IN THE SUPREME COURT OF THE STATE OF DELAWARE

HUBERT OWENS, Derivatively on Behalf of ESPERION THERAPEUTICS, INC., Plaintiff Below, Appellant, v. TIM M. MAYLEBEN, ROGER S. NEWTON, MARY P. MCGOWAN, NICOLE VITULLO, DOV A. GOLDSTEIN, DANIEL JANNEY, ANTONIO M. GOTTO, JR., MARK E. MCGOVERN, GILBERT S. OMENN, SCOTT BRAUNSTEIN, and PATRICK G. ENRIGHT, Defendants Below, Appellees, -and- ESPERION THERAPEUTICS, INC., a Delaware corporation, Nominal Defendant Below, Appellee.	)	No. 110, 2020 Court Below: Court of Chancery of the State of Delaware, C.A. No. 12985-VCS **PUBLIC VERSION--** Filed: July 13, 2020

APPELLEES' ANSWERING BRIEF

OF COUNSEL:

Deborah S. Birnbach
Adam Slutsky
David J. Zimmer
Ian Stearns
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, Massachusetts 02210
(617) 570-1000

Rudolf Koch (#4947)
Sarah A. Clark (#5872)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Counsel for Appellees

Dated: July 1, 2020

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NATURE OF PROCEEDINGS

This is a routine demand-futility derivative appeal from a thorough Court of Chancery decision dismissing the Complaint[1] with prejudice for falling "well short of the particularity mark" under Rule 23.1. Abandoning his *Caremark* claims and conceding the independence of nearly half of the supermajority of Outside Directors dominating Esperion's Board, Plaintiff has narrowed—but not improved—his demand-futility arguments on appeal.

First, Plaintiff asserts that a majority of Esperion's Board faces a substantial likelihood of liability for knowingly and in bad faith approving supposedly misleading statements in an August 2015 Press Release about a meeting between Esperion employees and the FDA. But as the Court of Chancery correctly concluded, the Complaint "contains not one particularized allegation" of bad faith or scienter by any Outside Director, much less a majority of the Board. And the Section 220 documents that Plaintiff relies on—but continues to misconstrue while tellingly omitting them from the record—support the opposite conclusion, as the Court of Chancery also recognized. Esperion's Directors [redacted]

[redacted]

[1] Unless otherwise noted, all capitalized terms are defined in the Court of Chancery's decision dismissing the Complaint ("Opinion"). *See* Plaintiff-Appellant's Opening Brief ("OB"), Ex. A. All internal quotation marks, citations, and alterations are omitted.

[redacted] and also tracked the FDA's unbroken pattern of regulatory approvals on a pathway consistent with the regulatory pathway to approval that Esperion disclosed. In February 2020, the FDA approved Esperion's drug on the *exact* regulatory pathway that Esperion projected in the August 2015 Press Release and that Plaintiff now contends was a lie.

Second, Plaintiff contends that a majority of Esperion's nine-member Board—comprised of seven Outside Directors when Plaintiff filed suit—is not independent. The Court of Chancery correctly held that the Complaint's allegations, which essentially are that a few Outside Directors worked for venture capital firms that were Esperion stockholders, raised "no reasonable doubts" about the fidelity of *any* of the Directors whose independence Plaintiff challenges.

Plaintiff's appeal invites this Court to abandon well-established precedent, to send Rule 23.1 to the annals by accepting conclusory and illogical allegations of bad faith, to draw unreasonable inferences from Section 220 documents that contradict his theory, and to remove the presumption of director independence whenever a director is employed by a company stockholder. The Court should decline Plaintiff's invitation and affirm the Court of Chancery's well-reasoned decision.

SUMMARY OF ARGUMENT

1. Denied.[2] The Court of Chancery correctly held that the Complaint did not adequately plead particularized facts supporting a reasonable inference that a majority of Esperion's Directors face a substantial likelihood of liability for breaching their duty of loyalty. As the Court of Chancery found, Plaintiff alleged *no* particularized facts suggesting that *any* Outside Director knew that any statement in Esperion's August 2015 Press Release was misleading or incorrect. The Complaint does not allege that any Director was present at the FDA meeting discussed in the Press Release, and the Press Release tracked—indeed, repeated nearly word-for-word—[redacted] as corroborated by Section 220 documents on which the Complaint relies.

2. Denied. When Plaintiff brought this suit, a supermajority of seven independent Outside Directors dominated Esperion's nine-member Board. Plaintiff concedes that three of those seven Outside Directors are independent. And Plaintiff's run-of-the-mill allegations that the remaining Outside Directors worked for Esperion stockholders or made money on the sale of "Old Esperion" stock sixteen

[2] Plaintiff's brief fails to "stat[e] in separate numbered paragraphs the legal propositions upon which [he] relies." Supr. Ct. R. 14(b)(iv); OB at 7-8.

years ago do not come close to establishing that *any*—let alone three—of the remaining Outside Directors lacked independence to consider a demand.

STATEMENT OF FACTS

In August 2015, Esperion[3] was a clinical-stage pharmaceutical company that had only one product candidate in clinical development—ETC-1002 or bempedoic acid—an oral, LDL-cholesterol ("LDL-C") lowering therapy for the treatment of patients with hypercholesterolemia and other cardiometabolic risk markers.[4] A037-038. Statins, such as the drug Lipitor, were the standard-of-care for LDL-C lowering. *Id.* But a significant number of patients suffering from high cholesterol were either "intolerant to [statin] therapies due to their side effects" or could not achieve sufficient LDL-C lowering despite receiving maximally-dosed statins. A038-039. Seeking to fill these patient gaps, Esperion was developing bempedoic acid both as (i) an add-on therapy for high risk patients who could not achieve sufficient LDL-C lowering on maximally tolerated statins, and (ii) an alternative therapy for statin-intolerant patients. *Id.*

This case concerns Esperion's public statements in August 2015 that, based

[3] Roger Newton founded what Plaintiff calls "Old Esperion." A058. In 2004, Pfizer acquired that company for $1.3 billion. *Id.* Four years later, Newton acquired the rights to bempedoic acid and re-established Esperion. A177.

[4] The facts herein are drawn from the Complaint, documents incorporated by reference (including Section 220 documents), and documents worthy of judicial notice (including SEC filings). Opinion at 3 n.2; *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169-71 (Del. 2006).

on a meeting with the FDA, the regulatory pathway for potential approval of bempedoic acid in two high risk patient populations did not require Esperion to complete a cardiovascular outcomes trial ("CVOT") before that potential approval. A024.

