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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SERGIO M. OLIVER, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	**C.A. No. 16570-NC**
	:	
BOSTON UNIVERSITY, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: November 2, 2005
Date Decided: April 14, 2006

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William O. LaMotte, III, Esquire of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; John F. Sylvia, Esquire and Paul P. Poth, Esquire of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Boston, Massachusetts, Attorneys for Defendants Boston University, John R. Silber, Leon C. Hirsch, Gerald S.J. Cassidy, and Kenneth G. Condon.

NOBLE, Vice Chancellor

Seragen, Inc. ("Seragen") was a financially troubled biotechnology company nurtured and controlled by Defendant Boston University ("BU") and its friends and affiliates, who, on several occasions, came to its short-lived fiscal rescue in transactions implemented without procedures reasonably designed to protect the interests of minority shareholders. With Seragen on the precipice of financial doom, Ligand Pharmaceuticals, Inc. ("Ligand") offered merger consideration of approximately $75 million to acquire Seragen. That amount would have to satisfy the various stakeholders in Seragen—including holders of preferred stock, creditors, and holders of Seragen's common stock—even though the claims of those stakeholders asserting rights to priority payment exceeded Ligand's offer. Several stakeholders carved up the consideration to be paid by Ligand; that effort, however, was not burdened by anyone acting on a counseled and informed basis on behalf of the common shareholders who, from among various stratagems, could have injected into the allocation process (i) various derivative claims based upon earlier self-interested, capital-raising transactions and (ii) arguments against specific steps taken in that process that were inconsistent with the rights of the common shareholders. A group of minority shareholders, led by Plaintiff Sergio M. Oliver ("Oliver"), brought to trial a series of claims challenging certain transactions before Seragen's merger with Ligand in August 1998 and the process

by which the merger proceeds were divvied up. This is the Court's memorandum opinion following trial.

I. FINDINGS OF FACT

A. *The Players*

Seragen was a Delaware corporation engaged in the business of developing, manufacturing and marketing various biotechnology products known as Fusion Proteins.[1]

BU, a Massachusetts charitable educational institution, was the controlling stockholder of Seragen. The individual defendants are John R. Silber ("Silber"), a former Chancellor and trustee of BU and a director of Seragen,[2] Leon C. Hirsch ("Hirsch"), a trustee of BU, and an individual identified as a BU Affiliate in Seragen's public filings,[3] Gerald S. J. Cassidy ("Cassidy"), director of Seragen, a

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[1] "Seragen's proprietary Fusion Proteins consist of fragments of diphtheria toxin genetically fused to a ligand (a targeting and binding mechanism) that targets specific receptors on the surface of disease-causing cells. The Fusion Proteins are designed to bind to specific receptors present on the surface of disease-causing cells, penetrate the target cells and destroy the target cells' ability to manufacture proteins, thereby killing the targeted cells." Joint Trial Exhibit ("JX") 262 at 8.

[2] Trial Transcript ("Tr.") 193, 198. Silber became the president and a trustee of BU in January of 1971 and remained a member of the Board of Trustees until November 1, 2003. Silber served on Seragen's Board from the late 1980's until the merger with Ligand.

[3] Tr. 158-59. Hirsch founded United States Surgical Corporation ("USSC") and was its chairman and chief executive officer during the 1990's. He invited Silber to sit on USSC's Board, and Silber invited Hirsch to become a BU Trustee. Hirsch was a member of the BU Board of Trustees from the early 1990's until 2004, and he was a member for the duration of his investment in Seragen.

paid consultant to BU, and a close friend of Silber,[4] and Kenneth G. Condon ("Condon"), treasurer of BU and a member of Seragen's Board.[5] The other individual defendants were Reed R. Prior ("Prior"), board chairman, chief executive officer, and treasurer of Seragen from November 1996 through the merger with Ligand, Jean C. Nichols ("Nichols"), a director of Seragen and its chief technology officer, and Norman A. Jacobs ("Jacobs"), an independent director of Seragen from the time Seragen began trading publicly until the merger.[6]

Plaintiffs are former holders of Seragen's common stock and represent the class of persons, other than Defendants and their affiliates, who owned Seragen common stock on November 4, 1997 and August 12, 1998, when Seragen merged with Ligand.

B. *BU Acquires Seragen and the Massachusetts Attorney General is Unhappy*

In August 1987, BU purchased a controlling interest in Seragen for $25 million.[7] Sometime after BU gained its controlling interest in Seragen and before

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[4] Tr. 703-06. Cassidy sat on Seragen's Board from 1987 until the merger with Ligand. Cassidy was also a member of the BU Board of Trustees from October 2003 through October 2004.

[5] Tr. 454-56. Condon became BU's treasurer in 1992 and joined Seragen's Board shortly thereafter. As part of his duties as BU's treasurer, Condon attended meetings of the audit committee, the investment committee, the executive committee and Board of Trustees' meetings. For convenience, BU, Silber, Condon, and Cassidy are sometimes referred to as the "BU Defendants."

[6] Pretrial Stipulation ("PT Stip.") at 5-6. Shortly before trial, Prior, Nichols, and Jacobs settled with the Plaintiffs. The settlement was approved on November 2, 2005.

[7] Tr. 195; JX 131 at BU06250.

Seragen went public, BU elected various persons, including Silber, Cassidy, and Condon, to Seragen's Board.

As a result of BU's significant investment in Seragen, the Massachusetts Attorney General investigated the relationship between BU and Seragen. On January 15, 1992, the Trustees of BU and the Attorney General entered into a letter agreement under which BU committed to "use best efforts to reduce significantly its financial exposure resulting from the Seragen investment and its financial commitment to Seragen."[8] BU also agreed to make monthly reports to the Attorney General on the "status of this reduction of financial exposure" and "all further expenditures and financial commitments made to or on behalf of Seragen." In addition, BU agreed to obtain the consent of the Attorney General before making any other investment in Seragen.

C. *Seragen Goes Public*

In April 1992, Seragen completed its initial public offering, raising $36 million.[9] Also in April 1992, BU established the Seragen Oversight Committee "to exercise Trustees' responsibilities to manage the University's investment in Seragen."[10] The Oversight Committee was "composed of persons who [had] no

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[8] JX 1. The Massachusetts Attorney General was concerned that "the Seragen Investment may constitute an undue concentration in a risky venture." *Id.*
[9] PT Stip. at 6; Tr. 459.
[10] JX 26 at BU12301.

personal financial interest, direct or indirect, in Seragen"[11] and was chaired by Earle C. Cooley ("Cooley").[12] In March 1993, Seragen raised an additional $16.5 million in a second public offering.[13] Later, in 1994, Seragen obtained $6.5 million through a private placement of common stock.[14]

Continuing the effort to raise capital, in August 1994 Seragen entered into a strategic alliance with Eli Lilly and Company ("Lilly"), by which Seragen received $10 million from Lilly and the prospect of procuring an additional $45 million.[15] The Lilly partnership created substantial optimism within BU and Seragen and throughout the investing public. Seragen had continually reported high hopes for itself and its upcoming products to BU's Board of Trustees and to the public.[16]

D. *The Loan Guarantee Transaction*

Seragen, as a biotechnology company without a product in the marketplace, was required to commit relatively large sums to research and, thus, was spending

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[11] *Id.* *See also* Tr. 205-06. Many members of BU's Board of Trustees were in some way invested in Seragen.

[12] Tr. 459. *See also* JX 131.

[13] Tr. 459. *See also* JX 131.

[14] JX 181; Tr. 460-61.

[15] JX 131. JX 26 at BU12327-28; JX 27 at BU12371 (George Masters ("Masters"), former chief executive officer of Seragen, stating at a BU Board of Trustees meeting that "[t]hrough the agreement with Lilly, we got $45 million, $10 million up front, another $10 million for milestone payments and an additional $25 million to come through the exercise of options. In addition to that $45 million opportunity, Lilly also committed to spend $17 million in clinical trials pushing forward our cancer opportunities.").

[16] Masters, as a representative of Seragen, often reported at the BU Board of Trustees meetings. *See, e.g.*, JX 26 at BU12301 (March 1994 Meeting), BU12313 (July 1994 Meeting), BU12330 (October 1994 Meeting).

its cash almost as soon as it was raised. Despite Seragen's partnership with Lilly and the funds that the relationship brought with it, it was clear, by February 1995, that Seragen was in a severe cash crunch and could potentially run out of funds sometime in July.[17] Addressing this desperate need for financing, Seragen entered into the Loan Guarantee Transaction on June 7, 1995.[18] This transaction, which raised $23.8 million, was described by Seragen as:

> [T]hree separate lines of credit which are guaranteed by three different entities for a total of $23.8 million in bank financing for the Company. Boston University, the Company's majority stockholder, is the lead guarantor, providing a guarantee of $11.8 million. Two other guarantors [Hirsch and Cassidy] have guaranteed a total of $12 million. Upon the closing of the lines of credit, the Company issued warrants to the guarantors to purchase 2,776,664 shares of its common stock at an exercise price of $4.75 per share. The warrants are exercisable immediately and expire in 2005. The Company has estimated the fair market value of the warrants to be $1.50 per warrant or $4,164,996 for the 2,776,664 issued and outstanding warrants.[19]

The Plaintiffs have characterized this transaction as "the beginning of the end" for Seragen's minority common shareholders because they believe that it was at this juncture that BU first caused Seragen to avoid the public equity markets in favor of the Loan Guarantee Transaction which prevented a significant dilution of BU's interest in Seragen. Although any challenge to this transaction is time barred, the question of whether other financing options existed in June 1995 is important to an

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[17] JX 36.
[18] JX 84 at 18.
[19] *Id.*

understanding of the context in which the pending dispute arose, and, thus, a digression may be appropriate.

By mid-1994, it had become apparent to both BU and Seragen management that Seragen would have to raise additional funds or it would be unable to continue its operations. Also, if Seragen failed, BU, as a large investor in Seragen, would suffer significant losses. Seragen turned to loan guarantees by BU-associated investors for two reasons. First, it could not borrow funds conventionally; the banks would not lend the needed funds on Seragen's credit alone. Second, BU was concerned that the issuance of more stock would dilute its equity interest in Seragen.

Various Seragen and BU representatives in 1994 painted a rather self-serving portrait of BU's motivations for pursuing the Loan Guarantee Transaction. For example, as early as July of 1994, Silber, when describing the Loan Guarantee proposal to the BU Executive Committee, stated:

> [I]f we can expand [Seragen] now, and develop [Seragen] by bank loans, instead of by dilution, it's going to be far better for [BU] . . . if we take all these steps, it's going to be pretty hard for the Attorney General to say no because it would require us not to fulfill our fiduciary responsibility to seek the interests of [BU] and protect the interests of [BU], but to ignore those concerns entirely on the instructions of the Attorney General.[20]

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[20] JX 26 at BU12319. At the same meeting Silber stated: "If we can avoid [public offerings], and do some of this by bank loans, and have the two million shares come to Boston University, it will be greatly in our favor. And, for us to fail to do this now, when the risk is so substantially

Not only had Silber informed the members of BU's Executive Committee of the importance of maintaining BU's majority position in Seragen, but also he stated that to do otherwise would leave them in breach of their duties to BU, seemingly with no worries about duties that BU's Seragen directors owed to Seragen and Seragen's other common stockholders. At trial, Silber expressed his concern for the consequences of dilution on all holders of Seragen common stock as follows:

> I'm a little concerned for the best interest of all the stockholders of Seragen, including [BU] and including myself, in which I had a major investment. It would not be fair to the stockholders to engage in a deal which involved a great deal of dilution if it were possible to find another means of financing the company that did not involve that dilution.[21]

At the October 1994 annual meeting of the BU Board of Trustees, Cooley told the Trustees that Seragen's issuing between three and four million shares pursuant to its business plan would reduce BU's holdings and the potential value of these holdings.[22] Additionally, Cooley stated:

> In view of the significant dilution that [the issuance of shares] represents in the value of the University's holdings of Seragen common stock as well as the holdings of a majority of the other stockholders that would result from any sale . . . at prices within the recent range[,] Mr. Masters requested the Seragen Oversight Committee to consider, in the interest of avoiding dilution, approval

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reduced by virtue of this agreement, seems to me it would be a great mistake and a great lost opportunity." *Id.* at BU12320.

[21] Tr. 245-47.

[22] JX 26 at BU12336-37.

> of a bank Loan Guarantee by [BU] for Seragen up to $30 million. In return . . . [BU] would receive a substantial number of warrants to purchase Seragen common stock at attractive prices. If [BU] were to provide this guarantee it could avoid at least 3/4 of the dilution anticipated by the issuance of the new shares, thus preserving the value of its holdings. . . . [This] method of financing Seragen's development without further dilution is clearly in the interest of both [BU] and all other stockholders.[23]

At this time, BU was optimistic about Seragen's future, its potential for profitability, and its ability to raise capital in the market.[24] Thus, the Plaintiffs suggest that BU pursued the Loan Guarantee Transaction not only to protect its own controlling position but also to turn a tidy profit on its investment. But for the evidence of Seragen's inability to raise capital) and the viable time bar defense available to the Defendants, such optimism, combined with the self-centered concern about dilution of BU's interests, may have led the Court to conclude that the Loan Guarantee Transaction was a deliberate avoidance of the public market in

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[23] *Id.* at BU12337. The Seragen Oversight Committee adopted a resolution approving the Loan Guarantee Transaction, subject to clearance by the Attorney General.

[24] *See* Tr. 662-63. According to Condon, the Lilly announcement was good news and it authenticated Seragen's technology. Masters stated at the July 1994 Executive Committee meeting that "[m]ore importantly, what this Lilly agreement means to us, it validates our technology as far as the outside world is concerned. That's why we got so many, what I would call positive endorsements in terms of the media." JX 26 at BU12317. Masters also shared his optimism: "[w]e now have, on the strength of the Lilly announcement a number of bankers chasing us, and we have financial opportunities that we are going to review . . . . So, I think from our perspective, the Lilly deal really puts us in solid shape." *Id.* at BU12318. Even Defendants' own expert testified that following the Lilly announcement Seragen may have been able to raise more capital in the market. Tr. 1578. Seragen's management eventually took a less favorable view of the Lilly arrangement. *See infra* text accompanying note 113.

order to prevent dilution of BU's control of Seragen as well as to maintain BU's profit potential in Seragen.

Sometime in late 1994 or early 1995 Silber began soliciting high net worth individuals to participate in the Loan Guarantee financing.[25] Silber, by letter dated January 26, 1995, reported to Masters that Hirsch had made a commitment for a "loan guarantee of $5 million with the understanding that he would be given warrants for 500,000 shares of [Seragen common stock.]"[26] In a letter to Hirsch, dated January 27, 1995, Silber expressed his hope that the Attorney General would approve BU's participation in the Loan Guarantee.[27] He also told Hirsch, "I think we have squeezed virtually all the risk out of this enterprise except the risk associated with having the necessary financing to reach profitability."[28] Cassidy also agreed to participate and to provide a loan guarantee of $1 million for which he would receive warrants to purchase 116,600 shares of Seragen common stock.[29] Silber, despite sending enthusiastic letters to other potential investors, was unable to persuade anyone else to participate in the Loan Guarantee.[30]

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[25] It should be noted that the Loan Guarantee had not yet been approved by Seragen or the Attorney General and at this point Silber was just building his list of potential investors. Hirsch testified that Silber told him that Seragen would be a great investment. Tr. 161; 166-67.
[26] JX 30.
[27] JX 31.
[28] *Id.*
[29] JX 37.
[30] For example, Silber sent a letter dated January 28, 1995 to one potential investor in which he wrote, "The risks involved in providing a loan guarantee are exceedingly low, not only because

Initially, BU committed $11.8 million, Hirsch committed $7.5 million and Cassidy committed $1 million, for a total of $20.3 million.[31] However, sometime after March 28, 1995, Cassidy and Hirsch increased their commitments, bringing the total to $23.8 million.[32] Although Cassidy served on Seragen's Board, he did not involve himself in the negotiations or the decision-making process surrounding the Loan Guarantee, and, instead, it appears that Cassidy accepted the terms that Seragen offered.[33] Cassidy did testify, however, that he believed that Hirsch might have negotiated the terms of the Loan Guarantee.[34] The final Loan Guarantee terms were unanimously approved on March 6, 1995, by Seragen's Board, including its three disinterested members.[35]

The Loan Guarantee Transaction was not without its other procedural issues. For example, both BU and Seragen were represented in the transaction by the same law firm, a troubling fact which repeats itself. Silber stated that he did not believe "there was any conflict of interest because the interest of [BU] and the interest of

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of the strength of Seragen's patents, the soundness of its science and its extraordinary success in so many different clinical trials. The risk is also low because the patents and the technology by themselves can easily be sold to our partner Lilly . . . for a good deal more than $30 million." JX 32. *See also* JX 35.

[31] JX 44.

[32] *Id.*

[33] Tr. 734-35.

[34] *Id.* Tr. 737. After the terms of the Loan Guarantee were proposed, the three independent directors declined to meet separately. *Id.*

[35] JX 41. The other members of Seragen's Board were Silber, Cassidy, and Condon—all closely connected to BU.

the stockholders of Seragen was one and the same."[36] Apparently, the terms were negotiated by Hirsch, Hirsch's banking representatives, and Masters.[37] Hirsch, however, failed to recall having any involvement in the Loan Guarantee Transaction beyond simply implementing its terms.[38]

While Silber was trying to assemble a roster of investors for the potential Loan Guarantee Transaction, executives at Seragen, especially Masters, were continuing to look for alternate methods to raise essential additional capital, particularly through public financing. It appears, however, that no alternative public or favorable private financing was available to Seragen. For example, a February 7, 1995 letter from Morgan Stanley to Masters recited that "[i]t would seem there is not a lot of support by our partners to make investments in biotech companies."[39] Additionally, minutes from Seragen Executive Committee meetings and memoranda from Seragen executives to the Board indicate that, although Seragen was investigating the potential for a public equity sale and even a private placement, those opportunities were either unavailable or would have been less

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[36] Tr. 294. *See also* Tr. 487-91 (Condon testified that he could not recall that anything had been done to ensure the fairness of the transaction.).
[37] *Id.* Thomas Konatich ("Konatich"), Seragen's chief financial officer at the time, also participated. Tr. 488.
[38] *See* Tr. 158-67, 191.
[39] JX 34.

beneficial and more costly than the Loan Guarantee Transaction.[40] According to Masters, Seragen had sought every financing "vehicle known to man," yet it was unable to find a bank that was willing to back an effort to raise capital in the public markets.[41] Perceiving bankruptcy as the only other option, Masters, as well as Konatich, recommended the Loan Guarantee Transaction.[42] Even at the March 6, 1995 Seragen Board meeting, the very meeting at which the Loan Guarantee Transaction was approved, there was a discussion of alternatives to the Loan Guarantee in which the Board recognized that "[t]he Company's investment bankers have advised that [a private placement] would most likely require shares to be sold at a significant discount from current market price, in addition to the issuance of warrants" and that a public offering was unavailable as "all of the

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[40] Notes from the February 22, 1995 Executive Committee meeting state that the Loan Guarantee was the "best mechanism for raising capital" and that there were "three investment bankers willing to do an offering when the public market recovers and [Seragen's] share price is at an appropriate level," but none was willing to proceed at that time. JX 36. The named banks were Oppenheimer & Co., Dillon Read, and A.G. Edwards. Additionally, a March 3, 1995 memorandum from Konatich to Seragen's Board states that Konatich had a discussion with a banker at Goldman Sachs and that the banker believed that there was "no public market for biotechnology companies like Seragen" and that no public offering could approach the amount already secured in the Loan Guarantee. JX 39. Konatich reported that Goldman had "little interest in managing a private equity offering for Seragen" and that "[a]ny private placement would likely require a substantial discount from the current markets, or warrants, or a combination of both." *Id.* *See also* JX 39A (memorandum from Konatich to the Seragen Executive Committee in which he demonstrated that, based upon the then-current market for biotechnology companies, the current share price, and advice he had received from Goldman Sachs, the dilution from the Loan Guarantee would be 800,000 shares less than would have been required for a private placement or other equity sale).

