IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MINNIE SARWAL,	)	
	)	
Plaintiff/Counterclaim Defendant,	)	
	)	
v.	)	C.A. No. 2023-0222-BWD
	)	
NEPHROSANT, INC.,	)	
	)	
Defendant/Counterclaim Plaintiff.	)	

POST-TRIAL MEMORANDUM OPINION

Date Submitted: October 9, 2026
Date Decided: November 12, 2026

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DAVID, V.C.

NephroSant, Inc. was founded to develop and monetize diagnostic tests derived from intellectual property developed in plaintiff Dr. Minnie Sarwal's laboratory at the University of California, San Francisco School of Medicine. Those diagnostic tests included a non-invasive urine test known as "QSant," used to identify the risk of kidney transplant rejection. A patient sends a urine sample to a lab that measures six "biomarkers" (cfDNA, m-cfDNA, clusterin, CXCL10, creatinine, and total protein) present in the sample, then the biomarker measurements are run through a machine learning algorithm to generate a numerical "score" between one and 100 correlating to the risk of kidney transplant rejection.

The QSant test is a laboratory-developed test regulated by the Centers for Medicare & Medicaid Services through its Clinical Laboratory Improvement Amendments program. MolDX establishes coverage and reimbursement rates for diagnostic tests. To obtain coverage for QSant, NephroSant submitted a clinical dossier to MolDX that repeatedly described QSant as a six-biomarker test.

NephroSant's initial tests for QSant used frozen samples. As NephroSant began to test fresh samples, it determined that exposure to heat during shipping presented a risk that one of the biomarkers, clusterin, would degrade. Sarwal and NephroSant's lab directors decided to exclude clusterin from the QSant algorithm, despite the company's prior representations in MolDX submissions that QSant was

a six-biomarker test. Sarwal, who served as CEO and a board member, did not inform her fellow directors of this material change to the company's lead product.

A year later, after Sarwal stepped down as CEO, NephroSant employees raised concerns that the company's lab had been running a five- instead of a six-biomarker QSant test. The board formed a special committee to investigate. After the special committee's counsel directed Sarwal to refrain from deleting or altering company documents, Sarwal downloaded then deleted tens of thousands of documents from a company Box account. She also urged NephroSant investors to back her in a new competing venture, though those efforts did not progress.

The board halted commercialization efforts, refunded Medicare reimbursements, and attempted to conduct a bridging study to validate the five-biomarker test. An initial validation analysis concluded that the five- and six-biomarker tests were not equivalent, and the company raised funds to pursue a new validation study, which it never completed. Instead, in May 2024, the company contributed substantially all of its assets to a new entity.

This post-trial decision imposes sanctions for Sarwal's document destruction. It concludes that Sarwal breached her fiduciary duty of loyalty by concealing material information about changes to the QSant test from the board, destroying company documents, and soliciting investors to form a competing business. It awards damages for those breaches, but nothing close to the $100 million

NephroSant's damages expert sought to establish at trial. Finally, the decision finds that Sarwal is not entitled to indemnification in connection with the special committee's investigation.

I. BACKGROUND

The following facts are as the Court finds them following a two-day trial held on May 26 and 27, 2026.[1]

A. Plaintiff Founds NephroSant Using Intellectual Property Developed At UCSF.

Plaintiff Dr. Minnie Sarwal ("Plaintiff") is a Professor in Residence of Transplant Surgery, is a Medical Director, and co-directs a Pancreas Transplant Program at the University of California, San Francisco School of Medicine ("UCSF").[2] She holds a Ph.D. in molecular genetics from Cambridge University, a diploma in Child Health from University College London, and an M.D. from Calcutta Medical College.[3]

In 2017, Plaintiff, with nonparties Josh Yang and Drew Watson, founded NephroSant, Inc. ("NephroSant" or the "Company"), formerly KIT.bio, Inc., with

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[1] The Joint Pre-Trial Stipulation and Order is cited as "PTO ¶ __". Dkt. 299. Trial testimony is cited as "Tr. (Witness) at __". Dkts. 303–04. Joint exhibits are cited as "JX __" unless otherwise defined. Dkt. 270.

[2] PTO ¶ 42; Tr. (Sarwal) at 5:7–12.

[3] Tr. (Sarwal) at 5:15–23; Pl.'s Opening Post-Trial Br. [hereinafter POB] at 2, Dkt. 311.

Plaintiff serving as Chief Executive Officer ("CEO").[4] NephroSant was founded to develop and monetize diagnostic tests derived from intellectual property developed in Plaintiff's "Sarwal Lab" at UCSF.[5] Those diagnostic tests included a non-invasive urine test known as "QSant," used to identify the risk of transplant rejection.[6]

Because UCSF owns the intellectual property rights for innovations developed in the Sarwal Lab, NephroSant and UCSF entered into two agreements to facilitate NephroSant's development of the QSant test. First, in February 2018, NephroSant and UCSF entered into an Exclusive License Agreement under which UCSF granted NephroSant an exclusive license to develop and market the QSant test.[7] Second, in September 2019, NephroSant and UCSF entered into an Outgoing Data and Material Transfer Agreement (the "MTA"), which granted NephroSant access to frozen urine samples that Plaintiff had collected in the Sarwal Lab over

[4] PTO ¶¶ 42–43, 67.

[5] *Id.* ¶ 42; Tr. (Sarwal) at 8:22–9:7.

[6] PTO ¶ 42.

[7] *Id.* ¶ 70; JX 1.

twenty years.[8] NephroSant was to use the samples in its research, conduct additional studies to progress the research beyond reliance on the samples, and then return the samples to UCSF.

The QSant test is intended to function as an at-home early-detection test that measures the risk of kidney rejection to enable early intervention.[9] Broadly speaking, the QSant test is conducted in two stages—a "wet" side and an "algorithm" side.[10] In the wet portion of the test, a patient sends a urine sample to the lab, where a test is conducted to measure six "biomarkers" present in the collected urine: cell-free DNA ("cfDNA"), methylated cell-free DNA ("m-cfDNA"), CXCL10, clusterin, total protein, and creatinine.[11] In the algorithm portion, the biomarker measurements are run through a machine learning algorithm that employs a "random forest" model.[12] The algorithm generates a numerical "score" between one and 100 (the

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[8] PTO ¶ 71; JX 2; Tr. (Sarwal) at 20:24–22:9. The MTA noted that the samples were covered by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). JX 2 § 1.

Separately, in August 2020, NephroSant and Plaintiff entered into a Confidential Information Agreement which stated that the data and intellectual property developed in connection with Plaintiff's role at UCSF or developed with UCSF's trade secret information during her professorship would remain UCSF's property. JX 17 § 3.

[9] PTO ¶ 43; Tr. (Sarwal) at 15:7–20.

[10] Tr. (Ghosh) at 409:17–410:3, 410:16–411:3.

[11] *Id.* at 409:17–410:3; JX 16 at 5–6.

[12] Tr. (Ghosh) at 410:4–7. A random forest model is a machine learning tool that combines the output of multiple decision trees to reach a single result. *See* JX 439 at 21.

"Q-Score") which correlates to the risk of kidney transplant rejection.[13] A higher Q-Score reflects higher risk; a Q-Score greater than thirty-two indicates kidney rejection.[14]

To train the model, data scientists begin with the "ground truth"—samples from patients for whom kidney rejection or nonrejection outcomes are known.[15] The machine learning model uses the "ground truth" to detect patterns in the biomarker measurements until it can accurately predict the risk of kidney rejection.[16] Once the algorithm is developed, it is "locked down" (so that it stops adapting to new data) before it can be applied to new samples in the next study.[17] Although Plaintiff contends that a laboratory-developed test remains subject to "constant improvements and amendments," if a material change is made to a test, a lab must conduct a "bridging study"—a validation process used to prove that the updated test version will produce results equivalent to the prior test.[18]

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[13] Tr. (Sarwal) at 14:13–15:2.

[14] *Id.*

[15] *Id.* (Ghosh) at 410:16–411:19.

[16] *Id.*

[17] *Id.* at 411:20–412:6.

[18] *Id.* (Sarwal) at 37:9–13; *id.* (Ghosh) at 439:20–23; *id.* (Stoll) at 466:19–467:3.

B. NephroSant Submits A Dossier To MolDX For CMS Coverage Describing A Six-Biomarker Test.

The QSant test is a laboratory-developed test regulated by the Centers for Medicare & Medicaid Services ("CMS") through its Clinical Laboratory Improvement Amendments ("CLIA") program.[19] MolDX is a program administered by CMS that establishes coverage and reimbursement rates for diagnostic tests.[20] Each submission is assigned a "Z-Code" to identify the test submitted to MolDX for reimbursement.[21]

By 2020, NephroSant had established a CLIA laboratory and hired three CLIA lab directors.[22] NephroSant and UCSF also published a series of papers that provided clinical validation for the QSant test in NephroSant's CLIA lab.[23]

As NephroSant prepared to make an application to MolDX, Plaintiff asked one of NephroSant's regulatory consultants, Bruce Quinn, about "using 5 markers in the final CLIA Q[]Sant assay" to eliminate m-cfDNA after finding this biomarker

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[19] *Id.* (Sarwal) at 17:14–22.

[20] PTO ¶ 84.

[21] Tr. (Sarwal) at 34:9–12.

[22] *Id.* at 32:4–7; *Id.* (Lai) at 256:7–17.

[23] *Id.* (Sarwal) at 22:20–24.

"ha[d] little to no impact on performance of the assay."[24] Quinn advised Plaintiff that "having a major 6 marker publication and a planned 5 marker CLIA version [wa]s a potential difficulty" and CMS would need to "give a different Z code for a 5 marker and 6 marker version."[25] After this exchange, NephroSant kept m-cfDNA as a biomarker in the QSant test.[26]

In June 2020, NephroSant submitted a clinical dossier to MolDX to obtain CMS coverage for QSant.[27] The dossier described NephroSant and UCSF's clinical studies to support the clinical validity of QSant. First, it summarized a 2020 clinical study, the "Yang study," that "developed and validated a score in urine for accurate detection of biopsy confirmed acute renal transplant rejection":

> In the initial Q[]Sant foundational clinical study, we developed an algorithmic model using ***cfDNA and five additional biologically relevant biomarkers*** (m-cfDNA, ***Clusterin***, CXCL10, Creatinine, and Total protein) to create a composite Q-Score to differentiate urine samples from patients with renal transplant quiescence (no rejection on a renal transplant biopsy) from transplant rejection (acute rejection on a renal transplant biopsy). We then validated the performance of the ***locked Q-Score*** for diagnosis of acute rejection in two independent

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[24] JX 3 at 2; *see* JX 421 at 1 (identifying Bruce Quinn as a "MolDx consultant who played a central role in the submission(s) the Company previously made to Medicare"). Plaintiff objects to JX 3 as hearsay, but this document shows Plaintiff was aware of a possible regulatory risk, not that m-cfDNA did not, in fact, impact the test. Joint Schedule of Evidence, Ex. A at 1, Dkt. 325; D.R.E. 801(d)(2).

