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Case Number 184,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

Over twenty-five years ago, investors in a nascent business entered into an agreement providing for the governance of a cluster of entities created to license and sell an abortifacient drug in the United States (the "Project"). That agreement, which needed to be acceptable to the licensor (which at the time was suing the Project to remove its principal), provided for the separation of the voting and economic rights of the Majority Shares that would control the complex web of entities that had been structured, in part, to protect the confidentiality of investors in the Project. The governance structure was memorialized in and implemented through the Irrevocable Proxy.[1] The recitals of the Irrevocable Proxy make clear that the parties made it an express condition of the transfer of the Majority Shares to MedApproach, L.P. ("MedApproach" or the "Partnership") that those shares would be subject to the governance structure set forth in the Irrevocable Proxy. In turn, the licensor's license agreement required the Project to maintain the proxy in effect or risk immediate termination of the license to the Project's sole product.

Plaintiff Sharon Hawkins and her husband, who were and remain investors in the Project, consented to the Irrevocable Proxy at the time of its

[1] Capitalized terms not otherwise defined herein shall have the meaning given in the Court of Chancery's Opinion dated April 4, 2022, which is attached hereto as Exhibit A.

execution. However, for the past thirteen years Plaintiff has challenged the validity of the Irrevocable Proxy in an effort to gain control of the Project, principally through litigation before the United States District Court for the Southern District of New York. Having been unsuccessful in her prior litigation challenges, once the term of the Partnership expired, Plaintiff filed an action in the Court of Chancery on May 24, 2022, seeking, among other things, a declaration that the Irrevocable Proxy did not run with the shares to bind subsequent owners of the Majority Shares.

Following a one-day trial, the Court of Chancery issued an Opinion on April 4, 2022 in which the Court held, among other things, that the Irrevocable Proxy does not run with the Majority Shares when MedApproach sells them during its liquidation process. While the Court of Chancery recognized that an irrevocable proxy can bind a subsequent owner if the language is plain and unambiguous, the court below found that the language here was, at best, ambiguous. In reaching its holding, the Court of Chancery committed three legal errors, any one of which, if corrected, would lead to a different result.

Rather than interpret and apply the plain language of the Irrevocable Proxy as written, the Court of Chancery erred in imposing purported "default" agency principles of a Restatement that was not adopted until nearly a decade after the parties entered into the Irrevocable Proxy to interpret the Non-Termination Provision. The Court of Chancery further committed legal error in reading

additional language into the Irrevocable Proxy in order to support its finding that the broad "catch-all" language that the parties included to prevent termination of the Irrevocable proxy did not encompass a sale of the shares. Finally, the Court of Chancery erred as a matter of law by not giving effect to all of the terms of the Irrevocable Proxy and improperly limiting the assignment clause of the Irrevocable Proxy so as not to bind assigns of the Stockholder. The result of these errors was an interpretation of the Irrevocable Proxy that effectively gives MedApproach the unilateral ability to jeopardize the governance structure agreed to and relied upon by some eighty other investors in the Project—something that the evidence and testimony unequivocally showed was the opposite of the parties' intent.

For all of these reasons, the Opinion should be reversed, and judgment should be entered for Defendants declaring that the Irrevocable Proxy runs with the shares and binds subsequent owners.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred as a matter of law when it applied purported "default principles" of the Restatement (Third) of Agency to interpret the Non-Termination Provision of the Irrevocable Proxy rather than applying the plain language, which makes clear that the parties intended for the Irrevocable Proxy to survive the sale of the shares. The Court below concluded that the termination events in the Non-Termination Provision "tracked" the Restatement (Third) of Agency, but there are material differences between the language in the Non-Termination Provision and the Restatement (Third) of Agency making the Court's finding that the parties intended to mirror the Restatement erroneous. Further, the Restatement (Third) of Agency was not published until almost a decade after the parties entered into the Irrevocable Proxy, and the Restatement (Second) did not include the comment that the Court below relied on to support its holding. Even if the Restatement (Third) of Agency was relevant to the analysis, the Court of Chancery still erred because the comment relied upon is contrary to Delaware law. The comment suggests that an irrevocable proxy cannot be binding on a transferee of stock, but as the Court below itself recognized, under Delaware law, an irrevocable proxy can run with the shares if the proxy has plain and unambiguous language that binds subsequent owners.

2. The Court of Chancery erred as a matter of law when it added additional words to its interpretation of the "any other event or events" language in the Non-Termination Provision. The Court below determined that the "any other event or events" language was plainly intended by the parties to serve as a "catch-all" to prevent termination of the Proxy. But rather than apply the plain language as written to encompass a sale, the Court below found that the language "only applies to events that occur while the Stockholder owns the [shares]." In contravention of well-established Delaware law, the Court of Chancery effectively added language "while the stockholder owns the shares" to the "any other event or events" catch all language to fit its interpretation of the Non-Termination Provision.

3. The Court of Chancery erred as a matter of law when it determined that the plain language of the Assignment Provision did not provide for the Irrevocable Proxy to run with the shares. The Court below used the rule of the last antecedent to interpret language in the Assignment Provision, but in so doing rendered the term "Stockholder" meaningless. The Irrevocable Proxy was already binding upon the Stockholder that executed the proxy; the only possible purpose in including a reference to "Stockholder" in that provision is to bind the Stockholders' assigns and others who later stand in their shoes. Thus, the Court below erred when it found that the word "their" only modified "Holders" because it makes the inclusion

of "Stockholder" in the sentence surplusage. In doing so, the Court of Chancery violated a cardinal principle of contract interpretation.

