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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 REPLY BRIEF ON CROSS APPEAL

OF COUNSEL:

Brad D. Sorrels (#5233)
Daniyal M. Iqbal (#6167)
Jessica A. Hartwell (#5645)
Lauren G. DeBona (#6743)
Joshua A. Manning (#6859)
WILSON SONSINI GOODRICH & ROSATI P.C.
222 Delaware Avenue, Suite 800
Wilmington, Delaware 19801
(302) 304-7600

Richard P. Rollo (#3993)
Travis S. Hunter (#5350)
John M. O'Toole (#6448)
Kevin M. Kidwell (#6988)
Edmond S. Kim (#6835)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Attorneys for Defendant Below-Appellee /Cross-Appellant, Aurion Biotech, Inc.

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PRELIMINARY STATEMENT[1]

The primary issue in this expedited appeal is whether Aurion can move forward with its Qualified IPO absent Alcon's consent, and whether a resolution of the Certificate issues is necessary to clear the path for Aurion's Qualified IPO before the February 13 pricing deadline. The Voting Agreement issues raised by the cross-appeal are less time sensitive but equally straightforward. Much like the trial court, Alcon's Answering Brief concerning the Voting Agreement ignores the forest (the entirety of the Voting Agreement) for a single tree (the second sentence in Section 7.20). As relevant here, Section 7.20 of the Voting Agreement—entitled "Voting Rights"—contains two independent provisions. The first, which Alcon ignores, is the "Voting Threshold" and acts as a prohibition on Alcon's ability to vote "in excess of 19% of the Company's outstanding Common Stock[.]" The second, the "Voting Proxy," describes who shall vote Alcon's stock in excess of 19% and the manner in which such stock must be voted. Because the first sentence of Section 7.20 is plainly not a "proxy" insofar as it does not vest authority in anyone to act "as a substitute

[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]"; Alcon's Opening Brief on Appeal is cited "[Alcon.Appeal.OB].[page]"; Aurion's Opening/Answering Brief on Appeal is cited "[Aurion.Appeal.OB].[page]"; Alcon's Reply/Answering Brief on Appeal is cited "[Alcon.Appeal.AB].[page]". Unless noted, all capitalized terms have the meaning ascribed to them in Aurion's Opening/Answering Brief on Appeal.

for another[,]"[2] it cannot be modified absent Aurion's consent—exactly as contemplated by the language in Section 7.8(h), a section whose reference to "7.20" would become meaningless if Alcon's interpretation was adopted.

That Alcon cannot simply vote stock "in excess of 19%" at any time of its choosing is supported by the business realities of why Section 7.20 was added to the Voting Agreement in the first place. According to Alcon's David Scileppi, if Alcon was deemed to have significant influence over Aurion, then the equity method of accounting would require Alcon to "book the proportionate share of Aurion's losses on Alcon's books. And if we had control, we would have to consolidate Aurion into Alcon."[3] "In accounting terminology, significant influence generally equates to ownership of 20% or more of the voting rights of a corporation[.]"[4] Consistent with Scileppi's testimony, the "Voting Threshold" in the first sentence of Section 7.20 was added as a limitation Alcon (and Aurion) could rely on to avoid application of the equity method of accounting. If Alcon could simply revoke Section 7.20 any

[2] *Merriam Webster's Dictionary* defining "proxy" as "the agency, function, or office of a deputy who acts as a substitute for another." https://www.merriam-webster.com/dictionary/proxy.

[3] B0671.88:9-89:17.

[4] *See, e.g.*, https://finquery.com/blog/equity-method-of-accounting-investments-joint-ventures-asc-323/;https://www.investopedia.com/terms/e/equitymethod.asp.

time at its sole option, then it would plainly still maintain "ownership of 20% or more of the voting rights."

Simply put, neither Alcon nor the trial court provides sufficient support for Alcon's ability—in its sole discretion and without Aurion's consent—to unilaterally change or modify the first sentence of Section 7.20, which, by its plain terms is not a "proxy" but a contractual limitation. Accordingly, the trial court's conclusion that Alcon could revoke the entirety of Section 7.20 anytime it wants should be reversed.

