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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT/CROSS-APPELLEE'S REPLY/ANSWERING BRIEF

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INTRODUCTION

Aurion argues that form should prevail over substance, but in truth it asks this Court to ignore *both* form and substance to adopt its preferred, narrow reading of the expansive Series C Consent language and anti-circumvention provisions to which it agreed. Aurion demands that this Court do so in four days' time, without argument, and on an unnecessarily rushed schedule.[1] Aurion likewise asks this Court to render irrevocable a self-described "Voting Proxy" that says nothing about irrevocability. Yet Aurion identifies no valid reason to affirm the Court of Chancery's erroneous analysis of the Reverse Split Amendment and Qualified IPO issues, *see* AlconBr.16-

[1] Aurion similarly pressed the Court of Chancery to expedite proceedings (and even forego a trial in favor of a paper record) based on representations about the urgency of the IPO's timing. In its November 4, 2024, pleading, Aurion averred that "[s]wift resolution [was] critical" because if its registration statement was not declared effective by February 14, 2025, this "delay would extend the closing of the IPO beyond the time at which Aurion is projected to run out of cash." A0027. In its January 31, 2025 submission to this Court, Aurion proposed that oral argument occur on February 12, 2025 for similar reasons. Now, just eight days later, it claims no argument is necessary, but that this Court must decide this matter on February 12.

The urgency is manufactured. Aurion disclosed to potential investors a cash runway well into the Fall of 2025. Aurion Biotech, Inc. Form S-1 at 8, 122, (Jan. 24, 2025), https://www.sec.gov/Archives/edgar/data/1924356/000095017025008763/aurion_s-1.htm#summary_consolidated_financial_data. And Deerfield's appointed director to Aurion's Board testified at trial that the IPO was not scheduled for February and may instead occur in Q2 2025, depending on market conditions. B0561. In its brief, Aurion asserts that the only consequence of delay is that the audited financials will be stale, and the Company will have to complete an audit of its 2024 financial statements before its registration statement can be deemed effective. Of course, the Company must pay for and undergo an audit of its 2024 financial statements regardless of whether this Court rules this week.

46, or to reverse the Opinion's correct conclusion as to the Voting Proxy. This Court should reject each of Aurion's arguments.

1. Aurion invokes the doctrine of independent legal significance and strict construction in an effort to rewrite the expansive Series C Consent and anti-circumvention provisions to which it agreed. The Certificate states that Aurion "shall not, either, directly or indirectly by amendment, merger, consolidation or otherwise" acquire or purchase shares or increase its authorized shares. A0339-340. This broad language must matter in Delaware. Indeed, it includes precisely the words and phrasing that this Court and the Court of Chancery have recommended to corporate drafters who wish to make clear, even given strict construction, the broad scope of preferred stockholders' rights despite the doctrine's default, narrowing effect. *Elliot Associates, L.P. v. Avatex Corp.*, 715 A.2d 843, 855 (Del. 1998); *Gunderson v. Trade Desk, Inc.*, 326 A.3d 1264, 1287 (Del. Ch. 2024).

According to Aurion, *Avatex* cannot be read to extend Series C Consent Rights to the Reverse Split Amendment. Aurion.Br.4; *see also id.* at 21. But Aurion's argument ignores what *Avatex* says: "[t]he phrase, 'whether by merger, consolidation or otherwise' … entirely changes the analysis." 715 A.2d at 854. The protective provision at issue in *Avatex* did not expressly require preferred stockholder consent for the conversion of preferred stock resulting from a merger. *Id.* at 853. Rather, the provision required consent for "any amendment, alteration or

repeal" of the certificate, "whether by merger, consolidation or otherwise" that "materially and adversely" affected the rights of the preferred stockholders. *Id.* at 852. Even though an unenumerated act with independent legal significance (a conversion) contributed to the adverse effect, this Court recognized that the proposed merger (an enumerated act) would cause the adverse impact. *Id.*

That very same construct applies here. The Certificate's protective provision does not enumerate "reverse split" or "combination" as specifically prohibited transactions; it instead prohibits *any amendment* that would directly or indirectly accomplish an acquisition or purchase of Company stock or an increase in the number of authorized shares. Under *Avatex*, no express reference to a reverse split, combination, or reclassification was necessary to trigger Series C Consent Rights over the Reverse Split Amendment. The question here is simply whether the result of the Amendment accomplishes what is expressly prohibited—an acquisition or purchase of any Company shares or increase in authorized shares.

Nor can Aurion's argument be squared with what the Court of Chancery explained in *Gunderson*: "[C]orporate drafters … employ[] the *Avatex* language when they want to extend special voting rights." 326 A.3d at 1283-84. Where, drafters do not employ that language, as in *Gunderson*, the doctrine of independent legal significant governs, and form trumps substance. *Id.* at 1285. Where, as here, they do employ that language, an analysis of "substantively equivalent outcomes" is

necessary—the Court should consider the form and substance of the "extend[ed]" preferred stockholder rights and the doctrine of independent legal significance does not apply. *Id.*

This is all the more so where drafters add the anti-circumvention term "indirectly." Despite Aurion's ineffectual efforts to distinguish *Shenandoah Life Insurance Co. v. Valero Energy Corp.*—and the Court of Chancery's failure to address it at all—it is the sole Delaware case analyzing that term in a contractual covenant. 1988 WL 63491, at *7 (Del. Ch. June 21, 1988). Regardless of what type of contract that term appears in, it must be given meaning. As *Shenandoah* explained, inclusion of "indirectly" "proscribe[s] some forms of transactions, which, when viewed formally, would not be otherwise proscribed by the provision" at issue. *Id*. Yet Aurion's argument would not only require myopic focus on form—contradicting the parties' choice to use more expansive language—it would read the term "indirectly" out of Section 3.4 entirely.

2. ***Aurion agreed to broad Series C Consent and anti-circumvention provisions recognized under Delaware law—and then violated them.*** Stripped of its specious reliance on the doctrine of legal significance and strict construction, Aurion has no leg to stand on. The Certificate bars Aurion from directly or indirectly acquiring or purchasing stock, whether by amendment, merger, consolidation, or otherwise. The Court of Chancery found that the Series C investors "limit[ed]

Aurion's headroom for future capital transactions." Op.4. Nevertheless, Aurion effected an amendment, without Series C Consent, that gave it sufficient authorized shares to sell to public investor and consummate an IPO.

It is undisputed that Aurion lacked sufficient authorized shares to complete a Qualified IPO before the Reverse Split Amendment. Op.13. Now, it "has sufficient shares for a Qualified IPO." Aurion.Br.14. Yet, according to Aurion's slew of strained arguments, it did not acquire these shares—directly or indirectly; rather, it just "has" them now (whereas before the Amendment, it did not). Under the plain meaning of "acquire," an objective, reasonable third party, *see* Aurion.Br.18, would conclude that Aurion acquired—directly or indirectly through the Amendment—the newfound shares it now intends to sell to the public for $20.99 per share.

