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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 Below.

No. 313, 2026

Court Below: Court of Chancery of the State of Delaware

C.A. No. 2025-0648-KSJM

# APPELLEES' ANSWERING BRIEF

Dated: October 12, 2026

*Of Counsel*:

GIBSON, DUNN & CRUTCHER LLP
Monica K. Loseman
John D. W. Partridge
1900 Lawrence Street, Ste. 3000
Denver, CO 80202-2111
(303) 298-2211

Jonathan D. Fortney
Mark H. Mixon, Jr. (#6252)
200 Park Avenue
New York, NY 10166-0193
(212) 351-4000

Jonathan C. Bond
John S. Acton
1700 M Street, N.W.
Washington, D.C. 20036-4504
(202) 955-8535

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
D. McKinley Measley (#5108)
Elizabeth A. Mullin Stoffer (#6380)
Jacob M. Perrone (#7250)
1201 North Market Street, 16th Floor
Wilmington, DE 19801
(302) 658-9200
dmeasley@morrisnichols.com
emullin@morrisnichols.com
jperrone@morrisnichols.com

*Attorneys for Defendants-Below/Appellees Alcon Research, LLC, Jeannette Bankes, Thomas Hudnall, Joe Rappon, and Thomas Frinzi*

COVINGTON & BURLING LLP
Benjamin J. Razi
850 Tenth Street, NW
Washington, D.C. 20001
(202) 662-5463

Robert C. Gianchetti
620 Eighth Avenue
New York, NY 10018
(212) 851-1159

POTTER ANDERSON & CORROON LLP
Thomas Brad Davey (#5094)
1313 North Market Street
Wilmington, DE 19801
tdavey@potteranderson.com
(302) 984-6021

*Attorneys for Defendants-Below/Appellees Petrichor Opportunities Fund I LP, and Petrichor Opportunities Fund I Intermediate LP*

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## NATURE OF PROCEEDINGS

This case is the coda to a dispute among stockholders of nominal defendant Aurion Biotech, Inc. ("Aurion"), a biotechnology company that is developing treatments for certain eye diseases, over the best way to finance the company's future operations. Before February 2025, defendant Alcon Research, LLC ("Alcon")—the world's leading eye-care company—was a minority stockholder of Aurion. Other Aurion stockholders pressed to pursue an IPO, which prompted disputes about Aurion's corporate governance. But, in early February 2025, an independent Special Committee of the Aurion Board that included no Alcon-designated members voted unanimously to postpone the IPO. As all agree, the decision of the independent Special Committee meant an IPO would not be possible for at least several months—until Aurion could, among other steps, obtain audited financial statements. Meanwhile, after the Special Committee vote, Alcon resolved the open disputes with other Aurion stockholders and acquired their shares, ultimately obtaining a nearly 99% stake in the company. Now fully funded, Aurion thereafter did not renew its pursuit of an IPO.

Plaintiff David Rostov—Aurion's former CFO and a minority stockholder—is dissatisfied with that outcome; he would have preferred for Aurion to go public. So after Alcon and other large Aurion stockholders resolved their differences, Rostov brought this derivative suit against many of those involved, asserting

breaches of fiduciary duties stemming from their purported failure to pursue an Aurion IPO adequately. The Court of Chancery dismissed the entire suit for failure to state a claim under Court of Chancery Rule 12(b)(6).

Rostov now appeals that dismissal, but only as to certain claims and issues. Rostov's suit asserted six claims, but on appeal he seeks to revive only three. One claim asserts breach of fiduciary duty by Alcon and another minority stockholder (Petrichor) for purportedly thwarting an Aurion IPO (Count I). The other two claims assert fiduciary duty breaches by individual Aurion directors for not supporting Aurion's IPO and, in one case, allegedly resigning to prevent it (Counts II and III).

In particular, Count I asserts that Alcon and Petrichor breached their duties as a control group in mid-February 2025—*after* Aurion's independent Special Committee had already postponed the IPO—by (according to Rostov) "thwarting" an IPO at some unspecified future point. The Court of Chancery correctly dismissed that claim for two reasons: (1) Rostov alleged no facts showing that an IPO was so clearly in Aurion's best interest that opposing or not pursuing it breached a duty; *and* (2) the complaint's own timeline conclusively shows there was no definite IPO that could possibly have been thwarted after the Special Committee's vote in February 2025. Rostov does not even challenge the first ruling, and—in any event—both rulings are correct.

Count II asserts that three Alcon-affiliated Aurion directors breached their duties to Aurion by opposing an IPO. The Court of Chancery rightly dismissed that claim against each director because Aurion's charter contains an exculpatory provision, so Rostov was required, but failed, to plead *individualized* facts establishing liability as to each director under *In re Cornerstone Therapeutics Inc., Stockholder Litigation*, 115 A.3d 1173 (Del. 2015) (en banc). Rostov does not address that ruling, much less identify any such individualized allegations. Regardless, the Court of Chancery also correctly held that Count II, like Count I, *assumes*—but does not state any well-pleaded facts that show—that an IPO was the best path. Rostov's mere disagreement with the directors cannot establish bad faith.

Count III asserts that Aurion's former Executive Chairman, Thomas Frinzi, breached his duty of loyalty simply by *resigning* from the Board, allegedly to create deadlock and thereby block the IPO. The Court of Chancery properly dismissed that claim. The general rule is that resigning a board seat is not, by itself, a breach of loyalty. The complaint here pleads no facts resembling the extreme circumstances that might possibly justify an exception. And, in all events, Rostov's claim assumes that fiduciary duties required Frinzi to pursue an IPO—an assumption his complaint pleads no facts to support.

In short, all of Rostov's claims fail for the same basic reason: Rostov alleges no facts establishing that anyone had a fiduciary duty to pursue an IPO at any

relevant time. Each of his claims fails for other reasons as well. Rostov's sour grapes about Aurion's change of control do not give rise to any actionable claims. The Court of Chancery dutifully applied well-settled principles of Delaware law in dismissing his suit. This Court should affirm.

## SUMMARY OF ARGUMENT

**1. Denied**. The Court of Chancery correctly dismissed Count I. That claim asserted that actions by Alcon and Petrichor in mid-February 2025—after the Special Committee had already voted to postpone an IPO indefinitely—were designed to scuttle a future IPO. The dismissal of Count I should be affirmed for two independent reasons. *First*, the Court of Chancery properly found that Rostov "plead[ed] no facts from which the court could infer that . . . [an] 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." Order ¶ 24. Rostov never challenges that ruling in his opening brief. He has thereby forfeited any challenge to that ruling; his appeal on Count I fails on that basis alone. Moreover, the Court of Chancery's ruling was correct. The complaint assumes that a future IPO was plainly in Aurion's best interest, but it alleges insufficient *facts* to support that assumption. *Second*, the Court of Chancery correctly determined that Rostov failed to allege any sufficiently definite IPO that Alcon and Petrichor could have "thwarted" by their alleged conduct in mid-February 2025. By that time, the scheduled IPO had already been postponed, and any renewed IPO was speculative and at least several months away. To complete a hypothetical IPO, Aurion would have needed to secure audited financial statements for 2024 and interim financing and to evaluate whether an IPO was preferable under *then*-prevailing conditions.