[25] JX 3 at 2.

[26] JX 16 at 5.

[27] PTO ¶ 85; JX 16.

> datasets of biopsy matched urine samples from adult and pediatric renal transplant recipients, with and without acute rejection. . . .
>
> These samples were used to train, test and validate the performance of the Q-Score, a composite scaled algorithm (from 0-100) developed across ***all six biomarkers***, to detect biopsy confirmed acute rejection with high sensitivity, specificity and accuracy.[28]

Second, the dossier summarized another 2020 clinical study, the "Nolan study," that "re-validated the assay for accurate detection of acute renal transplant rejection using the previously established threshold":

> To improve the analytical assay rigor and quality, the research assays used in the Yang *et al* foundational study were transitioned to the NephroSant CLIA lab, validated as per CLIA guidelines . . . and the ***locked assays*** were utilized for a clinical validation study to re-validate the Q[]Sant assay and Q-Score . . . .
>
> The study included 223 independent biopsy matched urine samples obtained with informed consent from 215 pediatric and adult recipients of renal allografts, transplanted at one of three different transplant centers . . . .
>
> Of the 223 samples, acute kidney allograft rejection (AR) was confirmed by the paired biopsy read in 71 samples and a no-rejection or stable (STA) phenotype confirmed in 152 samples. Urine samples were collected from these patients from 1 to 1539 days post-transplant. Statistical methods and machine learning models were applied to generate a Q-Score, similar to the foundational clinical paper to evaluate the correlation between a phenotype of AR and the Q-Score threshold. . . . Random Forest modeling was used to identify the relationship between the different biomarkers, along with time post-transplant, for defining kidney transplant rejection or no-rejection

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[28] JX 16 at 14 (emphasis added); *see* Joshua Y. C. Yang et al., *A Urine Score for Noninvasive Accurate Diagnosis and Prediction of Kidney Transplant Rejection*, Science Translational Medicine, Mar. 2020.

> status. The re-developed Q-Score from the training set, obtained using the Random forest model, was used to confirm if the threshold score of 32 still identified kidney allograft rejection.[29]

Further describing NephroSant's clinical tests, the dossier reiterated that:

> In the clinical validation study by Nolan *et al* . . . , ***we employed measurements of the six biomarkers*** (cfDNA, m-cfDNA, ***Clusterin***, CXCL10, Creatinine, and Total protein) in a kidney transplant cohort which comprised of 71 AR and 152 of STA to re-train and re-validate the Q[]Sant test, now performed in the NephroSant CLIA Lab. This CLIA validation study was designed to conduct a comprehensive assessment of the Q[]Sant assay and the Q-Score on urine samples ***using the same biomarkers***, same assays and same Q-Score analytics, as previously described in our clinical foundational paper could provide similar performance specifications, at a similar Q-Score threshold of 32, to differentiate AR from STA patients. . . . The utility of the individual biomarkers with the ***locked Q-Score*** and the locked threshold of 32 was applied to discriminate STA and AR outcomes by validation on 66 samples in the independent validation set.[30]
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> On July 17, 2020, MolDX assigned a Z-Code for the QSant test.[31]

C. The QSant Test Changes From A Six- To A Five-Biomarker Test.

NephroSant's initial tests for QSant used frozen urine samples collected from patients in the Sarwal Lab over a twenty-year period.[32] The hope, however, was that the test could be commercialized as a diagnostic test on fresh samples taken from

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[29] JX 16 at 15 (footnote omitted) (emphasis added).

[30] *Id.* at 15–16 (footnotes omitted) (emphasis added).

[31] PTO ¶ 86.

[32] Tr. (Sarwal) at 22:1–16.

patients at home.[33] To test QSant on fresh samples, NephroSant enrolled patients in an early access program ("EAP") from April through October 2021.[34]

One challenge NephroSant encountered in that process was that the chemical composition of urine rapidly degrades at room temperature, which can cause the biomarkers that QSant evaluates to lose their informative value.[35] NephroSant developed a preservative intended to slow degradation for three days so that the test could be taken at home and shipped to NephroSant's CLIA lab via FedEx.[36] But when NephroSant simulated extreme shipping conditions by exposing samples to high heat, the biomarker clusterin still presented a risk of degradation.[37] At some point after the MolDX application was submitted, during "weekly R/D meetings where the biomarker algorithm and biomarker stability studies were regularly examined" by Plaintiff and NephroSant's CLIA lab directors, "a decision was made

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[33] *Id.* at 15:7–20.

[34] *Id.* at 49:11–21.

[35] *Id.* at 20:10–23.

[36] *Id.*; JX 16 at 6 ("NephroSant has a urine preservative for stabilizing cfDNA and the other biomarkers that comprise the Q[]Sant test in urine. . . . This is essential to ensure stability of DNA during shipment of clinical specimens to NephroSant CLIA lab via FedEx overnight priority shipment."); *id.* at 8 ("Addition of a urine preservative stabilized high, medium, and low patient samples concentrations for both Clusterin (n = 6) and CXCL10 (n =8) for at least three days with the CXCL10 samples stable even after six days at room temperature."); *id.* at 9 ("Our results show that addition of a urine preservative stabilizes cfDNA and m-cfDNA, Clusterin, CXCL10, Total Protein and Creatinine in urine for at least 3 days at room temperature.").

[37] Tr. (Sarwal) at 45:15–46:6; JX 291 Interrog. 36.

to exclude a marker, Clusterin, to ensure assay robustness and reproducibility."[38] According to Plaintiff's own interrogatory responses, "[t]his decision was based on the fact that this marker did not impact the Q[S]core, but exposed the QScore potentially to minor variations as it had a risk of marker degradation over very high heat . . . ."[39] Plaintiff, who served as a member of NephroSant's board of directors (the "Board"), did not inform her fellow directors of this change to the QSant test.[40]

Despite conceding in discovery responses that "a decision was made to exclude" clusterin from the test, Plaintiff claimed at trial that the test changed itself. According to Plaintiff, as samples were processed, the algorithm began to "evolve."[41] The wet portion of the test continued to collect data from six biomarkers, including clusterin.[42] But the machine learning algorithm evolved with the addition

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[38] JX 291 Interrog. 36.

[39] *Id.*

[40] PTO ¶ 93; JX 291 Interrog. 32.

[41] Tr. (Sarwal) at 41:3–5; *id.* (Lai) at 262:16–263:2. *See also* JX 291 Interrog. 22:

> QSant has 6 biomarkers that are collected and analyzed. The algorithm is roughly a weighted average across the markers to generate the QScore. The QScore leveraged an AI based algorithm to generate the biomarker weights or coefficients. As more data was being collected, the AI-based algorithm evolved. This evolution was expected as presented in the MolDx submission and the CLIA lab certification. This evolution is expected to be further enhanced through the AQUA Registry as the AI-based algorithm is applied to additional patient data.

[42] Tr. (Sarwal) at 42:10–16; *id.* (Ghosh) at 410:8–15.

of new samples until it "reached its optimal performance on five [biomarkers] and de-emphasized clusterin."[43]

Contrary to Plaintiff's "constant evolution" theory, NephroSant's former Vice President of Data Science and Software Engineering, Dr. Srinka Ghosh, testified at trial that the algorithm was "locked" at five biomarkers by April 2021, despite NephroSant's earlier representations to MolDX that it was employing a six-biomarker algorithm.[44]

D. MolDX Approves A Six-Biomarker QSant Test For CMS Coverage.

Throughout 2021, NephroSant made three updated submissions to MolDX, which continued to describe QSant as a six-biomarker test.[45] MolDX approved the QSant test for Medicare coverage on August 20, 2021.[46]

After receiving MolDX approval, in September 2021, NephroSant launched a Series B financing round to raise $40 million.[47]

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[43] *Id.* (Sarwal) at 38:16–39:4, 43:9–11.

[44] PTO ¶ 60; Tr. (Ghosh) at 435:20–23, 437:19.

[45] PTO ¶¶ 87–89; JX 39 at 76; JX 42 at 7; JX 44 at 13.

[46] PTO ¶ 90.

[47] *Id.* ¶ 80. Plaintiff claims that at this time, the Company began storing documents in Box, a cloud-based storage service. Plaintiff created a folder in her NephroSant Box account "where [she] could keep some of [her] UCSF working files." Tr. (Sarwal) at 90:5–92:3.

In February 2022, NephroSant published a new study based on the EAP samples entitled *Through the Looking Glass: Unraveling the Stage-shift of Acute Rejection in Renal Allografts*.[48] Plaintiff claims this paper "validated" the five-biomarker test, but it did not.[49] Its methodology included collecting data from *six* biomarkers, and the paper did not address the effect (or non-effect) of clusterin in the algorithm portion of the QSant test.[50]

E. The Board Learns That The QSant Test Was Changed From A Six- To A Five-Biomarker Test And Forms A Special Committee To Investigate.

On March 11, Plaintiff voluntarily stepped down as NephroSant's CEO and Mark Capone replaced her as interim CEO.[51] Under the terms of a Transition Agreement, Plaintiff assumed the role of Chief Scientific Advisor.[52]

The following month, NephroSant employees raised concerns that the CLIA lab had been running a five-biomarker instead of a six-biomarker QSant test.[53] Capone called a special meeting of the Board—comprising Plaintiff, Capone, Jeffrey

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[48] JX 64 at 1; *id.* at 2–3 (providing "a new analysis of a real-world data (RWD) cohort, comprising of prospectively collected urine samples (*n* = 235) from 11 different US transplant centers, collected between 1 April and 1 October 2021").

[49] Tr. (Sarwal) at 49:15–50:1.

[50] JX 64 at 3.

[51] JX 68 at 1.

[52] PTO ¶ 42; JX 67 § 1(a)(i).

[53] PTO ¶ 94.

Giullian, Michele Colucci, and Juan Loaiza—to discuss concerns about "QSant tests in the laboratory and the accuracy of the results reported by the Company."[54]

Plaintiff emailed Board members, explaining she had heard that "some information was communicated by someone to somebody and perhaps to a board member that there was some information related with our Mol[DX] submission."[55] She warned that NephroSant was "at a very positive and critical inflection, with 6 weeks of cash, and [was] about to close a financing round," and "[d]ecisions we make as a board at this point have to be held to a high fiduciary standard at this critical time for the company."[56] Separately, Plaintiff sent the Board a document summarizing the history of the QSant test, which included a chart identifying five versions of the test, including two (versions four and five) that showed clusterin was given a weight of zero.[57]

At an April 16 special meeting, the Board established a special committee of directors comprising Giullian and Colucci (the "Special Committee") "to investigate allegations related to the process for running QSant tests in the laboratory and

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[54] JX 82 at 1; PTO ¶ 94.

[55] JX 79 at 1.