Just as tortured is Aurion's argument that it did not "directly or indirectly" purchase shares. According to Aurion, it merely "pa[id] cash for the[] fair value" of "temporary inchoate rights" (that would otherwise—by statute—have become fractional shares). Aurion.Br.42. This convoluted argument is merely an attempt to distract from the reality that a direct or indirect purchase occurred. Had it not paid cash for the "inchoate" rights, Aurion would have been obligated to issue fractional shares (which would have required Series C Consent) for those rights. Instead, it paid cash,. either directly or indirectly, and can now sell aggregated whole shares in an IPO.

In a deal where the parties agreed to limit headroom in the capital table and require Series C consent to expand it, the Amendment is at least an indirect increase in its authorized shares. Aurion's argument to the contrary, that it could design the Amendment to achieve indirectly what it could not do directly—by increasing only authorized, unissued shares without otherwise altering the number of authorized shares—renders meaningless the language that *Avatex*, *Gunderson*, and *Shenandoah* guide drafters to use to avoid this very kind of circumvention of preferred stockholder rights.

This Court should reject Aurion's efforts to sidestep its contractual obligation to secure Series C Consent before acquiring and purchasing shares—or, at least, indirectly increasing its authorized shares—via an amendment.

3. *Despite Section 5.1's plain language, Aurion asks the Court to collapse distinct steps that must occur before mandatory conversion*. The Court of Chancery focused on the sequence *beginning* with the mandatory conversion of the Preferred Stock. Op.29. But this misses the point. The Certificate specifies what must occur *before* mandatory conversion. A0352. Aurion must deliver the IPO shares so the IPO "closing" can occur, and the IPO must qualify as a Qualified IPO (based on the four conditions set forth in the Certificate). Only then, "[u]pon closing" of "a Qualified IPO" does automatic conversion occur. In other words, Alcon's Series C Consent Rights necessarily exist until those pre-conditions are

satisfied. They exist as to the Reverse Split Amendment, for example, and cannot be ignored as applied to the Amendment simply because the Company hopes to achieve conversion at a later date, upon the closing of a Qualified IPO.

Aurion again seeks to lump discrete steps together. But the case on which it relies is easily distinguishable, its Wikipedia-like online dictionary definition of "upon" does not support its argument, and its argument as to the evidence fails. Alcon simply seeks a clear ruling that Series C Consent rights over any acquisition or purchase of any shares, or any increase in the number of authorized shares, exist today because a Qualified IPO has not yet closed, and do not cease to exist unless and upon closing of a qualified IPO.

4. Aurion interpretation of Section 7.20 of the Voting Agreement clashes with the provision's language, Delaware law, the extrinsic evidence, and common sense. Aurion rightfully concedes that Section 7.20 "does grant a proxy." Aurion.Br.60. Because the self-described Voting Proxy says nothing about irrevocability, it is revocable under black-letter Delaware law. *See Eliason v. Englehart*, 733 A.2d 944, 947 (Del. 1999). It is not seriously disputed that the Accounting Treatment provision of the Purchase Agreement and the Voting Proxy it implemented were all agreed-to for Alcon's sole benefit to accommodate Alcon's own accounting issues and for no other purpose. Alcon therefore properly revoked its proxy, and its full voting power should be restored.

* * * * *

For the reasons addressed in Alcon's briefs, this Court should reverse the Court of Chancery's erroneous analysis of the Reverse Split Amendment and Qualified IPO issues. It should affirm the Trial Court's conclusion that the Voting Proxy was, indeed, a voting proxy and that it was, indeed, revocable because it did not say otherwise. The Court should reject Aurion's attempt to displace the parties' common understanding of the plain language of the Series C Consent provisions and to rush a decision with such significant consequences both for the parties and the venture-capital industry.

REPLY ARGUMENTS ON APPEAL

I. THE TRIAL COURT ERRED: AURION BOTH ACQUIRED AND PURCHASED STOCK VIA ITS REVERSE SPLIT AMENDMENT

In *Avatex*, the preferred stockholders had a right in the defendant company's certificate to consent to any "amendment, alteration, or repeal, *whether by merger, consolidation or otherwise*" that "materially and adversely" affected the preferred stockholders' rights. 715 A.2d at 852-54 (emphasis added). This Court determined that the right was "expressly and clearly stated" and that the "drafters of [the certificate] could not reasonably have intended any consequence other than granting [preferred consent rights] to *any merger* that would *result* in … the holders of that stock … be[ing] adversely affected." *Id.* at 853 (emphasis added). Thus, the language used in *Avatex* extended preferred consent rights to any merger that resulted in a material and adverse effect to the preferred stockholders' rights. *See id.*

Here, Section 3.4.5 of Aurion's Certificate requires Series C Consent for any acquisition or purchase of stock, "whether *by amendment,* merger, consolidation or otherwise." A0339-340 (emphases added). The parties to Aurion's Series C financing used exactly the language required to give preferred stockholders consent rights over a broad spectrum of possible dilutive transactions. By using the phrase "by amendment, merger, consolidation, or otherwise," the parties tracked the "path for future drafters" this Court laid out to "exalt substance over form." *See Avatex*,

715 A.2d at 855; *Gunderson*, 326 A.3d at 1287. And they thus ensured that *any* "amendment" that *results* in Aurion acquiring or purchasing its stock *requires Series C Consent*.

The parties also included anti-circumvention language—that an acquisition or purchase by Aurion of its stock, whether directly or indirectly, cannot be achieved without consent. As Chancellor Allen held in *Shenandoah*, the only Delaware authority on the precise issue, the term "indirectly" is "intended to reach situations in which the underlying economic reality of the completed transaction is the functional equivalent of" those specified outcomes. *See Shenandoah*, 1988 WL 63491, at *7.

This Court need not concern itself with the form of the transaction that Aurion chose, Reverse Split Amendment, to acquire and purchase Company stock. All that the Court needs to consider is whether the Reverse Split *Amendment* did, in fact, *result in* a direct *or indirect* acquisition or purchase of Company stock. And construing those terms objectively, as a reasonable third party would, the outcome is clear. Aurion's Reverse Split Amendment violated Section 3.4.5 because it resulted in an acquisition and purchase of Company stock.

As Alcon has explained, the Reverse Split Amendment resulted in Aurion obtaining control over 7,000,000 shares of authorized Common Stock it previously did not have and can now sell to consummate an IPO. Whether those shares are now

characterized as issued, unissued, treasury, outstanding, or otherwise, Aurion plainly *acquired* them. Further, Aurion paid cash for some portion of those shares. That is, Aurion plainly *purchased* them. Neither Aurion's say-so nor the "transactional magic" of a reverse split can alter that reality.

To distract from the Certificate's plain language, Aurion speaks out of both sides of its mouth. It says that its Reverse Split Amendment is so simple that no oral argument is warranted. Aurion.Br.2-3. Yet, the Company concocts *more than one dozen* reasons that purportedly justify the Amendment (Aurion.Br.17-45)—even though Aurion admits it designed the Amendment mid-way through this litigation to effect an end-run (through a perceived "loophole") around Section 3.4. *See* Aurion.Br.1-2. Aurion cannot reconcile its two positions.

The crux of Aurion's many muddied arguments, as best Alcon can tell, is (1) an amendment that resulted in an acquisition or purchase of stock does not require Series C Consent if the amendment in question did so by combining or reclassifying stock, and (2) even if such an amendment does require Series C Consent, Aurion did not acquire or purchase any Company stock.