**2. Denied**. The Court of Chancery also correctly dismissed Counts II and III, which asserted various fiduciary-breach claims against individual directors. As to Count II—against Bankes, Hudnall, and Rappon, for purported opposition to an IPO—the Court of Chancery rightly dismissed that claim because Rostov failed adequately to plead individualized breaches of loyalty against each named director. Once again, Rostov has forfeited any challenge to the Court of Chancery's dispositive holding in his opening brief. And once again, the court's conclusion was correct in any event: The complaint does not allege facts establishing that those directors' duty of loyalty obligated them to pursue an IPO *after* the independent Special Committee unanimously postponed it. As to Count III—against former Executive Chairman Frinzi, for resigning his seat—the Court of Chancery properly dismissed that claim because resigning a board position without more does not breach a fiduciary duty. Rostov's complaint does not come close to alleging the extremely limited circumstances in which the Court of Chancery has suggested that resigning from a board might be a breach of fiduciary duty. Additionally, Count III suffers the same fundamental flaw that dooms Counts I and II: The complaint alleges no facts showing that Frinzi's duty of loyalty required him to press for an IPO at some future time even after the Special Committee already had indefinitely postponed it.

## STATEMENT OF FACTS

This case is the postscript to a now-resolved dispute among Aurion's principal stockholders over whether to pursue an IPO in early 2025. Although Aurion had once pursued that prospect, an independent Special Committee voted unanimously in February 2025 to postpone any IPO for months. After that vote, the principal stockholders resolved their disagreements. Alcon acquired the others' stock, and Aurion has not pursued an IPO. Rostov objects to that outcome and brought this follow-on suit against Alcon and others to challenge it. But the Court of Chancery rejected Rostov's effort to dress up his personal disagreement as breaches of duty under Delaware law and dismissed the suit.

### A. Alcon And Others Invest In Aurion

Aurion is developing therapies to treat corneal endothelial disease through injections, instead of through surgical transfers of donated corneas. *See generally* A979-984. Aurion's therapies have shown immense promise, with a commercial launch in Japan in September 2024 and a U.S. Food and Drug Administration designation for one of its therapies as a breakthrough therapy. A13 (¶ 1); A973-975. But these therapies have not been fully approved by the FDA and are not yet broadly available outside of Japan, limiting Aurion's revenue to date. *See, e.g.*, A863.

Companies pursuing cutting-edge biomedical therapies require significant capital investment, and Aurion is no exception. It was founded in 2022 as a spinoff

from CorneaGen, Inc. A63. Aurion contemporaneously pursued a Series C fundraising round to help finance the development of its therapies, with the round led by venture-capital investor Deerfield Management. A18 (¶ 19); *Alcon Research, LLC* v. *Aurion Biotech, Inc.*, 2025 WL 312371, at *1 (Del. Ch. Jan. 27, 2025) (*Aurion I*).

"Alcon is the largest eye-care company in the world, focusing on technical advances in treating eye diseases and conditions." *Aurion I*, 2025 WL 312371, at *2. It is deeply invested in advancing cutting-edge technology to treat eye diseases and invests in emerging ophthalmic companies. *See, e.g.*, A726-728.

This made Alcon a natural investor in Aurion's Series C fundraising, and Alcon and Deerfield became the company's primary stockholders. Deerfield acquired 50% of the Series C shares for $55 million, and Alcon acquired 36% of the Series C shares for $40 million. *Aurion I*, 2025 WL 312371, at *2; Order ¶ 3. Additionally, Petrichor, a healthcare-focused private-equity firm, A16 (¶ 12), previously invested in CorneaGen and obtained shares of Aurion's Series B preferred stock through the reorganization. A64.

The stockholders adopted a voting agreement that, among other things, outlined their representation on Aurion's Board of Directors. A387-388; Order ¶ 4. The Board was to be composed of seven individuals: Each of Alcon, Deerfield, Petrichor, and a Series A investor was entitled to select a Board member; Aurion's

CEO would also automatically be a Board member; and the final two Board members would be selected by mutual agreement of the other Board members. A386-388. Alcon selected Jeannette Bankes, Deerfield selected Dr. Andrew ElBardissi, Petrichor selected Patrick Lally, and the Series A investor selected Dr. William Link. A387. Greg Kunst served as Aurion's CEO, and the Board mutually selected Thomas Frinzi and Christine McCauley to fill the final two seats. A388. Frinzi was named Executive Chairman. A1032.

On matters submitted to all stockholders, Alcon granted a revocable proxy to Aurion's CEO or CFO to vote Alcon's shares above a 19% threshold in a "neutral manner," *i.e.*, in the same proportion as the Series C shares held by investors other than Alcon. A401. That proxy did not limit Alcon's right to vote all its shares on matters submitted to preferred stockholders as a class or to specified preferred series. A401.

Aurion's charter contained an exculpatory provision limiting directors' personal liability "for monetary damages for breach of fiduciary duty as a director" to "the fullest extent permitted by law." A379 (Charter NINTH).

### B. Aurion Explores Further Financing Avenues

Even after the Series C funding, questions remained about how Aurion would continue to finance its operations and research. In March 2023, Aurion launched an auction to sell itself. *Aurion I*, 2025 WL 312371, at *4. Although conversations

began about Alcon's potential acquisition of Aurion, Alcon did not submit a formal offer. *See* A21-22 (¶¶ 29-30).

In response to Alcon's interest in a potential acquisition, Aurion created a Special Committee. It consisted of the designees of Deerfield, Petrichor, and the Series A investor, along with Frinzi and Kunst. *Aurion I*, 2025 WL 312371, at *4. Alcon formally ended its participation in the auction process in June 2023. But Aurion's Special Committee—still devoid of any Alcon-designated representation—continued on, and Aurion "began exploring a possible IPO." *See id.* In November 2023, Alcon offered financing to help Aurion reach regulatory milestones in exchange for an option to acquire the company later at a predetermined price. A66. Negotiations continued through October 2024. *Id.*

At its quarterly meeting in June 2024, Aurion's Board voted to pursue an IPO and empowered the Special Committee to oversee and negotiate "all aspects of an IPO or other financing alternative." A815. Bankes—Alcon's designee—was the only Aurion Board member to vote against pursuing an IPO. *Aurion I*, 2025 WL 312371, at *4. Deerfield later alleged that, in casting her vote against pursuing the IPO, "Bankes stated that 'we' were voting against the resolutions that approved moving forward with the IPO," which Deerfield interpreted as a reference to Alcon. A22 (¶ 31); A735. Lacking a representative on the Special Committee, Alcon was left "in the dark on Aurion's progress toward an IPO in the months that followed the

June meeting." *Aurion I*, 2025 WL 312371, at *5. Alcon, however, made it clear to Aurion that, in its capacity as a Series C stockholder, it would not consent to any IPO. *Id.*

After the June 2024 vote, the Special Committee apparently explored both a possible IPO and a possible sale to Alcon. It simultaneously negotiated with Alcon while taking steps toward an IPO and seeking other financing alternatives. *Aurion I*, 2025 WL 312371, at *5; A23 (¶ 33); A808-812.

Around this time, the composition of Aurion's Board changed. Thomas Hudnall, an Alcon legal executive, replaced Bankes in August 2024. A17 (¶ 16); A67. And in October, Alcon bought additional shares from Series A investors, increasing its ownership to approximately 40.5% on an as-converted basis, and appointed Alcon Research executive Joe Rappon to the Series A investor Board seat formerly occupied by Dr. William Link. A17 (¶ 17), A23 (¶ 34); A67. Neither Hudnall nor Rappon joined the Special Committee, which then consisted of ElBardissi (Deerfield), Lally (Petrichor), Frinzi (unaffiliated), and Kunst (Aurion). A66-67. At around the same time that it acquired the Series A shares, Alcon also informed Aurion that it was revoking the voting proxy that had authorized Aurion executives to vote Alcon's shares above 19%. *Aurion I*, 2025 WL 312371, at *5. But "Aurion refused to recognize the revocation." *Id.*

### C. Aurion And Alcon Litigate The Anticipated IPO

By late October 2024, it was clear that the Aurion Special Committee wished to proceed with an IPO, targeting a January 2025 launch. *Aurion I*, 2025 WL 312371, at *5. Some stakeholders disagreed, however, about whether the Special Committee could lawfully execute an IPO without Alcon's consent.

