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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 REPLY BRIEF

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NATURE OF PROCEEDINGS

As Defendants repeatedly contend in their Answering Brief, plaintiff and appellant David Rostov needs "more" to meet the reasonably conceivable standard for stating a claim under *Central Mortgage Company v. Morgan Stanley Mortgage Capital Holdings LLC*[1] and Court of Chancery Rule 12(b)(6).[2]

There is more. The Answering Brief does not address:

- Alcon's CEO, David Endicott, telling 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."[3]
- When the Special Committee voted to postpone the IPO on February 6, 2025, the Special Committee members "expressed their continued support for an eventual IPO."[4]
- The word *postpone* means "to put off to a later time."[5]

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[1] 27 A.3d 531 (Del. 2011).

[2] *See, e.g.*, Answering Brief at 6 ("resigning a board position without more does not breach a fiduciary duty"); *id.* at 23 ("absent circumstances triggering a more searching standard of review"); *id.* at 29–30 ("Rostov supplies no more than conjecture . . . .").

[3] Opening Brief at 10 (citing A22–A23 ¶¶ 32–33); *accord id.*at 28.

[4] *Id.* at 13 (citing A25 ¶ 41); *accord id.*at 26.

[5] *Postpone*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/postpone.

- A voting agreement amongst Aurion's major stockholders required notification of stock sales, but Alcon and Petrichor provided no notice when they completed their sale agreement on February 14, 2025.[6]
- Thomas Frinzi's resignation from the Board was delivered *at 9:36 p.m.* on Friday, February 14, 2025, which was Valentine's Day.[7]
- Minutes later that Friday night, *at 9:42 p.m.*, the written consent removing Patrick Lally from the Board was delivered to Aurion.[8] This completed, in the words of Deerfield, the "Valentine's Day massacre."[9]
- Deerfield, which had a Board designee that sat on the Special Committee, alleged in a verified pleading submitted to the Court of Chancery later that month that, absent Alcon's interference, "Aurion is expected to re-audit its financials, as is required, and to proceed with an IPO during the next cycle later this year."[10]

When these allegations in the Complaint are considered along with the allegations Defendants acknowledge—or even by themselves—it is clear that Rostov has stated a claim that Alcon, its employees that sat on Aurion's Board, and

[6] Opening Brief at 18 (citing A741 ¶ 53).

[7] *Id.* at 15 (citing A27 ¶ 48).

[8] *Id.* (citing A27 ¶ 48).

[9] A722 ¶ 7.

[10] Opening Brief at 27.

Petrichor breached their fiduciary duties by thwarting Aurion's IPO. It is not just reasonably conceivable, it is the strongest inference from the allegations pled.

Applying inapt case law to the selected portions of the Complaint, Defendants portray this action as "sour grapes" stemming from an ordinary business decision "over the best way to finance the company's future operations."[11] But Aurion's independent directors already determined the best way to finance the company's future operations: an IPO. Aurion itself sued Alcon to stop the interference with the IPO, and won. The Defendants then took extraordinary, overt measures to stop the IPO. So Deerfield, then Aurion's second-largest stockholder (after Alcon), immediately sued. When they sold their stock, Rostov, now Aurion's second-largest stockholder, immediately sued. Notably, oral argument in the appeal of the Aurion-Alcon Action, and the commencement of Deerfield's and Rostov's actions, all took place after the Special Committee postponed the IPO on February 6, 2025.

It is *not* reasonably conceivable that all of that ligation was over a "speculative" IPO, as Defendants claim.[12] To contend otherwise, Defendants are forced to rely on their bowdlerized version of the Complaint. But on a motion to dismiss, "*all* well-pled allegations and the reasonable inferences flowing from those

[11] Answering Brief at 1, 4.

[12] *Id.* at 5.

allegations are accepted as true."[13] When that standard is applied to the Complaint, it is reasonably conceivable that Rostov has stated a claim. Accordingly, the judgment of the Court of Chancery should be reversed.

[13] *Valley Joist BD Hldgs., LLC v. EBSCO Indus., Inc.*, 269 A.3d 984, 988 (Del. 2021) (emphasis added).

ARGUMENT

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

A. It Is Reasonably Conceivable that After Aurion Filed Suit to Affirm its Right to Pursue an IPO, Retained Two Law Firms and Four Underwriting Banks, Filed a Form S-1, and, with a Major Stockholder, Told Delaware Courts that Aurion Was Pursuing an IPO, that Aurion was Pursuing an IPO.

