in a transparent attempt to delay the IPO. The trial court denied Alcon's motion and encouraged Alcon to get its motion to expedite on file. Twelve hours later, Alcon finally did so (but sought to delay resolution until after February 14).

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[59] Alcon.Appeal.OB.1.

[60] A0798.253:21-24.

[61] Opinion.29.

Alcon filed its Opening Brief on February 3, and advance meritless arguments. There is no valid challenge to the Reverse Stock Split, Aurion has sufficient shares for a Qualified IPO,[62] and a prompt affirmance of the trial court's Charter rulings will permit Aurion to timely proceed.

[62] A0806.286.11-14.

ARGUMENT

I. The Trial Court Correctly Ruled Aurion Did Not Acquire Or Purchase Shares In The Reverse Stock Split (Alcon.Appeal.OB.16-37)

A. Questions Presented

Whether the trial court correctly ruled that Aurion did not "acquire" or "purchase" shares in the Reverse Stock Split in violation of Charter Section 3.4.5,[63] which says in relevant part that Aurion:

> shall not, either directly or indirectly by amendment, merger, consolidation or otherwise, do any of the following without ... the written consent or affirmative vote of the Requisite Series C Holders:
>
> ... purchase or redeem ... or acquire any shares of share capital of this Corporation, other than [exceptions omitted].[64]

B. Scope of Review

Contract interpretation "involves legal questions and thus the standard of review is *de novo*."[65]

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[63] Opinion.23-28; A0551-A0558; B0112-B0123; B0036-B0041; B0068-B0079.

[64] A0339 § 3.4.5.

[65] *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 744 (Del. 1997); *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 817 A.2d 160, 170 (Del. 2002).

C. Merits of Argument

1. Interpretation Principles (Alcon.Appeal.OB.16-20, 31-32)[66]

When sophisticated entities engage in arm's-length negotiations, Delaware law presumes the parties are bound by the language of their agreement,[67] consistent with Delaware's pro-contractarian policy.[68]

To determine contractual intent, Delaware courts start with the text. If unambiguous, the analysis ends there.[69] This adheres to the objective theory of contracts—construing the agreement as an objective, reasonable third party would understand it.[70] Under the plain meaning rule, if a contract is clear on its face, the

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[66] Opinion.18-22; A0560-A0566; B0118-B0120; B0028-B0032; B0071-B0078.

[67] *MidCap Funding X Tr. v. Graebel Cos.*, 2020 WL 2095899, at *10 (Del. Ch. Apr. 30, 2020); *see also Exit Strategy, LLC v. Festival Retain Fund BH, L.P.*, 2023 WL 4571932, at *7 (Del. Ch. July 17, 2023) ("The presumption that the parties are bound by the language of the agreement they negotiated applies with even greater force when the parties are sophisticated entities that have engaged in arm[']s-length negotiations."), *aff'd*, 326 A.3d 356 (Del. 2024).

[68] *MidCap Funding*, 2020 WL 2095899, at *10; *see also CM Com. Realty, Inc. v. Alpha Tr. Real Est., LLC*, 2022 WL 509693, at *6 (Del. Super. Feb. 18, 2022) ("[T]he Court may not interpret an agreement to add limitations 'not found in the plain language of the contract.'").

[69] *Exit Strategy*, 2023 WL 4571932, at *7; *see also Hawkins v. Daniel*, 273 A.3d 792, 832 (Del. Ch. 2022), judgment entered, (Del. Ch. 2022) ("best reading" is when "[t]he plain language ... does not go further" than what it means), aff'd, 289 A.3d 631 (Del. 2023).

[70] *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1044 (Del. 2023).

court relies solely on the clear, literal meaning of the words.[71] Extrinsic evidence may not be used to interpret intent, vary terms, or create ambiguity.[72]

Corporate charters are contracts among shareholders, so contract interpretation rules apply.[73] Stock preferences, however, are strictly construed because they are derogations of common law.[74] Any rights, preferences or limitations of preferred stock that distinguish it from common stock must be expressly and clearly stated—they will not be presumed or implied.[75]

These principles apply regardless of appeals to equity. "Equity respects the freedom to contract."[76] As the trial court stated, "[i]t is not the court's role to rewrite [a] contract between sophisticated market participants ... to suit the court's sense of

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[71] *Demetree v. Commonwealth Tr. Co.*, 1996 WL 494910, at *4 (Del. Ch. Aug. 27, 1996); *see also City Investing Co. Liquidating Tr. v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993) ("If a writing is plain and clear on its face, i.e., its language conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent.").

[72] Opinion.19.

[73] *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010).

[74] *Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990).

[75] *Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 852-53 (Del. 1998).

[76] Opinion.20; *see also Asten, Inc. v. Wangner Sys. Corp.*, 1999 WL 803965, at *6 (Del. Ch. Sept. 23, 1999).

equity or fairness. Nor is it the job of a court to relieve sophisticated parties of the burdens of contracts they wish they had drafted differently but in fact did not."[77]

When preferred stockholders assert contractual rights, the Board is obligated only to honor those rights, narrowly construed. The Board may take actions accomplishing objectives through structures not implicating express consent rights, even if alternative structures would require consent.[78]

The doctrine of independent legal significance is a bedrock of Delaware corporate law. As the trial court emphasized, "[a]n open-ended inquiry into substantively equivalent outcomes, devoid of attention to the formal means by which they are reached, is inconsistent with the manner in which Delaware law approaches issues of transactional validity and compliance with the applicable business entity statute and operative entity documents."[79] The court's goal is to give effect to the drafters' word choices, adhering to decades of guiding case law.

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[77] Opinion.19; *see also Exit Strategy*, 2023 WL 4571932, at *7 (internal quotation marks and footnote omitted); *Allied Cap. Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1029-30 (Del. Ch. 2006).

[78] *E.g.*, *McRitchie v. Zuckerberg*, 315 A.3d 518, 549 (Del. Ch. 2024) ("Just as a board does not owe fiduciary duties to other contractual claimants, [a] board does not owe fiduciary duties to preferred stockholders when considering whether or not to take corporate action that might trigger or circumvent the preferred stockholders' contractual rights"); *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 39 (Del. Ch. 2013).

[79] Opinion.20.

Contrary to Alcon's claims, this Court's *Avatex* opinion[80] does not alter these principles in any way relevant to this case.[81] While *Avatex* may support extending Series C Consent Rights to specified alternative transaction forms accomplishing a specified restricted action, it does not extend them to transactions with (allegedly) similar outcomes but not subject to any express restriction.

Alcon did not argue below that unambiguous preferred stockholder preferences are not strictly construed,[82] so it cannot now claim the trial court erroneously applied a "strict construction" standard when interpreting the Series C Consent Rights,[83] which the trial court found unambiguous.[84]

At bottom, preferred stock rights are strictly construed, must be expressly stated, will not be implied, and form prevails over alleged substance.

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[80] *Elliot Associates, L.P. v. Avatex Corp.*, 715 A.2d 843 (Del. 1988).

[81] Alcon.Appeal.OB.31-32.

[82] B0127-B0128 (arguing "Delaware courts do not strictly construe these rights ***when the language is deemed ambiguous***.").

[83] Alcon.Appeal.OB.31-32. *Clouser v. Doherty*, 2017 WL 3947404, at *5 (Del. Ch. Sept. 7, 2017). For the same reason, Alcon cannot now claim *Matulich v. Aegis Comm's Grp., Inc.*, 942 A.2d 596 (Del. 2008)) or *Rothschild Int'l Corp. v. Liggett Grp. Inc.*, 474 A.2d 133 (Del. 1984)), show the trial court's interpretive standard was erroneous.

[84] Opinion.20-29.

2. Aurion's Reverse Stock Split

Aurion's Board authorized the Reverse Stock Split, addressing the ratio for combining shares and the handling of fractional interests resulting from the reverse stock split.[85] Aurion's shareholders approved the split,[86] and on the effective date:

- Each 1.395 pre-split shares of Common Stock[87] were combined into 1 post-split share.
- No fractional shares were issued; instead, if a person's Common Stock shares were not divisible by 1.395, they obtained a right to receive cash for the fractional interests.
- The Qualified IPO price was adjusted accordingly from $15.04 to $20.99 per share.[88]
- The number of authorized Common Stock shares remained unchanged at 33,185,455.[89]

[85] B1165; Opinion.27-28.

[86] B1165; Opinion.14.

[87] Both outstanding and treasury shares. B0070.

[88] B1165.

[89] B1168; Opinion.25.

