



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. THE COURT OF CHANCERY ERRED IN IMPOSING DEFAULT PRINCIPLES OF THE RESTATEMENT (THIRD) OF AGENCY TO OVERRIDE THE PLAIN LANGUAGE OF THE NON-TERMINATION PROVISION.

The Non-Termination Provision states that the Irrevocable Proxy “*shall not be terminated by any act of the Stockholder*” except as contemplated in the Termination Provision. The phrase “any act of the Stockholder” is broad and unambiguous and memorialized the parties’ intent for the Irrevocable Proxy to survive the Stockholder’s sale of the shares and bind subsequent owners. However, as set forth in the Opening Brief, rather than interpret the plain language as written the Court of Chancery imposed “default principles” of the Restatement (Third) of Agency to limit the breadth of the Non-Termination Provision. (Op. at 52, 54). In the Answering Brief, Plaintiff barely even mentions, much less substantively attempts to defend, the clear legal error made by the Court of Chancery in its reliance on the Restatement (Third) of Agency to override the plain language of the Non-Termination Provision of the Irrevocable Proxy.

To begin, Plaintiff nowhere addresses in the Answering Brief the material differences between the Non-Termination Provision and the Restatement (Third) that fatally belie the Court of Chancery’s holding that the drafters of the Irrevocable Proxy were “mirroring” the Restatement and intending to memorialize its default principles. Op. at 51. The section of the Restatement (Third) cited by the

Court of Chancery lists five specific scenarios that will not terminate an irrevocable proxy. The Irrevocable Proxy at issue here is not so limited, and conspicuously provides that termination cannot be effected by “any act” of the Stockholder. Indeed, the broad catch-all language in the Non-Termination Provision that is at issue in this appeal (“any act of the Stockholder” and “any other event or events”) nowhere appears in the Restatement (Third) of Agency. By improperly excising the expansive language of the Irrevocable Proxy and imposing purported “default principles” of the Restatement (Third) of Agency, the Court of Chancery committed reversible error. *See Stream TV Networks, Inc. v. Seecubic, Inc.*, 2022 WL 2149437 at *10–11 (Del. June 15, 2022) (holding that the Court of Chancery erred in relying on case law interpreting Section 271 of the DGCL to interpret a charter provision because the charter provision did not track Section 271).

Implicitly acknowledging that the language of the Irrevocable Proxy and the Restatement (Third) cannot be reconciled, Plaintiff instead argues in her Answering Brief (at 26-27) that *Stream TV* is distinguishable because the Court of Chancery did not rely upon a statutory analogy. This simply misses the point. The Court’s holding in *Stream TV* that the court below erred in using an inapposite statutory provision to interpret a charter provision was not unique to the statutory context, but spoke more generally to ensuring that parties’ agreements are honored as written and are not redrafted by courts through analogy to texts outside the

relevant contract itself. The *Stream TV* principle applies equally to the Court of Chancery's use of inapposite "default principles" of a Restatement to interpret the plain language of the Non-Termination Provision of the Irrevocable Proxy. It was error for the Court of Chancery to assume that the parties intended to adopt default principles of the Restatement that are nowhere mentioned and conflict materially with the language that was actually used. For this reason alone, this Court should reverse the Court of Chancery's holding that it was appropriate to use the Restatement (Third) to discern the parties' intent as to whether the Irrevocable Proxy would run with the shares.

Even if it had been appropriate for the Court of Chancery to look to the Restatement in interpreting the Irrevocable Proxy, the Court of Chancery nevertheless committed legal error by importing into the Irrevocable Proxy a comment from the Restatement (Third), which postdated the Irrevocable Proxy by nearly a decade, when the effective Restatement at the time (Second) did not contain that comment and would have led to a different outcome. To support its holding, the Court of Chancery 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 (Third) provides 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. However, as

pointed out in the Opening Brief, the Restatement (Third) was not published until nearly 10 years after the drafting of the Irrevocable Proxy. 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. Restatement (Second) of Agency § 139 (Am. Law. Inst. 1958). Rather, the comment in the earlier Restatement (Second) provided that powers given as 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. The comment on which the Court of Chancery relied represented a material change in the default principles that existed when the Irrevocable Proxy was executed. Thus, the Court of Chancery’s holdings that Defendants’ interpretation 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.

