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PUBLIC VERSION DATED
JUNE 16, 2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HUBERT OWENS, Derivatively on Behalf of ESPERION THERAPEUTICS, INC., Plaintiff-Below Appellant, v. TIM M. MAYLEBEN, ROGER S. NEWTON, MARY P. MCGOWAN, NICOLE VITULLO, DOV A. GOLDSTEIN, DANIEL JANNEY, ANTONIO M. GOTTO, JR., MARK E. MCGOVERN, GILBERT S. OMENN, SCOTT BRAUNSTEIN, and PATRICK G. ENRIGHT, Individual-Defendants Below Appellees, and ESPERION THERAPEUTICS, INC., Nominal-Defendant Below Appellee.	No. 110, 2020 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 12985-VCS

APPELLANT HUBERT OWENS' OPENING BRIEF

Dated: June 1, 2020

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NATURE OF PROCEEDING

Plaintiff Appellant ("Plaintiff"), a stockholder of Esperion Therapeutics, Inc. ("Esperion" or the "Company"), brought this action derivatively to seek redress for harm caused to Esperion as a result of Defendants' false and misleading statements.[1]

Esperion focuses on developing and commercializing oral low-density lipoprotein cholesterol ("LDL-cholesterol" or "LDL-C") lowering therapies for patients with high cholesterol. (A022-23).[2] Esperion's lead product candidate was ETC-1002, a once-daily drug designed to lower LDL-C levels, and the Company's sole focus has always been on the development of that drug. *Id*. Esperion had never sold any products and had never generated any revenue, relying solely upon investor funding. Because ETC-1002 was a make-or break drug for Esperion, it was imperative that the Company's Board of Directors ("Board") singularly focus on issues related to the ultimate approval of the drug and ensure that the Company's communications with the public about ETC-1002 and the drug's prospects for

[1] "Defendants" refer collectively to Individual Defendants Appellees Tim M. Mayleben ("Mayleben"), Roger S. Newton ("Newton"), Mary P. McGowan, Nicole Vitullo ("Vitullo"), Dov A. Goldstein ("Goldstein"), Daniel Janney ("Janney"), Antonio M. Gotto, Jr. ("Gotto"), Mark E. McGovern ("McGovern"), Gilbert S. Omenn ("Omenn"), Scott Braunstein ("Braunstein"), and Patrick G. Enright ("Enright"), and Nominal Defendant Appellee Esperion.

[2] Citations to the Appendix to Appellant's Opening Brief are designated herein as "A__."

approval by the U.S. Food and Drug Administration ("FDA") were truthful. However, in breach of their fiduciary duties, the Director Defendants[3] knowingly made false and misleading public statements about a crucial meeting between Esperion and the FDA regarding ETC-1002.

On August 11, 2015, Esperion participated in an End-of-Phase 2 ("EOP2") meeting with the FDA concerning the approval process for ETC-1002. Less than a week later, on August 17, 2015, and without waiting for the FDA's official meeting minutes, the Company issued a press release that stated: (1) "***[b]ased on feedback from the FDA***, approval of ETC-1002 in the [relevant] patient populations ***will not require the completion of a cardiovascular outcomes trial (CVOT)***";[4] (2) "***LDL-C remains an accepted clinical surrogate endpoint*** for the approval of an LDL-C lowering therapy such as ETC-1002 in [relevant] patients"; and (3) "[w]e have a ***clear regulatory path forward for development and approval of ETC-1002***."

[3] "Director Defendants" refer to Mayleben, Newton, Vitullo, Goldstein, Janney, Gotto, McGovern, Omenn, Braunstein, and Enright.

[4] A cardiovascular outcomes trial ("CVOT") is a costly, lengthy study that measures a drug's effectiveness in reducing cardiovascular risk over several years. Because lower LDL-C is presumed to improve overall heart health, the FDA sometimes treats LDL-C as a "surrogate endpoint," or proxy, for cardiovascular risk. If a new drug is shown to lower LDL-C, the FDA assumes it also improves overall cardiovascular health.

(A023-24; A040-41). During an analyst conference call the same day, Mayleben, Esperion's President and Chief Executive Officer, stated: (1) "***the FDA confirmed for us*** that LDL-cholesterol lowering remains an acceptable clinical surrogate endpoint for the potential approval of a therapy such as 1002"; (2) ***"[w]e know*** that [ETC-]1002 ***will not require a [CVOT]*** to be completed prior to approval in … those patient populations that the FDA considers to have an appropriate benefit/risk ratio"; and (3) "we have a ***clear regulatory path*** forward." (A040-42).

However, on September 28, 2015, Esperion disclosed that, as reflected in the FDA's official meeting minutes, and contrary to the Company's prior representations, the FDA had actually "***encouraged the Company to initiate a [CVOT] promptly***" and told Esperion that "any concern regarding the benefit/risk assessment of ETC-1002 ***could necessitate a completed [CVOT] before approval***." (A043-44). The FDA meeting minutes are the official record of what took place and what was said at the EOP2 meeting and, therefore, reflect exactly what the Defendants knew when they issued their August 17, 2015 public statements. There should have been no material difference between the FDA's minutes and Defendants' public account of the meeting, yet the FDA minutes directly contradicted the Defendants' August 17, 2015 statements. (A040-41).

The Director Defendants knew the August 17 statements were false and misleading. It is undisputed that CEO Mayleben—also a member of Esperion's Board—attended the EOP2 meeting between Esperion and the FDA. As confirmed by Esperion's Section 220 production, the Outside Directors[5] [redacted]. The Director Defendants [redacted] (the content of which was reiterated by Mayleben in the analyst conference call held the same day). In the course of [redacted] unequivocally signal to the public that a CVOT would not be required prior to FDA approval of ETC-1002 and that the drug therefore had a clear path to FDA approval. These facts reflected in Esperion's books and records—considered together with the other particularized facts in the Complaint—are sufficient to support a pleading stage inference that the Director Defendants (1) knew the substance and results of the EOP2 meeting and (2) participated in the drafting and approval of the false and misleading press release

[5] "Outside Directors" refers to Vitullo, Goldstein, Janney, Gotto, McGovern, Omenn, Braunstein, and Enright.

issued on August 17, 2015, which was fundamentally inconsistent with what the FDA told Esperion, as reflected in the official FDA minutes.

