EFiled: Sep 10 2026 12:58PM EDT
Filing ID 80582647
Case Number 313,2026

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID ROSTOV, Plaintiff-Below/ Appellant, v. ALCON RESEARCH, LLC; JEANNETTE BANKES; THOMAS FRINZI; THOMAS HUDNALL; JOE RAPPON; PETRICHOR OPPORTUNITIES FUND I LP; and PETRICHOR OPPORTUNITIES FUND I INTERMEDIATE LP, Defendants-Below/ Appellees, and AURION BIOTECH, INC., Nominal Defendant.	)	No. 313, 2026 Court Below: Court of Chancery of the State of Delaware C.A. No. 2025-0648-KSJM

APPELLANT'S OPENING BRIEF

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Dated: September 10, 2026

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NATURE OF PROCEEDINGS

This appeal stems from multi-action litigation over whether Aurion[1] would complete its long-planned IPO. Alcon, one of Aurion's major stockholders, opposed the IPO because Alcon wanted to acquire Aurion. Despite this, Aurion retained advisers, filed its SEC Form S-1, and worked towards a February 2025 IPO. Alcon promised to "wreak havoc" to stop the IPO—and kept its word.

Alcon filed suit in the Court of Chancery to obtain a declaration that Alcon could use its voting rights to stop an IPO. The Court of Chancery held Alcon could not stop the IPO. So, while Alcon's appeal before this Court was pending, it took drastic action. On the day the Aurion IPO was set to price, Alcon agreed to purchase the Aurion stock held by another major investor, Petrichor, and then Alcon and Petrichor removed Petrichor's board designee (who had steadfastly supported the IPO), replaced the designee with an Alcon employee, and secured the resignation of an independent director, leaving the Aurion board with three Alcon-employee directors, and three directors who supported the IPO. The planned sale—and reason for Petrichor's about-face—was only revealed days later in regulatory filings. And to ensure any possibility of an IPO was destroyed, Alcon and Petrichor acted by written consent to dissolve the special board committee that was leading the IPO and remove Aurion executives' authority to pursue an IPO.

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[1] Capitalized terms are defined in the Statement of Facts.

This outrageous conduct was immediately challenged by Deerfield, another major stockholder, which sued in the Court of Chancery to stop Alcon from interfering with the IPO. But instead of defending its conduct, Alcon bought Deerfield's Aurion stock, removing Deerfield's standing, and giving Alcon more-than-90% ownership of Aurion.

But other minority stockholders remained, including David Rostov, one of Aurion's founders, its former CFO, and, after the Deerfield sale of stock to Alcon, Aurion's second-largest stockholder. Rostov moved to intervene after Deerfield lost standing. The Court of Chancery instead dismissed Deerfield's action without prejudice, permitting Rostov to refile the direct and derivative claims in a new action, which he did.

But the Court of Chancery dismissed Rostov's claims under Court of Chancery Rule 12(b)(6). It found the allegations in Rostov's complaint did not support an inference that Alcon opposed a viable IPO, because the IPO had been postponed to an undetermined date later in 2025 shortly before Alcon secured its control of Aurion's board. It held that it was not reasonably conceivable that Alcon's employees on the Aurion board were advancing Alcon's interests. And it held it was not reasonably conceivable that the ostensibly independent director with extensive ties to Alcon—who resigned just minutes before Alcon's delivery of the

written consent that created the deadlock, and admitted that Alcon had pressured him to resign—resigned to create the deadlock Alcon needed.

The Court of Chancery's ruling conflicts with the complaint's recitations of the candid pronouncements of Alcon and its board designees regarding their steadfast opposition to an Aurion IPO because Alcon wanted to acquire Aurion. Nothing suggests—nor is it contended—that Alcon or its designees believed an IPO was not in the best interests of Aurion. Nor did any other Aurion director oppose an IPO. Indeed, Alcon and Aurion litigated heavily over this issue—before and after the IPO was postponed in February 2025.

The Court of Chancery did not apply the reasonably conceivable standard mandated by Rule 12(b)(6), and dismissed a complaint that not only showed it was reasonably conceivable, but almost certain, that the defendants breached their fiduciary duties. The ruling of the Court of Chancery should be reversed and this matter remanded for further proceedings.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in holding it was not reasonably conceivable that Alcon and Petrichor objected to a viable IPO. The Court of Chancery did not hold that the creation of a deadlock, dissolution of the Special Committee, and bylaw amendments could not constitute actionable harms. Instead, the court found the allegations in the complaint did not make it reasonably conceivable that there was a viable IPO, and Alcon and Petrichor opposed that IPO. This ruling overlooks and conflicts with Aurion's continued litigation to preserve the IPO after it was postponed, its representations to this Court that it continued to pursue an IPO, and Deerfield's allegations about the continuing intentions for an IPO. It also conflicts with Alcon's pronouncements that it opposed an IPO, and litigation to stop the IPO.