Understanding the Reverse Stock Split requires an understanding of certain stock terms:

- "Authorized shares" represent the maximum number of shares a corporation is legally permitted to issue.[90]

- "Authorized but unissued" shares represent the remaining number of shares that a corporation may issue before reaching its upper limit, and a portion of them can be designated as "reserved" for specific purposes (*e.g.*, conversion of preferred stock to common stock).[91] Authorized but unissued shares are not corporate assets and are not considered "held" or "possessed" by the corporation or anyone else. Authorized but unissued and unreserved shares are often called "headroom" in a corporation's capital structure.

- "Issued shares" encompass both "outstanding" and "treasury" shares, and they count against the upper limit on shares a corporation may issue. The total number can fluctuate based on various corporate actions, but always remains less than or equal to the number of authorized shares.

- "Outstanding" shares are issued shares held by stockholders.

- "Treasury" shares are issued shares that have been repurchased or otherwise reacquired by a corporation. They are considered "issued but not outstanding." They lack voting rights, do not receive dividends, and can be re-sold for less than the "par value" of the shares. They can be held indefinitely, retired, or sold.[92] A corporation acquiring its own

[90] *See, e.g.*, 8 *Del. C.* § 161 (authorizing issuance of shares "up to the amount authorized in its certificate of incorporation").

[91] Reserving shares does not require a corporation to first issue them.

[92] The DGCL differentiates between a "disposition" of treasury shares and "issuance" from authorized but unissued shares. B0073.

> shares automatically renders them treasury and reduces stockholder equity on the balance sheet.

Aurion's Reverse Stock Split combined issued pre-split Common Stock shares, resulting in each share representing post-split a larger ownership stake and higher value, although the total value of each stockholder's stake was unchanged (excluding cashed out fractional interests). The number of issued Common Stock shares decreased,[93] and the number of authorized but unissued Common Stock shares reserved for Preferred Stock conversion reduced from about 25.9 million to 18.6 million.[94] Consequently, because the number of authorized Common Stock shares remained unchanged, there is now more headroom available for a potential Qualified IPO.

As discussed below, Aurion's Reverse Stock Split was largely governed by two DGCL sections. Section 242(a)(3) permits combination of issued shares, and Section 155 permits cash payment (rather than issuing fractional shares) for fractional interests resulting from a reverse stock split.

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[93] B1165; Opinion.24.

[94] B1114 (Alcon admitting); Opinion.25-26; A0342-A0343 (Charter Section 4.3.2 obligates Aurion to "reserve and keep available out of its authorized but unissued capital stock" sufficient Common Stock to convert all Preferred Stock); A0343 (Charter Section 4.4 addresses adjustments to the conversion price for dilutive issuances); A0350 (Charter Section 4.5 addressed adjustment for stock splits).

3. Aurion Did Not Acquire Shares In The Reverse Stock Split (Alcon.Appeal.OB.20-32)[95]

Alcon claims that Aurion violated Charter Section 3.4.5 by "acquiring" treasury Common Stock shares through the Reverse Stock Split because it allegedly "came to possess 92,000 additional Common Stock shares that were outstanding immediately before the split."[96] Alcon is wrong.

First, Alcon notes Section 3.4.5 includes "or acquire" (which is not in the NVCA Form), and speculates those words—coupled with Aurion's limited headroom—show the Charter drafters intended to broaden Section 3.4.5 to encompass any action Aurion might take to "obtain additional shares."[97] But Alcon cites no record evidence about why the phrase "or acquire" was in Section 3.4.5, or even who added it. Alcon's speculation thus has no weight,[98] and trial adduced no such evidence.

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[95] Opinion.23-26; A0551-A0556; B0112-B0120; B0037-B0043; B0080-B0086.

[96] Alcon.Appeal.OB.20-29.

[97] *Id.* at 20.

[98] *Goldstone v. Texas Int'l Co.*, 1985 WL 11570, at *2 (Del. Ch. July 10, 1985) ("[T]the fact remains that allegations are not evidence…."); *United States v. Howard*, 360 F.2d 373, 376 n.4 (3d Cir. 1966) ("[S]tatements made by counsel in their briefs are not evidence."); *United States ex rel. Bradshaw v. Alldredge*, 432 F.2d 1248, 1248 n.1 (3d Cir. 1970) ("We have repeatedly held that statements by counsel in briefs or in court are not evidence.").

Second, Aurion's Reverse Stock Split mechanics do not square with Alcon's argument.[99] As discussed above, the Reverse Stock Split combined all issued pre-split Common Stock shares, including any such treasury shares, into a lesser number of issued post-split shares.[100] Each post-split share represents a larger ownership stake[101] and higher per-share value.[102] Because post-split Common Stock shares are more valuable, each Preferred Stock share is convertible into fewer (although more valuable on a per-share basis) post-split Common Stock shares.[103] Consequently,

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[99] *See* Alcon.Appeal.OB.21; *see also* A0472-A0473.

[100] JX236.0001; A0392; B0027; 2 David A. Drexler et al., *Delaware Corporation Law and Practice* § 32.05[2] (2024) ("The antipode of the stock split is the amalgamation of shares by reclassification, known in the vernacular as the 'reverse split.' In a reverse split, outstanding shares of stock are combined into a smaller number of shares.").

[101] If Aurion only had Common Stock and 100 shares were outstanding pre-split (each owning 1% of Aurion), there would be 71 shares post-split (each owning 1.395% of Aurion).

[102] If a pre-split Common Stock share was worth $1, each post-split share is worth $1.395.

[103] B1114 (Alcon admitting). Aurion's Reverse Split Amendment adjusted the Preferred Stock conversion price under Charter Section 4.5. A0350 § 4.5 ("If [Aurion] shall … combine the outstanding shares of Common Stock, the Applicable Conversion Price of each series of Preferred Stock in effect immediately before the combination shall be proportionately increased so that the number of shares of Common Stock issuable on conversion of each share of such series shall be decreased in proportion to such decrease in the aggregate number of shares of Common Stock outstanding.").

post-split, Aurion must reserve fewer authorized but unissued Common Stock shares for conversion of Preferred Stock.[104]

That authorized but unissued Common Stock shares were once reserved for issuance does not create a perpetual obligation for Aurion to maintain that reserve.[105] Authorized but unissued shares are not assets of Aurion.[106] And shares of stock do not become personal property until after they are issued.[107] So, it follows that they cannot be "possessed" before they exists (*i.e.*, are issued).

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[104] B1114 (Alcon admitting); A0342-A0343 (Charter Section 4.3.2 obligates Aurion to "reserve and keep available out of its authorized but unissued capital stock" sufficient Common Stock to convert all Preferred Stock). That language tracks the NVCA Form. A0962 § 4.3.2.

[105] *See Tornetta v. Musk*, 2024 WL 4930635, at *3 (Del. Ch. Dec. 2, 2024) ("A reserve is a bookkeeping entry meant to ensure that all possible future stock issuances under Tesla's contracts do not collectively cause Tesla to exceed its total number of authorized shares.").

[106] *See Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 941 (Del. 1979) (explaining that a stock split effects "changes in the number of outstanding shares which are unaccompanied by other balance sheet changes: thus a stock split, reverse split or stock dividend changes only the number of shares outstanding without any change in corporate assets"); 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations & Business Organizations* § 5.17, at 5-56, n.312 (4th ed. 2025) ("Neither unissued shares, treasury shares, nor outstanding rights or options are shown as assets on the books of the corporation."). *Cf.* 8 *Del. C.* § 153 (recognizing the difference between an issuance of shares out of authorized but unissued shares and a "disposition" of treasury shares (which, for par value shares, may be issued without the need to receive consideration at least equal to the par value)).

[107] *See* 8 *Del. C.* § 159; *New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 568 (Del. Ch. May 2, 2023) ("By statute, a share of stock is the personal property of

Moreover, the Reverse Stock Split did not result in issued shares being returned to, or retired by, Aurion.[108] In other words, the Reverse Stock Split did not cause Aurion to possess (in treasury) any issued shares, post-split, that it did not possess pre-split. Rather, it created more headroom (*i.e.*, available authorized but unissued and unreserved shares) for a potential Qualified IPO by reducing the number of issued Common Stock shares, without changing the number of authorized shares the Company could issue.

Alcon's comments about the "accounting treatment" of treasury shares misses the point.[109] The headroom crated by the Reverse Split Amendment did not result from Aurion coming into possession of previously issued shares as Alcon claims. Rather, it resulted from a reduction in the number of issued shares. That authorized but unissued shares are not assets and do not become personal property until after they are issued, helps show Aurion did not acquire (*i.e.*, "possess") any new shares.

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its owner. The rights associated with and appurtenant to a share of stock are therefore rights that the owner can freely exercise or decline to exercise. Three rights are viewed as fundamental: the rights to sell, vote, and sue.") (footnote omitted).

[108] Such a reading would render superfluous the express language of the resolutions approving the Reverse Split Amendment, which provided that the shares will be combined "without further action on the part of the Company or any stockholders." B1165.

[109] Alcon.Appeal.OB.30-31.