As set out below, these arguments read out (or ignore) the plain language of Section 3.4.5, and are contrary to Delaware principles of interpretation and this Court's case law. They also defy common sense and Aurion's own representations

about the results of the Reverse Split Amendment to this Court, the Court of Chancery, the SEC, and the public. The arguments should be rejected.

A. Aurion Cannot Read Language Out of Its Certificate

As Alcon explained above, Section 3.4.5 of Aurion's Certificate requires Series C Consent for any "*direct or indirect*" acquisition or purchase of stock, whether effected "*by amendment, merger, consolidation or otherwise.*" A0339-340 (emphases added). Rather than grapple with the meaning of that language, Aurion invokes the doctrine of independent legal significance and the strict interpretation of preferred stock rights and distorts the plain holdings of the relevant case law. But Aurion cannot read language out of the Certificate. Delaware courts "give each provision and term effect, so as not to render any part of the contract mere surplusage." *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010). But Aurion's reading of Section 3.4.5 does just that and should be rejected.

1. The doctrine of independent legal significance does not foreclose Alcon's interpretation of Section 3.4.5.

Aurion's primary argument below and on appeal is that the doctrine of independent legal significance forecloses Alcon's interpretation of Section 3.4.5. Aurion asserts that Alcon's arguments to the contrary are based on a misreading of the relevant precedents. *See* Aurion.Br.29-31. But it is Aurion that misunderstands these decisions. For example, Aurion concedes that "*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" such as "changing the number of authorized shares." *Id.* at 31.

But Aurion ignores the clear and express language in Section 3.4.5 *that does precisely that.* Indeed, Series C Consent was required before Aurion adopted the Reverse Split Amendment because it accomplished an acquisition and purchase of Company stock—the *"specified action that is the subject of an express restriction"* in Section 3.4.5—and did so by an explicitly identified "alternative transaction"—an amendment to Aurion's Certificate.

Alcon is *not* arguing, as Aurion suggests, that "any transaction resulting in a purportedly similar outcome" or "that is not the subject of any such express restriction" such as "creating head room for Aurion's Qualified IPO without changing the number of authorized shares" also requires Series C Consent. *Id.* Nor is such an argument required for Alcon to prevail because of the clear and express language in Section 3.4.5: Series C Consent is required before Aurion "*acquires*" or "*purchases*" Company stock "*by amendment*." Aurion pretends that language does not exist.

Aurion also argues that the omission of "recapitalization" and "reclassification" in the listed "alternative transactions" in Section 3.4—which lists "*amendment*, merger, consolidation, or otherwise"—"suggests reverse stock splits

('combinations')" are "excluded from" Section 3.4. *Id.* at 33-34. But Aurion ignores that the combination at issue was implemented through an amendment, which is an expressly listed action. Again, Aurion reads words out of its own Certificate.

2. *Shenandoah* applies to Section 3.4.

Aurion next argues that "Alcon's reliance on *Shenandoah*" to interpret the word "indirectly" in Section 3.4 is "misplaced" because that case is supposedly "distinguishable." Aurion.Br.34. Aurion argues that *Shenandoah* did not address the doctrine and further focused on different rules of contractual interpretation. *Id.* at 34-35. But Aurion does not explain why either distinction is relevant.

Alcon is not relying on *Shenandoah* to argue that inclusion of "indirectly" in Section 3.4's preamble permits anything to "be presumed or implied" in Section 3.4.5. *See id.* Nor is Alcon asking this Court to presume or imply any protections granted to it by Section 3.4.5. As Alcon has explained, Section 3.4.5's prohibition is clear: Aurion cannot amend its Certificate, without Series C Consent, to directly or indirectly acquire shares of its capital stock. Far from presuming or implying protections, Alcon relies on Chancellor Allen's analysis in *Shenandoah* to explain an express protection—that is, to explain what "indirectly" means in that provision.

Aurion also argues that even if *Shenandoah's* interpretation of "indirectly" does apply to Section 3.4, it should not apply to the Reverse Split Amendment

because the Amendment "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." *Id.* at 35. That argument is nonsensical.

The language in Section 3.4 of Aurion's Certificate first appeared in the January 2022 term sheet that Deerfield, the investor that led Aurion's Series C round, negotiated with Aurion. *See* Alcon.Br.8-10. As the Trial Court found, "Deerfield also negotiated the number of authorized shares of Aurion Common Stock in connection with the Series C financing to limit Aurion's headroom for future capital transactions." Op.4. When Alcon filed suit, "Aurion lacked sufficient authorized shares to sell in an IPO. And the Charter requires Series C Consent to increase the number of authorized shares." Op.13. Alcon therefore sought "a declaration that Aurion would need Series C Consent to increase the number of authorized shares to consummate a Qualified IPO." *Id.* at 13-14. In response, Aurion devised "another means of securing more headroom in its capital structure—the 'Reverse Stock Split.'" *Id.* at 14. That is, Aurion's Reverse Split Amendment was a means "of securing more headroom in its capital structure" for use in an IPO, notwithstanding the Series C investors' attempt to constrain that headroom absent Series C Consent. Op.14. Thus, the Amendment did not accomplish an "independent economic function"; by design, it accomplished exactly what Section 3.4.5 prohibits.

Moreover, Aurion's assertion that it merely sought to increase "the per share value of the issued Common Stock", even if true, is immaterial. That resulted from Aurion's evasion of Alcon's rights, but was not a beneficial "independent economic function." Indeed, Aurion was right in the middle of the $10 to $20 sweet spot for an IPO before the Reverse Split Amendment. A1379. By increasing the per share price tonearly $21, the Amendment shifted Aurion's pricing outside of the traditional IPO sweet spot. A1379-1384. Thus, the share-price increase was a sacrifice Aurion made to acquire additional shares of its stock to sell, not an independent economic feature of the Amendment.

B. Aurion's Claim That Shares of Common Stock Cannot Be Acquired or Purchased Unless Issued Is Waived, Irrelevant, and Absurd

Aurion next argues that although the Reverse Split Amendment provided more "available authorized but unissued and unreserved shares" for sale in "a potential Qualified IPO," and although the Company paid cash to stockholders rather than providing them with fractional shares they would otherwise be entitled to, Aurion nevertheless did not acquire or purchase those shares. Aurion.Br.26-28, 39-41. According to Aurion, it cannot have acquired what it does not "possess," and it does not "possess" the additional "available authorized but unissued and unreserved shares" created by the Amendment until those shares are "issued." *See id.* at 26-28,

40-41. In fact, according to Aurion, until they are issued those shares do not even "exist." *Id.* at 27, 40-41. These assertions fail for multiple reasons.

First, Aurion did not raise this argument below and has therefore waived it. Supr. Ct. R. 8.