Seeking clarity on its rights, Alcon filed a declaratory-judgment action (*Aurion I*) against Aurion in the Court of Chancery, seeking declarations that the proposed IPO required consent from Series C stockholders and that Alcon could revoke its voting proxy. *See* A23-24 (¶ 35). Aurion asserted mirror-image counterclaims. *See* A23-24 (¶ 35); A760, A778. While that litigation was pending, Aurion approved a reverse stock split to free up shares for its IPO, and Alcon amended its complaint to argue that the reverse stock split violated its rights under Aurion's charter. A24 (¶ 36); *see Aurion I*, 2025 WL 312371, at *5-*7.

Aurion sought to ensure these questions were resolved quickly. Under the applicable SEC rules for a company of Aurion's size and financial status, Aurion could rely on its September 2024 interim financial statements to support an IPO only through February 14, 2025 (45 days after the end of Aurion's fiscal year); after that date, Aurion would need audited 2024 financial statements to complete an IPO. *See* 17 C.F.R. § 210.8-08(a); A25 (¶ 39). Aurion and Alcon therefore agreed to litigate the dispute on an expedited basis. *Aurion I*, 2025 WL 312371, at *6.

After the expedited trial, Chancellor McCormick held that Alcon had the right to revoke the voting proxy, but that Aurion had the right to pursue the reverse stock split and did not otherwise require Series C consent to complete a Qualified IPO. *Aurion I,* 2025 WL 312371, at *7, *17. Both parties appealed, again seeking expedited consideration. With Aurion's IPO pricing scheduled for February 13, 2025, this Court scheduled oral argument for February 12. A24-25 (¶¶ 38-39); A781 n.1.

### D. Aurion's Special Committee Unanimously Postpones The IPO

On February 6, 2025, Aurion's Special Committee—which still included no Alcon designees—unanimously voted to postpone Aurion's planned February IPO indefinitely. A25-26 (¶ 41). Rostov challenges neither the Special Committee's independence nor its process in reaching that decision. Order ¶ 23.

Aurion informed this Court of the postponement of its planned IPO five days later, on February 11. A781. Aurion expressed a continued commitment to pursue an IPO, but it identified no definite timeline for such an IPO. A781-782.

### E. Alcon Buys Petrichor's Shares

With the IPO delayed indefinitely, Petrichor agreed on February 14, 2025, to sell its Aurion shares to Alcon, ultimately giving Alcon approximately 54% of the outstanding shares of Aurion on an as-converted basis. A26 (¶ 44). The sale did not immediately close due to applicable antitrust waiting periods. A27 (¶ 45).

The complaint alleges that Executive Chairman Frinzi resigned from the Board later that evening. A27 (¶ 48). Petrichor and Alcon then acted by written consent to remove former Petrichor designee Lally and to replace him with Bankes, an Alcon employee who had previously served on the Board as Alcon's designee. *Id.* This left the Board with six members, three of whom (Bankes, Hudnall, Rappon) were Alcon employees. A27-28 (¶ 48).

On February 16, Alcon and Petrichor amended Aurion's bylaws by written consent. A28-29 (¶ 50). Alcon and Petrichor dissolved the standing Special Committee and, *inter alia*, adopted a new bylaw restoring the full Board's authority over all corporate financing decisions, including the decision whether or not to seek an IPO. *Id.*

### F. Deerfield And Alcon Litigate But Then Settle Their Disagreement

Following Alcon's agreement to acquire Petrichor's shares, Alcon and Deerfield controlled the overwhelming majority of shares in Aurion. Deerfield brought two suits against Alcon, the Alcon-affiliated directors, Petrichor, and Frinzi. A29-30 (¶ 53). One lawsuit alleged breaches of fiduciary duties by the defendants (*Aurion II*), and the other sought to invalidate the changes to Aurion's Board composition (*Aurion III*). A29-30 (¶¶ 53-54).

Within weeks, however, Deerfield and Alcon settled that litigation. As part of the resolution, Alcon acquired the remainder of Deerfield's shares in Aurion,

along with notes that Deerfield owned. A30-31 (¶ 57). Alcon and Aurion also stipulated to a dismissal of the *Aurion I* appeal that remained pending before this Court, and this Court dismissed that appeal on April 4, 2025. A32 (¶ 63).

These transactions demonstrated Alcon's substantial commitment to Aurion as a company. As Alcon's financial reports detailed, by the end of Q1 2025 it had acquired 58.7% of Aurion's outstanding equity for $486 million, leading to a nearly 99% ownership stake in Aurion. A33 (¶ 65). Alcon then began financing Aurion's operations. A39 (¶ 77).

### G. Rostov's Follow-On Derivative Suit

The resolution of Deerfield's dispute with Alcon should have brought this matter to rest, with previously dueling stakeholders having reached an acceptable outcome. Aurion's promising technologies are being stewarded by the largest eye-care company in the world. *See Aurion I*, 2025 WL 312371, at *2. And Alcon has a strong incentive to see Aurion succeed, having invested hundreds of millions of dollars to acquire a nearly 99% stake in Aurion. *See* A33 (¶ 65). Aurion's remaining minority stockholders thus have every reason to trust that these technologies will be managed successfully, leading ultimately to profitability. Meanwhile, Deerfield, Petrichor, and other earlier investors received immediate and guaranteed returns on their investments by voluntarily selling their shares to Alcon. *See* A23 (¶ 34), A26 (¶ 44), A30-31 (¶ 57), A33 (¶ 65).

Plaintiff David Rostov, Aurion's former CFO and a minority stockholder, remained unsatisfied. After seeking unsuccessfully to intervene in one of Deerfield's suits against Alcon (*Aurion II*), A72 (citing *Aurion II*, D.I. 34 (Del. Ch. July 14, 2025)), Rostov filed his own derivative suit in the Court of Chancery. A12.

Rostov's suit asserted six claims against an array of defendants, but only three claims—largely patterned on Deerfield's abandoned complaint—are at issue in this appeal. *See* A39-42 (¶¶ 81-93); *cf.* A751-755. In Count I, Rostov asserted that, "[a]s controlling stockholders of Aurion," Alcon and Petrichor breached their fiduciary duty of loyalty to Aurion and its stockholders by working to "thwar[t]" Aurion's IPO, including by creating "Board deadlock." A39-40 (¶¶ 81-85). In Count II, he asserted that three Alcon-affiliated Aurion directors (Bankes, Hudnall, Rappon) breached their fiduciary duties to Aurion by "continually oppos[ing] an Aurion IPO, because it conflicts with Alcon's planned takeover of Aurion." A40-41 (¶¶ 86-89). In Count III, he asserted that former Executive Chairman Frinzi breached his fiduciary duty by resigning from the Board, "enabl[ing] Alcon to derail the Aurion IPO." A41-42 (¶¶ 90-93).[1]

[1] Rostov also brought a claim against Deerfield for settling its suit against Alcon (Count IV), a claim against Alcon for its dismissal of the Alcon-Aurion action before this Court (Count V), and a claim for a declaratory judgment relating to an alleged breach of a Right of First Refusal agreement (Count VI). A42-45 (¶¶ 94-110). The Court of Chancery dismissed those claims for failure to state a claim, Order ¶¶ 31-41, and Rostov does not challenge their dismissal on appeal.