2. The Court of Chancery erred in concluding the director defendants' thwarting of the IPO was subject to business judgment review. The court noted whether to pursue an IPO is a matter for directors' business judgment, and directors are free to resign from boards. These verities are inapt here, where three of the director-defendants are dual fiduciaries who are alleged to have opposed an IPO in order to advance the interests of Alcon, their employer, and not the interests of Aurion, to which they owed fiduciary duties. Similarly, the notion that a director is

free to resign does not mean that, as alleged here, a director's resignation in order to create a deadlock that harms the company is not a breach of fiduciary duty.

STATEMENT OF FACTS

Nominal defendant Aurion Biotech, Inc. ("Aurion" or the "Company") is a biotechnology company that develops regenerative therapies to restore vision. In June 2024, the U.S. Food and Drug Administration designated the Company's AURN001 technology as both a Breakthrough Therapy and a Regenerative Medicine Advanced Therapy.[2] In September 2024, the Company announced the commercial launch of its product neltependocel (Vyznova) in Japan for the treatment of bullous keratopathy of the cornea.[3] In December 2024, the Company released the successful results from the US Phase I/II trial of AURN001.[4]

Plaintiff David Rostov is one of the Company's founders and first employees, becoming CFO in 2022. Before that he was the CFO of the predecessor company that spun off Aurion.[5] In September 2024, Plaintiff resigned from his CFO position, and then was retained on a project basis as a Company consultant.[6] Plaintiff currently holds Company common stock and is the Company's second-largest stockholder.[7]

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[2] A13 ¶ 1.

[3] *Id.*

[4] *Id.*

[5] A13 ¶ 2.

[6] *Id.*

[7] *Id.*

I. ALCON AND DEERFIELD INVEST IN AURION.

In 2022, Aurion completed a Series C fundraising round that raised over $120 million.[8] Defendants Deerfield Private Design Fund V, L.P. and Deerfield Healthcare Innovations Fund II, L.P. (collectively, "Deerfield") and Alcon Research, LLC ("Alcon") participated in the Series C round, with Deerfield purchasing 50% of the Series C preferred stock, and Alcon purchasing 36%.[9]

As part of the Series C round, Aurion adopted an April 5, 2022 amended and restated certificate of incorporation (the "Certificate").[10] Under the amended and restated certificate, certain actions could not be taken without the approval of holders of 66.7% of Series C preferred stock.[11] Due to the size of their Series C holdings, either Alcon or Deerfield could block any of these actions requiring 66.7% of the Series C preferred stock vote.[12]

Also as part of the Series C fundraising round, Aurion and the Series C preferred stockholders entered into the Aurion Biotech, Inc. Amended and Restated Voting Agreement (the "Voting Agreement").[13] The Voting Agreement (Section

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[8] A18 ¶ 19.

[9] *Id.*

[10] A18 ¶ 20.

[11] A18 ¶ 21.

[12] *Id.*

[13] A18 ¶ 22.

1.2), together with the Certificate (Section 3.2), provided that (i) the Series C stockholders elect two directors to the Aurion board, with Alcon and Deerfield each selecting one; (ii) Series B and B-1 preferred stockholders together elect one director to the Aurion board, with Petrichor selecting the Series B director; (iii) the Series A stockholders elect one director; and (iv) all stockholders, voting on an as-converted basis, elect the remaining three directors, one of whom is Aurion's CEO.[14]

The Voting Agreement also contained a limitation on Alcon's voting power in Section 7.20 (the "Alcon Voting Limitation"), which provided that Aurion's CEO and CFO have the authority to vote Alcon's Aurion stock above a 19% threshold consistent with how other Series C stockholders voted.[15] Due to Deerfield's 50% holding of the Section C preferred stock, this meant Alcon's stock above the 19% threshold was voted as Deerfield's Series C stock was voted.[16]

II. ALCON ATTEMPTS TO BLOCK AURION'S IPO OR ALTERNATIVE TRANSACTIONS.

A. Alcon Attempts to Leverage its Control.

In late 2022, shortly after making its Series C preferred stock investment, Alcon expressed an interest in acquiring Aurion.[17] In March 2023, the Aurion board

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[14] *Id.*

[15] A19 ¶¶ 23–24.

[16] A19 ¶ 24.

[17] A21 ¶ 29.

of directors (the "Board") formed a special committee (the "Special Committee") to consider Alcon's indication of interest and alternatives.[18] In response to other offers Aurion received, Alcon's CEO indicated to Aurion that Alcon would exercise its consent rights to block an offer from any party other than Alcon, unless the other party's offer was significantly superior to Alcon's offer.[19] Alcon also made financing proposals, but the Special Committee did not think Alcon's proposals were worth considering because they would limit Aurion's ability to obtain financing from other parties, positioning Alcon to deprive Aurion of funding and acquire Aurion on Alcon's own terms.[20]

Instead of pursing Alcon's unattractive proposals, the Special Committee chose to pursue an IPO.[21] In June 2024, the Board authorized the Special Committee to do so, with Alcon's designee, Jeanette Bankes, as the only dissenting vote.[22] According to a complaint later filed by Deerfield, "Bankes stated that 'we' were voting against the resolutions that approved moving forward with the IPO. On information and belief, Ms. Bankes' reference to 'we' was a reference to Alcon, indicating that Ms. Bankes was voting based on Alcon's wishes, rather than her own

[18] *Id.*

[19] *Id.*

[20] A21 ¶ 30.