Second, Aurion's argument contradicts its representations to this Court, the Court of Chancery, the SEC, and potential investors. As Aurion explained in its briefing here and below, represented to the SEC in its Form S-1, and told "large funds," Aurion now "*has*," or, in other words, possesses, "sufficient shares for a Qualified IPO" that it did not have before the Amendment. Aurion.Br.13-14 (emphasis added); A0801.268:24-8. Aurion also represented that it intends to sell those shares for "*no less than $21 per share*" to raise "*over $90 million*" in cash. Aurion.Br.2 (emphasis added). Not surprisingly, Aurion has not told the SEC or potential investors that the shares it is offering for sale are not in its possession and do not exist.

Third, Aurion's argument is absurd. According to Aurion, (1) it does not possess non-existent shares of its Common Stock that it also has and intends to sell, and (2) even though it did not previously have these non-existent shares, it did not acquire them. No objective, reasonable third party could comprehend this reasoning in light of "the clear, literal meaning of the words" in Section 3.4.5. *Demetree v. Commonwealth Tr. Co.*, 1996 WL 494910, at *4 (Del. Ch. Aug. 27, 1996); *see also*

Weinberg v. Waystar, Inc., 294 A.3d 1039, 1044 (Del. 2023). Nor can the "transactional magic of a reverse stock split" make sense of it. *See* Op.25.

Fourth, the fact that "[a]uthorized but unissued shares are not assets" or "personal property" of Aurion is, as Alcon has previously explained, irrelevant to the question at hand—whether Aurion acquired or purchased such shares because of the Reverse Split Amendment. *Id.* at 27. Aurion's brief makes this clear. Aurion explains that "[n]either unissued shares, *treasury shares*, nor outstanding rights or options are shown as *assets* on the books of the corporation." *Id.* at 27 n.106 (citing R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations & Business Organizations* § 5.17, at 5-56, n.312 (4th ed. 2025)). Aurion further explains that "'[t]reasury' shares are issued shares that have been *repurchased* or otherwise *reacquired* by a corporation" that "lack voting rights" and that a "corporation *acquiring* its own shares automatically renders them *treasury*." *Id.* at 23. That is, according to the Company, shares that "are not assets" or "personal property" of Aurion *can still be acquired and purchased by Aurion*.

C. The Statutory History of DGCL Sections 242 and 243 Support Alcon's Arguments.

Aurion also attempts to mischaracterize the history of DGCL Sections 242 and 243. Alcon demonstrated in its opening brief that a prior version of Section 243, which was later removed only because it was "surplusage," *explicitly states* that "a corporation acquires . . . shares . . . by [those shares] having been converted into or

exchanged for other shares of the corporation." 59 Del. Laws, c. 106, § 8 (1973). The earlier version then provided for the automatic retirement of "the shares so acquired." *Id.* The legislature could not have more clearly expressed its view that a reverse stock split, which requires a conversion or exchange, constitutes an acquisition.

Aurion argues that history "in no way suggests that all conversions are exchanges." Aurion.Br.36. But that isn't was Alcon is arguing. Rather, Alcon's point is that according to the legislature, exchanges (or conversions) *involve acquisitions* and the fact that the Amendment effected that acquisition through a reverse split doesn't preclude the conclusion that an acquisition occurred (as Aurion has repeatedly argued).

D. Aurion's Various Other Straw Man Arguments Fail

1. Alcon is not conflating "fractional shares" and "fractional interests."

Aurion argues that Alcon conflates "fractional interests," or "temporary inchoate rights" that DGCL Section 155 allows corporations to use to resolve "fractional shares." Aurion.Br.42-43. But Alcon's argument that Aurion purchased fractional shares does not depend at all on treating fractional interests and shares as the same thing. Nor does it hinge on "reverse stock splits automatically generat[ing] fractional shares." *Id.* Rather, Alcon's argument is that the path Aurion chose to

resolve the fractional interests resulting from the Amendment resulted in a purchase of stock.

The Reverse Split Amendment stated that Aurion would not issue to existing holders of Aurion Common Stock any fractional shares resulting from its fractional split. *See* A1424 (exchanging 1.395 share for each 1 share of Common Stock). Aurion's stockholders still had a right to fractional shares, warrants that could be aggregated into whole shares, or payment for the fair value of the fractional interests resulting from the split. *See* Aurion.Br.42 (citing DGCL 155). But Aurion didn't choose the former two routes. Instead, Aurion's Board resolved to—and did—pay cash to holders of Common Stock for fractional interests that, absent the payment, would necessarily become shares (fractional or whole). AR0696. That is unequivocally a purchase of stock (that will be aggregated and sold by Aurion in an IPO). Any attempt to treat that transaction otherwise "blinks reality."

2. Alcon does not ask this Court to hold that DGCL Section 160 applies to reverse stock splits.

Aurion next claims that Alcon is arguing "that DGCL Section 160 applies to reverse stock splits," which it contends would lead to absurd results, such as preventing "public companies on the verge of insolvency" from "seeking to maintain their stock exchange listing status." Aurion.Br.31-32.

But Alcon is not arguing that Section 160 separately applies to constrain stock splits. It does not; Section 160 permits Delaware companies to acquire shares of

their own stock. Alcon is arguing that Series C Consent was required because the Certificate expressly requires consent to an acquisition of Company shares. The latter argument does not depend at all on the former to succeed.

Further, a ruling in Alcon's favor here would not prevent public companies from employing a reverse split to increase the price of their stock (to maintain stock exchange listing status). First, unless the hypothetical company had a protective provision like Section 3.4.5 and was attempting to enact an amendment to its certificate like the Reverse Split Amendment, then preferred stockholder consent would not necessarily be implicated. Indeed, the extent to which any consent might apply would depend on the nature of the hypothetical company's certificate and the nature of the reverse split to be implemented. Second, even if such a hypothetical company did need to obtain the preferred stockholder consent to enact a reverse split, it presumably could do so if the alternative was de-listing.

3. Alcon is not asking this Court to "imply" the "concept" of a stock split "into Section 3.4.5."

Aurion argues that "Alcon's claim 'violates the interpretive maxim of *exclusion unius est exclusion alterius*'" because "Section 3.4 elsewhere explicitly refers to a stock split." Aurion.Br.32. Aurion is wrong. Alcon is not asking this Court to "imply" the "concept" of a stock split "into Section 3.4.5." *Id.* Alcon is explaining that Aurion acquired and purchased shares of its capital stock *by amendment* to its certificate, even though Section 3.4.5 expressly says it cannot do

so without Series C Consent. That argument does not depend on implying any prohibition on stock splits into Section 3.4.5. Nor is the fact that Section 3.4 mentions a split for an entirely separate purpose—namely, counting the number of outstanding Series C shares—relevant. This straw man argument also fails.

4. Alcon is not arguing that the Reverse Split Amendment violated Section 3.4.5 merely because it is "atypical."

Aurion incorrectly reduces Alcon's position to suggest consent is required merely because the reverse split here was atypical in structure. *See* Aurion.Br.38-39. Again, Alcon is not arguing that atypical reverse stock splits are inherently problematic. The issue instead is that Aurion's failure to proportionately reduce the number of authorized shares caused Aurion to acquire and purchase shares, which requires Series C Consent. There are certainly examples of such atypical splits in the market (including transaction involving counsel of record), but those examples largely did not implicate the same consent rights at issue here. A0890. The few examples involving the same Certificate language only prove Alcon's point: *stockholder consent was properly secured in those cases*. *Id.*; A0890.

