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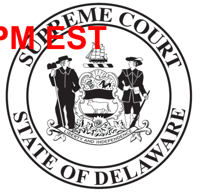

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BENJAMIN WARNER,	)	No. 322, 2024
	)	
Plaintiff-Below/Appellant,	)	Court Below: Court of Chancery
	)	
v.	)	
	)	C.A. No. 2023-0159-PAF
TIMOTHY C. TYSON, RICHARD CUNNINGHAM, CLIVE KABATZNIK, VINCENT PALMIERI, EDWARD ROFFMAN, and MICHAEL TAGLICH,	)	**PUBLIC VERSION** **Filed: November 8, 2024**
	)	
Defendants-Below/Appellees,	)	
	)	
and	)	
	)	
ICAGEN, INC., nka IXC Discovery, Inc.,	)	
	)	
Nominal Defendant-Below/Appellee.	)	

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

In his Complaint, Plaintiff-Below/Appellant Benjamin Warner ("Plaintiff") challenges the sale by Nominal Defendant-Below/Appellee Icagen Inc. ("Icagen" or the "Company") of its North Carolina facility and related assets to Ligand Pharmaceuticals, Incorporated ("Ligand") in March 2020 (the "Transaction"). There is no dispute that the Transaction was an independent third-party deal, which was negotiated at arms-length. Plaintiff also acknowledges that, at the time of the Transaction, Icagen was in default under its principal lending agreements and operating under a forbearance agreement that required the Company to sell significant assets (including the North Carolina facility) to pay down its debt. Nonetheless, Plaintiff argues that the Transaction was unfair and that certain of Icagen's directors were "interested" in the Transaction.

Plaintiff's theory as to how the Company's directors were "interested" in the Transaction has been a moving target.[1] In the Complaint, Plaintiff alleges that those directors who hold shares of the Company's Series C Preferred were interested

[1] Plaintiff named as defendants each of the five directors who approved the Transaction—Timothy C. Tyson, Clive Kabatznik, Vincent Palmieri, Edward Roffman, and Michael Taglich—along with the Company's then CEO, Richard Cunnigham (collectively, the "Individual Defendants" and, along with Icagen, "Defendants"). Defendants moved to dismiss the Complaint pursuant to Rules 12(b)(6) and 23.1.

because the Transaction resulted in the payment of the $19.4 million liquidation preference owed such shares. However, this assertion is obviously wrong based on the allegations of the Complaint itself and the documents relied upon therein. To acquire the North Carolina facility and related assets, Ligand agreed to pay $15 million in cash consideration and up to an additional $25 million contingent upon successful drug development and future revenue milestones. Plaintiff admits that the bulk of the $15 million cash consideration was immediately paid over to the Company's senior secured creditors (the "Senior Creditors") with the remainder going to transaction costs, other payables and working capital. Whether the Company would receive any portion of the contingent consideration and, if so, how much was highly speculative. Further, even after the Transaction, the Company continued to owe substantial sums to its Senior Creditors, which amounts would have to be repaid before any payment to Series C Preferred. Accordingly, Plaintiff fails to allege that any part of the Transaction proceeds went to the payment of the Series C Preferred liquidation preference.

Given this reality, Plaintiff sought to manufacture a new conflict in his briefing below—asserting that two of the five directors who approved the Transaction received a special benefit in the form of repayment of certain notes. Yet this purported conflict is also directly contradicted by the allegations in the

Complaint. The directors' notes were not repaid in connection with the Transaction, a fact that is evident from the Complaint and documents integral thereto.

Plaintiff changed tack once again at oral argument below. Having been forced to acknowledge that the Complaint fails to plead that the directors received any portion of the Transaction proceeds, Plaintiff argued that the directors were nonetheless interested because there was an *expectation* that the Transaction, coupled with other future assets sales, would ultimately generate sufficient proceeds to repay the directors' loans and provide some payment to the Series C Preferred.

Although the problems with Plaintiff's Complaint and theory of interestedness are manifold, the Court of Chancery focused on the most glaring deficiency. Plaintiff fails to sufficiently plead that a majority of the directors who approved the Transaction lacked independence or were interested. In fact, Plaintiff fails to plead any interest at all with regard to two of the five directors. As to a third director, Plaintiff merely argues that his ownership of 28,571 shares (0.8%) of the Series C Preferred created a disabling interest. However, there are no allegations in the Complaint concerning this director's financial circumstances and whether the speculative possibility that he might receive some future payment on the Series C Preferred was material to him. For this reason, the Court of Chancery found that "[t]he Complaint does not give rise to a reasonable inference that at least three

members of the five-person board that approved the Ligand Transaction lacked independence or were interested in the transaction." Therefore, the Court of Chancery held that Plaintiff had failed to rebut the presumptions of the business judgment rule and dismissed the Complaint under Rule 12(b)(6).

This determination by the Court of Chancery is plainly correct, and Plaintiff has provided no basis for reversal. This Court should affirm.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly determined that the Complaint fails to give rise to a reasonable inference that at least three members of the five-member Board of Directors (the "Board") that approved the Transaction suffered from a disabling interest in the Transaction. Specifically, Plaintiff fails to allege any interest or lack of independence on the part of Palmieri and Roffman. As to Kabatznik, Plaintiff argues that he was interested solely due to his ownership of 28,571 shares (0.8%) of the Series C Preferred. However, Plaintiff fails to allege anything about Kabatznik's economic circumstances or whether the possibility of some future payment on his shares of Series C Preferred was material to him. Furthermore, although the Court of Chancery did not find it necessary to reach the issue, Plaintiff's allegations are insufficient to establish an interest on the part of any of the directors holding Series C Preferred (Tyson, Taglich and Kabatznik) given that the Transaction did not trigger the payment of the liquidation preference or otherwise result in any payment to these directors.

2. Denied. Plaintiff's argument that the Individual Defendants structured the Transaction "for their own financial advantage," at an inadequate price, and through an unfair process is not supported by the allegations of the Complaint. The Complaint fails to allege that the Individual Defendants received any portion of the

proceeds of the Transaction. Rather, the bulk of the upfront proceeds from the Transaction were used to partially repay loans to the Company's Senior Creditors, which loans were then in default, with the remainder going to transaction costs, other payables and working capital. Accordingly, the Individual Defendants had the same interest as all other stockholders in the Transaction, *i.e.*, to receive the highest price available for the Company's North Carolina facility and related assets.

3. Denied. The Court of Chancery correctly determined that Plaintiff had failed to allege a basis for application of the entire fairness standard or otherwise rebut the presumptions of the business judgment rule.