A. Esperion repeatedly disclosed to investors the risks of its strategy of seeking FDA approval after it began, but before it completed, a CVOT.

There are different types of clinical trials relevant to approval of a cholesterol-lowering drug: clinical trials showing that the drug is safe and effective in lowering LDL-C, and CVOTs showing that this cholesterol lowering improves heart health. As discussed below, Esperion repeatedly disclosed to investors its strategy of seeking approval of bempedoic acid based on its ability to lower LDL-C *before* completing a CVOT—a strategy that made sense given that the FDA had never required a completed CVOT before approving a drug shown to lower LDL-C for the indications that Esperion sought approval. Opinion at 11. In other words, where the label indication sought for the drug was that it lowered cholesterol in the indicated patient populations, the FDA had not required completed CVOTs prior to LDL-C lowering approvals that did not claim to improve cardiovascular health.

Esperion consistently disclosed to investors the significant regulatory risks that it faced in seeking FDA approval of bempedoic acid. These disclosures included

that the FDA could require Esperion to conduct a lengthy and costly CVOT to study whether bempedoic acid lowered long-term cardiovascular disease risks, in addition to Phase 2 and Phase 3 clinical trials to demonstrate that bempedoic acid lowered LDL-C levels. *E.g.*, B002-004, 2013 Form S-1.

Esperion repeatedly told investors that, despite these risks, it planned to begin, but not complete, a CVOT before seeking FDA approval:

> Our current development timeline for [bempedoic acid] does not contemplate the completion of a [CVOT] prior to FDA approval. Any such study, if required, would be costly and time-consuming and, regardless of the outcome, would adversely affect our development timeline and financial condition.

B012, 2014 Form 10-K. For example, in March 2015, Esperion disclosed that it raised $190 million in part to "initiate" a CVOT, but that "[o]ur current development timeline for ETC-1002 does not contemplate the completion of a [CVOT] prior to FDA approval." B014-015, 2015 Form 424(b)(5).

Esperion also disclosed why it planned to initiate, but not complete, a CVOT before seeking FDA approval. The FDA had never—*not once*—previously required completion of a CVOT for approval of drugs that claim only to lower LDL-C: "To date, the FDA has not required any approved therapy targeting LDL-C lowering, including non-statin therapies, to … complete a [CVOT] in connection with its approval." B005, 2013 Form S-1. This makes perfect sense: as Plaintiff concedes

on appeal, the FDA's practice of approving LDL-C lowering drugs without requiring completion of a CVOT rested on the logical principle that "lower LDL-C is presumed to improve overall heart health," and "[i]f a new drug is shown to lower LDL-C, the FDA assumes it also improves overall cardiovascular health." OB at 2 n.4.

B. Esperion promptly reported to stockholders following its End-of-Phase 2 Meeting with the FDA in August 2015.

In August 2015, Esperion was nearing the end of Phase 2 clinical trials. A040. A drug sponsor typically meets with the FDA following the completion of Phase 2 trials in what is called an End-of-Phase 2 ("EOP2") meeting. The purpose of that meeting is to preliminarily discuss the study designs of the upcoming Phase 3 program. B007-011, 2014 Form 10-K. The drug sponsor typically submits a New Drug Application ("NDA") to seek FDA approval only after the completion of the Phase 3 program, which is the linchpin of a drug's NDA because it requires the sponsor to prove, over the course of large trials, that the drug is both safe and effective. B010-011, 2014 Form 10-K.

According to the Complaint, on August 11, 2015, certain "Esperion executives" attended the EOP2 meeting with the FDA regarding bempedoic acid's upcoming Phase 3 trials. A040. "It is not alleged that any of the Outside Directors were present at this meeting." Opinion at 11.

The Complaint also does not allege that Esperion CEO and Director Tim Mayleben attended the EOP2 meeting. A040. Nor could it: Mayleben was *not* at that meeting. Nevertheless, throughout his brief, Plaintiff repeatedly asserts that Mayleben *was* at the meeting, based on the bizarre theory that "Defendants do not dispute" that Mayleben attended. *E.g.*, OB at 4, 10 n.8, 25. Given that Plaintiff never alleged (or otherwise claimed below) that Mayleben attended the meeting, it is unclear how Defendants could have "dispute[d]" this purported fact. More fundamentally, if Plaintiff had any basis for alleging that Mayleben attended the meeting—which, again, Plaintiff does not, because Mayleben was not there—Plaintiff should have alleged that fact in his Complaint; he cannot "expand [the Complaint's] scope through briefing." *Feuer v. Dauman*, 2017 WL 4817427, at *4 (Del. Ch. Oct. 25, 2017), *aff'd*, 187 A.3d 551 (Del. 2018).

The Board's knowledge of what occurred at that EOP2 meeting was therefore based on what was conveyed to them by Esperion employees who *did* attend the meeting. *See* 8 *Del. C.* § 141(e). The Complaint's only allegations concerning what the Board was told come from an August 19, 2015 Board presentation—a document from which Plaintiff selectively quotes but, tellingly, does not present to this Court [redacted] [redacted] A052-054; *see* Opinion at 25-26 (describing the presentation as Plaintiff's "showcase pleading of Board

knowledge"). Indeed, the Complaint alleges that "a reasonable assumption is that what the Board was told at the August 19, 2015 meeting is consistent with what it was told while reviewing and editing the [August 17, 2015] press release." A052.

[redacted] what Esperion conveyed to investors in its August 17, 2015 press release (the

[redacted]

"August 2015 Press Release"), which forms the basis of Plaintiff's Complaint. "Based on feedback from the FDA" during the EOP2 meeting, Esperion disclosed:

> FDA confirmed that LDL-C remains an acceptable clinical surrogate endpoint for the approval of an LDL-C lowering therapy such as ETC-1002 in patient populations who have a high unmet medical need, including patients with [HeFH], or [ASCVD], who are already taking maximally tolerated statins yet require additional LDL-C reduction and where there is a positive benefit/risk ratio. Based on feedback from the FDA, approval of ETC-1002 in the HeFH and ASCVD patient populations will not require the completion of a [CVOT]. The Company continues to plan and initiate a CVOT prior to NDA filing to pursue broader label indications related to cardiovascular disease risk reduction…

A040-041; B016, August 2015 Press Release.

Consistent with its previous disclosures and the FDA's past practices—[redacted]—Esperion disclosed that a CVOT would not be required to be *completed* before approval as an add-on therapy for the high risk HeFH and ASCVD patient populations, but it told investors that it still would *initiate* a CVOT "not only for commercial purposes but also for the broader label indications related to cardiovascular disease risk reduction that can be achieved. As we have said consistently, we continue to expect to initiate the CVOT late next year or in early 2017 such that the CVOT will be underway by the time of our NDA submission." A041-042; B021, August 17, 2015 Conf. Call Tr.