[21] A22 ¶ 31.

[22] *Id.*

good faith decision. Board members regarded her statement as sufficiently notable that it was recorded in the minutes for the June 2024 Board meeting."[23] While Aurion continued working towards an IPO, the Board learned that Alcon's CEO, David Endicott, had told Board member and Executive Chairman Thomas Frinzi that "Alcon would use any and all efforts to obstruct an IPO and wreak havoc on Aurion and its stockholders."[24]

B. Alcon Files the Expedited Alcon-Aurion Action to Block Aurion's IPO.

As of 2024, after acquiring Series A and Series B preferred stock in secondary transactions, Alcon owned 40.5% of the Company's outstanding stock on an as-converted basis, and could appoint two board seats.[25] But per the Alcon Voting Limitation, Alcon could vote only 19% of the stock for any vote where all stock voted.[26]

On October 28, 2024, Alcon initiated an action against Aurion in the Court of Chancery, *Alcon Research LLC v. Aurion Biotech, Inc.*, C.A. No. 2024-1102-KSJM (Del. Ch.) (the "Alcon-Aurion Action").[27] Alcon sought a declaration that (i) Aurion

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[23] *Id.*

[24] A22–A23 ¶¶ 32–33.

[25] A23 ¶ 34.

[26] *Id.*

[27] A23 ¶ 35.

could not effect an IPO without the Series C stockholders' consent (with a 66.7% vote threshold, giving Alcon the ability to block an IPO), and (ii) Alcon could unilaterally terminate the Alcon Voting Limitation.[28] Aurion responded by asserting counterclaims, seeking a declaration that the Series C preferred stockholders were not entitled to a vote on an IPO, and that Alcon could not unilaterally terminate the Alcon Voting Limitation.[29] Notwithstanding the Alcon-Aurion Action, on December 16, 2024, the Board approved a 1.4-1 reverse stock split, which increased the available authorized but unissued common stock that could be used for an IPO.[30] In response, Alcon amended its complaint to challenge the reverse split, contending it required the consent of the Series C preferred stockholders (i.e., Alcon).[31]

After highly expedited proceedings, on January 27, 2025, the Court of Chancery issued its post-trial decision, ruling Alcon could not block the IPO, even when voting all of its stock, but that Alcon could terminate the Alcon Voting Limitation.[32] The Court of Chancery issued its implementing order on January 29, 2025, and that same day Alcon filed a notice of appeal in this Court, and Aurion

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[28] *Id.*

[29] A24 ¶35.

[30] A24 ¶ 36.

[31] *Id.*

[32] A24 ¶ 37; *Alcon Rsch., LLC v. Aurion Biotech, Inc.*, 2025 WL 312371 (Del. Ch. Jan. 27, 2025).

filed a notice of cross-appeal.[33]

The Alcon-Aurion Action had proceeded on an expedited basis because Aurion planned to price its IPO on February 14, 2025.[34] Meeting this deadline was critical; as Aurion explained to the Court of Chancery, if this February 14 deadline were missed, Aurion could not pursue an IPO until its 2024 audited financial statements were prepared, which would delay an IPO until after Aurion was projected to run out of cash.[35] To accommodate this, this Court scheduled oral argument on the appeals for February 12, 2025.[36]

C. Aurion's IPO is Delayed.

Deerfield's complaint in the Deerfield Action, defined *infra*, described what happened after the Court of Chancery issued its expedited January 29 order and how Alcon leveraged its litigation strategy against the Company to disrupt Aurion's IPO plans:

> As the [February 14, 2025] pricing deadline approached, general market conditions remained favorable, and Aurion's investment bankers marketed the IPO to potential investors. Despite significant interest in the fundamentals of the Company, with many expressing that this would be one of the higher quality IPOs of a biotech candidate seen in years, some of the feedback from potential investors was concerning. Investors expressed

[33] A24 ¶ 38.

[34] A25 ¶ 39.

[35] *Id.*

[36] *Id.*

> unease regarding the uncertainty associated with the pending appeal. Investors conveyed that, until the appeal was resolved, they did not want to commit the time and resources necessary to prepare for an IPO. In light of the appeal timeline, investors viewed the short timeframe from pre-marketing to IPO as creating potential risk to what otherwise would have been a highly successful public offering.[37]

So, on February 6, 2025, the Special Committee voted unanimously to postpone the IPO, even though it "expressed their continued support for an eventual IPO."[38]

On February 11, 2025, Aurion advised the Delaware Supreme Court that the Alcon-Aurion Action had hampered the planned IPO, but stressed that "Aurion remain[ed] fully committed to proceeding with a Qualified IPO at the earliest feasible opportunity."[39] Alcon responded by seeking to postpone the next day's appellate argument, in an attempt to create even more delay and uncertainty for Aurion.[40] This Court declined, and oral argument was held on February 12, 2024, as scheduled.[41]

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[37] A25 ¶ 40.

[38] A25 ¶ 41.

[39] A26 ¶ 42.

