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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEFFERY J. SHELDON and ANDRAS KONYA, M.D., PH.D., Plaintiffs Below-Appellants, v. PINTO TECHNOLOGY VENTURES, L.P., PINTO TV ANNEX FUND, L.P., PTV SCIENCES II, L.P., RIVERVEST VENTURE FUND I, L.P., RIVERVEST VENTURE FUND II, L.P., RIVERVEST VENTURE FUND II (OHIO), L.P., BAY CITY CAPITAL FUND IV, L.P., BAY CITY CAPITAL FUND IV CO-INVESTMENT FUND, L.P., REESE TERRY and CRAIG WALKER, M.D., Defendants Below-Appellees.	No. 81,2019 APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 2017-0838-MTZ

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

The underlying company at issue in this action – IDEV Technologies, Inc. ("IDEV") – was the brainchild of Plaintiffs Below-Appellants, Jeffery J. Sheldon and Andras Konya, M.D., Ph.D ("Plaintiffs"). Both Plaintiffs contributed valuable intellectual property that was the basis for IDEV's acquisition in 2013, and Mr. Sheldon was the founder and initial Chief Executive Officer of IDEV. Plaintiffs were also significant stockholders before the Defendants Below-Appellees unfairly diluted the economic and voting interests of Plaintiffs. Plaintiffs filed a complaint alleging that the Venture Capital Defendants[1] constituted a control group, thereby stating a direct claim under this Court's decision in *Gentile v. Rossette,* 906 A.2d 91 (Del. 2006).

The Court of Chancery misapplied the pleading standard and dismissed Plaintiffs' claims as derivative based on erroneous interpretations and applications of Delaware law. Specifically, the Court of Chancery erroneously determined that the Venture Capital Defendants did not constitute a control group, despite the well-pleaded facts taken from the allegations of the complaint and documents integral to the complaint demonstrating (i) a binding contractual obligation between the

[1] The "Venture Capital Defendants" refers to Defendants Below-Appellees Pinto Technology Ventures, L.P., Pinto TV Annex Fund, L.P., PTV Sciences II, L.P., RiverVest Venture Fund I, L.P., RiverVest Venture Fund II, L.P., Bay City Capital Fund IV, L.P. and Bay City Capital Fund IV Co-Investment Fund, L.P.

Venture Capital Defendants by which they acted together to control the IDEV board, (ii) a long and close history of the Venture Capital Defendants investing together in similar companies and serving on the same boards, and (iii) the Venture Capital Defendants' collective ownership of a controlling block in IDEV stock. Based on these legal errors, Plaintiffs seek reversal of the Court of Chancery's judgment.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in holding that Plaintiffs did not allege the existence of a control group when the well-pled factual allegations of the complaint and documents incorporated by reference in the complaint establish that the Venture Capital Defendants (i) collectively controlled over 60% of IDEV's outstanding shares of stock, (ii) entered into a Voting Agreement granting them direct control over three of IDEV's seven board seats (for a total of four) and indirect control over an additional two board seats (in addition to their control over the CEO selection, who also occupied a board seat), (iii) invested in tandem in similar companies at the same time they invested in IDEV, and (iv) were simultaneously appointed directors of other companies. These well-pled facts and supporting documents, under the Court's holding in *Gentile*, establish direct claims that should not have been dismissed.

STATEMENT OF FACTS

A. The Parties and Relevant Non-Parties

At all times relevant to Plaintiffs' claims, Jeffery Sheldon ("Sheldon") and Andras Konya ("Konya") were stockholders of IDEV. A24. Konya is the co-inventor of all of the initial intellectual property relating to vascular stents, and more than thirty additional items, licensed to IDEV in 2000 and 2002 by MD Anderson Cancer Center.[2] A24. Sheldon was the founder of IDEV, a key early stage investor in the Company and President and CEO of IDEV from its inception in 1999 through 2006. A24. Sheldon was President & COO of IDEV from 2006 through 2008 and an IDEV Senior Advisor/Consultant from 2008 through 2009. Sheldon was the first named inventor on 11 issued U.S. Patents, several Patent Applications still being prosecuted, numerous issued Foreign counterpart Patents and Patent Applications – along with Konya's initial intellectual property, all serving as the basis for IDEV's acquisition in 2013. A1069.