[56] *Id.*

[57] JX 81 at 4.

reporting the results" (the "Investigation").[58] Plaintiff did not support formation of the Special Committee, expressing "concerns regarding the impact of a potential investigation on the Company's cash runway and the ongoing Series B financing."[59] The Board nevertheless determined to "pause all QSant test reports until the Investigation reached a conclusion."[60]

At the same time Capone brought the issue to the Board, he also asked Ghosh and another NephroSant employee, Francisco Dias Lourenco, to review the QSant algorithm.[61] On April 16, Capone asked Lourenco, "[i]f we were going to do a proper validation" of the five-biomarker test, "how would we do that and how long would that take?"[62] Lourenco responded:

> With the current set of samples we have from EAP we would probably have enough data to re-validate—but we don't have permission to use the clinical data (we didn't set up EAP to be a trial). As I mentioned, the QSant results highly correlate with the clinical picture of the patients from the feedback we receive. If we had to start collecting samples from scratch, the fastest I've seen a study done is three months —but it was with a well-established clinical affairs team at cepheid.[63]

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[58] PTO ¶ 94; JX 82 at 2.

[59] JX 82 at 1.

[60] PTO ¶ 95.

[61] Tr. (Ghosh) at 417:3–15; *id.* (Sarwal) at 32:15–19 (identifying Lourenco as senior vice president of operations, product, marketing, and sales).

[62] JX 84 at 2.

[63] *Id.* at 1.

F. Plaintiff Deletes Documents From Her NephroSant Box Account.

The Special Committee engaged Fenwick & West LLP ("Fenwick") as its legal counsel in connection with the Investigation.[64] On April 21, Fenwick emailed Plaintiff, requesting that she "provide the login credentials for [her NephroSant] Box account so administrative rights can be transferred over to the Company, and that [Plaintiff] refrain from deleting or altering in anyway the contents of the account."[65] Fenwick followed up with Plaintiff later the same day but did not receive a response.[66]

On April 23, the Special Committee reported preliminary findings to the Board, including that "the QSant test remains effective, but the Company's marketing and reporting materials need to be updated to reflect the composition and accuracy of the version of the QSant test the Company is currently deploying."[67] The Special Committee further reported "that the current version of the QSant test is not what is reflected in the Company's prior submissions to MolDX, nor is it consistent with the descriptions on the reports."[68] The Special Committee recommended, based on its preliminary findings, that:

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[64] PTO ¶ 46.

[65] PTO ¶ 97; JX 111 at 2.

[66] JX 111 at 2.

[67] JX 105 at 1.

[68] *Id.*

> (i) the Company's Chief Executive Officer direct the efforts to review the algorithm utilized for the QSant test, and (ii) the Company continue to hold off on billing until further evaluation of the QSant test and, if appropriate, revision of the MolDX submission, reports, and marketing materials . . . .[69]

After the Board meeting, Plaintiff asked a NephroSant employee to "write code" for a new six-biomarker algorithm.[70] Plaintiff also worked with Lourenco on a presentation to the Special Committee proposing that NephroSant could either "keep [QSant] as 5-marker algorithm with internal documentation of product version evolution" or "[i]ncorporate clusterin to current algorithm to make it a 6-marker algorithm."[71] The Special Committee instructed Plaintiff to continue working from home and not to contact employees.[72]

On April 25, Fenwick again requested that Plaintiff turn over her NephroSant Box account credentials.[73] At trial, Plaintiff testified that she then spoke with Fenwick, who authorized her to delete HIPAA-protected patient information.[74] She

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[69] *Id.*

[70] JX 692 at 3 (Plaintiff instructing Yazar to create code on April 23, 2022, at 1:13p.m.).

[71] JX 108 at 1, 3.

[72] JX 107 at 1.

[73] JX 111 at 1.

[74] Tr. (Sarwal) at 98:11–99:10, 99:15–100:3.

further testified that Capone independently blessed her deletion of "UCSF proprietary" information.[75]

Between April 21 and April 23—before Fenwick purportedly authorized the deletion of HIPAA-protected information—Plaintiff downloaded, deleted, and cleared from the "trash" folder tens of thousands of documents from her NephroSant Box account.[76] Plaintiff also instructed her son, Reuben Sarwal (who also worked at NephroSant), to delete documents from her Box account, which he did.[77] In total, Plaintiff "downloaded 33,000 documents and double deleted 15,000 of those."[78] Plaintiff insists that she only deleted HIPAA-protected patient information and copies of documents that existed separately on the Company's server.[79] But—as discussed in further detail below—NephroSant claims that the deleted files contained data foundational to the Company's research (the "Master Data File").[80]

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[75] *Id.* at 97:21–98:8.

[76] PTO ¶¶ 98–100; JX 690 at "BoxLogs" cells A32, A48395.

[77] PTO ¶¶ 101–04.

[78] Tr. (Colucci) at 196:4–6; *see also* JX 329 at 4 (expert report concluding that "15,304 items were either moved to the Trash folder, or were emptied from the Trash folder," "33,008 files or folders were downloaded between April 19th, 2022, and May 16th, 2022," and "11,640 files and folders were downloaded which no longer exist in Nephro[S]ant's SharePoint environment").

[79] Tr. (Sarwal) at 103:17–24.

[80] *Id.* (Stoll) at 473:22–474:4.

The Board placed Plaintiff on administrative leave and removed her access to the Company's "digital and electronic systems" on April 26.[81] Plaintiff then engaged Orrick, Herrington & Sutcliffe ("Orrick") to represent her in connection with the Investigation.[82]

G. Plaintiff Meets With Investors About A Competing Business.

In late May, Plaintiff met with NephroSant investors, including Haydar Alireza and William R. Magee, Jr., and suggested they back her in a "new venture" using NephroSant's technology.[83] Plaintiff told the investors that "if [NephroSant] goes into [bankruptcy], the IP will revert to UCSF, and then [Plaintiff] can start again."[84] Nothing came of these preliminary discussions.

H. NephroSant Attempts To Validate The Five-Biomarker Test But Its Initial Validation Study Is Unsuccessful.

On May 1, one of NephroSant's CLIA lab directors, Dr. Donna Hongo, emailed NephroSant's other lab directors and Lourenco, asking: "[f]or the current re-validation of the QSant algorithm, we are comparing to the original validation set

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[81] PTO ¶ 107; JX 110.

[82] JX 666.

[83] JX 299 at 4; Tr. (Magee) at 573:8–9.

[84] Tr. (Magee) at 573:4–9.

that was use[d] in the *Nolan et al* paper and what was reported to CMS as our performance, correct?"[85] Copying Ghosh, Lourenco responded:

> The validation approach is to compare performance back to *Nolan et al*, and what was reported to CMS. For clarification, the current algorithm deployed to production (used in the lab), was also based on the same dataset as what we are doing with this new version. The issue with the current algorithm is that it does not have the same performance characteristics as the *Nolan et al* version, and uses 5 markers instead of 6. [Ghosh] is working with the team to correct both of those issues. And yes, we have access to the complete dataset. For clarification, the agreement with UCSF is with NephroSant, not [Plaintiff] specifically, so we still have access to data and the IP.
>
> The current plan is to complete validation of the algorithm this coming week, with a plan resumption of operations by Monday May 9th.[86]

In this initial validation analysis (the "Initial Validation"), Ghosh looked at three sets of data—the "Nolan Data" collected from "Mexico, Stanford, [and] UCSF cohorts" "over the last 15 years"; the "Wanzin Data" collected from the "ARETAN" and "TITRATE" cohorts from 2018 through 2020; and the "EAP Data" collected in the EAP beginning April 2021.[87] She compared the Nolan Data to the Wanzin Data and concluded that "26 samples [in the Nolan Data] which were originally diagnosed as nonrejection w[ere] changed to acute rejection in the second rendition of the data

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[85] JX 117 at 4; JX 633 at 2; Tr. (Sarwal) at 32:11–12.

[86] *Id.* at 3 (emphasis in original).

[87] JX 601 at 4.

cohort."[88] Ghosh believed someone manually altered the data to change some patients' diagnoses.[89] Ghosh also sought to "[d]etermine the effect of rescoring of EAP samples" against a new six-biomarker test.[90] Ghosh concluded that the five- and six-biomarker tests were not equivalent.[91]

Ghosh presented her findings to Capone, and the Board ultimately decided to "cease [NephroSant's] commercial activities" and "conduct a prospective validation of the QSant test."[92]

On May 10, Capone resigned as a director and interim CEO of the Company, and Colucci was named CEO.[93] The following week, the Company sent a letter to Fresenius Medical Ventures GmbH—which had offered two weeks prior to invest $10 million in the Series B financing round—disclosing the Investigation.[94] The letter explained that "material changes in the specifics of the QSant test led . . . experts to conclude that reliance on a QSant value obtained during real world testing

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[88] *Id.* at 20; Tr. (Ghosh) at 418:20–23; *see also* JX 601 at 6 ("26 samples changed from NR in Nolan to AR in Wanzin").

[89] Tr. (Ghosh) at 419:10–12; *id.* at 419:5–8 ("Q. And were you able to determine from your data review who changed the phenotypes from nonrejecting to acute rejection? A. It was Dr. Sarwal.").

[90] JX 601 at 7.

[91] *Id.* at 16; Tr. (Ghosh) at 422:6–423:4.

[92] JX 125 at 1–2; JX 601; Tr. (Ghosh) at 417:10–15.

[93] PTO ¶ 110.

[94] PTO ¶ 53.

was potentially unwarranted and that there should be a resetting and a reframing of the algorithm on which QSant is based."[95] Fresenius subsequently withdrew its offer.[96]

Later that month, Plaintiff and NephroSant's CLIA lab directors made a presentation to the Board to justify the five-biomarker algorithm and propose steps to return to commercialization.[97] One slide conceded that there was "[n]o [c]lusterin" in the "[c]urrent CLIA [d]eployment."[98]

I. The Special Committee Concludes Its Investigation And Plaintiff Resigns As Chief Scientific Advisor.

From April to June, the Special Committee conducted approximately forty-three interviews, including three interviews with Plaintiff.[99]

On June 14, the Board held a meeting at which the Special Committee presented the following "summary recommendations" based on its Investigation:

> [T]he Company should (i) engage regulatory experts and counsel to advise on remediation and disclosure, if any, including to Centers for Medicare and Medicaid and MolDX, (ii) develop standardized processes and clear documentation consistent with scientific and clinical laboratory best practices; consider oversight by independent third party, (iii) clearly identify roles and responsibilities, (iv) create independent processes for future validation efforts, (v) enforce culture

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[95] JX 140 at 3.

[96] PTO ¶ 116.

[97] PTO ¶ 93.

[98] JX 605 at 5.

[99] PTO ¶¶ 94, 119.