Third, Alcon ignores that, Charter Section 3.4.5 ("***purchase*** or ***redeem*** … ***or acquire*** any shares") tracks DGCL Section 160(a)[110] ("corporation may ***purchase***, ***redeem***, receive, take ***or otherwise acquire*** ... its own shares ..."). Under the doctrine of independent legal significance,[111] Court should not expand Certificate Section 3.4.5 to encompass a reclassification of Common Stock under DGCL Section 242.[112] The fact that the parties added the phrase "or acquire" to a string of corporate actions in Section 3.4.5 only more closely aligns that provision to Section 160, supporting the application of the doctrine of independent legal significance. That change does nothing to help Alcon.

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[110] A0555 ("Section 3.4.5 tracks the language of Section 160(a)…").

[111] *Gunderson*, 2024 WL 4692207, at *10 (describing *Benchmark Cap. P'rs IV, L.P. v. Vague*, 2002 WL 1732423, at *7 (Del. Ch. July 15, 2002), as explaining "[w]here the drafters have tracked [Section 242's language], courts have been reluctant to expand those restrictions to encompass the separate process of merger"); *Quadrant Structured Prods. Co. v. Vertin*, 102 A.3d 155, 201–02 (Del. Ch. 2014) ("Under this doctrine, 'action taken in accordance with different sections of that law are acts of independent legal significance even though the end result may be the same under different sections.' 'The mere fact that the result of actions taken under one section may be the same as the result of action taken under another section does not require that the legality of the result must be tested by the requirements of the second section.'").

[112] 8 *Del. C.* § 242(a)(3) ("by subdividing or combining the issued shares of any class or series of a class of shares into a greater or lesser number of issued shares"); 8 *Del. C.* § 242(d)(2) ("or an amendment to reclassify by combining the issued shares of a class of capital stock into a lesser number of issued shares of the same class of stock").

The trial court properly found that, taken together, the doctrine of independent legal significance and contract interpretation principles applicable to stock preferences "combine to force the court to treat different forms of corporate action authorized by the DGCL as independently permissible, regardless of other similarities in their substantive outcomes."[113]

Alcon's assertion that the parties opted out of the doctrine of independent legal significance is based on its misreading of *Gunderson v. Trade Desk, Inc.*[114] Indeed, the trial court quoted *Gunderson* and the bolded language below in ruling for Aurion:

> Essentially ignoring the doctrine of independent legal significance, Plaintiff contends that Delaware law requires the court to consider substance over form. This argument lacks persuasive force.... The doctrine of independent legal significance is a bedrock of Delaware corporate law and should not easily be displaced. "**An open-ended inquiry into substantively equivalent outcomes, devoid of attention to the formal means by which they are reached, is inconsistent with the manner in which Delaware law approaches issues of transactional validity and compliance with the applicable business entity statute and operative entity documents."** As this court has observed, "the entire field of corporation law has largely to do with formality. Corporations come into existence and are accorded their characteristics, including most importantly limited liability, because of formal acts.

[113] Opinion.22.

[114] 2024 WL 4692207, at *15-16 (Del. Ch. Nov. 6, 2024), as corrected (Nov. 8, 2024).

> Formality has significant utility for business planners and investors."
>
> The court's goal here is to give effect to the drafters' decisions in selecting which words to use—and which words to not use. Where decades of case law provides express guidance to corporate drafters and emphasizes that our courts charge drafters with knowledge of that case law, giving effect to the drafters' decisions entails adhering to that guidance at the judicial level as well.[115]

With preferred stock protective provisions, form prevails over (alleged) substance. While *Avatex* and *Gunderson* support extending Series C Consent Rights to alternative transactions that accomplish a specified action that is the subject of an express restriction (*e.g.*, changing the number of authorized shares), they ***do not***, contrary to Alcon's suggestion, support extending Series C Consent Rights to "any transaction resulting in a [purportedly] similar outcome" that is not the subject of any such express restriction (*e.g.*, creating head room for Aurion's Qualified IPO without changing the number of authorized shares).[116]

Fourth, Alcon's argument that DGCL Section 160 applies to reverse stock splits would lead to the absurd conclusion that reverse stock splits cannot be undertaken by corporations that are insolvent or lack surplus, despite that such a prohibition would further no creditor protection interests, and despite that reverse

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[115] *Gunderson*, 2024 WL 4692207 at *15-16.

[116] A0560-0563.

stock splits are often employed by public companies on the verge of insolvency seeking to maintain their stock exchange listing status.[117]

Fifth, unable to cite a case finding a reverse stock split is an acquisition, Alcon relies on a dictionary definition to argue Aurion "acquired" shares in the Reverse Stock Split.[118] But Alcon's claim "violates the interpretive maxim of *expressio unius est exclusio alterius*"[119] because Charter Section 3.4 elsewhere explicitly refers to a stock split—meaning the Court cannot imply that concept into Section 3.4.5:

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[117] *See, e.g.*, Opinion.25 n.133; SEC Release No. 30-101306 (Oct. 10, 2024), available at https://www.sec.gov/files/rules/sro/nyse/2024/34-101306.pdf (noting that the NYSE "has observed that some companies, typically those in financial distress or experiencing a prolonged operational downturn, engage in a pattern of repeated reverse stock splits" and "believes that such behavior is often indicative of deep financial or operational distress within such companies"); 1 David A. Drexler et al., *Delaware Corporation Law & Practice* § 20.04 (2024) (emphasis added) (explaining that "Section 173 distinguishes between stock dividends and stock splits, providing that no such transfer from surplus to capital is necessary in the latter case[,]" such that the creditors protections applicable to a stock dividend do not apply to stock splits effected by charter amendment).

[118] Alcon.Appeal.OB.21. This Court recently recognized that "[w]hile dictionary definitions can help discern the meaning of words ..., they can also be inconclusive and subject to selection bias." *In re Fox Corp./Snap, Inc.*, 312 A.3d 636, 647 (Del. 2024) (rejecting effort to "pluck" out words and applying "generic" dictionary definitions to support an unfounded construction inconsistent with the structure of the DGCL). Dictionary definitions are particularly unhelpful where, as here, the definition a party cherry-picks "lack[s] context[.]" *Id.*

[119] B0038 (citing cases). *See also In re Fox Corp./Snap Inc.*, 312 A.3d 636, 647 (Del. 2024) (rejecting effort to "pluck" out words and applying "generic" dictionary definitions to support an unfounded construction inconsistent with the structure of the DGCL).

> 3.4 Series C Preferred Stock Protective Provisions. At any time when at least an aggregate of 500,000 shares of Series C Preferred Stock (in each case subject to appropriate adjustment in the event of any stock dividend, ***stock split***, ***combination*** or other similar recapitalization with respect to the Series C Preferred Stock and) are outstanding, the Corporation shall not ... : (emphasis added)
>
> 3.4.5 purchase or redeem (or permit any subsidiary to purchase or redeem) or ***acquire*** any shares of share capital of this Corporation, other than ...[120] (emphasis added)

Sixth, Alcon's interpretation of the phrase "indirectly by amendment, merger, consolidation or otherwise" in Section 3.4's introduction is also flawed. The Charter was based on the NVCA Form, which uses broader language that is not present in the Charter. Both categorize stock splits and combinations as a recapitalization (green highlight below):

> 3.3 Preferred Stock Protective Provisions. At any time when [at least [____]] shares of Preferred Stock [(subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization with respect to the Preferred Stock)] are outstanding, the Corporation shall not, either directly or indirectly by amendment, merger, consolidation, recapitalization, reclassification, or otherwise, do any of the following without (in [121]

> 3.4 Series C Preferred Stock Protective Provisions. At any time when at least an aggregate of 500,000 shares of Series C Preferred Stock (in each case subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization with respect to the Series C Preferred Stock and) are outstanding, the Corporation shall not, either directly or indirectly by amendment, merger, consolidation or otherwise, do any [122]

[120] A0339.

[121] A0958 § 3.3.

[122] A0339.

But, unlike NVCA Form Section 3.3, Charter Section 3.4 does not include recapitalization or reclassification in the phrase "indirectly by amendment, merger, consolidation or otherwise." The omission suggests reverse stock splits ("combinations") are excluded from that phrase.[123]

Moreover, Alcon's reliance on *Shenandoah* to argue the use of "indirectly" (copied from the NVCA Form) in Section 3.4's introduction expands Section 3.4.5 to include all actions with an arguably similar result[124] is misplaced because *Shenandoah* is distinguishable[125] and Alcon's suggestion of an implied limitation conflicts with Delaware's strict construction of preferred stock protective provisions. *Shenandoah* did not grapple with (or address at all) the doctrine of independent significance or preferred stock protective provisions. Rather, it concerned the redemption of a debt instrument through the application, directly or indirectly, of money borrowed in a debt financing.[126] Unlike *Shenandoah*, where "[n]o

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[123] *Kansas City S. v. Grupo TMM, S.A.*, 2003 WL 22659332, at *3 (Del. Ch. Nov. 4, 2003) (applying maxim *expressio unius est exclusio alterius* and observing the inclusion of stockholder approval requirement in one provision but not another meant the parties intended to exclude it from the other).