Esperion and Mayleben now face significant liability in a securities fraud class action pending in the U.S. District Court for the Eastern District of Michigan (the "Securities Action"), which alleges securities laws violations arising from the same false and misleading statements that are at issue in this derivative action.[6] On September 27, 2018, the Sixth Circuit Court of Appeals reversed the District Court's dismissal of the Securities Action, finding:

> Plaintiffs allege facts—that the FDA meeting minutes reflect what was said during the End-of-Phase 2 meeting, and that what was said at that meeting was inconsistent with what Esperion told its investors in August—that most assuredly support a strong inference that the company knew its statements were false.

Dougherty v. Esperion Therapeutics, Inc., 905 F.3d 971, 982 (6th Cir. 2018) (Ex. C).

Plaintiff here has adequately alleged that demand on Esperion's Board was futile for two reasons. First, there is reason to doubt the disinterestedness of a majority of the Board, as all of the Director Defendants face a substantial likelihood of liability.

[6] *Dougherty v. Esperion Therapeutics, Inc., et al.*, CA. No. 2:16-cv-10089-AJT-RSW (E.D. Mich.). All emphasis is added and citations are omitted unless otherwise noted.

Second, there is reason to doubt a majority of the Director Defendants are sufficiently independent.[7]

On February 13, 2020, the Court of Chancery ("Chancery") granted the Defendants' motion to dismiss ("Opinion") (Ex. A), finding that Plaintiff failed to allege particularized facts to support a reasonable inference that (1) the Director Defendants "knowingly released a misleading press release" (Opinion at 20-24); or (2) there are any "reasonable doubts as to Vitullo, Janney, Goldstein or Gotto's independence" (*id*. at 27-30). Chancery erred in improperly failing to read all well-pleaded facts and all reasonable inferences therefrom in Plaintiff's favor, granting competing inferences in Defendants' favor, and requiring Plaintiff to establish at the pleading stage the Director Defendants' precise "motives" for issuing the false and misleading statements. A fair reading of the Board minutes and presentations obtained through Plaintiff's books and records inspection and other particularized allegations in the Complaint, and the reasonable inferences therefrom, compels the conclusion that demand on the Board was futile, and that the motion to dismiss should have been denied.

[7] At the time this case was commenced, the Board had nine members, comprised of all of the Director Defendants except Mr. Enright. Plaintiff therefore has to establish demand futility as to at least five of the Director Defendants.

SUMMARY OF ARGUMENT

Chancery erred in holding that the Complaint fails to adequately allege facts from which it may reasonably be inferred that (1) the Director Defendants face a substantial likelihood of personal liability for knowingly making false and misleading statements in the August 17, 2015 press release and conference call; and (2) there is reason to doubt the independence of a majority of the members of the Board as of the time this action was commenced.

In rejecting Plaintiff's particularized allegations that the Director Defendants face a substantial likelihood of liability for knowingly making false and misleading statements, Chancery improperly: (i) discredited Plaintiff's reasonable interpretation of Board minutes (and the conspicuous absence of certain Board minutes) and presentations, failed to read all well-pleaded facts and all reasonable inferences therefrom in Plaintiff's favor, and granted competing inferences in Defendants' favor; and (ii) required Plaintiff to establish at the pleading stage the Director Defendants' precise "motives" for issuing the false and misleading statements. The Board minutes, considered in their totality with the other particularized facts alleged in the Complaint and with all reasonable inferences read in Plaintiff's favor, support a pleading stage finding that the Director Defendants knew the press release they reviewed and approved was false and misleading. By declining to assess the demand

futility allegations as a whole and to make reasonable inferences in Plaintiff's favor, as is required under Delaware law on a motion to dismiss, Chancery erred.

Chancery also erred in failing to consider Plaintiff's independence allegations in their totality and in finding that the particularized facts alleged in the Complaint are insufficient to create reason to doubt the independence of a majority of the Board.

STATEMENT OF FACTS

A. Factual Background

Esperion is a pharmaceutical company focused on developing ETC-1002, a first-in-class, oral LDL-C lowering therapy for patients with hypercholesterolemia (i.e., high cholesterol). (A037-38). ETC-1002 was Esperion's lead drug candidate and best business prospect. *Id.*

Elevated LDL-C levels are a significant risk factor in cardiovascular disease. Despite the broad use of "statins" in treating high cholesterol, there is a significant population of patients who are intolerant to such therapies due to their side effects. *Id.* According to Esperion, ETC-1002 was differentiated from statins because it acts at an earlier step and can achieve reductions in LDL-C levels without many of the negative side effects. (A038-39).

Since its incorporation, Esperion had not sold any products or generated any revenue. The Company relied solely on investor funding and had incurred significant operating losses. (A039-40). Esperion admitted that its future depended almost entirely on the successful clinical development, regulatory approvals, and commercialization of ETC-1002. *Id.*

By August 2015, Esperion had completed Phase 2b clinical trials for ETC-1002, and both the Company and the investing public were eagerly anticipating the next step in the approval process: the EOP2 meeting with the FDA. (A040).

On August 11, 2015, Esperion executives attended the EOP2 with the FDA to discuss moving forward with Phase 3 of the development program for ETC-1002. *Id.*[8] Esperion anticipated that it would not receive the official EOP2 meeting minutes from the FDA until September 11, 2015. *Id.*

B. Defendants' False and Misleading Statements

Just six days after the EOP2 meeting, on August 17, 2015, Esperion issued a press release that stated: "Based on feedback from the FDA, approval of ETC-1002 in the HeFH and ASCVD patient populations will not require the completion of a [CVOT]." (A040-41). Mayleben stated, "we are pleased that LDL-C remains an accepted clinical surrogate endpoint for the approval of an LDL-C lowering therapy such as ETC-1002 in patients with HeFH and/or patients with ASCVD." *Id.* The press release further stated, "Esperion remains on track to initiate the ETC-1002 Phase 3 development program by the end of 2015." *Id.* Mayleben added, "We have a clear regulatory path forward for development and approval of ETC-1002." *Id.*

[8] Defendants do not dispute that Mayleben was one of the Esperion executives who attended the EOP2 meeting.

That same day, Esperion held a conference call for investors and analysts, during which Mayleben stated:

> [W]e now have a clear regulatory path forward. Of particular note, the FDA confirmed for us that LDL-cholesterol lowering remains an acceptable clinical surrogate endpoint for the potential approval of a therapy such as 1002.

(A041-42). And later during the conference call, Mayleben again emphasized: "***We know that [ETC-]1002 will not require a [CVOT] to be completed prior to approval*** in patients with [HeFH] and ASCVD, those patient populations that the FDA considers to have an appropriate benefit/risk ratio." (A042).