II. THE TRIAL COURT ERRED: AURION INDIRECTLY INCREASED ITS AUTHORIZED SHARES VIA AMENDMENT

To "create[] more headroom," AurionBr.28, Aurion amended its certificate to reduce the number of outstanding shares without a commensurate reduction in the number of authorized shares. This constituted an "indirect[]" "increase" in the number of authorized shares for issuance under the plain language of those terms. Indeed, "the underlying economic reality of the completed transaction is the functional equivalent" of an increase in authorized shares. *Shenandoah*, 1988 WL 63491, at *7. Aurion lacked the requisite headroom for an IPO before the Amendment—as the Series C investors intended, Aurion.Br.28—and had the requisite headroom thereafter.

Not surprisingly, then, Aurion cannot explain what the term word "indirectly" means in this context. Aurion first echoes the Court's unsound assertion that no "indirect" increase occurred because the number of authorized shares did not actually increase. AurionBr.5. But this proves no more than the truism that the Reverse Split Amendment did not "directly" "increase" authorized shares.

Aurion fails to explain how its constricted interpretation of Section 3.4.2 would not render the term "indirectly" mere "surplusage." *Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019). The term "indirect … increase" would have no meaning separate from "directly … increase" if the former only included common increase amendment transactions.

The term "indirectly," which must be given effect, captures transactions that are the "functional equivalent of a direct" increase. *Shenandoah*, 1988 WL 63491, at *7. Decreasing the number of outstanding shares without a proportionate reduction in the number of authorized shares *was* functionally equivalent to a direct increase in the number of authorized shares. Before the Amendment, Aurion had no headroom and no ability to increase its headroom. After the Amendment, it had headroom. Indeed, that is exactly why Aurion resorted to the reverse split mechanism after Alcon brought suit. The reverse split had the same "functional" effect—it increased the number of unissued shares or treasury stock that Aurion could sell in an IPO.

In response to these arguments, Aurion again falls back on the doctrine of independent legal significance. Aurion's argument that a "reclassification of issued shares" is different than an "increase or decrease in authorized shares," AurionBr.49, is not compelled by that doctrine because the parties contracted to avoid it. The parties here employed the *Avatex* language. *Avatex*, 715 A.2d at 854-55.

They also broadened the Preferred Stockholders' protections by adding the phrase "directly *or indirectly*." A0339 (emphasis added). Alcon's position is not that the mere reclassification and reduction of outstanding shares of a company via a reverse stock split constitutes an indirect increase in authorized shares. Rather, it is that such a reclassification and reduction, without a commensurate decrease in the

number of authorized shares, is the "functional equivalent," *Shenandoah*, 1998 WL 63491, at *7, of a direct increase in authorized shares. Alcon.OB.25-26. Aurion's focus on only one aspect of the transaction—the reclassification—ignores the clear "economic reality," *Shenandoah*, 1998 WL 63491, at *7, even though Aurion selected this transaction to achieve that specific economic reality. Op.1 (finding that Aurion adopted the Amendment to "free authorized shares to sell in the IPO").

Lastly, Aurion claims that Alcon's interpretation would render meaningless the separate requirement, also found in Section 3.4.2, that Aurion may not "directly or indirectly . . . reclassify any capital stock with . . . preferences that are *pari passu* with or senior to Series C Preferred Stock" without Series C Consent. AurionBr.50-51. Not so. This provision bars reclassifications of Series C Preferred Stock (or stock senior to such stock). Thus, unlike the "increase" provision of Section 3.4.2, this separate provision applies only to stock splits of certain classes of Preferred Stock (not Common Stock). Further, this provision could (absent Series C Consent) prevent a reverse stock split even if it included a corresponding reduction in the number of authorized shares. Thus, Alcon's argument does not render any portion of Section 3.4.2 superfluous.

III. THE TRIAL COURT ERRED: ALL SERIES C CONSENT RIGHTS EXIST UNTIL AFTER AURION CLOSES A QUALIFIED IPO

Aurion contends that Alcon's Series C Consent rights extinguish under Section 5.1 of Aurion's Certificate before a Qualified IPO. Aurion.Br.52. However, the plain language of Section 5.1 and industry custom proves that Alcon's Series C Consent rights will only extinguish *after* the delivery of the IPO shares such that the Company will still need Alcon's consent to take certain actions such as increasing the amount of authorized stock or otherwise affecting Aurion's capital structure prior to the Qualified IPO. Alcon therefore sought a declaration to protect those Series C Consent rights, including that Alcon's Series C Consent rights apply to any attempt by Aurion to increase the total number of authorized stock.

Section 5.1 of the Certificate confirms that Preferred Stock converts automatically (thereby extinguishing Series C Consent Rights) only when a sufficient number of IPO shares are delivered to public buyers, are listed and trading on an exchange, and generate more than $90,000,000 in gross proceeds that Aurion receives net of underwriter discounts—that is, "[u]pon closing" of a "Qualified IPO." The text of Section 5.1 and the evidence demonstrate that Series C Consent Rights survive until the closing of a Qualified IPO, when IPO shares are delivered, the closing occurs, and the transaction satisfies the conditions of a Qualified IPO. Thus, as a practical matter, Aurion cannot seek to close a Qualified IPO before undertaking a corporate action necessary to acquire, purchase, or otherwise increase

the shares it must sell in that very IPO via amendment to its Certificate—which, as demonstrated above, would require Series C Consent.

Aurion, however, has jumbled the necessary order of events. According to Aurion, Alcon's Series C Consent Rights somehow vanish when the Company takes certain corporate actions identified in Section 3.4 in hopes of achieving a Qualified IPO at some point in the future. AurionBr.58. But Aurion fails to offer any rational explanation for its reading of the language of the Series C Consent or its understanding of the sequence of events leading to the closing of a Qualified IPO.

To begin with, Aurion asserts that upon the closing of a Qualified IPO, the Preferred Stock is first converted and then an amended and restated IPO Charter is filed. AurionBr.54. According to Aurion, this IPO Charter would include "provisions that customarily appear in public company charters, such as a restriction on the stockholders' power to act by written consent." *Id.* But this is all irrelevant. To the extent Aurion is arguing that an IPO Charter amendment merely conforms the Company's charter to the requirements of a public company once closing has occurred, that fact does not explain how Aurion could rely on the mandatory conversion provision to extinguish Alcon's Series C Consent Rights *before* closing

has occurred.[2] *See* A0036-37 (the question is whether "Alcon's rights … to block changes in Aurion's capital structure … will be inoperative at the requisite time").

Section 5.1 allows no such thing. Under that provision, conversion occurs upon closing of a Qualified IPO. Widely-used dictionaries define "upon" as "immediately or very soon after," "or thereafter." Upon, Dictionary.com, https://www.dictionary.com/browse/upon (last visited Feb. 8, 2025); Upon, Merriam Webster, https://www.merriam-webster.com/dictionary/upon (last visited Feb. 8, 2025).