[124] Alcon.Appeal.OB.28.

[125] *See* B0034; A0396 n.131 (citing cases).

[126] *Shenandoah Life Ins. Co.*, 1988 WL 63491, at *4.

independent economic function would have been intended or occurred"[127] as a result of the application of borrowed funds, the Reverse Stock Split served an independent economic function; it increased the per share value of the issued Common Stock and lifted the cloud that this litigation cast over Aurion's planned IPO.[128] Moreover, the rules of interpretation for a debt instrument are more liberal than those applying to the interpretation and enforcement of preferred stock protective provisions. For example, Alcon highlights that the Court in *Shenandoah* considered the import of the implied covenant.[129] But the implied covenant is of no moment here, as rights, preferences and limitations attendant to preferred stock "will not be presumed or implied."[130]

Seventh, while Alcon plods through the statutory history of DGCL Sections 242 and 243, that history supports Aurion, not Alcon.

Alcon focuses on the phrase "converted into or exchanged" from the 1973 version of DGCL Section 243(a) to equate conversions with exchanges,[131] but that

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[127] *Id*. at *7.

[128] *See above* at 14.

[129] Alcon.Appeal.OB.39.

[130] *Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 852-53 (Del. 1998); Aurion.Post.OB.18-19.

[131] Alcon.Appeal.OB.23.

phrase applies only to a conversion into or exchange "for other shares of the corporation."[132] That version of Section 243(a) contemplated a particular type of conversion or exchange (*i.e.*, for other shares) but it in no way suggests that all conversions are exchanges.

Alcon also cites a Black & Alexander article for the proposition that a reverse stock split is an "exchange," but that is not what the article says:

> The authority to effect stock splits has been located in the penumbra of amendments contemplated by Section 242(a), such as "changes in stock," "exchanges" and "reclassifications."[133]

And the preceding sentence in that article expressly refers to a reverse stock split as involving a "combination of shares into a smaller number."[134] In other words, the DGCL was amended to add "combination" to Section 242 to help practitioners who had been effecting stock splits to continue to do so even if they were *not* an "exchange." This aligns with Delaware case law expressly referring to a reverse stock split as a "change" to the number of outstanding shares.[135] It also aligns with

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[132] 59 Del. Laws ch. 106, § 8 (1973).

[133] Lewis S. Black, Jr. & Frederick H. Alexander, *Analysis of the 1996 Amendments to the Delaware General Corporation Law*, at 314 (1996).

[134] *Id*.

[135] *Blades*, 2010 WL 4638603, at *8 ("A stock split is a means by which a corporation *changes* the number of outstanding shares[.]").

the current language of DGCL Section 242, which expressly refers to reverse stock splits as "reclassify[ing]" by "combin[ing]" shares.[136]

Moreover, an amendment to Section 242(a)(3), effective August 2023, mandates that all issued shares—*i.e.*, both outstanding and treasury—must be proportionally adjusted in any stock split.[137] That amendment ensures equal treatment of all issued shares in a stock split, regardless of whether they are owned by stockholders (*i.e.*, outstanding) or the corporation (*i.e.*, treasury), to prevent artificial inflation of treasury share percentages through selective splits (*e.g.*, assuming 10 outstanding and 10 treasury shares pre-split, a 10-to-1 reverse split of only outstanding shares would result in 1 outstanding and 10 treasury shares post-split). The amendment, effective before Aurion's Reverse Stock Split, render's insupportable Alcon claim that Aurion owns more treasury shares post-split.

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[136] 8 *Del. C.* § 242(a)(3) ("by subdividing or combining the issued shares of any class or series of a class of shares into a greater or lesser number of issued shares"); 8 *Del. C.* § 242(d)(2) ("or an amendment to reclassify by combining the issued shares of a class of capital stock into a lesser number of issued shares of the same class of stock").

[137] *See* Del. S.B. 114, 152nd Del. Gen. Assem. (2023); *see also* Morris, Nichols Arsht & Tunnel, *2023 Amendments to the DGCL & Delaware's Alternative Entity Statutes* (Sept. 2023), *available at* https://www.morrisnichols.com/insights-2023-amendments-to-the-dgcl-delawares-alternative-entity-statutes.

Finally, Alcon labels the Reverse Stock Split atypical because Aurion did not also reduce the number of authorized shares post-split,[138] but what is "typical" for IPOs is irrelevant to whether Alcon's consent was necessary under the Charter. Moreover, a cursory review of IPO filings since Alcon filed this lawsuit reveals multiple companies completed reverse stock splits without reducing authorized shares.[139] In fact, Alcon's lead counsel has advised on IPOs involving pre-IPO reverse stock splits without authorized share reductions.[140] Alcon knows that approach is not inherently problematic.

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[138] Alcon.Appeal.OB.29.

[139] *See, e.g.*, B1177 (Cortigent, describing pre-IPO reverse stock split and attaching certificate of amendment effecting reverse stock split and stating: "For purposes of clarity, after the [Reverse Split] Effective Time [the] total number of shares of stock which the Corporation shall have authority to issue shall remain at 110,000,000 shares, consisting of (i)100,000,000 shares of Common Stock, $0.001 par value per share, and (ii)10,000,000 shares of Undesignated Preferred Stock, $0.001 par value per share."); B1186 (Turo, describing: "the Company effected the one-for-two Reverse Stock Split and increased the number of authorized shares of common stock to 135,000,000 by filing the Stock Split Amendment."); B1184 (Apimeds, summarizing 2.6-for-1 reverse stock split of the common stock with no corresponding change to the authorized common stock).

[140] *See, e.g.*, B1173-B1174 (Rain Therapeutics: "the Company's board of directors and stockholders, respectively, approved an amended and restated certificate of incorporation of the Company to effect a 1-for-1.0799 reverse stock split of the Company's common stock ***and to increase the number of authorized shares of common stock from 24,000,000 shares to 250,000,000 shares***, of which 200,000,000 shares are be designated as voting common stock and 50,000,000 shares are designated as non-voting common stock" and disclosing that the validity

Moreover, Alcon cites no case supporting its claim that by failing to reduce the number of authorized shares, Aurion somehow morphed the Reverse Split Amendment into an acquisition[141]—so Alcon's claim has no weight.[142]

4. Aurion Did Not Purchase Shares In The Reverse Stock Split (Alcon.Appeal.OB.32-36)[143]

Alcon claims Aurion, through the Reverse Stock Split, violated Charter Section 3.4.5 by actually or functionally "purchasing" fractional Common Stock shares, which have allegedly now become treasury shares.[144] The trial court correctly rejected Alcon's arguments. Aurion did not purchase or redeem fractional shares through the split because Aurion did not issue fractional shares.[145] Fractional

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of the issuer's shares of common stock offered by the prospectus will be passed upon by Gibson Dunn); *c.f.* B1181; B1171.

[141] Alcon.Appeal.OB.28-29.

[142] *Magid v. Acceptance Ins. Cos.*, 2001 WL 1497177, at *8 (Del. Ch. Nov. 15, 2001) ("a single paragraph in the defendant's brief with no citation to legal authority or evidence of record-amounts to an *ipse dixit*.").

[143] Opinion.26-28; A0556-A0558; B0120-B0123; B0036-B0038; B0076-B0079; A0891.499:2-21, A0904.552:6-A0906.561:5.

[144] *See* A0557; B0121; B0123.

[145] Opinion.27.

interests were canceled and converted into the right to receive equivalent value in cash under DGCL Section 155.[146] Canceling or converting is not purchasing.[147]

First, fractional interests were canceled by operation of law, under DGCL Section 155.[148] And Aurion cannot have purchased fractional Common Stock shares

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[146] Opinion.27; *see also Kinder Morgan*, 2014 WL 5667334, at *7 n.2 ("But even in the most common and straightforward case of a corporation that effects a reverse split under Section 242 of the DGCL, 8 *Del. C.* 242(a)(3), the charter amendment is not the mechanism that converts the shares into cash. The charter amendment produces fractional shares. A different section of the DGCL—Section 155—generally authorizes a corporation to choose not to issue fractions of a share and to pay cash in lieu of fractional shares. 8 *Del. C.* § 155.").