To avoid scrutiny of Alcon and Petrichor's actions, Defendants invoke the business judgment rule. Defendants quote *Maffei v. Palkon*,[14] writing: "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.'"[15]

But in *Maffei v. Palkon*, this Court held the business judgment rule created a presumption "that in making a business decision the *directors of a corporation* acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the corporation."[16] *Maffei*, and other caselaw cited by Defendants to suggest that the business judgment standard of review applies to

[14] 339 A.3d 705, 728 (Del. 2025).

[15] Answering Brief at 23–24.

[16] 339 A.3d at 728 (emphasis added) (quoting *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986)).

Alcon and Petrichor, is inapposite in a case about controlling stockholder intervention.[17]

Delaware caselaw has traditionally not applied a standard of review to controlling stockholder intervention to thwart board operations, although the Court of Chancery recently applied enhanced scrutiny to controller intervention in *In re Sears Hometown & Outlet Stores, Inc. Stockholder Litigation*.[18] In the Order now under appeal, the Court of Chancery did not apply a standard of review.

But the standard of review is beside the point, because the Court of Chancery focused on the effects of Alcon and Petrichor's intervention, and found it was not reasonably conceivable that there was a viable IPO to thwart after the Special Committee postponed the IPO.

Defendants either ignore the overwhelming evidence that an IPO was being pursued after February 6, 2025, or just apply an adjective to the acknowledged

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[17] *Leo Investments Hong Kong Ltd. v. Tomales Bay Capital Anduril III, L.P.*, --- A.3d ---, 2026 WL 1993637, at *5 (Del. July 10, 2026), dealt with a fund principal who was alleged to have acted dishonestly when dealing with a third party, and who then expelled a limited partner in order to benefit the fund. In *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 722 (Del. 1971), this Court held the business judgment rule applied to directors' decision to issue a dividend that was paid, *pro rata*, to both the controlling stockholder and minority stockholders. Neither case involves the situation here, where controlling stockholders intervened to subvert board action.

[18] *In re Sears Hometown & Outlet Stores, Inc. S'holder Litig.*, 309 A.3d 474, 512–16 (Del. Ch. 2024), *modified on reargument*, 2024 WL 3555781 (Del. Ch. July 2, 2024).

averments in the Complaint. For example, Defendants contend a representation to this Court in a letter from counsel at Delaware's largest law firm, signed pursuant to Rule 12, that "Aurion remains fully committed to proceeding with a Qualified IPO at the earliest feasible opportunity," is "opaque."[19] Per Defendants, Deerfield's under-oath averment in its complaint that the Special Committee members "expressed their continued support for an eventual IPO" when voting to postpone the IPO on February 6, 2025, is an allusion: "Rostov also alludes to certain other stakeholders' expressions of 'continued support for an eventual IPO.'"[20]

Elsewhere, Defendants concede the IPO was scheduled to take place within months of the February, 2025, postponement.[21] In fact, as noted in the Opening Brief (but omitted from the Answering Brief), Deerfield, which had a director designee, alleged in its February 24, 2025, complaint, that absent Alcon's interference, "Aurion is expected to re-audit its financials, as is required, and to proceed with an IPO during the next cycle later this year,"[22] which would be the fall of 2025. The timing of the IPO was not speculative.

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[19] Answering Brief at 30.

[20] *Id.* at 31.

[21] *See id.* at 1 ("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.").

[22] A740 ¶ 50.

But Defendants want the details of the IPO they foiled, contending the Complaint "does not allege, for instance, the IPO's expected offering share price, anticipated proceeds, cost of capital, or investor commitments."[23] Defendants' argument shows how far afield they have strayed from the reasonably conceivable pleading standard. A comparison to claims for tortious interference with a prospective business relationship is apt; for those claims, a complaint does not need to contain numerical details of the thwarted business deal because prospective deals are "by definition, not as susceptible of definite, exacting identification as is the case with an existing contract."[24] Here too, Rostov does not have every detail of the IPO, because Defendants stopped it. Indeed, at trial Rostov would not be required to prove damages with such certainty.[25] But for the Complaint, all Rostov was required

[23] Answering Brief at 28.