Defendants Pinto Technology Ventures, L.P. ("Pinto Technology"), Pinto TV Annex Fund, L.P. ("PTV Annex") and PTV Sciences II, L.P. ("PTV II") each is a Delaware limited partnership with a principal office in Houston, Texas. Pinto

[2] As part of the license arrangement, the licensor accepted a smaller royalty percentage in exchange for shares of IDEV stock, which was distributed to Konya and others. A24.

Technology, PTV Annex and PTV II are affiliates and are referred to collectively herein as "PTV." A24-25.

Defendants RiverVest Venture Fund I, L.P. ("RiverVest I") and RiverVest Venture Fund II, L.P. ("RiverVest II") are both Delaware limited partnerships with a principal office in St. Louis, Missouri. Defendant RiverVest Venture Fund II (Ohio), L.P. ("RiverVest Ohio") is a Delaware limited partnership with a principal office in Cleveland, Ohio. RiverVest I, RiverVest II and RiverVest Ohio are affiliates and are referred to collectively herein as "RiverVest." A25.

Defendants Bay City Capital Fund IV, L.P. ("Bay City Capital") and Bay City Capital Fund IV Co-Investment Fund, L.P. ("Bay City Co-Investment") are both Delaware limited partnerships with a principal office in San Francisco, California. Bay City Capital and Bay City Co-Investment are affiliates and are referred to collectively herein as "Bay City." A25.

Defendant Reese Terry ("Terry"), at all times relevant to Plaintiffs' claims, was a Director of IDEV. Defendant Craig Walker, M.D. ("Walker" and together with Terry, the "Director Defendants") was a Director of IDEV from September 2006 to September 2013. A25. Despite being designated as the so-called "Independent" directors, both Terry and Walker were "Key" and/or "Significant Shareholders" of IDEV. A299, A302, A303.

Non-party Christopher Owens ("Owens"), at all times relevant to Plaintiffs' claims, was the President and Chief Executive Officer of IDEV. Owens also served as a Director of IDEV from November 2009 to September 2013. A25.

Non-party William W. Burke ("Burke"), at all times relevant to Plaintiffs' claims, was the Chief Financial Officer of IDEV. A26.

B. Certain IDEV Stockholders Enter Into A Shareholders Agreement

In late 2009, IDEV hired Owens as President and Chief Executive Officer and Burke as Chief Financial Officer. A28. While both Owens and Burke were offered rights to shares of IDEV common stock in connection with their employment, at the time the Company did not have sufficient authorized shares to deliver. A28.

Prior to 2010, certain IDEV stockholders, including Sheldon, Konya, PTV, RiverVest and Bay City, entered into the Shareholders Agreement. A28, A254-A305. As of early 2010, the Shareholders Agreement designated Sheldon as a "Key Shareholder" and a "Significant Shareholder," which provided Sheldon with certain rights relating to the prospective sale of IDEV shares by other parties to the Shareholders Agreement and preemptive rights to acquire newly issued IDEV shares to maintain his approximate 2.5% holdings in the Company. A299, 302. Konya was designated in the Shareholders Agreement as a "Key Shareholder," with similar rights. A299. The Shareholders Agreement could be amended only by the vote of

60% of the holders of various classes of IDEV stock and with the Company's consent. A269-A270 (§ 18).

Prior to 2010, IDEV had offered shares of Company common stock to various IDEV employees and had agreed to finance their purchases through full recourse promissory notes partially secured by the common stock so acquired. A28. The total amount of these notes was more than $1.7 million as of year-end 2009, with the largest such note (more than $375,000) having been executed by Owens. A29.

C. The Venture Capital Defendants Acquire Control Over IDEV

PTV, RiverVest and Bay City promote themselves as venture capital funds whose businesses involve investing in companies such as IDEV in hopes of earning substantial returns. A29. The Venture Capital Defendants' close relationships with each other both within IDEV and outside of IDEV are more than sufficient to support an inference that, acting together, they controlled the Company as a group.

First, by 2010, the Venture Capital Defendants had acquired substantial holdings of IDEV preferred stock and collectively controlled over 60% of the Company's issued and outstanding shares. The Venture Capital Defendants' preferred stock was convertible to common stock of the Company under certain circumstances. A29.