As it told investors, Esperion issued the August 2015 Press Release before

receiving the FDA's official minutes of the EOP2 meeting, which Esperion did not expect to receive until September because it takes time for the FDA to summarize the meeting discussion and add post-meeting comments. A040; *see infra* 13. Mayleben repeatedly cautioned investors that, regardless of Esperion's perspective on how the meeting went, only the FDA's forthcoming final meeting minutes would reflect the FDA's official position on Esperion's clinical program. *E.g.*, B020-023, B025-027, August 17, 2015 Conf. Call Tr. For instance, when asked what an analyst described as a "remedial question on FDA minutes," including how different the minutes would be from Esperion's notes and whether there could be "surprises," Mayleben re-emphasized "exactly why you've heard me say a number of times that we can't comment until we receive the final minutes from the FDA next month because … that it's just we have 0 interest in front running the FDA on this. The FDA's minutes are the only minutes that matter, and so we're going to wait for those minutes." B028, August 17, 2015 Conf. Call Tr.

Moreover, the FDA's minutes can include information that was *not* communicated in the EOP2 meeting. In his brief, Plaintiff cherry-picks a quote from FDA meeting guidance, which states that "FDA minutes are the official record of the meeting," claiming that this suggests that "the FDA minutes reflect exactly what the FDA told Esperion at the August 11, 2015 EOP2 meeting." OB at 13. But, in

reality, as the FDA acknowledges in its guidance, its "minutes are *not* intended to represent a transcript of the meeting" and it "may communicate additional information in the final minutes *that was not explicitly communicated during the meeting*." B115 (emphasis added). As Plaintiff was forced to concede during argument before the Court of Chancery, "I don't know that [Esperion] knew exactly what was going to go in [the minutes]." OB Ex. B at 43:12-13.

C. As promised after receiving the FDA's End-of-Phase 2 final meeting minutes one month later, Esperion updated investors.

On September 28, 2015, Esperion "provided an update on the design and timing of its planned pivotal Phase 3 clinical development program following receipt of the official EOP2 Meeting Minutes from the [FDA]." A043-044; B032 (the "September 2015 Press Release"). This update disclosed that "FDA has encouraged the Company to initiate a [CVOT] promptly, which would be well underway at the time of the [NDA] submission and review, since any concern regarding the benefit/risk assessment of ETC-1002 [in Phase 3 trials] *could* necessitate a completed [CVOT] before approval." B032 (emphasis added).

During a conference call later that day, Mayleben acknowledged that the language regarding the *potential* need for a pre-approval CVOT in the September 2015 Press Release was "slightly different from the language that we used in the original announcement back in August," attributing this difference to the "dynamic

nature of this therapeutic area" and the potential that the FDA could shift its views based on the future results of Phase 3 trials, something Esperion had warned about repeatedly in its risk disclosures. A046-047; B040, September 28, 2015 Conf. Call Tr.; *see also* B002-005, B012.

D. The FDA approved bempedoic acid before Esperion completed a CVOT.

In March 2017, Esperion received FDA confirmation of the regulatory pathway it disclosed in August 2015: The FDA "confirmed that Esperion's LDL-C lowering program is adequate to support approval of an LDL-C lowering indication for bempedoic acid" as an add-on therapy to statins in high risk patients. B058, March 20, 2017 Form 8-K.

Esperion submitted the NDA for bempedoic acid in February 2019—after it *initiated* but before it *completed* a CVOT, just as Esperion had disclosed in August 2015—and the FDA approved bempedoic acid in February 2020, with an indication "as an adjunct to diet and maximally tolerated statin therapy for the treatment of adults with [HeFH] or [ASCVD] who require additional lowering of LDL-C." B060-080, Forms 8-K of February 28, 2019 and February 21, 2020. When the FDA approved bempedoic acid, Esperion had not completed its CVOT, the results of which are not expected until 2022. B082-084, 2019 Form 10-K.

E. Plaintiff brought this suit and the Court of Chancery dismissed it with prejudice for failure to plead demand futility.

In February 2016, following the filing of a securities class action against Esperion and Mayleben (but none of Esperion's Outside Directors), Plaintiff made a Section 220 demand to inspect Esperion's books and records relating to alleged breaches of fiduciary duty concerning the August 2015 Press Release. B087-097. Plaintiff and Esperion agreed on the production of numerous Board materials and other documents concerning the CVOT for bempedoic acid generally and the August 2015 Press Release specifically (the "220 Documents"), and they agreed that the 220 Documents would be incorporated by reference into any complaint. OB at 38 n.52; Opinion at 25 n.117.

After receiving the 220 Documents, Plaintiff did not make a demand on Esperion's Board, and instead in December 2016, filed this one-count breach of fiduciary duty lawsuit purportedly on the Company's behalf based on the contents of the August 2015 Press Release. A057; Opinion at 15. Although the Complaint relies on snippets of the 220 Documents, Plaintiff did not provide those documents to the Court of Chancery; rather, Defendants placed the documents before the court in support of their motion to dismiss. Now, once again, Plaintiff declines to provide those documents to this Court, instead including in his opening Appendix [redacted]

[redacted]

When Plaintiff filed the Complaint, Esperion's Board consisted of nine Directors, including seven Outside Directors who, as Plaintiff alleges, did not work at Esperion. A060-069. Each of these seven Outside Directors satisfied the definition of independence under NASDAQ Rule 5605(a)(2). B055, 2017 Joint Proxy Statement. Although the Complaint alleges that *all seven* Outside Directors were not sufficiently independent to consider a demand, Plaintiff now concedes that three of the seven were sufficiently independent: Mark McGovern; Gilbert Omenn; and Scott Braunstein. *Compare* A062-069, *with* OB at 39-45. The four Outside Directors who Plaintiff claims lack independence are:

(i) **Dov Goldstein**, a partner at venture capital firm Aisling Capital, LLC ("Aisling") and a director of numerous life-sciences companies, A029, A066, ¶¶ 16, 79(e);

(ii) **Daniel Janney**, a managing director at venture capital firm Alta Partners, LP ("Alta") and a director of numerous life-sciences companies, A030, A059, A064-065, ¶¶ 17, 77, 79(c);

[redacted]

(iii) **Nicole Vitullo**, a partner at venture capital firm Domain Associates, LLC ("Domain") and a director of numerous life-sciences companies, A029, A059, A069, ¶¶ 15, 77, 79(i); and

(iv) **Antonio Gotto, Jr.**, Dean Emeritus & Co-Chair of Board of Overseer at Weill Cornell Medical College and Vice President of Cornell University, A030, A058, A067, ¶¶ 18, 76, 79(f).