[147] Opinion.27-28; *see also Shields v. Shields*, 498 A.2d 161, at 167 (Del. Ch. 1985) (Allen, C.) ("The statutory conversion of stock in a constituent corporation into stock in the surviving corporation that is effected by a stock for stock merger ought not be construed to constitute a sale, transfer or exchange of that stock for purposes of an agreement among shareholders restricting their power to transfer their stock."); *Mudrick Cap. Mgmt. L.P. v. QuarterNorth Energy Inc.*, 2024 WL 807137, at *6 (Del. Ch. Feb. 26, 2024) ("The plaintiffs reject the notion that the transfer discussed in the Drag-Along Notice is equivalent to a sale, arguing that a 'conversion' of equity does not implicate 'an actual *sale* and an actual *buyer*' of the interests. Individual shares of stock are not, however, 'sold' in a typical merger. They are converted into the right to receive merger consideration.") (footnote omitted).

[148] *See In re Kinder Morgan*, 2014 WL 5667334, at *7 n.2 ("But even in the most common and straightforward case of a corporation that effects a reverse split under Section 242 of the DGCL, 8 *Del. C.* 242(a)(3), the charter amendment is not the mechanism that converts the shares into cash. The charter amendment produces fractional shares. A different section of the DGCL—Section 155—generally authorizes a corporation to choose not to issue fractions of a share and to pay cash in lieu of fractional shares. 8 *Del. C.* § 155.").

through the Reverse Stock Split[149] because no such shares ever existed.[150] Alcon provides no case law supporting its *ipse dixit* that fractional shares were purchased.[151] And Alcon's position contradicts established Delaware law that statutory conversion of stock is not a "purchase" of that stock:

> The statutory conversion of stock in a constituent corporation into stock in the surviving corporation that is effected by a stock for stock merger ought not be construed to constitute a sale, transfer or exchange of that stock for purposes of an agreement among shareholders restricting their power to transfer their stock.[152]

Second, Alcon argues that Aurion's cash payment for fractional interests was the "functional equivalent" of a purchase under *Shenandoah* but runs into the doctrine of independent legal significance.[153] Charter Section 3.4.5 relates to DGCL

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[149] A0557.

[150] B1166 ("[N]o fractional shares of Common Stock shall be issued in connection with the Reverse Stock Split."); JX236.0004 ("No fractional shares of Common Stock shall be issued as a result of the Reverse Stock Split.").

[151] A0558.

[152] *Shields v. Shields*, 498 A.2d 161, at 167 (Del. Ch. 1985) (Allen, C.); *see also Mudrick Cap. Mgmt. L.P. v. QuarterNorth Energy Inc.*, 2024 WL 807137, at *6 (Del. Ch. Feb. 26, 2024) ("The plaintiffs reject the notion that the transfer discussed in the Drag-Along Notice is equivalent to a sale, arguing that a 'conversion' of equity does not implicate 'an actual *sale* and an actual *buyer*' of the interests. Individual shares of stock are not, however, 'sold' in a typical merger. They are converted into the right to receive merger consideration.") (footnote omitted).

[153] *See* above at 34-35.

Section 160 (acquisition of Aurion's own shares)[154] but Aurion's treatment of fractional interests in the reverse stock split falls under DGCL Section 155. Alcon ignores that the DGCL distinguishes between the two. Alcon also ignores that the Charter elsewhere expressly refers to stock splits, stock combinations, stock cancellations, stock conversions and fractional shares, but Section 3.4.5 does not.[155]

Third, Alcon's appeal brief conflates "fractional shares" and "fractional interests"—terms the DGCL distinguishes. Fractional interests are temporary inchoate rights, and DGCL Section 155 allows corporations to choose between paying cash for their fair value, issuing equity in the form of fractional shares, or issuing warrants that can be aggregated into whole shares. Alcon's argument that Aurion's Reverse Stock Split aggregated fractional interests into whole treasury shares[156] ignores Section 155, and if adopted would render that statute meaningless. Indeed, if reverse stock splits automatically generated fractional shares (rather than temporary fractional interests subject to Section 155's resolution mechanisms), there would be no work for Section 155 to do. And Alcon's theory is not supported by *Applebaum* because, in that case, "[t]he stockholders … authorized [the company]

[154] *Compare* B0037, *with* A0554.

[155] B0037-B0038.

[156] Alcon.Appeal.OB.34.

to compensate the cashed-out stockholders by combining their fractional interests into whole shares …"[157] Here, there was no such choice made by stockholders or the Board.

5. No Relevant Extrinsic Evidence Exists (Alcon.Appeal.OB.36-37)[158]

Alcon argued below that Charter Section 3.4 was unambiguous, but having lost Alcon now improperly[159] claims ambiguity.[160] Alcon argues that extrinsic evidence was introduced at trial that demonstrates "Alcon, Aurion, and Deerfied each understood, until very recently, that the Series C Consent provisions constrained corporate acts necessary to accomplish a Qualified IPO."[161] That argument (which misconstrues the evidence) failed in the trial court, and fails here, too.

In determining whether a disputed contract term is ambiguous, the Court "must give effect to all terms of the instrument, must read the instrument as a whole,

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[157] *Applebaum v. Avaya, Inc.*, 812 A.2d 880, 887 (Del. 2002).

[158] A0567-A0569; B0127-B0131; B0050-B0054; B0019-B0022.

[159] *See* above at 21 n.83.

[160] Alcon.Appeal.OB.5-6.

[161] Alcon.Appeal.OB.36.

and, if possible, reconcile all the provisions of the instrument."[162] A term is not ambiguous because the parties dispute its meaning. Rather, to be ambiguous, it "must be fairly or reasonably susceptible to more than one meaning."[163] As discussed above, Aurion offers the only reasonable interpretation of the disputed provisions.

At any rate, Alcon failed to present at trial any pertinent extrinsic evidence of the parties' intentions at the time the Charter was agreed to. The trial's first day featured testimony from eight witnesses, including multiple Alcon representatives who were not involved in drafting or (directly) negotiating the documents.[164] Alcon's witnesses offered their personal interpretations of Alcon's rights under the Charter and Voting Agreement.[165] But none said that their understanding was ever communicated to Aurion or its counsel during negotiations.[166]

Even Scileppi, Alcon's in-house counsel involved in the negotiations of the Series C investment, did not communicate directly with Aurion or its counsel about

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[162] *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 386 (Del. 2012).

[163] *Id*. at 385.

[164] A0746.46:5-10; A0756.87:1-6; A0759.98:5-10.

[165] *See, e.g.*, A0752.69:22-70:10, 70:15-71:4; A0769.139:23-140:5; A0779.177:16-178:18, A0787.209:8-14.

[166] *See, e.g.*, A0756.87.1-6; A0782.191:15-18, A0784.200:14-20.

the Charter during its negotiation.[167] Instead, Arnold & Porter, Alcon's counsel, communicated with counsel for the other parties involved.[168] Williams of Arnold & Porter recalled no communications with Aurion (or anyone else other than Alcon) during negotiations about Charter Section 3.4.[169] She also disclaimed any ability to testify about the purpose of Section 3.4 from Alcon's perspective—offering, instead, only her understanding of the purpose of protective provisions generally.[170]

Alcon's failure to identify any contemporaneous communication about the disputed contract language is significant given this Court's consistent position that "evidence of one side's undisclosed, private mental impressions or understandings is useless" in contract interpretation.[171] So too here.

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[167] B0667.71:12-73:16; A0772.149:10-13.

[168] B0667.71:4-18; A0772.149:6-9.

[169] B0752.36:21-37:2; B0755.48:6-49:2; B0756.50:19-25, 53:18-23; B0757.54:11-20; A0782.190:1-193:3, 194:2-12.

[170] B0755.46:19-47:10; A0784.200:21-202:10.

[171] *Utd. Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 835 n.118 (Del. Ch. 2007); *see also Paul v. Rockpoint Grp., LLC*, 2024 WL 89643, at *15 (Del. Ch. Jan. 9, 2024) ("[T]he private, subjective feelings of the negotiators are irrelevant and unhelpful to the Court's consideration of a contract's meaning, because the meaning of a properly formed contract must be shared or common.").

II. The Trial Court Correctly Ruled Aurion's Reverse Stock Split Did Not Alter The Number Of Authorized Shares (Alcon.Appeal.OB.38-40)

A. Questions Presented

Whether the trial court correctly ruled that Aurion's Reverse Split did not alter the number of authorized Common Stock shares in violation of Charter Section 3.4.2,[172] which says in relevant part that Aurion:

> shall not, either directly or indirectly by amendment, merger, consolidation or otherwise, do any of the following without ... the written consent or affirmative vote of the Requisite Series C Holders:….
>
> increase or decrease the number of authorized shares of Common Stock....[173]

B. Scope of Review

Contract interpretation "involves legal questions and thus the standard of review is *de novo*."[174]

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[172] Opinion.20-23; A0558-A0560; B0123-B0127; B0032-B0037; B0076-B0080.