Plaintiff nowhere in her Answering Brief addresses the dispositive difference between the Restatement (Second) and Restatement (Third). Rather, Plaintiff instead cites to Delaware cases generally holding that “voting rights are integral to stock ownership” and that, when stock is sold, the right to vote travels with the shares. However, these cases are irrelevant to the issue of whether the Court of Chancery’s reliance on the Restatement (Third) to support its holding was legal error. Stated simply, the fact that voting rights are important and generally travel

with the shares has no bearing on whether the plain language of the Non-Termination Provision stating that no act of the Stockholder shall terminate the Irrevocable Proxy memorializes the parties' intent for the Irrevocable Proxy to survive the Stockholder's sale of the shares.

With respect to this issue, the parties' inclusion of the broad language that "any act of the stockholder" shall not terminate the Irrevocable Proxy encompasses the act of a sale of the shares by the stockholder. Indeed, a sale or transfer of the shares is one of the only acts (and possibly the most obvious acts) that a stockholder can take with the shares. The Court below provided no support other than its improper reliance upon the Restatement (Third) for its holding that the broad language only "encompasses acts that the principal might take to terminate the agency relationship while remaining the owner of the Majority Shares." Op. at 52. Because the Court of Chancery's imposition of the default principles of the Restatement (Third) to override the plain language of the Non-Termination Provision constitutes legal error, the Court's holding should be reversed and the language of the Irrevocable Proxy should be given its plain meaning as written. *See Stream TV Networks, Inc.*, 2022 WL 2149437, *15 (holding that, "[w]hen the contractual provision is clear and unambiguous, the court will give the provision's terms their plain meaning").

II. THE COURT OF CHANCERY ERRED BY VIOLATING A CARDINAL PRINCIPLE OF CONTRACT INTERPRETATION TO LIMIT THE PARTIES' CATCH-ALL LANGUAGE.

In her Answering Brief, Plaintiff does not challenge the well settled principle of contract interpretation that prohibits a Court from adding or deleting words from the parties' agreement under the guise of construing the contract. As set forth in Defendants' Opening Brief, here the Court of Chancery violated this cardinal principle by reading additional language into the Non-Termination Provision to limit the application of the parties' broad catch-all language that "any other event or events" shall not terminate the Irrevocable Proxy. While a sale or transfer of the shares would constitute an event under the Non-Termination Provision, the Court of Chancery improperly added additional words to the provision to support its holding that the language encompassed "anything the Stockholder might do while owning the Majority Shares, short of selling the Majority Shares" (Op. at 57). Plaintiff's attempts to excuse the Court of Chancery's legal error fail.

Plaintiff first argues that the Court of Chancery's holding should be upheld because that the Non-Termination Provision solely represents a commitment of the Stockholder, who at the time was Pike. However, an Irrevocable Proxy always represents a commitment of the stockholder at the time of execution since such person is the only one that has the power to grant the authority to the proxy holders to vote the shares. Here, it is not disputed that the Stockholder made the proxy

irrevocable such that the Stockholder gave up the power to revoke the proxy as long as the Stockholder held the shares. The issue is whether the parties, having provided that the Stockholder would have no power to revoke the Irrevocable Proxy, intended for the Stockholder to be able to terminate the Irrevocable Proxy through a sale or transfer or instead intended for the proxy to run with the shares.

With respect to that issue, by including the broad catch all language in the Non-Termination provision to make clear that the Irrevocable Proxy would not terminate based upon any other event or events, the parties manifested their intent for the Irrevocable Proxy to continue after the Stockholder's sale or transfer of the shares. Indeed, to hold otherwise would mean that, having carefully drafted the Irrevocable Proxy to make clear that it was irrevocable and would only expire "on the latest date permissible under such applicable law," the parties intended at any time to allow the termination of the proxy through a simple sale or transfer of the shares by the Stockholder.

In interpreting contract language to determine intent, Delaware courts look both to the plain meaning of the terms used as well as their meaning in the context of the agreement as a whole. *See Fletcher v. Feutz*, 246 A.3d 540, 555 (Del. 2021). Here, 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 Project's primary asset. The 50-year term of the license would immediately be terminable if the Irrevocable Proxy were terminated for any reason. A226–A227; A086. The record showed that the purpose of the Irrevocable Proxy was to procure the resolution of Popco's lawsuit and to preserve the license. Op. at 10-11. Given the context and purpose of the Irrevocable Proxy, it is unreasonable to conclude that the parties sought to protect the Popco license, and included provisions prohibiting revocation and extending the duration, but 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. Thus, the plain language of the Non-Termination as well as the context in which it was drafted demonstrate an intent for the Irrevocable Proxy to survive a sale of the shares and bind subsequent owners.