[24] *Coretel Am., Inc. v. Oak Point P'rs, LLC*, 2022 WL 2903104, at *10 (Del. Super. July 21, 2022) (quoting *World Energy Ventures, LLC v. Northwind Gulf Coast LLC*, 2015 WL 6772638, at *7 (Del. Super. Nov. 2, 2015)); *see also World Energy Ventures* , 2015 WL 6772638, at *8 (finding tortious interference claim adequately pled when plaintiff alleged it had been wrongfully led to withhold funding solicitation, so funding terms were never reached).

[25] *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1131 (Del. 2015), *as corrected* (Dec. 28, 2015) ("Where the injured party has proven the fact of damages—meaning that there would have been some profits from the contract—less certainty is required of the proof establishing the amount of damages. In other words, the injured party need not establish the amount of damages with precise certainty 'where the wrong has been proven and injury established.'" (emphasis omitted)) (quoting *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *15 (Del. Ch. Oct. 23, 2002)).

to do is plead damages generally.[26] Defendants' argument that an IPO has to be priced and scheduled before a claim about it can vest is meritless.

To effect its IPO, Aurion initiated the Aurion-Alcon Action to obtain a judicial declaration that it could proceed with an IPO. It retained two law firms and four underwriting banks—spending hundreds of thousands of dollars, if not millions, pursuing the IPO.[27] It filed a Form S-1.[28] On February 11, 2025, Aurion's counsel told this Court in a letter that "Aurion remains fully committed to proceeding with a Qualified IPO at the earliest feasible opportunity."[29] On February 12, 2025, Aurion's counsel presented argument before this Court in support of Aurion's right to proceed with its IPO.[30] On February 24, 2025, Deerfield filed its verified complaint, alleging: "Assuming that Alcon is not successful in obstructing the effort, Aurion is expected to re-audit its financials, as is required, and to proceed with an

[26] *See Travelers Cas. & Sur. Co. of Am. v. Blackbaud, Inc.*, 361 A.3d 59, 69–70 (Del. 2026) ("Once the plaintiff has alleged facts raising a reasonable inference that damages were caused by the defendant, damages may be pled generally.").

[27] A842–43.

[28] A842.

[29] A781.

[30] A26 ¶ 42.

IPO during the next cycle later this year."[31] It is reasonably conceivable that Aurion was pursing an IPO on February 14 and 16, 2025.[32]

B. Defendants' Argument that Unconflicted Directors Who Pursue an IPO are not Presumed to Act in the Corporation's Best Interests Should be Rejected.

Defendants' argument that "Rostov failed to plead facts showing that an IPO was clearly in Aurion's best interest"[33] turns Delaware law on its head. As Defendants repeatedly note, no one challenges the Special Committee's independence or process.[34] It is well established that, in these circumstances where the business judgement rule applies, "a court will not second guess the decisions of disinterested and independent directors."[35] But that is exactly what Defendants now

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[31] A740 ¶ 50.

[32] In a footnote, Defendants assert Count I fails as to Petrichor, because it was not a controlling stockholder. Answering Brief at 32 n.3. This ignores the fact that after the February 14, 2025, agreement for Petrichor to sell its Aurion stock to Alcon, which did not immediately close, Alcon and Petrichor were controlling stockholders together, owning 54% of Aurion's equity, and coordinated the change in Board compositions, as evidenced by the delivery of a joint written consent changing the Board composition. A26 ¶ 44; A1143. This combined majority ownership and coordination makes Alcon and Petrichor a control group. *See Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 251 (Del. 2019).

[33] Answering Brief at 25 (capitalization altered).

[34] *Id.* at 13, 18, 29, 39. Rostov does not challenge the Special Committee's independence or diligence. But when it voted to postpone an IPO, it was unaware that Alcon and Petrichor would ensure that no IPO would ever occur—indeed, the sale of Petrichor's stock to Alcon was not revealed to other major stockholders, despite notification obligations in a voting agreement. *See* Opening Brief at 16, 18.

[35] *In re Match Grp., Inc. Deriv. Litig.*, 315 A.3d 446, 459 (Del. 2024).

ask the Court to do, under the guise of assertions that Rostov has not adequately buttressed the Special Committee's decision.