STATEMENT OF FACTS

I. THE ORIGINS OF THE PROJECT.

MedApproach is one of several entities involved in a multi-decade effort to develop and sell mifepristone (formerly called RU-486), an abortifacient drug. That Project originated in the mid-1990s, when Population Council, Inc. ("Popco"), the licensor of mifepristone, was unable to license the controversial drug for manufacture and distribution through conventional channels. (Ex. A, Court of Chancery Opinion, "Opinion" or "Op." 4). Popco reached out to Joseph Pike, an investor with whom it had prior dealings, and granted his company (formerly "Neogen Investors Group," now "Danco Investors Group, LLP" ("Danco LP")) an exclusive sublicense in 1995 to manufacture and distribute mifepristone in the United States. A135; A189.

The Project was intentionally structured as a complex web of entities, in part to promote the confidentiality of investors in light of public controversy surrounding abortion. A526. Many investments in the Project were made indirectly, through single purpose investment vehicles such as MedApproach, which Daniel formed in 1995. A513; A539. In 1995, Gregory Hawkins, the husband and predecessor-in-interest to Appellee Sharon Hawkins,[2] made an initial investment of

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[2] Mr. Hawkins transferred his interests in MedApproach to Mrs. Hawkins on July 2, 1998. A498. He continued to manage the investment of behalf of Mrs. (Continued . . .)

$1.5 million in the Project through MedApproach. A513. There are twelve investors in MedApproach, and approximately ninety in the Project overall. A540; A572.

At the time of Hawkins' initial investment, Pike was the sole owner of N.D. Management, Inc. ("Danco GP")—the general partner of Danco LP—and thus he alone controlled the Project. A527. Hawkins did not object to Pike's sole control over the Project or its complex structure. A527. Rather, Hawkins acknowledged that the structure promoted the anonymity of investors. A526; A464. Hawkins invested in part due to "appreciation for the nature of the project"—*i.e.*, its connection to reproductive rights. A514; A526.

II. THE POPCO DISPUTE AND THE PIKE BUYOUT.

The early years of the Project were mired in controversy and litigation. In 1996, Popco learned that Pike had an undisclosed prior criminal conviction and threatened to terminate the license unless Pike was removed from control of the Project and investors were given an opportunity to rescind their investments. Op. at 8-9; A497; A188; A190. The threat was existential: the Popco lawsuit jeopardized the sole asset of the Project, and thus the value of investors' investments. A487–A488.

Hawkins thereafter. A511. References to "Hawkins" herein are to Gregory Hawkins.

Over forty of the Project partners met in San Diego in December 1996 (with others participating by phone) to discuss how to preserve their investments in the Project. *See* A025–A029; A206–A207; A514. Hawkins was not directly involved due to confidentiality concerns. A514; A515; A528; A542. At the meeting, five partners were selected to negotiate with Popco and Pike: Daniel, Jeffrey Rush, Brian Freeman, William Elkus and Richard Cusac. A541; A016; A026. With the guidance of the representatives, the Project partners agreed to buy out Joe Pike, transfer voting control to the proxyholders, and execute a rescission offer that would allow investors to withdraw from the Project if they so wished. *See* A497; A025–A029.

Originally, the limited partner representatives determined that ***all*** of the limited partners of Danco LP would acquire Mr. Pike's interests. A207. It was later recognized that this was not practical for logistical reasons and due to time pressure from the Popco lawsuit. *Id.* Accordingly, it was decided that the representatives and any other partners who promptly stepped forward would put up the funds to acquire the Majority Shares of Danco GP from Pike, subject to the proxy. *Id.*; A025–A029. As described to the partners in a January 24, 1997 memorandum from the limited partner representatives, voting control would be "turned over" to the proxyholders, and the economic benefits of Danco GP shares would be shared by those who contributed funds. A026. Shortly thereafter, given the press of deadlines from the

Popco lawsuit, it was decided that MedApproach would put up the money for the Pike buyout and receive beneficial ownership of the Majority Shares, but it would not have the right to vote those shares, which would remain subject to the Irrevocable Proxy. A542; A543. On February 4, 1997, Hawkins signed an agreement authorizing the Proxy Holders "enter into all agreements, proxies or other documents as are reasonably necessary to maintain, Messrs. Daniel, Rush and Freeman as members of the board of N.D. Management, Inc. … or any successor thereto." A031.

The Pike buyout was memorialized in a January 21, 1997 Agreement Regarding Neogen Project, under which Pike sold 75% of his Danco GP shares ("Majority Shares") and transferred voting control of all Danco GP shares to three proxyholders—Daniel, Rush, and Freeman. A016–A024; A207; *see* A026. Those three were selected because they represented "90 to 95 percent of the money" in the Project. A542. The agreement provided that ***all*** of the shares of Danco GP would be subject to the Proxy, and not merely those retained by Mr. Pike. A020. At no time was it suggested that Hawkins or MedApproach would obtain voting control over the Project. As noted above, MedApproach's acquisition of the Majority Shares was a last-minute expedience, and was never intended to create a situation in which MedApproach would control the Project. Those involved understood "it really belonged to everyone," (A543) and neither Popco nor the investors brought in

through Dr. Rush or Mr. Freeman would have accepted control by MedApproach. A543.