By stating that the FDA had given "feedback" that "confirmed"—and that the Company therefore "knew"—that the FDA would continue to use LDL-cholesterol as a proxy for cardiovascular risk and would not require a completed CVOT prior to approving ETC-1002, Esperion was telling investors unequivocally that ETC-1002 had a clear path to regulatory approval. In a highly unusual move, Defendants made these statements prior to receiving the official EOP2 meeting minutes from the FDA. *Id*. Noting the unexpected timing of the announcement, a Credit Suisse analyst asked:

> Just given how volatile the stock has been and especially today, before the release came out, can you just walk us through the thinking and … what was it that kind of changed your mind … I thought you were going to wait until … second half of September?

Mayleben replied:

> [A]s we digested the meeting last week, clearly, the thing that we had learned last week that we thought was significant was that ETC-1002 … ***has a clear path to approval***, and it's in … this high unmet medical need patient population, and we thought that, that was significant enough that it warranted speaking about it sooner rather than later.

Id.

Analysts clearly understood Defendants' statements to mean that the FDA had told Esperion that a CVOT would not be required prior to approval. (A042-43).

C. The Truth Is Revealed

On September 28, 2015, Esperion issued a press release that stated:

> For patients on maximally tolerated statin therapy who require additional LDL-C lowering, Esperion will plan to conduct efficacy and long-term safety trials. ***FDA has encouraged the Company to initiate a cardiovascular outcomes trial promptly***, which would be well underway at the time of the New Drug Application submission and review, since ***any concern regarding the benefit/risk assessment of ETC-1002 could necessitate a completed cardiovascular outcomes trial before approval***. Esperion intends to initiate a global long-term safety study for ETC-1002 by the end of 2015.

(A043-44).

This correction based on the official EOP2 meeting minutes was directly at odds with Defendants' August 17, 2015 statements that "based on feedback" from the FDA, Defendants "kn[e]w" that the FDA "will not require the completion of a [CVOT]," and that the FDA had "confirmed" that "LDL-C remains an accepted clinical surrogate endpoint." (A040-42). FDA meeting minutes are the official

record of what took place and what was said at the EOP2 meeting. *See* U.S. Department of Health & Human Services, *Guidance for Industry Formal Meetings Between the FDA and Sponsors or Applicants* at 10 (¶X) (May 2009) (accessible at https://bit.ly/2q3itP6) (last viewed May 31, 2020) ("FDA Meeting Guidance") ("FDA minutes are the official record of the meeting."). In other words, the FDA minutes reflect exactly what the FDA told Esperion at the August 11, 2015 EOP2 meeting.

Also on September 28, 2015, the Company held a conference call to discuss the press release and the FDA's official minutes from the EOP2 meeting. In response to analysts' questions regarding the inconsistencies between Esperion's previous statements and the FDA's official record of the meeting, Mayleben claimed it was just "***slightly different from the language that we used in the original announcement back in August***," but was forced to acknowledge—belatedly and contrary to the Defendants' prior statements—that "just because that's been the way it's been in the past [i.e., the FDA treating LDL-C lowering as an acceptable clinical surrogate endpoint and not requiring a pre-approval CVOT], there is no lead-pipe cinch guarantee that that's the way it will be in the future." (A045-46).

Analyst reports following the September 28, 2015 press release and conference call show they believed Defendants' earlier statements missed the mark.

See A046-47 (calling the EOP2 meeting minutes "***inexplicitly inconsistent"*** with and "more than 'slightly different from' prior 17 August 2015 EOP2 commentary," and "ominous" given "concerns on the benefit/risk profile of ETC-1002"). Esperion's stock price plummeted almost 50%, erasing over $376 million in market capitalization. (A047-48).

D. The Board Knowingly Approved the False Statements

[redacted][9] [redacted][10] [redacted][11]

[9] All references to "ESPERION____" are from documents produced in response to Plaintiff's inspection demand (the "220 Documents").

[10] [redacted]

[11] [redacted]

[redacted], the final version of the press release reads, "We have a clear ***regulatory path forward*** for development ***and approval*** of ETC-1002." [redacted]

E. Federal Securities Claims Against Esperion and Mayleben Are Upheld by the Sixth Circuit Court of Appeals

Esperion and Mayleben currently face significant liability in the related Securities Action, which alleges securities laws violations arising from the same false and misleading statements that are at issue in this derivative action. On

September 27, 2018, the Sixth Circuit Court of Appeals reversed the District Court's dismissal of the Securities Action, finding:

> Plaintiffs allege facts—that the FDA meeting minutes reflect what was said during the End-of-Phase 2 meeting, and that what was said at that meeting was inconsistent with what Esperion told its investors in August—that most assuredly support a strong inference that the company knew its statements were false.

Dougherty, 905 F.3d at 982.

On April 14, 2020, lead plaintiffs in the Securities Action asked the District Court to "unseal all documents and testimony … pertaining to the EOP2 meeting" between Esperion and the FDA "so that the Delaware [C]ourt [of Chancery] may have a more complete record on which to render a decision on the merits." Ex. D at 6.[12] The lead plaintiffs note that, in granting the Defendants' motion to dismiss in this derivative action, Chancery did not have the benefit of the class plaintiffs' discovery—"including damning evidence confirming that Defendants' August 17, 2015 statements were false when made." *Id.* at 3. The lead plaintiffs further contend that Defendants' claim in this derivative action that "it was implausible that Esperion

[12] This Court may take judicial notice of the class plaintiffs' brief because it is a pleading filed in the related Securities Action pending in the U.S. District Court for the Eastern District of Michigan. *See, e.g.*, *Baca v. Insight Enters, Inc.*, 2010 WL 2219715, at *1 (Del. Ch. June 3, 2010) (taking judicial notice, in the context of a motion to dismiss, of filings in pending derivative and securities actions).

would intentionally (or with deliberate recklessness) mislead investors on August 17, 2015 when Defendants knew that the truth would later be disclosed with the FDA minutes in September 2015" was "misleading." *Id.* at 4-5. The brief makes clear that the defendants had motives for issuing the August 2015 press release ahead of the FDA's official EOP2 meeting minutes, at least one of which was "to maintain the value of Esperion's stock price," and that lead plaintiffs have seen "no evidence that Defendants ever intended to disclose the EOP2 minutes." *Id.*[13]

[13] Plaintiff intends to file a motion to stay this Appeal pending resolution of the Motion to Unseal the relevant documents in the Securities Action as Defendants have already rejected Plaintiff's request to enter into a stipulation providing for such relief. Should the Court deny any motion to stay, and decide to uphold Chancery's dismissal order, Plaintiff respectfully requests that the Court remand this case to permit him to amend the complaint to add any new evidence ultimately disclosed in the Securities Action. *See, e.g.*, *Inter-Marketing Group USA, Inc. v. Armstrong*, C.A. No. 2017-0030-TMR (Del. Ch. Jan. 31, 2020).