> of openness, not "siloed" information, (vi) conduct training and set clear expectations for management of issues that must be escalated to the Board and (vii) evaluate personnel decisions . . . .[100]

In total, the Company incurred $827,682.84 in legal fees in connection with the Investigation.[101]

One month later, on July 13, Plaintiff resigned as Chief Scientific Advisor and made a demand for unpaid compensation and indemnification of expenses incurred in connection with the Investigation.[102] Plaintiff resigned from the Board on July 31.[103]

J. NephroSant Pursues The PARK Study, But Then Transfers Its Assets To KidneyMetrix.

After the Investigation concluded, NephroSant continued to evaluate the QSant test. NephroSant's Vice President of Product Management, Jeffery Stoll, was tasked with locating the data required to support a formal validation of the five-biomarker test.[104] At trial, Stoll testified that the Company lacked sufficient data to

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[100] JX 178 at 1–2.

[101] JX 604. At the pre-trial conference, the Court granted Plaintiff's motion in limine to exclude belatedly produced evidence purporting to summarize the Special Committee's findings. *See* JX 191; Tr. of Pretrial Conference [hereinafter PTC Tr.] at 29:19–24, Dkt. 326.

[102] PTO ¶¶ 121–22; JX 246.

[103] Tr. (Sarwal) at 87:19–24.

[104] *Id.* (Stoll) at 464:16–23, 468:10–21.

validate the test results because it could not recover the "Master Data File" Plaintiff purportedly deleted in April 2022.[105]

In August, the Company raised $9.27 million in bridge financing to pursue a new validation study (the "PARK Study").[106] The "[k]ey [o]bjective" of the PARK Study was to "[u]pdate QSant['s] 6 biomarker algorithm and validate performance specs" using data from nine transplant centers from 500 samples collected over six to nine months.[107]

NephroSant never finished the PARK Study.[108] NephroSant informed MolDX that the PARK Study "[r]equire[d] minimal data collection" and that

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[105] *Id.* at 469:5–17, 472:17–473:3.

[106] *Id.* (Colucci) at 203:20–23, 206:14–17. On July 9, 2022, NephroSant executed a term sheet with a group of investors led by Alireza for a "minimum of $6.25 million invested in . . . notes . . . subject to a maximum amount of $9 million." JX 660 at 1. The funds were "for work relating to the validation of the current Q[S]ant product." *Id.* Additionally, on August 12, NephroSant executed a Note Purchase Agreement in exchange for $7 million. Those proceeds were also used "(i) to fund work relating to the validation of the Company's QSant test and related products, including, but not limited to, implementing any guidance provided by third party experts retained by the Board or conducting any study, analysis or plan of action as recommended by the Company's Chief Executive Officer, with approval from the Board and (ii) for general corporate purposes." JX 640 at 164.

[107] JX 430 at 14.

[108] Tr. (Colucci) at 204:5–8 ("So [the Park Study] took just a lot longer than we even expected it to take. And it would have taken a lot more money to complete it, which we were not able to do, unfortunately."); *id.* at 211:23–212:1 ("We would have had to probably spend another $10 million to take that study to fruition.").

NephroSant expected to complete it in "Q3 2023."[109] But, according to NephroSant, the study took "a lot longer" than expected and was too expensive to continue.[110]

On May 22, 2024, NephroSant and KidneyMetrix Inc. ("KidneyMetrix"), a newly formed entity for which Colucci served as CEO, entered into a Contribution Agreement under which "substantially all of the assets of NephroSant were transferred to KidneyMetrix" in exchange for "6,250,000 shares, or 6.25% of KidneyMetrix common stock."[111]

NephroSant then wound down its operations. It incurred legal fees totaling $400,000 and paid $1,377,000 to terminate a lease.[112] The Company also refunded $256,411.51 to Medicare and private plans that paid for the QSant test.[113]

K. Procedural History

On February 21, 2023, Plaintiff initiated this action through the filing of a Verified Complaint.[114] On September 23, Plaintiff filed the operative Verified Amended Complaint (the "Complaint").[115] The Complaint alleges three counts.

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[109] JX 448 at 33; JX 431 at 8.

[110] Tr. (Colucci) at 203:23–204:8.

[111] PTO ¶¶ 132–33; JX 308.

[112] Tr. (Colucci) at 210:19–24, 211:11–14.

[113] *Id.* at 210:4–8.

[114] Dkt. 1.

[115] Verified Am. Compl. [hereinafter Compl.], Dkt. 143.

Count I seeks an order requiring NephroSant to indemnify Plaintiff for her legal expenses incurred in connection with the Investigation under her indemnification agreement with the Company (the "Indemnification Agreement").[116] Count II seeks an order of "fees on fees" incurred in litigating this lawsuit.[117] Count III alleges a claim against the Company for breach of Section 9(b) of the Indemnification Agreement.[118]

The Company filed an Answer and Verified Counterclaims to Plaintiff's First Amended Complaint on October 7, 2025 (the "Counterclaims").[119] The Counterclaims allege three counts. Count I seeks a declaration that Plaintiff is not entitled to indemnification in connection with the Investigation.[120] Count II seeks a declaration that the Company is entitled to set off any amounts owed to Plaintiff under a promissory note.[121] Count III alleges that Plaintiff breached her fiduciary duties to NephroSant.[122]

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[116] *Id.* ¶¶ 30–37.

[117] *Id.* ¶¶ 38–41.

[118] *Id.* ¶¶ 42–47. Plaintiff waived this claim by failing to address it in post-trial briefing.

[119] Def. NephroSant, Inc.'s Answer And Verified Countercls. To Pl.'s First Am. Compl. [hereinafter Countercls.], Dkt. 159.

[120] *Id.* ¶¶ 53–59.

[121] *Id.* ¶¶ 60–65.

[122] *Id.* ¶¶ 66–69.

On April 1, 2026, NephroSant filed a Motion for Sanctions Against Plaintiff Minnie Sarwal for Spoliation (the "Motion for Sanctions").[123] The Court deferred ruling on that motion because it raised disputed facts best suited for resolution after trial.[124]

The Court held a two-day trial on May 26 and 27, 2026.[125] The parties completed post-trial briefing on September 24,[126] and the Court heard post-trial oral argument on October 9.[127]

II. ANALYSIS

The parties proceeded to trial on Counts I through III of the Complaint and Counts I through III of the Counterclaims.[128]

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[123] NephroSant, Inc.'s Mot. For Sanctions Against Pl. Minnie Sarwal For Spoliation [hereinafter Mot. for Sanctions], Dkt. 227.

[124] PTC Tr. at 11:6–15.

[125] Dkt. 305.

[126] On July 15, 2026, Plaintiff filed her Opening Post-Trial Brief. POB. On August 12, NephroSant filed its Post-Trial Opening And Answering Brief. NephroSant, Inc.'s Post-Trial Opening And Answering Br. [hereinafter DOB], Dkt. 313. On September 10, Plaintiff filed a Combined Reply And Answering Post-Trial Brief. Pl.'s Combined Reply And Answering Post-Trial Br. [hereinafter PRB], Dkt. 316. On September 24, NephroSant filed its Post-Trial Reply Brief. NephroSant, Inc.'s Post-Trial Reply Br. [hereinafter DRB], Dkt. 319.

[127] Dkt. 322.

[128] Compl. ¶¶ 30–47; Countercls. ¶¶ 53–69.

The Indemnification Agreement allocates to NephroSant the burden to prove that Plaintiff is not entitled to indemnification.[129] NephroSant also bears the burden to prove "each element" of its counterclaim for breach of fiduciary duty, "including damages, . . . by a preponderance of the evidence." *In re Happy Child World, Inc.*, 2020 WL 5793156, at *10 (Del. Ch. Sept. 29, 2020) (quoting *Revolution Retail Sys., LLC v. Sentinel Techs., Inc.*, 2015 WL 6611601, at *9 (Del. Ch. Oct. 30, 2015)). "[P]roof by a preponderance of the evidence means proof that something is more likely than not." *Narayanan v. Sutherland Glob. Hldgs. Inc.*, 2016 WL 3682617, at *8 (Del. Ch. July 5, 2016).

An "indemnification dispute generally cannot be resolved until after the merits of the underlying controversy are decided because the good faith standard requires a factual inquiry into the events that gave rise to the lawsuit." *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 586 (Del. Ch. 2006). I therefore begin with NephroSant's counterclaim for breach of fiduciary duty, before returning to Plaintiff's claim for indemnification. But before reaching the merits of either claim, I first address the pending Motion for Sanctions.

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[129] JX 24 § 11(a) ("In making a determination with respect to entitlement to indemnification hereunder, the person, persons or entity making such determination shall, to the fullest extent not prohibited by law, presume that Indemnitee is entitled to indemnification under this Agreement, and the Company shall, to the fullest extent not prohibited by law, have the burden of proof to overcome that presumption.").

A. The Motion For Sanctions Is Granted In Part.

In the Motion for Sanctions, NephroSant seeks relief under Court of Chancery Rule 37(e) based on Plaintiff's destruction of documents during the Investigation. As set forth above, on April 16, 2022, the Board held a special meeting during which Capone reported concerns "regarding the process for running QSant tests in the laboratory and the accuracy of the results reported by the Company."[130] At the meeting, the Board established the Special Committee "to investigate allegations related to the process for running QSant tests in the laboratory and reporting the results."[131] Five days later, on April 21, the Special Committee's counsel at Fenwick directed Plaintiff to "refrain from deleting or altering in anyway the contents of" her NephroSant Box account.[132] In disregard of that instruction, between April 21 and April 23, Plaintiff downloaded, deleted, and cleared from the "trash" folder tens of thousands of documents from the Box account.[133] Plaintiff also instructed her son to delete documents from her account, which he did.[134] As a remedy for Plaintiff's spoliation, NephroSant seeks (1) an adverse inference that the destroyed documents would have supported NephroSant's defenses and counterclaims, and (2) an order

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[130] JX 82 at 1; PTO ¶ 94.

[131] JX 82 at 2.

[132] PTO ¶ 97; JX 111 at 2.

[133] PTO ¶¶ 98–100; Tr. (Colucci) at 196:4–6.