Aurion instead advances a definition found in a Wikipedia-esque public sourcing website, Definitions.net, that allows the public to provide and edit definitions. AurionBr.57; *see* Definitions, definitions.net ("Our multilingual dictionary is . . . open for everyone to contribute.") (last visited Feb. 8, 2025). The Company thus defines "upon" as "at a prescribed point in time." AurionBr.57. Even if that dubious source were credible, either reading of "upon" yields the same result: Alcon's Series C Consent rights survive until the closing of a Qualified IPO.

Despite the Company's assertions, the Court of Chancery's decision in *TCG Securities Inc. v. Southern Union Co.*, 1990 WL 7525 (Del. Ch. Jan. 31, 1990),

[2] Aurion claims that "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." Aurion.Br.53. Tellingly, Aurion cannot identify any such argument by Alcon. *See generally* Aurion.Br.52-58.

bolsters Alcon's position, not Aurion's. There, the preferred stockholders had the right to vote on merger approval so long as their shares remained outstanding at the moment the merger was scheduled to take effect. *Id.* at *9. But the company's certificate authorized the company to redeem preferred shares at any time. *Id.* at *10. Because the company exercised this power "before the merger t[ook] effect," the Court ruled that the preferred stockholders no longer had a right to vote on the merger. *Id.* at *9-10.

Here, however, Aurion's Certificate does not authorize the Company to redeem Alcon's Preferred Shares at any time. So, unlike in *TCG Securities*, the only way Aurion can extinguish Alcon's Series C Consent Rights is to close a Qualified IPO, thereby triggering the automatic conversion.

The evidence at trial further cemented Alcon's position and undercut Aurion's. Alcon's expert, who has vast experience with biotechnology IPOs, explained that "preferred stock" is "not converted until after the closing of the IPO" because "preferred holders will not give up their rights … unless they are certain that closing is going to occur." A0807-A0808. This is consistent with Alcon's position that "upon" in Section 5.1 means "immediately after."

Aurion seizes on one word that McCarty used in his testimony ("simultaneous"), asking this Court to ignore every other part of his testimony. According to Aurion, this testimony means that all steps necessary to close a

Qualified IPO, including the Reverse Split Amendment or any other amendment to increase authorized shares, take place at a single moment in time. AurionBr.57. Yet, McCarty never suggested that conversion occurs during the IPO *process*; instead, he testified that conversion occurs only at closing, which is "when [the Company] exchange[s] the shares," and not before. A0808.

In all events, whether Preferred Stock converts immediately after ("upon") or simultaneously with the closing of a Qualified IPO makes no difference here. Even if the Preferred Stock converts at the same time as delivery of IPO shares, Aurion must first obtain those shares (which requires Series C Consent) before it can deliver them. *See, e.g.*, A1374 ("[T]he shares to be sold in an IPO must have already been authorized, issued and outstanding *prior to* the closing of the IPO."). The conversion does not happen at any earlier point in time, which just makes sense. As Aurion's brief concedes, it is not even certain it can or will close a Qualified IPO.[3] So it cannot simply skip ahead to mandatory conversion and the extinction of Series C Consent Rights.

Ultimately, the Court should have held that Aurion must secure Series C Consent before it can authorize, acquire, or purchase shares even if the Company ultimately closes a Qualified IPO.

[3] Aurion is "testing the waters" still, and apparently has not secured "investor commitments." AurionBr.2.

SUMMARY OF ARGUMENTS IN RESPONSE TO CROSS-APPEAL

1. Denied. The Court of Chancery correctly ruled that the Company's refusal to recognize Alcon's revocation of the Voting Proxy and its ability to vote all of its shares is baseless. The Court of Chancery found that the Voting Proxy is a proxy and is revocable because the parties did not deem Section 7.20 of the Voting Agreement irrevocable. The Court of Chancery also held that the extrinsic evidence supported a finding that Section 7.20 is a revocable Voting Proxy.

STATEMENT OF FACTS REGARDING CROSS-APPEAL

Aurion pursued a Series C fundraising round in 2022. Deerfield led Aurion's Series C round. Op.2-3. The transaction's terms were memorialized in a Preferred Stock Purchase Agreement (the "Purchase Agreement"). *Id.* at 3. In early April 2022, after every other party signed that Agreement, Alcon raised an issue pertaining to its potential accounting treatment for the investment. Op.6. Specifically, owning more than 20% of Aurion's shares after the Series C Closings would factor into whether Alcon would be expected to consolidate Aurion's financials into its own. *Id.*; AR0001; AR0126.

Alcon conveyed to the other parties that it needed flexibility to avoid consolidation, if it so wished. *See id.* To address this issue, Alcon and the other Series C investors agreed to add Section 6.15 to the Purchase Agreement, which stated that "Alcon may elect to have any or all securities" it purchased "to be in the form of non-voting securities or for such securities to have limitations on voting rights." *Id.* at 6-7; A0128-129. The parties further agreed to "take such other actions reasonably necessary to implement the provisions" preserving Alcon's ability to manage its investment. Op.7; A0129.

No other party to the Purchase Agreement or any officer or director of Aurion objected to including Section 6.15 in the Purchase Agreement. Op.7; A0590. Nor did anyone demand additional consideration in response to Alcon's request. *Id.*

Contrary to Aurion's position in this litigation, nobody expressed any concern about Alcon's minority voting power. Op.7. In fact, every other investor has already executed the Purchase Agreement as-is, without Section 6.15, before Alcon even identified and raised the accounting issue. AR0001. As a former Aurion investor and director, Dr. Bill Ink, testified, Section 6.15 was added for Alcon's sole benefit.[4] *See* A0589-590.

Beginning in May 2022, Alcon and Deerfield negotiated a structure to effectuate Alcon's right to elect to limit its voting rights under Section 6.15. Op.7-8. They initially explored a non-voting stock structure. *Id.* Specifically, Alcon and Deerfield negotiated proposed revisions to the Series C agreements permitting an exchange of Alcon's shares of the Series C Preferred Stock into a newly created Series C-2 Preferred Stock. *Id.* at 8. Per Alcon and Deerfield's proposed revisions to Section 4.1.1 of the Certificate, the Series C-2 Preferred Stock could convert into non-voting Common Stock to the extent Alcon's voting percentage exceeded 19%. *See* AR0143. Importantly, Alcon (and only Alcon) could waive the provision. AR0157-158. In particular, Section 4.1.1 could "only be waived by the affirmative written consent or vote of the holders of at least a majority of the shares of Series C-

[4] The Court of Chancery found Dr. Link's testimony "highly credible." Op.11, n.70.

2 Preferred Stock then outstanding"—and, as structured, only Alcon would hold Series C-2 Preferred Stock. *Id.*

In July 2022, Alcon and Deerfield proposed the revised Series C certificate to Aurion. AR0126. Aurion believed the proposal was too complex. Op.8. Aurion suggested alternatives. *Id.* One was to have Alcon grant a voting proxy to the Company's CEO or CFO, permitting them to vote any shares Alcon owned in excess of 19% of the Company's outstanding shares on an as-converted basis. *Id.*[5] That was acceptable to Alcon, and the parties then memorialized this Voting Proxy in Section 7.20 of the Voting Agreement, as amended on December 13, 2022. B1048-1081 ("Voting Agreement").