In February 2020, the Court of Chancery (Slights, V.C.) issued a thirty-one-page written decision dismissing the Complaint with prejudice for failure to plead demand futility under Rule 23.1. Opinion at 31.

The court began by criticizing the lack of clarity concerning Plaintiff's theory of demand futility. As the court explained, "direction [wa]s lacking" in the Complaint as to whether Plaintiff was pursuing claims based on the Board's affirmative action under *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), or failure to act under *Rales v. Blasband*, 634 A.2d 927 (Del. 1993). Opinion at 17-18. The court also noted that while Plaintiff "denies he is pleading a *Caremark* [oversight] claim," his "attempt to repackage clearly pled *Caremark* claims as something else … has undermined the credibility of Plaintiff's legal arguments." *Id.* at 19-20 & n.97; *see* A027-032. The court then held that the Complaint's factual allegations, taken as

true, do not establish that a majority of the Board either face a substantial likelihood of liability or are not otherwise able to act independently.

Starting with liability, the court first held that Plaintiff failed to allege facts establishing a substantial likelihood that Esperion's Directors could be liable for making intentional misstatements to stockholders in the August 2015 Press Release. Opinion at 20-23. Specifically, the court held that Plaintiff's allegations of scienter "fall well short of the particularity mark" because the Complaint "contains not one particularized allegation of intentional misconduct" and "pleads no facts that would allow a reasonable inference the Outside Directors … knew that anything included in the press release was false." *Id.* at 20-21. As the court explained, Plaintiff's "showcase pleading of Board knowledge" of falsity, the August 19, 2015 Board presentation, not only did not support a reasonable inference of the requisite bad faith by the Directors, but "actually support[ed] the *opposite* inference." *Id.* at 25-26.

The court also held that Plaintiff's allegations, taken as true, did not establish a reasonable doubt that a majority of Esperion's Directors lacked independence. *Id.* at 26-30. The Complaint's "naked assertions" of "previous business relationship[s]" were insufficient, and the court explained that Plaintiff's allegations created "no

reasonable doubts" about the independence of any of the four Outside Directors that Plaintiff challenges on appeal. *Id.* at 26-30.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFF DID NOT ALLEGE WITH PARTICULARITY THAT A MAJORITY OF THE BOARD IS INTERESTED.

A. Question Presented

Did the Court of Chancery correctly conclude that Plaintiff's failure to make a demand on Esperion's Board was not excused because the Complaint fails to allege with particularity that a majority of Directors face a substantial likelihood of liability for knowingly approving false and misleading statements in the August 2015 Press Release in bad faith? *See* Opinion at 19-26; OB at 18, 22-39.

B. Scope of Review

This Court reviews "de novo the decision of the Court of Chancery to dismiss a derivative suit under Rule 23.1." *White v. Panic*, 783 A.2d 543, 549 (Del. 2001). Plaintiff is "entitled to all reasonable factual inferences that logically flow from the particularized facts alleged, but conclusory allegations are not considered as expressly pleaded facts or factual inferences." *Id.* The Court "need not blindly accept as true all allegations, nor must [it] draw all inferences from them in [Plaintiff's] favor unless they are reasonable." *Id.*; *see Pfeffer v. Redstone*, 965 A.2d 676, 683 (Del. 2009) ("[W]e … accept only truly reasonable inferences."). "Inferences that are not objectively reasonable"—including inferences unreasonably drawn from Section 220 documents incorporated by reference into the Complaint—

"cannot be drawn in the plaintiff's favor." *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 56-57 (Del. 2017) ("The plaintiffs unfairly describe the [board] presentation, which we are not required to accept on a motion to dismiss.").

C. Merits of Argument

It is a "cardinal precept" and "fundamental principle" of Delaware law that boards of directors, not stockholders, manage the affairs of a corporation. *Aronson*, 473 A.2d at 811-12; *Stone v. Ritter*, 911 A.2d 362, 366 (Del. 2006) (citing 8 *Del. C.* § 141(a)). It is therefore ordinarily the board's "responsibility" to "decid[e] whether to bring litigation on the corporation's behalf." *McElrath v. Kalanick*, 224 A.3d 982, 987 (Del. 2020). Likewise, a "basic tenet[]" of Delaware law is that "independent directors are presumed to be motivated to do their duty with fidelity," including in considering demands to initiate litigation on the corporation's behalf. *In re Cornerstone Therapeutics Inc., S'holder Litig.*, 115 A.3d 1173, 1182-83 (Del. 2015).

To bring this litigation absent any demand of Esperion's Board, Plaintiff must satisfy Rule 23.1's "heightened burden to plead particularized facts establishing a reasonable doubt that the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand." *McElrath*, 224 A.3d at 990. That heightened burden imposes "stringent requirements of factual particularity" for Plaintiff to overcome the presumption of

board fidelity. *Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008). Because Plaintiff concedes that *Rales* applies (OB at 19 n.16), Plaintiff "must plead particularized facts raising reasonable doubt of the board's independence and disinterestedness when the demand would reveal board inaction of a nature that would expose the board to a substantial likelihood of personal liability." *Good*, 177 A.3d at 55 & n.40 (*Rales* requires particularized facts showing "director conduct that is so egregious on its face that board approval cannot meet the test of business judgment").

Plaintiff's primary argument on appeal is that a majority of the Board is interested due to a substantial likelihood of liability in this suit. Although Plaintiff's Complaint focused on a *Caremark* claim—containing, as the Court of Chancery noted, "classic *Caremark* language"—Plaintiff now concedes that he cannot meet the *Caremark* standard and has abandoned any reliance on *Caremark*. OB at 23 n.34. As the Court of Chancery noted, "[t]his attempt to repackage clearly pled *Caremark* claims as something else … has undermined the credibility of Plaintiff's legal arguments." Opinion at 20 n.97. Remarkably, Plaintiff criticizes the Court of Chancery for "analyz[ing] Plaintiff's allegations under the typical *Caremark* analysis." OB at 23 n.34. But faced with Plaintiff's admitted "confusion"[9] about

[9] During oral argument, Plaintiff's counsel acknowledged the "confusion" arising from the Complaint's allegations. OB Ex. B at 33:19.

the nature of his claims, the Court of Chancery simply took the conservative route of analyzing *both* whether Plaintiff plausibly alleged intentional misstatements (Opinion at 20-23), *and* whether Plaintiff plausibly alleged a *Caremark* oversight claim (Opinion at 23-26).