[134] PTO ¶¶ 101–04.

that Plaintiff cannot prevail on any material factual issue if her testimony is the sole evidence in support.[135]

A person "who has reason to anticipate litigation has an affirmative duty to preserve evidence that might be relevant to the issues in the lawsuit." *Beard Rsch., Inc. v. Kates*, 981 A.2d 1175, 1185 (Del. Ch. 2009); *see also Triton Constr. Co., Inc. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *8 (Del. Ch. May 18, 2009) ("An affirmative duty to preserve evidence attaches upon the discovery of facts and circumstances that would lead to a conclusion that litigation is imminent or should otherwise be expected."), *aff'd*, 988 A.2d 938 (Del. 2010). A person owes a duty to "preserve what [she] knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." *TR Invs., LLC v. Genger*, 2009 WL 4696062, at *17 (Del. Ch. Dec. 9,

[135] Mot. for Sanctions ¶ 28. NephroSant also seeks an order elevating the standard of proof on any affirmative defenses asserted by Plaintiff. *Id.* Plaintiff's answer to the Counterclaims asserts six "affirmative" defenses (some of which are just defenses): (1) the Counterclaims fail to state a claim, (2) the Counterclaims are barred by estoppel and/or unclean hands, (3) the Counterclaims are barred by laches, acquiescence, or waiver, (4) NephroSant is not entitled to recover fees, damages, and expenses, (5) the Counterclaims are barred because Plaintiff's actions were justified, and (6) NephroSant has not suffered any cognizable injury proximately caused by Plaintiff's conduct. Pl.'s Reply To Def.'s Countercls. at 32–33, Dkt. 19. However, Plaintiff did not advance any affirmative defenses at trial, so NephroSant's request to elevate the standard of proof on affirmative defenses is moot.

2009) (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)), *aff'd*, 26 A.3d 180 (Del. 2011).

Plaintiff understood that the Special Committee was investigating the changes made to the QSant test. She attended a meeting at which the Board authorized the Special Committee to "implement a litigation hold for all relevant employees" and "obtain documents and any relevant information."[136] She understood that included documents in her possession. Indeed, Fenwick explicitly instructed Plaintiff in writing to refrain from deleting documents.[137] She nevertheless downloaded 33,000 files and deleted over 15,000 files from her NephroSant Box account.[138] Some of the deleted file names, such as "Original_QScore.PDF," "Qscore_cvs.cvs," and "re_qscore_model_test.csv," plainly reference the QSant test.[139] By mass-deleting files, Plaintiff violated her duty to preserve evidence she knew could be relevant to the Investigation. *See Kan-Di-Ki, LLC v. Suer*, 2015 WL 4503210, at *16, *29 (Del. Ch. July 22, 2015) (finding a person had a "duty to preserve evidence" five months before litigation commenced when he was already "communicating with his attorneys about possible allegations"); *Triton Constr. Co., Inc.*, 2009 WL 1387115,

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[136] JX 82 at 1.

[137] PTO ¶ 97; JX 111.

[138] *See* discussion *supra* Section I.F.

[139] JX 350 at "NEPHEXPRT00000509" cells F46686, F46787, F46799; Tr. (Ferreira) at 507:5–509:22 (authenticating JX 350).

at *8 (finding a party spoliated evidence before litigation was filed but "at a time when he knew such litigation was imminent or otherwise to be expected"); *see also, e.g.*, *Zbylski v. Douglas Cnty. Sch. Dist.*, 154 F. Supp. 3d 1146, 1163 (D. Colo. 2015) ("Courts have found the duty to preserve to be triggered based on an internal investigation.").

Having found that Plaintiff spoliated evidence, I must determine the appropriate sanction. "[The] decision to impose sanctions must be just and reasonable." *Gallagher v. Long*, 2007 WL 3262150, at *2 (Del. Nov. 6, 2007) (ORDER). "In determining what remedy to award for spoliation, the court should consider: (1) the culpability of the spoliating party; (2) the degree of prejudice suffered by the aggrieved party; and (3) the availability of lesser sanctions that could both avoid unfairness to the aggrieved party and serve as an adequate penalty to deter such future conduct." *TR Invs., LLC*, 2009 WL 4696062, at *18. "The Court has wide latitude to fashion an appropriate remedy, but the remedy must be tailored to the degree of culpability of the spoliator and the prejudice suffered by the complaining party." *Beard Rsch.*, 981 A.2d at 1189–90. This is a fact-driven, case-specific analysis that often requires a developed trial record.

On the question of Plaintiff's culpability, the trial record shows that Plaintiff deleted thousands of Company files after the Special Committee's counsel directed

her not to.[140] While Plaintiff testified that both Capone and Fenwick authorized her deletion of files, that story lacks credibility and conflicts with the documentary record.[141] Plaintiff testified that she deleted files to protect HIPAA-protected patient data.[142] Her data privacy concerns are not entirely manufactured—the Special Committee itself recommended that NephroSant instruct Plaintiff to return documents "exclusive of identifiable patient data in violation of HIPAA and UCSF proprietary documentation."[143] But Plaintiff admitted that instead of "go[ing] through each of the files and folders and delet[ing] the UCSF files one by one," she "just delete[d] the whole folder" of documents.[144] Plaintiff's admission that she mass-deleted documents instead of undertaking a document-by-document review for HIPAA-protected information supports a finding that she acted at least recklessly in permanently deleting thousands of Company documents.

As for prejudice, Plaintiff argues that she "d[oes] not believe she permanently deleted any data regarding test results" because "she understood that the only NephroSant files saved in [the account] were copies of documents NephroSant had

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[140] PTO ¶¶ 97–104; JX 111 at 2.

[141] Tr. (Sarwal) at 97:21–99:10.

[142] *Id.* at 99:2–10; POB at 57 (claiming Plaintiff's Box account had "HIPAA documents that she could not just turn over to NephroSant").

[143] JX 187 at 4–5.

[144] Tr. (Sarwal) at 103:17–22.

elsewhere."[145] It is impossible to know if that is true. Plaintiff faults NephroSant for failing to compare every deleted document against file names on its server,[146] but even if NephroSant could locate a similar file name for each deleted document, it could never know if the documents deleted from Plaintiff's Box account were identical to the files on its server. And, although Plaintiff later offered to assist NephroSant in locating missing documents and returned copies of some deleted files, she did not return them all.[147]

These factors support imposing a relatively severe sanction that will "serve as an adequate penalty to deter such future conduct." *TR Invs., LLC*, 2009 WL 4696062, at *18. "The most severe remedy for the destruction of evidence is the imposition of a default judgment." *Beard Rsch.*, 981 A.2d at 1190. "Entry of a judgment against the spoliating party should be regarded as 'a last resort.'" *Id.* (quoting *Baliotis v. McNeil*, 870 F. Supp. 1285, 1289 (M.D.Pa. 1994)); *see also Sundor Elec., Inc. v. E.J.T. Constr. Co., Inc.*, 337 A.2d 651, 652 (Del. 1975) (explaining that a default judgment should be entered only "if no other sanction would be more appropriate under the circumstances"). "That devastating sanction,

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[145] POB at 26.

[146] *Id.* at 50 ("Plaintiff showed that the file names NephroSant sought in the UCSF subpoena matched those on the SharePoint File Listing during Colucci's cross-examination.").

[147] PTO ¶ 130; JX 279 at 1.

in my view, must be reserved for spoliation of evidence so material and egregious that it renders the truth unobtainable, to the opponent party's irremediable detriment." *Infab Co. Inc. v. Cusick*, 2024 WL 277864, at *4 (Del. Ch. Jan. 25, 2024) (footnote omitted). I am not convinced that high bar is met here, and NephroSant does not seek entry of a default judgment.

A more moderate but still severe sanction that "affects the merits of an action is the drawing of an adverse inference against the spoliator." *Beard Rsch.*, 981 A.2d at 1191. "An adverse inference instruction is appropriate where a litigant intentionally or recklessly destroys evidence, when it knows that the item in question is relevant to a legal dispute or it was otherwise under a legal duty to preserve the item." *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 552 (Del. 2006). "[D]rawing an adverse inference is appropriate when an actor is under a duty to preserve evidence and takes part in the destruction of evidence while being consciously aware of a risk that he or she will cause or allow evidence to be spoiled by action or inaction and that risk would be deemed substantial and unjustifiable by a reasonable person." *Beard Rsch.*, 981 A.2d at 1192. When drawing an adverse inference, the Court will "adopt a view of the facts as unfavorable to the wrongdoer as the known circumstances will reasonably admit." *Equitable Tr. Co. v. Gallagher*, 102 A.2d 538, 541 (Del. 1954).

With the benefit of a full trial record, I find "the most equitable sanction in this circumstance is to draw inferences in favor of [NephroSant] when the evidence is incomplete, and where it is reasonable to infer that potential evidence has been deleted." *Infab*, 2024 WL 277864, at *4. NephroSant is also entitled to an award of costs incurred in responding to Plaintiff's spoliation, which includes the costs incurred in briefing the Motion for Sanctions and in retaining a digital forensic expert. *See TR Invs., LLC*, 2009 WL 4696062, at *19 (awarding "reasonable attorneys' fees and expenses related to the motions for contempt and spoliation"). NephroSant must file a Rule 88 affidavit identifying the costs incurred, and Plaintiff will have thirty days to respond.[148]

B. Plaintiff Breached Her Fiduciary Duties.

"A claim for breach of fiduciary duty requires proof of two elements: (1) that a fiduciary duty existed and (2) that the defendant breached that duty." *Beard Rsch., Inc. v. Kates*, 8 A.3d 573, 601 (Del. Ch. 2010), *aff'd sub nom. ASDI, Inc. v. Beard Rsch., Inc.*, 11 A.3d 749 (Del. 2010). As a director and officer of a Delaware

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[148] Plaintiff, for her part, also argues that she is entitled to adverse inferences, on the theory that "NephroSant disclosed a limited, self-selected record concerning many of the crucial events at issue in the case" and "concealed materials and information that are crucial to understanding . . . its allegations." POB at 61, 64. Plaintiff is not entitled to such relief. To the extent documents were belatedly produced, the Court has already imposed an appropriate remedy. PTC Tr. at 29:19–30:23. NephroSant did not "intentionally or recklessly destroy[] evidence." *Sears*, 893 A.2d at 552. No further relief is warranted.

corporation, Plaintiff owed fiduciary duties of care and loyalty to NephroSant and its stockholders. *Crescent/Mach I P'ship, L.P. v. Turner*, 2007 WL 2801387, at *4 (Del. Ch. May 2, 2007). The duty to act in good faith is a "subsidiary element" of the duty of loyalty. *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006).

NephroSant contends that Plaintiff breached her duty of loyalty by (1) "misrepresenting the nature of the QSant test, including the number of biomarkers used in the algorithm related thereto, to the Board, to investors, and to other third parties, thereby exposing the Company to significant regulatory and other risk;" (2) "taking and refusing to return tens of thousands of the Company's files;"[149] and (3) plotting to form another company to compete with NephroSant.[150]

1. Plaintiff Failed To Act In Good Faith When She Concealed Material Information From Her Fellow Directors.

"Delaware courts have long held that a certain duty to disclose inheres in the duty of loyalty." *Big Lots Stores, Inc. v. Bain Cap. Fund VII, LLC*, 2006 WL 4762843, at *11 (Del. Ch. Mar. 28, 2006). "When interacting with the Board, the duty of loyalty requires a fiduciary to act in good faith. Good faith requires candor with the board." *In re Oracle Corp. Deriv. Litig.*, 339 A.3d 1, 22 (Del. 2025)

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[149] Countercls. ¶ 68.

[150] DOB at 42.