[40] *Id.*

[41] *Id.*

III. ALCON SOLIDIFIES ITS CONTROL OF AURION.

A. Alcon's St. Valentine's Day Massacre

On February 14, 2025—two days after the expedited appellate argument, and before the Supreme Court could rule whether Alcon had the power to block an Aurion IPO—Alcon entered into a stock purchase agreement with Petrichor Opportunities Fund I LP and Petrichor Opportunities Fund I Intermediate LP (collectively, "Petrichor"), which would sell Alcon its approximately 13.5% interest in the Company (on an as-converted basis) and which, once consummated, would result in Alcon holding approximately 54% of the outstanding shares of Aurion on an as-converted basis, and control of Aurion—should Aurion's appeal regarding Alcon's purported termination of the Alcon Voting Limitation not succeed.[42] The sale would also give Alcon the power to appoint the Series B director, a right previously belonging to Petrichor.[43]

[42] A26 ¶ 44.

[43] A18 ¶ 22; A26 ¶ 44.

As of Friday, February 14, 2025, Aurion's Board had seven members:[44]

Director	Stockholder Affiliation
Greg Kunst	Aurion CEO, unaffiliated
Thomas Frinzi	Aurion Executive Chairman, unaffiliated
Christine McCauley	unaffiliated
Andrew ElBardissi	Deerfield
Thomas Hudnall	Alcon
Joe Rappon	Alcon
Patrick Lally	Petrichor

Thomas Hudnall had been appointed to the Board by Alcon in August 2024, and was Alcon's Vice President, Corporate Legal, and Assistant Corporate Secretary.[45] Joe Rappon was appointed to the Board by Alcon in October 2024, and is Alcon's Vice President and Head of the R&D Pharma Platform.[46]

At 9:36 p.m. ET that night, Thomas Frinzi, the Board's Executive Chairman who was elected by all Aurion stockholders, sent a resignation email to the Board.[47] At 9:42 p.m. ET, Petrichor emailed a written consent signed by it and Alcon to the Board.[48] The written consent removed Patrick Lally, the Series B director appointed by Petrichor, and appointed in his place Bankes, Alcon's Senior Vice President and

[44] A27 ¶ 47.

[45] A17 ¶ 16.

[46] A17 ¶ 17.

[47] A27 ¶ 48.

[48] *Id.*

President, Global Franchises.[49] Hudnall signed the written consent on behalf of Alcon.[50]

Although the Alcon-Petrichor sale had not closed and the antitrust-review period had not yet passed, Petrichor executed the consent at Alcon's direction, effecting a wholesale change in position for Petrichor. Lally, Petrichor's Board designee, had openly supported the IPO, and had voted to postpone it on February 6, 2025—while presumably unaware of Alcon's plan to thwart the IPO.[51] Tadd Wessel, Petrichor's founder and managing partner who was a Board observer, had supported the IPO.[52] But Bankes, the Alcon employee Petrichor was placing on the Board, had been the sole Board member who opposed an IPO 2024.[53]

[49] *Id.*

[50] A38 ¶ 76; A750 ¶ 72.

[51] A25 ¶ 41.

[52] A26 ¶ 41.

[53] A22 ¶ 31. Bankes had left the Board before being reappointed. A16 ¶ 14.

After the delivery of the February 14, 2025, written consents, the Board looked as follows:[54]

Director	Stockholder Affiliation
Greg Kunst	Aurion CEO, unaffiliated
Christine McCauley	unaffiliated
Andrew ElBardissi	Deerfield
Thomas Hudnall	Alcon
Joe Rappon	Alcon
Jeanette Bankes	Alcon

This manufactured deadlock was designed to thwart the IPO. Alcon's three employees on the Board, Hudnall, Rappon, and Bankes (the "Alcon Designees") opposed the IPO.[55] As Deerfield described it in its complaint, "shortly after Alcon's February 14 attempt to place Ms. Bankes on the Board, Thomas Hudnall, an Alcon employee who is one of Alcon's designated directors on Aurion's Board, conveyed to Aurion's CEO that the IPO was not going to happen and that Alcon would only provide financing that would allow Alcon to purchase the Company on Alcon's terms and at a time that would be suitable for Alcon."[56]

On February 16, 2025, Alcon and Petrichor amended Aurion's bylaws by written consent.[57] The amendments dissolved all Board committees, including the

[54] A27–A28 ¶ 48.

[55] A28 ¶ 49.

[56] A724 ¶ 9.

[57] A28 ¶ 50.

Special Committee, stripped Aurion officers or agents of the "the power or authority to approve or take any action in furtherance of any debt or equity financing activities, including, without limitation, any initial public offering of securities of the Company", and effectively granted Alcon a veto right over any IPO.[58] The bylaw amendments ensured that any residual or future Board approval of an IPO could not be carried out by Aurion's officers.

While all of this was occurring, the Board members unaffiliated with Alcon were unaware of the sale agreement between Alcon and Petrichor, despite notification obligations to other major stockholders in a voting agreement.[59] It was only on February 18, 2025, that the sale was revealed through public anti-trust filings.[60] Alcon could not have achieved its takeover of Aurion without Petrichor, which remained a stockholder while awaiting anti-trust clearance of its sale of Aurion stock to Alcon.[61]

B. Deerfield Files the Deerfield Action.

With an IPO blocked by Alcon, and Petrichor's manufactured deadlock, on February 24, 2025, Deerfield initiated *Deerfield Private Design Fund V, L.P. v. Alcon Research, LLC*, C.A. No. 2025-0201-KSJM (Del. Ch.) (the "Deerfield

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[58] *Id.*; A29 ¶ 50.