ARGUMENT

CHANCERY ERRED IN FINDING THAT THE COMPLAINT FAILED TO PLEAD DEMAND FUTILITY

A. Questions Presented

1. Does the Complaint adequately allege there is reason to doubt the disinterestedness of a majority of the members of Esperion's Board at the time this action was commenced based on Plaintiff's allegations that the Director Defendants face a substantial likelihood of liability for the knowing issuance of false and misleading public statements? (A057-58; A063-69; A153-73; Transcript of Oral Argument on Defendants' Motion to Dismiss ("MTD Transcript") (Ex. B) at 33-49; *see also* Notice of Appeal filed March 16, 2020).

2. Does the Complaint adequately allege that there is reason to doubt the independence of a majority of the members of Esperion's Board at the time this action was commenced? (A058-62; A174-83; MTD Transcript at 50; *see also* Notice of Appeal filed March 16, 2020).

B. Scope of Review

The Court's review of the decision on a motion to dismiss under Chancery Court Rule 23.1 for failure to plead demand futility is *de novo*.[14] The Court must

[14] *Marchand v. Barnhill*, 212 A.3d 805, 817.

accept all well-pleaded allegations as true and draw all reasonable inferences in Plaintiff's favor.[15]

C. Merits of the Argument

1. Legal Standards Applicable to Demand Futility

Under Chancery Court Rule 23.l, a derivative complaint must "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors ... and the reasons for the plaintiff's failure to obtain the action or for not making the effort."

Demand is excused as futile where the particularized facts alleged create a reason to doubt that "the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand."[16]

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[15] *Sandys v. Pincus*, 152 A.3d 124, 126-28 (Del. 2016).

[16] *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993). The demand futility tests laid out in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984) (where there is an affirmative board action) and *Rales* (where there is no affirmative board decision) are "complementary versions of the same inquiry." *In re China Agritech, Inc. S'holder Derivative Litig.*, 2013 WL 2181514, at *16 (Del. Ch. May 21, 2013). That inquiry is whether the board of directors in place at the time the complaint was filed was capable of "validly consider[ing] a litigation demand." *Id.* As Chancery did (Opinion at 18), Plaintiff analyzes his demand futility allegations herein pursuant to the test laid out in *Rales*.

One way to establish demand futility is to allege there is reason to doubt the disinterestedness of a majority of the members of the board because the directors would face a "substantial likelihood" of liability if suit were filed.[17] A plaintiff does not have to demonstrate a reasonable probability of success on the claim—in *Rales*, the Delaware Supreme Court rejected such a requirement as "unduly onerous."[18] The plaintiff need only "make a threshold showing, through the allegation of particularized facts, that the[] claims have some merit."[19]

Demand is also futile where there is reason to doubt directors' independence.[20] Directors are deemed not independent where there is reason to doubt that their decisions will be "based on the corporate merits of the subject before the board rather than extraneous considerations or influences."[21]

With respect to both disinterestedness and independence, "reasonable doubt" can be said to mean that there is "a reason to doubt," which is "akin to the

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[17] *Rales*, 634 A.2d at 936.

[18] *Id.* at 934-35.

[19] *Id.* at 934.

[20] *See, e.g.*, *Sandys*, 152 A.3d at 126-28; *Del. Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1020 (Del. 2015) ("*Sanchez*").

[21] *Rales*, 634 A.2d at 936.

concept that the stockholder has a 'reasonable belief' that the board lacks independence or that the transaction was not protected by the business judgment rule"—an "objective test.'"[22] It is "sufficiently flexible and workable to provide the stockholder with 'the keys to the courthouse' in an appropriate case where the claim is not based on mere suspicions or stated solely in conclusory terms."[23]

Plaintiff "need not plead evidence."[24] The requirement of factual particularity at this stage "does not entitle a court to discredit or weigh the persuasiveness of well-pled allegations."[25] "[A]lthough the plaintiff is bound to plead particularized facts in pleading a derivative complaint, so too is the court bound to draw all inferences from those particularized facts in favor of the plaintiff, not the defendant, when dismissal of a derivative complaint is sought."[26] This is true even if the Court believes an inference in favor of Defendants is more likely.[27] In addition, "it is important that the trial court consider all of the

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[22] *Grimes v. Donald*, 673 A.2d 1207, 1217 & n.17 (Del. 1996).

[23] *Id*. at 1217.

[24] *Aronson*, 473 A.2d at 816.

[25] *La. Mun. Police Emps.' Ret. Sys. v. Pyott*, 46 A.3d 313, 351 (Del. Ch. 2012), *rev'd on other grounds*, 74 A.3d 612 (Del. 2013).

[26] *Sanchez*, 124 A.3d at 1022 (quoted in *Sandys* 152 A.3d at 126-28).

[27] *Pyott*, 46 A.3d at 356.

particularized facts pled by the plaintiffs … in their totality and not in isolation from each other."[28]

At the time this action was commenced, the Board was comprised of the following nine defendants: Mayleben, Newton, Vitullo, Goldstein, Janney, Gotto, McGovern, Omenn, and Braunstein. (A057). Plaintiff must plead demand futility as to five of these Board members.

2. Demand Was Futile Because the Director Defendants Face a Substantial Likelihood of Liability

a. Directors' Fiduciary Duties Require Them to be Truthful in Public Communications

"Whenever directors communicate publicly or directly with shareholders about the corporation's affairs, with or without a request for shareholder action, directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty."[29] "Communications that depart from this expectation ... violate the fiduciary duties that protect shareholders," and "[s]uch violations are sufficient to subject directors to liability in a derivative claim."[30] Thus, directors who knowingly issue false and

[28] *Sanchez*, 124 A.3d at 1019.

[29] *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998).

[30] *In re InfoUSA, Inc., S'holders Litig.*, 953 A.2d 963, 990 (Del. Ch. 2007); *see Malone*, 722 A.2d at 14 ("When the directors … are deliberately misinforming shareholders about the business of the corporation, … there is a violation of

misleading statements to shareholders "may be considered to be interested for purposes of demand."[31]

"[E]ven where there is no obligation to disclose certain information, if it is volunteered, the information must be stated truthfully and candidly."[32] A fiduciary also may be held liable if he "later comes into knowledge of the misleading nature of the previous communication, and knowingly and in bad faith (in other words, 'dishonestly') fails to correct the misleading impression created by the earlier communication."[33]

Plaintiff has adequately alleged that the Director Defendants knowingly made false and misleading statements in this case.[34]

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fiduciary duty[] [t]hat … may result in a derivative claim on behalf of the corporation.…").