STATEMENT OF FACTS[2]

A. The Parties.

Nominal Defendant Icagen is a Delaware corporation. A019. During the relevant time period, Icagen was a drug discovery company. A021-A022. The Company's business model was focused on research collaborations and partnerships with large pharmaceutical and biotechnology companies and foundations, who it partnered with to support the discovery and development of innovative pharmaceuticals. A022. Icagen operated out of two sites, one in Durham, North Carolina and the other in Tucson, Arizona. *Id*.

Plaintiff Benjamin Warner is a common stockholder of the Company. A019.

Defendant Timothy C. Tyson ("Tyson") was at all relevant times a director and the Non-Executive Chairman of Icagen's Board. A019-A020. At the time of the Transaction, Tyson held 685,704 shares (19.9%) of the Series C Preferred, as well as 164,284 shares of common stock, warrants to purchase 820,704 shares of common stock, and options to purchase 223,500 shares of common stock (of which

[2] The facts stated herein are taken from the Complaint, the well-pled factual allegations of which must be accepted as true on a motion to dismiss, as well as documents referenced in the Complaint and certain SEC filings, which may also properly be considered. *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 818 (Del. 2013). Moreover, the books and records produced by Icagen pursuant to 8 *Del. C.* § 220 were agreed to be incorporated by reference into the Complaint and may also be considered. *See* A469; *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 797 (Del. Ch. 2016).

99.9% were vested or would vest within 60 days), altogether representing beneficial ownership of 23.3% of the Company's common stock. A040-A041. In addition, Tyson held a 10% bridge note issued by the Company in the principal amount of $300,000, which was not paid at maturity and the interest rate thereon was increased to 15%. A041; A130.

Defendant Michael Taglich ("Taglich") was at all relevant times a director of the Company. A021. At the time of the Transaction, Taglich held 114,285 shares (3.3%) of the Series C Preferred, as well as 453,314 shares of common stock, warrants to purchase 340,461 shares of common stock, and options to purchase 57,500 shares of common stock (of which 99.6% were vested or would vest within 60 days), altogether representing beneficial ownership of 14% of the Company's common stock. A042. In addition, Taglich held a 15% subordinated promissory note issued by the Company in the aggregate amount of $250,000. *Id.*; *see also* A131. Taglich's brother, non-party Robert Taglich, held 114,284 shares (3.3%) of the Series C Preferred and warrants to purchase 301,544 shares of common stock, representing beneficial ownership of 10.7% of the Company's common stock. A131. Robert Taglich also held a 15% subordinated promissory note issued by the Company in the aggregate amount of $250,000. *Id.*

Defendant Clive Kabatznik ("Kabatznik") was a director of the Company at the time of the Transaction. A020. Following completion of the Transaction, Kabatznik resigned as a director in April 2020. *Id.* Kabatznik held 28,571 shares (0.8%) of the Series C Preferred, as well as 25,000 shares of common stock, warrants to purchase 58,571 shares of common stock, and options to purchase 85,000 shares of common stock (of which 99.7% were vested or would vest within 60 days), altogether representing beneficial ownership of 3% of the Company's common stock. A044-A045; *see also* A131.

The Complaint does not directly allege that the remaining directors on the Board that approved the Transaction—defendants Vincent Palmieri ("Palmieri") and Edward Roffman ("Roffman")—held any equity or debt interests in the Company. However, public filings referenced in the Complaint disclose that Palmieri and Roffman beneficially held, respectively, 3.1% and 1.6% of the Company's common stock, but no Series C Preferred. *See* A149-A150.

Finally, defendant Richard Cunningham ("Cunningham") has been President and CEO of the Company since 2014. A020. At the time of the Transaction, Cunningham owned 21,428 shares of common stock and options to purchase 959,616 shares of common stock (of which 67.8% were vested or would vest within 60 days). A045. Following the Transaction, in April 2020, Cunningham became a

director of the Company. A020. After the Transaction was approved, the Board authorized a $300,000 bonus for Cunningham and the Company's Senior Creditors agreed to transfer 500,000 shares of their Series C Preferred to Cunningham for his work on the Transaction. A056-057; A460.

B. The Company's Research Collaborations.

As noted above, Icagen sought to partner with large pharmaceutical and biotechnology companies and foundations to support the discovery of innovative pharmaceuticals. These collaborations would provide the Company with upfront payments, as well as the opportunity for revenue from future milestone and royalty payments should any new drugs ultimately be developed and commercialized. A022-A023; A335.

On May 1, 2018, Icagen announced its first such research collaboration with the Cystic Fibrosis Foundation. A034. In connection with the project, the Cystic Fibrosis Foundation awarded Icagen up to $11 million to support a "multi-year drug discovery initiative." *Id.* In the event the collaboration was successful in developing and commercializing a drug, Icagen further could receive up to $59 million in milestone payments. *Id.*

In December 2018, Icagen announced its second collaboration with F. Hoffman-La Roche Ltd. and Hoffman-La Roche Inc. (together, "Roche") regarding the discovery of therapies for certain neurological diseases. A022.

C. The Company's Series C Preferred Stock.

On April 9, 2018, the Company issued a Form 8-K reporting that it had "closed the first tranche of its preferred stock and warrant offering" by entering into a purchase agreement with a trust affiliated with one of the Company's directors. A030. The purchase agreement provided for the Company to receive $2 million in return for the sale of 571,428 shares of Series C Preferred and a warrant to purchase 571,428 shares of common stock. *Id.*

The Series C Preferred ranks senior to the shares of the Company's common stock and any other class or series of stock issued by the Company with respect to dividend rights, redemption rights and rights on the distribution of assets on any voluntary or involuntary liquidation, dissolution or winding up of the Company's affairs. A031. In the event of the Company's liquidation, dissolution or winding up, holders of the Series C Preferred would further be entitled to a preference equal to $5.25 per share of Series C Preferred plus all accrued and unpaid dividends. A032. Additionally, upon the occurrence of a "Cash Liquidity Event," the holders of Series C Preferred could require that the Company redeem their shares for a price

of $5.25 per share, subject to certain adjustments. *Id.* A Cash Liquidity Event is defined as including, among other things, a sale of assets in a single or multiple transactions, other than in the ordinary course, resulting in aggregate gross proceeds received by the Company during any twelve-month period in excess of $40 million. A032-A033. Further, each holder of Series C Preferred has the right to cast the number of votes equal to three times the number of shares into which the Series C Preferred is convertible.[3] A032.