[59] A741 ¶ 53.

[60] *Id.*

[61] A29 ¶ 52.

Action") and a companion action under 8 *Del. C.* § 225 to invalidate the changes in Board composition Alcon and Petrichor effected.[62] At the time, Deerfield held approximately 34% of the Company's stock on an as-converted basis.[63]

In the Deerfield Action, Deerfield brought derivative and direct breach of fiduciary duty claims against Alcon, as Aurion's controlling stockholder, against the Alcon Directors who breached their fiduciary duties by favoring Alcon over Aurion and its stockholders, against Frinzi, Aurion's former Executive Chairman, for his resignation from the Board in order to bring about Alcon's desired Board deadlock, and for Alcon for aiding and abetting his breach.[64] Deerfield sought an injunction prohibiting Alcon and the other defendants from interfering with Aurion's ability to pursue an IPO or other strategic transactions, as well as damages.[65]

C. Deerfield and Alcon Settle the Deerfield Action and Deerfield Sells Out to Alcon.

On March 19, 2025, the parties to the Deerfield Action filed a letter with the Court of Chancery, advising that over two weeks earlier, on March 3, 2025, Alcon and Deerfield had entered into a "confidential settlement agreement" that would

[62] A29 ¶ 53.

[63] A30 ¶ 53.

[64] A30 ¶ 54.

[65] A30 ¶ 55.

resolve the Deerfield Action (the "March 19 Letter").[66] Alcon and Deerfield advised further that also on March 3, 2025, the parties agreed that Deerfield would sell its Aurion stock and notes to Alcon, giving Alcon approximately 99% of Aurion's outstanding stock on an as-converted basis.[67] (Alcon had also purchased two other large stockholders' Aurion stock.[68]) The parties anticipated closing the transaction on March 24, 2025.[69]

In their March 19 Letter, Deerfield and Alcon informed the Court of Chancery that their settlement agreement called for dismissal of the derivative claims with prejudice, but they were requesting dismissal of all claims in the Deerfield Action without prejudice and without a hearing—which necessarily contemplated no notice to Aurion's other stockholders.[70] In response to the March 19 Letter, the Court of Chancery scheduled a settlement hearing for March 24, 2025.[71]

On Sunday, March 23, Rostov wrote to the Court of Chancery, advising of his intention to appear through counsel at the settlement hearing and object to the

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[66] A30 ¶ 57; A836.

[67] A30–31 ¶57; A838.

[68] A31 ¶ 57.

[69] *Id.*

[70] A31 ¶ 58.

[71] A31 ¶ 59.

settlement because no notice had been provided to Aurion's stockholders.[72] That evening, Alcon and Deerfield submitted a joint letter to the Court of Chancery, advising that they withdrew their request for a dismissal without prejudice, and would instead seek dismissal with prejudice after notice was provided to Aurion stockholders.[73]

On March 24, 2025, Alcon's purchase of Deerfield's Aurion stock and notes was completed.[74] The following day, Deerfield dismissed its Section 225 action.[75] On March 28, 2025, Alcon and Deerfield filed in the Deerfield Action their proposed notice, scheduling order, and proposed order of dismissal with prejudice.[76] On April 14, 2025, Alcon sent the notice to Rostov.[77] On June 6, 2025, the Court of Chancery held a hearing on the dismissal, at which Rostov and other objectors appeared, with Rostov seeking to intervene as a plaintiff. The Court of Chancery instead dismissed the Deerfield Action without prejudice.[78]

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[72] *Id.*

[73] *Id.*

[74] A31 ¶ 60.

[75] *Id.*

[76] A32 ¶ 60.

[77] *Id.*

[78] *Deerfield Private Design Fund V, L.P. v. Alcon Rsch., LLC*, C.A. No. 2025-0201-KSJM (Del. Ch. July 14, 2025) (ORDER) (Trans. ID 76642507).

D. Rostov's Litigation in the Court of Chancery

On June 9, 2025, Rostov filed his complaint in the Court of Chancery, asserting the claims Deerfield—now no longer an Aurion stockholder—had asserted in the Deerfield Action, and additional claims.[79]

The defendants moved to dismiss on two grounds. First, the defendants moved to dismiss under Court of Chancery Rule 12(b)(1), contending there was no justiciable controversy because the Special Committee had already been dissolved and Alcon's purchase of Deerfield and Petrichor's stock gave it control over whether there would be an IPO, so Rostov's claims were moot or unripe.[80] Second, the defendants moved to dismiss under Court of Chancery Rule 12(b)(6), because the Special Committee's decision to postpone the IPO was subject to business judgment review, and there was no obligation for the Alcon to subsequently pursue an IPO.[81] The defendants argued further that there were no damages because an IPO merely changes the capital structure of a company, not the company's overall value, and

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[79] *See* A12.

[80] A75–85.