[31] *InfoUSA*, 953 A.2d at 991.

[32] *Marhart, Inc. v. CalMat Co.*, 1992 WL 82365, at *3 (Del. Ch. Apr. 22, 1992).

[33] *Metro Commc'n Corp. BVI v. Advanced MobileComm Techs. Inc.*, 854 A.2d 121, 156, 159 (Del. Ch. 2004).

[34] Chancery analyzed Plaintiff's allegations under the typical *Caremark* analysis. Opinion at 19-20. But Plaintiff does not base his claims on alleged ignorance of wrongdoing or insufficient reporting controls that prevented the board from becoming aware of information that rendered the challenged statements false. Rather, Plaintiff alleges that the Director Defendants knowingly approved false and misleading statements. *See, e.g., City of Hialeah Emps. Ret. Sys.*, 2018 WL 1912840, at *2 (Del. Ch. Apr. 20, 2018) (distinguishing *Caremark* from claims of director knowledge of misleading disclosures). In any event, it is undisputed that

b. The Director Defendants Reviewed and Approved the False and Misleading Statements

Plaintiff alleges particularized facts showing that, following [redacted], the Director Defendants [redacted] Neither Chancery nor the Defendants dispute that [redacted] nor that [redacted]

c. The Statements Were False and Misleading

Plaintiff has alleged with particularity that the statements in the August 17, 2015, press release and analyst/investor conference call were false and misleading when they were made. Chancery did not find that Plaintiff had failed to adequately

knowingly lying to stockholders is a breach of the duty of loyalty, for which directors will face a substantial likelihood of liability.

[35] *See InfoUSA*, 953 A.2d at 990 (finding plaintiff had adequately alleged that directors faced substantial risk of personal liability for breach of duty of disclosure where they signed SEC filings).

allege that the August 2015 statements were false and misleading, and it cannot reasonably be disputed that the FDA minutes accurately reflect what the FDA told Esperion at the EOP2 meeting, and that the statements in the August 17 press release and investor call contradicted what the FDA told Esperion.[36]

d. The Director Defendants Knew the Challenged Statements Were False and Misleading

Plaintiff has alleged particularized facts showing that the Director Defendants (1) knew what the FDA told Esperion at the August 11 meeting, and (2) knew the contents of—and, [redacted], which directly contradicted what the FDA told Esperion at the EOP2 meeting. (A050-55).

The 220 Documents Show Board Knowledge

Defendants do not dispute that Mayleben was one of the Esperion executives who attended the EOP2 meeting with the FDA on August 11, 2015, and the 220 Documents show [redacted]

[36] Defendants do not dispute that the Company's public statements contradicted the official FDA record of the meeting. *See* A111-15. Notably, the FDA provides for a process by which written objections to the FDA's official meeting minutes may be submitted. FDA Meeting Guidance at 10 (¶IX). Yet there is no evidence that Esperion ever objected to the minutes or otherwise challenged the accuracy of the minutes, and the Company's corrective September 28 statements did not suggest that the FDA meeting minutes were inaccurate.

[redacted]

[redacted] (A050-51). The FDA minutes are the official record of the EOP2 meeting and, thus, reflect precisely what Mayleben (along with the other Esperion executives in attendance) was told at the EOP2 meeting. FDA Meeting Guidance at 10 (¶X).[37]

[redacted]

[37] *See In re Amylin Pharm., Inc. Sec. Litig.*, 2002 WL 31520051, at *5 (S.D. Cal. Oct. 10, 2002) (strong inference of scienter where company was put on notice at FDA meeting that Phase III trials may have been insufficient to support approval and was under no obligation to make the allegedly misleading statements); *In re Mannkind Sec. Actions*, 835 F. Supp. 2d 797, 814 (C.D. Cal. 2011) (strong inference of scienter where defendants had "'access to the true facts from' their meetings and various other communications with the FDA").

[redacted], it is reasonable to infer that the results of the EOP2 meeting were shared with the Director Defendants. Chancery simply ignored these particularized allegations when it claimed that the only fact from which scienter could be inferred was that the Director Defendants "reviewed, edited and approved the August 17, 2015 press release," and failed to draw reasonable inferences in Plaintiff's favor in concluding that "[t]he Complaint does not allege the Outside Directors … knew what occurred at that meeting." Opinion at 21.

[redacted]

[redacted] This supports a reasonable inference that a conscious decision was made during the course of [redacted] to inform the public that the FDA had confirmed that no pre-approval CVOT would be required and that ETC-1002 had a clear path to regulatory approval—despite the fact that the FDA had told Esperion no such thing.

Notably, no minutes or other contemporaneous records were kept to record exactly what occurred during [redacted] (A050-51). Given the absence of these Board minutes, when the Board would typically keep such records, all inferences must be read against Defendants and in Plaintiff's favor.[38] Chancery erred in not granting

[38] *See, e.g.*, *Hughes v. Hu*, 2020 WL 1987029, at *16 (Del. Ch. Apr. 27, 2020) ("The Company could have produced documents in response to the plaintiff's Section 220 demand that would have rebutted this inference. The absence of those documents is telling because '[i]t is more reasonable to infer that exculpatory documents would be provided than to believe the opposite: that such documents existed and yet were inexplicably withheld.'"); *Feuer v. Redstone*, 2018 WL 1870074, at *14 (Del. Ch. Apr. 19, 2018) ("Perhaps discovery will bear out that these concerns actually were addressed as defendants imply, but the record currently before the court does not. To the contrary, there is no indication [of that] in plaintiff's pleading, or in the many documents defendants chose to place in the record from the Section 220 production.…").

reasonable inferences in Plaintiff's favor based on the Board minutes and the lack of records of certain of the Board's proceedings—records that are typically kept as a matter of course and could inculpate the Director Defendants. Instead, by giving Defendants the benefit of such reasonable inferences, Chancery foreclosed any possibility of Plaintiff showing the Board's knowledge of the false statements.

[redacted] a change which could require Esperion to conduct a CVOT prior to its approval of ETC-1002. [redacted] receipt of news that the FDA had confirmed to Esperion executives that no pre-approval CVOT for ETC-1002 would be required and LDL-C lowering conclusively would continue to be an accepted surrogate endpoint (as the Defendants told the public had occurred in the August 17 statements) would have been of immeasurable significance to the Director Defendants, negating any potential counter-inference that the Director Defendants simply did not know what actually happened at the EOP2 meeting when they reviewed, edited, and approved the August 2015 press release.