Second, pursuant to a voting agreement executed in connection with their investments, the Venture Capital Defendants directly controlled three seats on the

IDEV Board of Directors. A265 (§ 7(a)). Two additional directors were then appointed by the three directors controlled by the Venture Capital Defendants -- *not* the Company's stockholders. A265 (§ 7(a)(v)). In 2010, these two so-called "Independent" Board seats were filled by defendants Terry and Walker. The Venture Capital Defendants' hand-picked CEO (Owens) filled an additional Board seat. A29. If that were not enough, yet another director (Rick Anderson) affiliated with one of the Venture Capital Defendants was appointed to the Board by the three directors controlled by the Venture Capital Defendants and named Chairman of the Board, giving them total control over the board. A1131, A1193. In sum, the composition of the board at the relevant time period was as follows:

- Rick Anderson (affiliated with PTV Sciences and Chairman of Board); [3]
- Matt Crawford (affiliated with PTV Sciences);
- Jay Schmelter (affiliated with RiverVest Capital);
- Jeanne Cunicelli (affiliated with Bay City Capital);
- Reese Terry ("Significant Shareholder" designated by the Venture Capital Defendants);
- Craig Walker ("Significant Shareholder" designated by the Venture Capital Defendants); and

[3] In addition, Rick Anderson and Jay Schmelter shared director positions in connection with the investment of PTV and RiverVest's in Tryton Medical. A1183.

- Christopher Owens (CEO handpicked by the Venture Capital Defendants). A1131.

Third, the Venture Capital Defendants have had a long and close relationship of investing together for their mutual benefit. In addition to IDEV, the Venture Capital Defendants have made coordinated investments in at least four other companies that Plaintiffs could identify from public sources (and likely many more). Two or more of the Venture Capital Defendants count Cameron Health among their portfolio companies and have participated in a $14 million financing with Tryton Medical, Inc., a $8.25 million financial with Accumetrics, a $28.8 million financing with Accumetrics, Inc., a $42.2 million financial of Calpyso Medical Technologies, Inc. and a $50 million financing of Calypso Medical Technologies, Inc. A1167-A1185.

Fourth, the conversion of the Venture Capital Defendants' IDEV preferred stock holdings to common stock as described below permitted them to collectively act by written consent to amend the Company's Certificate of Incorporation, Shareholders Agreement and other agreements, paving the way for the Venture Capital Defendants to extract economic benefits for their own selfish gain while unfairly diluting Plaintiffs' economic and voting interests. A30.

D. Defendants Conspire to Increase Their Holdings in the Company and Dilute Plaintiffs' Economic and Voting Interests

Through the actions described in the First Amended Complaint, Defendants essentially eliminated Sheldon's approximately 2.5% holdings in the Company and Konya's approximately 1.25% holdings in the Company (as well as the holdings of other IDEV common stockholders) for the purpose of granting options to Owens and Burke for approximately 5% and 1.5% of the Company's shares, respectively, which the Company was previously unable to deliver. A30.

In early 2010, Defendants determined to act in concert to alter IDEV's stock holdings by pooling their interests and executing a written consent for the purposes of: (i) diluting the holdings and voting power of Plaintiffs to the point that they (and other common stockholders) would be nearly wiped out altogether; (ii) permitting only the Venture Capital Defendants and their select affiliates to acquire newly issued IDEV preferred stock; and (iii) delivering IDEV stock to Owens, Burke, Terry and Walker. In doing so, Defendants collectively sought to (and did) dilute Sheldon's and Konya's combined holdings of 3.75% to less than 0.012% of the Company's outstanding shares. A31.

Beginning in mid-July 2010, Defendants took the following concerted actions to accomplish their goals:

- On July 15, 2010, the Venture Capital Defendants, without prior notice to other shareholders, caused the conversion of all IDEV preferred stock (including Sheldon's preferred stock) to common stock. This had

the effect of severely diluting the voting power of Plaintiffs and the other common stockholders.

- On July 15, 2010, the Venture Capital Defendants, leveraging their newly converted shares of IDEV common stock, acted together by written consent to amend the Company's Certificate of Incorporation to (i) effect a reverse stock split of all IDEV common stock to reduce the number of common stock shares by a 100 to 1 factor, and (ii) authorize the issuance of new shares of IDEV preferred stock.