[81] A85–92; *id* at 90 ("Rostov pleads no facts from which one could reasonably infer that Alcon or Aurion had any obligation to complete an IPO at some unspecified time in the future after it was postponed by the Special Committee, or that an IPO is so clearly in Aurion's best interests that not doing so would be a breach of fiduciary duty. Decisions about how to finance a corporation require business judgments about which reasonable minds can and do differ.").

Rostov had no right to liquid shares.[82] Finally, the defendants contended the individual defendants faced no liability because they never voted against an IPO once Alcon controlled Aurion, and Frinzi was free to resign.[83]

In response, Rostov asserted there was a justiciable controversy because monetary damages—such as the "upwards of $1 billion" in damages that Deerfield contended were incurred because of the thwarted IPO—could be awarded.[84] Rostov contended further that Alcon and the director defendants were liable for thwarting an IPO, despite the Special Committee's postponement vote and the lack of a contractual right to an IPO, because the defendants had forced the Special Committee to postpone the IPO and then took advantage of that delay to stop an IPO once and for all.[85]

In their reply brief, the defendants articulated for the first time a new basis for dismissal under Rule 12(b)(1): that the notion of an IPO after the Special Committee's postponement was too speculative to revive a moot claim or ripen into a claim.[86] Rostov responded to this contention at oral argument, chronicling the extensive evidence—including the verified allegations by Deerfield, which had a

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[82] A93–96.

[83] A96–A100.

[84] A687–90.

[85] A693–702.

[86] A1162–64.

Special Committee designee—that showed Aurion continued pursuing an IPO after February 6, 2026.[87]

The Court of Chancery issued its Order Granting Defendants' Motion to Dismiss (the "Order") on June 26, 2026.[88]

In dismissing Count I, the trial court noted that Rostov "seems to fault the Board for not pursuing an IPO after a concededly disinterested and independent Special Committee made the decision to postpone it," and that the complaint contained "no facts from which the court could infer that: Alcon and Petrichor objected to some IPO at some unspecified time in the future, or the IPO was so clearly in Aurion's best interests after the Special Committee determined to postpone it that failing to pursue it would constitute a breach of fiduciary duties."[89]

In dismissing Counts II and III, the Court of Chancery noted there was no allegation of a vote that resulted in deadlock, any particular director action after February 6, 2024, that would thwart an IPO, and that Frinzi, like all directors, are free to resign from boards.[90]

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[87] A1225–26.

[88] *Rostov v. Alcon Rsch., LLC*, 2026 WL 1847466 (Del. Ch. June 26, 2026) (ORDER).

[89] *Id.* ¶ 24.

[90] *Id.* ¶¶ 26–28.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN HOLDING IT WAS NOT REASONABLY CONCIEVABLE THAT ALCON AND PETRICHOR OBJECTED TO A VIABLE IPO.

A. Question Presented

Did the Court of Chancery err in concluding Rostov did not state a claim against Alcon and Petrichor because it was not reasonably conceivable that Alcon and Petrichor objected to a viable IPO? This argument was preserved at A693–97, A700–02, A1225–1230.

B. Scope of Review

The standard of review of a decision granting a motion to dismiss is also *de novo*.[91]

C. Merits of the Argument

The pleading standard for a motion to dismiss in Delaware courts is reasonable conceivability.[92] "When reviewing a motion to dismiss under Rule 12(b)(6), Delaware courts (1) accept all well pleaded factual allegations as true, (2) accept even vague allegations as well pleaded if they give the opposing party notice of the claim, and (3) draw all reasonable inferences in favor of the non-moving party."[93]

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[91] *Olenik v. Lodzinski*, 208 A.3d 704, 714 (Del. 2019).

[92] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 536–37 (Del. 2011).

[93] *Garfield v. Allen*, 277 A.3d 296, 319 (Del. Ch. 2022) (citation modified) (quoting *Cent. Mortg.*, 27 A.3d at 535).

Dismissal is appropriate only if the "plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."[94]

The Court of Chancery's dismissal of Count I—the breach of fiduciary duty claim against Alcon and Petrichor for thwarting the IPO—is premised on the idea that it is not reasonably conceivable that an IPO would take place after the Special Committee's postponement, and that even if it were, it was not reasonably conceivable that Alcon and Petrichor would oppose it. The Court of Chancery's conclusion cannot be squared with the well-pled allegations of Rostov's complaint.

When Alcon and Petrichor manufactured the board deadlock on February 14, 2025, and dissolved the Special Committee shortly thereafter, Aurion was decidedly pursuing an IPO. Aurion had already completed much of the IPO process, filing a SEC Form S-1.[95] As noted in Rostov's complaint, Deerfield, whose board designee sat on the Special Committee, alleged in its verified complaint in the Deerfield Action that when the Special Committee voted to postpone the IPO, its "members, including Petrichor's Board designee Mr. Lally, expressed their continued support for an eventual IPO. In addition, Petrichor's Founder and Managing Partner and

[94] *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003) (quoting *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995)).