Because no one can undermine the Special Committee's independence and process, Defendants seek to cut off presumptions afforded to the Special Committee's determinations as of February 6, 2025, when the Special Committee voted to postpone the IPO. But, as addressed in Section I.A., the Special Committee postponed the IPO until the earliest feasible opportunity, so the IPO was still in the works when Alcon and Petrachor intervened and dissolved the Special Committee, leaving the IPO in the hands of the half-Alcon-employee Board. Nothing suggests conditions had changed or the Special Committee had reversed course—indeed, Deerfield's complaint, filed after February 14, 2025, avers Aurion was still working towards an IPO—making it reasonably conceivable that an IPO remained in Aurion's best interests when Defendants intervened.

As a fallback, Defendants contend the Order contains an independent holding that there was no allegation that an IPO was in Aurion's best interest, dismissed the Complaint on that basis, and that basis for dismissal is not challenged on appeal.[36] In reality, the Court of Chancery held:

> The Complaint seems to fault the Board for not pursuing an IPO after a concededly disinterested and independent Special Committee made the decision to postpone it. The

[36] Answering Brief at 18, 25.

> Complaint alleges that "general market conditions remained favorable" for the IPO after the Special Committee's decision. But as of February 6, Aurion could not re-launch any IPO efforts until Aurion secured audited financial statements for year-end 2024. That was months away. And the Complaint pleads 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. In essence, Plaintiff seeks to hold Alcon and Petrichor liable as controllers for Aurion's inaction. Even assuming that claim is legally viable, then more must be alleged to support it. The Controller Claim is dismissed.[37]

Section I of the Opening Brief is devoted to explaining why this holding is wrong. But Defendants take the ruling and divide it into two separate rulings in their Answering Brief: "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."[38]

The case Defendants rely upon for their waiver argument, *In re COVID-Related Restrictions on Religious Services*,[39] shows how off the mark Defendants'

[37] Order ¶ 24 (citations omitted).

[38] Answering Brief at 2.

[39] 326 A.3d 626 (Del. 2024).

waiver claim is. In *COVID-Related Restrictions*, in the Superior Court's opinion dismissing a declaratory judgment claim, the court held in section III.A. of the opinion that there was no case of controversy to justify a declaratory judgment.[40] In Section III.B., the court held the plaintiffs did not have standing to assert their claims.[41] On appeal, the appellants' brief had a section dedicated to the standing holding, but no section regarding the case-or-controversy holding. Instead, in the standing section of the opening brief, in a single sentence, the appellants asserted the case-or-controversy holding was also wrong, without describing the Superior Court's analysis or citing to the decision the Superior Court applied. This Court held any challenge to the case-or-controversy holding was waived.[42]

In contrast, here the Opening Brief quotes the part of the Order Defendants contend is unchallenged.[43] It details the Special Committee's formation, and chronicles its history from its formation to the IPO's postponement, and to its dissolution.[44] And instead of accepting Defendants' paradigm—where Rostov has to prove an IPO suddenly became undesirable between February 6 and February 14,

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[40] *In re COVID-Related Restrictions on Religious Servs.*, 302 A.3d 464, 492–96 (Del. Super. 2023), *aff'd*, 326 A.3d 626 (Del. 2024).

[41] *Id.* at 496–97.

[42] *COVID*, 326 A.3d at 642–43 (Del. 2024).

[43] Opening Brief at 24.

[44] *Id.* at 8–18.

2025—the Opening Brief correctly notes: "Nothing suggests—nor is it contended—that Alcon or its designees believed an IPO was not in the best interests of Aurion."[45]

The Opening Brief's treatment of the part of the Order addressing Count I as a whole, without splitting one sentence into two sections as the Answering Brief does, is not a waiver.

[45] *Id.* at 3.

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

A. Bankes, Hudnall, and Rappon Were Conflicted Directors who Put Alcon's Interests Above Aurion's.

In the Opening Brief, Rostov explained that as Alcon employees sitting on the Aurion Board, Bankes, Hudnall, and Rappon were dual fiduciaries who were obligated to act in Aurion's best interests,[46] citing *Weinberger v. UOP, Inc*.[47] and *In re Trados Inc. Stockholder Litigation.*[48] Defendants to not refute or address this.

Instead, defendants contend *In re Cornerstone Therapeutics Inc., Stockholder Litigation,*[49] controls, suggesting Rostov has to plead "individualized facts" to show the Alcon Directors acted in bad faith.[50] But *Cornerstone*—wherein the Delaware Supreme Court held claims against *independent directors* should be dismissed if there is no allegation those independent directors acted in bad faith—is inapposite when it comes to the Alcon Directors, because they are not independent directors unaffiliated with the conflicted controlling stockholder.[51] Indeed, the Court of

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[46] Opening Brief at 4, 31.