- On July 15, 2010, the Venture Capital Defendants, with the approval and acquiescence of their majority-controlled Board of Directors, then exploited their collective control over IDEV to cause the Company to amend the Shareholders Agreement to eliminate Sheldon (and other similarly situated shareholders) as "Significant Shareholders" with preemptive rights. Defendants eliminated these preemptive rights for the purpose of facilitating the extreme dilution of Sheldon's and other Significant Shareholders' stock holdings through the various transactions described in the First Amended Complaint.

- On July 16, 2010, once Sheldon's and the other Significant Shareholders' preemptive rights were eliminated, the IDEV Board of Directors, controlled and directed by the Venture Capital Defendants, then caused the Company to offer newly issued preferred stock primarily for the benefit of themselves and the Venture Capital Defendants. Defendants did not offer this newly issued preferred stock to all of the common stockholders – but only to the common stock holdings that had been converted from preferred.

A31-A32.

E. Defendants' Unlawful Manipulation of the Company's Stockholdings Deprive Plaintiffs of an Opportunity to Meaningfully Participate in the Abbott Transaction.

On July 15, 2013, Abbott Laboratories ("Abbott") announced publicly that it had entered into an agreement to purchase all outstanding equity of IDEV for $310 million net of cash and debt, which was completed on August 21, 2013. A34. Had

Plaintiffs' holdings of IDEV stock not been severely manipulated, diluted and devalued by Defendants' unlawful actions as described herein, Sheldon and Konya would have been paid as much as approximately $7.75 million and $3.875 million, respectively. A35.

F. The Texas Action

On July 12, 2013, Plaintiffs initiated an action in Texas against the Defendants in this action as well as Owens and Burke. A35. After the Texas trial court dismissed Plaintiffs' claims based on a Delaware forum-selection clause contained in the Shareholders Agreement, an intermediate appellate court reversed the trial court's decision. A36. Defendants then appealed to the Texas Supreme Court, which upheld the dismissal of Plaintiffs' claim (*except claims against Owens and Burke*) and held that the forum selection clause contained in the Shareholders Agreement required Plaintiffs to bring their claims in Delaware. A36.

Following the ruling of the Texas Supreme Court, Plaintiffs commenced this action in the Delaware Court of Chancery.

ARGUMENT

I. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW BY HOLDING THAT PLAINTIFFS ALLEGED DERIVATIVE CLAIMS, RATHER THAN DIRECT CLAIMS, BASED ON THE CONCLUSION THAT THE VENTURE CAPITAL DEFENDANTS WERE NOT A "CONTROL GROUP"

A. Questions Presented

1. Whether it is reasonably conceivable for stockholders to be considered a control group under *Gentile* when the well-pleaded factual allegations of the complaint and documents incorporated by reference in the complaint demonstrate that the stockholder group (i) collectively controlled over 60% of the outstanding shares, (ii) entered into a Voting Agreement granting them direct control over three of IDEV's seven board seats (for a total of four) and indirect control over an additional two board seats (in addition to their control over the CEO selection who filled the remaining board seat), (iii) invested in tandem in similar companies at the same time, and (iv) simultaneously appointed directors of other companies.

2. Whether Plaintiffs sufficiently alleged facts establishing that the Venture Capital Defendants constituted a control group of IDEV and supporting direct claims that survived Abbott's acquisition of IDEV.

These issues were preserved for appeal at A29-30, A1067-A1068, A1084-A1095, A1543-A1555.

B. Standard of Review

"A motion to dismiss a complaint presents the trial court with a question of law and is subject to *de novo* review by this Court on appeal." *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 557 (Del. 2002) (citing *Malone v. Brincat*, 722 A.2d 5, 9 (Del. 1998)); *Chavous v. State*, 953 A.2d 282, 286 n.15 (Del. 2008) ("[W]e review the trial judge's determinations *de novo* for errors in formulating or applying legal precepts."). When reviewing a ruling on a motion to dismiss, this Court, like the trial court, "(1) accept[s] all well pleaded factual allegations as true, (2) accept[s] even vague allegations as 'well pleaded' if they give the opposing party notice of the claim, (3) draw[s] all reasonable inferences in favor of the non-moving party, and (4) do[es] not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs., LLC*, 27 A.3d 531, 535 (Del. 2011) (citations omitted).