[95] A842.

designated Board observer, Tadd Wessel, participated in Special Committee meetings and strongly indicated his desire to move forward with an IPO."[96]

On February 11, 2025, shortly after the February 6 postponement, counsel for Aurion informed this Court that "Aurion remains fully committed to proceeding with a Qualified IPO at the earliest feasible opportunity."[97] Indeed, in its February 24, 2025 complaint, Deerfield noted that if Alcon was unable to have the Court of Chancery's ruling in the Alcon-Aurion Action overturned on appeal, "Aurion is expected to re-audit its financials, as is required, and to proceed with an IPO during the next cycle later this year."[98] Deerfield's first prayer for relief was an order "enjoining Alcon and the Alcon Director Defendants from engaging in any conduct that interferes whatsoever with Aurion's ability to pursue an IPO or any other strategic transaction the Board (or any special committee thereof) deems in the best interest of the corporation."[99]

Alcon also decidedly opposed this IPO—a point that is uncontested. Alcon had expressed interest in acquiring Aurion since 2022, had submitted a non-binding indication of interest, and indicated that it would use its Series C consent right to

[96] A26 ¶ 41; *see also* A740 ¶ 50.

[97] A26 ¶ 42; *see also* A781.

[98] A740 ¶ 50.

[99] A757 ¶ a.

block a deal with any other acquiror unless Alcon found the deal to be well superior.[100] In 2024, when casting the sole vote against formation of the Special Committee, Banks stated "we"—presumably Banks and Alcon, which appointed her to the board—opposed pursing an IPO. Per Deerfield's verified allegations, Alcon's CEO had told Frinzi that "Alcon would use any and all efforts to obstruct an IPO and wreak havoc on Aurion and its stockholders."[101] And removing any doubt about Alcon's opposition to an IPO, it initiated the Alcon-Aurion Action to obtain a declaration that it could block Aurion's IPO, and when that was unsuccessful, appealed to this Court the very day the Court of Chancery entered its final judgment.[102]

These allegations do not accord with the Court of Chancery's conclusion that Rostov pled "no facts from which the court could infer that: Alcon and Petrichor objected to some IPO at some unspecified time in the future."[103] Alcon was open about its opposition to the IPO, and has not contended that the removal of Petrichor's board designee, the dissolution of the Special Committee, or the bylaw amendments were for any purpose other than stopping the IPO.

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[100] A21 ¶ 30; A733 ¶ 34.

[101] A22 ¶ 32; A736 ¶ 41.

[102] A23–A24 ¶¶ 34–38.

[103] Order ¶ 24.

Petrichor's participation was essential, because its sale of Aurion stock could not be effected immediately due to the delay for anti-trust review. Despite its documented support for the IPO, Petrichor replaced its board designee with an Alcon employee, creating the deadlock. It has offered no explanation for this, and when viewed in light of Frinzi's resignation, the Special Committee dissolution, and the bylaw amendments, the import is clear.

"A complaint must survive a motion to dismiss under Rule 12(b)(6) if the plaintiff could ultimately prevail on the merits of their claims based on any reasonable set of facts alleged in the complaint."[104] Here, Rostov pled a litany of facts showing that there was a real IPO process, that was opposed by Alcon, and thwarted by Alcon and Petrichor. The Court of Chancery's dismissal of Count I should be reversed.

[104] *Krasner v. Moffett*, 826 A.2d 277, 286 (Del. 2003).

II. THE COURT OF CHANCERY ERRED IN CONCLUDING THE DIRECTOR DEFENDANTS' THWARTING OF THE IPO WAS SUBJECT TO BUSINESS JUDGMENT REVIEW.

A. Question Presented

Did the Court of Chancery err in concluding that the Alcon Directors' opposition to the IPO and Frinzi's resignation were not reasonably conceivably motivated by bad faith? This argument was preserved at A698–700, A1237–38.

B. Scope of Review

The standard of review of a decision granting a motion to dismiss is also *de novo*.[105]

C. Merits of the Argument

The creation of a 3-3 deadlock on the board—the three Alcon Directors who opposed the IPO, and those unaffiliated with Alcon who had supported the IPO—was designed to stop the IPO, and indeed, after the deadlock Aurion reversed course and, despite its representation to this Court that "Aurion remains fully committed to proceeding with a Qualified IPO at the earliest feasible opportunity,"[106] has not proceeded with an IPO.

The Court of Chancery characterized the Alcon Directors' opposition to the IPO as a matter of ordinary business judgment, and the claim challenging this

[105] *Olenik*, 208 A.3d at 714.

[106] A26 ¶ 42; *see also* A781.

opposition as a claim based upon director inaction.[107] This blinks reality—Alcon, and the Alcon Directors, were not shy about their opposition to the IPO, and the reason for that opposition: Alcon's desire to acquire Aurion.

Both Rostov and Deerfield pled that Bankes, Hudnall and Rappon were Alcon-appointed directors who were Alcon's employees placed on the Aurion Board to advance Alcon's interests.[108] As such, they were classic dual fiduciaries who faced divided loyalties and who, when acting as Aurion directors, were bound to act in Aurion's best interests.[109] At the pleadings stage, the trial court cannot reject the logical inference that in taking positions lockstep with Alcon—and in direct opposition to the other directors—the Alcon Directors breached their fiduciary duties to Aurion.[110] For two of the Alcon Directors, no inference is necessary. Hudnall, on behalf of Alcon, executed the written consent that removed Lally (who had supported an IPO) from the board and replaced Lally with Bankes.[111] As Deerfield, which had a board-designee at the time, pled, after Alcon and Petrichor created the deadlock on February 14, "Hudnall, an Alcon employee who is one of

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[107] Order ¶¶ 25–27.