The parties chose the proxy structure because it was quick to implement, it provided stability, and it made the management of the Project representative of the investors. A542. Moreover, Popco insisted on a stable and representative management team at the Project and made it a condition of the continuation of the license that the proxyholders maintain control. A226–A227; A086. The proxy structure was uncontroversial among the Project partners who voted to approve it. A530; A542. Hawkins himself approved the proxy and the selection of the three proxyholders and does not recall any alternatives being discussed or proposed. A529; A530.[3]

No evidence suggests that the parties contemplated any eventual replacement to the Irrevocable Proxy. Although the Irrevocable Proxy references the prospect that a "Newco" might later be formed, A035; A019–A020, the concept was merely aspirational at the time of the Irrevocable Proxy. A529; A544. The only situation the parties discussed in which the proxy would terminate would be a sale of the entire Project. A545–A546. As discussed below, neither the Irrevocable

[3] Then, as now, Mr. Daniel controlled Old MedApproach as the principal of its general partner. The Irrevocable Proxy thus served to limit Mr. Daniel's and MedApproach's authority over the Project by adding two additional Proxy Holders to represent the Project investors and govern Danco GP.

Proxy nor the agreements that led to it suggest that the Proxy is to be of limited duration or was considered a temporary measure.

III. THE CREATION OF THE IRREVOCABLE PROXY.

The Irrevocable Proxy was executed on February 5, 1997. A034. It was executed and delivered "in order to induce the Participating Investors (as defined in the Agreement) to perform certain obligations under the Agreement, including … the incurring by the Participating Investors of certain financial obligations to the Partnership." *Id*. The investors decided to "stay in the [P]roject" or contribute additional capital in the rescission offer because they relied on the existence of the Irrevocable Proxy, which gave Rush, along with the other two proxyholders, "a say-so in the general partnership." A545.

Hawkins approved the Irrevocable Proxy but did not draft or negotiate its terms. A528; A544. Although Pike did not sell 75% of his Danco GP shares until after the Irrevocable Proxy was executed, A544, MedApproach nonetheless became a party to the Irrevocable Proxy ***prior to*** obtaining the Majority Shares, and it agreed in the Addendum "not to transfer any such shares to any other MedApproach Person unless such transferee agrees in writing satisfactory to the Proxy Holders (other than W. Bradley Daniel) to be boun[d] by this Irrevocable Proxy as the Stockholder." A038. This was intended in part to ensure that the

Project's leadership remained representative of all investors and to prevent those inimical to reproductive rights from gaining control of the Project. A546.

The Irrevocable Proxy was designed to serve as the management structure of the Project. Section 1 gave the proxyholders the power "to vote all of the Shares[,]" defined in the first recital as all 100 shares of Danco GP—including those that would later be transferred to MedApproach. A034. Section 9 states that the proxyholders are granted "full voting power with respect to [Danco GP] for all purposes." A036. Although MedApproach was a beneficial owner of the Majority Shares, it was "never a thought" that MedApproach would acquire or exercise voting control over Danco GP or that the Irrevocable Proxy should apply only to the 25 shares that Pike retained. A543; A545. In fact, as a federal court found in prior litigation between these parties (discussed below), "the shareholders in Danco and MedApproach do not support removal of the proxy." A441.

The parties intended that the Irrevocable Proxy be durable and to continue as long as legally permissible, regardless of who owned the Majority Shares. Section 1 indicates that the Irrevocable Proxy should last until the "latest date permissible" under law, and there were no discussions at the time that any shorter duration might be appropriate. A545; A034–A035. Section 5 provides that no act of the Stockholder could terminate the Irrevocable Proxy:

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

A035. Section 15 provides that the Irrevocable Proxy "shall be binding upon and inure to the benefit of Stockholder and the Holders and their respective . . . agents and permitted assigns." A037. An Addendum was added to the Irrevocable Proxy at the request of Popco and Rush "to make sure that, regardless of who owned stock, that his investors and his money would be represented." A546.

It was essential to the parties that the Irrevocable Proxy would not terminate, as that would jeopardize the license from Popco—the Project's primary asset. That license, which had a fifty-year term with potential renewal terms beyond that, provided that removal of the Proxy Holders would constitute a "Change of Control" event, which would risk the immediate termination and forfeiture of the entire license. A226–A227; A086. Hawkins conceded that the termination of the Irrevocable Proxy would jeopardize the Amended Sublicense from Popco. A534. At trial, Hawkins acknowledged "I know we're using intellectual rights" from Popco, and he agreed that a termination of the license to use those rights would be an adverse event for the Project. A534. The "belt-and-suspenders" approach of the

Irrevocable Proxy reflects that the survival of the Project hinged on its perpetuation. At no point during the creation of the Irrevocable Proxy or prior to this lawsuit did Hawkins or anyone else suggest that the Irrevocable Proxy would not bind a transferee of the Majority Shares. *See* A535.[4]

IV. THE RESCISSION OFFER.

In addition to requiring ongoing control over the Project by the proxyholders, Popco also demanded that investors be given the opportunity to exit the Project. The rescission offer sought to raise $27,500,000, roughly half of which would repurchase the interests of any rescinding investors, with the remainder serving as additional capital for the Project. A137. To ensure that funds would be available to support the rescission offer, MedApproach entered into a February 4, 1997 letter agreement to shoulder 50% of this "backstop" liability, with Freeman and Rush each agreeing to take on 25%. A030. The rescission offer was delayed, however, in part because Hawkins suffered financial difficulties upon the collapse of his hedge fund, Long Term Capital Management. A569. The rescission offer launched on August 5, 1998, nearly a year and a half after the Pike buyout. A128.