Defendants jointly moved to dismiss all six counts under Rule 12(b)(6) for failure to state a claim. A74. The Court of Chancery granted the motion.[2]

The Court of Chancery applied the well-settled "reasonable conceivability" pleading standard. Order ¶ 21. The court recognized that it "must accept all well-pleaded factual allegations in the complaint as true . . . [and] draw all reasonable inferences in favor of the plaintiff," and that it must "deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof." *Id.* (quoting *Central Mortgage Co.* v. *Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011)) (brackets omitted). But the court concluded that, even under that standard, Rostov failed to plead facts sufficient to state a claim on Counts I-III.

***Count I.*** The Court of Chancery explained that Rostov's "gripe" in Count I against Alcon and Petrichor "[wa]s that the February Actions thwarted an IPO, thereby harming Aurion" and Rostov. Order ¶ 22. Specifically, Rostov alleged that "Petrichor joined Alcon to manufacture Board deadlock in amending Aurion's bylaws to thwart an IPO." *Id.* But that theory, the court held, had two independently fatal problems.

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[2] The Court of Chancery rejected Defendants' alternative arguments to dismiss Counts I-V under Rule 12(b)(1) on mootness and ripeness grounds, noting that Rostov seeks monetary relief on those counts for alleged past injuries. Order ¶ 20 n.42.

*First*, "according to the Complaint" itself, "the IPO was postponed *before* any of the actions that form the basis of" Count I. Order ¶ 23 (emphasis added). Rostov's own complaint "allege[d] that 'the Special Committee voted unanimously to postpone the IPO' on February 6, 2025," and "[t]he Complaint does not challenge the Special Committee's process or independence." *Id.* (quoting A25 (¶ 41)). Rostov thus "seem[ed] to fault the Board for not pursuing an IPO *after* a concededly disinterested and independent Special Committee made the decision to postpone it." Order ¶ 24 (emphasis added). But the Special Committee's action disabled Aurion from doing so for months: The complaint's allegations reflected that, "as of February 6, Aurion could not re-launch any IPO efforts until Aurion secured audited financial statements for year-end 2024," which was "months away." *Id.* (citing A25 (¶¶ 39-40)). And Rostov pleaded "no facts from which the court could infer" that, as relevant, "Alcon and Petrichor objected to some IPO at some unspecified time in the future." *Id.*

*Second*, the Court of Chancery concluded that the complaint pleaded no facts from which it could infer that "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." Order ¶ 24. In other words, Rostov failed to plead facts establishing any fiduciary duty to pursue an IPO in these circumstances.

***Count II.*** The Court of Chancery found Count II, against the three individual Alcon-affiliated Aurion directors, suffered from similar (and additional) problems. Rostov asserted "that the Director Defendants were placed on the Board by Alcon to create a three-to-three deadlock over an IPO, and that they did so for Alcon's benefit rather than" for Aurion's, and that these directors also refused to authorize the IPO through "conscious inaction" that constituted a breach of fiduciary duty. Order ¶ 25. Like Count I, the court held that Count II failed (at least) twice over.

*First*, Aurion's charter contains an exculpatory provision enforceable under 8 *Del. C.* § 102(b)(7), so Rostov needed to plead individualized allegations supporting an inference that each Director Defendant committed a non-exculpated breach of fiduciary duty. Order ¶ 26 (citing *Cornerstone*, 115 A.3d at 1179-1180). The court found that Rostov failed to do so. "The Complaint [did] not allege facts as to each Director Defendant" and instead "suffer[ed] from group pleading issues." *Id.* Count II did not allege specific *actions* of the directors that breached a fiduciary duty; it challenged "Board inaction" without "any allegations sufficient to support an inference that the Director Defendants acted in bad faith by consciously failing to act." *Id.*

*Second*, the Court of Chancery explained that Count II (like Count I) "relie[d] on the *assumption* that pursuing an IPO was the best and only path forward for Aurion." Order ¶ 27 (emphasis added). As the court had just explained in

addressing Count I, Rostov pleaded no facts to support that conclusion. Order ¶ 24. Rostov's subjective "disagreement with a Board's decision" was insufficient to "rebut th[e] presumption" that directors "act in good faith." Order ¶ 27. The court addressed Bankes's alleged remark in casting her unsuccessful 2024 vote against an IPO that "'we' were voting against . . . the IPO," Order ¶ 8, but found that insufficient, Order ¶ 27. Giving Rostov the benefit of all reasonable inferences, "[i]t is reasonable to infer that 'we' referred to Bankes and Alcon," but that "single plural pronoun, without additional facts, is insufficient to overcome the presumption of good faith." Order ¶¶ 8, 27.

***Count III.*** Finally, the Court of Chancery dismissed Count III against Frinzi for allegedly resigning "to facilitate Board deadlock." Order ¶¶ 28, 30. As the court explained, "directors are free to resign from boards," and the "act of resigning, without more, generally would not give rise to a breach of the duty of loyalty, absent unusual circumstances." Order ¶ 28. The court acknowledged but distinguished Rostov's leading case, the transcript ruling in *In re Puda Coal, Inc. Stockholders Litigation*, C.A. No. 6476-CS (Del. Ch. Feb. 6, 2013). In *Puda Coal*, all directors but the chairman had resigned after a derivative claim was filed, leaving the company in the "sole hands of the 'principal suspected wrongdoer.'" Order ¶ 29 (quoting *Puda Coal*, C.A. No. 6476-CS, at 6:16-17). As the Court of Chancery here observed, the *Puda Coal* court denied a motion to dismiss under Rules 23.1 and

12(b)(6), suggesting that "the 'extreme circumstances'" of that case "'might well constitute' a breach of fiduciary duty." *Id.* (quoting *Puda Coal*, C.A. No. 6476-CS, at 23:3-17). But Frinzi's resignation, the court reasoned, "does not compare": Rostov did 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." Order ¶ 30.

## ARGUMENT

### I. The Court Of Chancery Correctly Held That Rostov Failed To State A Claim Against Alcon And Petrichor

#### A. Question Presented

Did the Court of Chancery correctly dismiss Rostov's Count I against Alcon and Petrichor for failure to state a claim? Order ¶¶ 22-24; A88-93, A111-113.

#### B. Scope Of Review

This Court reviews the Court of Chancery's dismissal of a claim under Court of Chancery Rule 12(b)(6) de novo. *City of Sarasota Firefighters' Pension Fund* v. *Inovalon Holdings, Inc.*, 319 A.3d 271, 288 (Del. 2024). In assessing a Rule 12(b)(6) motion, the court accepts all well-pleaded factual allegations as true and draws all reasonable inferences in the plaintiff's favor; dismissal is appropriate only if the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof. *Central Mortgage Co.*, 27 A.3d at 536. This standard, however, requires only *reasonable* inferences, and the court should not "credit conclusory allegations that are not supported by specific facts, or draw unreasonable inferences in the plaintiff's favor." *Norton* v. *K-Sea Transportation Partners L.P.*, 67 A.3d 354, 360 (Del. 2013).

"The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal." Del. Supr. Ct. R. 14(b)(vi)(A)(3).