[41] Dep. of George Masters at 25-27.

[42] *Id*. at 30; JX 39A.

investment bankers [that] the Company has spoken to do not believe a reasonable offering could be accomplished at this time."[43]

The Plaintiffs contend that, despite the written and testimonial record of Seragen's efforts to secure alternative financing, no such attempt was truly made and, if Seragen had chosen to do so, it could have found alternative financing on materially superior terms to the Loan Guarantee Transaction.[44] The Court is convinced that however self-serving the motivations may have been to enter into the Loan Guarantee Transaction, and however positively some may have viewed Seragen's prospects, Seragen did not in fact have other reasonable financing alternatives available to it.

E. *The Series B Transaction*

Not long after the loans secured through the Loan Guarantee Transaction infused $23.8 million into Seragen, Seragen encountered more serious financial problems. NASDAQ, the exchange on which Seragen's shares traded, classified the $23.8 million from the Loan Guarantee Transaction as debt instead of equity, and, on April 16, 1996, NASDAQ threatened to delist Seragen because Seragen

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[43] JX 41.

[44] The Plaintiffs have argued that the BU Defendants should have produced at trial the bankers who informed Seragen's management that no other form of financing was available or feasible. That is a fair argument, but it does not alter the Court's conclusion.

did not meet its net tangible asset requirement.[45] NASDAQ requested that Seragen submit its proposal for achieving compliance by April 30, 1996.[46] Immediately following the receipt of this letter, Masters and other members of the Seragen Board devised alternative strategies to avoid delisting. Two suggestions were (1) convince NASDAQ that the $23.8 million was in fact equity and, if that failed, (2) persuade the three loan guarantors to pay off the loans that they had guaranteed in exchange for an enhanced equity position in Seragen.[47] Additional financing options were also discussed, including contacting other high net worth individuals about potential investments in Seragen, BU's possible sale of a major asset with the proceeds going to Seragen, and a possible Regulation S offering through Scharff, Witchel & Co. ("Scharff, Witchel").[48] All attempts to convince NASDAQ that the $23.8 million loan obligation was equity quickly proved fruitless.[49]

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[45] JX 88. Condon testified that at the time of the Loan Guarantee that he was "not aware of the NASDAQ regulations with respect to their listing/delisting requirements" and that he did not incorporate this possibility into his analysis of the Loan Guarantee Transaction. Tr. 477. All parties agree that delisting would have had serious, negative consequences for Seragen and its shareholders.

[46] JX 88.

[47] *See* JX 89. *See also* Tr. 507, 522-24.

[48] JX 89.

[49] The Plaintiffs suggest that the Loan Guarantee Transaction created the delisting crisis and, thus, the purported immediate need for the Series B transaction. The Series B transaction (which would convert the debt of the Loan Guarantee Transaction into equity) was an available solution to the delisting challenge. It is, however, not fair to say that the crisis was created by the Loan Guarantee financing. The crisis, instead, was the result of the overall fiscal condition of Seragen—if it had not been spending its cash at such a prodigious rate, the balance sheet conditions that aroused NASDAQ's concerns would not have existed (or existed as soon).

On May 13, 1996, Seragen's Board unanimously authorized the Company to engage Scharff, Witchel to act as an agent to raise $4 million in a Regulation S offering.[50] According to Condon, all major decisions regarding this financing were influenced by the need for prompt action in light of the threatened NASDAQ delisting.[51] Through this transaction, Seragen issued its Series A Preferred stock ("Series A") to a third party investor.[52] Seragen expected a financing comprised of two separate $4 million tranches, one to be completed in June of 1996 (the Series A), and the second tranche to be completed by July or August of 1996.[53] The principal terms of the Series A were as follows: the Series A shares were convertible at the option of the holder, beginning in July 1996, into shares of Seragen's common stock at a conversion price equal to the lesser of: the closing bid price on NASDAQ on May 28, 1996; or 73% of the average closing bid prices for a specified period prior to the conversion date.[54] The Series A shares also provided for dividends payable in shares of Seragen's common stock.[55] Issuance of the Series A raised $4 million for Seragen (because of costs associated with the

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Accordingly, the "problem" addressed by the Series B financing was not the Loan Guarantee Transaction; it was more fundamental: Seragen's unfortunate financial circumstances.

[50] JX 97; JX 103.

[51] Tr. 530-31.

[52] Tr. 530.

[53] JX 102.

[54] JX 104; JX 109.

[55] JX 104. The final terms were established on May 28, 1996, and did not materially differ from the earlier terms of May 13, 1996. JX 109.

offering, Seragen netted $3.8 million).[56] However, this was not nearly enough additional capital to avert NASDAQ's potential delisting.

At the same time, there were serious ongoing discussions both within Seragen and by the Seragen Oversight Committee concerning what to do with the Loan Guarantee financing. By May 14, 1996, Seragen's counsel, who also represented BU, had sent to all three loan guarantors draft letters of intent describing a proposed restructuring of the loans.[57] On July 1, 1996, Seragen and the loan guarantors proceeded with the restructuring by issuing the Series B Preferred Stock ("Series B").[58] In exchange for the guarantors' assuming or satisfying Seragen's $23.8 million liability to the banks, the guarantors were issued 23,800 shares of the newly created Series B at a per share price of $1,000.[59] Effectively, for each $1 million of loan amount guaranteed and satisfied (or assumed), Seragen issued $1,000 in Series B shares with a liquidation preference, a floating dividend, equal initially to the interest rate payable on the guaranteed loan, and voting rights, not exercisable as a separate class, equal to 250,000 shares of common stock; the shares were redeemable at Seragen's option after May 1999 at

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[56] *Id.*
[57] JX 99. A second draft went out on May 22, 1996. JX 101.
[58] JX 118.
[59] JX 112; JX 118.

a redemption price equal to the purchase price per share plus accrued dividends.[60] The Series B shares were also convertible at the holders' option: each Series B share would convert into the number of shares of common stock equal to $1,000 divided by the average of the closing sale price of the common stock as reported by NASDAQ for the preceding ten consecutive trading days.[61] Furthermore, BU, Hirsch, and Cassidy received warrants to purchase Seragen common stock at $4.00 per share,[62] in addition to the warrants already received for the original Loan Guarantees.[63] No dividend was ever paid to the Series B shareholders and no Series B shares were ever converted into shares of common stock. This transaction ended, for a time, NASDAQ's threatened delisting because it provided sufficient equity to allow Seragen to meet NASDAQ's standards. However, Seragen received no "new" money; the transaction only served to reclassify the debt from the Loan Guarantee Transaction to equity. On the day the Series B restructuring was announced, Seragen common stock gained 22%.[64]

The Plaintiffs contend, and this Court concurs, that the Defendants failed to adopt or follow any procedures or safeguards that would have ensured that the

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[60] JX 101; 118.
[61] *Id.*
[62] Although valued by Seragen at $8.6 million, the warrants issued in connection with the Series B were "under water" when issued and never reached the surface. JX 262 at 122.
[63] In its 1996 annual report, Seragen reported the fair market value of the warrants issued in connection with the Loan Guarantee Transaction as $4,104,996. JX 84 at 005912.
[64] Tr. 976.

Series B transaction was entirely fair to Seragen's minority shareholders. Condon testified that, as with the Loan Guarantee Transaction, both BU and Seragen were represented by the same law firm.[65] No independent committee was formed to evaluate or to negotiate issuance of the Series B.[66] Condon also testified that the terms of the Series B issuance were set by Konatich.[67] However, Condon indicated that both Hirsch and Cassidy played some part in the Series B negotiations, and he recalled:

> [T]here was a discussion with respect to offering the same opportunity to other shareholders [to buy into the Series B], but what it came down to [was] that [Hirsch], who was not . . . a related party with Seragen, if you will, was the one who we would have to follow with respect to his structuring the deal. And it was sort of a take it or leave it kind of thing.[68]

Hirsch, however, had no recollection of any involvement with the Series B transaction except for having his shares converted.[69] In other words, Hirsch claims that he took no part in the Series B negotiations. Cassidy also testified that he did not negotiate the terms of the Series B.[70]

Silber's approach to the retention of counsel is symptomatic of the interrelationship of BU and Seragen. When asked if Seragen had retained

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[65] Tr. 502-04.
[66] *Id.*
[67] Tr. 658.
[68] Tr. 505.
[69] Tr. 168.
[70] Tr. 736.

independent legal counsel during the Series B negotiations, Silber stated that he believed that the lawyers "were independent counsel, because there is no separation of interest between Boston University and the [minority] stockholders of Seragen. Consequently, there was no conflict of interest, and that means that the counsel that represented both was independent counsel."[71] When Silber was asked what, if anything, was done to establish the fairness of the Series B, he responded that he thought:

> [T]hese nonparticipating shareholders of Seragen, including myself, were highly benefited by the fact that money came in that kept us from going bankrupt. . . . [T]he wonderful thing was that [BU] and the people it persuaded to join them in that loan guarantee saved the company and consequently saved the interest of every single stockholder who had invested in Seragen.[72]

F. *The Series C Transaction*

Because of Seragen's continuing high cash burn rate, the Series B did not permanently remedy the delisting problem, and NASDAQ, on August 21, 1996, again notified Seragen that, if it did not meet certain capital requirements, Seragen would be delisted.[73] On September 12, 1996, NASDAQ granted Seragen an extension on its potential delisting until November 15, 1996.[74] That extension was predicated upon Seragen's "us[ing] its best efforts to complete a private placement

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[71] Tr. 305.
[72] Tr. 306-07.
[73] JX 132; JX 133; Tr. 555-56.
[74] JX 141.

of $4 million of convertible preferred stock."[75] Seragen had represented that the private placement would be completed by September 30, 1996.[76] The preferred shares which Seragen had planned to issue, with Scharff, Witchel's assistance to the holder of the Series A shares, were to have a 34% conversion discount to market plus 250,000 ten-year common stock warrants per million dollars invested.[77]

According to Condon, the delisting crisis arose again at this time because the Series A holder which had a right of first refusal on the additional financing, wanted more generous terms in the second tranche than it had received under the Series A, and Seragen was forced to look elsewhere for the $4 million it had expected to receive from the Series A holder.[78] Scharff, Witchel, however, was unable to secure additional financing and, on September 24, 1996, as the September 30, 1996, deadline for completing the private placement approached without any other potential investors available, Cooley, also the Chairman of BU's Board of Trustees, approved an emergency $5 million cash investment in Seragen

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[75] *Id.*

[76] *Id.*; JX 142. It appears that before retaining Scharff, Witchel, Seragen had some contact with MeesPierson Inc. about raising funds but they could not agree on terms. *See* JX 140. It also appears that there were some discussions concerning a possible financing with RBC Dominion Securities. JX 132. *See also* JX 136. Additionally, there may have been some discussions concerning a possible sale of Seragen to another entity, and Seragen went so far as to hire Lehman Brothers to provide financial services with respect to the possible sale. JX 146; JX 154. However, for reasons that were not explained at trial, the sale did not occur.

[77] JX 142.

[78] Tr. 557, 561, 574; JX 127.

to avoid a NASDAQ delisting; these funds were delivered to Seragen the next business day, September 27.[79] Cooley, on his own, had concluded that Seragen needed an immediate cash infusion from BU, and he expected that the cash would "be replaced or returned to [BU] through a private placement by the end of the fiscal year on June 30, 1997."[80]

When Cooley decided to proceed with the transaction, he had not yet been presented with any terms of the Series C. Condon testified that the terms of the Series C were not determined until after the $5 million had been invested and that the documents memorializing the transaction were backdated.[81] However, Condon later recanted this testimony and stated that the deposit of the funds with Seragen and the issuance of the Series C were simultaneous.[82] For the Court's purposes, it is not so much when the terms of the Series C were determined but who negotiated them because, as with the Series B, insiders negotiated the terms of the Series C.

The Seragen Board voted to issue the Series C shares on September 27, 1996, and the shares were issued on September 30, 1996.[83] The terms of the Series C were that BU, for its $5 million investment would receive 5,000 shares; they were convertible at BU's discretion into Seragen common stock at a per share

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[79] JX 171 at 12417-21; Tr. 643.
[80] JX 171 at 12418. *See also* Tr. 575-77.
[81] Tr. 574-77.
[82] Tr. 641-42.
[83] JX 145; JX 146.

conversion price equal to the lesser of $2.75 or 73% of the average closing bid prices for the five-day period prior to the conversion date, up to a maximum of 3,360,625 shares; if not previously converted, all shares would be converted to common shares on March 31, 1998, except that those Series C shares which could not be converted because of the conversion maximum would be repurchased by Seragen for $1,150 per share; and Seragen had the right to redeem the shares upon the repayment of principal only.[84] However, NASDAQ questioned the requirement that Seragen repurchase the unconverted shares; it suggested that this provision might prevent treatment of the $5 million from the Series C as equity. On November 25, 1996, BU, to satisfy NASDAQ and to avoid delisting, irrevocably waived the right to have Seragen buy back any Series C shares that did not convert because of the conversion limit.[85]

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[84] JX 145; JX 262 at 127.

[85] JX 167. The waiver reads in part:

> Notwithstanding said paragraph 3.c.ii [the paragraph which allows the buyback] the undersigned [Condon on behalf of BU] hereby agrees to waive forever its right to exercise the option set forth in the last sentence of such paragraph to cause the Company to repurchase its Series C Shares in the event that it is unable to convert such shares as a result of the limitation set forth in the penultimate sentence of such paragraph (the "Repurchase Option"). The undersigned further agrees that it will not transfer its Series C Shares unless its transferee aggress to execute a waiver in the form of this letter and to cause any further transferee(s) to do the same.

See also Tr. 581-82. This waiver will take on added significance. Briefly, as of March 30, 1998, 1,060 Series C shares automatically converted into 3,360,625 shares of common stock, and although BU had waived the right to have Seragen repurchase its outstanding unconverted Series C shares, Seragen repurchased the remaining 3,940 Series C shares for an aggregate purchase price of $4,530,461. PT Stip. ¶ II(D)(3). Defendants assert that BU was entitled to

The procedures followed in issuing the Series C also raise fundamental questions about its fairness to the other holders of Seragen common stock. As with the Series B, Silber was unable to recall whether an independent investment advisor opined as to the fairness of the Series C transaction, or whether any steps were taken to insure the fairness of the Series C transaction.[86] Cassidy and Condon also testified that they were unaware of any steps taken to insure the fairness of the Series C.[87]

Although process to assure fairness was lacking, BU, nonetheless, took the Series C on less desirable terms than Seragen had privately negotiated at arms-length with the Series A holder through Scharff, Witchel.[88] The proposal to the Series A holder involved a 36% discount to market while the Series C shares received by BU, on a converted basis, only carried a 27% discount to market (or $2.75 per share, if less).[89]

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receive not only $4,530,461 as the $1,150 payment per outstanding unconverted share, but also $2,453,256.25 as the payment of $0.73 per share merger price of the Series C shares that did convert to common shares. BU, the Series C shareholder, accepted $5 million from the merger proceeds as total satisfaction for what it believed it was owed; however, it did so by ignoring the irrevocable waiver it signed.

[86] Tr. 311-12.

[87] Tr. 585, 715-16.

[88] *See* JX 272 at 13.

[89] *Id.*; JX 262 at 127.

G. *The Lack of Financing Alternatives*

As to the Series B, and to a lesser extent the Series C, the Plaintiffs have again argued that BU caused Seragen not to take advantage of other sources of funding and instead to engage in the Series B and Series C transactions, because it served to benefit BU and its affiliates. Both sides have presented experts on the question of financing available to Seragen in the summer and fall of 1996,[90] and for reasons set forth below, the Court concludes that there were no reasonable financing alternatives.[91] The Court relies upon Defendants' expert Katherine Kirk ("Kirk").[92]

In reaching her conclusion that Seragen was not financeable from 1995 through 1997, Kirk drew upon her significant and successful experience as a banker who had raised funds for many biotechnology companies.[93] The factors considered in determining whether a biotechnology company could raise capital

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[90] Expert testimony must be both relevant and reliable to be admitted, and the Court may look to testing, peer review, error rates and acceptability in the relevant scientific community when determining reliability. *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. 1999) (citing *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 589 (1993)).

[91] As the Lehman Brothers representative who advised Seragen about the merger with Ligand put it: "[t]he biotech industry is the single most capital-intensive industry in the world, which means that raising capital is the single biggest issue . . . ." Dep. of Frederick Frank ("Frank Dep.") at 19.

[92] Kirk is a former managing director of Hambrecht & Quist, an investment bank that specialized in high technology offerings, especially for biotechnology companies. *See* JX 272. She testified that she had raised capital for more than 100 companies during her tenure, and that more than fifteen of those had been biotechnology companies. She had met with Seragen in 1992 or 1993 and determined that it was not a potential client for Hambrecht & Quist because it did not have any near term prospects that she thought were encouraging. Tr. 1543.