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[4] It is "arbitrary" that MedApproach's partnership term expired before that of Danco LP, which MedApproach was created to invest in. A549. At the time of the Irrevocable Proxy, the parties did not contemplate or intend that MedApproach's expiration would create the governance crisis that it did. All of the partners other than Mrs. Hawkins voted to extend the partnership term to coincide with the 2045 term of Danco LP. A549.

The rescission offer successfully raised (and retained) $23,901,966—nearly 90% of the target amount. A572. The Rescission Offer Memorandum itself acknowledged that the proxyholders were successful in persuading many existing investors not to rescind, reducing the amount that needed to be raised. A162.

The Rescission Offer Memorandum contains detailed disclosures concerning the Project and its governance, including that a majority of Project partners consented to "the transfer of voting control of the General Partner [Danco GP] to the Proxy Holders[.]" A207. No disclosure suggested that this approved transfer of voting control would be temporary or subject to later termination. A569. To the contrary, the disclosures confirmed that the elimination of the Irrevocable Proxy would constitute a "Change of Control" event under the Amended Sublicense, which would risk the immediate forfeiture of the Project's primary asset. A226–A227; A086. No contemporaneous evidence portrays the Irrevocable Proxy as subject to replacement or suggests that an alternative governance structure was presented. The partners who remained in the Project or contributed capital during the rescission offer accepted those disclosures and invested in reliance on the Irrevocable Proxy as the only contemplated governance structure.

V. THE PROJECT FOLLOWING THE RESCISSION OFFER.

The Project underwent various corporate changes in the years following the rescission offer. The "Newco" contemplated in the Irrevocable Proxy was formed in 1998, eliminating some of the Pike entities. A544. No partner questioned the continuing utility or viability of the Irrevocable Proxy at that time. A544. MedApproach itself was reorganized in 1999. The Hawkinses consented to the reorganization documentation and raised no questions or concerns about the Irrevocable Proxy at the time, nor did they suggest (prior to this lawsuit) that the transfer of the Majority Shares to the new MedApproach entity rendered the Irrevocable Proxy inapplicable to the shares. A548; A407; *see* A535; A548. Finally, the Danco GP underwent a reorganization in 2002, in which it was domesticated as a Delaware corporation (from the Cayman Islands) with Hawkins' involvement. A548; A466. During that effort, neither Hawkins nor anyone else raised the idea that the Irrevocable Proxy was invalid, inapplicable or should be eliminated. A548–A549.

The first time that Hawkins ever raised questions about the Irrevocable Proxy to Daniel was in 2009, when Daniel proposed restructuring Danco GP from a C Corporation to an S Corporation to reduce tax burdens on the shareholders. A549. Hawkins attempted at that time (and at all times since then) to block the tax

restructuring because he hoped to use the tax issue as "leverage" to alter the governance structure of the Project in his favor. A440.

Soon thereafter, litigation emerged between the parties, and Sharon Hawkins filed a lawsuit in 2013 in the United States District Court for the Southern District of New York (the "New York Action") seeking to invalidate the Irrevocable Proxy, and effectively wrest control over the Project for Hawkins. *See* A424–A451. The Court in the New York Action dismissed the proxy-related claims as timed-barred, and Hawkins added a claim seeking the distribution of Danco GP stock to the MedApproach shareholders, which also would have given control over the Project to Hawkins. A451. The Court in the New York Action found that Mrs. Hawkins was an inadequate derivative plaintiff because she "has sought to advance her interest as to the proxy." A441. The Court granted summary judgment against Mrs. Hawkins' claims, observing that "Defendants have put forward unrebutted evidence that the shareholders in Danco and MedApproach do not support removal of the proxy." *Id.*

VI. THE END OF MEDAPPROACH'S TERM.

Under the Partnership Agreement, MedApproach's term was to end on December 31, 2020, A320; A466–A467, which Daniel and Hawkins agreed had been chosen as an "arbitrary" future date at the time the Partnership was created. A535; A549. All of the partners other than Plaintiff voted to extend the Partnership's

term to coincide with the 2045 term of Danco LP—the company for which MedApproach served as a special purpose vehicle. A549. On December 29, 2020, two days before term expiration, Plaintiff agreed to an extension of the Partnership term for two months, or until February 28, 2021. A499.

In the months that followed, Hawkins again sought to acquire control over the Project. In February 2021, Hawkins had his accounting firm reach out to the Project's Chief Financial Officer to indicate that an unidentified person might be interested in purchasing the Partnership assets. A537; A452. Hawkins admitted that he was behind the proposal. A536. On March 22, 2021, Hawkins wrote to Daniel with a proposal to buy the Majority Shares. A455–A456. Notably, Hawkins made no offer for the Partnership's limited partner interest in Danco LP and was only interested in the asset that would give him control over the Project. A538. Daniel responded on March 25, 2021 that "[w]e will consider any serious offer" and asked Hawkins to provide proof of funds and terms for a sale which would take into account the Irrevocable Proxy. A457.

Hawkins did not respond, other than by filing this action on May 24, 2021. A550. Following a one-day trial in September 2021, and post-trial argument on January 24, 2022, the Court of Chancery issued its Opinion on April 4, 2022. Ex. A. The Court of Chancery entered the Order and Final Judgment on May 9, 2022. Ex. B. Defendants timely filed a notice of appeal on May 31, 2022.