(footnote omitted). "When a fiduciary withholds material information from the board, engages in deceptive conduct, or otherwise misleads the board, [s]he has failed to act in good faith and therefore acted disloyally." *Id.*

Plaintiff breached her duty of loyalty to act in good faith by concealing from her fellow directors material information about the changes her team made to the QSant test. In June 2020, NephroSant submitted a clinical dossier to MolDX to obtain CMS coverage for QSant.[151] The dossier repeatedly represented to MolDX that the QSant test used six biomarkers—cfDNA, m-cfDNA, CXCL10, creatinine, total protein, *and clusterin*—to assess the risk of transplant rejection.[152] But by April 2021, while the MolDX application remained under review, Plaintiff and her clinical team discovered that "very high heat" from "extreme shipping conditions" could "degrad[e]" the clusterin biomarker.[153] Plaintiff and the CLIA lab directors made a decision to exclude clusterin from the QSant test to "ensure assay robustness and reproducibility,"[154] and the QSant algorithm was "locked" at five, instead of six, biomarkers.[155]

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[151] PTO ¶ 85; JX 16.

[152] JX 16 at 5–6.

[153] JX 291 Interrog. 36.

[154] *Id.*

[155] Tr. (Ghosh) at 435:20–23; JX 89 at 5 (showing the October 2021 "[c]ommercially [a]vailable" QSant test used a "[c]lusterin weight of 0, per changes to assay").

The clinical team's finding that the clusterin biomarker could degrade in shipping, and the resulting decision to modify the QSant algorithm to test five instead of six biomarkers, was highly material information. Information is material when it is "relevant and of a magnitude to be important to directors in carrying out their fiduciary duty of care in decisionmaking." *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 718 (Del. 2020) (quoting *Brehm v. Eisner*, 746 A.2d 244, 259 n.49 (Del. 2000)). "The touchstone of the materiality inquiry is whether a reasonable board or special committee member would have regarded the existence of the undisclosed facts as significant." *In re Oracle*, 339 A.3d at 23. NephroSant was an early-stage company developing the QSant test as its lead product and expected to generate revenue primarily through Medicare reimbursements.[156] In that context, a decision to change the test as the Company had described it to MolDX was highly material. Yet Plaintiff withheld that information from the rest of the Board. The evidence supports a finding that she did so because, as a substantial investor and as a founder with a strong interest in advancing her life's work, she feared disclosure would slow NephroSant's progress

[156] Tr. (Ghosh) at 417:7 ("QSant was the only test"); *id.* (Sarwal) at 71:9-15 ("[W]e're a small company and we're in the middle of a Series B raise to explode and bring about an amazing test that's being covered by MolDX at $2,753 per test, when the cost of running the test was . . . $150. So it's an amazing commercial . . . flagship for all the investors.").

and impede its financing efforts.[157] This was a breach of duty; "[c]orporate officers and directors are not permitted to use their position of trust and confidence to further their private interests." *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939).

Plaintiff's primary response is that neither she nor her team changed the QSant test from a six- to a five-biomarker algorithm, and the algorithm instead evolved on its own through the machine-learning process. As detailed above, the record does not support that theory.[158] Plaintiff's own verified discovery responses concede that "a decision was made to exclude" clusterin "based on the fact that this marker did not impact the Q[S]core, but exposed the QScore potentially to minor variations as it had a risk of marker degradation over very high heat . . . ."[159] Even if it were true that the algorithm changed on its own, Plaintiff knew about the change, that was highly material information, and she nevertheless failed to disclose it to her fellow directors.[160]

Plaintiff also insists that a change from six to five biomarkers did not require an update to MolDX. According to Plaintiff, "as long as the test [wa]s targeting the same indication and providing the same result (rejection diagnosis), no

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[157] *See, e.g.*, JX 79; Tr. (Ghosh) at 452:4–16.

[158] *See* discussion *supra* Section I.C.

[159] JX 291 Interrog. 36.

[160] PTO ¶ 93; Tr. (Sarwal) at 43:17–44:20.

communication [wa]s required with Medicare."[161] It is no response that Plaintiff thought she knew better than the Board. When the Board finally learned about the changes made to the QSant algorithm, it did not agree that disclosure to MolDX was not required. The Special Committee recommended that "[NephroSant] continue to hold off on billing until further evaluation of the QSant test and, if appropriate, revision of the MolDX submission."[162] It later recommended that NephroSant "engage regulatory experts and counsel to advise on remediation and disclosure."[163] The Board halted commercialization efforts, refunded Medicare reimbursements, and raised additional funds to conduct a bridging study to validate the five-biomarker test before resubmitting to MolDX.[164]

Again, "[g]ood faith requires candor with the board." *In re Oracle*, 339 A.3d at 22. Even if reasonable minds could reach different conclusions about MolDX's requirements, the change presented a material risk that the Board—not Plaintiff alone—was entitled to weigh. Plaintiff insists that "[s]he wholeheartedly believed the QSant test worked and would help patients."[165] She also vigorously denies that

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[161] JX 291 Interrog. 32.

[162] JX 105 at 1.

[163] JX 178 at 1.

[164] JX 125 at 2; Tr. (Colucci) at 210:4–8, 203:20–23.

[165] PRB at 13.

as "a renowned nephrologist, [she] would manipulate test data and jeopardize the very patients she aids."[166] That all may be true. But even if Plaintiff honestly believed the change did not warrant notification to MolDX, she could not withhold material information from the Board to make this decision herself; her duties required disclosure so that *the Board* could assess the legal risks and make an informed decision. *In re Oracle*, 339 A.3d at 22–23.[167]

2. Plaintiff Failed To Act In Good Faith When She Destroyed Company Documents.

"Delaware courts have . . . recognized bad faith where a fiduciary acts with a purpose contrary to the corporation's interests." *Dodiya v. Franklin*, 2026 WL 2517931, at *15 (Del. Ch. Aug. 26, 2026). NephroSant argues that Plaintiff acted in bad faith by permanently deleting the "Master Data File," a term NephroSant recently created as "a shorthand" to describe foundational materials on which NephroSant's research is based.[168] NephroSant contends that it "was forced to

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[166] *Id.* at 17.

[167] NephroSant also asserts that Plaintiff breached her fiduciary duties by retaliating against whistleblowers. NephroSant has not met its evidentiary burden on this claim. The evidence on which it relies does not prove by a preponderance of the evidence that Plaintiff engaged in retaliatory conduct. *See* JX 40 (summarizing unproven allegations of misconduct); JX 53 (same).

[168] DRB at 35.

undertake a new validation effort because it could not validate and restore the QSant assay using the data Plaintiff deleted and withheld."[169]

At trial, NephroSant did not prove that Plaintiff deleted a foundational "Master Data File" that impaired NephroSant's revalidation efforts, forcing it to undertake the PARK Study.[170] It is telling that, although Plaintiff's spoliation occurred in April 2022, NephroSant never referenced a "master" file until May 2026. When the Company learned that Plaintiff destroyed files in December 2022, it sent Plaintiff a letter describing the files it believed had been deleted, including files concerning "Q Score and Biomarker correlations," "NephroSantDataRoom," "Series A DILIGENCE," "Company employees' files and folders," and "MolDX meeting notes and coverage decisions."[171] It did *not* reference the "foundational" data NephroSant now claims was lost.

In NephroSant's counterclaims filed in March 2023, and its amended counterclaims filed in October 2025, NephroSant likewise did not assert that Plaintiff deleted foundational material.[172] In its first pre-trial brief filed in December 2025, NephroSant asserted in general terms that "[t]he stolen and deleted data

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[169] *Id.*

[170] *Id.*

[171] JX 279 at 3.

[172] Def. NephroSant, Inc.'s Answer And Verified Countercls. To Pl.'s Verified Compl., Dkt. 9; Countercls.

increased the time and expense required to validate and revalidate QSant," but provided no additional detail about a "master" file that supposedly was deleted.[173] It was not until NephroSant filed its Motion for Sanctions in April 2026 that NephroSant argued Plaintiff had deleted "essentially every file that would be needed to properly revalidate the QSant test and thus continue commercialization, along with the research and development work that had been done for additional products in the pipeline."[174]

Then, in May 2026, after a continuance of trial, NephroSant filed a new pre-trial brief claiming for the first time in this litigation:

> At UCSF, Sarwal's lab compiled a master file with all data from all transplant patients from all studies used in all the various tests (the "Main Data File"). The Main Data File contains the data used for the foundational studies conducted with Yang, Nolan, and Wanzin, upon which the QSant test w[as] based. Additional sets of data existed that underlay the other tests in the R&D pipeline. . . . NephroSant was never able to revalidate the 5-biomarker QSant test as it had been running under Dr. Sarwal's direction, in part because it lacked access to the Main Data File.[175]

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[173] Def./Countercl. Pl. NephroSant, Inc.'s Pretrial Opening Br. at 33, Dkt. 185.

[174] Mot. for Sanctions ¶ 5.

[175] NephroSant, Inc.'s Pretrial Br. at 25, 31, Dkt. 277.

In post-trial briefing, NephroSant changed its terminology from "Main Data File" to "Master Data File," asserting that Plaintiff had deleted "foundational data from UCSF—the 'Master Data File' upon which the tests were based."[176]

Despite its position that deleting a "Master Data File" prevented NephroSant from "perform[ing] the validation and bridging work necessary to return the assay to market," NephroSant cannot describe the "Master Data File" with any specificity.[177] In response to NephroSant's December 2022 letter requesting the return of files, Plaintiff offered to guide the Company to "ANY critical file at NephroSant," but NephroSant did not respond with a specific request.[178]

NephroSant now claims it "requested access to the Main Data File and other associated data sets," but its only evidence is an email referencing "samples in the TITRATE and Aretan data sets."[179] At trial, Plaintiff demonstrated that NephroSant still has access to data concerning the "Titrate" study on its Sharepoint,[180] and NephroSant has not explained what files it is missing concerning the "Aretan" study, either. NephroSant also cites trial testimony from Stoll describing efforts to "look

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[176] DOB at 3.

[177] DRB at 35.

[178] JX 279 at 1.

[179] NephroSant, Inc.'s Pretrial Br. at 37, Dkt. 277 (citing JX 155).

[180] Tr. (Ferreira) at 528:12–17.

for any existing data," "the dataset," "clinical data" for "samples," and "the master dataset in an Excel file," but the testimony is extraordinarily vague.[181]

NephroSant also claims that the "Master Data File" included "all data from all transplant patients from all studies used in all the various tests."[182] But NephroSant does not explain how, if Plaintiff deleted *all* the Company's research in April 2022, Ghosh conducted the Initial Validation in late April and early May using the Nolan Data, Wanzin Data, and EAP Data.[183]

One would expect that if critical research material was deleted, the Company could explain with *some* specificity what missing data necessitated the PARK Study. Yet the record contains virtually no evidence supporting NephroSant's contention that the PARK Study was conducted due to missing data. Stoll testified at trial that it was "possible" NephroSant could have avoided a revalidation study if it had the missing files, but provided no other detail to support that assertion.[184]

One also would expect that if NephroSant believed information vital to QSant's revalidation had been deleted, it would have pursued recovery efforts with

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[181] *Id.* (Stoll) at 469:5–473:21.