[47] 457 A.2d 701, 710 (Del. 1983).

[48] 73 A.3d 17, 47 (Del. Ch. 2013).

[49] 115 A.3d 1173 (Del. 2015).

[50] Answering Brief at 3.

[51] 115 A.3d at 1176 ("In this decision, we hold that even if a plaintiff has pled facts that, if true, would require the transaction to be subject to the entire fairness standard of review, and the interested parties to face a claim for breach of their duty of loyalty,

Chancery only cited *Cornerstone* for a general proposition that the Director Defendants are protected by the exculpatory provision in Aurion's certificate of incorporation, so Rostov must plead bad-faith claims against them.[52] It did not (and could not) state that the Alcon Directors were unconflicted.

Next, Defendants attempt to avoid the standard-of-review question altogether, claiming the Court of Chancery never addressed the issue.[53] It is true that the Court of Chancery did not announce its standard of review. But the court held: "The Director Claim also relies on the assumption that pursuing an IPO was the best and only path forward for Aurion. Delaware law does not permit the court to substitute Plaintiff's business judgment for that of the Board. Under Delaware law, directors are presumed to act in good faith, and a minority stockholder's disagreement with a Board's decision does not, standing alone, rebut that presumption."[54] For this, the Court of Chancery cited *Warshaw v. Calhoun*, where this Court describes the

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the independent directors do not automatically have to remain defendants. When the independent directors are protected by an exculpatory charter provision and the plaintiffs are unable to plead a non-exculpated claim against them, those directors are entitled to have the claims against them dismissed . . . .").

[52] Order ¶ 26. The other decision on which Defendants rely, *In re BGC Partners, Inc. Derivative Litigation*, 2021 WL 4271788 (Del. Ch. Sept. 20, 2021), is inapposite, as the Court did not determine the directors were conflicted—finding one was not, and the Court could not determine if the other two were independent—and was resolving a summary judgment motion after discovery. Answering Brief at 35.

[53] Answering Brief at 40.

[54] Order ¶ 27.

business judgment rule: "The acts of directors are presumptively acts taken in good faith and inspired for the best interests of the corporation, and a minority stockholder who challenges their Bona fides of purpose has the burden of proof."[55]

As explained in the Opening Brief, this application of the business judgment rule to the Alcon Directors was an error, because of the Alcon Directors' conflicting positions.[56] This is why Defendants' assertion that "Rostov's mere disagreement with the directors cannot establish bad faith"[57] is meaningless. "When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain."[58] Moreover, it was not just Rostov who disagreed with the Alcon Directors; every single unconflicted Aurion director, and major stockholder besides Alcon, wanted to pursue an IPO.

Defendants also resort to calling the allegations against the Alcon Directors "group pleading," and once again allege waiver because the Opening Brief does not quote the one sentence in the Order that used the term, although the dismissal is not

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[55] 221 A.2d 487, 493 (Del. 1966); *see also Lynch v. Vickers Energy Corp.*, 429 A.2d 497, 506 (Del. 1981) (citing *Warshaw* for the business judgment rule), *overruled in part by Weinberger*, 457 A.2d 701 (Del. 1983).

[56] Opening Brief at 4, 31.

[57] Answering Brief at 3.

[58] *Weinberger*, 457 A.2d at 710.

explicitly based on group pleading.[59] Defendants' waiver argument ignores the Opening Brief's descriptions of what Bankes, Hudnall, and Rappon are alleged to have done and their affiliations with Alcon.[60]

The Complaint does not contain group pleading; it is a pleading about a group of Alcon employees who sat on the Aurion Board. When defendants act as a group, they can be grouped together in the pleadings.[61] The main case Defendants cite for their group-pleading argument, *In re Tangoe, Inc. Stockholders Litigation*, confirms this, refusing to dismiss claims against directors that are captured in one defined term—the "Director Defendants"—with minimal analysis of what each director did, to the point that one defendant (Golding) is only individually mentioned in the introductory portion of the opinion where parties are identified.[62]

In contrast, the Complaint contains allegations that Bankes, when voting against the formation of the Special Committee to lead the IPO in 2024, stated that

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[59] Answering Brief at 34 (quoting Order ¶ 26).