ARGUMENT

I. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW IN ITS USE OF THE RESTATEMENT (THIRD) OF AGENCY TO INTERPRET THE PLAIN LANGUAGE OF THE NON-TERMINATION PROVISION.

A. Question Presented.

Did the Court of Chancery commit legal error in imposing the purported "default principles" of common law from the Restatement (Third) of Agency to interpret the plain and unambiguous language of the Non-Termination Provision in the Irrevocable Proxy? Op. at 49-55.

B. Scope of Review.

The issue of whether the Court of Chancery erred in interpreting the language of the Irrevocable Proxy is a question of law subject to *de novo* review by this Court. *See, e.g.*, *Genger v. TR Invs., LLC*, 26 A.3d 180, 190 (Del. 2011); *See Stream TV Networks, Inc. v. Seecubic, Inc.*, 2022 WL 2149437, *10 (Del. June 15, 2022) (interpreting corporate charter).

C. Merits of the Argument.

The Court of Chancery held that an irrevocable proxy runs with the shares if the language of the proxy plainly indicates an intent to bind a subsequent owner. Op. at 2, 33. However, rather than simply looking to the language of the Non-Termination Provision itself to determine the parties' intent, the Court started its analysis with the Restatement (Third) of Agency as setting forth purported

"default principles" for interpreting the terms of the Non-Termination Provision of the Irrevocable Proxy. *See id.* at 51. The Court of Chancery's approach of imposing the concepts of the Restatement (Third) of Agency to divine the intent of the parties, rather than giving effect to the plain language of the Non-Termination Provision as written, constituted legal error. *See Stream TV Networks, Inc.*, 2022 WL 2149437, *10-11 (holding that Court of Chancery erred in applying its interpretation of Section 271 to a clear and unambiguous charter provision).

Here, the plain and unambiguous language of the Non-Termination Provision of the Irrevocable Proxy memorialized the parties' intent for the proxy to survive a sale of the shares and bind subsequent owners. A035. In relevant part, the Irrevocable Proxy provides that it shall not be terminated:

> … ***by any act of the Stockholder*** (other than in connection with the termination provisions of Section 4 hereof), … ***or by the occurrence of any other event or events*** other than as provided in Section 4 hereof**.**

Op. at 49. Section 4, in turn, contemplates termination in connection with a merger or reorganization that would effectuate a sale of the Project. A035; A545–A546. The Non-Termination Provision's broad reference to "any act of the Stockholder" and "any other event" necessarily would include the stockholder's sale of the shares. A035. The provision, as a whole, communicates that only the circumstances of Section 4 may result in termination of the Irrevocable Proxy, and the Stockholder

itself may not terminate the Irrevocable Proxy. Thus, had the Court of Chancery limited its analysis to interpreting the language of the provision, it would have found that the language plainly indicated the parties' intent that the Irrevocable Proxy would survive a sale of the shares and continue to bind subsequent owners.

However, rather than interpret the words of the Non-Termination Provision according to their plain meaning as written, the Court of Chancery instead found that the provision implicitly reflects a common contractual practice of memorializing default principles of common law contained in the Restatement (Third) of Agency. Op. at 51. Analyzing the Non-Termination Provision in the context of the Restatement's purported default principles, the Court of Chancery held that Defendants' interpretation of "any act of the Stockholder" conflicted with the Restatement (Op. at 52) and that additional language would be required to "override the default rule in the Restatement." Op. at 54. Specifically, the Court reasoned that the "any act of the Stockholder" language, despite its breadth, was implicitly not intended to apply to transfers because "comment b" in the Restatement, which purportedly set forth one of the default principles, stated that an irrevocable proxy terminates "when it is no longer possible for the proxyholder to vote because the grantor of the proxy no longer owns the securities …." Op. at 53. The Court's application of the Restatement (Third) of Agency to interpret the plain

language of the Irrevocable Proxy constituted legal error for at least three independent reasons.

As this Court recently held, a statutory provision should not be used to interpret contract language where the contract at issue is different from the statute. *See Stream TV Networks, Inc.*, 2022 WL 2149437, *10-11 (holding that the Court of Chancery should not have interpreted a charter provision on asset dispositions by relying on case law interpreting Section 271 of the DGCL because the charter provision did not track Section 271). This principle is equally applicable in this case. The Court of Chancery's holding that the Irrevocable Proxy memorialized default principles of the Restatement was premised solely on the Court's finding that the termination events in the Non-Termination Provision purportedly "tracked" three of the five termination events listed in the Restatement. Op. at 51. However, the Irrevocable Proxy includes broad catch-all language such as "any act of the Stockholder" and "any other event or events" which nowhere appears in the Restatement (Third) of Agency. A035. Given these material differences, the drafters of the Irrevocable Proxy were not "mirror[ing]" the provisions of the Restatement, as the Court of Chancery determined. Op. at 51. As a result, the Court of Chancery erred as a matter of law in imposing the purported "default principles" of the Restatement (Third) of Agency to interpret language of the Irrevocable Proxy

which nowhere appears in the Restatement. *See Stream TV Networks*, 2022 WL 2149437 at *10–11.