Chancery misconstrued Plaintiff's factual allegations and improperly weighed inferences from [redacted] in Defendants' favor. For example, in finding that Plaintiff failed to adequately allege Board knowledge as to the falsity of the challenged statements, Chancery found that because certain language from a post-August 17 press release presentation to the Board [redacted] the Director Defendants must have acted in good faith. Opinion at 25-26. No such competing inference in Defendants' favor is warranted on this set of facts, particularly at the pleading stage. The language in the August 17 press release and investor conference [redacted] both directly contradicted what the FDA had told Mayleben and other Esperion executives, as reflected in the official FDA minutes. Plaintiff is not required to "point to actual confessions" in Esperion's Board-level documents to survive a Rule 23.1 motion—Defendants almost certainly would not openly reveal their own misconduct in corporate documents, and the Court can draw the inference of wrongful conduct here based on Plaintiffs' particularized allegations of fact.[39]

[39] *Pyott*, 46 A.3d at 357.

Chancery also improperly credited Defendants' preferred interpretation of the facts and read competing inferences in Defendants' favor in concluding that "[f]ar more likely is that the Esperion officials who attended the meeting simply misinterpreted the FDA's comments, and the Outside Directors then relied on Mayleben's assessment of the meeting, as they are entitled to do under *8 Del. C.* § 141(e). This is especially so when the facts relayed to the Board by Mayleben were consistent with the FDA's past practices." Opinion at 22 & 22 n.105. There is nothing in the record suggesting that Mayleben or any of the Defendants innocently misunderstood the straightforward statements from the FDA at the EOP2 meeting, as reflected in the official FDA minutes, or ever expressed any confusion or uncertainty about the FDA's comments to Esperion at the meeting. Moreover, whatever the FDA's "past practices," the FDA had told Esperion at the EOP2 meeting that a CVOT may be required, and [redacted] which increased the likelihood that the FDA would require Esperion to conduct a CVOT prior to its approval of ETC-1002. [redacted] Neither the Court nor Defendants may rewrite Plaintiff's complaint or

otherwise are entitled to their own preferred interpretations of the facts at the pleading stage.[40]

Accordingly, Chancery erred when it refused to read all reasonable inferences from the particularized facts alleged in Plaintiff's favor even if it believed an inference in favor of Defendants was more likely.[41]

The Importance of ETC-1002 to Esperion and The Director Defendants' Professional Experience Bolster The Inference of Board Knowledge

Further bolstering the reasonable inference that the Director Defendants knew the August 17 statements were false and misleading is the fact that ETC-1002 was the Company's primary drug candidate, and the Company's continued investment funding and future viability were completely dependent on the drug being approved by the FDA.[42]

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[40] *See In re Clovis Oncology, Inc. Derivative Litig.*, 2019 WL 4850188, at *13 n.201 (Del, Ch. Oct. 1, 2019) ("[w]hile Defendants may ultimately prove that their interpretation [] is correct, they cannot rewrite Plaintiffs' Complaint on a motion to dismiss"); *id*. at *14 n.214 (finding demand futile and weighing inferences in plaintiffs' favor despite "fully acknowledging" that defendants might "present evidence at summary judgment" supporting their competing interpretation of the facts); *Hialeah*, 2018 WL 1912840, at *4 ("[a]t the pleading stage, a court cannot determine what actually happened or choose among reasonable inferences").

[41] *Pyott*, 46 A.3d at 356.

[42] *See, e.g., In re Fitbit, Inc. Stockholder Derivative Litig.*, 2018 WL 6587159, at *15 n.179 (Del. Ch. Dec. 14, 2018) ("totality of the facts Plaintiffs have pled with particularity allow a reasonable pleading stage inference that, because the problems [with the product] were profound and [the product] drove the Company's bottom line,

Moreover, given the Director Defendants' substantial previous experience working for companies undertaking clinical trials and working with the FDA to seek approval of new drug products (A063-69), they were well aware of how unusual it was for Esperion to issue a press releases and hold an analyst conference call just six days after meeting with the FDA and prior to receiving the FDA's official meeting minutes.[43]

These particularized facts—viewed in their totality—support a reasonable pleadings-stage inference that the Director Defendants were aware of (i) what the

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… the Board knew of the alleged material, nonpublic information"), *aff'd sub nom. Fitbit, Inc. v. Agyapong*, 202 A.3d 511 (Del. 2019); *In re Fitbit, Inc. Stockholder Derivative Litig.*, 2019 WL 190933, at *3-4 (Del. Ch. Jan. 14, 2019) ("there is no per se rule that a court cannot infer scienter based on the core operations doctrine when the presumption that flows from the doctrine is offered along with particularized factual allegations"), *aff'd*, *Agyapong*, 202 A.3d 511; *see also Marchand*, 212 A.3d at 809 (affording weight, in evaluating board's fiduciary duties, to fact that company had just one product for sale and operated in highly regulated industry); *id*. at 822-24 (recognizing importance of board's duties when company operating in midst of "mission critical" regulatory risk); *Clovis*, 2019 WL 4850188, at *13 (discussing importance of directors fulfilling their fiduciary duties when "company operates in an environment where externally imposed regulations govern its 'mission critical' operations"); *id*. at *14 n.210 (drawing inferences in plaintiffs' favor and against defendants because product at issue "was such an important product for the [c]ompany").

[43] Chancery did not dispute that the Director Defendants' experience is relevant to the demand futility inquiry, but simply ignored Plaintiff's numerous other particularized allegations of Board knowledge. Opinion at 23 n.108.

FDA told and did not tell Esperion at the EOP2 meeting; (ii) the content of the drafts and final version of the August 2015 press release; and (iii) the fact that the press release—particularly as [redacted]—and Mayleben's similar comments at the analyst conference call that day were false and misleading because they directly contradicted what the FDA had told the Company.[44]

Chancery Improperly Required Plaintiff to Establish "Motive" – and Potential Motives Exist in Any Event

Chancery improperly required Plaintiff to establish the Director Defendants' "motive" for issuing the false statements on August 17, 2015. Opinion at 22. Plaintiff need make no such showing—especially in light of the other particularized facts discussed above—in order to support a pleading-stage inference that the Defendants knowingly approved the false and misleading August 17 statements. The Director Defendants' motivations are not dispositive (or even particularly relevant) here because Plaintiff's allegations of knowledge are not based on a claim