[93] JX 272. *See also* Tr. 1535.

were "the company's technological capabilities, [its] ability to formulate and complete clinical trials; the projected time frame to revenues and profits; the size of the ultimate market [and the] intellectual property portfolio."[94] In addition, the product pipeline was "absolutely crucial" in determining whether a biotechnology company could raise capital because progress in clinical trials was "really the only litmus test that investors had that was tangible."[95]

After examining Seragen's product pipeline from the end of 1995, Kirk concluded that Seragen was foundering because, of Seragen's seven products in clinical trials, five had stalled with insignificant results or no response from patients, and one trial was halted due to serious side effects in a test subject.[96] Kirk drew similar conclusions concerning the clinical development outlook in 1996, finding that Seragen had dropped several trials, including those for large markets, and that Seragen's clinical drug program had "been severely diminished."[97]

Kirk also stated that, beyond the product pipeline, investors would typically look to the company's finances because it needed the resources to develop its products, and "if a company had less than one year's cash . . . they were vulnerable

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[94] Tr. 1514.
[95] Tr. 1514-15.
[96] Tr. 1521-24. *See also* JX 272 at 21. Kirk also noted that in the beginning of 1995 these trials had looked "very promising." Tr. 1522.
[97] Tr. 1524-28. According to Kirk, "from the time [Seragen] went public . . . there was waning interest in [Seragen]" because its product pipeline continued to deteriorate. Tr. 1615.

and on the rocks."[98] Examining Seragen's finances, Kirk ascertained that Seragen was running out of cash by the end of 1995; that it was in "dire straights," and that Seragen's auditors had issued going concern qualifications.[99] Additionally, Kirk concluded that the addressable markets for the drugs that Seragen was developing had drastically shrunk from initial projections, and that they were so small, in fact, that they could not be profitable enough to cause investors to have any interest in Seragen.[100] After evaluating Seragen's product development pipeline, Seragen's financial situation in 1995-96, and the ever-shrinking potential markets for Seragen's potential products, Kirk concluded that "Seragen at the time . . . was not financeable."[101]

Plaintiffs' expert, J. Mark Penny ("Penny"), opined that in the summer of 1996 Seragen did in fact have a number of alternative financing options available to it that would have been more beneficial than the Series B transaction.[102] Penny,

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[98] Tr. 1515-16.
[99] Tr. 1528.
[100] Tr. 1529-33. *See* also JX 272 at 22.
[101] Tr. 1535. Kirk testified that despite Ontak's (a drug that Seragen had developed) $25 million revenue during 2004 and projected 2005 revenue of $30 million, that type of revenue return would not be considered a success because "companies spend hundreds of millions of dollars and more than five years of time developing a product" and bankers look for potential profits in "excess of a billion dollars . . . not $30 million opportunities." Tr. 1536. The success (or failure) of a product six years after a merger is of limited, if any, value in assessing conduct before the merger. It does, however, undercut the Plaintiffs' concerns about (and any possible reliance on) post-merger developments.
[102] JX 271. Penny is a managing director of Hempstead & Company. Hempstead is a financial consulting company that specializes in valuation and related financial analysis. Penny, however, has never participated in raising funds for companies. Tr. 777.

however, does not have the relevant work experience and has not relied on generally accepted methods for determining whether Seragen could have obtained alternative financing in 1996. The Defendants, with some persuasive force, have argued that his testimony should be excluded. The Court, however, has determined that it is appropriate to deal with Penny's opinions on their merits instead of excluding him as an expert.

Penny's report asserts, in a disconcertingly generalized manner, that because the biotechnology market had product sales of $10.8 billion in 1996 (up from $9.3 billion in 1995), because the period from mid-1995 to mid-1996 was strong for biotechnology public offerings, and because other biotechnology firms were able to raise significant capital through public offerings, Seragen must have been able to raise significant capital and simply opted not to do so.[103] It is the Court's perception, as confirmed by Kirk, that simply because peer companies were able to raise funds does not signify that Seragen would have been able to raise funds because "[p]eople were going to look at Seragen. [T]hey weren't going to care if some other company was raising money."[104] What mattered was whether Seragen was a good investment opportunity, and Penny took no meaningful steps to evaluate Seragen in that light. Penny instead testified that Seragen's weak

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[103] JX 271. Kirk said it best: "I don't believe [Penny] draws a conclusion . . . at all. He just makes the statement that companies comparable were raising substantial funds." Tr. 1544.
[104] Tr. 1545.

financial condition at the beginning of 1996 was due to the Loan Guarantee Transaction, but Penny had no opinion on the effect the poor trial results may have had upon Seragen's ability to raise financing.[105] Penny's opinion on this matter, beyond simply being outside his field of expertise, is based on only the slightest bit of scientific/technical knowledge, and he provides no data, rationale, or research specific to Seragen in order to support his conclusion. For these reasons, the Court accords no weight to his opinion that Seragen had viable or practicable alternative financing available.

H. *New Management for Seragen*

Shortly after the Series C transaction, Seragen hired Prior as its new chief executive officer.[106] Before taking the position at Seragen on November 6, 1996, Prior, had made a name for himself in the biotechnology world as a "turn-around executive."[107] Seragen was Prior's fifth biotechnology company, and, before he was hired, Prior interviewed with Silber, Hirsch, Cassidy, and Nichols, among others.[108] In addition to a yearly salary of $350,000, Prior's contract included stock options equal to 8.5% of the then outstanding common stock of Seragen

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[105] Tr. 824-26.
[106] *See* JX 168.
[107] Tr. 1176.
[108] Tr. 168-69, 720-21, 1777-78.

measured on a fully diluted basis.[109] The options would vest in accordance with a schedule of 2.0833% on the date of his hiring and the same percentage on the first of each month thereafter so that all of the options would become vested before the fourth anniversary of his hiring.[110] However, in the event of a change of ownership, the options were to vest retroactively with 25% on the effective date and an additional 2.0833% on the first of each calendar month so that 100% shall be fully vested following the third anniversary of the effective date. Additionally, Prior was to receive 8.5% of the net proceeds resulting from a change of ownership during Prior's employment. This payment was known as the "Asset Value Realization Bonus."[111]

Prior described Seragen's condition upon his arrival as "dire," with less than three months of money left in the bank and no prospects of raising any more.[112] Specifically, Prior noted:

> Shortage of cash was [the] number one [problem]. The four plus million dollars due [under an existing license agreement] . . . was number two right up there. The constant selling, converting and selling of Series A . . . shares [was] depressing the stock price. The Lilly deal . . . was really terrible, had transfer prices basically below any projected potential manufacturing costs. And also the inability to

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[109] JX 168 at 3-5.
[110] *Id*. at 4-5.
[111] *Id.* at 11.
[112] Tr. 1178.

> do other corporate deals because of provisions in the Lilly agreement that prevented that . . . . [W]e had a serious problem there.[113]

On accepting a position with Seragen, Prior's plan was to reduce Seragen's cash burn rate by turning the company into a virtual biotechnology company through sale of the physical plant[114] and to raise additional capital by restructuring some of the preferred stock into common stock.[115]

I. *The Sale to Marathon*

Prior's first significant act as chief executive officer was the sale of Seragen's operating division to Marathon Biopharmaceuticals, LLC ("Marathon"), an entity created by BU expressly for the purposes of this sale, for $5 million. Silber presented the potential transaction to the Seragen Oversight Committee at its December 10, 1996 meeting and told the BU Board of Trustees that the proposed acquisition cost would be $5 million and that BU would be expected to enter into a services agreement under which BU would fund the facility's operating expenses for two years, up to a maximum of $9 million per year, or a total of $18 million.[116] Additionally, Seragen retained the right to re-purchase the facility for the original sale price, $5 million, plus any expenses incurred by BU and interest at ten

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[113] Tr. 1465-66.
[114] Tr. 1466-67. A virtual biotechnology company retains its research but outsources its production. Tr. 317-18.
[115] Tr. 721-24.
[116] JX 180 at BU12444-45; Tr. 1345.

percent.[117] The Seragen Oversight Committee approved the proposal, as did the Seragen Executive Committee,[118] and the transaction was consummated on February 19, 1997.[119] Prior expressed gratitude and felt "lucky" that BU was willing take the operating division because, in his opinion, the operating division was devouring cash at an incredible rate and nobody else was interested in purchasing the facility.[120] Prior testified that he relied on the advice of a representative of Lehman Brothers which had been working with Seragen; the investment banker expressed the view that the transaction was necessary because otherwise Seragen could not survive with the operating division's cash consumption.[121]

For reasons not clear in the record, almost ten months later, the Seragen Board submitted this transaction for a shareholder vote during its December 16, 1997 Annual Meeting of Shareholders and provided substantial information in its November 4, 1997 proxy statement regarding both the Marathon transaction and the financial status of Seragen at the time.[122] The shareholders approved the Marathon transaction, although, it is unclear what would have happened at this late

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[117] JX 211 at App. B, 10-11.
[118] *Id.*
[119] JX 183.
[120] Tr. 1466-71.
[121] Tr. 1467.
[122] JX 211 at 27-40.

date had the shareholders failed to approve the transaction.[123] As with the Loan Guarantee, the Series B, and the Series C, this was yet another transaction with BU on both sides, and prudent steps to assure the fairness of this transaction are not evident.

J. *The USSC Transaction*

Between the Marathon transaction and the shareholder approval of that transaction, Seragen entered into a technology licensing arrangement that has become known as the USSC transaction. This transaction involved a licensing agreement executed by Seragen and USSC on July 31, 1997, under which Seragen granted USSC certain rights related to Seragen's fusion protein technology in exchange for $5 million.[124] Hirsch was both a director and officer of USSC; Silber was also a director in USSC and held a stake in the company. Hirsch, however, claims not to have been involved in any aspect of the USSC licensing agreement.[125] The agreement conferred upon USSC the option to pay an additional $5 million to affirm the agreement within fifteen months of the initial date.[126] However, if USSC chose not to exercise that option, USSC would receive $5 million in Seragen common stock based on the lower of the average of the

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[123] Because the Court previously dismissed the disclosure claims concerning the Marathon proxy statement, there is no need to consider the adequacy of that proxy statement.
[124] JX 194; JX 203.
[125] Tr. 186.
[126] JX 194.

market price for the preceding ten days or the stock price on the day the agreement was signed.[127] Seragen, if optimistic results were achieved, also stood to receive as much as $40 million from USSC over the ensuing three to four years in potential milestone payments.[128]

K. *The Accord Agreement and the Merger*

With no end in sight to its financial problems, Seragen began to consider merger opportunities.[129] After months of discussion, an agreement in principle was reached between Seragen and Ligand for the acquisition by Ligand, on February 20, 1998, of Seragen and its operating assets (including Marathon) for aggregate consideration of approximately $75 million, with $70 million to be paid for Seragen and $5 million to be paid for the Marathon facility.[130] One of the conditions to the merger was that no more than ten percent of the common shares be presented for appraisal.

Although the Seragen Board believed that $75 million was a sufficient combined price for Seragen and Marathon, it remained necessary to allocate the merger proceeds among the various stakeholders of Seragen before definitive

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[127] *Id. See also* Tr. 367.
[128] JX 197.
[129] Despite the various efforts to raise capital, NASDAQ delisted Seragen on September 9, 1997. JX 262 at 117.
[130] JX 232; JX 262 at App. C (Agreement and Plan of Reorganization ("Merger Agreement")). The dispute before the Court is not a challenge to the fairness of the consideration paid by Ligand. The dispute is over its allocation among the various Seragen stakeholders.

agreement could be reached and a proxy statement concerning the merger could be distributed.[131] To determine how best to allocate the proceeds of the merger, the BU defendants, other Seragen and BU insiders, and Hirsch (or his representatives) negotiated primarily among and against themselves to establish the discounts that they were willing to take on their various investments while at the same time taking into consideration the least amount of proceeds that it would be necessary to divert to the common shareholders in order to avoid the exercise of appraisal rights for more than ten percent of the common shares.

Although less than clear, the better inference is that Prior and Robert Crane ("Crane"), Seragen's chief financial officer, began the effort to provide the numbers to the various inside investors in their attempt to come to a final agreement on the discounts each would take.[132] The agreement allocating the merger proceeds among the various stakeholders came to be known as the "Accord Agreement."[133] Despite the fact that the allocation was to be decided by many interested parties, the Seragen Board, once again, failed to adopt or to follow any procedures to assure that the division of the merger proceeds and the ensuing Accord Agreement and Merger Agreement were fair to Seragen's minority

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[131] *See* Tr. 1368-69.
[132] Tr. 1372-74, 1404-05.
[133] JX 262 at App. F (Accord and Satisfaction Agreement, May 11, 1998) ("Accord Agreement").

common shareholders.[134] The only disinterested member of the Board was Jacobs, and he was unavailable to perform any separate evaluation and negotiation.[135] Moreover, although Silber and Prior both testified that they relied on the opinions of a representative of Lehman Brothers for the fairness of the final allocation, no written opinion which stated that any such allocation was fair was ever presented.[136] Because the Court has not been provided with details of this opinion or the grounds for any such opinion, the Court is unable to rely on any such opinion in its entire fairness inquiry.

Describing the negotiations, Prior testified, "[w]e took the amount of money we thought we would have in total proceeds. We tried to figure out where we thought there were stakeholders who would be willing to take less in consideration

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[134] *See* Tr. 1449-50.

[135] The only explanation for Jacobs' absence was that he "was unavailable time-wise to do any kind of separate valuation." Tr. 1450.

[136] Indeed, Lehman Brothers' fairness opinion expressly disclaims any opinion regarding the fairness of the allocation. *See* JX 262 at App. A; *infra* text accompanying notes 268-70. The minutes of the Seragen board meeting, held on May 1, 1998, to approve the merger (JX 258), recite that Lehman Brothers reported that the merger consideration to the common shareholders (then expected to be $0.73 per share) "would be fair, from a financial point of view, to holders of Company Common Stock." Lehman Brothers' fairness opinion contains the same statement. Although the minutes indicate that the Board was informed of the basis for this opinion, they do not include the reasoning. Thus, it is unclear whether Lehman Brothers had considered the various potential derivative claims, the question about the payments to BU for its Series C shares, or the new, and increased, price for the Marathon facility. The better inference is that no detailed assessment of the validity of those transactions was undertaken. *See* Frank Dep. at 158-59. Lehman Brothers did consider the typical financial data, trading history of Seragen's common stock, and operating information. JX 262 at 49. The "fair, from a financial point of view" conclusion appears to be premised upon understanding (1) that the consideration paid by Ligand for the enterprise was fair and (2) that the preferred stockholders took a substantial discount to the face value of their claims and the common shareholders received a substantial premium to market. Frank Dep. at 144-45.

of others doing the same and where there were ones that wouldn't."[137] Silber recalled that Prior:

> [n]egotiated [the allocations] and negotiated the steepest haircut that he could arrange from all the people that had to have their interest converted from preferred to common and with regard to warrants and with regard to their rights to certain intellectual properties, all of which had to be forfeited. And I think that [Prior] was the one who negotiated this and negotiated it so severely that I think that obviously the interest of the average stockholders and the minority stockholders was certainly clearly represented in that negotiation.[138]

Silber also stated that this was all one transaction; that nobody separately represented BU, Seragen, or Marathon in these negotiations, and that BU accepted a discount because it was the only alternative to the possible loss of its entire investment.[139] Prior testified that Ligand wanted the stakeholders in Seragen, including the common shareholders, to be satisfied with the deal, and even though the $75 million in merger consideration did not change from February through the close of the merger in August, the transaction remained cloaked in uncertainty until the final allocations were agreed upon by the interested parties.[140] Prior characterized the allocation negotiations as:

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[137] Tr. 1374.
[138] Tr. 347.
[139] *Id. See also* Tr. 352-53.
[140] Tr. 1396-99. The participation (or lack of participation) of the common shareholders in the allocation process is clear from the minutes of Seragen's board meeting on May 1, 1998 (JX 258): "Mr. Prior briefed the Board on the proposed agreement among the Company's preferred stockholders, creditors and obligees regarding the allocation of proceeds to be paid by Ligand in connection with the Merger." Absent is any reference to the common shareholders.

> an overall negotiation . . . [in which] we were just trying to get a fair allocation for the commons. We were trying to get rid of the creditors . . . . I remember trying to fight for total amounts; but where individual parties wanted divvied up amongst their pieces, we were as accommodating as we could be to get the darn deal done.[141]

Lastly, Prior "believed that if the commons got anything, it was fair."[142]

The principal participants in the process of negotiating the Accord Agreement recognized that there was a significant risk of litigation by unhappy minority common shareholders. They were aware of the history of related party transactions between Seragen and BU and its affiliates. They also appreciated the importance of obtaining a premium for the common shareholders, especially because of the potentially adverse consequences for the merger if "too many" shares were presented for appraisal. In short, it is unlikely that the filing of this action came as much of a surprise to the defendant fiduciaries.[143]

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[141] Tr. 1413. It can be assumed that Prior meant that various parties were invested in more than one way in Seragen; thus, they were willing to take discounts on certain investments in return for payment on others. For example, Prior stated that Hirsch was willing to take a discount on his Series B shares as long as USSC received the full $5 million from the license agreement. *See* Tr. 1414-15. Hirsch has no recollection of this.

[142] Tr. 1463. If the preferred shareholders and other creditors had refused to accept less than their priority claims suggested that they were owed, there would have been nothing left for the common shareholders. However, if the common shareholders had received nothing, they likely would have either voted against the merger (which, as such, might not have mattered because of BU's voting control) or sought appraisal, at which point the merger very well may have failed (because of the ten percent cap on appraisal demands), and all parties would have lost their investments (except for what might have been salvaged in bankruptcy).

[143] The Plaintiffs rely upon a February 25, 1998 memorandum (JX 234), purportedly authored by Robert Crane, Seragen's chief financial officer, that was directed to, among others, Cassidy, Hirsch, Prior, Silber and counsel for BU. *See* Pls.' Opening Post-Trial Br. at 11, referring to JX 232, but quoting from JX 234. That memorandum offered several interesting observations:

Without the benefit of an independent advisor or even a dedicated advocate, the negotiations evolved into a process in which the principal concern was the division of the merger pie in such a way as to appease the minority common shareholders while at the same time ensuring transfer of the greatest amount of merger consideration to those invested in the various preferred shares and other credit arrangements. While Prior may have done his best, and the Court concludes that Prior did what he could under the difficult conditions, it is clear that he was too concerned with completing the merger to commit himself to representing the interests of the minority common shareholders. Additionally, Prior himself was

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> The total proceeds of $70 million [the $5 million for Marathon had been omitted] are not sufficient to permit all shareholders to be paid in full and at the same time allow for the common shareholders to receive a premium to the market price. Company counsel strongly advises that Seragen pay a substantial premium to the current market price to the common shareholders, since Seragen will be unable to have an independent Committee of the Board of Directors approve the transaction and since there are numerous related party transactions between Seragen, [BU] and [USSC]. . . . In order to assure that at least $1.00 per share is allocated to the common stock, a number of concessions, including a discount of approximately 22% would be required of the [Series B], the [Series C], the investment bankers and management.