On June 5, 2018, Icagen issued another Form 8-K announcing the closing of the "second tranche" of the preferred stock and warrant offering, pursuant to which a member of the Board again acquired 571,428 shares of Series C Preferred and a warrant to purchase 571,428 shares of common stock for $2 million. A030.

D. The Company's Credit Agreements.

On August 31, 2018, the Company entered into a Credit Agreement and Guaranty (the "Icagen Credit Agreement") with the Senior Creditors, including Perceptive Credit Holdings II, LP ("Perceptive"), which acted as administrative agent for the Creditors. A126. On the same date, Icagen's wholly-owned subsidiary,

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[3] The Series C Preferred Stock is convertible into such number of shares of common stock as shall be equal to $3.50 plus any accrued and unpaid dividends on such shares of Series C Preferred Stock divided by the conversion price, which initially shall be $3.50 per share. A031.

Icagen-T, Inc., entered into a related Credit Agreement and Guaranty (the "Icagen-T Credit Agreement" and together with the Icagen Credit Agreement, the "Credit Agreements"), for which Perceptive also served as administrative agent. *Id.* Pursuant to the Credit Agreements, Icagen received a $7.25 million term loan and Icagen-T received an aggregate of $11.0 million in term loans. *Id.* The term loans were secured by first priority liens on all of Icagen's existing and after acquired tangible and intangible assets and a pledge of 100% of the Company's equity interests in its subsidiaries, including Icagen-T. *Id.*

E. The Company Defaults Under the Credit Agreements and Enters into a Series of Forbearance Agreements.

In its Form 10-Q for the quarter ending September 30, 2019, Icagen reported that "[t]he Company's working capital is insufficient to meet its short-term cash requirements and fund any future operating losses" and, as a result, there was "uncertainty about the Company's ability to continue as a going concern." A035.

During 2019, Icagen also defaulted on its obligations in the Credit Agreements.[4] A127. As a result, on August 27, 2019, Icagen and Perceptive entered

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[4] The Information Statement explains that, during this time period, the Company engaged in extensive efforts to "explor[e] the full range of strategic and financial alternatives available to it," which included retaining a bank to advise on potential merger or sale transactions. A133 (noting that bank approached 25 potential strategic partners). Although the Complaint relies heavily on the Information Statement and purports to challenge the Board's process, these facts are

in a Forbearance Agreement and First Amendment to the Icagen-T Credit Agreement (the "First Forbearance Agreement") in order "to stop [Perceptive] from taking legal action to exercise its rights and remedies on the Term Loans until December 31, 2019." *Id.*; *see also* A016.

Because Icagen remained in default under the Credit Agreements upon expiration of the First Forbearance Agreement, on January 13, 2020, the Company and Perceptive entered into a further Forbearance Agreement and Second Amendment to the Credit Agreements (the "Second Forbearance Agreement"). A127; A047-A048. Pursuant to the Second Forbearance Agreement, the Company agreed that it would seek to sell significant assets in order to repay its debt. Specifically, the Company agreed to sell its North Carolina business on or before February 15, 2020 and to retain a real estate broker to sell the Tucson facility, which sale was expected to occur prior to July 15, 2020. A047-048; A128; A442-A444.

On February 12, 2020, Icagen and Perceptive entered into a Third Forbearance Agreement, which extended the time to sell the North Carolina facility to March 15, 2020 and extended the time to retain a real estate broker and sell the Tucson facility. A050-A052; A128.

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noticeably absent from the pleading.

F. Icagen Enters into an Agreement to Sell its North Carolina Business to Ligand.

On February 11, 2020, Icagen and certain of its wholly-owned subsidiaries entered into the Asset Purchase Agreement (the "APA" or, as defined above, the "Transaction") with Adjacent Acquisition Co., LLC, a subsidiary of Ligand, for the sale of substantially all of the assets located at the Company's Durham, North Carolina facility. A023. Those assets included, but were not limited to, Icagen's research and development operations focused on ion channels and transporters, High Throughput Screening and lead optimization technology, assay development and x-ray fluorescence-based assays. A023-A024. The assets to be sold also included all existing collaborations and partnerships (including the Cystic Fibrosis Foundation and Roche collaborations), inventory, leased real estate, intangible assets and the trademark "Icagen." A025; A122.

Ligand agreed to pay the Company base consideration of $15 million subject to a working capital adjustment and less an indemnity escrow of $1.25 million. A025; A124. In addition, Ligand agreed to assume certain liabilities of the Company, including certain liabilities associated with the North Carolina facility. A124. Ligand also agreed to pay future consideration of up to $25 million (the "Earn Out Consideration"). *Id.* The Earn Out Consideration would consist of 15% of Third Party Revenue and 1% of Direct Revenue that Ligand may receive on or before

December 31, 2027 from milestone payments or other amounts with regard to future products that might be developed from certain of Icagen's existing partnerships. A125.

G. The Company Obtains Stockholder Consent and Provides the Information Statement.

On February 19, 2020, the Corporation obtained the approval of the APA by written consent ("Written Consent") of stockholders that together held approximately 68.4% of the voting power of the Company. A015; A018.

On March 2, 2020, Icagen filed the Information Statement. A115. The Information Statement explained that the Company would use approximately $8.3 million of the $15 million in upfront proceeds from the Transaction "to repay the indebtedness of the Corporation to [Perceptive], and the remaining proceeds will be used to pay the related transaction costs, payables in arrears as well as for working capital purposes." A026. Following such payment to Perceptive, the Company would continue to owe approximately $11.5 million under the Credit Agreements. *Id.*

The Information Statement provided that the Board determined the sale of the North Carolina business on the terms set forth in the APA was "in the best interests of the Corporation's shareholders because [the Board] believes the purchase price represents a fair valuation of the Assets and that the Corporation will have a better

chance of increasing shareholder value by selling the Assets in this transaction than it would if [Perceptive] were to foreclose on all of the Corporation's assets including the assets of Icagen-T." A027. Also, while the Board did not retain a financial advisor to issue a formal opinion on the fairness of the Transaction, the Information Statement detailed the basis for the Board's determination that the price paid by Ligand was fair. A135 (noting the Transaction "represented the highest price … that the Corporation had received after marketing the business to multiple potential buyers").

With regard to Icagen's operations after completion of the Transaction, the Information Statement stated that the Company "will continue its operations at its Tucson facility, but intends to promptly retain a commercial real estate broker for the sale of the Tucson facility by July 16, 2020." A018; A125. The value of the Tucson facility was estimated between $18 million to $31.5 million, depending upon whether it was used for office space or drug discovery. A028; A126 (noting, however, that "[t]he Corporation cannot assure you that the Tucson Facility will be sold at its highest market value, at a price that is favorable to the Corporation or at all"). If the Tucson facility could be sold within the estimated price range, the Company expected the sale proceeds would be sufficient to satisfy the Company's and its subsidiaries' remaining debt under the Credit Agreements ($11.5 million), as

well as "satisfy the Corporation's subordinated debt in the amount of approximately $0.94 million, and a portion [of] the Series C Preferred Stock liquidation preference estimated to be $19.4 million." A026; A120.