[60] Opening Brief at 31–33.

[61] *Principal Growth Strategies, LLC v. AGH Parent LLC*, 2024 WL 274246, at *20 (Del. Ch. Jan. 25, 2024) ("The defendants next argue that the complaint engages in impermissible group pleading. The defendants contend that the complaint does not spell out allegations against each individual entity. That is generally true but beside the point. The complaint pleads that the defendants acted as a group because the defendants participated together in the Agera Transaction.").

[62] 2018 WL 6074435 (Del. Ch. Nov. 20, 2018).

"we" were voting against the resolution, an apparent reference to her and Alcon.[63] 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.[64] He then advised Aurion's CEO that there would not be an IPO, and that Alcon would finance the company on terms that allowed it to acquire Aurion at a time of its choosing.[65] Hudnall's promise came true, and there has been no IPO.

Defendants note that Hudnall executed the written consent in his capacity as an Alcon employee, and that Hudnall was "merely" relaying or sharing "Alcon's views," and come to the conclusion that Hudnall must have otherwise acted independently when sitting on the Aurion Board.[66] That is one inference, but not a reasonable one. Combined with Bankes's "we" vote, displaying her view that she was a constituent director, Hudnall's participation in the creation of the February 14,

[63] A22 ¶ 31.

[64] A27 ¶ 48; A28 ¶ 48; A38 ¶ 76; A750 ¶ 72. Bankes had left the Board after first voting against the IPO.

[65] A724 ¶ 9.

[66] Answering Brief at 36–37. Defendants contend the allegation about Hudnall telling Aurion's CEO that there will be no IPO does not appear in Rostov's Complaint, but in Deerfield's. Rostov's Complaint is based on Deerfield's complaint (Rostov had tried to intervene to prosecute Deerfield's derivative case after Deerfield sought to dismiss it), the Court of Chancery and this Court can take judicial notice of filings in other cases, D.R.E. 202(d)(1)(C), and Rostov included this allegation in his opposition to the motion to dismiss in the Court of Chancery, A698–99.

2025, deadlock, and the undeniable fact that the long-planned IPO that was only months away never occurred, the reasonable inference is that Hudnall, along with Bankes and Rappon, were acting for Alcon's benefit when exercising their duties as Aurion directors.

Finally, Defendants attempt to defend the Alcon Directors by contending the claim against them is based upon inaction.[67] Defendants' argument appears plausible when most of the allegations regarding Aurion's efforts to go public, especially regarding the continuing efforts after February 6, 2025, are elided, as in the Answering Brief. But when *all* of the allegations are considered, the reasonable inference is that the Alcon Directors stopped the only-months-away IPO. Thus, it is reasonably conceivable that the Alcon Directors acted to advance Alcon's interests.[68]

B. The Timing of Frinzi's Resignation Makes it More than Reasonably Conceivable that he Was Aiding Alcon.

In the Answering Brief, Defendants fail to engage with the most telling allegations regarding Frienzi's resignation: that it occurred contemporaneously with the delivery of the written consent, and those two actions, together, created the Board

[67] Answering Brief at 39.

[68] For this reason, even if the Complaint is viewed through the lens of *Cornerstone*, it states a claim against the Alcon Directors, and *In re Oracle Corp. Derivative Litigation*, 2021 WL 2530961, at *7 (Del. Ch. June 21, 2021), where the Court dismissed claims against a conflicted director who did not act to promote the interests of the controller, is inapposite.

deadlock. This, especially combined with Frinzi's ties to Alcon,[69] and admission that Alcon had pressured him to resign,[70] leads to the inference that Frinzi choreographed his resignation with, and to benefit, Alcon.

Defendants try to distinguish *Puda Coal*,[71] but cannot. As Defendants note, "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."'"[72] What occurred here is little different: Frinzi resigned, giving the principal suspected wrongdoer, Alcon, a veto over the IPO it long opposed. The only way Defendants can contend otherwise is to ignore the well-pled allegations regarding Frinzi's resignation.

[69] A16 ¶ 15; A727 ¶ 20;

[70] A17 ¶ 15; A728 ¶ 20.

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

[72] Answering Brief at 20 (quoting Order ¶ 29, and *Puda Coal*, C.A. No. 6476-CS, at 6:16-17).

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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