This document, thus, appears to support several key aspects of the Plaintiffs' case: (1) suggesting that the price for the Marathon facility at that point was $5 million; (2) recognizing the conflicts among members of Seragen's Board and the minority common shareholders; and (3) acknowledging the related party transactions. There is one problem: the exhibit was never admitted into evidence. No witness remembered it or identified it. Crane did not testify and there are no deposition designations that support the exhibit's admissibility. It is the sponsoring party's responsibility to provide the necessary foundation for admission of an exhibit. Admittedly, cases of this nature usually involve a large number of exhibits; in this case, that number approached 300. There may be a tendency to assume that there will be no difficulty in introducing file documents into the record, especially because of the nature of a bench trial. It is difficult to accept that the Plaintiffs were unable to succeed in their efforts to introduce this exhibit, but they left the Court with little choice.

faced with accepting discounts on payments that were owed to him under his employment contract (the Asset Value Realization Bonus) and, therefore, it cannot be said that Prior did not have a personal interest in keeping the amount allocated to the minority shareholders low in order to avoid increased reductions in the sums owed to him. To this end, neither Prior nor anyone else on Seragen's Board ever questioned the value of the potential derivative claims held by Seragen concerning the Series B, the Series C, the Marathon transaction or the USSC transaction, and they therefore never took the potential derivative claims into account when determining or negotiating what the common shareholders should receive.[144]

Although the total consideration offered by Ligand did not change from late February through the closing of the merger in August 1998, the allocation to the purchase of Marathon did increase from $5 million to $8 million.[145] At some point before May 1, 1998 it was decided that Marathon, a BU entity, would receive $8 million instead of $5 million, thereby reducing the amount to be allocated among Seragen's various stakeholders to $67 million.[146] When asked to explain how the number allocated for the purchase of Marathon went from $5 million to $8 million, Silber, stated that, although he did not know for certain, it was likely

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[144] Tr. 1408-09.
[145] *Compare* JX 232 at BU00661 *with* JX 262 at D-12. *See also* Tr. 1400.
[146] Tr. 1398, 1400, 1421; JX 262 at 50. It appears that the consideration to be paid to the common shareholders started out at approximately $1.00 per share, had at least one intermediate point of $0.83 per share (JX 254), and settled at $0.73 per share.

because BU had been absorbing Marathon's operating losses and that it had continued to do so since the initial merger figures were established in February.[147] On this same point, Prior speculated that the increase from $5 million to $8 million was the result of strong negotiating by BU's counsel who believed that because Marathon had absorbed so many millions of dollars in operating losses that Marathon was owed more than $5 million.[148] Prior acknowledged that the losses incurred by Marathon far exceeded the $3 million dollar increase in the cost of Marathon.[149] Although Prior and Silber may have believed that an additional $3 million was owed to BU from Seragen because of Marathon's operating costs, the defendants have provided no persuasive evidence of this, and they have not demonstrated why BU was entitled to payments in addition to proceeds it otherwise received for the cost of the Marathon operation.[150]

The merger proxy statement, which was distributed on or about July 14, 1998, informed the shareholders that:

> Pursuant to the Accord Agreement, the Compromising Claimants [BU, BU related entities, including BU Holding and Marathon, USSC, Hirsch, . . . Cassidy, Mrs. Cassidy, Prior, Nichols, and others] agreed, in order to facilitate the Merger, to accept the right to receive Merger Consideration in satisfaction of certain of their claims against Seragen. The amount of Merger Consideration allocated to

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[147] Tr. 351-52.
[148] Tr. 1400-02.
[149] Tr. 1402.
[150] *See infra* note 256 and accompanying text.

> [Hirsch, . . . Cassidy, Prior, Nichols, and others] and, to the extent of its claims arising from its holdings of (i) Seragen Series B Preferred Stock and (ii) those shares of Seragen Common Stock issued, and those debt obligations of Seragen owed, to it in connection with the conversion of the Seragen Series C Preferred Stock, BU Holding . . . under the terms of the Merger Agreement constitutes what Seragen management expects to be a discount from 25% to 40% (with the exact amount of the discount depending on the date of the Closing and the amount of Seragen's payables as of the Closing) on amounts otherwise owed by Seragen to such persons in respect of their relevant claims.[151]

The shareholders were advised that $67 million of the merger proceeds would be split among Seragen's shareholders and creditors, and $8 million would be paid to purchase the Marathon facility.[152] The Merger Proxy also informed the shareholders that their portion of the merger proceeds would be paid in part with Ligand stock: each common share of Seragen would exchange into 0.035736 shares of Ligand. When the Proxy was issued, Ligand was trading at $13.9875 per share.[153] Accordingly, each share of common would convert into $0.49999, or $0.50 worth of Ligand stock. Additionally, holders of Seragen common stock might also be entitled to "Milestone Consideration" of $0.23 per share.[154] Effectively, the shareholders expected, under the Merger Agreement as described

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[151] JX 262 at 67.

[152] *Id*. at 11, 77-80, D-12. The $67 million in merger proceeds included $30 million at closing and up to $37 million in "Milestone Consideration." *Id.* at 11.

[153] *Id* at 2.

[154] *Id*. at 79. At Ligand's option, the "Milestone Consideration" was payable in stock or cash.

in the Proxy Statement, to receive $0.73 per share.[155] The shareholders, however, did not receive $0.73 per share because they bore the risk that the price of Ligand stock might decrease, which it did. By the time the merger closed, Ligand shares had declined to $9.6875 per share,[156] and Seragen's common shareholders received only $0.35 per share, plus the $0.23 per share milestone payment, for a total of roughly $0.58 per share.[157] The Merger Proxy, however, did not disclose to the shareholders any of the negotiations that took place in arriving at the allocation.[158] Ten percent of the common shares were not submitted for appraisal, and the merger was approved and consummated by Ligand on August 12, 1998, a few days after the Plaintiffs had filed this action.

II. CONTENTIONS

The Plaintiffs contend that the BU Defendants breached their fiduciary duties to Seragen's common shareholders by approving the Series B transaction, the Series C transaction, and the Accord Agreement. The Series B and Series C transactions precluded, according to the Plaintiffs, access to capital markets, thus causing the financial stress which resulted in the choice of (i) a merger for less than

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[155] *Id.* at 77-79. This allocated to the common shareholders a substantial premium above Seragen's trading price, less than $0.50 per share, when the merger was announced. JX 274 at 178; JX 262 at 50.

[156] JX 273 at Ex. 6.

[157] *Id.*

[158] The Plaintiffs challenge the sufficiency of the proxy statement. Those claims, and additional factual background, are reviewed in Part III(E), *infra*.

what Seragen should have been worth or (ii) Seragen's demise. In short, they argue that the Defendants bear the burden, but did not satisfy the burden, of proving that the initial transactions were entirely fair to the minority shareholders. Similarly, they contend that the Defendants failed to meet that burden with respect to the Accord Agreement and the allocation of merger proceeds. Not only was there no properly prepared and supported advocate for the common shareholders at the bargaining table, but also no one used the potential derivative claims springing from not only the Series B and Series C transactions, but also the USSC transaction and the Marathon transaction, as bargaining chips. In addition, the process allowed (1) BU to avoid its waiver of its right to a minimum price for its remaining Series C shares and (2) BU and Marathon to obtain a premium on the sale of the Marathon facility to Ligand for $8 million, instead of the initially agreed upon amount of $5 million. Because of all this, the Plaintiffs contend that the various transactions were not fair to the common shareholder as a matter of price and process. Moreover, the Plaintiffs insist that the disclosures made in the merger proxy statement were insufficient to inform the shareholders in their decision to vote for the merger or to exercise their appraisal rights. Finally, the Plaintiffs argue that Hirsch aided and abetted the faithless fiduciaries in the transactions in which he was interested—the Series B transaction and the Accord Agreement—and in the transactions involving USSC's interests.

The BU Defendants maintain that the Series B and Series C transactions were not only entirely fair to Seragen and its minority shareholders but also that those transactions were critical to the survival of Seragen. Also, they argue that the allocation process was fair to the minority shareholders. In addition, they assert that Seragen's minority shareholders were provided with material and accurate information to which they were entitled. Finally, Hirsch, reiterating that he owed no fiduciary duties to Seragen and its stockholders, maintains that he did not assist the BU Defendants in any breach of fiduciary duty but, instead, was acting in his self-interest (or in the interest of USSC) as he was entitled to do.

III. ANALYSIS

A. *The Analytical Context*

Ligand's offer of an effective $75 million to acquire Seragen (including the Marathon operating facility) and to resolve all of the claims and interests of Seragen's stakeholders created a framework that fed the conflict among the stakeholders and placed even greater pressures on a conflicted board that was ill-suited to meet its responsibility to protect the interests of Seragen's minority stockholders. Three board members—Silber, Condon, and Cassidy—were employees of, or affiliated with, BU. Prior and Nichols had their own employment-related benefits to protect. Of the board members, only Jacobs could have represented the minority common shareholders unburdened by significant

conflicts, but he was not available for the job. Prior, and his management team, may well have done the best job that they could have done under the circumstances, but Prior's principal function was to hold the Ligand transaction together—otherwise, bankruptcy was the likely end game—but that may have necessarily involved sacrificing the interests of the minority shareholders to placate the other stakeholders. It is within this troubled corporate governance context that this case must be resolved.[159]

B. *The Distinction Between Direct and Derivative Claims*

Before trial, the Court denied, in part, the Defendants' motion for summary judgment as to the Plaintiffs' direct claims with respect to the Series B and Series C transactions because there were sufficient questions of material fact

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[159] Prior identified Seragen's corporate governance shortcomings when he was hired and insisted upon increasing the number of independent directors. Tr. 1186-92. He was unable to achieve that goal for two reasons. First, Seragen's other problems were immediate—in a corporate survival sense—and he never had the opportunity to facilitate the necessary changes within the time available to him. Second, because of Seragen's financial predicament, attracting qualified directors was a daunting task. Tr. 1192-94. In short, Prior acted responsibly under difficult conditions, but he was not in a position where his allegiance to the common shareholders—at least in a structural sense—was free from doubt. He may also be right in his view that "if the commons got anything [from their investment in Seragen], it was fair." Tr. 1463. After all, if BU (and its affiliates) had not come forward with essential financial assistance through the Loan Guarantee (which led to the Series B transaction) and the Series C financing, or Marathon's purchase of the operating facility that was the major cause of Seragen's debilitating cash burn rate, Seragen likely would have been forced to pursue the bankruptcy option long before any transaction with Ligand (or anyone else) could have been arranged. That BU's largesse, which, of course, was not free from the self-interested motivation to protect its large investment in Seragen, may have been critical to Seragen's continued survival and that Seragen remained in difficult financial circumstances did not relieve the corporate fiduciaries of their obligations to the minority shareholders.

concerning their characterization as either direct or derivative.[160] However, with the benefit of evidence presented at trial, it is appropriate to revisit the question of whether the Plaintiffs' challenges to the Series B and Series C transactions present derivative, and not direct, claims.

The question of whether a claim is to be characterized as direct or derivative is a fundamental one because a derivative claim may only be brought by a shareholder who continues to hold the shares of the corporation on whose behalf the shareholder is suing.[161] The determination of whether a claim is direct or derivative is governed by the analysis set forth in *Tooley*:

> [A] court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.[162]

In essence, the Court must determine whether it was the individual shareholder or the corporation that was allegedly harmed and which person would benefit from

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[160] At that time, the Plaintiffs were asserting two sets of direct claims based on the Series B and Series C Transactions. First, they contended that those transactions frustrated Seragen's ability to raise additional capital and, thus, caused its precipitous decline. That claim was dismissed as derivative. Second, they contended that their interests in Seragen were unfairly diluted. That claim survived the Defendants' summary judgment motion.

[161] *See* Ct. Ch. R. 23.1. *See also Tooley v. Donaldson, Lufkin & Jenrette, Inc.,* 845 A.2d 1031 (Del. 2004); *Gentile v. Rossette*, 2005 WL 2810683 (Del. Ch. Oct. 20, 2005).

[162] *Tooley*, 845 A.2d at 1039. *See also Agostino v. Hicks*, 845 A.2d 1110 (Del. Ch. 2004).

any potential recovery.[163] If a claim is found to be derivative and not direct, that claim may not be brought by the former corporate shareholders (who lost that status by way of merger) because those claims then belong to the acquiring company, and only that company may seek to enforce those claims.[164]

C. *Whether the Series B and Series C Claims are Direct or Derivative in Nature*

The Plaintiffs claim that issuance of the Series B and Series C shares resulted from self-interested transactions in which both the Director Defendants and BU breached their fiduciary duty of loyalty. According to the Plaintiffs, the Series B and Series C transactions resulted in both equity dilution (because the value of the common shares was decreased as a direct result of the issuance of the Series B and C shares which reduced their proportionate share of the venture) and voting power dilution (because their voting power was diminished (or threatened) by the additional shares which were, or could have been, issued).

The Court now turns to the question of whether the Series B and Series C duty of loyalty claims presented by Plaintiffs are direct claims, in which case the

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[163] The Court in *Tooley* provided the additional guidance that the "issue must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley*, 845 A.2d at 1033 (emphasis in original). *See also In re J.P. Morgan Chase & Co. S'holders Litig.*, 2005 WL 1076069, *5 (Del. Ch. Apr. 29, 2005), *aff'd*, 2006 WL 585606 (Del. Mar. 8, 2006).

[164] *Lewis v. Ward*, 852 A.2d 896, 900-01 (Del. 2004). *See also Schreiber v. Carney*, 447 A.2d 17, 21 (Del. Ch. 1982).

Plaintiffs would have standing, or are derivative claims, in which case, because they are no longer Seragen shareholders, the Plaintiffs would lack standing. Because the Plaintiffs have identified two distinct harms, equity dilution and voting power dilution, the claims will be considered separately.

1. Equity Dilution

The Plaintiffs complain that the Series B and the Series C transactions resulted in equity dilution which reduced the value of their common shares and their proportionate investment in Seragen. However, as explained below, such a claim is derivative in nature, not direct, and therefore the Plaintiffs lack standing to bring these claims. Our cases have held, both before and after *Tooley*, that equity dilution does not generally constitute a direct harm, but, instead, a derivative one. For example, in the pre-*Tooley* case of *Kramer*,[165] the plaintiff contended that corporate waste worked a special and direct injury to the common shareholders' rights, an injury distinct from the harm to the corporation, because it affected the common shareholders' merger consideration.[166] The Court concluded that mismanagement, which has the effect of depressing the value of stock, constitutes a wrong to the corporation as an entity, and, thus, "where a plaintiff shareholder claims that the value of his stock will deteriorate and that the value of his

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[165] *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348 (Del. 1998).
[166] *Id*. at 350 n.2.

proportionate share of the stock will be decreased as a result of alleged director mismanagement, his cause of action is derivative in nature."[167]

In the post-*Tooley* era, this approach was employed in *In re J.P. Morgan Chase & Co. Shareholder Litigation*.[168] The plaintiffs in that case, shareholders of J.P. Morgan Chase & Co. ("JPMC"), alleged that the JPMC stock issued to acquire Bank One—at a premium of 14% above the market price of Bank One stock—constituted overpayment and diluted the plaintiffs' collective ownership in the surviving corporation.[169] The Court, concluding that the plaintiffs' dilution claims were derivative, explained that "[a]ny alleged dilution was a harm suffered by all pre-merger JPMC stockholders and, consequently, JPMC itself. Thus, the harm alleged in the complaint cannot give rise to a direct claim."[170]

Similarly, in *Gatz v. Ponsoldt*,[171] this Court addressed a dilution claim of disgruntled shareholders:

> Mere claims of dilution, without more, cannot convert a claim, traditionally understood as derivative, into a direct one. Clearly, a corporation is free to enter into (in good faith) numerous transactions, all of which may result legitimately in the dilution of the public float. Such dilution is a natural and necessary consequence of investing in a corporation. . . . The only cognizable injuries, if any, would be a failure to act in the best interest of [the corporation]. . . . These

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[167] *Id.* at 353 (citing *Elster v. Am. Airlines, Inc.,* 100 A.2d 219, 222 (Del. Ch. 1953)).
[168] 2005 WL 1076069, at *5 - *7.
[169] *Id.* at *7.
[170] *Id.* at *6.
[171] 2004 WL 3029868 (Del. Ch. Nov. 5, 2004).

> alleged harms were inflicted upon the corporation itself and could be asserted only by or on behalf of the corporation.[172]

In the present case, the Plaintiffs have alleged equity dilution in a similar fashion. They assert that, because of a breach of the duty of loyalty by the Director Defendants and BU, the Series B and Series C shares were issued for far less consideration than they were actually worth, thereby diluting the equity value of the common shares. Under *Tooley*, the harm alleged by the Plaintiffs was suffered by the corporation because it was the corporation in the Plaintiffs' scenario that issued its stock too cheaply. Any equity dilution that Plaintiffs may have suffered is simply a byproduct of the harm to the corporation. Therefore, any recovery would have gone to the corporation, because the Plaintiffs are unable to demonstrate any harm to themselves, as shareholders, without also demonstrating harm to the Seragen. For these reasons, the Plaintiffs lack standing to assert claims of equity dilution concerning the actions of the defendants in the issuance of the Series B and Series C shares.