[173] A0487 ¶ 14; A0339 § 3.4.2. The NVCA Form has a similar limitation, which requires consent to: "increase the authorized number of shares of Preferred Stock or any additional class or series of capital stock of the Corporation unless the same ranks junior to the Preferred Stock with respect to its rights, preferences and privileges." A0959 § 3.3.3.

[174] *Emmons*, 697 A.2d at 744; *Gotham P'rs*, 817 A.2d at 170.

C. Merits of Argument

At trial, Alcon sought declarations that:

> Aurion must secure Alcon's consent to a [Charter] amendment to increase the authorized number of shares of Common Stock in connection with Aurion's planned IPO.
>
> Aurion cannot do directly or indirectly anything set forth in Section 3.4 without Series C Consent.[175]

As to the first, the trial court correctly found that because Aurion's Reverse Stock Split "did not increase or decrease the number of authorized shares of Common Stock—either directly or indirectly," it had sufficient authorized but unissued and unreserved shares of Common Stock to effect a Qualified IPO and thus did not need Alcon's consent to issue additional shares pre-IPO.[176] As to the second, the trial court rejected Alcon's various arguments that Aurion's Reverse Stock Split or planned Qualified IPO violated Series C Consent Rights in Charter Section 3.4.[177]

The relevant principles for interpreting the Charter are discussed in Section I.C.1 above.

Alcon's first attack on Aurion's pre-IPO process was to argue that the Reverse Stock Split violated Charter Section 3.4.2 because it "indirectly" increased the

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[175] A0064 ¶ 44; A0496 ¶ 58(b).

[176] Opinion.21.

[177] *Id.* at 20-28.

number of authorized Common Stock shares.[178] The trial court easily dispatched that argument, because the Reverse Stock Split:

> did not increase or decrease the number of authorizes shares of Common Stock—either directly or indirectly. Rather, it divided the issues shares by a specific number. Before the Reverse [Split Amendment], there were 33,185,455 shares of Common Stock authorized under the Charter. After the Reverse [Split Amendment], there were the exact same number—33,185,455 shares of Common Stock—authorized under the Charter.[179]

Alcon admits in its Opening Brief that the Reverse Stock Split "did not directly increase the number of Aurion's authorized shares."[180]

Instead, Alcon again relies on *Shanendoah* to claim an implied limitation against the Reserve Stock Split based on it being a "functional equivalent" of increasing authorized shares.[181] The trial court properly rejected that argument as running "headlong into the doctrine of independent legal significance and principles of contract interpretation governing stock preferences."[182] This Court should too.

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[178] Opinion.20.

[179] *Id.* at 21; *see also id.* ("Alcon concedes" that the Reverse Split Amendment did not change the number of authorized shares).

[180] Alcon.Appeal.OB.39.

[181] *Id.*

[182] Opinion.21-22.

DGCL Section 242(a)(2) separately addresses changes to the number of authorized shares and combinations of issued shares through a reverse stock split.[183]

Alcon's argument ignores that distinct statutory treatment and conflates a reclassification of issued shares with an increase or decrease of a corporation's authorized shares.[184] The Reverse Stock Split accomplished only the former; it reclassified issued shares without altering the number of authorized shares.[185] The "subdividing or combining" of issued shares contemplated by DGCL Section 242(a)(3) is a means of reclassifying issued shares. And DGCL Section 242(d)(2) distinguished between "[a]n amendment to increase or decrease the authorized number of shares of a class of capital stock" and "an amendment to reclassify by combining the issued shares of a class of capital stock into a lesser number of issued shares of the same class of stock." Alcon rhetorically characterizing the statute as

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[183] 8 *Del. C.* § 242(d)(2); *see also, e.g.*, *Blades v. Wisehart*, 2010 WL 4638603, at *10 (Del. Ch. Nov. 17, 2010) ("[I]it is crucial to distinguish an amendment to the certificate of incorporation that merely increases a corporation's authorized but unissued capital stock, as expressly authorized under the first clause of § 242(a)(3), from an amendment that changes the number of outstanding shares, as expressly authorized by the amended language in the last clause of § 242(a)(3) that contemplates a distinct charter amendment that would have the effect of 'subdividing or combining the outstanding shares of any class or series of a class of shares into a greater or lesser number of outstanding shares.'").

[184] Alcon.Appeal.OB.39; A0469.

[185] Opinion.15, 21.

"lump[ing] those actions into the same category"[186] does not change that fact. Alcon offers no supporting case cite, or explanation of the "category" the actions are allegedly "lumped" into, or argument for why distinct actions cannot be contained in a single sentence. Labels are not valid arguments.

Although a different portion of Charter Section 3.4.2 requires Series C Consent to "reclassify any capital stock with voting, distribution or liquidation preferences that are *pari passu* with or senior to the Series C Preferred Stock," in certain scenarios, that section does not apply to a reclassification of the Common Stock because its "preferences" with respect to voting, distribution or liquidation are by definition junior to those of the Series C Preferred Stock. While a "preference" is often used to describe a prior right in payment, it is a special right that fundamentally distinguishes a class or series of preferred stock from the default rights of common stock.[187] In this case, the Common Stock has no special rights—and none that are *pari passu* or senior to those of the Series C Preferred Stock.

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[186] Alcon.Appeal.OB.40.

[187] *See, e.g.*, *Greenmont Cap. P'rs I, LP v. Mary's Gone Crackers, Inc.*, 2012 WL 4479999, at *4 (Del. Ch. Sept. 28, 2012) (referring to "preferences, and limitations of the preferred stock that distinguish preferred stock from common stock"); *Elliott Assocs.*, 715 A.2d at 852 (referring to "rights, preferences and limitations of preferred stock that distinguish that stock from common stock"); *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 594 (Del. Ch. 1986) (referring to "preferences or limitations that distinguish preferred stock from common").

Under Alcon's argument, the express restriction on reclassifications of shares ranking *pari passu* or senior to the Series C Preferred Stock in relation to voting, distribution or liquidation preferences would have no meaning if it were applied to a reclassification of junior shares. Delaware courts, however, will read contracts in their entirety: "[w]e will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage."[188]

Finally, for reasons explained above, Alcon's reliance on *Shenandoah* as support for its "functional equivalence" argument is misplaced.[189]

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[188] *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010).

[189] *See* above at 34-35.

III. The Trial Court Correctly Ruled Series C Consent Rights Are Extinguished During—Not Before Or After—A Qualified IPO Closing (Alcon.Appeal.OB 41-46)

A. Questions Presented

Whether the trial court erroneously failed to address Alcon's argument that Series C Consent Rights are not extinguished before a Qualified IPO closing.[190]

B. Scope of Review

Contract interpretation "involves legal questions and thus the standard of review is *de novo*."[191]

C. Merits of Argument

Alcon claims the trial court misunderstood its argument about when Series C Consent Rights terminate in a Qualified IPO under Charter Section 5.1. Succinctly put, the contractual question is whether the phrase "[u]pon … the closing of" a Qualified IPO means before, during or after that closing. Alcon at first argued that it meant after a closing but at trial its own expert undermined that position by testifying the Series C Consent Rights are eliminated during the closing (which has been Aurion's position from the start).

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[190] Opinion.28-29; A0570-A0573; B0131-B0135; B0045-B0050; B0089-B0094.

[191] *Emmons*, 697 A.2d at 744; *Gotham P'rs*, 817 A.2d at 170.

First, Alcon argues that its "Series C Consent Rights exist up to the point that preferred shares are automatically converted to Common Stock" under Section 5.1.[192] According to Alcon, that automatic conversion "does not happen until Aurion delivers the IPO shares and meets the Charter's conditions for a Qualified IPO."[193] But, as explained further below, Alcon's Series C consent rights are extinguished as part of a Qualified IPO closing "in light of the parties' contractual scheme" under Section 5.1.

Second, Alcon tries to repackage its argument below, which the Opinion described as not being advanced "whole-heartedly," and blames the trial court for "misconstru[ing] Alcon's argument."[194] Alcon seeks to side-step its argument that Section 3.4.1 is implicated in a Qualified IPO because Alcon must consent to any Charter amendment. And for good reason. The trial court correctly held that no Preferred Stock (and consequently no Series C Consent Rights) would exist at the time of any IPO-related certificate amendment as part of a closing. Instead, Alcon doubles down on its argument that the steps required in anticipation of a Qualified

[192] Alcon.Appeal.OB.41-42.

[193] Alcon.Appeal.OB.41-42.

[194] Alcon.Appeal.OB.45-46.

IPO necessarily change the capital structure of Aurion and so Alcon must provide its consent. In any event, both arguments fail.