[44] *See Weiss v. Swanson*, 948 A.2d 433, 449 n.60 (Del. Ch. 2008) (breach of fiduciary duty may be averred generally through "well-pleaded facts from which it can reasonably be inferred that [the information] was knowable and that the defendant was in a position to know it"); *InfoUSA*, 953 A.2d at 991 ("reasonably infer[ring], based upon the[] allegations, that the directors who signed the … 10–Ks "did so knowing that the information contained therein fell far below the standards of candor expected from them").

that the Director Defendants sought to personally enrich themselves.[45] In fact, the Sixth Circuit in the related Securities Action found that plaintiffs had adequately pled scienter despite finding that the motive allegations were too general and speculative.[46]

Chancery's reliance on *Ryan v. Armstrong*, 2017 WL 2062902, at *17 (Del. Ch. May 15, 2017), and *In re Novell, Inc. S'holder Litig.*, 2014 WL 6686785, at *9 (Del. Ch. Nov. 25, 2014), was misplaced. Opinion at 22 & 22 nn.104-05. In *Armstrong*, the plaintiff's demand futility argument was premised on the allegation that the directors' actions were "taken for entrenchment purposes" and, thus, the plaintiff had to show that the "board's sole or primary motivation was entrenchment."[47] The court found that, in those circumstances, the plaintiff had failed to plead demand futility because the complaint was "silent as to the

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[45] *See, e.g.*, *Desimone, v. Barrows*, 924 A.2d 908, 933 (Del Ch. June 7, 2007) (directors may act disloyally "even though their motives were not necessarily selfish," as deceiving shareholders is "a disloyal act"); *McElrath v. Kalanick*, 2019 WL 1430210, at *11 n.150 (Del. Ch. April 1, 2019) ("[p]leading bad faith via a showing of conscious disregard of duties does not require a pleading of motive, such as personal interest"); *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) (same).

[46] *See Dougherty*, 905 F.3d at 982 ("'[T]he absence of a motive allegation is not fatal.'").

[47] *Armstrong*, 2017 WL 2062902, at *17.

individual director's motivations, interests, and actions."[48] And in *Novell*, the court was ruling on a motion for summary judgment—not a motion to dismiss.[49] Moreover, the single "narrow issue remaining after the motion to dismiss stage [wa]s whether [d]efendants were influenced by some improper motive" in connection with the sale of the company.[50]

Here, Plaintiff's allegations are not based on and are not dependent upon an underlying self-serving motive, and a showing of motive is therefore not required to support a pleading-stage inference of Board knowledge—especially in light of the other particularized facts alleged in the Complaint. But even if the Director Defendants' motives for making the false statements were required here, the record implicates numerous potential motives.

As courts have recognized, defendants are often motivated to mislead in order to buy time hoping that a difficult business situation "would right itself."[51] The Director Defendants here may well have hoped that, prior to the issuing its

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[48] *Id.*

[49] 2014 WL 6686785, at *5-6, *9.

[50] *Id.* at *7 n.89.

[51] *See, e.g.*, *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 710 (7th Cir. 2008).

official minutes, the FDA would reconsider the information it provided to Esperion at the EOP2 meeting and come to a different conclusion. That possibility is actually consistent with positions taken by Defendants in the litigation to date. *See, e.g.*, MTD Transcript at 28:2-7 [redacted] Plaintiff argued at the motion to dismiss hearing that this was one possible motivation for the Director Defendants' approval of the false and misleading August 17 statements. *See id*. at 41:17-44:12. Chancery failed to even mention this potential motive in its Opinion and summarily concluded that "[i]n the absence of some conceivable explanation for why Defendants would lie so openly, especially when they were virtually certain to be caught in the lie, it is not reasonable to infer bad faith." Opinion at 22. In addition to ignoring the potential motive above, Chancery ignored the fact that there is no FDA requirement that Esperion disclose the final EOP2 meeting minutes—and no evidence that Defendants ever intended to disclose the EOP2 minutes. Chancery's assumption that the EOP2 minutes necessarily would be released is unsupported by the record, and the inference of good faith Chancery drew from that assumption was unwarranted.

The 220 Documents reveal another potential motive. On August 12, 2015—the day after the EOP2 meeting with the FDA—Esperion's then Vice President of Finance (and now Chief Financial Officer) Rick Bartram ("Bartram") [redacted][52] [redacted] taken together with the other particularized facts in the Complaint—supports a reasonable inference that one of the Defendants' motives was to maintain the Company's stock price in the lead-up to receiving the official FDA record of the EOP2 meeting. In fact, it appears from

[52] As Chancery correctly noted, the "parties agreed, as a condition to the Section 220 production, that all documents produced would be deemed incorporated into the Complaint." Opinion at 25 n.117; A022.

discovery uncovered in the Securities Action the defendants, in fact, were "motivated to maintain the value of Esperion's stock price." Ex. D at 5.

1. Plaintiff Adequately Alleged Demand Futility on the Ground that There Is Reason to Doubt the Independence of a Majority of the Director Defendants

Plaintiff pled sufficient particularized facts creating reason to doubt the independence of a majority of the Board. (A027-28; A029-31; A058-69). These well-pled facts were ignored by Chancery. Defendants conceded two of the members of the nine-person Board, defendants Mayleben and Newton, were inside directors who were interested and lacked independence. (A084). As a result, Plaintiff had to demonstrate only three other directors lacked independence in order to establish demand futility.

"At the pleading stage, a lack of independence turns on whether the plaintiffs have pled facts from which the director's ability to act impartially on a matter important to the interested party can be doubted because that director may feel either subject to the interested party's dominion or beholden to that interested party."[53] The Court must view the "pled facts ... in full context in making the ... pleading stage determination of independence."[54] "Independence is a fact-specific determination

[53] *Sandys*, 152 A.3d at 128.

[54] *Id*.

made in the context of a particular case. The court must make that determination by answering the inquiries: independent from whom and independent for what purpose?"[55] "The Court of Chancery in the first instance ... must review the complaint on a case-by-case basis to determine whether it states with particularity facts indicating that a relationship—whether it preceded or followed board membership—is so close that the director's independence may ***reasonably*** be doubted. This doubt might arise either because of financial ties ... [or] a particularly close ... business affinity...."[56]

The Court should not consider facts tending to show directors lack independence in a vacuum. "Delaware law requires that all the pled facts regarding a director's relationship to the interested party be considered in full context in making the, admittedly imprecise, pleading stage determination of independence."[57] As noted by the court in *Delaware County*, long-standing economic ties may be

[55] *Beam ex. Rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1049-50 (Del. 2004).

[56] *Id.*, 845 A.2d at 1051 (emphasis in original).