2. Voting Power Dilution

Apart from the alleged equity dilution stemming from the Series B and Series C transactions, Plaintiffs have also contended that their voting power was diluted by issuance of the Series B and Series C shares. Voting power dilution

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[172] *Id*. at *7 (internal citations omitted).

may constitute a direct claim, because it can directly harm the shareholders without affecting the corporation, and any remedy for the harm suffered under those circumstances would benefit the shareholders.[173]

The Plaintiffs allege that issuance of the Series B and Series C shares allowed BU and its affiliates to solidify their control over Seragen at the expense of the minority shareholders. The Court, accordingly, will address the Plaintiffs' voting power dilution claim as a direct claim.[174]

D. *The Fiduciary Duty of Loyalty and the Entire Fairness Standard*

The duty of loyalty requires that a corporate fiduciary act with "undivided and unselfish loyalty to the corporation" and that "there shall be no conflict between duty and self-interest."[175] "Classic examples" implicating the duty of loyalty are when "a director [appears] on both sides of a transaction or [receives] a personal benefit . . . not received by the shareholders, generally."[176] If corporate fiduciaries stand on both sides of a challenged transaction, an instance where the directors' loyalty has been called into question, the burden shifts to the fiduciaries to demonstrate the "entire fairness" of the transaction. The duty of loyalty also

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[173] *J.P. Morgan*, 2005 WL 1076069, at *6.
[174] *See infra* Part III(F).
[175] *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) (citing *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939)).
[176] *Cede & Co. v. Technicolor, Inc.,* 634 A.2d 345, 362 (Del. 1993), *modified*, 636 A.2d 956 (Del. 1994) ("*Technicolor II*") (citing *Nixon v. Blackwell*, 626 A.2d 1366, 1375 (Del. 1993)).

requires that a "controlling" shareholder not act, or cause its representatives to act, in such a manner as to deal unfairly with the minority shareholders.[177]

The entire fairness inquiry has two basic aspects: (1) fair dealing or fair process and (2) fair price.[178] The inquiry into fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained."[179] The fair price inquiry "relates to the economic and financial considerations of the proposed [transaction], including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of the company's stock."[180]

Within an entire fairness inquiry, if the burden is on the corporate fiduciary, she must "establish to the court's satisfaction that the transaction was the product of both fair dealing and fair price."[181] Although evaluation of two components is necessary to determine entire fairness, "the test for fairness is not a bifurcated one

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[177] *See Ivanhoe Partners v. Newmont Mining Corp.,* 535 A.2d 1334, 1344 (Del. 1987); *Weinberger v. UOP, Inc.*, 409 A.2d 1262, 1265 (Del Ch. 1979).
[178] *Weinberger*, 457 A.2d at 711. *See Carlson v. Hallinan*, 2006 WL 771722, at *12 - *13 (Del. Ch. Mar. 21, 2006).
[179] *Weinberger*, 409 A.2d at 711. *See also Kahn v. Tremont Corp.,* 694 A.2d 422, 430-31 (Del. 1997); *Emerald Partners v. Berlin*, 2003 WL 21003437, *22 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003); *Solar Cells, Inc. v. True N. Partners, LLC*, 2002 WL 749163, at *5 (Del. Ch. Apr. 25, 2002).
[180] *Weinberger,* 457 A.2d at 711. *See also Emerald Partners*, 2003 WL 21003437, at *22.
[181] *Cinerama, Inc. v. Technicolor, Inc.,* 663 A.2d 1156, 1179 (Del. 1995) ("*Technicolor III*") (citations omitted; emphasis omitted). *See also Technicolor II*, 634 A.2d at 361.

as between fair dealing and price; [instead, all] aspects of the issue must be examined as a whole since the question is one of entire fairness."[182] It may be analytically convenient to address price and process as separate concepts, but the ultimate issue, one must remember, is the entire fairness of the overall transaction, assessed by way of a thorough inquiry into the means by which the fiduciaries performed (or failed to perform) their duties.[183]

Six directors served on Seragen's Board at the time of the merger with Ligand.[184] Silber and Condon were high-ranking employees and trustees of BU. BU was a participant in the Series B, Series C, and the Marathon transactions. It was a major player in negotiating the Accord Agreement. Cassidy was closely affiliated with BU—as an adviser and later as a trustee—and he personally participated in the Series B transaction and the Accord Agreement. Accordingly, these three directors were deeply conflicted with respect to the Accord Agreement and all other transactions at issue involving BU and their personal interests. Not only did Silber and Cassidy have significant personal stakes in the outcome of the Accord Agreement negotiations, but Silber, Cassidy and Condon were also so

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[182] *Weinberger,* 457 A.2d at 711.
[183] *See Emerald Partners v. Berlin*, 787 A.2d 85, 97 (Del. 2001) ("To demonstrate entire fairness, the board must present evidence of the cumulative manner by which it discharged *all* of its fiduciary duties. An entire fairness analysis then requires the Court of Chancery 'to consider carefully how the board of directors discharged all of its fiduciary duties with regard to each aspect of the non-bifurcated components of entire fairness: fair dealing and fair price.'") (quoting *Technicolor III*, 663 A.2d at 1163, 1172) (emphasis in original).
[184] These same directors also constituted the board during the Marathon and USSC transactions.

closely linked to BU that no one could expect them to act without being unduly concerned with the interests of BU.

Prior and Nichols, were likely free of domination by BU; nonetheless, as a consequence of their personal interest in the negotiation of the Accord Agreement, in light of its potential impact on their rights under their employment agreements, they also were self-interested.

Thus, there was not a majority of the Seragen board free of control by BU, and five out of the six directors (either personally or because of their relationships with BU) had a substantial stake in the outcome of the negotiation of the Accord Agreement. With this corporate governance structure, the defendant fiduciaries must demonstrate entire fairness of the Accord Agreement.[185]

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[185] The consequences of this conclusion are, of course, significant. It must be recognized that BU and those working for it were responsible for Seragen's infirm corporate governance structure. Moreover, with respect to the Accord Agreement, the Court has not been called upon to evaluate the sufficiency of the process implemented in an effort to protect the minority shareholders; instead, there was no process undertaken by an independent person to protect the minority shareholders. It is, of course, possible that an independent effort would have yielded no more for the minority shareholders, but that is an outcome that the fiduciary defendants have not demonstrated to be likely; indeed, they have not seriously attempted to do so.

The Plaintiffs' claims against BU are premised upon its status as a controlling shareholder, its principal/agent relationship with Silber and Condon, and its affiliation with Cassidy. "A shareholder that owns a majority interest in a corporation, or exercises actual control over its business affairs, occupies the status of a fiduciary to the corporation and its minority shareholders." *In re MAXXAM, Inc.*, 659 A.2d 760, 771 (Del. Ch. 1995) (citing *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113 (Del. 1994)). Thus, a majority (or controlling) stockholder has a duty of loyalty to the company and its minority stockholders, and "where a shareholder owing such fiduciary duties stands on both sides of a challenged transaction, it will be required to demonstrate that the transaction was entirely fair to the corporation." *In re MAXXAM*, 659 A.2d at 771 (citing *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 937 (Del. 1985)).

1. Should Directors Value Derivative Claims When Allocating Merger Proceeds in this Context, and, If So, How?

a. *The Appropriate Standard*

Derivative claims are, of course, assets of the corporation. Because of the manner in which Ligand structured its acquisition of Seragen, the Seragen board was required to allocate the proceeds to be paid by Ligand. Any fair allocation of those proceeds could not ignore Seragen's derivative claims because the purpose of the process was to determine the relative entitlement of the various Seragen stakeholders to the fund created with the merger proceeds. The Seragen stakeholders who premised their claims to the merger proceeds, in part, upon rights acquired through the questioned transactions (upon which derivative claims could have been based) could not use their fiduciary positions to avoid potential accountability simply by failing to address the claims. Therefore, in determining how the merger proceeds could fairly be allocated, the directors should have

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See also Emerald Partners v. Berlin, 726 A.2d 1215, 1221 (Del. 1999). Although BU's percentage holding in Seragen varied during the period in question, it was always significant—approaching 50%—and it always had the benefit of three directors, loyal to BU, on Seragen's six-member board and was able to (and did) exercise effective control over its affairs. Moreover, at the time of the merger (and, thus, approval of the Accord Agreement), BU controlled a majority of the voting equity in Seragen. *See* JX 262 at 139-33. BU has not contended that it was not the controlling stockholder of Seragen or that it did not owe fiduciary duties to Seragen's minority shareholders.

evaluated the derivative claims of which they had knowledge during the negotiation and merger processes.[186]

Review of the various derivative claims is also necessary for at least two other reasons. First, to the extent that the Plaintiffs have sought to invoke the quasi-appraisal methodology,[187] this review assesses the impact of Defendants' conduct on Seragen generally. This aspect focuses on the consequences of the Series B issuance and, to a lesser extent, issuance of the Series C shares on Seragen's ability to raise funds and, thus, its ability to survive until its products

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[186] The treatment of derivative claims in the appraisal process provides guidance in this somewhat comparable context. *See Onti, Inc. v. Integra Bank*, 751 A.2d 904, 931-32 (Del. Ch. 1999) ("'[T]here would be strong logic in including the *net* settlement value of such claims as an asset of the corporation for appraisal purposes,' subtracting 'attorneys' fees from any estimated value,' I find both strong case law and even stronger intuitive support for [the expert witness'] view that *all* litigation must be factored in, and all defenses against it must be considered, in determining the value of contingent claims." The three derivative claims in this case had already been filed when the valuation occurred.) (quoting *Gonsalves v. Straight Arrow Publishers, Inc.*, 1996 WL 483093, *2 - *3 (Del. Ch. Aug. 22, 1996). *See also Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1141-44 (Del. 1989); *Nagy v. Bistricer*, 770 A.2d 43, 55-56 (Del. Ch. 2000) ("in certain circumstances an appraisal proceeding will require the court to value breach of fiduciary duty claims, . . . because those claims are part of the going concern value of the corporation whose entity value is being determined. Put a bit differently, because those claims are assets of the corporation being valued, the court must place a value on those assets in coming to a fair value determination.") (citing *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 1994 WL 198726, at *2 (Del. Ch. May 16, 1994) ("[B]reach of fiduciary duty claims that do not arise from the merger are corporate assets that may be included in the determination of fair value.")).

One can argue that the better procedure would be for shareholders to assert derivative claims exclusively in the appraisal process. There is the risk that the derivative claims could be addressed in the allocation process and then be used in the context of formal appraisal litigation. While that risk exists in theory, it is not present here and to ignore the potential derivative claims on this ground would exclude from the negotiation process a critical component of the relationship among the various stakeholders.

[187] *See infra* note 259.

could reach the market in commercially viable quantities.[188] Second, it informs the entire fairness assessment of the Accord Agreement negotiations. The funds to be allocated by the Accord Agreement were well below the Plaintiffs' estimate of what Seragen's market capitalization would have been but for the Defendants' conduct. Nonetheless, the process of allocating the merger proceeds among the common shareholders and the holders of priority rights should be evaluated with the relative strengths of their bargaining positions in mind. As the strength of the Plaintiffs' challenges to the actions of Hirsch and the BU Defendants' may increase, the allocation of merger proceeds away from the BU Defendants and Hirsch and toward the minority shareholders should also increase.

The Court must first identify those derivative claims known to the directors. The appropriate standard for addressing knowledge is one of inquiry notice.

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[188] The answer to this line of inquiry would be more important if the Court had not already concluded that Plaintiffs' equity dilution claim and their claim that the Defendants' conduct deprived Seragen of its capacity to meet its financial needs in the market (and, thus, depressed its share value) are derivative claims.

In many instances, this question will not arise because there is no formal allocation of merger proceeds. With Seragen, however, this issue takes on great importance because Seragen, in substance, was being acquired for a lump sum, and it was up to the directors of Seragen to allocate the merger proceeds among its common shareholders, preferred shareholders, and creditors. In other instances, valuation of derivative claims could be significant in determining the fairness of the merger price paid by the acquirer. *See, e.g.*, *Merritt v. Colonial Foods, Inc.*, 505 A.2d 757 (Del. Ch. 1986). That question is not posed here because the Plaintiffs do not challenge the fairness of the consideration paid by Ligand; they do challenge its allocation because they contest the validity of certain claims of other Seragen stakeholders to the merger consideration.

Inquiry notice "exists when the [directors] become[] aware of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of injury."[189] A broader standard of knowledge would force the directors to engage in an exhaustive research process not only to discover, but then to assess, all potential derivative claims. Such a requirement would not only be burdensome, but it would also require a commitment that in the transactional context may not be achievable. On the other hand, a more restrictive standard, say, one which requires that directors consider only already filed derivative claims (or claims for which demand for action has been made upon the board), would be far too narrow as it would exclude potentially viable claims known to the directors but which, for whatever reason, have not been filed (or are not the subject of a demand).[190] The inquiry notice standard places sufficient burden on the directors

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[189] *Certainteed Corp. v. Celotex Corp.,* 2005 WL 217032, *7 (Del. Ch. Jan. 24, 2005) (internal quotations and citations omitted).

[190] *See* Lawrence A. Hamermesh and Michael A. Wachter, *The Fair Value of Cornfields in Delaware Appraisal Law*, 43 n.151 (Univ. of Pa. Inst. for Law & Econ. Research, Paper No. 05-24, July 2005), *available at* http://ssrn.com/abstract=810908 ("We would reject the claim that a derivative action asserting the usurpation must have been on file before the merger in order to take the business opportunity into account in determining "fair value." As previously noted, *Cavalier* explicitly recited the fact that no such claims had been pending, yet the court included the value of the usurped line of business in determining "fair value." It is true that in *Gonsalves*, in an analogous setting . . ., the Supreme Court ruled that "in the absence of a derivative claim attacking excessive compensation, the underlying issue of whether [executive compensation] costs may be adjusted may not be considered in an appraisal proceeding." We believe, however, that the formal pendency of derivative proceedings pre-merger should not be dispositive, and that the *Gonsalves* court's reference to derivative claims is best understood as referring to viable derivative claims, regardless of whether they have been formally commenced. Of course, the absence of such proceedings pre-merger may well be probative of the lack of merit of such

to value derivative claims that they have reason to be aware of, but does not require excessive action on the part of the directors to uncover claims.

If the directors are on notice of potential derivative claims, a decision by the directors as to the value of derivative claims, as with other business decisions made by the directors, would fall under the business judgment rule, unless the presumption of that doctrine is rebutted. The business judgment rule is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, . . . and in the honest belief that the action taken was in the best interests of the company."[191] "[G]ood faith and the absence of self-dealing are threshold requirements for invoking the rule."[192] Additionally, the directors must make an informed decision, and the determination of whether a decision was informed "turns on whether the directors have informed themselves 'prior to making a business decision, of all material information reasonably available to them.'"[193] In order to rebut the presumption, a plaintiff must demonstrate that the

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claims, absent some explanation (*e.g.*, key facts were not disclosed to the shareholders before the merger, as was the case in *Cavalier*) for the fact that such proceedings had not been commenced.") (internal citations omitted).

[191] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (citing *Kaplan v. Centex Corp.,* 284 A.2d 119, 124 (Del. Ch. 1971); *Robinson v. Pittsburgh Oil Refinery Corp.,* 126 A. 46 (Del. Ch. 1924)). *See also Gagliardi v. TriFoods Int'l, Inc.,* 683 A.2d 1049 (Del. Ch. 1996).

[192] *Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988), *overruled, on other grounds, by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

[193] *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (quoting *Kaplan*, 284 A.2d at 124).

directors either breached one of their fiduciary duties in making the decision, exhibited gross negligence, or that the directors were not reasonably informed.

Thus, in order to maintain the benefits of the business judgment rule, directors would be expected to evaluate all material derivative claims of which they could reasonably be charged with knowledge and make a determination as to their validity and their potential value before suggesting an allocation of the merger proceeds. Meeting such standards, the good faith decisions of independent and disinterested directors concerning the value of derivative claims, in this context, would be free from further scrutiny. However, when a breach of the duty of loyalty is established, in the context of the allocation process, the burden would shift to the directors to demonstrate that their treatment of the derivative claims was entirely fair.[194]

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[194] Because Seragen's shareholders, after allocation of the merger proceeds, voted and approved the merger (and, thus, the allocation), the Director Defendants' actions in developing the allocation, arguably, could have been insulated from the burden of demonstrating entire fairness as the result of ratification by the shareholders. "[I]n the context of a duty of loyalty claim where plaintiff minority shareholders can state a claim of self-dealing at their expense, an *informed shareholder ratification* by the minority shifts the burden of proof of entire fairness to the plaintiff." *Solomon v. Armstrong*, 747 A.2d 1098, 1115 (Del. Ch. 1999). Under this standard, if the plaintiffs can state a claim of self-dealing by the majority at the expense of the minority, but there has been informed shareholder approval, the burden is on the plaintiffs to demonstrate that the allocation was not entirely fair. However, with a failure to demonstrate that an informed vote occurred, the burden to demonstrate entire fairness will remain with the fiduciaries. In this instance, shareholder approval of the merger did not ratify the allocation process because the merger proxy statement did not fully and completely inform the shareholders about the process (or lack thereof) for protecting the interests of minority shareholders in negotiation of the Accord Agreement. *See infra* Part III(E). The burden of entire fairness is borne by the BU Defendants.

b. *Evaluation of the Derivative Claims*

After applying these principles, the Court concludes that the director defendants, who were on inquiry notice with respect to the derivative claims concerning the Series B, the Series C, and the Marathon transactions, made the merger allocation recommendations in breach of their duty of loyalty because they stood on both sides of the allocation process and failed otherwise to protect the rights of the minority shareholders.[195] Although the four challenged transactions are considered within the entire fairness framework, the Court is not called upon to assess whether each transaction was entirely fair. Instead, the entire fairness analysis is required for review of the allocation process because that effort gave rise to the Plaintiffs' surviving direct claims (other than their voting power dilution and disclosure claims).

(1) <u>The Directors Were on Inquiry Notice of the Derivative Claims</u>

The defendant directors were on notice of the potential for derivative claims; they were aware of the self-interested nature of several of the transactions;[196] and

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[195] The use of the phrase "both sides" is somewhat inaccurate. "Both" suggests two, but there were more than two sides to the negotiations. For present purposes, the focus is on the tension between BU's interests and those of the minority common shareholders. The claims of Hirsch, USSC, and Seragen management, of course, further complicated the process.

[196] Indeed, the allocation process resolved claims premised upon rights acquired in the challenged transactions.

before the merger, a small, but active group of minority shareholders, including Oliver, had forcefully expressed its concerns to Seragen's Board.[197]

(2) <u>The Derivative Claims</u>

There are four derivative claims that the Director Defendants should have evaluated and factored into the allocation of merger proceeds but did not.[198] They are: (1) the equity dilution and other harm to Seragen from the Series B transaction as a result of the breach of the duty of loyalty; (2) the equity dilution and other harm to Seragen from the Series C transaction as a result of the breach of the duty of loyalty; (3) the waste of corporate assets caused by the Marathon transaction which resulted from the breach of the duly of loyalty, and; (4) the breach of the duty of loyalty associated with the USSC transaction.

(a) *The Series B and C Derivative Claims*

Seragen's directors, having done nothing to value the potential Series B and Series C derivative claims, effectively ignored them in negotiating the Accord Agreement. The Series B and Series C transactions should have been assessed as derivative claims because the BU Defendants stood on both sides of these transactions, and there were no safeguards to ensure the fairness of the

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[197] *See, e.g.*, JX 213; Tr. 103-05.

[198] It is undisputed that the Defendants made no effort to value the derivative claims or to use them in their negotiations with those Seragen stakeholders who would have been the targets of any derivative suits.

transactions. Specifically, Condon and Silber (as Seragen directors and BU executives) and Cassidy (as a Seragen director and affiliate of BU) had conflicted interests because BU invested heavily in the Series B and exclusively in the Series C. Cassidy also invested in the Series B. The derivative claims of Seragen, arising from the Series B transaction and the Series C transaction, could have been used in negotiating against the claims of BU, its affiliates, and possibly Hirsch. In substance, the claims, including the attendant litigation risks and expenses, could have been used to bolster the position of the minority shareholders in the process of dividing up the merger consideration to be paid by Ligand.[199]

The Court turns first to the issue of fair price of the Series B and Series C. Fair price, in this context, involves not only the actual consideration received but also the consequences that those transactions had on Seragen. Indeed, the Plaintiffs also argue that the terms of the Series B and Series C put downward pressure on Seragen's stock price, thereby making its efforts to obtain financing even more difficult, if not impossible.

The burden is on the Defendants to demonstrate fair price. The appropriate starting point is review of their experts' testimony concerning the fairness of the

[199] Disinterested and independent fiduciaries, acting in accordance with the duties imposed upon them as a result of their status, may well have concluded that asserting some or all of the claims was not the appropriate action. That, however, directs the focus to the simple fact that there was no independent and disinterested fiduciary acting on behalf of the interests of the minority shareholders as a priority. The claims, regardless of the value that may be ascribed to them, were substantial enough to merit careful evaluation.

price and terms of the Series B and C. The Defendants first presented Dr. Allan Kleidon ("Kleidon").[200] The Court concludes that Kleidon, supplemented somewhat by Kirk, demonstrated that the price and terms of the Series B and Series C shares were fair to Seragen and that a nil value for those claims would have been appropriate.[201]

Kleidon began his analysis by accepting that the Loan Guarantee Transaction was in place and that Seragen needed to remedy the NASDAQ delisting crisis.[202] He concluded that no harm resulted to Seragen's common shareholders when the Series B and Series C were issued, and he, indeed, opined that there is strong evidence that the Series B was valuable to shareholders at the time.[203] In Kleidon's opinion, "analytically[,] the effect on the common shares of having the bank loan in place or replacing the bank loan with the Series B[—]it's equivalent from the point of view of the common shareholders."[204] Kleidon argued that, because Seragen replaced $23.8 million in Loan Guarantee financing with the Series B shares which could convert, at most, into $23.8 million worth of Seragen

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[200] Kleidon holds an M.B.A. and a Ph.D. in finance from the University of Chicago, has taught at Chicago and Stanford, and is currently employed by Cornerstone Research, a financial and economic consulting firm. JX 273.