1. Under Charter Section 5.1, Series C Consent Rights Terminate During A Qualified IPO Closing

At closing of the planned Qualified IPO, Aurion intends to amend the Charter to include provisions that customarily appear in public company charters, such as a restriction on the stockholders' power to act by written consent. Charter Section 5.1(a) provides for the automatic conversion of all of Aurion's issued shares of Preferred Stock to Common Stock upon closing of a Qualified IPO, such that any Series C consent rights will not apply to any such amendment.[195] The automatic conversion contemplated by Section 5.1 cancels all issued Series C Preferred Stock (*i.e.*, less than 500,000 will be outstanding). The automatic conversion and resulting cancellation occur as part of the Qualified IPO closing process. As the trial court correctly held:

> First comes the mandatory conversion of the issued Preferred Stock. Second comes the filing of the amended and restated IPO charter. Because all shares of Series C Preferred Stock will have been automatically converted upon the Qualified IPO, no shares will remain outstanding upon the filing and effectiveness of the 'IPO Charter,' Without any Series C Shares outstanding, there is no

[195] A0352 § 5.1(a).

> blocking right to exercise. Thus, the Series C Consent Rights will not apply to a Qualified IPO.[196]

This conclusion is supported by precedent from the Court of Chancery in similar circumstances. For the same reasoning applied in *TCG Sec., Inc. v. S. Union Co.*, for example, Aurion's (and the trial court's) interpretation of Section 5.1's effect is the only logical one. There, the court held that protective provisions ceased to apply to a merger when the shares, by redemption, ceased to be outstanding before the effectiveness of the merger, even though the shares were outstanding on the record date. The court explained:

> It is true that one must look to the record date to determine if preferred stock was outstanding and entitled to vote at the special meeting. But the more relevant question here is whether, at the moment the merger is scheduled to take effect, shares of Southern Union's preferred stock remain outstanding and, if so, whether a supermajority of such stock has voted to approve the merger. Here, Southern Union and Metro have taken the necessary steps to ensure that all of Southern Union's preferred stock is redeemed before the merger takes effect. And that is the precise contractual protection that Southern Union's charter provision is designed to afford preferred stockholders.[197]

This Court should affirm the trial court's holding. Alcon's Series C Consent rights will cease to exist before the closing of the Qualified IPO.

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[196] Opinion.29.

[197] *TCG Sec., Inc.*, 1990 WL 7525, at *9 (Del. Ch. Jan. 31, 1990).

Alcon, on the other hand, argues that its Series C Consent Rights do not terminate until *after* Aurion delivers IPO shares and a Qualified IPO closes.[198] Alcon's strained argument relies on a cherry-picked dictionary definition of "upon." According to Alcon, "dictionaries define 'upon' as 'immediately or very soon after.'"[199] As a result, "[t]he term's plain meaning confirms that the automatic conversion will occur after the closing of a Qualified IPO, not during the closing process—much less before the closing."[200] Alcon's argument was (twice) rejected by its own expert at trial:

> Q. When in the process is preferred stock converted into common?
>
> A. It occurs ***simultaneous*** with closing.
>
> ….
>
> Q. So does the conversion of stock occur before or after the IPO closes?
>
> A. It occurs ***simultaneous*** with the closing and after the pricing.[201]

[198] Alcon.Appeal.OB.42.

[199] Alcon.Appeal.OB.42.

[200] Alcon.Appeal.OB.42-43.

[201] A0808.293:23-294:1, 294:5-8.

Alcon's own expert recognized that an IPO closing is a process and conversion of the preferred stock is just one part. By Alcon's own admission, automatic conversion does not occur after closing of a Qualified IPO. For these exact reasons, although not properly raised below and therefore waived, Alcon's argument about its cherry-picked definition of "closing" likewise fails. The consummation of an IPO is a process. That process includes the conversion of any Preferred Stock held by Alcon and the filing of the public company charter.

Even if Alcon's argument had not been rejected by its own expert, Aurion offered a definition of upon that means "at a prescribed point in time"[202] (*i.e.*, at closing). While Alcon advocated for a different meaning, the meaning resulting in a narrower restriction should apply, consistent with strict rules of construction for preferred stock protections discussed above.[203]

The other "events" that Alcon alleges must occur before a Qualified IPO are addressed elsewhere. Alcon's attempt to rewrite Section 5.1 should be rejected.

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[202] B0041 (*citing* www.definitions.net/definition/upon).

[203] Alcon's argument that "[i]f the parties intended the mandatory conversion to occur earlier, they knew how to say so," Alcon.Appeal.OB.43, carries no weight. Indeed, Alcon gets it backwards. The Charter states that the automatic conversion occurs upon closing. It was Alcon that could have negotiated for the explicit right to approve the Qualified IPO, had it so desired. But it did not do so.

2. The Trial Court Did Not Misconstrue, Or Erroneously Fail To Address, Alcon's Argument

According to Alcon, "[t]he Court misconstrued Alcon's argument" and "erred in conflating" principles that Alcon apparently did not advance exclusively. Rather than arguing it has some "freestanding Series C Consent right over a Qualified IPO because IPOs result in a charter amendment," an argument that the trial rejected, "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."[204] Those specific arguments are addressed above,[205] and none have merit.

[204] Alcon.Appeal.OB.45.

[205] *See* above at Section III.C.1.

IV. The Trial Court Erroneously Ruled Alcon Revoked All Of Voting Agreement Section 7.20

A. Questions Presented

Whether the trial court correctly ruled Alcon validly revoked all of Voting Agreement 7.20 ("Voting Limitation"). Aurion raised this issue below, and the trial court addressed it.[206]

B. Scope of Review

The interpretation of contracts "involves legal questions and thus the standard of review is *de novo*."[207]

C. Merits of Argument

1. The Trial Court Erroneously Ruled Section 7.20 Is Only A Proxy

As relevant here, Section 7.20 of the Voting Agreement contains two relevant parts (with a line-break added to separate the two sentences):

> Alcon shall not be permitted to exercise voting rights with respect to any shares of capital stock beneficially owned by Alcon that, in the aggregate, represent voting rights in excess of 19% of the Company's outstanding Common Stock on an as-converted basis (the "**Voting Threshold**") on any matter submitted to vote of all holders of capital stock of the Company.

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[206] Opinion.29-37; A0573-A0578; B0135-B0138; B0045-B0052; B0086-B0090.

[207] *Emmons*, 697 A.2d at 744; *Gotham P'rs*, 817 A.2d at 170.

> Instead, the Chief Financial Officer or the Chief Executive Officer of the Company then in office, each of them individually, with full power of substitution and resubstitution, shall exercise the voting rights with respect to such shares of capital stock in excess of the Voting Threshold in a Neutral Manner (the "**Voting Proxy**").[208]

The first sentence contains a prohibition on Alcon's ability to vote. The second sentence designates Aurion's CEO or CFO to vote Alcon's stock in excess of the Voting Threshold in a "Neutral Manner." In rejecting Aurion's arguments, the trial court ignored the first sentence as well as other provisions of the Voting Agreement.

In addressing Aurion's arguments, the Opinion stated, "Aurion first argues that Section 7.20 is not, in fact, a proxy."[209] Aurion's argument is more nuanced. The first sentence is a ***prohibition*** on Alcon's exercise of voting power with respect to shares beyond the specific threshold on matters submitted to a vote of all outstanding capital stock.[210] It is plainly not a proxy. The second sentence does grant a proxy to Aurion's CFO and CEO, but it does not establish a customary proxy arrangement and must be read together with Section 7.8 of the Voting Agreement, which reflects the parties' agreement as to the consents required to amend Section

[208] B1066 § 7.20.

[209] Opinion.31.

[210] *See* A0406-A0407; B0046-B0047; A0907.562:19-563:15.

7.20 (including the first sentence).[211] In concluding that "[t]he Voting Proxy is a proxy,"[212] the trial court did not address the nuances of Aurion's argument.

The Opinion stated, "Aurion de-emphasizes [the CFO or the CEO's right to vote Alcon's shares], arguing that the 'identity of the person who implements Alcon's obligation is immaterial' under the Voting Proxy."[213] Once again, this misses Aurion's point. The language Aurion identifies makes the Voting Proxy a non-customary proxy arrangement because it represents ***Alcon's*** agreement to cause excess shares to be voted in a "Neutral Manner." As the trial court recognized, "[t]he proxy relationship is a 'particular sort of agency' in which the stockholder is the principal and the proxy holder is the agent to vote on the shares."[214] Because the Voting Proxy obligates Alcon, it is more than the simple principal-agent relationship of a proxy. That the second sentence of Section 7.20 is called the "Voting Proxy"

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[211] *Id.*

[212] Opinion.32.

[213] Opinion.32.