C. Merits of Argument

The Court of Chancery's decision to dismiss Plaintiffs' claims hinged on the Court's conclusion that those claims were derivative and, therefore, Plaintiffs lost standing to pursue them when Abbott acquired IDEV. Ex. A. at 32-65. Plaintiffs' Amended Complaint, however, states direct claims for breach of fiduciary duty, aiding and abetting and unjust enrichment under the well-established rule of *Gentile*

v. Rossette, 906 A.2d 91 (Del. 2006), that extraction and expropriation by a controlling shareholder of the minority shareholders' economic value and voting power in the corporation results in a claim that may be brought directly by former minority shareholders. While Defendants questioned at the trial court level whether *Gentile* is good law (A99), they are unable to point to a subsequent decision by this Court that overruled it. The Court of Chancery relied on *Gentile* in its decision, but misapplied *Gentile* when it concluded that the Venture Capital Defendants were not a control group. Ex. A at 20-23.

A control group exists when stockholders "are connected in some legally significant way—*e.g.*, by contract, common ownership, agreement, or other arrangement—to work together toward a shared goal." *Dubroff v. Wren Holdings, LLC,* 2011 WL 5137175, at *3 (Del. Ch. Oct. 28, 2011) (*Dubroff II)* (quoting *Dubroff v. Wren Holdings, LLC,* 2009 WL 1478697, at *3 (Del. Ch. May 22, 2009) (*Debroff I)*). "If such a control group exists, it is accorded controlling shareholder status, and its members owe fiduciary duties to the minority shareholders of the corporation." *Frank v. Elgamal*, 2012 WL 957550, at *4 (Del. Ch. Mar. 30, 2012) (citation and quotations omitted).

"Because the analysis for whether a control group exists is fact intensive, it is particularly difficult to ascertain at the motion to dismiss stage when 'dismissal is inappropriate unless the plaintiff would not be entitled to recover under any

reasonably conceivable set of circumstances susceptible of proof.'" *In re Hansen Med., Inc. Stockholders Litig.*, 2018 WL 3030808, at *6 (Del. Ch. June 18, 2018); *(quoting In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006)). *See also Williamson v. Cox Communs., Inc.*, No. 1663-N, 2006 Del. Ch. LEXIS 111, at *23-24 (Del. Ch. June 5, 2006) (denying motion to dismiss control group allegations, noting that that "whether a shareholder is a controlling one is highly contextualized and is difficult to resolve based solely on the complaint"). "Although parallel interests alone are 'insufficient as a matter of law to support the inference that the shareholders were part of a control group,' . . . parallel interests, in addition to other facts alleged by [plaintiffs]," can support a reasonable, but not necessarily conclusive, inference that a control group existed. *Hansen*, 2018 WL 3030808, at *6 (citations omitted).

For the reasons explained below, the Court of Chancery erroneously held that Plaintiffs failed to sufficiently allege the existence of a control group. Plaintiffs' Amended Complaint contains well-pleaded allegations that describe a reasonably conceivable set of circumstances from which the Court may infer that the Venture Capital Defendants constituted a control group. Rather than consider Plaintiffs' allegations *in toto*, as the sum of their parts, the Court of Chancery considered them separately, seemingly rejecting each in isolation as sufficient evidence of a control group.

1. The Voting Agreement Is A Legally Significant Connection

Plaintiffs allege that the Venture Capital Defendants collectively owned more than 60% of IDEV's issued and outstanding shares. A29. While that fact alone is not sufficient to support a control group, it is one of many factors that this Court should consider in its analysis. For example, Plaintiffs allege the existence of a Voting Agreement whereby the Venture Capital Defendants directly controlled three seats on the IDEV Board of Directors. A265 (§ 7(a)). In addition, the Chairman of the IDEV Board -- Rick Anderson – was affiliated with PTV Sciences as a Managing Director, giving the Venture Capital Defendants control over a majority of the Board. A1193. Through the majority vote of their three controlled directors pursuant to the Voting Agreement, the Venture Capital Defendants also appointed two additional directors. A265 (§ 7(a)). The Voting Agreement pre-designated defendants Terry and Walker as these two so-called "independent" Board seats. (A265 (§ 7(a)). The Venture Capital Defendants' hand-picked CEO (Owens) filled the remaining Board seat. A29. As these facts demonstrate, the Venture Capital Defendants controlled *every* seat on the IDEV Board.