[201] Of course, the Court's conclusion that the claims would not have been successful does not preclude their use in the negotiation process. Perhaps an independent fiduciary would have taken that view, but the claims were not frivolous and had at least some negotiation or settlement value.

[202] Tr. 944-45, 1015.

[203] Tr. 950-51.

[204] Tr. 956.

common shares, the position of Seragen's common stockholders was left unaffected.[205] In other words, the Series B transaction was, in Kleidon's view, substantially equivalent to the Loan Guarantee Transaction because both the Loan Guarantee and the Series B established priority claims over the rights of the common stockholders in the amount of $23.8 million. Therefore, the Series B transaction did nothing to change the share value of the common stock because it created no new liabilities or obligations.[206] In support of this analysis, Kirk testified that she considered Series B shares "much more favorable than the debt it replaced" because "it became permanent capital," and it was her view that because of the circumstances facing Seragen, the terms of the Series B were fair.[207] Kirk also opined that, as an investment banker, she could not have sold the Series B to an outside investor.[208]

Addressing the Series C, Kirk observed that the Series C was functionally a $5 million interest-free loan from BU to Seragen because Seragen had the right to redeem the Series C shares with a $5 million payment without interest.[209] Not surprisingly, Kirk testified that she could have not sold the Series C to any other

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[205] Tr. 959.
[206] Tr. 959. *See also* Tr. 960-61 (Kleidon) ("[A]nalytically the shareholders are in the same position whether the prior claim was the original bank debt or if the prior claim was Series B stock which was convertible into $23.8 million worth of common shares."). This, of course, overlooks the transaction costs, including the warrants issued to the Series B holders.
[207] Tr. 1557-58.
[208] *Id.*
[209] Tr. 1560-61

investor because there was no benefit to be gained by an investor who provided an interest-free $5 million loan.[210]

Kleidon also conducted an event study because it was his belief that, if the terms of the Series B and Series C were as grievous as Penny portrayed them,[211] those fears would have been reflected in the price of the common shares when the transactions were disclosed to the public.[212] Kleidon found that, on the day the Series B was announced, "there was a residual return of . . . 22 percent" for the common shares.[213] Kleidon stated that the increase in the price of Seragen common on the day that the Series B was announced was directly related to the Series B and could not be attributed, as Penny suggested,[214] to positive clinical announcements, because those clinical announcements were already available in the marketplace and did not contain any new information.[215] Accordingly, Kleidon concluded the market reacted positively to the Series B because it was an important fiscal event for Seragen.[216] Kleidon conceded that the announcement of the

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[210] *Id.*
[211] The concern was that the conversion feature, which allowed for acquisition of an ever-increasing number of common shares as the share price declined, would encourage short selling.
[212] Tr. 971-72.
[213] Tr. 976. *See also* JX 274.
[214] Tr. 836-37.
[215] Tr. 1090-93.
[216] The Court, although not ignoring the conclusions of Kleidon's event studies, contemplates them with some skepticism. First, it is not clear that the market had the necessary information to assess fully the import of the issuance of the Series B and Series C shares. Second, on a short-term basis (because they alleviated immediate NASDAQ delisting and cash flow problems), the

Series B did not report that the Series B holders would have voting rights and dividend rights, but it did contain the remaining, supposedly more detrimental Series B's characteristics, including the conversion and warrant features.[217] Additionally, Kleidon found that on the day the Series C transaction was announced, there was no significant change in the price of Seragen's common shares.[218]

Kleidon addressed the market's failure to show a negative reaction to either issuance of the Series B or issuance of the Series C by explaining that neither had the characteristics which would lead to short selling and thereby drive the price of Seragen common stock down.[219] Instead, Kleidon perceived that the market was pleased that Seragen had acquired some form of financing which would allow it to avoid delisting and to continue operations and testing. According to Kleidon, the reason the share price of Seragen was continually experiencing a decline—a decline that started before the issuance of the Series B and continued well after the Series C shares were issued—was unrelated to the Series B and Series C. Instead, Kleidon believed that Seragen, with its high cash burn rate and its failure to report

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transactions were beneficial to Seragen. The fair debate, however, focuses on the longer-term consequences. Finally, the market may have grown bored with Seragen. It was, at best, limping along; its prospects were not encouraging, especially in light of its cash flow needs; and institutional coverage of the stock was waning (if it had not already waned).

[217] Tr. 1095.

[218] Tr. 977-78. *See also* JX 274.

[219] Tr. 966-69.

good news or progress over a period of months, was responsible for its own declining share price.[220] In other words,

> [y]ou've got a company which is burning money month by month. And if you never hear a positive announcement which says 'yes, this drug is going to work and we're going to have a large market for it,' that company will eventually run out of money and go out of business.[221]

Taking Kleidon and Kirk's testimony together, the Court concludes that the price and terms for the Series B and C were fair. Primarily, the Court does not accept that, based upon the terms of either of these issues, any harm was done to the common shareholders. The Series B could only ever convert into $23.8 million worth of common, and the Series C, while converting at a discount, did have a ceiling beyond which it could not yield any additional common shares. In addition, if the terms of the Series B shares and Series C shares placed the Seragen common shareholders at a material and unwarranted risk of dilution, the market price of the Seragen common should have reacted negatively when those shares were announced. However, no such reaction was observed.

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[220] Tr. 1118-23. In Kleidon's opinion, his event study reflected that Seragen's poor state was the result of its inability to report any positive developments over this time period. To Kleidon, the failure to have good news for a company with a high cash burn rate is akin to bad news. *See also* Tr. 1548-49 (Kirk) ("[I]f you take a look at the Seragen common price history, the decline quite clearly starts in 1995, when it was—the news was coming out to the marketplace that this company's clinical trials were foundering—maybe it's floundering.")

[221] Tr. 1124.

The Plaintiffs have not demonstrated otherwise. They attempt to counter Kleidon and Kirk's testimony by asserting that, because of the unfair price and terms associated with the Series B and C, the common shares of Seragen decreased in value; they suffered equity dilution; and it became increasingly difficult, if not impossible, to raise financing for Seragen. The Plaintiffs rely almost entirely on the report and testimony of their expert, Penny.[222] Although Penny, as an appraiser, may be more qualified to give an opinion as to the damages that the Series B and C may have caused to Seragen and its shareholders than he was to determine whether Seragen was financeable, the Court still concludes that Penny's analysis is without merit.

Penny opined that the Series B and C "had certain dilutive characteristics which resulted in a stock price decline subsequent to the issuance of the Series B and Series C" and that those characteristics then created a major barrier for Seragen to acquire new financing.[223] Penny believed that issuance of the Series B and Series C shares resulted in dilution because the Series B and Series C were convertible based upon the future price of Seragen common shares, and "this characteristic, if the stock price of Seragen falls, then these securities are convertible into an ever-increasing number of common shares . . . of Seragen stock

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[222] *See* JX 271.
[223] Tr. 826-27. *See also* JX 271 at 3, 11-21.

and would then, after conversion, represent a growing percentage of the ownership interest in Seragen."[224] Next, Penny recognized that companies that issue these types of securities[225] often witness a rapid decline in their stock price because these stocks attract interest from short sellers who engage in short selling to drive the price down which enables them to convert a progressively greater amount of common stock.[226] Penny also suggested that because the Series B and C shares were sold to insiders there was some extra incentive for them to drive the share price down.[227]

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[224] Tr. 827. The Series B shares were convertible based on a price equal to the ten-day average closing price of Seragen's common stock with no ceiling, and the Series C was convertible at the lesser of $2.75 or 73% of the five-day average closing price with a ceiling of 3,360,625 shares. *See* JX 145; JX 262 at 127.

[225] Penny refers to them as "future priced securities"; they are also known as "floating-priced securities," "death spiral securities," or "exploding securities." *See, e.g.*, JX 270 (Sec. & Exch. Comm'n, *Investor Information: Convertible Securities*, Feb. 27, 2005).

[226] Penny purportedly relied upon an article written several years after the events in question: Pierre Hillion & Theo Vermaelen, *Death Spiral Convertibles*, 71 J. Fin. Econ. 381 (2004).

[227] None of the holders of Series B and Series C shares converted and sold common shares. The same cannot be said about the holder of the Series A shares. The problems created by the holder of the Series A shares were described by Prior:

> Q. [Mr. Griffin] And the first sentence [of JX 189] states that, "The company currently has a capital structure that, in the judgment of the new management, makes an equity financing virtually impossible." Do you see that?
>
> A. [Mr. Prior] I do.
>
> Q. Was that the judgment of your management team?
>
> A. As it stood, yes. One of many factors.
>
> Q. Now --
>
> A. The principal problem there was the continuous conversion of the Series A, which was -- appeared to be depressing the stock over and over again. And we had to get that stuff converted, we had to stop it somehow. We couldn't fund the company as long as the stock price continued to just -- just go down that slope. So, yeah, it was -- it was a big problem. We had a lot of others, but it was a problem.

Penny sought support for this conclusion by presenting a simple graph which demonstrates that from the middle of May 1996 the Seragen share price decreased in value from $4.813 to a low of $1.00 in December 1996.[228] Noting that the Series B shares were issued in June 1996, and the Series C shares were issued in September 1996, Penny took what can best be described as a leap of faith (not logic) and concludes that, because of the potentially dilutive characteristics of the Series B and Series C shares, the drastic decrease in share price was solely attributable to the Series B and Series C shares. Penny again avoids any semblance

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> Q. So you saw a correlation between the decline in Seragen's stock price and the terms of Seragen's preferred [Series A] shares?
>
> . . . .
>
> A. [We] did not.
>
> Q. Why not?
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> A. The Series B were not being converted or sold. The Series A were being converted, were being sold and, of course, we were aware of it because we got notice by virtue of the terms of the Series A. We had to provide the stock to [the holder of the Series A Preferred stock]. And so when they – they would exercise their -- their right, they would buy it at the discount or convert it, rather, and then they would dump it into the market. And so we knew it was happening. Every time it happened, we could see them doing it.
>
> And the real pain was anytime there was any kind of even the slightest bit of good news, the [holder of the Series A] would exercise more and dump more. So we were constantly -- the market was -- it was being sold into the market whenever there was the slightest demand. So, yeah, that was a big, big problem for us. Going forward we couldn't see any investor tolerating that, having the selling pressure, constant selling pressure on the stock; any new investor, that is.

Tr. 1238-41. *See also* Tr. 1242-43.

[228] JX 271 at 15.

of logic when he concludes that it was also these terms that made Seragen almost impossible to finance in the future.[229]

Penny identified two theories of why a company's stock may suffer a decline after it issues securities that resemble Series B and Series C shares.[230] The first theory, as Penny described it, is that the issuance of securities that resemble the Series B and Series C shares causes short selling which drives the stock value down. The second theory, which Penny did not bother to mention until cross-examination and ignored entirely in his report, is that the Series B and Series C financing could be examples of "last resort financing," which would be followed by a decline in the value of the stock in any event because the company is on its last legs.[231] Penny, however, took no steps, other than to review a handful of reports prepared by Seragen and graph Seragen's stock price, to identify any other potential cause of the decline in the price of Seragen's shares.[232] In fact, Penny went so far as to state that he "focused on factors which in [his] view strongly pointed to the market reaction to the B and C, and its negative features."[233] Penny simply failed to consider, except in the most cursory fashion, other factors that may

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[229] The holders of the Series B and Series C shares did not interfere with Seragen's efforts to obtain alternative financing.
[230] Tr. 885-87.
[231] Tr. 886-87.
[232] Tr. 887-88.
[233] Tr. 888.

have played a significant, if not a complete, role in the decline of Seragen's share price.

In addition to failing to consider other potential causes of the decline in share price, Penny also ignored the fact that the Series B and Series C shares do not embody all of the characteristics generally associated with death spiral securities. Namely, the Series B shares were not convertible at a discount, and no holder of the Series B or Series C shares engaged in short selling.[234] On top of this oversight, Penny does not consider that the Series A shares were convertible at a discount; the Series A holder did convert; and the Series A holder's selling practices may have been responsible, in material part, for the decline in share price.[235] Thus, the Court is satisfied that neither issuance of the Series B shares nor issuance of the Series C shares was materially responsible for the decline in share price or caused any cognizable equity dilution.[236]

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[234] Tr. 886-87. *See also* Tr. 966-67 (Kleidon) (stating that "what is required for . . . death spirals to have some impact on the value of the stock is, first of all, that they are convertible into common at a discount to the prevailing stock price" and that "there is short-selling related to these convertible securities that short-selling can drive the stock price down" and neither of these conditions was present with the Series B share).

[235] Tr. 885. *But see* Tr. 1048 (Kleidon) (stating that the conversion and the short selling of the Series A was not sufficient to explain the entire decrease in Seragen's price). *See also* JX 273 at 24.

[236] At the core of the Plaintiffs' case is the notion that floating-priced convertible securities ("death spirals" to some) are, especially if issued to insiders and if issued with a discount to market, *malum in se*. The issuance of such securities frequently precedes bad financial consequences for the issuer. A major problem is that they create an incentive for short selling. As Hillion and Vermaelen describe the process:

> Convertible investors have an incentive to sell short the stock prior to conversion. The resulting-selling pressure may push the stock below fair value, especially considering that the typical issuer is a small, thinly traded firm. As conversions take place at prices below fair value, the resulting dilution lowers the underlying value per share. In addition, the potential to lower the fundamental value of the stock when conversions take place below fair value attracts professional short-sellers and hedge funds. This hypothesis predicts that issuing firms experience negative abnormal returns after the announcement date. We refer to this hypothesis as the *faulty contract design hypothesis*.

Hillion & Vermaelen, *supra* note 226 at 383 (emphasis in original). The other likely explanation is that securities of this nature reach the market because the issuers have no viable choices. Again, as Hillion and Vermaelen have framed the argument:

> [Those] who defend the use of the floating-priced convertibles claim that the issuers have no other alternative, i.e., that managers are unable to raise equity or convertibles with a fixed conversion price because the stock is overvalued. The subsequent price decline reflects the fact that the market gradually discovers the poor operating performance of the issuer. The issuing firm, rather than the instrument, is a source of concern and floating-priced convertibles help companies survive difficult times. Because the stock is overvalued at the time of the issue, this hypothesis predicts that issuing firms experience negative abnormal returns after the announcement date. Compared to the faulty contract design hypothesis, it also predicts that measures of operating performance decline abnormally after the issuance. This is referred to as the *last-resort financing hypothesis.*

Id. (emphasis in original).

Seragen did issue floating-priced securities to several of the BU Defendants. None engaged in short selling. Thus, the Defendants' actions do not fall within the conduct described by Hillion and Vermaelen as critical to the adverse consequences associated with short selling under the faulty contract design hypothesis. Seragen, with its issuance of its Series B and Series C shares, can more fairly be characterized as an example of an issuer engaged in "last resort financing."

The Plaintiffs suggest that the BU Defendants implemented this strategy to drive down Seragen's stock price so that they could acquire greater control. Other than speculation, this contention has no factual support. Although the BU Defendants did not want to dilute their holdings, there was no scheme to manipulate stock price downward through the various financings in which they participated.

Moreover, the earlier efforts that resulted in the Series A financing are instructive. The Series A shares were not issued to insiders; instead they were the product of a marketing effort by an independent firm, Scharff, Witchel, which sought out potential third-party investors. The best that could be obtained was the Series A financing, a death-spiral security, convertible at a discount, and sold to an outside investor who thereafter engaged in short selling.

In short, the issuance of floating price securities to some of the BU Defendants was not unfair simply because of the nature of the security issued.

As to fair process, however, the Court cannot characterize the treatment, during the negotiation of the Accord Agreement, of the Series B and Series C transactions as entirely fair because, quite simply, there was *no* process to protect the interests of the minority shareholders. However, the nil value effectively assigned to the Series B and Series C claims was, in the Court's view, a fair price as demonstrated by the evidence; thus, the only harm suffered by the Plaintiffs was a procedural one.[237] Therefore, although the BU Defendants did breach their duty of loyalty and were unable to demonstrate the entire fairness of the Series B and C transactions,[238] for purposes of assessing the fiduciaries' treatment of these claims

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[237] Much of the force (albeit, limited) behind the Plaintiffs' argument traces back to the Loan Guarantee Transaction, but challenges to that transaction are time-barred. The Plaintiffs did not prove that the Loan Guarantee Transaction was structured with the intent to set-up the Series B or Series C transactions. When the Series B transaction occurred, time was of the essence and Seragen had no attractive options. Similarly, the circumstances necessitating issuance of the Series C shares were not cooked up by the BU Defendants in an effort to expand their grip on Seragen. The Plaintiffs argue that the temporal exigencies were created by the BU Defendants and that they were little more than a pretext to avoid "sharing" Seragen with third-party investors. They respond to Kirk's prediction that no third-party investor would have invested in Series C shares by accepting her prediction but pointing out that the terms were structured in such a fashion to allow the BU Defendants (and Hirsch) to find an attractive investment when no one else would. Seragen considered allowing other shareholders to participate in the Series B financing. Perhaps because Hirsch was opposed to that idea, it was abandoned. With hindsight, allowing others to invest in the Series B shares might have been a good idea—not so much because it would have helped Seragen, but because it might have been useful to the BU Defendants in defending this action and the losses that they suffered could have been shared with others. In short, by the time of the Series B transaction, Seragen had no viable options for resolving its liquidity problems and the steps taken by Seragen's Board, although lacking in procedural propriety, did not cause the deterioration in Seragen's stock price or exacerbate its already difficult cash flow position.

[238] The Defendants satisfied the fair price aspect of the entire fairness analysis, but they abysmally failed to support the fair process part of that test. As noted, entire fairness is not the

in the context of negotiating the Accord Agreement, the Court does not find it appropriate to assign anything but nominal damages to these breaches.[239]

(b) *The Marathon Claim*

As with the Series B and C derivative claims, Seragen's directors did nothing to value the potential Marathon derivative claim which was a claim of both waste and breach of the duty of loyalty because the Marathon facility was sold to a BU-controlled entity in a clear case of self-dealing, and no steps were taken to ensure that the sale to Marathon was fair.