On appeal, Plaintiff challenges only the Court of Chancery's conclusion regarding his claim that the Directors face a substantial likelihood of liability for knowingly and in bad faith "review[ing] and approv[ing]" the allegedly false statements in the August 2015 Press Release. OB at 10, 14. But the Court of Chancery correctly concluded that the Complaint contains *no* particularized factual allegation that, taken as true, could plausibly establish that the Board *knew* any statement in the Press Release was false. In fact, as the Court of Chancery recognized, the 220 Documents incorporated into the Complaint compel the exact opposite conclusion.

1. Plaintiff must plead particularized facts showing a substantial likelihood of scienter.

This Court has made clear that Plaintiff faces a heavy burden in attempting to establish a substantial likelihood of liability for intentional Board misconduct.

First, "the *mere threat* of personal liability is insufficient to challenge [] the … disinterestedness of directors and [] a reasonable doubt that a majority of directors is incapable of considering demand should only be found where a

substantial likelihood of personal liability exists." *Wood*, 953 A.2d at 141 n.11 (emphasis added). Pleading particularized facts supporting a substantial likelihood of directors' personal liability, rather than a mere threat or possibility, is a "rigorous standard." *In re Gen. Motors Co. Deriv. Litig.*, 2015 WL 3958724, at *13 (Del. Ch. June 26, 2015), *aff'd*, 133 A.3d 971 (Del. 2016).

Second, "[w]hen, like here, the directors are protected from liability for due care violations under [§ 102(b)(7)], the plaintiff must allege with particularity that the directors acted with scienter," or bad faith. *Good*, 177 A.3d at 55.[10] As this Court has recently recognized, "showing [] bad faith in the context of demand excusal" is a "difficult task," "a high hurdle," and "essentially requires [Plaintiff] to demonstrate intentional wrongdoing by the board." *McElrath*, 224 A.3d at 991, 993. In the context of Plaintiff's theory on appeal, only if particularized facts support a reasonable inference that a majority of Esperion's Directors (including at least three Outside Directors) "knowingly disseminat[ed] to the stockholders false information" is there a substantial likelihood of liability excusing demand. *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998) (affirming dismissal); *see* OB at 22.

[10] Plaintiff does not dispute that Esperion's charter contains an exculpatory clause extending to the limits of § 102(b)(7). Opinion at 19; B086.

2. The Complaint pleads zero particularized facts supporting a reasonable inference that any Director knowingly approved false statements.

The critical flaw in Plaintiff's theory, and the one on which the Court of Chancery based its conclusion that the Complaint "fall[s] well short of the particularity mark" under Rule 23.1, is that the Complaint "pleads no facts" supporting a reasonable inference that a majority of the Directors "knew that anything included in the [August 2015 Press Release] was false." Opinion at 21. As the Court of Chancery explained, the Complaint "contains not one particularized allegation of intentional misconduct." *Id.* at 20.

On appeal, Plaintiff still cannot identify any such particularized factual allegations in the Complaint. Rather, in his brief, Plaintiff claims that: "Defendants (1) *knew what the FDA told Esperion at the August 11 meeting*, and (2) knew the contents of … the August 17 press release, *which directly contradicted what the FDA told Esperion at the EOP2 meeting*." OB at 25 (emphasis added). The flaw in this circular speculation is that the Complaint lacks any allegations supporting the emphasized language—*i.e.*, that the Directors, including Outside Directors, either knew what the FDA communicated to Esperion at the EOP2 meeting or knew of any conflict between what FDA told Esperion and the information in the August 2015 Press Release. The Complaint does not allege that the Directors—including, as

discussed above, *supra* 9, CEO Mayleben—attended the EOP2 meeting. A040; Opinion at 21. And Plaintiff concedes that Esperion did not receive the FDA's official meeting minutes until weeks after the August 2015 Press Release. A040, A054.

Whistling past the "high hurdle" he faces, *McElrath*, 224 A.3d at 993, Plaintiff's brief does not cite a single demand-futility case in which this Court found facts supporting a reasonable inference that directors, presumed to be disinterested, faced a substantial likelihood of liability for "knowingly disseminating to [] stockholders false information." *Malone*, 722 A.2d at 10; *see* OB at 22-32. And little wonder: This Court and the Court of Chancery have repeatedly rejected conclusory allegations like those in the Complaint here, requiring far more particularized facts supporting director bad faith and knowledge of falsity or illegal conduct. *See, e.g.*, *Wood*, 953 A.2d at 142 (demand not excused when the "Complaint allege[d] many violations of federal securities and tax laws but does not plead with particularity … that the defendants knew that such conduct was illegal"); *McElrath*, 224 A.3d at 994 ("[T]he allegations as pleaded d[o] not support a reasonable inference that the directors knew the transaction was [illegal]."); *Stone*,

911 A.2d at 373 (rejecting attempt to "[w]ith the benefit of hindsight … equate a bad outcome with bad faith").[11]

With no particularized allegations, Plaintiff reverts to conclusory arguments based on group pleading of "Board knowledge" and [redacted] *Compare* OB at 25, 27-28, 30, 32, *with* Opinion at 20 (the Complaint "contains not one particularized allegation of intentional misconduct as to a single Outside Director"). But the "'group' accusation mode of pleading demand futility" is insufficient because Plaintiff must "plead facts *specific to each director*." *In re Citigroup, Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 121 n.36 (Del. Ch. 2009); *Higher Educ. Mgmt. Grp., Inc. v. Mathews*, 2014 WL 5573325, at *8, *11 n.65 (Del. Ch. Nov. 3, 2014) (requiring particularized allegations "*with particularity* that each director, individually … had knowledge that the Loan was a fabrication" and rejecting attempt to "attribute identical actions to all of the directors, as a defined group").

Stripped of its conclusory allegations, the Complaint's only possible basis for the Directors' knowledge of what was communicated at the EOP2 meeting was a

[11] *See also, e.g.*, *Rojas v. Ellison*, 2019 WL 3408812, at *11 (Del. Ch. July 29, 2019); *Ellis v. Gonzalez*, 2018 WL 3360816, at *11 (Del. Ch. July 10, 2018), *aff'd*, 205 A.3d 821 (Del. 2019).

report from Esperion employees who *were* at the meeting. As the Court of Chancery recognized, and as discussed below, that report not only does not support a reasonable inference of bad faith, but instead *undermines* Plaintiff's theory because it is consistent with the August 2015 Press Release.