On October 4, 2024, Alcon informed Aurion that it was revoking the Voting Proxy and waiving any other rights included in Section 7.20 of the Voting Agreement so that Alcon could exercise the full extent of its voting power. Op.11. On October 23, 2024, Aurion rejected the revocation and waiver, repudiating Alcon's rights under the Purchase Agreement and Voting Agreement. *Id.*

[5] The other, a pre-funded warrant, would, like the proxy, also permit Alcon to vote its full block of stock in the future. A0769.

ARGUMENTS ON CROSS-APPEAL

I. ALCON HAS THE RIGHT TO VOTE ITS FULL SHARES

A. Question Presented

Did the Court correctly hold that Alcon validly revoked the "Voting Proxy" in Section 7.20 of the Voting Agreement? Alcon raised this question below, A0474-A0479, and the Court addressed it, Op.29-37.

B. Scope of Review

This Court reviews the trial court's interpretation of the Voting Agreement *de novo*. *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998).

C. Merits of Argument

The Alcon accommodation, to which Aurion and all investors agreed in Section 6.15 (in April 2022), and which Aurion and all investors implemented via Section 7.20 to the Voting Agreement (in December 2022), was defined as a "Voting Proxy," which Alcon effectively revoked in October 2024. The Court of Chancery correctly rejected Aurion's claim that Alcon did not validly revoke the Voting Proxy.

1. Section 6.15 of the Purchase Agreement Was Added for Alcon's Sole Benefit

When they executed the Purchase Agreement, Aurion and the other investors agreed to give Alcon maximum optionality to later acquire Aurion securities in a manner consistent with its preferred accounting treatment. This benefitted Alcon alone. Section 6.15 says in no uncertain terms that "Alcon *may elect* to have any or

all securities" it purchased "to be in the form of non-voting securities or for such securities to have limitations on voting rights." A0128-129 (emphasis added). And the parties further agreed to "take such other actions reasonably necessary to implement the provisions" preserving Alcon's ability to manage its investment. *Id.* The Purchase Agreement gives Alcon, in no uncertain terms, ultimate optionality to later—at its sole discretion—opt into, or out of, a securities structure to accommodate its preferred accounting treatment.

The eleventh-hour addition of Section 6.15—after all parties except Alcon had signed the Series C transaction agreements—proves Section 6.15 was for Alcon's sole benefit. The other parties agreed to Section 6.15 without voicing any concern whatsoever about Alcon's potential voting power and without any additional consideration or re-negotiation of other terms. Op.6, 34; AR0001; A0790; A0590.

2. Section 7.20 Is a Revocable Proxy, Which Alcon Validly Revoked

The parties fulfilled their Section 6.15 obligations to Alcon by amending the Voting Agreement in December 2022 to add, as a new section at the end of that Agreement, the "Voting Proxy" in Section 7.20. Section 7.20 begins:

> 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. 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").

B1066. Section 7.20 thus created a single, integrated structure—the Voting Proxy—that implemented Section 6.15 "Accounting Treatment" of the Purchase Agreement.

The Court found that "[t]he Voting Proxy is a proxy" and "Alcon has the authority to revoke" it. Op.32, 34. Aurion offers no reason for this Court to disturb this finding.

a. The Plain Language of Section 7.20 Proves the Proxy Is Revocable

As Trial Court rightly held, the Voting Proxy is revocable for the simple reason that it does not expressly say otherwise. For a proxy to be considered irrevocable under Delaware law, "[a] proxy must state that it is irrevocable, which means that the word 'irrevocable,' or perhaps a synonym, must appear in the proxy." *Eliason*, 733 A.2d at 947; *see* 8 Del. C. § 212(e) ("A duly executed proxy shall be irrevocable if it states that it is irrevocable …"). Nowhere in Section 7.20 does the word "irrevocable" (or anything remotely close to it) appear. The Court of Chancery agreed, noting that "[t]he parties did not deem Section 7.20 irrevocable." Op.34.

As the Trial Court explained, "[t]he parties knew how to structure an irrevocable proxy. They did so in Section 4.2 of the Voting Agreement, titled 'Irrevocable Proxy and Power of Attorney.'" Op.33. Section 4.2 (entitled

"Irrevocable Proxy and Power of Attorney") expressly states that it is "coupled with an interest and … irrevocable." B1058-B1059.

Grasping, Aurion claims that the proxy here is like that in *Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling*, 53 A.2d 441 (Del. 1947), a case Aurion raised for the first time on appeal. Aurion.Br.62-63. But that case involved a voting pool agreement in which two of three stockholders agreed that when exercising any voting rights, "the parties will act jointly in the exercising [of] such voting rights in accordance with such agreement as they may reach." *Ringling*, 53 A.2d at 443. The parties then agreed that should they fail to concur on any voting rights matter, they would submit that question to arbitration and the arbitrator's decision would bind the parties. *Id.* In other words, the parties there did not agree to a proxy, so *Ringling* is readily distinguishable.

Aurion contends that the Voting Proxy is not a real proxy, Aurion.Br.60-62, even though it agreed to call it that in Section 7.20. B1066 (defining the construct the parties agreed to in the first two sentences of Section 7.20 as a "Voting Proxy"). It appears that Aurion reads Section 7.20 "not [as] a proxy" but instead as an "agreement to cause excess shares to be voted in a 'Neutral Manner.'" Aurion.Br.60-61. None of Aurion's arguments has merit

Here, all parties involved in drafting Section 7.20, including Aurion and Deerfield, referred to the construct they memorialized in Section 7.20 as a "proxy"

from the outset. *See, e.g.*, AR0515; AR0516; AR0520; AR0595; AR0670; AR0631. This language appeared in the first draft of Section 7.20 that Aurion's counsel drafted. AR0574. And it was expressly defined as a "Voting Proxy" in the final version of Section 7.20 that Aurion's Board approved, AR0631, and the parties signed, B1066-76.

Further, the "Voting Proxy" was revocable. The fact that the word "irrevocable" does not appear in Section 7.20—but does appear in the title of a section elsewhere in the Voting Agreement—is telling. If the parties intended the same result in Section 7.20, they certainly "knew how to" effect it. *Skye Min. Invs., LLC v. DXS Cap. (U.S.) Ltd.*, 2020 WL 881544, at *16 (Del. Ch. Feb. 24, 2020). They did not.

b. Section 7.8 of the Voting Agreement Does Not Render the Proxy Irrevocable

Aurion contends that Section 7.8 (which generally requires other parties' consent to amend, modify, or terminate provisions) must be read in connection with Section 7.20, thus rendering the proxy irrevocable absent the consent of the other parites. Aurion.Br.60-61, 63-65. But, as the Court held, Alcon did not amend, modify, or terminate the Voting Agreement by revoking the Voting Proxy in Section 7.20. Op.34. Section 7.8 generally concerns parties' approvals for amendments, modifications, and terminations. It says nothing about revocation of the Voting Proxy. More importantly, the Voting Proxy is in Section 7.20, and a proxy's

statement of irrevocability "means that the word 'irrevocable,' or perhaps a synonym, must appear in the proxy." *Eliason*, 733 A.2d at 947. No such language appears, and therefore it is revocable.