### C. Merits Of Argument

The Court of Chancery correctly determined that Count I of Rostov's complaint fails to state a claim against Alcon and Petrichor for supposedly thwarting an IPO. Rostov failed to allege facts establishing any duty to pursue an IPO. And he failed to allege that Alcon's and Petrichor's complained-of conduct from February 14-16, 2025—*after* Aurion's Special Committee unanimously voted on February 6 to postpone the previously scheduled IPO—could have thwarted any real, definite IPO that could otherwise have occurred.

Count I targets the actions of Alcon and Petrichor as "controlling stockholders of Aurion." A40 (¶ 82). "[A]ll stockholders have the right to vote their shares in their own best interests." *Rutledge* v. *Clearway Energy Group LLC*, 360 A.3d 1271, 1277-1278 (Del. 2026). "[C]ontrolling stockholders owe a fiduciary duty of loyalty to the corporation and its minority stockholders when they exercise their control over corporate actions and decisions." *Id.* at 1278. That duty mandates that "the best interest of the corporation and its shareholders takes precedence" over "any interest possessed by a . . . controlling shareholder and not shared by the stockholders generally." *Cede & Co.* v. *Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993), *modified by* 636 A.2d 956 (Del. 1994). But, absent circumstances triggering a more searching standard of review, Delaware courts apply the business-judgment rule and presume that all business decisions have been taken "in good faith and in the honest

belief that the action taken was in the best interests of the corporation." *Maffei* v. *Palkon*, 339 A.3d 705, 728 (Del. 2025). Rostov has not argued that any higher standard (such as entire fairness) applies to Count I.

Applying the business-judgment rule, a reviewing court "will not substitute its judgment" for that of the corporate decisionmaker. *Maffei*, 339 A.3d at 728. A business decision need only be "rational, not the most rational." *Leo Investments Hong Kong Ltd.* v. *Tomales Bay Capital Anduril III, L.P.*, __ A.3d __, 2026 WL 1993637, at *5 n.37 (Del. July 10, 2026) (en banc); *see, e.g.*, *Sinclair Oil Corp.* v. *Levien*, 280 A.2d 717, 722 (Del. 1971) ("Even if Sinclair was wrong in developing these opportunities as it did," the "decision of which subsidiaries would be used to implement Sinclair's expansion policy was one of business judgment with which a court will not interfere absent a showing of gross and palpable overreaching.").

Consistent with those principles, the Court of Chancery correctly concluded that Count I failed to state a claim for two independent reasons. First, Rostov failed to allege facts demonstrating that failure to pursue an IPO was a breach of the duty of loyalty. Order ¶ 24. Second, he failed to allege facts showing that Alcon and Petrichor opposed a sufficiently definite IPO. *Id.* Rostov's opening brief challenges only the second conclusion. Br. 25-29. He has forfeited any challenge to the first, which by itself supports affirmance. Both holdings, moreover, are correct.

### 1. Rostov Failed To Plead Facts Showing That An IPO Was Clearly In Aurion's Best Interest

a. This Court can and should affirm the dismissal of Count I because the Court of Chancery ruled that Rostov failed to allege facts showing that Alcon and Petrichor had a duty to pursue an IPO, and Rostov has not challenged that ruling on appeal. "[A]ny argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal." Del. Supr. Ct. R. 14(b)(vi)(A)(3).

The Court of Chancery expressly determined that "the Complaint pleads no facts from which the court could infer that . . . 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." Order ¶ 24. Yet Rostov says nothing to refute that ruling on appeal. *See* Br. 25-29. "Nowhere in [his] opening brief do[es] [Rostov] either identify or present an argument" on the question whether he adequately alleged that the failure to pursue an IPO was a breach of the duty of loyalty "in the manner that is required by the Rules of this Court." *In re COVID-Related Restrictions on Religious Services*, 326 A.3d 626, 643 (Del. 2024) (en banc). Rostov thus "abandoned and waived this issue on appeal," and this Court should affirm the Court of Chancery's dismissal for failure to allege facts showing a breach of the duty of loyalty on forfeiture grounds. *Id.* at 644.

This Court's decision in *COVID-Related Restrictions* is instructive. There, the appellants briefed an argument challenging the lower court's holding on standing but not its holding on the case-or-controversy requirement. 326 A.3d at 643. This Court emphasized that these were "independent requirements of justiciability, and both must be met"—and therefore, both must be briefed. *Id.* Because the "[a]ppellants abandoned" any challenge to the lower court's case-or-controversy ruling on appeal, this Court affirmed that ruling. *Id.* at 644.

So too here. Whether failure to pursue an IPO demonstrates a breach of the duty of loyalty is a threshold requirement for Rostov to state a claim for breach of that duty. His failure to brief the question is thus dispositive.

b. The Court of Chancery's holding is also correct on the merits. Alcon and Petrichor had no duty to seek an IPO. There is more than one way to finance a company. An IPO was one possible path. But so was further investment by Alcon. Absent well-pleaded facts alleging that one or the other was so clearly in Aurion's interest that failing to pursue it breached a fiduciary duty, neither the company nor its controlling stockholders were obligated to choose one over the other. Aurion ultimately chose a path Rostov did not prefer. But that is exactly the kind of business judgment that this Court generally will not second-guess. *See Maffei*, 339 A.3d at 728.

As the Court of Chancery also appreciated, the relevant question is not whether an IPO was the desirable path forward for Aurion in the abstract. Instead, the question is whether Petrichor and Alcon breached a fiduciary duty by acting to "thwart" an IPO *after* Alcon became a controlling stockholder, which was "*after* the Special Committee determined to postpone" the IPO. Order ¶ 24 & n.54. At that point, an IPO was a materially less attractive prospect for Aurion than it previously might have seemed. Among other reasons, after the Special Committee's decision, an IPO could not proceed until Aurion secured audited 2024 financial statements, which could take months. On the other side of the scales, within weeks after the February 2025 conduct that Count I challenges, Alcon—the largest eye-care company in the world—invested hundreds of millions of dollars to obtain near-total ownership of Aurion. Alcon had a readily apparent interest in ensuring that Aurion's therapies become profitable. To succeed on Count I, Rostov thus must plead facts supporting a reasonable inference that an IPO was plainly in Aurion's best interest *even after* the Special Committee unanimously decided against a February 2025 IPO.

Rostov's complaint, however, is devoid of any facts from which a court could reasonably draw that inference. The complaint simply assumes that an IPO was obviously and always in Aurion's best interest, *see*, *e.g.*, A36 (¶ 73), A40 (¶ 83), A41 (¶ 89), but that is Rostov's threadbare ipse dixit. His self-serving say-so is not nearly enough; a trial court should not "accept as true conclusory allegations

'without specific supporting factual allegations.'" *In re General Motors (Hughes) Shareholder Litigation*, 897 A.2d 162, 168 (Del. 2006) (quoting *In re Santa Fe Pacific Corp. Shareholder Litigation*, 669 A.2d 59, 65-66 (Del. 1995)). The complaint does not allege, for instance, the IPO's expected offering share price, anticipated proceeds, cost of capital, or investor commitments. It does not compare those forecast economics with any available private financing or other alternative, including with the current economics of an Alcon-owned Aurion. It identifies no financial analysis showing how abandoning an IPO would itself destroy corporate value. And it certainly does none of these things for a *post*-February 6 IPO, which is the sole focus of Rostov's suit. Even on their own terms, Rostov's allegations show at most only that Aurion had devoted substantial effort to preparing for an IPO, that various constituencies at times favored one, that bankers and potential investors viewed Aurion and the then-existing market conditions favorably, and that the Company's independent Special Committee ultimately decided to postpone an IPO indefinitely. Allegations of sunk costs, previously dissenting stakeholders, and generally positive views of Aurion's value do not, by themselves, make it reasonably conceivable that pursuing that option was so plainly in Aurion's best interests that a contrary financing judgment constituted disloyalty.