[214] Opinion.31 (quoting Edward P. Welch et al., *Folk on the Delaware General Corporation Law, Fundamentals* § 212.03[A], at GCL-688-89 (2020 ed.)) (internal quotation marks omitted).

does not mean otherwise.[215] "[A] catchline in a contract is not determinative[.]"[216] Rather, the plain meaning of the contractual language controls.[217] The text of the second sentence shows it is not just a proxy. And the fact Section 7.20 contains a proxy aligns with Aurion's arguments.

The Opinion also ignored the distinction between a naked proxy and a voting agreement. *Eliason*, the primary case on which Alcon relied to presume that Section 7.20 is revocable, concerns the former. There, a stockholder executed a one-paragraph proxy giving his daughter the authority to vote his stock.[218] Unlike here, that proxy did not impose obligations on the proxy giver and was not part of a larger voting agreement benefitting other stockholders. By contrast, in *Ringling Brothers* this Court enforced a stockholder's "promise … to exercise her own voting rights in

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[215] *See* Opinion.32.

[216] *Donegal*, 622 A.2d at 1089. This is especially true where, as here, the Voting Agreement expressly states as much. *See* B1061 § 7.6 ("The titles and subtitles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.").

[217] *Cf. In re Appraisal of GoodCents Hldgs., Inc.*, 2017 WL 2463665, at *6 (Del. Ch. June 7, 2017) ("[Here] the headings provide only limited guidance. ... [T]he plain meaning of the language controls."); *Beckrich Hldgs., LLC v. Bishop*, 2005 WL 1413305, at *6 (Del. Ch. June 9, 2005) ("If the recitals are inconsistent with the operative or granting part, the latter controls.").

[218] *Eliason v. Englehart*, 733 A.2d 944, 945 (Del. 1999).

accordance with" the terms of a voting agreement.[219] In doing so, the Court recognized that construing this obligation as revocable, as the stockholder urged, "would impugn well-recognized means by which a shareholder may effectively confer his voting rights upon others while retaining various other rights."[220] Here, as in *Ringling Brothers*, the Voting Agreement bound Alcon to refrain from voting certain shares, creating an enforceable right for other parties to the agreement that Alcon lacked authority to waive.

2. The Trial Court Erroneously Ruled Alcon Validly Revoked Section 7.20

Even if this Court agrees with the trial court that Section 7.20 could be revoked, in whole or in part, the trial court still erred because Alcon did not validly revoke it. Section 7.8 sets clear rules on how to amend, modify, terminate, or waive terms in the Voting Agreement, requiring consent from multiple parties, including Aurion:

> This Agreement may be amended, modified or terminated ... and the observance of any term hereof may be waived (either generally or in a particular instance and either retroactively or prospectively) ***only by a written instrument executed by (i) [Aurion]***; (ii) the holders of a majority of the shares of Common Stock issued or issuable upon conversion of the shares of Preferred Stock held by the Investors (voting together as a single class and on an

[219] *Ringling Bros.*, 53 A.2d at 446.

[220] *Ringling Bros.*, 53 A.2d at 447.

> as-converted basis); ... and (iii) the Requisite Series C Holders.[221]

The second sentence of Section 7.8 begins with "Notwithstanding the foregoing:" and is followed by a list of eight subparts providing for additional required consents or exceptions to the first sentence. On such additional consent relates to Section 7.20:

> (h) Subsection 1.2(d), Section 7.20, and this Subsection 7.8(h) shall not be amended, modified, terminated or waived without the written consent of Alcon.

That language is unnecessary if Alcon could unilaterally terminate Section 7.20 (as it purported to do).

Alcon does not argue that it complied with the rules in the first sentence. And the trial court rejected Alcon's contentions that it somehow fit into one of the eight exceptions in the second sentence. Yet the trial court accepted Alcon's argument that, because Section 7.8 does not expressly address revocation, and bolstered by the presumption against disenfranchisement, the parties had not deemed Section 7.20 to irrevocable.[222]

Section 7.8 refers broadly to amendments, modifications or terminations of the provisions of the Voting Agreement. Alcon sought to change the Voting Agreement to remove its contractual obligations reflected in the first sentence of

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[221] B1062 § 7.8.

[222] Opinion.34.

Section 7.20. That is an amendment/modification[223] or termination.[224] Unless such amendment/modification or termination falls within one of the enumerated exceptions to Section 7.8, such amendment/modification or termination requires the consent of other parties (including Aurion). The presumption against disenfranchisement does not apply. Courts apply that presumption "absent a clear intent by the parties."[225] The parties' intent is clear: Alcon may not unilaterally amend or modify Section 7.20. To hold otherwise would ignore that clear intent.

3. The Trial Court Erroneously Ruled Alcon's Purported Revocation Of The Voting Proxy Eliminates Other Obligations In Section 7.20

The trial court summarily rejected Aurion's argument that the Neutral Manner requirement remains even if the Voting Proxy were validly revoked (it was not). In doing so, the trial court equated the Neutral Manner language to voting instructions associated with a proxy.[226] But in the *Dell* and *Parshalle* cases cited by the trial court,

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[223] *See, e.g., In re Tyler's Estate*, 109 F.2d 421, 422 (3d Cir. 1940) ("[I]f a power to modify a trust is subject to no restrictions, it includes a power to revoke it as well…. [I]t is obvious that while a power to modify a trust may include a power to revoke it, the power to revoke a trust need not include necessarily the power to alter it.").

[224] *See, e.g., Mellon v. Driscoll*, 117 F.2d 477, 480 (3d Cir. 1941) ("in substance a power to terminate is the equivalent of a power to revoke").

[225] *Salamone v. Gorman*, 106 A.3d 354, 370 (Del. 2014).

[226] Opinion.35.

the voting instructions were to the proxy holders, instructing them to vote in a certain manner.[227] The proxies were then replaced by new proxies with new instructions, overwriting the prior instructions. The Neutral Manner requirement was not just an instruction to Alcon's proxy but also an obligation upon Alcon. Even if the Voting Proxy (in the second sentence of Section 7.20) were revoked, the Neutral Manner requirement remains.

The trial court rejected Aurion's argument that the Voting Threshold remains, based on a flawed interpretation of "[i]nstead" in the second sentence of Section 7.20.[228] The trial court viewed that word as signaling that the Voting Threshold and the Voting Proxy are intended to operate together—i.e., that the Voting Proxy exists as an alternative to a circumstance where Alcon votes its excess shares, and therefore, if the Voting Proxy is removed, Alcon may vote its excess shares.[229] The trial court missed the mark.

To begin, Alcon made that argument about the import of "instead" for the first time in rebuttal at post-trial oral argument.[230] The argument never appeared in any

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[227] *In re Appraisal of Dell Inc.*, 143 A.3d 20, 57-58 (Del. Ch. 2016); *Parshalle v. Roy*, 567 A.2d 19, 28 n.9 (Del. Ch. 1989).

[228] Opinion.36.

[229] Opinion.36.

[230] A0910.572:22-575:8.

of Alcon's pleadings, or its three trial briefs. Arguments not briefed are considered waived.[231] The trial court therefore improperly relied on a new argument, which Alcon waived by failing to brief it.

But even if this Court is inclined to engage with the "instead" argument, it should reject it. The Voting Threshold imposes a ***prohibition*** on Alcon. The Voting Proxy provides the ***manner*** in which to vote the excess shares. Revoking the Voting Proxy does not lift the prohibition set by the first sentence. Consider the following analogy:

> Steve tells Alan, "You shall not be permitted to write with a red pen. Instead, you should write with a black pen." Later, Steve tells Alan, "Actually, you may not write with a black pen." Alan still is not permitted to write with a red pen. Perhaps he can write in blue or green, but not red.

While the Voting Proxy may contemplate an alternative to Alcon voting its excess shares, removing the Voting Proxy does not mean that Alcon now gets to vote in excess of the Voting Threshold.

Nor, contrary to the trial court's holding, does the last sentence of Section 7.20, which states that the provision is intended to satisfy Aurion's obligations under Section 6.15 of the Purchase Agreement, somehow modify the clear contractual

[231] *Emerald P'rs*, 726. A.2d at 1224.

obligations in Section 7.20.[232] The parties do not dispute, consistent with the evidence, that Section 7.20 was intended, in part, to provide for a favorable accounting treatment for Alcon.[233] But Section 7.20 is not to Alcon's ***sole*** benefit. On its face, Section 7.20 imposes obligations on Alcon, which are benefits to the other parties. While extrinsic evidence is unnecessary given the plain language,[234] deposition and trial testimony revealed that Section 7.20 addressed concerns about Alcon exerting undue control over Aurion.[235]

[232] Opinion.36.

[233] A0562.

[234] The trial court unnecessarily relied on extrinsic evidence to support its conclusion. Opinion.34.

[235] B0568.157:2-17; A0764.120:8-A0765.121:3.

CONCLUSION

For all these reasons, the Opinion should be affirmed with respect to the Charter and reversed with respect to the Voting Agreement.

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