Further, Plaintiff's argument that the Irrevocable Proxy only applies to the Shares when held by the Stockholder is without basis. Indeed, the language of the Non-Termination Provision itself provides that the Irrevocable Proxy shall not terminate by the *death* of the Stockholder memorializing the intent for the Irrevocable Proxy to survive when the shares are held by a representative, executive or heir. In that regard, there is no meaningful difference with respect to what the

parties would have intended upon the dissolution of MedApproach and similar transfer to successor third parties.

Equally unavailing is Plaintiff's argument that the Court of Chancery's holding that the Irrevocable Proxy does not run with the shares should be affirmed based solely upon the Court's finding that "it is enough that the Irrevocable Proxy does not expressly address a sale of the Majority Shares." Op. at 57. To support her argument, Plaintiff relies upon this Court's affirmance in *Genger v. TR Investors, LLC*, 26 A.3d 180 (Del. 2011). However, as pointed out in the Opening Brief, neither *Genger* nor any other Delaware authority has ever held that Delaware law requires that an irrevocable proxy use magic words such as "transfer" or "sale" in order 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 "***shall not be terminated***" 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.* 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, Plaintiff attempts to excuse the Court of Chancery’s legal error by pointing to the Court’s reliance on the “presence” of the Addendum that was attached to the Irrevocable Proxy as supporting its holding that the Irrevocable Proxy did not run with the shares. Op. at 57, 71 (finding that Popco’s lawyer “did not believe that the language of the Irrevocable Proxy, standing alone, was sufficient to bind Old MedApproach to the Irrevocable Proxy.”). However, the Court of Chancery’s reliance on the Addendum was legal error since the Court should have focused exclusively on the language of the Irrevocable Proxy itself that plainly reflected the intention of the proxy givers and proxy holders as discussed above. Stated differently, even if one were to accept the Court of Chancery’s inference that Popco’s lawyer, a third party to the Irrevocable Proxy, did not believe the language was sufficient to bind MedApproach,¹ this evidence was, at best, extrinsic and the court below erred in using it to override the plain language of the Non-Termination Provision and Assignment Provision of the Irrevocable Proxy itself.

¹ Although nowhere acknowledged by the Court of Chancery in its Opinion, Popco’s lawyer’s desire to include the Addendum to bind MedApproach is easily explainable from the fact, as set forth in the recitals of the Irrevocable Proxy itself, that Pike was in the process of transferring the Majority Shares to MedApproach as part of the parties’ global agreement with respect to the going-forward governance of the Project at the time the Irrevocable Proxy was executed. The Addendum served the purpose of documenting that MedApproach, which at the time was the known future owner of the shares, had itself agreed to be bound by the governance structure set forth in the Irrevocable Proxy as the Stockholder.

Further, even if the redundancy of the Addendum was properly considered by the court below, the fact that Popco’s attorney added “belt and suspenders” language does not mean, as the Court of Chancery’s held, that the parties to the Irrevocable Proxy did not believe that the Irrevocable Proxy itself reflected an intent for the proxy to run with the shares. *See Meso Scale Diagnostics LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 87 (Del. Ch. 2013) (finding that a provision “arguably operated as a cautious, ‘belt and suspenders’ reaction” and did not create an ambiguity in the language); *Tygon Peak Cap. Mgmt., LLC v. Mobile Invs. Investco, LLC*, 2022 WL 34688, at *18 (Del. Ch. Jan. 4, 2022) (“That certain transactions may be covered by multiple provisions of Section 5.10 is not dispositive and suggests that the parties took a ‘belt and suspenders’ approach to drafting this provision.”); *Blue Cube Spinco LLC v. Dow Chem. Co.*, 2021 WL 4453460, at *9 (Del. Super. Sept. 29, 2021) (“interpreting two terms redundantly is unproblematic where, as here, doing so plainly reflects the parties’ mutual intent to ensure with ‘belt-and-suspenders’ a contractual outcome will be guaranteed”). Indeed, not only does the Irrevocable Proxy include numerous overlapping and redundant provisions memorializing the intent that the Irrevocable Proxy be irrevocable, durable and lasting, the Addendum itself contained redundancies. Both the first clause and the second clause of the Addendum repeat that MedApproach is bound to the Irrevocable Proxy as the “Stockholder.” If anything, these redundancies undermine the central premise

of the Court of Chancery's holding (and Plaintiff's contention that the Irrevocable Proxy was a mere stopgap measure) in that they underscore the importance to the parties of ensuring that the Irrevocable Proxy be durable and not be able to be revoked or terminated so as to protect the Project's license with Popco.