### 2. Rostov Failed To Plead Facts Showing That Alcon And Petrichor Thwarted An IPO That Was Already Postponed

The Court of Chancery also correctly held that Count I failed to state a claim for the independent reason that, according to the complaint, the IPO had already been delayed by the Special Committee by the time of the conduct Count I challenges. Order ¶¶ 23-24; A25 (¶ 41). The decision of the Special Committee—whose "process" and "independence" Rostov has never impugned—meant that any hypothetical new IPO was at least "months away": As the Court of Chancery explained, "Aurion could not re-launch any IPO efforts until Aurion secured audited financial statements for year-end 2024." Order ¶¶ 23-24; *see* A25 (¶¶ 39-40). There was no live, definite IPO that Alcon and Petrichor could "thwart." Order ¶ 22.

Nor does the complaint allege facts establishing that any future IPO was imminent or certain. To carry out an IPO in the wake of the Special Committee's decision, Aurion would have needed to obtain interim financing, complete its audit, and determine—based on then-existing market conditions and alternatives—that an IPO was in Aurion's best interest at that time. Because Rostov pleaded that the Special Committee's decision pushed out any possible IPO by months, the complaint had to plead facts from which a court could reasonably infer that an IPO would overcome those obstacles in order to state a claim. Instead, Rostov supplies no more

than conjecture—a counterfactual of an Aurion IPO sometime after that decision, even absent Alcon and Petrichor's conduct from February 14 onward.

On appeal, all Rostov can muster from his complaint are qualified representations Aurion made in court filings about its intentions and the preferences of other stakeholders. But those do not come close to filling the factual gap. He cites a statement in a letter Aurion filed in this Court that "Aurion remain[ed] fully committed to proceeding with a Qualified IPO at the earliest feasible opportunity." Br. 27 (quoting A26 (¶ 42)). But that opaque statement does not say anything about when (or even whether) a "feasible opportunity" would arise, let alone offer any well-pleaded facts in support. And it must be read alongside the complaint's own allegation that, "if th[e] February 14 deadline was missed," that "would delay an IPO until after Aurion was projected to run out of cash." A25 (¶ 39). The same goes for Rostov's new proclamation in his appellate brief (not drawn from his complaint) that, even after the Special Committee's decision and later dissolution, "Aurion was decidedly pursuing an IPO." Br. 26. That self-serving assertion is contradicted by Rostov's own concession elsewhere that "on February 6, 2025, the Special Committee voted unanimously to postpone the IPO." *Id.* at 13. In any event, that contention is unsupported by any well-pleaded facts showing how that hypothetical pursuit could have succeeded.

Instead of confronting this pleading gap, which the Court of Chancery identified, Rostov seeks to distract with other issues. Claiming the court failed to credit his allegations, Rostov spends pages (Br. 26-29) purporting to establish that Alcon and Petrichor remained ever opposed to an IPO in principle. Rostov also alludes to certain other stakeholders' expressions of "continued support for an eventual IPO." Br. 26 (quoting A26 (¶ 41)). Those contentions, however, share a common problem: Neither Alcon's and Petrichor's alleged opposition to an IPO nor other stakeholders' support could make any difference so long as there was, and could be, no IPO in the offing when the alleged conduct occurred. The court did not conclude that an IPO had no defenders after February 14 or that Alcon and Petrichor abruptly abandoned their opposition. Rather, it ruled more modestly and carefully that, at the *relevant times for Count I—i.e.*, after the Special Committee had already delayed the IPO—no facts alleged support an inference that any definite, imminent IPO existed for Alcon and Petrichor to "thwart." *See* Order ¶ 24 & n.54.

In short, as the Court of Chancery explained, the complaint speculates that "Alcon and Petrichor objected to some IPO at some unspecified time in the future," but it "pleads no facts from which the court could infer that" conclusion. Order ¶ 24. The court reserved judgment on whether such a claim can ever be "legally viable" because it held that, even if so, "more must be alleged to support it." *Id.*

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The Court of Chancery's commonsense conclusion was correct. Rostov's complaint pleads no facts that establish a duty to pursue an IPO or that any definite IPO existed for anyone to thwart. The dismissal of Count I should be affirmed.[3]

[3] Count I also fails as to Petrichor because Petrichor was never a controlling stockholder and thus had no fiduciary duties to minority stockholders. *See Ivanhoe Partners* v. *Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987). And Count I fails as to Alcon to the extent it relies on any conduct before Alcon became a controlling stockholder. *See* Order ¶ 24 n.54.

## II. The Court Of Chancery Correctly Held That Rostov Failed To State A Claim Against The Individual Directors

### A. Question Presented

Did the Court of Chancery correctly dismiss Rostov's Count II against Bankes, Hudnall, and Rappon and Count III against Frinzi for failure to state a claim? Order ¶¶ 25-30; A88-93, A96-99, A111-113.

### B. Scope Of Review

This Court reviews the Court of Chancery's dismissal of a count for failure to state a claim de novo, making reasonable inferences from the plaintiff's complaint but refraining from speculation. *See* Part I.B, *supra*. This Court treats arguments that are not raised in the appellant's opening brief as waived. *Id.*

### C. Merits Of Argument

The Court of Chancery properly dismissed the only other two counts Rostov raises on appeal, both concerning individual directors: Count II against Bankes, Hudnall, and Rappon for generic opposition to the IPO, and Count III against Frinzi for resigning from the Board. Order ¶¶ 25-30. Those counts each fail for claim-specific reasons, but they also share the same fundamental problem as Count I: the complaint's failure to allege facts from which a court could reasonably infer a duty to pursue and not undermine an IPO—a failure that alone dooms Rostov's entire case. The Court of Chancery's dismissal of Counts II and III should be affirmed.

### 1. Rostov Failed To Plead Individualized Facts To Show A Breach Of Duty By Bankes, Hudnall, And Rappon

a. Count II asserts fiduciary-breach claims against corporate directors, but it runs headlong into an obstacle. As the Court of Chancery explained, "the Director Defendants are protected by an exculpatory charter provision," so Rostov's complaint "must plead that *each* of the Director Defendants acted in bad faith to support a claim against them." Order ¶ 26 (citing *Cornerstone*, 115 A.3d at 1179-1180) (emphasis added). "When a plaintiff seeks to hold multiple directors protected by an exculpatory provision liable for breach of fiduciary duty, that plaintiff must well-plead a loyalty breach against each individual director; so-called 'group pleading' will not suffice." Order ¶ 26 n.60 (quoting *In re Tangoe, Inc., Stockholders Litigation*, 2018 WL 6074435, at *12 (Del. Ch. Nov. 20, 2018)). But, as the Court of Chancery correctly recognized, Rostov's "Complaint does *not* allege facts as to each Director Defendant; it suffers from group pleading issues." Order ¶ 26 (emphasis added).