ARGUMENT

I. SECTION 7.20 IS NOT JUST A PROXY

Both Alcon and the trial court interpret Section 7.20 as a "proxy" and cite to authorities involving proxies to support a flawed conclusion. But, as explained above, and in Aurion's Opening/Answering Brief on appeal, Section 7.20 is a contractual provision that contains more than just a "naked" proxy. Alcon's Answering/Reply Brief implicitly recognizes the distinction by repeatedly referring to "the Voting Proxy in Section 7.20."[5]

Contrary to the trial court's holding, the first sentence of Section 7.20, entitled "Voting Threshold," is not a proxy, cannot be viewed under the authorities applicable to standard proxies, and cannot be amended or modified without Aurion's consent as contemplated by Section 7.8(h). Accordingly, the trial court erred by concluding that Alcon could validly revoke Section 7.20 and thereby vote "in excess of 19% of the Company's outstanding Common Stock[.]"

A. The Plain Language of Section 7.20 Undercuts Alcon.

As relevant here, Section 7.20 of the Voting Agreement contains two independent provisions.[6] The first sentence contains a prohibition on Alcon's ability to vote its shares exceeding 19% of Aurion's common stock on an as-converted basis

[5] Alcon.Appeal.AB.39.

[6] Aurion.Appeal.OB.59-60.

(*i.e.*, the Voting Threshold).[7] The second sentence designates Aurion's CEO or CFO to vote Alcon's shares in excess of the Voting Threshold, and only in a "Neutral Manner."[8]

Desperate to muddy the waters, Alcon never addresses the full scope and significance of Section 7.20. Rather, Alcon focuses exclusively on the non-customary proxy granted in the second sentence of Section 7.20, while ignoring the voting prohibition in the first sentence entirely. Alcon argues that the plain language of Section 7.20 demonstrates that "a single, integrated structure" was created.[9] Alcon is wrong. The first sentence of Section 7.20 is plainly not a proxy for the reasons set forth in Aurion's Opening/Answering Brief on appeal.

As an initial matter, the trial court's reliance on the word "[i]nstead" in Section 7.20—an argument that Alcon raised for the first time in post-trial rebuttal argument—misses the mark. Use of the word "instead" does not transform the language in the first sentence of Section 7.20 into a proxy. Rather, it simply identifies who—instead of Alcon—will handle the voting. Aurion's hypothetical in its Opening/Answering Brief undercuts Alcon's proffered interpretation, and, of

[7] B1066 § 7.20.

[8] *Id*.

[9] Alcon.Appeal.AB.37.

course, Alcon never responds.[10] Accordingly, 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 nothing more than cancel that independent provision. It does not mean that Alcon now gets to avoid the plain language of the Voting Threshold.

This Court's decision in *Ringling Brothers – Barnum & Bailey Combined Shows Inc. v. Ringling*, 53 A.2d 441 (Del. 1947) offers guidance here. While Alcon tries to distinguish the case, it fails. Alcon's reading of *Ringling Brothers* is that because "the parties there did not agree to a proxy, *Ringling* is readily distinguishable."[11] Alcon's short shrift of *Ringling Brothers* is telling. While *Ringling Brothers* may have involved a "promise" to vote in a certain manner versus a proxy, the effect is the same.[12] 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. The Voting Agreement is a contract, and Alcon cannot avoid the plain language of the Voting Threshold.

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[10] *See* Aurion.Appeal.OB.66-67. Alcon's failure to engage should be viewed as a concession on the issue.

[11] Alcon.Appeal.AB.38.

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

B. Alcon did not Validly Revoke Section 7.20 Because it did not Receive the Required Consents under Section 7.8.

Tellingly, Alcon spends one paragraph on the language of Section 7.8 and only glosses over it, stating that "[i]t says nothing about revocation of the Voting Proxy."[13] But contrary to Alcon's assertion, the second sentence of Section 7.20 is obviously a term of the Voting Agreement, and Section 7.8 sets clear rules on how to amend, modify, terminate, or waive any 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 as-converted basis); … and (iii) the Requisite Series C Holders.[14]

It is undisputed that Alcon never obtained consent from Aurion. And, under Section 7.8(h)—which expressly references Section 7.20—the parties agreed that Alcon must also consent (a reality that makes sense because Alcon would not want Aurion unilaterally destroying the accounting treatment Section 7.20 was intended to provide). Because it is undisputed that Alcon did not obtain consent to modify

[13] Alcon.Appeal.AB.39.