[182] DOB at 32 n.25. NephroSant cites to JX 671, which does not support the proposition. It is an email from Plaintiff describing the data collected over her many years of research, but it says nothing about the files stored in her Box account.

[183] Tr. (Ghosh) at 417:3–9; 418:7–15.

[184] *Id.* (Stoll) at 478:12–16.

more vigor before expending $9.27 million on the PARK Study. At trial, Stoll testified that at one point, he saw the "Master Data File" on Reuben Sarwal's computer, but then NephroSant just accepted Reuben's claim that the files "didn't belong to [NephroSant]" and did not pursue the issue with him further.[185] NephroSant also has asserted that Plaintiff "stored the stolen files on a UCSF-owned server," yet it did not subpoena UCSF for those records until September 2025, over a year after the KidneyMetrix transaction and more than two years after NephroSant launched the PARK Study.[186]

To be fair, NephroSant cannot prove the contents of documents Plaintiff deleted. But it also cannot rely on adverse inferences to make the claim that a critically important "Master Data File" was deleted without explaining what "foundational" data was missing during its revalidation efforts. Because "[t]he point of discovery in litigation is to establish the truth as it relates to the issues being litigated," NephroSant does not get a blank check on what it can ask the Court to accept as true. *Infab*, 2024 WL 277864, at *3. Rather, when drawing an adverse inference, the Court will "adopt a view of the facts as unfavorable to the wrongdoer

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[185] *Id.* at 471:8–17.

[186] Mot. for Sanctions ¶ 17; JX 460. NephroSant claims that it did, in fact, pursue the materials from UCSF sooner, but its only evidentiary support is an email from May 2022 stating that "NephroSant would like to ask UCSF a question." JX 144 at 1.

as the known circumstances will reasonably admit." *Equitable Tr.*, 102 A.2d at 541 (emphasis added). The Court will draw inferences only "where it is *reasonable* to infer that potential evidence has been deleted." *Infab*, 2024 WL 277864, at *4 (emphasis added). Here, the known circumstances do not reasonably admit an inference that Plaintiff deleted documents critical to the Company's revalidation efforts.

Although NephroSant did not prove that Plaintiff deleted foundational research necessitating the PARK Study, she still deleted thousands of Company files. The record supports a finding that, more likely than not, she destroyed Company documents to impede an Investigation focused on her conduct. In doing so, she placed her interests above the corporation's, in breach of her duty of loyalty.

Plaintiff argues that the Confidential Information Agreement preempts a fiduciary duty claim premised on document destruction because a "dispute [must] be treated as a breach of contract claim" when it "arises from obligations that are expressly addressed by contract."[187] The Confidential Information Agreement prohibits Plaintiff from "mak[ing], retain[ing], remov[ing] or distribut[ing] any copies of any Confidential Information or other materials or property belonging to

[187] PRB at 21 (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1129 (Del. 2010)).

[NephroSant] . . . for any reason whatsoever."[188] The Confidential Information Agreement does not preempt a breach of fiduciary duty claim because Plaintiff's duty not to destroy company information does not arise from that contract, but rather, exists independently of any additional contractual obligation she owes. *See, e.g.*, *In re Saama Techs. Litig.*, 2026 WL 2921243, at *30 (Del. Ch. Sept. 28, 2026) ("[T]he contractual and fiduciary claims against [the officer] do not overlap . . . and [the officer]'s fiduciary obligations arise independently due to his officer role.").

3. Plaintiff Breached Her Duty Of Loyalty When She Solicited NephroSant's Investors To Start A Competing Business.

NephroSant also contends that Plaintiff breached her fiduciary duties by plotting to start a competing business.[189] It is a "fundamental proposition that directors may not compete with the corporation." *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 442 (Del. 1996).

The record evidence shows that on one occasion, Plaintiff met with NephroSant investors and "suggested that instead of funding the company, NephroSant, . . . [investors] should divert the[ir] funds to a new entity that she intended to create."[190] Plaintiff told the investors that "if [NephroSant] goes into

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[188] JX 17 § 1(c).

[189] DOB at 42.

[190] JX 299 at 4.

[bankruptcy], the IP will revert to UCSF, and then [Plaintiff] can start again."[191] Though Plaintiff denied any recollection of this meeting at trial,[192] the testimonial and documentary record support a finding that it occurred.[193]

Although Plaintiff's meeting with investors was a breach of duty, nothing came of this preliminary discussion. NephroSant concedes that the damages arising from this breach are "minimal."[194] The Company is entitled to nominal damages of $1. *See, e.g.*, *OptimisCorp v. Williams Atkins*, 2026 WL 1289885, at *18 (Del. Ch. May 11, 2026) (quoting *Macrophage Therapeutics v. Goldberg*, 2021 WL 2582967, at *19 (Del. Ch. June 23, 2021)) ("In the absence of sufficient proof of a specific injury, the court will issue a declaration that the defendant breached his fiduciary duties and award nominal damages."); *Ravenswood Inv. Co., L.P. v. Est. of Winmill,* 2018 WL 1410860, at *25 (Del. Ch. Mar. 21, 2018) (awarding nominal damages of $1 where the Court "found a breach of the duty of loyalty but [was] unable to award any other form of relief"), *aff'd*, 210 A.3d 705 (Del. 2019) (ORDER).

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[191] Tr. (Magee) at 573:7–8.

[192] *Id.* (Sarwal) at 117:7–18.

[193] *See, e.g.*, JX 632 at 1; JX 443 at 2.

[194] Tr. of Post-Trial Oral Arg. at 52:14–15, Dkt. 327.

C. NephroSant Is Entitled To Damages.

Having concluded that Plaintiff breached her fiduciary duties, I next consider the remedy. To meaningfully recover on its breach of fiduciary duty counterclaim, NephroSant "must prove [its] damages by a preponderance of the evidence." *Beard Rsch.*, 8 A.3d at 613.

"Delaware law dictates that the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly." *Thorpe*, 676 A.2d at 445. "Once disloyalty has been established," our law "require[s] that a fiduciary not profit personally from his conduct, and that the beneficiary not be harmed by such conduct." *Id.* "It remains the law, however, that 'when acting as the fact finder, this Court may not set damages based on mere "speculation or conjecture" where a [claimant] fails adequately to prove damages.'" *OptimisCorp v. Waite*, 2015 WL 5147038, at *82 (Del. Ch. Aug. 26, 2015) (quoting *In re Mobilactive Media, LLC*, 2013 WL 297950, at *24 (Del. Ch. Jan. 25, 2013)), *aff'd*, 137 A.3d 970 (Del. 2016). Although the Court has wide discretion to fashion an appropriate remedy, "damages must be logically and reasonably related to the harm or injury for which compensation is being awarded." *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773 (Del. 2006).

As set out above, in June 2020, NephroSant submitted a clinical dossier to MolDX representing that the QSant test used six biomarkers.[195] By April 2021, Plaintiff and her clinical team had discovered that "very high heat" from "extreme shipping conditions" could "degrad[e]" the clusterin biomarker, and they made "a decision" to "exclude" clusterin from the QSant test to "ensure assay robustness and reproducibility"[196] by "locking" the QSant algorithm at five biomarkers.[197] Plaintiff did not inform the Board of this change and the Board did not learn of it for nearly a year, until April 2022.[198] When the Board was finally alerted to the issue, it formed the Special Committee, which recommended that NephroSant "continue to hold off on billing until further evaluation of the QSant test" and "engage regulatory experts and counsel to advise on remediation and disclosure."[199] The Company then halted commercialization efforts, refunded Medicare reimbursements, and raised additional funds to conduct a bridging study to validate the five-biomarker test.[200] Intuitively, the proper measure of damages for Plaintiff's failure to inform the Board of a material change to the QSant test should capture the costs wasted in pursuit of the

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[195] PTO ¶ 85; JX 16 at 5–6.

[196] JX 291 Interrog. 36.

[197] Tr. (Ghosh) at 435:20–23; JX 89 at 5.

[198] PTO ¶ 94; JX 82.

[199] JX 105 at 1; JX 178 at 1.

[200] JX 125 at 2; Tr. (Colucci) at 210:4–8, 203:20–23.

five-biomarker test that was not approved and the cost of subsequent remediation efforts.

At trial, however, NephroSant's damages calculation sought a windfall. The primary analysis presented by its expert assumed a world in which, "but for" the change to the QSant test, commercialization would have continued "seamlessly."[201] In addition, several of NephroSant's arguments are based on the unproven factual premise that Plaintiff destroyed a foundational "Master Data File" that prevented NephroSant from revalidating the QSant test in the PARK Study. Although damages for breach of fiduciary duty should not be determined narrowly and mathematical certainty is not required, most of NephroSant's damages figures are overreaching.

Below, I consider NephroSant's arguments that it is entitled to an award of (1) $100 million based on its expert's "but-for" analysis; (2) costs for the PARK Study and the Company's wind-down; (3) other "compensatory" damages; and (4) costs incurred in the Investigation.

[201] JX 330 at 9.

1. NephroSant's Expert Damages Analysis

At trial, NephroSant's damages expert, Dr. William Powley,[202] opined that NephroSant suffered $100 million in damages from Plaintiff's breaches.[203] To support this figure, Dr. Powley assumed Plaintiff's conduct was responsible "for the cessation of commercialization and business activities at NephroSant in or around April 2022" and "calculate[d] damages associated" therewith.[204] To do this analysis, he assumed that "as a result of Dr. Sarwal's actions[,] the Series B financing collapsed, which forced NephroSant into a restructuring phase through 2022 to the Present."[205] Dr. Powley then assessed "what would NephroSant's equity value have been had commercialization continued seamlessly in 2022, compared to the diminished value after the shutdown and revalidation period," measuring "the difference between the company's expected trajectory" against its "actual trajectory in which operations were suspended, capital was lost, and equity value eroded."[206]

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[202] Dr. Powley is the Co-Founder of Formidable Partners LLC. He is a former Fellow of the Program on Corporate Governance at Harvard Law School, earned his Ph.D. in Management and a Master of Science in Management Research from the Massachusetts Institute of Technology, and received a B.A. in economics with a minor in math from the University of Chicago. *Id.* at 3.

[203] DOB at 66.

[204] JX 330 at 3.

[205] *Id.* at 6.

[206] *Id.* at 9.