When waste is asserted, the issue is whether "what the corporation has received is so inadequate in value that no person of ordinary, sound business judgment would deem it worth what the corporation has paid [or received]."[240] Waste is a rare, "unconscionable case [] where directors irrationally squander or give away corporate assets."[241]

The Marathon sale, however, was not one of those rare cases in which waste can be found. The Marathon facility was sold to BU for $5 million plus a

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sum of two separate tests, but, instead, it is one integrated test. It is difficult to review the Series B and Series C transactions and conclude that they were the product of entire fairness.

[239] No effective remedy for the procedural shortcomings is available. *See* Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. Pa. L. Rev. 785, 798 n.41 (2003) ("[s]uppose the price is entirely fair, but the process is faulty. To what else are shareholders entitled beyond a fair price?"). On the other hand, this Court has the power "to fashion any form of equitable and monetary relief as may be appropriate." *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1184 (Del. Ch. 1999).

[240] *Saxe v. Brady*, 184 A.2d 602, 610 (Del. Ch. 1962). *See also Brehm*, 746 A.2d at 263.

[241] *Id.*

significant commitment to meet ongoing operating expenses. Although, the Plaintiffs argue that this was so little consideration that no person of ordinary sound business judgment would have sold Marathon for such a price, they offer no specific factual basis for separately valuing the facility. The basis for their claim is simply that Marathon, several months later, was sold to Ligand in connection with the merger for $8 million. Perhaps the Marathon facility was undervalued, but the transaction, in light of the consideration paid by BU, does not amount to waste.

Of course, concluding that the Marathon transaction was not waste does not end the inquiry. The BU Defendants, nonetheless, must show entire fairness. Neither side in this debate devoted significant resources to the task, and the Court has little before it to allow for an informed judgment. Even though the burden of proving fair price and fair process is imposed upon the fiduciaries in this context, the shareholders cannot achieve recovery without some factual basis.

It is clear that the Marathon facility was a cash drain on Seragen and that Prior recognized that escaping this burden was an early and essential task of his tenure.[242] Seragen, from the Marathon transaction, received cash that was essential for continued operations, and BU's subsidy of Marathon's operating costs significantly helped with Seragen's survival. In addition, Seragen retained the right to reacquire the facility on very favorable terms. In short, based on the

[242] Tr. 1466-67.

evidence before the Court, it is reasonable to conclude that the price was fair even though the process, of course, was sorely deficient.[243]

(c) *The USSC Transaction*

The Plaintiffs assert that the USSC transaction resulted from a breach of the duty of loyalty by the Director Defendants because of their relationship with Hirsch, a major benefactor of BU, a trustee of BU, and the major participant in the Series B transaction. The Defendants, or so the Plaintiffs argue, provided a special deal for USSC, a company founded and led by Hirsch. Therefore, the Plaintiffs contend that the USSC claim had value and that the defendant directors breached their duty of loyalty by failing to evaluate that claim in the context of the Accord Agreement.[244] The USSC transaction involved a licensing agreement between Seragen and USSC under which USSC purchased the licensing rights to certain Seragen Fusion Proteins for $5 million.[245] USSC had the option to make an additional $5 million payment to affirm the agreement within fifteen months of the initial date of the agreement. If it chose not to exercise that option, USSC would have received $5 million in Seragen common stock based on the lower of the

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[243] To the extent that the Plaintiffs claim that the $8 million paid by Ligand for the Marathon facility demonstrates fair value in excess of the $5 million directly paid by BU, the Court's conclusion, *infra*, regarding the increase in the price paid by Ligand above the price initially proposed by Ligand for the Marathon facility accomplishes essentially the same result.

[244] The Plaintiffs' specific challenge to the USSC transaction was dismissed by way of summary judgment because it is a derivative claim and the Plaintiffs lost any standing to assert it because of the merger.

[245] JX 194; JX 203.

average market price for the preceding ten days or the stock price on the day the agreement was signed. USSC was bound to fund various studies on the Fusion Proteins, and Seragen could have received as much as $40 million in milestone payments.[246]

Although the Plaintiffs contend that this transaction was tainted by the Seragen board's lack of loyalty, it is difficult to conclude that any director, other than Silber, potentially could have breached the duty of loyalty in regard to this transaction. Silber sat on both Seragen's Board and USSC's Board and had material holdings in both corporations. However one may view Silber's status, the other Seragen directors approved this transaction and there has been no showing that Silber received any direct benefit from the transaction or controlled any of the other directors as they approved the transaction.

Moreover, although the parties devoted little effort to the USSC transaction at trial, the Defendants produced evidence to support the conclusion that the USSC transaction was at a fair price. It was effectively a $5 million loan (perhaps masquerading as a licensing agreement) from USSC to Seragen, that USSC could call back and exchange into Seragen common stock based upon a preset formula. Significantly, USSC was to fund research on the Seragen Fusion Proteins. If this research proved successful, USSC could invest another $5 million and Seragen

[246] JX 197.

could be entitled to substantial funds in milestone payments. Given Seragen's need for funds at the time, its inability to raise funds from other sources, and the potential benefits of the transaction, it was fair to Seragen and its shareholders. As a derivative claim, it was without value. At most, it was a claim that the directors should have evaluated—for it was a claim not wholly without merit. As such, it amounts to nothing more than a minor procedural flaw in the negotiation of the Accord Agreement.[247]

2. Was the Allocation of the Merger Proceeds in the Accord Agreement Entirely Fair?

a. *Some General Thoughts*

The allocation of merger proceeds accomplished by the Accord Agreement was a self-interested effort that raised significant doubts about the director defendants' loyalty because these parties stood on both sides of this transaction and sought to gain, for themselves or for BU, at the expense of the common shareholders.[248] Because this transaction was in violation of the duty of loyalty, the BU Defendants are charged with the burden of demonstrating the entire fairness of the overall allocation. For the reasons stated below, they did not

[247] Related to this determination is the Court's conclusion that Hirsch did not aid and abet the BU Defendants' breaches of fiduciary duty. *See infra* Part III(G).

[248] The Plaintiffs' claims arising under the Accord Agreement are direct claims because the corporation was not harmed by the challenged conduct—the shareholders were. *See Parnes v. Bally Entm't Corp.*, 722 A.2d 1243 (Del. 1999). Indeed, "the misconduct at issue was intimately bound up with the merger itself." *Big Lots Stores, Inc. v. Bain Capital Fund VII, LLC*, 2006 WL 846121, at *8 (Del. Ch. Mar. 28, 2006).

demonstrate the entire fairness of this transaction, and, the Plaintiffs did suffer actual harm from the BU Defendants' breaches of fiduciary duty.

The Director Defendants treated the merger allocation negotiations with a surprising degree of informality, and, as with many of Seragen's transactions reviewed here, no steps were taken to ensure fairness to the minority common shareholders. More disturbing is that, although representatives of all of the priority stakeholders were involved to some degree in the negotiations, no representative negotiated on behalf of the minority common shareholders. BU, even with its substantial holdings of Seragen common stock, did not have the same incentive to negotiate for the minority common shareholder as an otherwise disinterested representative of the minority common shareholder would have been, because BU had interests that went well beyond its common shares. Additionally, Prior, with significant financial interests of his own, cannot be said to have negotiated for the minority common shareholder because every dollar the minority common shareholder received was likely to reduce the Asset Value Realization Bonus that he would receive as a consequence of the merger. Clearly the process implementing these negotiations was severely flawed and no person acted to protect the interests of the minority common shareholders.

Prior, Hirsch (or his representatives), and the BU Defendants were aware of the risk that the minority shareholders might pursue litigation attacking the merger

proceeds allocation. Prior and the other directors understood that Seragen's inability to implement a satisfactory process for the allocation process could expose the directors to a shareholder suit.

Turning to fair price, the Court has already concluded that, although the directors failed to value the known derivative claims against Seragen during the allocation process, there was no discrete, material value to these claims. However, more than a simple valuation of the derivative claims was involved in the merger proceeds allocation effort.

b. *USSC's Repayment in Full*

The Plaintiffs have questioned why USSC was entitled to receive the $5 million it invested with Seragen back at 100 cents on the dollar when everyone else was forced to take a discount.[249] The Plaintiffs' argument on this point fails because neither Hirsch nor USSC was a conflicted party, and they had the right to claim what they were owed.[250] The critical element is that Hirsch and USSC did not owe any fiduciary duty to Seragen or its shareholders, and, therefore, Hirsch could insist upon the terms negotiated in the USSC transaction, which included the

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[249] *See* JX 262 at App. F, 31-32.

[250] BU (or Cassidy, for that matter) was entitled to refuse to negotiate and demand that 100% of its investment be returned; however, the fiduciaries could not negotiate that among themselves as the Seragen board and then present the product of self-interested efforts to the common shareholders as a freely negotiated settlement that was in everyone's best interests.

cancellation of the agreement for $5 million in Seragen stock. USSC received $5 million in cash as a substitute for stock. Entire fairness is not implicated.

c. *Payments to BU Related to the Series C Shares*

As to the allocation of merger proceeds based on the Series C shares, the Court finds that the price paid was unfair. By the terms of the Series C shares, as of March 30, 1998, those shares automatically converted at a discount into the maximum of 3,360,625 Seragen common shares.[251] Additionally, although Seragen was bound at the time of issuance to redeem all unconverted Series C shares for $1,150, this provision was waived to satisfy NASDAQ's capital requirements.[252] On March 30, 1998, 1,060 Series C shares automatically converted into the maximum allowable 3,360,625 shares of Seragen common stock in accordance with the terms of the Series C issuance.[253] The remaining 3,940 Series C shares were purchased by Seragen for $1,150 per share, for a total of $4,530,461. Seragen, of course, could not pay this amount and it became a debt owed by Seragen to BU. Under the Accord Agreement, BU received $5,000,000 in satisfaction of the debt owed to it from the conversion of the remaining Series C shares and for the delivery of its 3,360,625 shares of common stock which it received as the result of conversion of some of its Series C shares. The debt and

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[251] JX 145; JX 262 at 127.
[252] JX 167. *See also supra* note 85 and accompanying text.
[253] JX 262 at 127.

common stock (3,360,625 shares at $0.73 per share) represented a combined claim of $6,983,717, which BU compromised to $5,000,000. However, BU had waived any right to receive any compensation for those Series C shares which had not been converted because of the conversion ceiling. Thus, it had no right to recover the debt purportedly owed to it by Seragen from the exchange of the remaining Series C shares; compensation for the remaining Series C shares, as part of the allocation process, cannot be considered "entirely fair." The $5,000,000 which BU accepted—perhaps not coincidentally the same amount as BU had paid for the Series C shares—represents a compromise of a claim. How to factor the compromised amount with the amount to which BU had no viable claim presents an interesting question with respect to the calculation of damages. Perhaps the amount to which BU had no claim should be subtracted from the $5,000,000 received by BU, but that would deprive BU of any "credit" for the amount by which it compromised its claim. Another approach would be to prorate the compromised amount across both the claim to merger proceeds based on the common shares and the claim representing the remaining Series C shares. The more appropriate methodology would be to treat the 3,360,625 shares for what they were—validly converted shares with an implicit value at that time of $0.73 per share and allow BU the implicit value represented by those common shares. If the common shares are given a value of $2,453,256 (3,360,625 shares at $0.73 per

share) and that amount is deducted from the $5,000,000 paid to BU under the Accord Agreement for the rights arising under the Series C shares, *i.e.*, $2,546,744, then, the proper measure of damages (or, more specifically, the deviation from fair value) is established.[254] The Defendants were unable to present any evidence to explain why any payment was made for the remaining Series C shares, and they were able to offer nothing more than an admitted "hypothesis" as to the rationale behind the payment.[255] Because this payment to BU was not entirely fair, the Court concludes that BU had a windfall of $2,546,744, which, therefore, was unfairly paid to BU, the sole Series C holder.

d. *The Reallocation of Proceeds to Marathon*

Finally, the Plaintiffs challenge the fairness of the $8 million that BU was paid for the Marathon facility in connection with the merger. The merger closed

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[254] This has the consequence of denying any value to BU for the remaining Series C shares. BU, however, waived the only right—$1,150 per share—that the remaining shares otherwise retained; thus, it was left with nothing as a consequence of the confluence of the deal that it controlled and its own actions.

[255] *See* Transcript of Oral Argument, July 21, 2005, at 109-16. It was Defendants' counsel's speculation that the reason that BU was paid for the remaining Series C shares was because Ligand did not want those senior shares to remain in existence after they completed the merger, and the only way to extinguish those remaining shares was to have them cancelled for a price which Ligand directed be paid to BU. That explanation, however, is inconsistent with the notes to Seragen's financial statement accompanying the merger proxy statement. There, (JX 262 at F-34, n.10) it was reported the Series C shares had been purchased by Seragen on March 31, 1998, in accordance with the conversion terms for an aggregate purchase price of $4,530,461. Thus, by the time of the Accord Agreement, the remaining Series C shares were no longer outstanding and had been replaced with evidence of a debt obligation. It is this debt obligation, evidencing a claim that had been waived by BU, that was (or should have been) at issue in the negotiation of the Accord Agreement.

on August 12, 1998, and BU received $8 million for the Marathon facility, which it had purchased from Seragen for $5 million on February 19, 1997. The BU Defendants have failed to demonstrate that the price paid by Ligand for Marathon was fair at the time of the merger. No party saw fit to make an effort to show, in any helpful fashion, the actual value of the Marathon facility. Early in the negotiations with Ligand, it appeared that $5 million would be the price for the Marathon facility. For reasons that no one has convincingly explained, that number increased to $8 million.[256] The Defendants argue that Marathon owned the Marathon facility and that Seragen had no claim to it because it already sold it. Under more typical circumstances, that argument might prevail, but BU, in effect, owned the Marathon facility and controlled the allocation process, the process that divided up the entire consideration provided by Ligand, including those funds which would be paid for the Marathon facility. The increase in the price of the Marathon facility occurred at the expense of Seragen's common shareholders and was accomplished by BU and acquiesced in by its representatives on the Seragen board for BU's exclusive benefit.

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[256] It was suggested, although without any degree of confidence, by both Prior and Silber (Tr. 351-54, 1339-49), that the increase was to reimburse BU for operating expenses which it had advanced in the interim. The difficulty with this explanation (and the reason why it must be rejected based on the record before the Court) is that BU and Marathon received in excess of $5 million for technology service fees under the Marathon service agreement for the period of February 14, 1997 through June 30, 1998 (JX 262 at 79). In addition, milestone consideration was to be paid to Marathon for technology service fees until the merger's closing. *Id*. at 80.

Although the consideration allocated from Ligand's offer to BU for the Marathon facility cannot satisfy any "entirely fair" standard, the question of how to value that claim remains. The Marathon aspect of the allocation process may be valued as if Seragen had repurchased Marathon from BU and then passed it along to Ligand as part of the merger. Seragen was allowed to repurchase Marathon for $5 million, plus operating expenses, plus ten percent interest. The record does not demonstrate that BU was not repaid the operating expenses that it advanced; therefore, BU was entitled to receive for Marathon $5 million plus ten percent interest. The interest, charged over the one year, 5 months and 3 weeks of BU's ownership of Marathon, computes to $737,500, and, therefore, the total amount that BU should have been paid for Marathon was $5,737,500. The difference, $2,262,500, measures the spread between actual consideration ($8 million) and fair consideration ($5,737,500).

e. *Some Concluding Thoughts on the Allocation Process*

The allocation process, with the limits established by what Ligand was willing to pay, necessarily left Seragen's stakeholders disappointed. The Series B holders, for example, received approximately 60% of their investment (including accrued interest). How to allocate such a fund in a fair fashion after the fact is a daunting task. The priority holders could have held fast or compromised their claims—USSC was paid, but Hirsch settled for a discount on his Series B shares.

Also, BU received back the $5 million it had invested in the Series C, but it also compromised its Series B rights. Would the analysis be different if, for example, the Series B holders had taken more and USSC and BU (for its Series C rights) had taken less? Creating, after-the-fact, a fair bargaining dynamic is, at best, an imprecise effort. Even though they received a premium to the prevailing market price for their shares, it is apparent that the common shareholders' rights were not reasonably satisfied by the defendant fiduciaries because the allocation process cannot meet an entire fairness standard. That answer, however, leaves open the question of what to do about those shortcomings. The derivative claims, which should have been assessed and could have been used as bargaining chips, were, when separately analyzed, of little quantifiable value. There are two aspects of the Plaintiffs' challenge which are readily capable of quantification and approximation. They do as well as any other measuring stick in approximating the net benefit that might have been conferred by a fair bargaining process. Yet, monetary relief in that amount does not fully compensate the Plaintiffs for the fundamental failures of their fiduciaries. A more specific determination of those damages cannot be accomplished through this review and, thus, the Plaintiffs are not entitled to a greater specific monetary award; because of the harms which they suffered, which were real, they are entitled to a recognition of those harms through an award of nominal damages.

One of the many ironies is that Silber and Oliver, staunch adversaries here, at one time shared the same view of Seragen's future. Perhaps both were unduly optimistic, but both continued to support Seragen after its difficulties should have been apparent. The Series A shares, which generated fewer dollars than Seragen had sought and were issued under terms generally unfavorable to Seragen, should have warned them about the lack of market interest in Seragen. Oliver, even after issuance of the Series B shares, about which he now complains, continued to invest in Seragen. Ultimately, this is a case about frustrated expectations. Oliver (and the other Plaintiffs) blame BU; BU's conduct, from a corporate governance standpoint, obviously fell far short of what was required of it, but that was not the cause of Seragen's downfall. Without the Ligand acquisition, Seragen most likely would have ended up in bankruptcy, but that destination would have been the result of Seragen's cash flow needs and the market's lack of interest in the company and its unwillingness to satisfy its cravings for cash.

The Court's view of the "value" of the derivative claims is not a matter of exigent circumstances excusing fiduciary failures.[257] It is not a matter of asking the question: if the BU Defendants had not come forward with the Series B and Series C financings, then what would have happened? Instead, despite the

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[257] *See Solar Cells, Inc.*, 2002 WL 749163, at *5.

shortcomings that one can identify with the issuance of the Series B and Series C shares, any harm resulting to Seragen and its shareholders was, at most, negligible.

Of course, any evaluation of a fiduciary's compliance with his duties must consider the circumstances confronting the fiduciary. Those negotiating the Accord Agreement, even with the awareness of the potential for shareholder litigation, were under serious time constraints. Unless they reached an agreement promptly, Seragen might well have run out of money before the merger could have been consummated. In addition, with the limited proceeds, compared to the demands of the stakeholders to those proceeds, there was an incentive not to make the process more costly than necessary. Unfortunately, there was no process, and, in the absence of even the most rudimentary measures to protect the interests of the minority shareholders when the participating fiduciaries are all conflicted, those fiduciaries should not be surprised that adverse consequences result.