[108] A27–A8 ¶¶ 48–49; A30 ¶ 54.

[109] *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983); *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 47 (Del. Ch. 2013).

[110] *See In re EngageSmart, Inc. S'holder Litig.*, 354 A.3d 796, 846 (Del. Ch. 2026).

[111] A38 ¶ 76; A750 ¶ 72.

Alcon's designated directors on Aurion's Board, conveyed to Aurion's CEO that the IPO was not going to happen and that Alcon would only provide financing that would allow Alcon to purchase the Company on Alcon's terms and at a time that would be suitable for Alcon."[112] And Bankes, when voting against the formation of the Special Committee to lead the IPO in 2024, stated that "we" were voting against the resolution, an apparent reference to her and Alcon.[113]

The fact that none of the other directors presented a futile IPO resolution for the Alcon Defendants to reject is of no moment—they are not required to advance futile proposal, especially after Hudnall announced that no IPO would happen.[114] "From a semantic and even legal viewpoint, 'inaction' and 'action' may be substantive equivalents, different only in form."[115] "Delaware law recognizes that conscious inaction represents as much of a decision as conscious action."[116]

By not causing Aurion to pursue the long-planned IPO, Bankes, Hudnall and Rappon caused Aurion to effect an about-face. While all of the factual allegations in

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[112] A724 ¶ 9.

[113] A22 ¶¶ 31.

[114] *Cf. In re Shawe & Elting LLC*, 2015 WL 4874733, at *26 (Del. Ch. Aug. 13, 2015) (noting deadlock exists when necessary vote cannot be obtained, and listing numerous issues of deadlock without formal votes), *aff'd sub nom.*, *Shawe v. Elting*, 157 A.3d 152 (Del. 2017).

[115] *Hubbard v. Hollywood Park Realty Enters., Inc.*, 1991 WL 3151, at *10 (Del. Ch. Jan. 14, 1991).

[116] *Garfield*, 277 A.3d at 336.

the complaint support the inference that this was done at the behest of, and to benefit, Alcon, nothing suggests—and the Alcon Defendants have not contended—that they decided an IPO was not in Aurion's best interest. For these reasons, the Court of Chancery's dismissal of Count II should be reversed.

Similarly, the trial court dismissed Count III because directors, such as Frinzi, are free to resign from boards.[117] That verity does not apply here. As then-Chancellor Strine recognized, there are circumstances when a director's resignation is a breach of fiduciary duty.[118] Frinzi was nominally an independent director, but had close ties to Alcon, as chronicled by Deerfield in its complaint: Frinzi had been president and CEO of a company Alcon had acquired, Frinzi was CEO of a company Alcon had considered acquiring in 2024 and recently announced that it is acquiring the company, Frinzi is executive chairman of a company where Alcon is the lead investor, and Frinzi and Alcon's CEO are golfing partners who have sat together on conference panels.[119] Because of this relationship, Frinzi had circumvented Aurion's financial advisors and held direct talks with Alcon about an alternative to

[117] A97–A99.

[118] *In re Puda Coal, Inc. S'holders Litig.*, C.A. No. 6476-CS, at 23 (Del. Ch. Feb. 6, 2013) (TRANSCRIPT).

[119] A16 ¶ 15; A727 ¶ 20.

an IPO.[120] And, per Deerfield, Frinzi had confided to Deerfield's board designee that Alcon had been pressuring Frinzi to resign.[121]

With all of Frinzi's connections to Alcon, the fact that he resigned at 9:36 p.m. on a Friday evening—six minutes before Alcon and Petrichor delivered the written consent that, in combination with Frinzi's resignation, created a deadlock—creates the reasonable inference that he was working with Alcon to advance Alcon's interests. It is not just reasonably conceivable, but almost certain that, as Deerfield averred based on information and belief, "Alcon and Mr. Frinzi had an agreement, whether written or oral, that Mr. Frinzi would resign in connection with the Stock Purchase Agreement to facilitate Alcon's plan to deadlock the Board."[122]

Thus, the Court of Chancery's conclusion that "Plaintiff does not allege that Frinzi had actual knowledge of wrongdoing at the Company and chose to resign rather than cause the Company to resolve the matter"[123] is rebutted by the allegations in the complaint, which strongly indicate that Frinzi was aware of Alcon's plan, and resigned in order to advance it. Accordingly, the Court of Chancery's dismissal of Count III should be reversed.

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[120] A16 ¶ 15; A727 ¶ 20.

[121] A17 ¶ 15; A728 ¶ 20.

[122] A28 ¶ 49; A743 ¶ 59.

[123] Order ¶ 30.

CONCLUSION

For these reasons, Rostov respectfully requests that the Order dismissing Counts I, II, and III be reversed and remanded for further proceedings.

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CERTIFICATE OF SERVICE

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