In its decision, the Court of Chancery questioned why "Plaintiffs offer 'no explanation for why the [Venture Capital Defendants] are members of an alleged control group while the numerous other signatories to these agreements are not," referring to the other signatories of the Shareholders Agreement. Ex. A at 27 (citing

van der Fluit v. Yates, 2017 WL 5953514 (Del. Ch. Nov. 30, 2017) at *6)). This, however, ignores the facts that (i) the other signatories to the Shareholders Agreement did not have director appointment rights, (ii) the Chairman of the Board was also affiliated with one of the Venture Capital Defendants, and (iii) the Voting Agreement legally bound the Venture Capital Defendants to act together as a group and designate additional directors. A265 (§ 7(a)(v)). Those are legally significant connections – none of which were at issue in *van der Fluit* – that readily distinguish the Venture Capital Defendants from the other signatories to the Shareholder Agreement.

The Court of Chancery also relied on *van der Fluit* for the proposition that "where agreements with no relation to the actual transaction were entered into by the *entirety of the stockholders* instead of just the control group,' those agreements do not create a control group." Ex. A at 17 (emphasis added) (internal citations omitted). In its analysis, however, the Court of Chancery erroneously concluded that the Shareholders Agreement bound "all Shareholders." *Id*. In fact, not all shareholders were signatories to the Shareholders Agreement and as stated therein "[t]his [Shareholders] Agreement shall become effective at such time it is executed by the Corporation and, with respect to a Shareholder, by such Shareholder." A270

(§ 20).[4] In addition, unlike the agreement at issue in *van der Fluit*, the Voting Agreement not only entitled the Venture Capital Defendants to fill board seats, it contractually bound the Venture Capital Defendants (and not the other Shareholders) to vote together and designate additional directors. A contractual obligation to act together demonstrates that the Venture Capital Defendants were "bound together in a legally significant way rather than merely evidencing a concurrence of self-interest." *van der Fluit*, 2017 WL 5953514. There is no more "legally significant" connection than a contractual obligation to elect two directors to the exclusion of the other stockholders. *See Dubroff II*, 2011 WL 5137175 (noting the connection can be through "contract, common ownership, agreement, or other arrangement—to work together toward a shared goal.") This structure and their other board seats provided the Venture Capital Defendants total control over the IDEV board, enabling them to push through a transaction that benefited them to the exclusion of Plaintiffs.

[4] Moreover, the Texas Supreme Court declined to dismiss claims brought by Plaintiffs against Owens and Burke precisely because they *did not* sign the Shareholders Agreement. *See Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428, 445 (Tex. 2017), *reh'g denied* (Sept. 22, 2017) (declining to dismiss claims against Owens and Burke under the forum selection clause in the Shareholders Agreement because they were not parties to that agreement).

2. The Venture Capital Defendants' coordinated investments in other companies and shared board membership support an inference of a control group.

In its Opinion, the Court of Chancery was dismissive of the Venture Capital Defendants' history of investing together for their mutual benefit in at least five different companies (including IDEV). In addition to IDEV, the Venture Capital Defendants have made several coordinated investments in at least five other instances, including: (i) a $14 million financing with Tryton Medical, Inc.; (ii) a $8.25 million financing with Accumetrics, In.; (iii) a $28.8 million financing with Accumetrics, Inc.; (iv) a $42.2 million financial of Calpyso Medical Technologies, Inc.; and (v) a $50 million financing of Calypso Medical Technologies, Inc. A1167-A1185. The Court of Chancery, however, held that "Plaintiffs' allegations merely indicate that venture capital firms in the same sector crossed paths in a few investments." Ex. A at 25. That conclusion denies Plaintiffs the reasonable inferences to which they are entitled and ignores key facts alleged by Plaintiffs. Rather than mere happenstance, it is "reasonably conceivable that the investments were coordinated," with certain of the Venture Capital Defendants participating in not one, but two separate rounds of financing in two separate companies (Accumetrics and Calypso). A1167-A1185. In addition, representatives of two Venture Capital Defendants -- Rick Anderson (of PTV) and Jay Schmelter (affiliated with RiverVest) -- occupied board seats on Tryton Medical at the same time both

held director seats at IDEV. A1183. Discovery will likely reveal even more extensive relationships between the Venture Capital Defendants, but Plaintiffs alleged enough to support a reasonable inference of cooperation and coordination at the motion to dismiss stage to establish a control group under *Gentile*.