In summary, the Court concludes that the Defendants failed to demonstrate that the merger allocation was entirely fair because not only was there no process to ensure its fairness, but also because the price assigned to the BU's interests resulting from cancellation of the Series C shares was unfair and the price paid to BU for the Marathon facility was unfair. Damages, thus, amount to $4,809,244.[258]

[258] The Court has concluded that BU's share of the merger proceeds was not fairly allocated to it. Other stakeholders who acquiesced in the discounts could argue that they should be entitled to

Plaintiffs are additionally entitled to nominal damages for the other process failures associated with negotiation and implementation of the Accord Agreement.[259]

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participate in the Court's process that, in substance, reallocates the merger proceeds. Because they asserted no claims, because they were able to participate in the negotiation process, and because the common shareholders appear to have provided the primary source of diverted funds to lubricate the interested parties' negotiation efforts, the common shareholders are the proper beneficiaries of the reallocation.

[259] The Plaintiffs have also sought to prove damages through an effort akin to quasi-appraisal. *See Gilliland v. Motorola, Inc.*, 873 A.2d 305, 312 (Del. Ch. 2005). Whether that effort is appropriate in circumstances where shareholders, such as Oliver, were generally aware of the various derivative claims at the time of the merger is one that may be fairly debated. Indeed, as this Court observed at the outset of these proceedings: "I conclude that there is no need to expedite this proceeding [to enjoin the vote for the Merger] because plaintiffs are able to rationally exercise their conclusion to dissent and seek appraisal based on the information outlined in detail in their own individual complaint. It is, frankly, disingenuous of the plaintiffs to file this individual action, not oppose the merger itself, and declare that the merger vote should be enjoined because of inadequate information when in their own complaint, they demonstrate more than adequately that as far as they are concerned they have already exercised their judgment that the merger should be opposed. . . . They gratuitously conclude it is impossible for [other common shareholders] . . . to parse the 150 page proxy statement and decide for themselves whether they have adequate information to vote for the merger or dissent and seek appraisal rights." *Oliver v. Boston Univ.*, C.A. No. 16570-NC, Let. Op. at 7 (Aug. 7, 1998). The Plaintiffs have not disputed that the consideration paid by Ligand was a fair price for the business and assets (other than the potential derivative claims) that it acquired through the transaction. Penny sought to calculate the harm resulting from the various challenged transactions by projecting the fair value of Seragen as of the date of the merger, as if challenged transactions had not occurred. *See* JX 271. He concluded that the fair value of Seragen common stock would have been in the range of $10.02 to $19.94 per share, more than 20 times (at the lower end of the range) the trading price of Seragen common stock before the merger was announced. Perhaps in theory this approach might supply a reasonable means of damages assessment, but Penny's conclusion suffers from an unrealistic projection of financeability of Seragen during the period of 1995 through 1998, a failure to appreciate the difficult market for biotechnology stocks (such as Seragen) at that time; an inability to accept Seragen's fiscal problems, especially, its cash flow limitations; and a failure to acknowledge the difficulties posed by Seragen's inability to bring products with sizable markets into production, after first obtaining the necessary regulatory approval, in a timely fashion. Because the assumptions upon which Penny premised his projections are so at odds with the Seragen that existed during the time in question (as opposed to that entity which Penny, Silber, Oliver and others may have wished for), his conclusions are rejected.

E. *The Disclosure Claims*

"Delaware law imposes upon a board of directors the fiduciary duty to disclose fully and fairly all material facts within its control that would have significant effect upon a stockholder vote."[260] Therefore, to prevail on a disclosure claim, a plaintiff must prove not only an omission or misstatement of a particular fact, but also that the fact was material.[261] An omitted fact is material

> if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.[262]

The "materiality standard is an objective one, measured from the point of view of [a] reasonable investor[] [and not] the subjective views of the directors."[263] Thus, the omission of an immaterial fact or the making of an immaterial misstatement will not result in a finding of a violation of the duty of disclosure. Also, corporate

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[260] *Stroud v. Grace*, 606 A.2d 75, 85 (Del. 1992). *See also Malpiede v. Townson,* 780 A.2d 1075, 1086 (Del. 2001); *Malone v. Brincat*, 722 A.2d 5, 9 (Del. 1998); *In re Wheelabrator Tech., Inc. S'holders Litig.*, 663 A.2d 1194, 1198-1199 (Del. Ch. 1995).

[261] *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1997).

[262] *Rosenblatt*, 493 A.2d at 944 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). *See also Arnold v. Society for Sav. Bancorp, Inc.,* 650 A.2d 1270, 1277 (Del. 1994).

[263] *Zirn v. VLI Corp.*, 621 A.2d 773, 779 (Del. 1993).

fiduciaries "are not required to confess wrongdoing or engage in self-flagellation in proxy materials."[264] "[E]ven where material facts must be disclosed, negative inferences or characterizations of misconduct or breach of fiduciary duty need not be articulated."[265]

The Plaintiffs have asserted a number of disclosure claims concerning the merger proxy statement . They contend that the proxy was insufficient because it did not discuss the shortcomings of the Series B, Series C, Marathon and USSC transactions and the potential liability of those stakeholders. Therefore, according to the Plaintiffs, the proxy failed to inform the common shareholders of the possibility that instead of taking the discount described, these holders may have been entitled to nothing (or substantially less than they took). Additionally, the Plaintiffs assert that because of the way the proxy addressed BU's entitlement under the Series C, and because it insinuated that the Lehman Brothers fairness opinion confirmed the fairness of the allocation to the common shareholders (and not just the overall transaction) the proxy failed to disclose material facts and made material misstatements.

The Plaintiffs first complain that the Defendants did not reveal that the various transactions may have been challengeable due to breaches of the duty of

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[264] *Citron v. E.I. du Pont de Nemours & Co.*, 584 A.2d 490, 503 (Del. Ch. 1990).
[265] *Loudon*, 700 A.2d at 143.

loyalty. The essential facts defining the transaction, challenged by the Plaintiffs, were in the public domain. The self-interested nature of the transactions was known.[266] Therefore, the "facts" that form the basis for the various challenges were disclosed. Corporate fiduciaries are not required to review the facts and then draw and report the negative inferences that they may have breached their fiduciary duties. This broad-based knowledge of Seragen's various transactions implemented by a board controlled by BU seriously undercuts any argument that the Plaintiffs would have pursued appraisal if only there had been better disclosure. This was an instance in which the common shareholders knew, or should have known, the facts necessary to have made an informed decision with respect to the exercise of appraisal rights.

The Plaintiffs next, and more specifically assert, that the merger proxy was incorrect with respect to what BU was owed from its Series C investment. The Court has already found that the payment BU received from the Series C investment did not satisfy the applicable entire fairness standard. The failure to inform shareholders that BU had waived its right to receive $1,150 for each of the remaining Series C shares after all conversion rights had been exhausted was a material omission. In the context of allocating the merger proceeds, the diversion of such an amount would have been significant to an informed exercise of the

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[266] The primary plaintiffs certainly were well aware of the key facts. *See supra* note 259.

shareholder franchise. The Plaintiffs are entitled to no separate damages beyond nominal damages, from this disclosure failure because of the Court's award of damages based on the underlying allocation. Whether an accurate disclosure would have induced more shareholders to seek appraisal cannot be ascertained now and the award of damages based on the overpayment for the Series C shares fairly compensates the minority shareholders.[267]

Finally, the Court must address the Plaintiffs' allegation that the proxy statement was misleading and intentionally confusing with its references to the Lehman Brothers fairness opinion. Specifically, the Plaintiffs argue the proxy statement gives the impression that Lehman Brothers approved of both the overall merger price and the allocation of the merger proceeds to the common shareholders. Lehman did not provide a fairness opinion with respect to the merger allocation and the Plaintiffs might have had a viable claim if the merger proxy had unequivocally reported that Lehman had given an opinion as to the

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[267] The Plaintiffs have also complained that USSC received repayment of its full $5 million even though the Accord Agreement and the Merger Agreement stated that it would be taking a discount in the range of 25 percent to 40 percent. Plaintiffs have misread the Accord and Merger Agreements. USSC is not among the parties that would take a 25 percent to 40 percent discount, and instead the document revealed that USSC was willing to accept the merger consideration allocated to it in full satisfaction of the claims it held against Seragen under the License Agreement. *See* JX 262 at 67-68.

fairness of the allocation.[268] However, the proxy statement cannot be fairly and comprehensively read as setting forth any such opinion. Instead, it stated:

> Lehman Brothers has acted as financial advisor to Seragen in connection with the Merger. As part of its role as financial advisor to Seragen, Lehman Brothers rendered to the Seragen Board an opinion as to the fairness, from a financial point of view, to holders of Seragen Common stock of the consideration to be offered to such stockholders in the Merger.
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> . . . .
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> . . . Lehman Brothers was not requested to and did not make any recommendation to the Seragen Board as to the form of the consideration to be offered to Seragen's common stockholders in the Merger, which was determined through arm's-length negotiations between the parties. In arriving at the Opinion, Lehman Brothers did not ascribe a specific range of value to Seragen, but made its determination as to the fairness, from a financial point of view, of the consideration to be offered to Seragen's common stockholders in the Merger on the basis of financial and comparative analyses described below. . . . [T]he Opinion does not address . . . (ii) *the fairness of the allocation of the aggregate consideration to by paid by Ligand among the common stockholders of Seragen and other intended recipients.*[269]

Lehman Brothers' fairness opinion was attached to the proxy statement, and it read in part:

> We have not been requested to opine as to, and our opinion does not in any manner address . . . (ii) the fairness of the allocation of the aggregate consideration to be paid by Ligand among the common stockholders and such other intended recipients.
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> . . . .
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> . . . [W]e are of the opinion as of the date hereof that, from a financial point of view, the consideration offered to the common

[268] *See* JX 262 at 48 and App. A.
[269] JX 262 at 48-49 (emphasis added).

> stockholders in the aggregate in the Proposed Transaction is fair to such stockholders.[270]

The proxy statement, and the Lehman Brothers' fairness opinion, although falling short of the proverbial model of clarity, both clearly report that Lehman did not offer an opinion to the fairness of the allocation of the merger consideration "among the common shareholders of Seragen and the intended recipients." The distinction could have been clearer, but, with a fair reading, the proxy statement did not mislead the minority shareholders into believing that Lehman Brothers had approved the allocation. Accordingly, the proxy statement was not materially false or misleading with respect to Lehman's fairness opinion.

F. *Voting Power Dilution*

The Court now turns to the Plaintiffs' claims that they were directly harmed as the result of the voting power dilution caused by the issuance of the Series B and Series C shares.

Seragen issued 23,800 Series B shares, and each share had 250 voting rights.[271] This is the equivalent of additional 5,950,000 additional voting shares. No small number, but this is not what Plaintiffs have focused on. Instead, Plaintiffs have argued that, because of its conversion features of the Series B—the shares were convertible into an ever-increasing number of common shares as the

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[270] *Id.* at App. A.
[271] JX 128.

price of the common shares dropped—the Series B had the potential to dilute in drastic fashion the voting power of the minority shareholders if Seragen's stock price declined and the Series B holders converted.[272] However, this argument is missing one very important piece of the puzzle: not one share of the Series B ever converted. Thus, although the Series B had the potential to dilute the voting power of the common shareholders, because no such conversion ever occurred, no harm resulted.[273] That the Series B shares were accorded 250 votes each for merger voting purposes had no impact on the outcome of that shareholder vote.[274] Accordingly, the Court concludes the Plaintiffs have failed to demonstrate that they suffered any cognizable dilutive harm to their voting rights because of the Series B issuance.

The Plaintiffs encounter similar obstacles in their voting power dilution challenge to the Series C. Those shares came with no voting rights.[275] Thus, the

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[272] For example, if the Series B had been replaced with an equal value of common shares (at $4 per share) on the date of issue, 5,950,000 shares of common stock would have been issued. By early November 1996, Seragen estimated that, based upon the $1.916 stock price of Seragen common stock, the Series B shares were convertible into 12,421,712 shares of common stock.

[273] It should be noted that Seragen's share price was $3.875 the day before the Series B transaction was announced. *See* JX 274 at 81-82. Assuming that public financing was available to Seragen at this time, at that price Seragen would have had to issue 6,141,935 shares of common stock to raise $23.8 million (without accounting for the costs of issuance). Thus, the Series B shares, at issuance, were not dilutive because the Series B would have converted into almost 200,000 fewer shares than would have had to have been issued at the market price to raise the same level of investment.

[274] Thus, for merger voting purposes, the Series B holders had the same number of votes as if they had acquired common shares initially instead of Series B shares.

[275] JX 145.

Series C shares (without conversion) could not have had any dilutive effect on the Plaintiffs' voting rights. However, unlike the Series B, the Series C could convert at a discount.[276] On March 30, 1998, a portion of the Series C shares converted into the maximum permitted number of shares of Seragen common stock.[277] This conversion, however, did not happen until after the potential merger with Ligand had been announced, and the Plaintiffs have not demonstrated that the outcome of any shareholder vote was affected by BU's control of these additional shares of Seragen common stock. For these reasons, the Plaintiffs have failed to demonstrate any injury.[278]

G. *The Aiding and Abetting Claims Against Hirsch*

Plaintiffs contend that Hirsch (through his involvement with the Series B issuance and the Accord Agreement) aided and abetted the defendant directors in breaching their fiduciary duties. An aiding and abetting claim has four elements:

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[276] *Id. at 2.*

[277] JX 262 at 25-26; Tr. 1410. BU received 3,360,625 common shares on March 30, 1998. JX 262 at 59. On the date of conversion, Seragen's common shares were trading at $0.46. JX 272 at 170. At that per share price, BU's $5 million investment would have garnered 10,869,565 shares.

[278] It may be worth noting that Plaintiffs brought the voting power dilution claim, roughly two years after the Series C transaction. The potential harm from the unlimited conversion of the Series B shares may have been (and the Court expresses no views on this proposition) the proper subject for prospective relief, which might have been obtainable if the Plaintiffs had acted timely. In this instance, the Court is left with the *ex post* assessment of the consequences and, at least as to voting power, there were no adverse consequences. BU's effective control of Seragen may have discouraged other investors; BU's effective control, however, existed with or without the Series B or the Series C shares.

"(1) the existence of a fiduciary relationship, (2) the fiduciary breached its duty, (3) a defendant, who is not a fiduciary, knowingly participated in a breach, and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the non-fiduciary." [279]

With the dismissal of the Plaintiffs' direct challenge to the Series B transaction, it necessarily follows that claims against Hirsch for aiding and abetting that transaction fail.

Hirsch's involvement in the merger allocation does not amount to "knowing participation" in the fiduciaries' breaches of their duty. The negotiations Hirsch (or his representative) had with Seragen and the other stakeholders were conducted at arms-length: Hirsch was an independent third-party, owing no fiduciary duty to the minority shareholders. Hirsch did not force, or even encourage, the fiduciaries, as fiduciaries, to breach their duties. He bargained hard for his interests and those interests conflicted with those of the fiduciaries—indeed, at one point, Hirsch even threatened to sue the members of Seragen's Board.[280]

Furthermore, no damages sustained by the Plaintiffs resulted from "concerted action" between Hirsch and the Board. The Plaintiffs were harmed by

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[279] *In re General Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *24 (Del. Ch. May 4, 2005), *aff'd*, 2006 WL 722198 (Del. Mar. 20, 2006) (internal citations omitted). *See, e.g.*, *Malpiede*, 780 A.2d at 1096.
[280] Tr. 1417.

the fiduciaries' decision to overcompensate BU (by paying for the Series C preferred shares under a provision that BU had previously waived and by allocating additional funds for the Marathon facility). The Board chose this outcome, in breach of its fiduciary duty and independent of Hirsch's influence.[281] Based on these facts, Hirsch is not liable for the aiding and abetting claims brought against him.

H. *Nominal Damages*

The Plaintiffs are entitled to an award of nominal damages for the failure of fair process in the negotiation of the Accord Agreement. Although monetary relief can only satisfactorily redress the benefits received by BU with respect to the Series C shares and the Marathon facility, the minority shareholders' rights to fair price and process were infringed and nominal damages are appropriate. For example, the negotiation of the Accord Agreement with respect to the Series B transaction does not support a separate award of calculable damages, but it does support a nominal award. Some indeterminate economic consequences resulted.[282]

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[281] *See, e.g., Hughes*, 2005 WL 1089021, at *24 (providing an example of conduct constituting aiding and abetting, the Court stated that (in the context of allegations of money diversion) the actions of the non-fiduciary must specifically induce the fiduciaries to breach their duties. "In other words, the diversion of money caused by the alleged aider/abetter becomes an incentive for the directors to 'ignore their fiduciary obligations.'") (quoting *In re USACafes, L.P. Litig.*, 600 A.2d 43, 56 (Del. Ch. 1991)).

[282] *Cf. In re J.P. Morgan Chase & Co. S'holder Litig.*, 2006 WL 585606.

Even though Seragen common stock was trading for less than $0.50 per share before announcement of the merger, the Plaintiffs argue that nominal damages in excess of $1.00 per share are appropriate.[283] That request is excessive:

> Nominal damages are not given as an equivalent for the wrong, but rather merely in recognition of a technical injury and by way of declaring the rights of the plaintiff. Nominal damages are usually assessed in a trivial amount, selected simply for the purpose of declaring an infraction of the Plaintiff's rights and the commission of a wrong.[284]

Nominal damages of $1.00 per share have been awarded in certain circumstances in which a rational basis can be found in the record for the award.[285] No such showing has been made. Accordingly, "for the purpose of declaring an infraction of the Plaintiff[s'] rights and the commission of a wrong,"[286] the Court awards the Plaintiffs, and the prevailing class they represent, one dollar in nominal damages.

IV. CONCLUSION

For the foregoing reasons, the Court concludes that the common shareholders of Seragen suffered actual damages of $4,809,244 and nominal

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[283] Pls.' Opening Post-Trial Br. at 49 n.25.
[284] *Penn Mart Supermarkets, Inc. v. New Castle Shopping LLC*, 2005 WL 3502054, at *15 (Del. Ch. Dec. 15, 2005).
[285] *See, e.g.*, *Weinberger v. UOP, Inc.*, 1985 WL 11546, at *10 (Del. Ch. Jan. 30, 1985), *aff'd*, 497 A.2d 792 (Del. 1985) (awarding nominal damages of $1.00 per share where the offered acquisition price was $21 per share, and evidence of the market price at closing and defendants' expert witness testimony supported a finding that the fair value of the stock (which included a control premium) was within the range of $20-$22 per share).
[286] *Id.*

damages of one dollar. The Plaintiffs and the class as of the time of the merger which they represent are entitled to judgment for their proportionate share against BU, Silber, Condon, and Cassidy, jointly and severally, together with interest at the legal rate from the date of the merger and costs.[287] The Plaintiffs' claims against Hirsch, the Plaintiffs' claims relating to voting power dilution, the Plaintiffs' other claims directly challenging issuance of the Series B shares and the Series C shares, and the Plaintiffs' disclosure claims (other than as related to payment for BU's remaining Series C shares), however, are dismissed. Counsel are requested to confer and to submit a form of order to implement this memorandum opinion.

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[287] Questions involving attorneys' fees are held in abeyance.