Further, contrary to the Court of Chancery's finding (Op. at 51) the parties could not have intended for the Irrevocable Proxy merely to memorialize the "default principles" of the Restatement (Third) of Agency because the Restatement (Third) of Agency was not published until 2006. The parties entered into the Irrevocable Proxy in 1997. Op. at 48, n. 28; A034; *Doe v. Giddings*, 2012 WL 1995861, at *1 n.4 (Del. Super. Ct. May 23, 2012) ("The Restatement (Second) of Agency has been superseded by the Restatement (Third) of Agency, which was adopted in 2005 and published in 2006."). At the time the parties entered into the Irrevocable Proxy, the Restatement (Second) of Agency did not include the "comment b" quoted and relied upon by the Court of Chancery.[5] Restatement (Second) of Agency § 139 (Am. Law. Inst. 1958). Instead, the comment in the earlier Restatement (Second) provided that powers given by a security terminate only on conveyance to a "bona fide purchaser," *i.e.*, a purchaser who does not have notice of the irrevocable proxy. *See id.* cmt. a. Accordingly, even if one were to

[5] Nor did the applicable section of the Restatement (Second) of Agency, Section 139, even directly address irrevocable proxies as the section was entitled "Termination of Powers Given as Security." As the Court of Chancery acknowledged, those "two concepts establish different legal relationships." Op. 50, n. 29.

adopt the Court of Chancery's reasoning that "default common law principles" of the Restatement should be used to interpret the language of the Irrevocable Proxy, those principles as set forth in the Restatement (Second) would support that the parties understood that the proxy would be binding on purchasers with notice. For this reason alone, the Court of Chancery's findings that Defendants' interpretation of "any act of the Stockholder" conflicts with the Restatement (Op. at 52) and that additional language would be required to "override the default rule in the Restatement" (Op. at 54) were legal error.

Finally, even if the Restatement (Third) of Agency were relevant to the interpretation of the Irrevocable Proxy (which it is not), the Court's reliance on "comment b" of the Restatement (Third) would still have been legal error because it sets forth a principle contrary to Delaware law. *See* Op. at 52-53. The sentence quoted by the Court of Chancery would suggest that an irrevocable proxy can never be binding on a transferee of stock. *See id.* at 52. But the Court of Chancery itself recognized in its Opinion that Delaware law is exactly the opposite: an irrevocable proxy does apply to a transferee if the proxy contains plain and unambiguous language binding a subsequent owner. Op. at 3, 33. Thus, to justify its reliance on comment b, the Court needed to add additional language, *i.e.*, "absent specific and express language to the contrary," which does not exist in comment b. *Id.* In other words, the Court of Chancery's reliance upon a comment in the Restatement (Third)

that was (and is) contrary to Delaware law to interpret the plain terms of the Irrevocable Proxy was also legal error.

The Irrevocable Proxy at issue in this matter is an agreement that involved several parties, one of which—MedApproach—had not yet even acquired the shares at issue when it executed the document. *See* A038. It was error for the Court of Chancery to apply common law agency concepts to override the express intent of the parties. This Court recently reaffirmed in *Stream TV Networks, Inc. v. Seecubic, Inc.*, that, "[w]hen the contractual provision is clear and unambiguous, the court will give the provision's terms their plain meaning." 2022 WL 2149437, *15 (citations and quotations omitted). The Court of Chancery erred as a matter of law by using purported default principles of a Restatement rather than relying on the plain terms of the Irrevocable Proxy.

II. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW BY READING ADDITIONAL WORDS INTO ITS INTERPRETATION OF THE "CATCH ALL" PROVISION TO LIMIT ITS APPLICATION.

A. Question Presented.

Did the Court of Chancery commit legal error in holding that the "catch-all" language in the Non-Termination Provision in the Irrevocable Proxy did not include a sale of the shares and bind subsequent owners? Op. at 56-57.

B. Scope of Review.

The issue of whether the Court of Chancery erred in interpreting the language of the Irrevocable Proxy is a question of law subject to *de novo* review by this Court. *See, e.g.*, *Genger*, 26 A.3d at 190; *See Stream TV Networks, Inc.*, 2022 WL 2149437, *10.

C. Merits of the Argument.

The Court of Chancery correctly noted that the "any other event or events" language in the Non-Termination Provision was "plainly intended as a catch-all." Op. at 57. However, rather than give the broadly phrased language its plain meaning, the Court held that the catch-all did not encompass a sale of the Majority Shares because the only reasonable reading of the language was that it "only applies to events that occur while the Stockholder owns the [shares]." *Id.* The Court of Chancery's holding constitutes legal error.

Delaware law is clear that, in interpreting the terms of an agreement, the court should not contort, add, or delete words under the guise of construing the contract. *Conner v. Phoenix Steel Corp*., 249 A.2d 866, 868 (Del. 1969) ("It is, of course, axiomatic that a court may not, in the guise of construing a contract, in effect rewrite it to supply an omission in its provisions."); *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 288 (Del. 2001) (citation omitted) ("The Delaware courts should 'not destroy or twist [contract] language under the guise of construing it.'"). Here, to reach its holding that the "catch-all" language encompassed "anything the Stockholder might do while owning the Majority Shares, short of selling the Majority Shares" (Op. at 57), the Court of Chancery necessarily had to add words into the Non-Termination Provision that do not exist in the Irrevocable Proxy:

> The Stockholder agrees that such Irrevocable Proxy … shall not be terminated … by the occurrence of any other event or events [***while the stockholder owns the shares***] ….

A035 (emphasis added). A sale or transfer of the Majority Shares is plainly an "event" that falls within the ordinary meaning of the words in the provision. The Court of Chancery erred as a matter of law by reading additional language into the Non-Termination Provision rather than interpreting the words contained in the provision according to their plain meaning.