Finally, Plaintiff's assertion that Defendants' position on appeal is somehow contrary to the arguments that Defendants made before the Court of Chancery is baseless. As on appeal, Defendants argued to the Court of Chancery that the "Irrevocable Proxy has multiple overlapping provisions underscoring that it runs with the shares and cannot be terminated by any action or even demise of the Partnership." AR0101; *see also* AR0006 ("The Irrevocable Proxy was born out of conflict, and its belt-and-suspenders approach reflects the parties' effort to resolve that conflict with a durable governance structure."). Alternatively, Defendants argued before the Court of Chancery that the Transfer Restriction in the Addendum prohibited the Partnership from transferring the shares to any person unless the transferee agreed to be bound by the Irrevocable Proxy. The Court of Chancery held that the Transfer Restriction "applies to any sale to an affiliate, but not a sale to a third-party," a holding which neither party has appealed. The fact that Defendants argued in the alternative that the Transfer Restriction of the Addendum restricted transfers of the shares is in no way inconsistent with the arguments that Defendants

previously made to the Court of Chancery or have made on appeal regarding the Irrevocable Proxy.

III. THE COURT OF CHANCERY ERRED IN FINDING THAT THE ASSIGNMENT PROVISION DID NOT BIND ASSIGNS OF THE STOCKHOLDER TO THE IRREVOCABLE PROXY.

Finally, the Court of Chancery committed legal error in holding that the Assignment Provision of the Irrevocable Proxy only bound assigns of the Holders, and not the Stockholder. Op. at 60-61. In her Answering Brief, Plaintiff fails to identify any purpose for the inclusion of “Stockholder” in the Assignment Provision if the Court’s interpretation is accepted. Indeed, as set forth in the Opening Brief, the only reading of the Assignment Provision that gives meaning to all of the words is to read “their” as modifying both the Stockholder and the Holders such that the Irrevocable Proxy is binding upon assigns of both the Stockholder and the Holders. In fact, inasmuch as the first sentence of the Assignment Provision deals exclusively with the Proxy Holders, the explicit inclusion of the Stockholder in the second sentence cannot be dismissed as unintentional. Plaintiff’s attempts in her Answering Brief to excuse this legal error of the Court of Chancery in violating the cardinal principle of contract construction “to give effect to all terms of the instrument” are futile.

Unable to identify a purpose for the inclusion of Stockholder in the Assignment Provision, Plaintiff resorts in her Answering Brief simply to asserting that Defendants’ argument “clashes with the trial court’s thorough analysis.” To support the argument, Plaintiff first points to the Court of Chancery’s use of the last

antecedent rule to support its holding that “their” only modified the Holders. However, Plaintiff does not dispute the settled rule set forth in the Opening Brief (at 33) that the last antecedent rule should not be used if the structural or contextual evidence suggest a contrary intention. Here, both the inclusion of the word “Stockholder” as well as the contextual evidence supports that the parties’ intent was to bind assigns of the Stockholder. As such, the Court of Chancery’s use of the rule of the last antecedent to override that intent was legal error.

Nor is the Court of Chancery’s legal error cured as Plaintiff argues (at 39) because the Court of Chancery posited that there was a grammatically better way to write the Assignment Provision. “A court applying Delaware law ‘will not allow the imprecise placement of adverbs and commas to alter the otherwise plain meaning of a contractual provision or to frustrate the overall plan or scheme memorialized in the parties’ contract.’” *Symbiont.iO, Inc. v. Ipreo Holdings, LLC*, 2021 WL 3575709, at *35 (Del. Ch. Aug. 13, 2021) (quoting *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 556 (Del. Super. 2005); see also *MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455, at *7 (Del. Ch. Dec. 30, 2010) (“[G]rammar and punctuation are of secondary importance to a court in interpreting a contract where such grammar and punctuation reasonably would frustrate the parties’ clear intent as evinced from the language used in the contract.”)). Here, in order to give effect to all of the words of the Assignment Provision the provision

must be read so as to make the Irrevocable Proxy binding on assigns of the Stockholder.