The Information Statement further explained that, if the Tucson facility could be sold within twelve months of the Ligand Transaction and for a sufficiently high price, then the transactions together "may be considered to be a Cash Liquidity Event," triggering the holders of the Series C Preferred stock's right to require redemption of their shares at the liquidation price. A029; A130.

With regard to the common stock, the Information Statement stated if the Company received sufficient Earnout Consideration under the APA, then funds could be available for distribution to the common stockholders. A026. But the Information Statement cautioned that "[t]here can be no assurance that the Corporation will receive any value from the earn out and, therefore, it is possible that our Common Stockholders will not receive any distribution, making the Common Stock worthless." *Id.*

H. Following the APA, Icagen Deregisters from the SEC and Restructures its Board.

On March 3, 2020, the Board met and received an update on the anticipated closing of the Transaction. A052-A053; A450-A452. The Board further considered termination of the Company's "filing requirements with the SEC in order to avoid

expenses associated therewith." A451. Following discussion, the Board unanimously approved the filing of a Form 15 with the SEC terminating the Company's registration and filing requirements. *Id.* Because the Company remained in default of its principal loans, the Board also unanimously approved executing a further amendment to the Credit Agreements. A451-A452.

At a meeting on April 24, 2020, the Board received an update on the closing of the Ligand Transaction. A055; A459. The directors also discussed the structure of the Board moving forward. "Inasmuch as the Corporation was seeking to wind down operations the Board agreed that Messrs. Kabatznik, Palmieri and Roffman would resign as directors effective April 30, 2020 and Mr. Cunningham, due to his continuing role [as CEO] at the Corporation, would be added as a Board member immediately after the meeting." A459. Cunningham then left the meeting and the Board met in executive session to discuss Cunningham's compensation. A055-056. Tyson "suggested a $300,000 cash bonus be paid to Mr. Cunningham for his work with respect to the Ligand transaction (noting that Perceptive was in alignment with the proposal) and the second Roche collaboration, to be paid upon the Corporation's receipt of funding from the collaboration." A056; A460. Tyson also "informed the Board that Perceptive had agreed to transfer 500,000 of their Series C Preferred shares to Mr. Cunningham for his work on the transaction." A056; A460. The Board

unanimously approved Tyson's recommendation for payment of a $300,000 bonus to Cunningham, to be paid out of the proceeds of the Roche collaboration. A056; A460.

On May 27, 2020, the Board determined to amend the terms of the bonus to be paid to Cunningham such that it would be paid upon the signing of the Roche collaboration agreements. A056; A463.

I. Plaintiff Obtains Books and Records, and Files Suit More than Two Years Later.

Following announcement of the Transaction, Plaintiff made a demand pursuant to 8 *Del. C.* § 220 to inspect certain books and records of the Company. A018. On September 17, 2020, without conceding the validity or sufficiency of the demand, the Company agreed to produce to Plaintiff certain board materials pursuant to a Confidentiality Agreement. A466. The Company made its production on September 30, 2020. A091.

More than two years later, on February 9, 2023, Plaintiff filed his Complaint. The Complaint was filed just days before the three-year anniversary of the APA, which was executed on February 11, 2020. A161.

J. The Court of Chancery Dismisses the Complaint.

On March 13, 2023, Defendants filed a motion to dismiss the Complaint pursuant to Court of Chancery Rules 12(b)(6) and 23.1.

After full briefing and argument, on July 12, 2024, the Court of Chancery issued an Order Addressing Defendants' Motion to Dismiss (the "Order"), in which the Court granted in full the motion to dismiss under Rule 12(b)(6). The Court of Chancery explained that although Plaintiff characterized his claim against the Individual Defendants as both direct and derivative, it was not necessary to resolve this issue "because regardless of whether the claims are direct or derivative, they must be dismissed because they do not state a non-exculpated claim against the individual director defendants or any claim against Cunningham." Ex. A ("Order") at 9.

The Court of Chancery noted that Icagen's Certificate of Incorporation contains an exculpatory provision immunizing its directors from liability for duty of care violations and, therefore, to survive dismissal Plaintiff must adequately plead that the directors committed a non-exculpated breach of fiduciary duty. Order at 9, n.24. The Court of Chancery further stated that in challenging the Board's approval of the Transaction, Plaintiff bears the burden of rebutting the presumptions of the business judgment rule. *Id.* at 9-10. Plaintiff attempted to do so by arguing that "three of five directors approving the Transaction (Tyson, Taglich, and Kabatznik) were interested in the Transaction," due to their ownership of Series C Preferred. *Id.* at 11. The Court of Chancery observed that "Plaintiff's theory appears to be that,

even though the holders of the Series C Preferred or unsecured debt received none of the proceeds from the $15 million cash payment in the Ligand Transaction, there was an expectation that they could potentially receive payments if a contingent payment was made or other assets were later sold." *Id.*

However, the Court of Chancery explained that even assuming a director's ownership of Series C Preferred could potentially give rise to a disabling interest as to the Transaction, the Complaint "does not contain well-pleaded facts to create a reasonable inference that Kabatznik's ownership of Series C Preferred was material to him." *Id.* Kabatznik held 28,571 shares of Series C Preferred, which had a liquidation preference of $149,997.75 and represented only 0.8% of the outstanding Series C Preferred. *Id.* at 13. Plaintiff failed to plead any facts regarding Kabatznik's financial circumstances. *Id.* Nor had Plaintiff adequately pled that any portion of the proceeds of the Ligand Transaction were actually paid to Kabatznik or how much, if any, Kabatznik expected to receive from the Ligand Transaction. *Id.*, n.31. Accordingly, the Court held that it is not reasonable to infer that Kabatznik was interested in the Ligand Transaction. *Id.* at 14.

The Complaint therefore failed to adequately plead that at least three members of the five-person Board that approved the Ligand Transaction lacked independence

or were interested. Thus, the Court of Chancery held that Plaintiff had failed to rebut the presumptions of the business judgment rule, requiring dismissal.[5] *Id.*

The Court of Chancery also noted that, although named as defendants, Plaintiff does not allege that directors Palmieri and Roffman were interested, lacked independence, or acted in bad faith. *Id.* at 10. The Court held that the claims against these directors should be dismissed for this independent reason. *Id.*, n.26.