3. The 220 Documents do not support, and in fact contradict, Plaintiff's theory of bad faith.

Unable to point to any particularized factual allegations of bad faith by any Director, much less a majority, Plaintiff resorts to mischaracterizing the 220 Documents. OB at 25-32. Plaintiff pursued this same strategy below, and the Court of Chancery rejected his attempt to "draw unreasonable inferences" from the 220 Documents by attempting to "seize on a document, take it out of context, and insist on an unreasonable inference." Opinion at 25 & n.117 (citing *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 818 (Del. 2013)). Plaintiff tries the same playbook again on appeal.

The Complaint's allegations about what the Board was told about the EOP2 meeting depend exclusively on the August 19 Board presentation—Plaintiff's "showcase pleading" of purported bad faith. *Id.* at 25-26; OB at 15, 30. The Complaint acknowledges that "what the Board was told at the August 19, 2015 meeting is consistent with what it was told while reviewing and editing the [August 17] press release." A052. But as the Court of Chancery noted, the Board was told

exactly, nearly word-for-word, what investors were told—*i.e.*, that Esperion would start, but not have to complete, a CVOT prior to approval of bempedoic acid as an add on therapy for high risk patients. Opinion at 26; *see supra* 10.

- [redacted] and investors were told "FDA confirmed that LDL-C remains an acceptable clinical surrogate endpoint" in the same patient populations. [redacted] B016.
- [redacted] and investors were told "[b]ased on feedback from the FDA, approval of ETC-1002 in the HeFH and ASCVD patient populations will not require the completion of a [CVOT]." [redacted] B016.
- [redacted] and investors were told "we have a clear regulatory path forward for development and approval." [redacted] B016.

Thus, not only does the August 19 presentation not support the requisite reasonable inference that a majority of Esperion's Directors misrepresented in bad faith the content of a meeting that they did not attend, it "actually supports the *opposite* inference." Opinion at 26. Further, Plaintiff does not dispute that the Directors were

statutorily entitled to rely in good faith on what they were told by Esperion's employees about the EOP2 meeting. *See McElrath*, 224 A.3d at 993 & n.57 (rejecting conclusory scienter allegations because board is "fully protected in relying in good faith upon the … information, opinions, reports or statements presented by the corporation's officers").

Plaintiff's brief does not seriously challenge the consistency between what the Board was told about the EOP2 meeting and the August 2015 Press Release. OB at 30. Instead, Plaintiff suggests that the Court of Chancery "improperly weighed inferences from the 220 Documents" to conclude that the Directors "must have acted in good faith." *Id.* The Court of Chancery explicitly did not commit such an error. Opinion at 25-26 & n.117. Instead, the court simply considered the totality of the 220 Documents—[redacted]—in concluding that the facts alleged did not support Plaintiff's conclusory allegations of bad faith.

This Court and the Court of Chancery routinely dismiss claims that rest on unreasonable inferences from board materials that contradict conclusory allegations. *See, e.g.*, *Good*, 177 A.3d at 56-57, 58 n.65, 63 (criticizing plaintiff for omitting information in board presentation from allegations, rejecting inference of bad faith as "not one reasonably drawn from the minutes," and holding that "[w]hen the board

presentations are fairly considered, none of the facts … lead to a reasonable inference of bad faith conduct"); *McElrath*, 224 A.3d at 993 (rejecting theory of "intentional wrongdoing by the board" where directors relied on presentation from management); *Gen. Motors*, 2015 WL 3958724, at *17, *aff'd*, 133 A.3d 971 (rejecting inference contradicted by "next page of [board] presentation"); *Melbourne Mun. Firefighters' Pension Tr. Fund v. Jacobs*, 2016 WL 4076369, at *5, *12 (Del. Ch. Aug. 1, 2016), *aff'd*, 158 A.3d 449 (Del. 2017) (Section 220 documents containing "minutes and selected presentations made to the Board" supported the inference that the board "was under the impression that [company's] conduct did not violate applicable antitrust laws").[12]

The remaining 220 Documents on which Plaintiff relies likewise do not support any inference that Esperion's Directors knew information about the EOP2 meeting that contradicted the August 2015 Press Release. [redacted]

[12] *See also In re GoPro, Inc. S'holder Deriv. Litig.*, 2020 WL 2036602, at *2 (Del. Ch. Apr. 28, 2020); *Steinberg v. Bearden*, 2018 WL 2434558, at *11 (Del. Ch. May 30, 2018); *Horman v. Abney*, 2017 WL 242571, at *12-13 (Del. Ch. Jan. 19, 2017); *Reiter v. Fairbank*, 2016 WL 6081823, at *13 (Del. Ch. Oct. 18, 2016).

A050-051; *see* Opinion at 21-22 (even accepting the inference that the Outside Directors revised the August 2015 Press Release, that inference "cannot bear the weight of Plaintiff's burden … that those board members knew the statements were false").

Plaintiff also tellingly ignores other 220 Documents that undermine any inference of bad faith.

[redacted]

Perhaps finally recognizing the lack of allegations supporting a reasonable inference of bad faith, Plaintiff asks this Court to draw various "inferences" in his favor. Such "inferences" are not a substitute for factual allegations required by Rule 23.1, and in any event, are unsupported by the precedent Plaintiff cites. First, Plaintiff claims that [redacted] means that "all inferences must be read against Defendants." OB at 28 & n.38. But the two inapposite cases cited by Plaintiff—*Hughes v. Hu*, 2020 WL 1987029 (Del. Ch. Apr. 27, 2020),[14] and *Feuer v. Redstone*, 2018 WL 1870074 (Del. Ch. Apr. 19, 2018)[15]—drew no inference about the absence of minutes for informal board calls. Moreover, Plaintiff had access to an array of board

[14] *See Hughes*, 2020 WL 1987029, at *14-16 (*Caremark* claim where minutes that company *did* produce revealed that audit committee "never met for longer than one hour and typically only once per year").

[15] *See Feuer*, 2018 WL 1870074, at *12-14 (waste claim where complaint contained board emails noting that the chairman "is totally unintelligible" and "incomprehensible").

minutes and materials, [redacted] that the Complaint concedes "is consistent with what [the Board] was told while reviewing and editing the [August 17, 2015] press release." A052.