On appeal, Rostov ignores this holding. *See* Br. 30-33. As with Count I, this Court should affirm the Court of Chancery's dismissal of Count II based on that forfeiture. *See* Part I.C.1.a, *supra*. Because Rostov did not challenge an independently dispositive basis for the decision below, it is "deemed waived." Del. Supr. Ct. R. 14(b)(vi)(A)(3); *In re COVID-Related Restrictions*, 326 A.3d at 643.

b. The Court of Chancery's individualized-pleading holding is also correct. Rostov brought a single claim against Bankes, Hudnall, and Rappon for alleged breaches of fiduciary duties to Aurion. A40-41 (¶¶ 86-89). But because each director is exculpated, Rostov had to plead "a non-exculpated claim for breach of fiduciary duty . . . regardless of the underlying standard of review for the transaction." *Cornerstone*, 115 A.3d at 1179. This requires facts supporting a reasonable inference that each director either "harbored self-interest adverse to the stockholders' interests, acted to advance the self-interest of an interested party from whom they could not be presumed to act independently, or acted in bad faith." *Id.* at 1180. "[E]ach director has a right to be considered individually" when facing a claim for damages. *Id.* at 1182.

Rostov cannot satisfy *Cornerstone* simply by alleging that Bankes, Hudnall, and Rappon were all Alcon employees and therefore lacked independence. Even assuming their Alcon employment called their independence into question, that does not answer the critical question: whether they "*acted* to advance" Alcon's self-interest instead of Aurion's. *In re BGC Partners, Inc. Derivative Litigation*, 2021 WL 4271788, at *11 (Del. Ch. Sept. 20, 2021) (emphasis added). *That* question must be assessed as to each individual. Rostov must advance well-pleaded facts that the *particular* director acted to advance Alcon's interests in violation of their duties of loyalty to Aurion. *See id.* at *11; *In re Oracle Corp. Derivative*

*Litigation*, 2021 WL 2530961, at *7 (Del. Ch. June 21, 2021). The court therefore must assess each director's real-world conduct, and "'[g]roup pleading' will not suffice." *In re Tangoe*, 2018 WL 6074435, at *12.

The complaint does not come close to clearing this bar. Critically, it does not (and cannot) allege that any of those three directors were members of the Special Committee, whose vote on February 6 actually postponed the IPO. Instead, the complaint merely alleges in conclusory fashion that all three directors were Alcon designees and that they "continually opposed an Aurion IPO." A41 (¶ 88). It sets forth no individualized facts that they *acted* to advance Alcon's interests.

As to Rappon, the complaint alleges only that he was an Alcon executive whom Alcon appointed to the Board in October 2024. It identifies no specific act or decision by Rappon that supposedly constituted a loyalty breach. A38 (¶ 76).

As to Hudnall, the complaint alleges that he was an Alcon executive and that he executed the stockholder written consent replacing Lally with Bankes. A38 (¶ 76). But Hudnall appropriately executed that consent in his capacity as an employee *of Alcon*, not in his capacity as an Aurion director. *See* A1147. Rostov's brief also asserts that Hudnall stated that an IPO was "not going to happen" and described the terms on which Alcon was interested in financing Aurion. Br. 31-32. But that statement is not in his complaint. And, even if it were, it hardly

demonstrates that Hudnall was acting to advance Alcon's interests merely by relaying (or even sharing) Alcon's views to those at Aurion.

As to Bankes, the complaint alleges only that she voted against pursuing an IPO in June 2024 and (according to Deerfield) said that "'we' were voting against" the relevant resolutions. From that statement, Rostov jumps to the conclusion that Bankes was voting based on Alcon's wishes *rather than* her own judgment. A22 (¶ 31). But even assuming that statement occurred, Rostov's leap from it oversteps the bounds of any reasonable inference. Applying the Rule 12(b)(6) standard, the Court of Chancery stated that "[i]t is reasonable to infer that 'we' referred to Bankes and Alcon." Order ¶ 8. But it is quite another to infer from that remark that Bankes had abandoned her duty of loyalty to Aurion—particularly for a decision on which Bankes cast the sole dissenting vote. As the court explained, that "single plural pronoun, without additional facts, is insufficient to overcome the presumption of good faith." Order ¶ 27. And Rostov offers no additional facts in the complaint that could transform Bankes's alleged June 2024 remark into a breach of any duty.

Rather, the complaint's remaining allegations merely lump all three directors together. It asserts hazily that "Bankes, Hudnall and Rappon have continually opposed an Aurion IPO, because it conflicts with Alcon's planned takeover of Aurion." A41 (¶ 88). Those are not the type of individualized allegations of non-

exculpated loyalty breaches that Delaware law requires to state a claim against exculpated directors.

c. The Court of Chancery also rightly held Count II deficient for an additional, independent reason that mirrors a key flaw in Count I: Count II, the court explained, "challenges Board inaction." Order ¶ 26. Rostov's theory as to those three directors was that they "create[d] a three-to-three deadlock" that blocked an IPO by not affirmatively supporting it, and his briefing below characterized the claim as alleging "'conscious inaction.'" Order ¶ 25 (citation omitted). That made it incumbent on Rostov to plead facts "to support an inference that the Director Defendants acted in bad faith by consciously failing to act." Order ¶ 26. But just as the complaint lacked any factual allegations that an IPO was so clearly in Aurion's interest that Alcon and Petrichor had a duty to pursue or not oppose an IPO, it "lacks any allegations" from which the court could reasonably infer that inaction on the IPO at any relevant point embodies bad faith. *Id.* Instead, as the court explained, the complaint "relies on the assumption that pursuing an IPO was the best and only path forward for Aurion." Order ¶ 27. But that is precisely the assumption Rostov needed to plead facts to support. Absent any such allegations, the court could not "substitute [Rostov's] business judgment for that of the Board." *Id.* Instead, it properly presumed that the directors had acted in good faith and concluded that

Rostov's "disagreement" does not "rebut that presumption," much less demonstrate they acted in bad faith. *Id.*

This analysis was also correct. The complaint alleged nothing suggesting that any of the three directors took any actions that undermined an IPO before February 2025. The only director the complaint alleged took a formal step against an IPO was Bankes in June 2024—and she was outvoted. A22 (¶ 31). Apart from that 2024 vote, the complaint alleged no effort by any of the three to "thwart" an IPO before February 2025. The decision to postpone an IPO was made on February 6, 2025, by the Special Committee, whose "process" and "independence" Rostov does not challenge. Order ¶ 23.

The complaint alleged only (at most) nebulous inaction by the Board as a whole in failing to take affirmative steps to pursue an IPO. In particular, Rostov asserted that the Board was in a state of "deadlock," and that this abstract deadlock was designed to "thwart the IPO." A28 (¶ 49). But even that supposed "deadlock" was hypothetical. As the Court of Chancery noted, the complaint did not even "identify any Board decision on which the Board deadlocked." Order ¶ 26. And focusing solely on the "inaction" of not affirmatively pursuing an IPO after February 14, the complaint lacked any concrete allegation that demonstrates that it would have been so much better for Aurion to pursue an IPO that a director's failure to affirmatively pursue that path evinces bad faith. *See* Part I.C.1.b, *supra*.

Rostov does not engage the Court of Chancery's actual holding but rather reframes Count II as a standard-of-review dispute and argues that the court improperly applied the business-judgment rule. Br. 30-33. He misreads the decision. The court held that the Aurion charter's exculpatory provision plus the complaint's group-pleading problems required dismissal. It had no reason to address the standard of review that would otherwise apply because, under this Court's precedent, the exculpatory provision made that irrelevant. *See Cornerstone*, 115 A.3d at 1179-1187. Instead, the Court of Chancery simply recognized that the key assumption underlying Rostov's claim of bad faith was unsupported by pleaded facts and that his own disagreement with the directors' views did not show that they acted in bad faith.