[57] *Sanchez*, 124 A.3d at 1022.

sufficient, in and of themselves, to demonstrate a lack of independence between a seemingly independent director and one who is a high-level executive.[58]

Plaintiff alleges that Mayleben and Newton reassembled members of the Old Esperion board both before and shortly after New Esperion went public. They enlisted defendant Gotto, a former board member of Old Esperion, as a Board member of Esperion in early 2014 shortly after the latter went public. Gotto earned $839,700 in 2004 when, as part of the Old Esperion merger agreement, he consented to the cancellation of 30,000 stock options priced at $7.01 in exchange for a cash payment representing the difference between the prices of the options and the market value of the underlying common stock on the effective date of the merger ($35). A058-59; Antonio M. Gotto, Jr., Statement of Changes in Beneficial Ownership (Form 4) (Feb. 12, 2004).

It is apparent Gotto was invited *to rejoin* the Esperion Board because of his long-term relationship with Mayleben and Newton and his proven loyalty and trustworthiness to them, and Gotto was willing to serve because he had made a significant sum of money from Esperion in the past and was looking for further

[58] *Id.*, 124 A.3d at 1023.

enrichment. Nevertheless, Chancery did not consider these obvious factors, brushing them off as:

> Precisely the kind of "naked assertion[s] of a previous business relationship" that this court routinely deems insufficient to meet Rule 23.1's particularity standard…. The Complaint does not plead with particularity that Gotto's relationship with Mayleben and Newton involves the "very warm and thick personal ties of respect, loyalty, and affection" that would support an inference Gotto "would be more willing to risk his [] reputation than risk the relationship with the interested director."

Opinion at 30.

There is *nothing* routine about a company that reconstitutes itself years after a merger when its original members invite a former loyal board member who profited handsomely from the prior endeavor to join the new board. Gotto had proven himself over the course of nearly twenty years to be a reliable supporter of both insider directors Newton and Mayleben, and his sense of owingness to those defendants for his Old Esperion windfall and his desire for more enrichment raises a reason to doubt whether he could impartially consider a demand to sue Mayleben and Newton.[59]

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[59] *See In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 55 (Del. Ch. 2013) ("I find that Prang's current ***and past*** relationships with Gandhi and Sequoia resulted in a sense of 'owingness' that compromised his independence for purposes of determining the applicable standard of review."); *Sandys*, 152 A.3d at 134 (Del. 2016) (inferring that two directors were not independent of a controller for purposes of Rule 23.1 where they had "a mutually beneficial network of ongoing business relations" based on past

The same is true for defendants Janney and Vitullo. After having made millions for Alta Partners, LP ("Alta") on the merger of Old Esperion, Janney reinvested Alta's funds in New Esperion and joined the Board in November 2012, before the Company went public. (A030; A059-60). Newton and Mayleben had confidence that Janney, having made a substantial amount of money for Alta on Old Esperion, would conform to their wishes, and Janney was incentivized to follow them down the path to another windfall for Alta. Similarly, Vitullo had made a shrewd investment in Old Esperion for Domain Associates, LLC ("Domain"), earning millions on the merger, and reinvested in New Esperion and was tabbed as a director by Newton *in 2008*, years before the Company went public. (A029; A059-60). Again, Newton and then Mayleben trusted Vitullo to be loyal, and Vitullo unquestionably was seeking another big payday for Domain.

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investments and service on company boards); *In re EZCORP Inc. Consulting Agreement Derivative Litig.*, 2016 WL 301245, at *36-37 (Del. Ch. Jan. 25, 2016) (finding reasonable doubt existed about a director's ability to impartially consider a litigation demand where the interested party had the "ability to influence [the director's] future" at a separate entity); *InfoUSA*, 953 A.2d at 979, 990-94 (finding prior business ties and significant financial compensation received from the controlling director established reasonable doubt as to the directors' independence); *In re Primedia Derivative Litig.*, 910 A.2d 248, 261 n.45 (Del. Ch. 2006) (holding on motion to dismiss that directors who had "substantial past or current relationships, both of a business and of a personal nature, with [a controller]" were not independent).

Chancery erred by ignoring the fact that Gotto was a repeat director and investor in Esperion, and Janney and Vitullo were repeat large investors in Esperion before the Company went public, making them special "friends" not only of the Company but of its co-founder, Newton, and one of its original and continuing senior executives, Mayleben. (A027-28). Instead, Chancery resorted to boilerplate analysis rather considering the facts at hand. Opinion at 28-29.

Again, Chancery ignored the fact that Gotto was invited *twice* to join Esperion's board, and Janney and Vitullo were invited to join the board after they had both made substantial sums on Old Esperion and were looking to do so again with New Esperion. The longstanding business affinity Gotto, Janney, and Vitullo had with Newton and Mayleben casts reason to doubt whether they could independently consider a demand to initiate litigation against Newton or Mayleben.

In addition, the Complaint details a web of entangling relationships involving a majority of the Board members—Mayleben, Newton, Vitullo, Janney, and Goldstein—arising from their venture capital activity. (A060-62). In light of these entanglements, there is reason to doubt whether defendants Mayleben, Newton, Vitullo, Janney, and Goldstein would vote to initiate litigation against each other due to the risk of their venture capital funds being cut out of future investment opportunities in retaliation. *Id*. Venture capital firms have to compete in order to be

allowed to invest into companies before they go public. There is reason to doubt whether these defendants would risk their and their firms' reputations and future investment opportunities by voting to initiate litigation against founders of a company. *Id.* This Court has recognized this reality, stating: "Venture capital firms 'compete' with each other, and networks arise of repeat players who cut each other into beneficial roles in various situations. There is, of course, nothing at all wrong with that. In fact, it is crucial to commerce and most human relations. But, precisely because of the importance of a mutually beneficial ongoing business relationship, it is reasonable to expect that sort of relationship might have a material effect on the parties' ability to act adversely toward each other. Causing a lawsuit to be brought against another person is no small matter, and is the sort of thing that might plausibly endanger a relationship."[60]

The particularized facts alleged in the Complaint—considered in their totality—create a reason to doubt the independence of a majority of the Board.

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[60] *Sandys*, 152 A.3d at 134; *see Goldman v. Pogo.com, Inc.*, 2002 WL 1358760, at*4 (Del. Ch. June 14, 2002) (finding lack of independence between "business partners"); *In re Orchard Enters., Inc. Stockholder Litig.*, 88 A.3d 1, 21-22 (Del. Ch. 2014) (discussing closeness of long-standing business relationship as bearing on independence, including "making co-investments in a venture capital fund and at least four other companies").

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests reversal of Chancery's decision.

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