Second, Plaintiff claims that because "Defendants almost certainly would not openly reveal their own misconduct in corporate documents," the "Court can draw the inference of wrongful conduct here." OB at 30. That "inference," for which Plaintiff cites no decision of this Court,[16] would eviscerate Rule 23.1 and this Court's precedent requiring particularized facts to satisfy the "difficult task" and "high hurdle" of pleading bad faith. *McElrath*, 224 A.3d at 991, 993.

4. The Court of Chancery correctly rejected Plaintiff's reliance on "core operations" and "director experience" allegations.

With no particularized facts required by Rule 23.1, Plaintiff retreats to generalized allegations of bempedoic acid's importance to Esperion and the Directors' "professional experience." OB at 32-34. But such allegations are irrelevant to Plaintiff's only argument regarding interestedness on appeal—whether

[16] Plaintiff's misplaced reliance on *Pyott*, which was reversed, has been repeatedly rejected by the Court of Chancery. *See Horman*, 2017 WL 242571, at *13 n.82; *Okla. Firefighters Pension & Ret. Sys. v. Corbat*, 2017 WL 6452240, at *25 n.375 (Del. Ch. Dec. 18, 2017) (collecting cases); *La. Mun. Police Emps.' Ret. Sys. v. Pyott*, 46 A.3d 313, 357 (Del. Ch. 2012), *rev'd*, 74 A.3d 612 (Del. 2013).

the Board "knowingly made false and misleading statements." *See id.* at 23 & n.34 (abandoning *Caremark* claims). The importance of bempedoic acid to Esperion and the level of the Directors' clinical-trial expertise have little bearing on whether it is reasonable to infer from the facts alleged that they knowingly lied about the EOP2 meeting.

In any event, the Court of Chancery correctly rejected this "last gasp to allege scienter" and noted that Plaintiff's arguments "elide[] the scope and purpose of the [core operations] doctrine," because "Plaintiff must plead other particularized facts that support an inference of director knowledge before the … doctrine may be invoked to enhance that inference." Opinion at 23. Plaintiff's reliance on other decisions from Vice Chancellor Slights in which he applied the core operations doctrine—"along with particularized factual allegations"—supporting *Caremark* claims is therefore misplaced. *Compare In re Fitbit, Inc. S'holder Deriv. Litig.*, 2019 WL 190933, at *3 (Del. Ch. Jan. 14, 2019), *with In re Nanthealth, Inc. S'holder Litig.*, 2020 WL 211065, at *6 n.44 (Del. Ch. Jan. 14, 2020) (rejecting core operations theory absent particularized allegations of directors' "aware[ness] of any wrongdoing").

Likewise, as the Court of Chancery held, Plaintiff's attempt to bootstrap particularized allegations of bad faith with the Board's general "professional

experience" has been repeatedly rejected by Delaware courts. *See, e.g.*, *Wood*, 953 A.2d at 142-43 (it is "contrary to well-settled Delaware law" that experience with "SEC rules and regulations" is a substitute for particularized allegations "that the directors had a culpable state of mind"); *Citigroup*, 964 A.2d at 131 (similar).

Plaintiff's argument—that generally alleging misleading statements regarding a "core operation" approved by an "experienced" board is sufficient to allege scienter—would erase Rule 23.1 and expose nearly every company with a "core" product or an "experienced" board to a flood of demand-futility lawsuits.

5. The Court of Chancery did not require Plaintiff to plead motive, but permissibly recognized that the lack of motive undermined the plausibility of bad faith.

Plaintiff attacks a strawman when he claims that the Court of Chancery "improperly required" the Complaint to plead the Directors' "motive for issuing" the allegedly false statements in the August 2015 Press Release. OB at 34-39. The court held that the Complaint "pleads no facts that would allow a reasonable inference the Outside Directors … knew that anything in the [August 2015] Press Release was false." Opinion at 21. That holding did *not* impose a requirement that Plaintiff plead motive. Instead, in one paragraph of its thirty-one pages of analysis, the court noted that it was "not surprising" that the Complaint lacked particularized facts supporting a reasonable inference of bad faith given the absence of a

"conceivable reason" why the Board would "intentionally lie to the market knowing full well the official FDA minutes would contradict their statements in a matter of weeks." *Id.* at 22. Thus, the Court of Chancery did not "require" motive, but used the lack of motive to confirm its holding that, independent of motive, there was no plausible allegation of scienter.

Plaintiff cites no authority for the proposition that a court cannot consider the lack of motive to lie to investors in evaluating the plausibility of a claim that the Board did, in fact, intentionally lie. Indeed, courts *have* considered motive in precisely this way. *E.g.*, *White v. Panic*, 793 A.2d 356, 368 (Del. Ch. 2000), *aff'd*, 783 A.2d 543 (Del. 2001) ("Mere speculation on motives for undertaking corporate action are wholly insufficient to establish a case of demand excusal.").

Perhaps recognizing that the Court of Chancery's analysis concerning the lack of conceivable motive to lie was not only permissible but appropriate, Plaintiff attempts to backfill his Complaint with speculation concerning the Board's motive. *E.g.*, OB at 36-38. This speculation comes far too late, however, and rests on *nothing* in the Complaint. Plaintiff's unpled suppositions on appeal such as "Defendants here may well have hoped" and motives that he cloaks in "possibility" and "potential" (OB at 36-38), are not factual allegations, much less particularized ones. *See White*, 793 A.2d at 368 (rejecting "[m]ere speculation on motives").

Plaintiff's motive arguments are, in any event, illogical. According to Plaintiff, the Directors were purportedly motivated to lie to investors "to maintain the Company's stock price." OB at 38. But this generalized assertion—that would apply to any company's board—makes no sense given that (i) not a single Director sold one penny of Esperion stock between the August and September 2015 Press Releases,[17] and (ii) in the August 2015 Press Release, Esperion promised to disclose an update after receiving the FDA's minutes—meaning "they were virtually certain to be caught" in the supposed lie. Opinion at 22.

[17] During oral argument, Plaintiff conceded that "[w]e don't have a pump and dump. We don't have them unloading stock." OB Ex. B at 40:15-19.

II. THE COURT OF CHANCERY CORRECTLY CONCLUDED THAT THE COMPLAINT FAILS TO ALLEGE A REASONABLE DOUBT ABOUT THE INDEPENDENCE OF ANY OF ESPERION'S SUPERMAJORITY OF OUTSIDE DIRECTORS.

A. Question Presented

Did the Court of Chancery correctly hold that Plaintiff's failure to make a demand on Esperion's Board was not excused because the Complaint's allegations do not support a reasonable doubt about the independence of *any* of Esperion's supermajority of Outside Directors, much less a majority of the Board? *See* Opinion at 26-30; OB at 18, 39-45.