The Court of Chancery attempted to bolster its interpretation that the catch-all language should not be interpreted to require the Irrevocable Proxy to run with the shares by holding that "it is enough that the Irrevocable Proxy does not expressly address a sale of the Majority Shares." Op. at 57. However, the Court of Chancery cited no Delaware authority, nor is there any Delaware authority, that requires that an irrevocable proxy use magic words such as "transfer" or "sale" in order to reflect an intent for the proxy to run with the shares. Here, the "any other event or events" language, which the Court of Chancery recognized was "plainly intended as a catch-all," memorialized the parties' intent that the proxy should not terminate based upon any event, which would include a sale of the shares by the stockholder to the extent that a sale was not already covered by the "any act of the Stockholder" language. *See id.* Moreover, the provision elsewhere makes clear that circumstances in which the Stockholder no longer owns the shares (*e.g.*, the death of the Stockholder) will not affect a termination. The Court of Chancery committed legal error by not giving the provision's terms their plain meaning. *See Stream TV Networks, Inc.*, 2022 WL 2149437, *15 ("When the contractual provision is clear and unambiguous, the court will give the provision's terms their plain meaning.").

Finally, the Court of Chancery erred as a matter of law in attempting to bolster its holding by relying upon the Addendum as somehow creating a negative inference that the Irrevocable Proxy terminates when stock is transferred. Op. at 57.

The Addendum, which was attached to the Irrevocable Proxy as a separate agreement and was drafted by a lawyer representing Popco, contains language through which Old MedApproach agreed to, among other things, be bound by the Irrevocable Proxy as the Stockholder and not to transfer the Majority Shares unless the transferee expressly agreed to be bound by the Irrevocable Proxy. A038; A039. The Court of Chancery determined that the Addendum suggests (despite the absence of any testimony to this effect) that Popco's lawyer "did not believe that the language of the Irrevocable Proxy, standing along, was sufficient to bind Old MedApproach to the Irrevocable Proxy." Op. at 71. It was legal error for the Court of Chancery to rely on the Addendum to interpret the Irrevocable Proxy.

The Addendum was drafted by Popco and its counsel, not the giver of the Irrevocable Proxy (Pike and later Old MedApproach). *See* A546. The Court of Chancery's analysis should have focused exclusively on the language of the Irrevocable Proxy that plainly reflected the intention of the proxy givers and proxy holders as discussed above. Furthermore, the Court of Chancery itself recognized that the Addendum "is not a model of clarity, and it contains internal inconsistencies." Op. at 73. That ambiguity should not have worked to limit the generality of the Non-Termination Provision, given the testimony and evidence that the redundancies and inconsistencies in the Irrevocable Proxy reflected an effort to maintain the proxy as an essential, ongoing requirement to the Project's license.

Finally, the Court of Chancery found that the Addendum was drafted at a time when the parties were aware that Pike was in the process of transferring the Majority Shares to Old MedApproach (Op. at 77) and that Old MedApproach was in turn soliciting investments from the Project Partners. The Addendum therefore required Old MedApproach to covenant that its beneficial owners and affiliates would be bound by the Irrevocable Proxy, even if they were already in the process of deciding whether to invest in Old MedApproach. A038; A039. The treatment of those owners and affiliates provides no inference as to how the Irrevocable Proxy might bind future third-party owners of the Majority Shares, who had no relationship with Old MedApproach at the time the Irrevocable Proxy was entered into and who would clearly have notice of the Irrevocable Proxy before making any decision to invest in the Majority Shares. *See id.*

III. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW IN FINDING THAT THE ASSIGNMENT PROVISION DID NOT INDICATE THE INTENT FOR THE PROXY TO RUN WITH THE SHARES TO BIND SUBSEQUENT OWNERS.

A. Question Presented.

Did the Court of Chancery error as a matter of law in holding that the Assignment Provision does not plainly provide for the Irrevocable Proxy to run with the Majority Shares? Op. at 58.

B. Scope of Review.

The issue of whether the Court of Chancery erred in interpreting the language of the Irrevocable Proxy is a question of law subject to *de novo* review by this Court. *See, e.g.*, *Genger*, 26 A.3d at 190; *See Stream TV Networks, Inc.*, 2022 WL 2149437, *10.

C. Merits of the Argument.

As noted above, the Bound Parties Clause of the Assignment Provision expressly provides that the Irrevocable Proxy "shall be binding upon and inure to the benefit of Stockholder and the Holders and their respective heirs, devises, legatees, personal representatives, agents and permitted assigns." A037. While acknowledging that some of the language of the Assignment Provision "comes close" to providing for the Irrevocable Proxy to run with the Majority Shares (Op. at 58), the Court of Chancery ultimately held that the Assignment Provision only

bound assigns of the Holders, and not the Stockholder. Op. at 60-61. In reaching this holding, the Court of Chancery principally relied upon the "rule of the last antecedent" to find that "their" only modified "Holders" and did not modify "Stockholder." *Id.* at 62-63. While the Court of Chancery stated that the rule of the last antecedent is "a settled principle of interpretation," courts have routinely held that the rule should not be used where structural or contextual evidence suggests a contrary intention. *See, e.g., Lockhart v. United States*, 577 U.S. 347, 355 (2016) (citation omitted) (The U.S. Supreme Court "has long acknowledged that structural or contextual evidence may 'rebut the last antecedent inference.'"); *United States v. Bass*, 404 U.S. 336, 341 (1971) (declining to apply rule); *Porto Rico Railway, Light & Power Co. v. Mor.*, 253 U.S. 345, 348 1920) (same); (*E.I. du Pont de Nemours & Co. v. Green*, 411 A.2d 953, 955-56 (Del. 1980) (declining to use the rule of the last antecedent). Here, the Court of Chancery's use of the last antecedent rule to find that the Assignment Provision did not bind assigns of the Stockholder was legal error.

