SAM GLASSCOCK III
VICE CHANCELLOR

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

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Re: Flaa v. Montano, Civil Action No. 9146-VCG

Dear Counsel:

In an earlier iteration of this action, *Flaa v. Montano*,[1] certain stockholders of CardioVascular BioTherapeutics, Inc. ("Cardio") executed written consents purporting to remove the Defendant directors, including Daniel Montano, from the Cardio board of directors. That action was disputed in an action under Section 225. As is typical in Section 225 actions,[2] a Status Quo Order was put in place, which established an Interim Board, of which Daniel Montano and the other individual Defendant directors were not members.[3] On October 4, 2013, I issued a Memorandum Opinion, in which I found that the written consent action purporting

[1] *Flaa v. Montano*, 2013 WL 5498045 (Del. Ch. Oct. 4, 2013).
[2] *See Arbitrium (Cayman Islands) Handels AG v. Johnson*, 1994 WL 586828, at *3 (Del. Ch. Sept. 23, 1994) ("[I]t has become customary in § 225 actions to put into place, either by agreement of the parties or court order, a status quo arrangement that precludes the directors presently in control of the corporation from engaging in transactions outside the ordinary course of the corporation's business until the control issue is resolved.").
[3] *Flaa v. Montano*, No. 8632-VCG (Del. Ch. July 12, 2013) (ORDER).

to remove the Defendants from the Cardio board of directors was ineffective, because a dispositive consent was invalid as it was delivered without actual or apparent authority. After I issued that Memorandum Opinion, the Plaintiff appealed, and the parties stipulated to abide by the Status Quo Order pending appeal.[4] Before the Supreme Court heard oral argument on that appeal, however, certain stockholders initiated a second written consent action, again purporting to remove Daniel Montano and the other individual Defendant directors from the Cardio board; the Plaintiff then filed this action under Section 225 seeking to confirm the validity of the second consent action. The Supreme Court has stayed appeal of the first action pending a resolution of the second.[5] The Defendants moved to dismiss this action on several grounds, including ripeness. This Court has previously explained that "[r]ipeness, the simple question of whether a suit has been brought at the correct time, goes to the very heart of whether a court has subject matter jurisdiction."[6] I therefore agreed to consider the Defendants' Motion to Dismiss for lack of ripeness prior to holding an evidentiary hearing on the merits of the 225 action.

"A ripe dispute arises where litigation 'sooner or later appears to be unavoidable' and where 'the material facts are static.' In deciding whether a claim

[4] *Flaa v. Montano*, No. 8632-VCG (Del. Ch. Oct. 10, 2013) (ORDER).
[5] *Flaa v. Montano*, No. 557,2013 (Del. Jan. 30, 2014) (Letter to Counsel).
[6] *Julian v. Julian*, 2009 WL 2937121, at 3 (Del. Ch. Sept. 9, 2009).

is ripe for decision, Delaware courts look at 'whether the interests of those who seek relief outweigh the interests of the court and of justice in postponing review until the question arises in some more concrete and final form.'"[7]

The Defendants here argue that the 225 action before me is not yet ripe because "[a]n action under Section 225 'is a statutory equivalent of a common law *quo warranto* action by which title to corporate office may be determined," and because "an action to remove an elected officer [under the common law writ of *quo warranto* cause of action] is not ripe when the challenged official is not currently seated and exercising the rights and powers of office."[8] In particular, the Defendants cite to an opinion from the Court of Appeals of Ohio, *St. Nikola Macedonian Orthodox Church v. Zoran*, in which that court held that a writ of quo warranto was not the proper remedy to challenge a purportedly-elected board's authority, on the basis that the newly elected directors, though they claimed a right to the office, "were not holding office at the time the complaint was filed."[9]

Section 225 provides that "[u]pon application of any stockholder or director, or any officer whose title to office is contested, the Court of Chancery may hear and determine the validity of any election, appointment, removal or resignation of any director or officer of any corporation, and the right of any person *to hold or*

[7] *Id.* (internal citations omitted).
[8] Defs.' Reply Mem. in Support of their Mot. to Dismiss on the Ground of Lack of Ripeness at 1-2.
[9] *St. Nikola Macedonian Orthodox Church v. Zoran*, 2006 WL 1409827, at *2 (Ohio App. May 24, 2006).

continue to hold such office . . . ."[10] The statute imposes no explicit requirement that a director must "hold office" before this Court may determine her right to a director seat. Even under a *quo warranto* analysis, moreover, the action is ripe. Montano and the other individual Defendant directors were, prior to the first consent, sitting directors of Cardio exercising the authority conferred by that position. The Defendants were purportedly removed from the board via a consent procedure that I found to be ineffective in a proceeding under Section 225. During the pendency of that action, the Plaintiff and certain non-parties acted as interim directors under my Status Quo Order, but Montano and the other Defendants remained on the de jure board. The parties agreed to leave the Status Quo Order in place pending appeal. As of the time the second consent procedure was taken, Montano and the other Defendants had not been "removed" from the board of Cardio. They were prevented from exercising the authority of those offices only by the Status Quo Order, as their recent (unsuccessful) motion to lift that Order makes clear. I find that this action is therefore ripe.

The Defendants also argue that "[t]here is nothing in the law which authorizes the 'removal' of a 'director' who is not at the time sitting as a director, and has none of the rights, duties or privileges of that office. Nor is there anything in the law which permits an 'anticipatory consent' removing in advance a party

[10] 8 *Del. C.* § 225(a) (emphasis added).

who may become a director."[11] That argument does not address the ripeness of this action; it challenges the procedural efficacy of a written consent purporting to remove a director who is not a member of an interim board created by a status quo order. To the extent the Defendants challenge the effectiveness of the consent delivered, the parties are free to make that argument, along with the other procedural challenges they have raised in their Motion, at a future evidentiary hearing.

To the extent the foregoing requires an Order to take effect, IT IS SO ORDERED.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III

[11] Defs.' Mot. to Dismiss at 3.