Dr. Powley's valuation rests on several faulty factual premises, most notably that if Plaintiff had timely informed the Board of the degradation of clusterin and resulting changes to the QSant test, NephroSant's efforts to commercialize QSant as a six-biomarker test would have continued uninterrupted.[207] To support Dr. Powley's analysis, NephroSant asserts that "issues with the QSant test in 2022 arose solely from Plaintiff's data manipulation, poor scientific practices in locking algorithms, and most importantly, lack of disclosures to regulatory authorities and stakeholders."[208] The record does not support that assertion. Plaintiff's team moved to a five-biomarker algorithm to address the degradation of clusterin when exposed to heat during the shipping process.[209] Plaintiff should have reported the change to the Board, but the record does not support a finding that NephroSant could have continued to use a six-biomarker test "but for" her breach.[210] Stated differently, Dr. Powley's "but-for" world could never have existed because the six-biomarker test did not work as expected under real-world conditions.

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[207] Tr. (Powley) at 559:10–23; *id.* at 560:4–7.

[208] DOB at 68.

[209] *See* discussion *supra* Section I.C.

[210] *See* DOB at 68 (conceding that NephroSant would have to "resolve the stability issues with the 6 biomarker algorithm" to use that test).

2. The PARK Study And Wind-Down Costs

Alternatively, NephroSant seeks a damages award in the amount of $9,275,000 for costs incurred in the PARK Study. NephroSant asserts that it was "forced to undertake" the PARK Study "because it could not validate and restore the QSant assay" without the "Master Data File" Plaintiff purportedly deleted.[211] NephroSant claims that "[t]he deleted documents would have made the $9[] [million] spent on the PARK study unnecessary" and "[t]he deleted documents would have accelerated NephroSant's return to commercialization."[212]

As addressed above, the record does not support NephroSant's contention that Plaintiff's destruction of documents necessitated the PARK Study. NephroSant has made no attempt to explain in any detail what files were missing and how that impacted the Company's research. It has not explained how, or if, the PARK Study replicated NephroSant's prior research. NephroSant simply asserts, without explanation or proof, that NephroSant could have avoided the PARK Study but for Plaintiff's breaches. NephroSant failed to meet its burden to prove this measure of damages.

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[211] DRB at 35.

[212] DOB at 35; *see also id.* at 69 ("With the Master Data File, NephroSant could have either gone back to the approved 6-biomarker test and resolved the stability issues or pivoted quickly to a properly validated and MolDX-approved five-biomarker test.") (emphasis removed).

NephroSant also claims that it is entitled to "wind down" damages, including legal fees paid in the restructuring, payments made for executive severance compensation, and termination expenses, including the cost of terminating a lease.[213] Like the costs for the PARK Study, this measure of damages rests on the false premise that Plaintiff's breaches prevented NephroSant from revalidating the QSant test and forced the Company's closure. NephroSant failed to prove either premise, and the Court therefore rejects this measure of damages as well.

3. Other Compensatory Damages

Alternatively, NephroSant seeks to recoup "compensatory damages" or "out-of-pocket costs" incurred between April 2021, when the QSant algorithm was changed from a six- to a five-biomarker test, and April 2022, when the Board learned of the change. NephroSant explains that it incurred costs funding, promoting, and selling "a test that actually had not been approved by MolDX."[214] NephroSant points to $7,125,000 in proceeds from bridge notes that were used to fund the Company

[213] DOB 50–51.

[214] DRB at 34.

from October 2021 through March 2022[215] or $2,350,000 expended for sales and marketing from 2021 to 2022.[216]

NephroSant is entitled to damages for the costs incurred in developing and marketing the unapproved five-biomarker QSant test. NephroSant contends that $7,125,000 in proceeds from the bridge notes was used to commercialize the five-biomarker QSant test.[217] The record confirms that NephroSant spent at least that amount for developing and marketing the QSant test from April 2021 through April 2022.[218] Even if imprecise, I find this is a reasonable approximation of the harm

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[215] *Id.* ("NephroSant raised $7,125,000 in bridge notes from investors starting in October 2021 after the MolDX approval was obtained . . . money which NephroSant spent attempting to commercialize the approved test."); *see* JX 347; JX 65 at "Balance Sheet" cell F86 (reflecting $6,150,000 in notes payable for 2021); *id.* at cell G86 (reflecting $16,425,000 in notes payable for 2021 and 2022); Tr. (Colucci) 171:24–172:12 ("In the fall of 2021 . . . [Plaintiff] raised another . . . 7.2 million. That gave her more room to then negotiate a Series B.").

[216] JX 65 (balance sheets from January 2017 to February 2023); *see* DRB at 34 ("NephroSant spent approximately $2.1 million on sales personnel and $250,000 on related commercialization expenses for the launch of QSant, but those expenses were to market a test that actually had not been approved by MolDX.").

[217] DRB at 34.

[218] *See* JX 65 at Profit and Loss column F (showing in 2021, NephroSant incurred costs of $5,150,370.41 on Salaries, Wages, and Benefits; $338,232.53 on Facility Expenses; $301,034.21 on Software & Equipment & Material; $2,747,919.79 on Research and Development; $393,243.22 on Office/General Administrative Expenses; and $95,394.76 on Marketing & Advertising); JX 280 at 3 (showing between January and March 2022, NephroSant incurred approximate costs of $205,000 on Salaries, Wages, and Benefits; $458,000 on Research & Development; $172,000 on Office/General Administrative expenses; $602,000 on Facility Expenses; and $71,000 on Marketing & Advertising).

caused by Plaintiff's breaches.[219] *See Thorpe v. CERBCO, Inc.*, 1993 WL 443406, at *12 (Del. Ch. Oct. 29, 1993) ("[O]nce a breach of duty is established, uncertainties in awarding damages are generally resolved against the wrongdoer.").

4. Cost Of The Special Committee's Investigation

NephroSant also seeks costs incurred in connection with the Special Committee's Investigation, including $827,682.84 in fees paid to Fenwick for its services in the Investigation. NephroSant would not have incurred these "out-of-pocket" costs but for Plaintiff's breach of fiduciary duty. *Strassburger v. Earley*, 752 A.2d 557, 579 (Del. Ch. 2000). NephroSant is entitled to a damages award to cover these costs.

* * *

NephroSant is awarded damages in the amounts of $7,125,000 for costs incurred in developing a five-biomarker QSant test between 2021 and 2022, and $827,682.84 for costs incurred in the Investigation. It is also entitled to a nominal damages award in the amount of $1 for Plaintiff's solicitation efforts, as well as fees

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[219] NephroSant seeks an additional award of $2,350,000 in sales and marketing expenses. Because sales and marketing costs are encompassed in the $7,125,000 figure above, NephroSant is not entitled to these additional damages.

NephroSant also seeks $256,411.51, representing refunds to Medicare. This is not an appropriate measure of damages because NephroSant would not have received that revenue even if Plaintiff had not breached her duties, as the record does not support a finding that NephroSant could have continued with the six-biomarker test.

incurred in connection with the Motion for Sanctions and retention of a digital forensic expert.

D. Plaintiff Is Not Entitled To Indemnification.

Plaintiff seeks indemnification of expenses incurred in the Investigation under Section 145 of the Delaware General Corporation Law ("DGCL"); Section 5.1 of NephroSant's bylaws; and Sections 2, 3, 4, and 5 of her Indemnification Agreement.[220]

Section 145(a) of the DGCL governs permissive indemnification for directors and officers:

> A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that the person is or was a director, officer, employee or agent of the corporation . . . against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding ***if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation***, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful.

8 *Del. C.* § 145(a) (emphasis added). "[A]s far as § 145 is concerned, Delaware corporations lack the power to indemnify a party who did not act in good faith or in

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[220] POB at 53–54.

the best interests of the corporation." *VonFeldt v. Stifel Fin. Corp.*, 1999 WL 413393, at *2 (Del. Ch. June 11, 1999). I found above that Plaintiff breached her fiduciary duty of loyalty, both in connection with the underlying subject matter of the Investigation and by deleting documents during the Investigation. A consequence of those findings is that Plaintiff did not "act[] in good faith and in a manner [she] reasonably believed to be in or not opposed to the best interests of the corporation," and indemnification is not permissible under Section 145(a).

Plaintiff nonetheless contends that she is entitled to mandatory indemnification under Section 145(c)(1) of the DGCL, which states:

> To the extent that a present or former director or officer of a corporation has been ***successful on the merits or otherwise*** in defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.

8 *Del. C.* § 145(c)(1) (emphasis added). Plaintiff argues that if she was "'successful on the merits or otherwise' . . . then [s]he is entitled to indemnification regardless of whether or not [s]he acted in good faith or in what [s]he perceived to be the best interests of the corporation." *Perconti v. Thornton Oil Corp.*, 2002 WL 982419, at *3 (Del. Ch. May 3, 2002). Even if Section 145(a) did not prohibit indemnification, Plaintiff was not "successful" in the Investigation. The Investigation targeted her conduct, and she was placed on administrative leave and directed not to "contact employees, investors, vendors or other Company parties in connection with any

Company business, directly or indirectly."[221] As a result of its Investigation, the Special Committee recommended "evaluat[ing]" Plaintiff's "role . . . in corporate decision making, including all roles with [NephroSant]," then Plaintiff resigned from her position at the Company.[222] The Special Committee also recommended that the Board "[i]nstruct [Plaintiff] to return ~33K files that were downloaded from the Box account," a direction with which Plaintiff only partially complied.[223] And the Special Committee recommended that the Board "[c]reate independent processes for future validation efforts by instituting and maintaining standard operating procedures and high-quality documentation consistent with best practices for scientific decision making throughout each step of the validation process[],"[224] while scientific investigators concluded "that reliance on a QSant value obtained during real world testing was potentially unwarranted and that there should be a resetting and a reframing of the algorithm on which QSant is based."[225] Plaintiff was not "successful" on the merits or otherwise.

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[221] JX 110 at 1.

[222] JX 187 at 4.

[223] *Id.*

[224] *Id.*

[225] JX 140 at 3; *id.* at 1.

The DGCL "*prohibits* a corporation from indemnifying a corporate official who was not successful in the underlying proceeding and has acted, essentially, in bad faith." *Hermelin v. K-V Pharm. Co.*, 54 A.3d 1093, 1094 (Del. Ch. 2012) (emphasis in original). Because indemnification is neither mandatory nor permitted under Section 145, Plaintiff cannot receive indemnification under the Company's bylaws or the Indemnification Agreement.[226]

III. CONCLUSION

For the reasons explained above, judgment is entered for NephroSant on Counts I, II, and III of the Complaint and Counts I and III of the Counterclaims. Count II, seeking a setoff for indemnification under a promissory note, is moot. NephroSant is entitled to a damages award in the amount of $7,952,683.84, plus the costs incurred in briefing the Motion for Sanctions and in retaining a digital forensic expert.

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[226] Because Plaintiff is not entitled to indemnification, the Court does not reach NephroSant's alternative argument that it is entitled to an offset against any indemnification award under the Partial Recourse Note. *See* DOB at 59 ("Any amount awarded to Plaintiff must be offset against the amount she owes NephroSant under either the Partial-Recourse Note").