### 2. Rostov Failed To Plead Any Extreme Circumstances That Could Transform Frinzi's Resignation From The Board Into A Breach Of Fiduciary Duty

The Court of Chancery correctly dismissed Count III, which seeks to hold Frinzi liable solely for *resigning* from his Board seat. Directors are ordinarily free to resign. *See Frantz Manufacturing Co.* v. *EAC Industries*, 501 A.2d 401, 408 (Del. 1985). So, as the court explained, "[t]he act of resigning, without more, generally would not give rise to a breach of the duty of loyalty." Order ¶ 28. Resigning *ends*, rather than breaches, a duty of loyalty going forward.

The Court of Chancery considered but found readily distinguishable Rostov's lead authority: a Court of Chancery transcript decision, *In re Puda Coal, Inc. Stockholders Litigation*, C.A. No. 6476-CS (Del. Ch. Feb. 6, 2013), which posited a *possible* exception for certain "extreme circumstances." Order ¶ 29 (quoting *Puda Coal*, C.A. No. 6476-CS, at 23:3-17). In *Puda Coal*, the plaintiffs alleged that directors resigned to cover up a wrongdoer's fraudulent actions. Specifically, the plaintiffs alleged that the directors had full knowledge of wrongdoing that defrauded the company and an opportunity to litigate claims on behalf of the company. *Puda Coal*, C.A. No. 6476-CS, at 16:1-9. But instead the directors resigned—knowingly leaving the company in the fraudster's hands—and then claimed that the lawsuit could not proceed because demand was not futile. *Id.* at 16:9-23. The court was understandably troubled by the directors' overt manipulation to protect a fraudster, as the board seemed to *prefer* to "cause the company [not] to sue or do anything" through their resignations. *Id.* at 23:9-17. The court denied a motion to dismiss under Rules 23.1 and 12(b)(6). Yet even then, *Puda Coal* did not conclude that a fiduciary breach occurred. Rather, it suggested that there "might well" be a breach depending on the facts that ultimately came out. *Id.* at 23:8. As it cautioned:

> [i]f these directors are going to eventually testify that at the time that they quit they believed that the chief executive officer of the company had stolen the assets out from under the company, and they did not cause the company to sue or do anything, but they simply quit, I'm not sure that that's a decision that itself is not a breach of fiduciary duty.

*Id.* at 23:9-16. Nevertheless, the court "sustain[ed] the complaint" based on that possibility. *Id.* at 23:17.

As the Court of Chancery explained here, "Frinzi's resignation does not compare to" the extraordinary scenario in *Puda Coal.* Order ¶ 30. Rostov did not adequately allege "that Frinzi had actual knowledge of wrongdoing at the Company and chose to resign rather than cause the Company to resolve the matter." *Id.* There was nothing for Frinzi to cover up by resigning.

Instead of pointing to any allegations here remotely akin to those in *Puda Coal*, Rostov speculates that Frinzi's connections to Alcon and its leaders and the timing of his resignation show that he was acting to "advance Alcon's interests" at the expense of Aurion's. Br. 34. That is not reasonable inference, but bald and conclusory conjecture. No facts alleged in the complaint support an inference that Frinzi resigned *for the purpose* of empowering Alcon-affiliated directors. The complaint alleges, for example, that Frinzi supported an IPO as Executive Chairman but served on the Special Committee that voted unanimously for the February 6 postponement. *See* A22 (¶ 31), A25 (¶ 41). And it alleges that Alcon's CEO asked Frinzi to resign months earlier and that he resigned shortly after Alcon agreed to buy Petrichor's shares, which gave Alcon a majority stake. A16-17 (¶ 15), A27 (¶ 48). Whatever one might reasonably infer about Frinzi's awareness of the acquisition or Alcon's desire for his departure, the facts alleged support no inference that Frinzi

sought by resigning to "deadlock the Board" or thwart an IPO, Br. 34, which had already been delayed by the Special Committee.

Even if Rostov could and did allege that Frinzi resigned with the expectation that his departure would preclude an IPO in the immediate future, Count III still fails to state a claim for the same fundamental reason as Counts I and II. Rostov's theory assumes that Frinzi's fiduciary duty obligated him to support an IPO at that time, but the complaint pleads no facts to support that assumption by establishing that an IPO was so clearly the best path for Aurion that opposing it would be disloyal. Frinzi could well have believed, mere days after the Special Committee had voted unanimously to postpone the IPO, that an IPO was still not the best next step for Aurion at that juncture for any number of reasons. Just as for Rostov's other claims, Count III utterly lacks well-pleaded facts establishing a fiduciary duty to pursue the IPO that Rostov personally prefers.

## CONCLUSION

This Court should affirm the Court of Chancery's dismissal of Rostov's complaint.

*Of Counsel*:

GIBSON, DUNN & CRUTCHER LLP

Monica K. Loseman
John D. W. Partridge
1900 Lawrence Street, Ste. 3000
Denver, CO 80202-2111
(303) 298-2211

Jonathan D. Fortney
Mark H. Mixon, Jr. (#6252)
200 Park Avenue
New York, NY 10166-0193
(212) 351-4000

Jonathan C. Bond
John S. Acton
1700 M Street, N.W.
Washington, D.C. 20036-4504
(202) 955-8535

*Attorneys for Defendants-Below/Appellees Alcon Research, LLC, Jeannette Bankes, Thomas Hudnall, Joe Rappon, and Thomas Frinzi*

COVINGTON & BURLING LLP

Benjamin J. Razi
850 Tenth Street, NW
Washington, D.C. 20001
(202) 662-5463

Robert C. Gianchetti
620 Eighth Avenue
New York, NY 10018
(212) 851-1159

*Attorneys for Defendants-Below/Appellees Petrichor Opportunities Fund I LP, and Petrichor Opportunities Fund I Intermediate LP*

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

*/s/ D. McKinley Measley*
D. McKinley Measley (#5108)
Elizabeth A. Mullin Stoffer (#6380)
Jacob M. Perrone (#7250)
1201 North Market Street, 16th Floor
Wilmington, DE 19801
(302) 658-9200
dmeasley@morrisnichols.com
emullin@morrisnichols.com
jperrone@morrisnichols.com

POTTER ANDERSON & CORROON LLP
Thomas Brad Davey (#5094)
1313 North Market Street
Wilmington, DE 19801
tdavey@potteranderson.com
(302) 984-6021

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## CERTIFICATE OF SERVICE

I hereby certify that, on October 12, 2026, a copy of the foregoing *Appellees' Answering Brief* was served by File & Serve*Xpress* on the following attorneys of record:

Marcus E. Montejo
Kevin H. Davenport
John G. Day
Kirsten M. Valania
PRICKETT, JONES & ELLIOTT, P.A.
1310 King Street
Wilmington, DE 19801

T. Brad Davey
POTTER ANDERSON & CORROON LLP
1313 North Market Street, 6th Floor
Wilmington, DE 19801

David J. Margules, Esquire
Alan C. Cardenas-Moreno, Esquire
BALLARD SPAHR LLP
222 Delaware Avenue, 10th Floor
Wilmington, DE 19801

David E. Ross
Eric D. Selden
ROSS ARONSTAM & MORITZ LLP
Hercules Building
1313 No. Market Street, Suite 1001
Wilmington, DE 19801

Catherine A. Gaul
Elizabeth C. Greene
ASHBY & GEDDES, P.A.
500 Delaware Avenue, 8th Floor
Wilmington, Delaware 19801

*/s/ Jacob M. Perrone*
Jacob M. Perrone (#7250)