3. The Court of Chancery misapplied the holdings on *Hansen* and *van der Fluit*

The Court of Chancery held that "[t]he Venture Capital Defendants in this case were not as intertwined, collaborative, or exclusive as the members of the *Hansen* control group," Ex. A at 25, a case relied on by all parties at the trial court level. Instead, the Court held "this case more closely resembles *van der Fluit* than *Hansen*, and therefore find Plaintiffs have failed to allege the Venture Capital Defendants functioned as a control group." Ex. A. at 28. Rarely are the facts of two cases identical and this case is no exception. Plaintiffs have alleged far more than the plaintiff in *van der Fluit,* but somewhat less than *Hansen*, thereby falling somewhere in between. In analogizing this case to *van der Fluit*, however, the Court ignored several key distinguishing factors that should tip the scales in Plaintiffs' favor at this stage of the proceeding:

- In *van der Fluit*, the alleged control group held less than 50% of the company's stock, depriving them of majority control. *van der Fluit*, 2017 WL 5953514, at *6. In this case, the Venture Capital Defendants held over 60% of the Company's stock.

- In *van der Fluit*, the alleged controllers held three of seven board seats. In this case, the Venture Capital Defendants directly controlled *four* of seven board seats.[5]

- Unlike this case, *van der Fluit* contained no allegation that the alleged control group was contractually bound to combine their votes and elect two additional directors.

- Unlike this case, *van der Fluit* contained no allegation that the alleged control group had simultaneously invested in similar companies, in some cases multiple times.

- Unlike this case, *van der Fluit* contained no allegation that members of the alleged control group shared seats on the board of other companies.

Here, the Court of Chancery held that Plaintiffs sought "a charitable reading of their allegations." Ex. A at 29. A "charitable" reading, however, is exactly what Plaintiffs are entitled to at the motion to dismiss stage, and this Court's opinions require only that Plaintiffs allege a "reasonably conceivable set of circumstances" from which the existence of a control group may be inferred. *Cent. Mortg. Co.*, 27 A.3d at 535. This case is not a situation where Plaintiffs ask the Court to "pile up [the] questionable inferences." Ex. A at 29 n.134 (quoting *In re Crimson Expl. Inc. S'holder Litig.*, 2014 WL 5449419 at *15 (Del. Ch. Oct. 24, 2014). In addition to well-supported allegations of coordinated activity, Plaintiffs have alleged an explicit

5 In its Opinion, the Court of Chancery found that the Venture Capital Defendants only controlled three board seats. Ex. A at 28. The Court failed to note that in addition to the three board seats they controlled through the Voting Agreement, a representative of PTV (Rick Anderson) was Chairman of the board. A1193.

contractual obligation legally binding the Venture Capital Defendants to act together in a way that controls the Company to the exclusion of other stockholders. This is not mere speculation – this is a conclusive, legally significant connection among the Venture Capital Defendants, which is all that is required to establish a control group. *Dubroff II,* 2011 WL 5137175, at *3 (a control group exists when stockholders "are connected in some legally significant way—*e.g.*, by contract, common ownership, agreement, or other arrangement—to work together toward a shared goal."), quoting *Dubroff I,* 2009 WL 1478697, at *3.

CONCLUSION

The Court of Chancery's dismissal of Plaintiffs' well-pled allegations at an early stage of the proceedings was contrary to Delaware law and allows the actions of faithless fiduciaries to evade judicial scrutiny. Plaintiffs respectfully request that this Court reverse the Court of Chancery's holding as inconsistent with *Gentile* and remand the action to allow Plaintiffs to prosecute their claims on their merits.

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Dated: April 11, 2019

CERTIFICATE OF SERVICE

I, Scott B. Czerwonka, hereby certify that on this 11th day of April, 2019, true and correct copies of APPELLANTS' OPENING BRIEF were served upon the following counsel of record via File & Serve*Xpress*:

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