[14] Aurion.Appeal.OB.63 (citing B1062 § 7.8).

Section 7.20 from ***both*** Alcon and Aurion, the "Voting Threshold" in the first sentence of Section 7.20 remains in place , i.e., the "proxy" in the second sentence of Section 7.20 is not revocable at any time by Alcon, but rather is only revocable under certain specified circumstances, i.e., if it receives approval for modification by the parties identified in Section 7.8.

In its Answering/Reply Brief, Alcon largely ignores Section 7.8 and its various sub-sections by stating that "[Section 7.8] says nothing about revocation of the Voting Proxy."[15] But as Alcon concedes, "Section 7.8 generally concerns parties' approvals for amendments, modifications, and terminations."[16] And as explained in Aurion's Opening/Answering Brief, a revocation is necessarily an amendment/modification[17] or termination.[18] Alcon does not address *In re Tyler's Estate* or *Mellon*, and thereby concedes Aurion's argument. The presumption, then, is that revocation of the Voting Proxy requires the consent of other parties (including Aurion) under Section 7.8 because the Voting Agreement does not say otherwise.

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[15] Alcon.Appeal.AB.39.

[16] *Id.*

[17] Aurion.Appeal.OB.65 (citing *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.")).

[18] Aurion.Appeal.OB.65 (citing *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")).

Moreover, if Section 7.20 is revocable at Alcon's option as Alcon contends (and the trial court accepted), then it makes no sense for Section 7.8(h) to reference Section 7.20.[19] Alcon does not contest this argument. Section 7.8(h) reads:

> (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.[20]

Read together with the introductory paragraph of Section 7.8, 7.8(h) provides that Alcon's written consent, in addition to the consent of other parties, is required to amend, modify, terminate or waive Section 7.20. But if, as Alcon contends, Section 7.20 is presumptively revocable, then Section 7.8(h) need not also require Alcon's consent to amend, modify, terminate or waive Section 7.20. Alcon's interpretation would render the reference to Section 7.20 in Section 7.8 surplusage.[21]

Instead of engaging with the language of Section 7.8, Alcon spends two pages pointing to other provisions of the Voting Agreement as well as extrinsic evidence. Both arguments are mere distractions.

With respect to other provisions of the Voting Agreement, Alcon contends that "[t]he parties knew how to structure an irrevocable proxy" and points to Section

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[19] *See* Aurion.Appeal.OB.64.

[20] B1063 § 7.8(h).

[21] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("We 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.").

4.2.[22] This argument, however, is a red herring because the first sentence of Section 7.20 is ***not*** a proxy; it is a contractual voting limitation. And there would be no reason for a drafter of the Voting Agreement to expressly say the first sentence of Section 7.20 was "irrevocable" when Section 7.8(h) deals with amendments or modifications of that voting limitation.

And with respect to extrinsic evidence, this Court need not consider it because Section 7.8 is unambiguous.[23] But even if this Court looks beyond the four-corners of the Voting Agreement, the business reality for the addition of Section 7.20 supports Aurion's interpretation because it would be impossible for Alcon to obtain the accounting treatment it desired based on a lack of voting control if, one second after executing the Voting Agreement, Alcon could unilaterally terminate the Voting Threshold in its sole discretion. Such an interpretation is nonsensical, and, therefore, cannot be correct as a matter of law.[24]

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[22] Alcon.Appeal.AB.37.

[23] *See* below at Argument Section I.C.

[24] *Osborn,* 991 A.2d at 1156 ("An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract."); *Qwest Commc'ns Int'l, Inc. v. Nat'l Union Fire Co. of Pitt*., 821 A.2d 323, 328 (Del. Ch. 2002) (noting that courts will not "countenance . . . nonsensical and unfair reading of [a] contract.").