The Court of Chancery further held that Plaintiff's claim for breach of fiduciary duty against Icagen must be dismissed "because '[a]s a corporate entity, [the Company] did not owe fiduciary duties to its stockholders,' and, therefore, could not be liable for breach thereof." *Id.* at 9 (quoting *In re Wayport, Inc. Litig.*, 76 A.3d 296, 322-23 (Del. Ch. 2013)).

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[5] Because Plaintiff had failed to plead a disabling interest as to a majority of the directors approving the Transaction, it was not necessary to consider the allegations of interestedness with regard to Tyson and Taglich. Nonetheless, in his Opening Brief, Plaintiff repeatedly suggests the Court's failure to address the allegations against Tyson and Taglich was improper. *See* Opening Brief ("OB") at 24, 29-33. Plaintiff is wrong. *See, e.g., In re Kraft Heinz Co. Derivative Litig.*, 2021 WL 6012632, at *13 (Del. Ch. Dec. 15, 2021) ("Because this decision has already found that six of the Demand Board's eleven directors were able to consider a demand impartially, I need not resolve whether Zoghbi or Van Damme are independent."), *aff'd*, 282 A.3d 1054 (Del. 2022) (TABLE).

Finally, the Court of Chancery found that Plaintiff had abandoned any claim that Cunningham had breached his duties in his officer capacity because Plaintiff had failed to address the issue either in briefing or at argument. *Id.* at 15-16.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY DETERMINED THAT THE COMPLAINT FAILS TO PLEAD THAT A MAJORITY OF THE DIRECTORS APPROVING THE TRANSACTION WERE INTERESTED.

A. Question Presented

Whether the Court of Chancery erred in finding that Plaintiff's Complaint fails to adequately plead that a majority of the directors who approved the Transaction were interested.

B. Scope of Review

This Court reviews a decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6) *de novo* "[to] determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Feldman v. Cutaia*, 951 A.2d 727, 730-31 (Del. 2008). Dismissal is warranted where the complaint fails to allege "a reasonably conceivable set of facts under which the plaintiff would be entitled to relief." *Winshall*, 76 A.3d at 813. The Court will "accept all well-pleaded factual allegations in the Complaint as true and draw all reasonable inferences in favor of the plaintiff." *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 716 (Del. 2020) (cleaned up). The Court need not, however, "accept every strained interpretation of the allegations, credit conclusory allegations that are not supported by specific facts, or draw unreasonable inferences in the plaintiff's favor."

Id. (cleaned up).

C. Merits of Argument

"It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). Plaintiff bears the burden of rebutting that presumption. *Id.*; *see also Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995). "To rebut successfully business judgment presumptions [], thereby leading to the application of the entire fairness standard, a plaintiff must normally plead facts demonstrating 'that a majority of the director defendants have a financial interest in the transaction or were dominated or controlled by a materially interested director.'" *Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002) (quoting *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 979 (Del. Ch. 2000)). "If the presumption of the rule is not rebutted, then the Court will not second-guess the business [judgment] of the board." *In re Trados Inc. S'holders Litig.*, 2009 WL 2225958, at *6 (Del. Ch. July 24, 2009).

Moreover, where—as here—the corporation's charter contains an exculpatory provision immunizing the directors for liability for breaches of the duty of care,

dismissal is appropriate unless "the complaint contains well-pleaded allegations that the defendant directors breached their duty of loyalty by engaging in intentional, bad faith, or self-interested conduct that is not immunized by the exculpatory charter provision." *McMillan v. Intercargo Corp.*, 768 A.2d 492, 495 (Del. Ch. 2000); A488.

The Court of Chancery correctly applied these bedrock principles of Delaware law in dismissing the Complaint.

1. The Complaint Fails to Rebut the Presumptions of the Business Judgment Rule

a. The Complaint Fails to Raise a Reasonable Inference that the Directors' Ownership of Series C Preferred Created a Conflict of Interest.

The Complaint asserts a single claim challenging the fairness of the Transaction—*i.e.*, Icagen's sale of the North Carolina facility and related assets to Ligand. A015; A058; A060. The Board that approved the Transaction was comprised of five directors: Palmieri, Roffman, Kabatznik, Tyson, and Taglich. A446-A448. Plaintiff fails to plead that two of these directors (Palmieri and Roffman) had any interest in the Transaction, lacked independence, or acted in bad faith. Instead, Plaintiff alleges that the three remaining directors (Kabatznik, Tyson, and Taglich) were each interested because they held Series C Preferred. OB at 16-18. With regard to Tyson and Taglich, Plaintiff further argues that they were

interested because they held certain unsecured debt instruments. *Id.*

As is clear from the Complaint and documents integral thereto, the holders of the Series C Preferred and the unsecured debt did ***not*** receive any portion of the $15 million cash consideration paid in the Ligand Transaction. A025-A026; A120. Nonetheless, Plaintiff now asserts that Kabatznik, Tyson, and Taglich were each interested because it was expected that a subsequent, future transaction could generate sufficient proceeds that, when coupled with the Ligand Transaction, would constitute a "Cash Liquidity Event," entitling holders of the Series C Preferred the right to redeem their shares for $5.25 per share. OB at 12.[6]

Specifically, Plaintiff notes that the Information Statement provides that the Company had agreed with Perceptive (the agent for the Senior Creditors) to retain a commercial real estate broker for its remaining Tucson Facility by July 16, 2020 and to sell the Tucson facility by August 15, 2020. A128. The Company further disclosed that "[t]he Corporation has received a valuation of between $18 million to $31.5 million for the sale of the Tucson Facility, depending upon whether it is used

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[6] While Plaintiff currently argues that, at the time of the Transaction, the directors holding Series C Preferred "***believed*** they were to receive, among other things, through their holdings of the then weaponized Series C preferred stock, a portion of the $19.4 million preference not available to the common stockholders" and that they "***anticipated***" that the Transaction with the sale of the Tucson facility would constitute a Cash Liquidity Event (OB at 14, 23), those allegations appear nowhere in the Complaint.

for office space or drug discovery." A135. Therefore, if the Tucson facility were sold promptly and at a sufficiently high price, it was possible that the transactions taken together could constitute a "Cash Liquidity Event." A130. As the Information Statement explained:

> A 'Cash Liquidity Event' is defined as the closing of any sale, lease or licensing transaction, relating to a single asset or multiple assets … resulting in aggregate gross proceeds received by the Corporation at closing or closings in a transaction or transactions during any twelve (12) month period in excess of $40 million. Thus, the [Ligand Transaction] together with the sale of the Tucson Facility ***may*** be considered to be a Cash Liquidity Event.