Finally, accepting that the provision was intended to bind assigns of the Stockholder, the Court of Chancery committed legal error in holding that 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.” Op. at 64-67. As set forth in the Opening Brief, the Court of Chancery’s holding was inconsistent with the plain dictionary definition of an assignment as encompassing the transfer of property from one person to another. Further, the Court of Chancery failed to explain 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. Given the context here—in particular, the parties’ undisputed desire to avoid the forfeiture of a license that required the perpetuation of the Irrevocable Proxy—the Court of Chancery’s approach makes little commercial sense.

In response, Plaintiff argues in her Answering Brief that the Court of Chancery drew from “various reliable sources” to support that assign and transfer are not equivalent. Plaintiff first points to the fact that the Court of Chancery relied upon Black’s Law Dictionary, which the Court noted defined transfer as involving a conveyance of property, to support its holding. However, as stated in the Opening

Brief, the dictionary definition of “assignment” similarly includes the transfer of property, as this Court recently noted in *Stream TV Networks, Inc.*, 2022 WL 2149437, *13. As such, the use of the term assign in the Irrevocable Proxy should have been interpreted as including the transferee of the property.

Next, Plaintiff points to the fact that the Court of Chancery observed that an issuer under the Uniform Commercial Code registers a transfer of shares, that Section 202 of the Delaware General Corporation Law refers to restrictions on the ability to transfer title as transfer restrictions, and the alternative entity statute provides for an assignment of certain rights. However, none of these inapposite contexts is relevant, much less dispositive, of the issue of whether the drafters of the Irrevocable Proxy intended for subsequent owners to be bound by the Irrevocable Proxy by making it binding on the Stockholder’s assigns. In the context of an Irrevocable Proxy where the parties have included express provisions memorializing the intent that the stockholder will not have the power to revoke the proxy, the more reasonable interpretation of assign is that it includes a transferee of the property consistent with the dictionary definition.

Equally baseless is Plaintiff’s argument (at 43) that the Court of Chancery’s holding is supported by the Court’s observation that the drafters of the Irrevocable Proxy used the verb transfer to refer to the acquisition of shares in other sections. The fact that the Irrevocable Proxy references in the 3rd Recital that 75

Shares are being transferred by Stockholder to MedApproach L.P. actually supports, rather than undercuts, an intent for the Irrevocable Proxy to survive a sale or transfer of shares. As the recitals make clear, the Irrevocable Proxy was not entered into as a simple, stand-alone proxy, but memorialized the governance structure for the parties' global agreement and was a condition for MedApproach's receipt of the Majority Shares. Despite the context, neither the Court of Chancery nor Plaintiff explain why it would have made rational sense for the parties to the Irrevocable Proxy to bind assigns of the Stockholder but not transferees, or who would qualify as an assign but not a transferee of the Stockholder that would be bound by the Irrevocable Proxy.

Similarly suspect was the Court of Chancery's citation to the Addendum to support its holding that the "drafters of the Irrevocable Proxy recognized the distinction between transferees and assignees." Op. at 68. Even putting to the side the fact that the Addendum was put forth by Popco's counsel, the language of the Addendum evidences that the parties used the words assigns and transferee interchangeably. The first part of the first sentence of the Addendum defines "MedApproach Person" to include assigns of MedApproach and binds them to the Irrevocable Proxy as the "Stockholder"; the second part reiterates that MedApproach is bound by the Irrevocable Proxy and agrees not to transfer the shares

to any other MedApproach Person (which includes assigns) unless the transferee agrees to be bound.

Finally, Plaintiff argues that the Court of Chancery could not have considered the context in which the Irrevocable Proxy was being executed in interpreting and applying the plain language of the document. As noted above, the recitals of the document itself memorialize that 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. Further, in determining the intent of the parties in utilizing the broad catch all language of the Non-Termination provision and the inclusion of Stockholder in the Assignment Provision, it would have been entirely appropriate for the Court below to have taken into account the context and purpose of the Irrevocable Proxy. *See Fletcher v. Feutz*, 246 A.3d at 555 (In interpreting contract language to determine intent, Delaware courts look both to the plain meaning of the terms used as well as their meaning in the context of the agreement as a whole). Thus, the plain language of the Non-Termination and Assignment Provision as well as the context in which they were executed demonstrate an intent for the Irrevocable Proxy to survive a sale of the shares and bind subsequent owners.

CONCLUSION

For all of these reasons as well as those stated in their Opening Brief, 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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I hereby certify that on August 30, 2022, copies of the foregoing *Appellants' Reply Brief* was caused to be served upon the following counsel of record via File & ServeXpress:

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