To the extent the Court looks to extrinsic evidence, Delaware courts apply a "presumption against disenfranchisement." *Salamone v. Gorman*, 106 A.3d 354, 371 (Del. 2014). The Trial Court found that Alcon's interpretation of the Voting Agreement is "[b]olstered by th[is] presumption." Op.34. "If the agreement is ambiguous on its face," Aurion must show by "clear and convincing evidence that the contract was intended to restrict" Alcon's voting rights. *Id.*; *Salmone*, 106 A.3d at 371. "Historically, proxies have been interpreted narrowly and when there is an ambiguity, read as not restricting the right to vote the shares." *Daniel v. Hawkins*, 289 A.3d 631, 648 (Del. 2023) (quoting *TR Investors, LLC v. Genger*, 2010 WL 2901704, at *20 (Del. Ch. July 23, 2010) (cleaned up)). Thus, Aurion's Section 7.8 argument further "falters under the presumption against disenfranchisement." Op.32.

The Court of Chancery further found that "the extrinsic evidence supports Alcon's view" and "suggests that it was the parties' intent to allow Alcon to revoke the Voting Proxy." Op.34-35. Aurion's Brief does not attempt to grapple with the extrinsic evidence, stating only that "[t]he trial court unnecessarily relied on extrinsic evidence." Aurion.Br.68, n234. This is presumably because the negotiation history

shows that the parties intended Alcon's voting accommodation to be flexible. As described above, Alcon initially proposed, with Deerfield's agreement, a more complex, non-voting share structure that Alcon could waive unilaterally, which was the Series C-2 non-voting stock. Op.6-9. Aurion instead proposed either a warrant or the Voting Proxy, which would apply to the voting of Alcon's shares above the 19% threshold. *Id.* at 35. Indeed, Aurion's counsel drafted and circulated the Voting Agreement amendment with the proposed proxy language that became Section 7.20. *See id.* Alcon's lawyers' testimony is unrebutted: it was their understanding that the Voting Proxy was revocable because it did not say that it was irrevocable. A0769; A0780.

Aurion understood that Alcon could revoke its proxy at any time. After Alcon revoked its proxy on October 4, 2024, Aurion's CEO acknowledged to its financial advisor Alcon's right to exercise full voting rights. B0291; AR0671. Deerfield's internal communications reveal that it similarly believed the revocation was effective and that Alcon had regained its full voting power. *See* AR0678 (ElBardissi email noting Alcon "consolidate[d] Aurion from an accounting perspective"). That is precisely what Alcon did after revoking its proxy. A0752.

3. Even If Section 7.20's Voting Threshold Is a Separate Provision, Alcon Validly Waived It.

Aurion urges this Court to partition Section 7.20 by holding that the Voting Threshold in Section 7.20 is a "covenant" distinct from the Voting Proxy. A0037-38; Aurion.Br.60. That is wrong, as the Trial Court rightly held. Op.36-37.

The Voting Threshold and the Voting Proxy, joined together in a provision titled "Voting Rights," reflect the parties' implementation of Alcon's right. *See id.* The Voting Threshold and Voting Proxy are therefore part and parcel of a single structure in Section 7.20 that implemented Section 6.15. *Id.* As the Court of Chancery noted, "the two sentences are intended to operate together." *Id.* 36.[6] Accordingly, "if the Voting Proxy is revoked, so too is the Voting Threshold." *Id.*

It would make no sense for the parties to agree that Alcon could revoke the Voting Proxy but not the Voting Threshold. *See Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1044 (Del. 2023) ("An interpretation is unreasonable if it produces an absurd result or a result that no reasonable person would have accepted when entering the contract." (cleaned up)). Under Aurion's position, those un-proxied

[6] The Opinion relied on the word "[i]nstead" as evidence that the Voting Threshold and Voting Proxy were "intended to operate together." Op.36. Aurion says Alcon first introduced this point at post-trial oral argument. Aurion.Br.6, 66. That is wrong. In Alcon's pre-trial briefing, Alcon pointed to the first two sentences of Section 7.20 and asserted that "[t]he Voting Threshold and Voting Proxy are therefore part and parcel of a single structure in Section 7.20." A0477.

voting shares—an enormous amount of voting power—would remain in limbo, unable to be exercised by *anyone*. In any event, Aurion has not identified any text or extrinsic evidence to support its contention that the Voting Proxy should be sub-divided.

As the Court found, the Voting Proxy's entire point was to accommodate Alcon's accounting needs; Alcon had the right to unilaterally waive it because it was implemented for Alcon's sole benefit. A party may waive any and "all rights or privileges to which [such party] is legally entitled under a contract [that] are intended for [such party's] sole benefit." *Components, Inc. v. Western Elec. Co.*, 267 A.2d 579, 582 (Del. 1970); *see also Wolf v. Crosby*, 377 A.2d 22, 27 (Del. Ch. 1977) (plaintiffs entitled to waive financing contingency in contract written "for the protection and benefit of the plaintiffs"); *Tattersall v. Underhill*, 1987 WL 7755, at *3 (Del. Ch. Mar. 4, 1987) (because provision of contract "was clearly only for buyer's benefit, buyer could unilaterally waive that aspect of the contract"); 13 Williston on Contracts § 39:24 (4th ed.) (waiver appropriate if "condition was inserted in the contract solely for the benefit of the party seeking" it). The Voting Agreement incorporates this common law rule, providing that "any provision hereof

may be waived by the waiving party on such party's own behalf, without the consent of any other party." B1063.[7]

Both the Purchase Agreement and the Voting Agreement show that the parties added Section 7.20 to the Voting Agreement for Alcon's sole benefit. Aurion claims, without any support, that the "voting agreement benefit[s] other stockholders." Aurion.Br.62. Worse, Aurion flips Section 7.20 on its head and claims that it benefits all parties *except* Alcon. Aurion.Br.66 ("The Neutral Manner requirement was … an obligation upon Alcon."); *id.* 68 ("Section 7.20 imposes obligations on Alcon, which are benefits to the other parties."). Aurion's sole support is ElBardissi's self-serving testimony, Aurion.Br.10, but the Court found that his testimony was "not consistent with the contemporaneous evidence," including evidence from Aurion's CEO, CFO and other directors, Op.34. As Aurion's CFO explained, the Section 6.15 "was something we agreed to in our financing," and Section 7.20 was merely "the documentation to memorialize this. I.e. it's a deal clean up item." AR0586. In addition, ElBardissi conceded that "[n]o one explicitly sa[id] this" in any document and it was "not memorialized." A0764-765.

[7] The Voting Agreement says Section 7.20 "shall not be amended, modified, terminated or waived without the written consent of Alcon." B1063.

"Aurion's interpretation … ignores 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." Op.36. Section 6.15 states that the parties "intend for Alcon to invest in [Aurion] on a basis …. that does not convey control of [Aurion] to Alcon in a manner that would result in Alcon consolidating the financial results of [Aurion] with those of Alcon." A0128-29. Therefore, "Section 7.20, in its entirety, exists to address Alcon's accounting concerns." Op.36-37.

CONCLUSION

This Court should reverse the judgment below as to issues raised in Alcon's appeal and affirm as to those in Aurion's cross-appeal.

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