Id. (emphasis added).

However, this speculative possibility that a Cash Liquidity Event could happen in the future, based upon a later asset sale, did not create a disabling interest for the directors holding Series C Preferred. Indeed, because the bulk of the proceeds of the Ligand Transaction went solely to pay down the Company's third party debt (which was in default), the directors had the same interest as all other stockholders in getting the highest price available for the assets. Plaintiff fails to offer any rational reason why the directors would sell the North Carolina facility to Ligand on the cheap. In fact, as Plaintiff admits, even after using the cash proceeds of the Transaction to reduce the Company's debt, it continued to owe the Senior Creditors $11.5 million and subordinated noteholders approximately $0.94 million. A26;

A136. These amounts would need to be repaid before any payment to the Series C Preferred. *Id.* Thus, achieving a higher price (if available) would plainly have been in the interests of the Series C Preferred holders, as well as all other stockholders. Therefore, certain directors' ownership of Series C Preferred did not create a conflict at all.

Nor can Plaintiff manufacture a conflict based upon the Information Statement's disclosure that the preferential rights of the Series C Preferred "***could*** also result in divergent interests between the holders of shares of the Series C Preferred Stock and holders of our common stock." A040 (emphasis added). This is merely a cautionary disclosure of a potential risk and in no way suggests that such risk was present in connection with the Ligand Transaction.

b. Even Assuming Ownership of the Series C Preferred Could Constitute Director Self-Interest in the Transaction, the Complaint Fails to Allege that Such Interest was Material.

As the Court below explained, even if one were to assume that a director's ownership of Series C Preferred could somehow give rise to a disabling interest in connection with approval of the Ligand Transaction, the Complaint does not contain any well-pleaded facts raising an inference that such interest would be *material* to the directors, including, in particular, Kabatznik.

"It is well established that when a party challenges a director's action based

on a claim of the director's debilitating pecuniary self-interest, that party must allege that the director's interest is material to that director." *Solomon v. Armstrong*, 747 A.2d 1098, 1118 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000) (TABLE); *see also City of Miami Gen. Empls'.& Sanitation Empls'. Ret. Tr. v. Comstock*, 2016 WL 4464156, *18 (Del. Ch. Aug. 24, 2016) (same), *aff'd*, 158 A.3d 885 (Del. 2017) (TABLE); *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *8 (Del. Ch. May 4, 2005) ("[I]t is well settled that plaintiffs' allegations of pecuniary self-interest must allow the Court to infer that the interest was of a sufficiently material importance, in the context of the director's economic circumstances, as to have made it improbable that the director could perform her fiduciary duties without being influenced by her overriding personal interest.") (internal quotation marks and citation omitted), *aff'd*, 897 A.2d 162 (Del. 2006).[7] "A director's potentially conflicting financial interest need not be large, but there must be some basis to conclude it is material enough to that director that it could overcome their rational

[7] Remarkably, Plaintiff asserts this Court adopted a reasonable person standard for determining whether a director's alleged interest is material in *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 363 (Del. 1993). *See* OB at 26. But Plaintiff has *Cede & Co.* exactly backwards. In *Cede & Co.*, this Court adopted a subjective actual person standard for assessing the materiality of an alleged director interest. *See Cede & Co.*, 634 A.2d at 364; *see also Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1167 (Del. 1995) (recognizing Court's rejection of the "reasonable person" standard in *Cede & Co.* and reiterating the adoption of a subjective "actual person" standard).

business judgment." *DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *12 (Del. Ch. Sept. 30, 2013) (noting further that "[o]nly benefits that are material to the fiduciary, as judged from the perspective of the fiduciary herself, raise issues under the duty of loyalty").

Here, Plaintiff failed to plead any facts whatsoever regarding Kabatznik's financial circumstances. Instead, Plaintiff merely pled that Kabatznik held interests in the Company's common stock (representing beneficial ownership of 3.0% of the common stock), as well as 28,571 shares of Series C Preferred (which represented only 0.8% of the Series C Preferred). Kabatznik's shares of Series C Preferred had a liquidation preference of $149,997.75. Given the complete absence of any allegations concerning his financial situation, the Court of Chancery properly found that Plaintiff failed to allege facts that "provide a basis to conclude that Kabatznik's Series C Preferred interest 'was of a sufficiently material importance, in the context of [his] economic circumstances, as to have made it improbable that [Kabatznik] could perform [his] fiduciary duties without being influenced by [his] overriding personal interest." Order at 13-14 (quoting *Gen. Motors (Hughes)*, 2005 WL 1089021, at *8).

This is particularly true given that—at the time of the Ligand Transaction—it was highly speculative whether Kabatznik would receive any part of the liquidation

preference on his Series C Preferred shares. This was true for at least three reasons. ***First***, while the Company had agreed to hire a real estate broker and sell the Tucson facility by August 15, 2020, there was no guarantee that a sale could be accomplished in that timeframe or within 12 months of the Ligand Transaction. In fact, even though the Complaint was filed nearly three years after the Ligand Transaction, Plaintiff fails to plead that the Tucson facility was sold within the twelve-month window for a Cash Liquidity Event or at all.[8]

Second, it was unknown at what price the Tucson facility might ultimately be sold. The valuation range disclosed in the Information Statement was broad—between $18 million to $31.5 million.[9] If sold in the bottom half of this range, then even when coupled with the Ligand Transaction, there would not be a Cash Liquidity Event. Rather, the Tucson facility would have to sell for at least $25 million to trigger the $40 million threshold for a Cash Liquidity Event. The Complaint contains no allegations as to whether this was likely or at what price the directors

[8] Plaintiff notes that the Company deregistered under the SEC rules and "went dark" following the Ligand Transaction. OB at 10. However, this does not excuse Plaintiff's pleading failures. Plaintiff could have exercised (and actually did exercise) his stockholder inspection rights during the nearly three years between the Transaction and the filing of the Complaint.

[9] In fact, the Information Statement provides that "[t]he Corporation cannot assure you that the Tucson Facility will be sold at its highest market value, at a price that is favorable to the Corporation or at all." A126.

expected the Tucson facility to be sold.