C. The Trial Court Erroneously Pointed to Irrelevant Extrinsic Evidence While Ignoring the Simple Business Realities.

Finally, Alcon's effort to support its misplaced interpretation of Section 7.20 using self-serving "extrinsic evidence" should be rejected. As an initial matter, the trial court did not find that the Voting Agreement is ambiguous, and Alcon has never argued it was. Nevertheless, both Alcon and the trial court cite to extrinsic evidence. This, of course, is improper because "[i]f a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity."[25] Nor is the purported "extrinsic evidence" helpful to the analysis.

First, the trial court relied on evidence that Alcon's in-house counsel "Scileppi and Alcon's [outside] counsel understood that [the Voting Proxy] was revocable."[26] But Alcon did not introduce a single piece of evidence demonstrating that belief was communicated or understood by anyone at Aurion. Counsel's "private, subjective feelings" are "irrelevant and unhelpful to the Court's

[25] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

[26] Opinion.35.

[determination] of a contract's meaning, because the meaning of a properly formed contract must be shared or common."[27]

Second, and setting aside that any review of extrinsic evidence was erroneous under the circumstances, the trial court cherry-picked evidence supportive of its conclusion and ignored dispositive evidence to the contrary. For example, while the trial court relied on testimony from Alcon's in-house counsel to explain Alcon's unexpressed understanding of the Voting Proxy, it ignored his testimony that the Voting Threshold was put in place to allow Alcon to avoid a presumption of significant influence over Aurion sufficient to avoid application of the equity method of accounting.[28] "In accounting terminology, significant influence generally equates to ownership of 20% or more of the voting rights of a corporation[.]"[29] If the entirety of Section 7.20 was revocable anytime in Alcon's sole discretion—as the trial court concluded—then the alleged "protection" against equity accounting that Alcon bargained for is both pretextual and illusory. Plainly, a limitation on Alcon's influence over Aurion that Alcon can opt out of at any time is insufficient to rebut a

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[27] *Paul v. Rockpoint Grp., LLC*, 2024 WL 89643, at *15 (Del. Ch. Jan. 9, 2024).

[28] A0768.133:15-134:13.

[29] *See, e.g.*, https://finquery.com/blog/equity-method-of-accounting-investments-joint-ventures-asc-323/;https://www.investopedia.com/terms/e/equitymethod.asp.

presumption that its 40% ownership position gives it substantial influence over Aurion that would require the application of equity accounting principles.

Likewise, the trial court and Alcon cite evidence that Section 7.20 was added to the Voting Agreement solely for Alcon's benefit but ignore other evidence that the parties understood it to be a protection for ***all*** stockholders. Indeed, contemporaneous communications among Aurion's executives demonstrates this reality.[30] But again, "private, subjective feelings" about the operation of contractual provisions are irrelevant, which is why the trial court was wrong to consider any of the extrinsic evidence cited in the Opinion.

At bottom, extrinsic evidence concerning Section 7.20 of the Voting Agreement is irrelevant, and the trial court was wrong to rely on extrinsic evidence to vary the plain language of the Voting Threshold contained in the first sentence. Absent a modification agreed to by Aurion and Alcon as contemplated by Section 7.8(h), Alcon is prohibited from voting "in excess of 19% of the Company's outstanding Common Stock[.]"

[30] AR0587 ("The good news is that the non-Alcon shareholders are the beneficiaries of this Alcon voting limitation."). Notably, Alcon cites other quotes from the CFO in the same email chain but omits this one. Alcon.Appeal.AB.44 (citing AR0586)

CONCLUSION

For these reasons and those stated in Aurion's Opening Brief, the Opinion should be reversed with respect to the Voting Agreement.

/s/ Richard P. Rollo
Richard P. Rollo (#3994)
Travis S. Hunter (#5350)
John M. O'Toole (#6448)
Kevin M. Kidwell (#6988)
Edmond S. Kim (#6835)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Attorneys for Defendant Below-Appellee /Cross-Appellant, Aurion Biotech, Inc.

OF COUNSEL:

Brad D. Sorrels (#5233)
Daniyal M. Iqbal (#6167)
Jessica A. Hartwell (#5645)
Lauren G. DeBona (#6743)
Joshua A. Manning (#6859)
WILSON SONSINI GOODRICH & ROSATI P.C.
222 Delaware Avenue, Suite 800
Wilmington, Delaware 19801
(302) 304-7600

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