It is a cardinal principle of contract construction that the court is "to give effect to all terms of the instrument." *Elliott Assocs. v. Avatex Corp.*, 715 A.2d 843, 854 (Del. 1998); *Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 839 (Del. 2019) (reversing trial court's ruling based on recognized rule that Courts must "give each provision and term effect, so as to render any part of the

contract mere surplusage"); *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) (refusing to accept interpretation of contract that would render a term "meaningless or mere surplusage"). Here, the Court of Chancery violated this cardinal principle by interpreting the Bound Parties Clause of the Assignment Provision so as to give no effect to the inclusion of the term "Stockholder." *See* Op. at 62; A037. By applying the last antecedent rule, the Court of Chancery effectively read the Bound Parties Clause, as it applies to the Stockholder, as if it simply stated that the Irrevocable Proxy "shall be binding upon and inure to the benefit of the Stockholder." *See id.* However, the Irrevocable Proxy was already binding upon the Stockholder that executed the proxy. A038; A039. Thus, the Court of Chancery's finding that the word "their" only modified "Holders" makes the inclusion of "Stockholder" in the sentence surplusage. Rather, the only reading of the sentence that gives meaning to all of the words is to read "their" as modifying both the Stockholder and the Holders. Stated differently, the only reason to insert the reference to Stockholder in the Bound Parties Clause was to have the Stockholders' assigns bound to the Irrevocable Proxy.

The Court of Chancery also committed legal error in holding that, even if "their" modified Stockholder such that "permitted assigns" of the Stockholder are bound by the Irrevocable Proxy as Appellants argued, subsequent owners of the Majority Shares would not be bound because the terms assigns and transferees are

not equivalent and the Irrevocable Proxy needed to use the specific word "transferee," not "assign," to bind subsequent owners. Op. at 64-67. As this Court recently reaffirmed in *Stream TV Networks, Inc. v. SeeCubic, Inc.*, this Court "often looks to dictionaries to ascertain a term's plain meaning." 2022 WL 2149437, *13. Based upon the dictionary definitions, the Court found that an "assignment" includes the transfer of rights or property from one to another. *Id.* at *14. While the Court of Chancery claims in the Opinion that the term assignee may be more limited than transferee in certain contexts, it nowhere explains why it would make sense in the context of interpreting the Irrevocable Proxy to define assignee differently than transferee such that the Stockholder's assigns would be bound but its transferees would not. As such, the Court of Chancery's interpretation was inconsistent with the plain dictionary definition of an assignment as encompassing the transfer of property from one person to another, and therefore, the interpretation was legal error.

Finally, the Court of Chancery erred as a matter of law in holding that, "[a]s in *Genger Trial*, if the parties had wanted the Assignment Provision to cause the Irrevocable Proxy to bind a subsequent owner, then they should have stated clearly that the Irrevocable Proxy binds the Stockholder and the Stockholder's transferee." Op. at 68. The Court did not hold in *Genger,* nor has any other Delaware court held, that drafters of an irrevocable proxy need to use the magic word "transferee" for the irrevocable proxy to run with the shares and be binding on

a subsequent owner. Here, the plain language of the Assignment Clause reflects the parties' intent to bind third parties including assignees of the Stockholder.

In that regard, the Court of Chancery concluded that the Assignment Provision did not include any restriction on the Stockholder's ability to transfer the Majority Shares. Op. at 60. The Court of Chancery's interpretation of the Assignment Clause as not binding assigns of the Stockholder would lead to a commercially unreasonable outcome. As reflected in the recitals of the document, the Irrevocable Proxy was part of a multi-party agreement for the governance of the Project that would be acceptable both to the investors and Popco and preserve the license. A034; *see also* A135; A189; A542; A543. The continuation of the Irrevocable Proxy was an essential ongoing condition of the Popco license, the 50-year term of which would immediately be terminable if the Irrevocable Proxy were terminated for any reason. A226–A227; A086. Given the context and purpose of the Irrevocable Proxy, is unreasonable to conclude that the parties who created the Irrevocable Proxy to protect the Popco license, and included provisions restricting termination and perpetuating the proxy on assignment, intentionally did not include any language to restrict the Stockholder's ability to transfer or bind subsequent owners such that MedApproach would have the unilateral power to terminate the Irrevocable Proxy with a single transfer of the Majority Shares. *See, e.g., Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1211 (Del. 2021)

(holding that "interpretations that are commercially unreasonable or that produce absurd results must be rejected."). Rather, the better reading of the plain language of the Non-Termination Clause and the Assignment Provision is that those provisions were intended for the Irrevocable Proxy to run with the shares and bind subsequent owners.

CONCLUSION

For all of these reasons, Defendants below, Appellants respectfully request that the Court enter an Order reversing the Opinion of the Court of Chancery and declaring that the Irrevocable Proxy runs with the shares and binds subsequent owners.

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2022, copies of the foregoing Appellants' Opening Brief was caused to be served upon the following counsel of record via File &Serve*Xpress*:

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