Third, even if a Cash Liquidity Event might occur upon some future sale of the Tucson facility, Kabatznik would still be unlikely to receive the full amount of the liquidation preference on his Series C Preferred. As noted above, after the Company paid down its debt with the proceeds from the Ligand Transaction, the Company continued to owe $11.5 million to its Senior Creditors and nearly $1 million to its subordinated noteholders. A136. These creditors would need to be repaid before any payment to the Series C Preferred. A26. Thus, for example, if the Tucson facility was sold within a year of the Ligand Transaction for $25 million in cash (*i.e.*, a Cash Liquidity Event), then after the payment of the debt only approximately $12.5 million (or 64% of the total liquidation preference) would be potentially available for distribution to the Series C Preferred.[10] All of these contingencies show that any value associated with a potential future payment to the Series C Preferred was highly speculative at the time of the Ligand Transaction.

Furthermore, Plaintiff made no effort to quantify what, at the time of the Ligand Transaction, the actual value was of the chance that the Series C Preferred

[10] This calculation ignores that the Company was operating at a loss and would have to satisfy transaction costs (including broker fees) in connection with any sale of the Tucson facility. This further highlights that it was entirely speculative how much, if anything, would be paid to the Series C Preferred following a future sale of the Tucson facility.

might receive some future payment. Nor did Plaintiff make any effort to allege that, whatever this speculative value might be (if anything), it was sufficiently great to be material to these directors. Such pleading failures required dismissal. *See RCS Creditor Tr. v. Schorsch*, 2017 WL 5904716, at *15 (Del. Ch. Nov. 30, 2017) (finding plaintiff had failed to sufficiently plead material self-interest where the Court was left to speculate as to the actual value of the purported interests).

Thus, as the Court of Chancery concluded, Plaintiff failed to alleged facts that raised a reasonable inference that Kabatznik's Series C Preferred interest was material to him in the context of his economic circumstances. Order at 14.

2. Kabatznik's Alleged Interest Is Not "Presumptively Material."

As discussed above, this Court adopted a subjective "actual person" standard in determining whether a particular director's alleged interest was material. *See, e.g., McMullin v. Beran*, 765 A.2d 910, 923 (Del. 2000); *Cinerama*, 663 A.2d at 1167. Therefore, in order to rebut the business judgment rule, "plaintiffs' allegations of pecuniary self-interest must allow the Court to infer that the interest was of a sufficiently material importance, ***in the context of the director's economic circumstances***, as to have made it improbable that the director could perform her fiduciary duties without being influenced by her overriding personal interest." *Gen. Motors (Hughes)*, 2005 WL 1089021, at *8 (emphasis added).

Nonetheless, Plaintiff argues that the Court of Chancery has on occasion found that an alleged self-interest was so substantial as to be "presumptively material" even in the absence of allegations about the director's economic circumstances. *See* OB at 35. Even accepting that certain benefits can be so large as to raise an inference of materiality regardless of the director's economic position, that standard clearly is not satisfied here.

For example, in *In re Multiplan Corp. Stockholders Litigation*, 268 A.3d 784, 813 (Del. Ch. 2022), the Court of Chancery explained that the directors of a SPAC each indirectly held "founder shares" that would be worth several million dollars if the SPAC completed a business combination within a specified period, but "valueless" if the SPAC failed to complete a transaction within that period. This attribute of the SPAC structure created a situation in which the directors had an interest in completing any business combination, even a value-decreasing transaction, to preserve the value of the founder shares. *Id.* The value of this self-interest to the *Multiplan* directors was many multiples more than anything at issue here. *Id.* (noting that the directors' interests in the founder shares were worth $3.3 million, $8.7 million, and $43.6 million, which absent a transaction would be rendered valueless). Even if one focuses solely on a hypothetical that the *Multiplan* Court posed, which suggested that "[a] greater than half-million-dollar payout is

presumptively material at the motion to dismiss stage,"[11] it still dwarfs the alleged contingent and speculative chance that Kabatznik could potentially receive up to $149,997.75 at some future date for his Series C Preferred.

Apparently recognizing that *Multiplan* is factually distinguishable, Plaintiff focuses most heavily on *Orman v. Cullman*, 794 A.2d 5 (Del. Ch. Feb. 26, 2002). According to Plaintiff, in *Orman*, the Court of Chancery found that consulting fees of $75,000 were presumptively material. OB at 37. But this is incorrect. In fact, the *Orman* Court carefully examined whether the allegations in the complaint regarding the consulting agreement raised an inference of material self-interest as to the particular director, John Bernbach. In doing so, the *Orman* Court stressed that the consulting agreement was not for a one-time payment of $75,000 but was an ongoing agreement that the controller would be responsible for renewing going forward. Thus, Plaintiff's argument that Kabatznik's alleged interest here is "approximately double the amount the *Orman* Court found to be material" is wrong on two fronts. OB at 37. First, the *Orman* Court did not find that the benefit at issue

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[11] *Multiplan*, 268 A.3d at 813; *but see LC Cap. Master Fund, Ltd. v. James*, 990 A.2d 435, 453 (Del. Ch. 2010) (refusing to find that $500,000 alleged benefit was presumptively material to a director absent any supporting allegations about the director's economic circumstances, stating: "The man could be as rich as Croesus or Jimmy Buffett. The plaintiffs have a burden here and they have not even tried to meet it.").

there was only $75,000 but much more than that given the contract's continuing nature. Second, the value (if anything) of Kabatznik's Series C Preferred cannot be the full liquidation preference (approximately $150,000) when it was highly speculative whether he would ever actually receive such payment.

In addition, the *Orman* Court did not find that the value of the consulting agreement was "presumptively material," but instead relied upon the specific allegations concerning Bernbach's economic circumstances in determining materiality. *Orman*, 794 A.2d at 30 (finding that "the inference of materiality is strengthened" because Bernbach's principal occupation was alleged to be his own consulting firm).[12] For this reason too, *Orman* simply does not support Plaintiff's contentions.[13]

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[12] Notably, the *Orman* Court did find that an alleged interest of $3.3 million on the part of another director, Peter Soloman, was presumptively material on a motion to dismiss. *See Orman*, 794 A.2d at 31 ("I think it would be naïve to say, as a matter of law, that $3.3 million is immaterial."). However, this sum is obviously significantly different than the amount at issue here.

[13] In a footnote, Plaintiff also references *Voigt v. Metcalf*, 2020 WL 614999 (Del. Ch. Feb. 10, 2020) and *Frank v. Elgamal*, 2012 WL 1096090 (Del. Ch. Mar. 30, 2012). However, these cases are also distinguishable. In *Voigt*, the Court held allegations that a director worked for or served on the boards of CD&R owned companies for twenty-seven years, and that she derived her principal income from such service, was sufficient to raise an inference of materiality and lack of independence. *Voigt*, 2020 WL 614999, at *15. In *Frank*, the Court found an allegation that a director was paid a fee of $250,000 for his role in the challenged transaction was sufficient to make him interested. *Frank*, 2012 WL 1096090, at *7. No similar facts are at issue here.

Finally, Plaintiff relies upon *In re Trados Inc. Shareholder Litigation*, 2009 WL 2225958 (Del. Ch. July 24, 2009)[14] for the notion that directors' preferred stock ownership may create a disabling interest. OB at 37-38. However, as the Court of Chancery explained, this decision is readily distinguishable. In *Trados*, the challenged transaction triggered the preferred stockholders' $57.9 million liquidation preference, of which approximately $52 million was paid as a result of the merger, with nothing going to the common stockholders. *Id.* at *6. In the unique circumstances of that case, the *Trados* Court concluded that this created a disabling interest on the part of four directors who were appointed by and depended upon the preferred stockholders for their livelihoods. *Id.* at *8-9. Here, by contrast, the liquidation preference of the Series C Preferred was ***not*** triggered as a result of the Ligand Transaction, and both the Series C Preferred and common stockholders received nothing in connection with the Ligand Transaction. Rather, the Transaction proceeds were primarily used to pay down debt (which was in default) owed to a third party. Plaintiff merely alleges an expectation of a future additional sale of assets that might have yielded proceeds sufficient to trigger payment of some portion of the Series C Preferred liquidation preference. However, as explained above, the

[14] Plaintiff's Opening Brief cites to the *Trados* motion to stay decision *i.e.*, *In re Trados Inc. S'holder Litig.*, 2009 WL 608552 (Del. Ch. Feb. 26, 2009), rather than the motion to dismiss decision cited above. This appears to be an error.

value associated with this possibility is far too speculative to create a disabling interest, especially in the absence of any allegations about the directors' economic circumstances.

Thus, upon examination, none of the authorities relied upon by Plaintiff support reversal of the Court of Chancery's well-reasoned Order.

3. Plaintiff's Challenges to the Issuance of the Series C Preferred are Untimely and Admittedly Not the Basis for His Claim.

Similar to Plaintiff's arguments below, much of the Opening Brief appears to challenge the issuance and terms of the Series C Preferred. *See, e.g.*, OB at 7-8 ("The Company (or more precisely its then Board) diluted the holdings of the common stockholders and served to weaponize the Preferred Shares at the time of the Transaction by providing that each holder of Series C Preferred Stock …."); 23 ("Even were there no Cash Liquidity Event, the majority of directors received outsized financial benefits as a result of their holding of the Series C preferred stock…."). However, as the Court of Chancery observed, "Plaintiff insists he is not challenging the terms or issuance of the Series C Preferred, obviously recognizing that any such claim would likely be time barred."[15] Order at 7, n.21. Given

[15] The Series C Preferred was first issued in April 2018, nearly two years before the Ligand Transaction and nearly five years before the filing of the Complaint. A410.

Plaintiff's insistence that he is not challenging the Series C Preferred, these allegations are irrelevant and, in any event, do nothing to bolster his assertion that the directors had a material interest in the Ligand Transaction.

4. Plaintiff's Opening Brief Contains Numerous Statements that are Unsupported by the Complaint.

In the Opening Brief, Plaintiff mischaracterizes the facts and nature of the Ligand Transaction, as reflected in the Complaint and the documents relied upon therein. For example, Plaintiff repeatedly states that the Ligand Transaction provided the directors with "significant warrants or options" that increased their ownership of the Company. *See, e.g.*, OB at 3-4, 17-18, 23, 35. But this makes no sense. The Ligand Transaction was sale of assets to an unrelated third party. The Transaction did not result in the issuance of warrants, options, or expanded stockholdings for anyone.

At other points, Plaintiff argues that Tyson and Taglich had their subordinated notes repaid as part of the Ligand Transaction. *See, e.g.*, OB at 3, 11, 17. However, this allegation is nowhere in the Complaint. To the contrary, the Complaint and the documents referenced therein reflect that the director notes were ***not*** repaid following the Ligand Transaction. *See* A052-053; A451; A128-A129. In fact, at oral argument below, Plaintiff's counsel ultimately conceded that "we don't know today whether or not the[] [loans have] been paid." A576.

Plaintiff also suggests that the directors had majority voting power over the Company as result of the issuance of the Series C Preferred. *See* OB at 21 (referring to "the control [the directors] obtained by issuing themselves the Series C"). Yet this allegation is unsupported. The Complaint acknowledges that Perceptive (as agent for the Senior Creditors) was issued substantial amounts of Series C Preferred in connection with the various forbearance agreements. *See, e.g.*, A047 (noting issuance of 1,900,000 shares of Series C to Perceptive); A127 (noting issuance of 599,991 shares of Series C to Perceptive). Accordingly, as set forth in the Information Statement, Perceptive (not the directors) held the bulk of the Series C Preferred stock. A149-50. And, as a result, the directors did not have anywhere near majority voting control.

II. THE COURT OF CHANCERY PROPERLY DETERMINED THAT PLAINTIFF HAD ABANDONED ANY CLAIM THAT CUNNINGHAM BREACHED HIS DUTIES IN HIS OFFICER CAPACITY.

A. Question Presented

Whether the Court of Chancery erred in finding that Plaintiff's had abandoned his claim that Cunningham had breached his duties as CEO.

B. Scope of Review

This Court reviews a decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6) *de novo* "[to] determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Feldman*, 951 A.2d at 730-31.

C. Merits of Argument

As the Court of Chancery observed, Defendants argued in their opening brief on the motion to dismiss that Plaintiff had not alleged any specific misconduct by Cunningham in his capacity as CEO. Order at 15 (citing Def's Opening Br. at 37). Thus, to the extent Plaintiff was purporting to assert a claim against Cunningham in his officer capacity, it was subject to dismissal. The Court of Chancery correctly found that Plaintiff did not respond to this argument in briefing or at argument. *Id.* Thus, the Court properly concluded any such claim had been abandoned. *Id.* at 16.

Even before this Court, Plaintiff only appears to address this issue in a footnote of his Opening Brief. *See* OB at 39, n.9. It is well established that matters

raised only in footnotes are not preserved for appeal. *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1264 (Del. 2012); Supreme Court Rule 14(d). But even putting this aside, Plaintiff appears to misconstrue the issue by pointing to instances where he alleged that Cunningham was interested for demand futility purposes under Rule 23.1. *See* OB at 39, n.9 (citing A525 and A573). These allegations do state a claim against Cunningham in his officer capacity. Accordingly, the Court below properly dismissed any such claim.

CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Chancery's order of dismissal.

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Dated: October 24, 2024