B. Scope of Review

This Court reviews "de novo the decision of the Court of Chancery to dismiss a derivative suit under Rule 23.1." *White*, 783 A.2d at 549; *supra* 20.

C. Merits of Argument

In contending that the Complaint supports a reasonable doubt regarding the independence of a majority of Esperion's nine-member Board, which was dominated by a supermajority of seven Outside Directors, Plaintiff repeatedly blames the Court of Chancery for "ignoring" the Complaint's allegations and "resort[ing] to boilerplate analysis rather than considering the facts at hand." OB at 44; *see also id.* at 39, 42. But the Court of Chancery did not ignore anything. Rather, it fully considered the Complaint's thin allegations and reached an inescapable conclusion:

Plaintiff's "naked assertions of [] previous business relationships" are insufficient and raise "no reasonable doubts as to [the] independence" of *any* of the four Outside Directors at issue on appeal. Opinion at 4-7 & nn. 12-36; *id.* at 26-30 & nn. 121-139.

1. Plaintiff ignores the governing legal standard, which requires far more than owning shares or prior business relationships with management.

"[D]irectors are entitled to a *presumption* that they [a]re faithful to their fiduciary duties" and act independently. *Beam v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004). The "burden is upon the plaintiff" to "allege[] particularized facts creating a reasonable doubt of a director's independence to rebut the presumption." *Id.* at 1049. A reasonable doubt requires particularized facts, not "[h]earsay and hyperbole," *McElrath*, 224 A.3d at 996 n.77, and is not satisfied with "mere suspicions" or "conclusory terms," *Beam*, 845 A.2d at 1050.

"In order to show lack of independence, the [C]omplaint … must create a reasonable doubt that a director is not so 'beholden' to an interested director [in this case, Newton or Mayleben] that his or her 'discretion would be sterilized,'" or that he "would be more willing to risk his … reputation than risk the relationship with the interested director." *Id.* at 1050, 1052 (quoting *Rales*, 634 A.2d at 936).

Although "[i]ndependence is a fact-specific determination," this Court and the Court of Chancery have developed guideposts. *Id.* at 1049-50. "Importantly, being nominated or elected by" an interested director is not sufficient to "reasonably doubt a director's independence." *McElrath*, 224 A.3d at 995. And, of course, a director's employment by a stockholder, or her own status as a stockholder, cannot overcome the presumption of independence. *See, e.g.*, *In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 356-57 (Del. Ch. 1998), *aff'd in relevant part sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *see also Shabbouei v. Potdevin*, 2020 WL 1609177, at *9 (Del. Ch. Apr. 2, 2020) (rejecting "weak sauce … futility argument" that directors' employment with major stockholder undermined independence); *Tilden v. Cunningham*, 2018 WL 5307706, at *12 (Del. Ch. Oct. 26, 2018) (similar).

While outside business relationships with an interested director may, in extreme circumstances, rise to the level of supporting a reasonable doubt about a director's independence, "naked assertion[s] of a previous business relationship [are] not enough to overcome the presumption of a director's independence." *Orman v. Cullman*, 794 A.2d 5, 27 (Del. Ch. 2002); *see also Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 980 (Del. Ch. 2000) ("long-standing 15-year professional and personal relationship" insufficient). For example, a plaintiff must "assert particularized facts establishing that the business relationships are *material* to" the

outside director or entity with whom the director is affiliated. *Jacobs v. Yang*, 2004 WL 1728521, at *6 (Del. Ch. Aug. 2, 2004), *aff'd*, 867 A.2d 902 (Del. 2005); *see also McElrath*, 224 A.3d at 996 (director independent where complaint did not allege "personal or financial connection" that was of "substantial material importance" to outside director). Further, allegations that a non-interested director has "derived substantial wealth" from a company in the past fall short of overcoming the presumption of independence because such allegations do not support an inference that an interested director "has any means to deprive [the non-interested director] of the wealth [he] has accumulated" "let alone wealth that is material to [him]—*going forward*." *McElrath v. Kalanick*, 2019 WL 1430210, at *18 (Del. Ch. Apr. 1, 2019), *aff'd* 224 A.3d 982 (emphasis added). Likewise, while "personal relationships" "may raise a reasonable doubt" of independence where they "border on or even exceed familial loyalty and closeness," common "collegial relationships" and friendships do not render demand futile. *Beam*, 845 A.2d at 1050-51.

As even the cases Plaintiff cites confirm (OB at 39-41, 45), a reasonable doubt of an outside director's independence exists in rare circumstances, such as where a company concedes in its own disclosures that a director is not independent,[18] where a director is an interested party's "close friend of a half century, [and] derives his

[18] *Sandys v. Pincus*, 152 A.3d 124, 131 (Del. 2016).

primary employment from a company over which [that party] has substantial control,"[19] or where a director owes his entire career to an interested party.[20]

2. The Court of Chancery correctly held that Plaintiff's allegations do not come close to overcoming the presumption of independence.

At the time Plaintiff filed suit, Esperion's Board had nine Directors, including a supermajority of seven Outside Directors. A029-032; Opinion at 27. As Esperion disclosed, its CEO Mayleben and its founder Newton were not considered independent under NASDAQ Rule 5605(a)(2), but Plaintiff does not contest that the seven Outside Directors satisfy the standard for independence under that rule. *Supra* 16. And Plaintiff now concedes that three of those Outside Directors are independent. OB at 39-45; Opinion at 27 & n.126. Accordingly, Plaintiff must demonstrate that three of the remaining four Outside Directors—*i.e.*, Goldstein, Janney, Vitullo, and Gotto—were so beholden to Mayleben or Newton that their discretion was sterilized and that they would risk their reputations before risking their relationships with Mayleben or Newton. *Id.* The Court of Chancery correctly held that the Complaint fails to allege particularized facts supporting a reasonable doubt as to the independence of *any* of these four challenged Outside Directors, let

[19] *Del. Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1021 (Del. 2015).

[20] *Marchand v. Barnhill*, 212 A.3d 805, 819-20 (Del. 2019).

alone three of them. *Id.* at 26-30.

Goldstein. Plaintiff's brief does not mention Goldstein other than to include him in a generalized list. OB at 44. That absence of analysis is not surprising given that the Complaint's *only* allegations concerning Goldstein are that (i) he works for a venture capital firm that is an Esperion stockholder,[21] and (ii) he had been an Esperion Director for eight years when Plaintiff filed suit. *See* A029, A062, A066. Neither unremarkable fact comes close to supporting any doubt regarding Goldstein's independence, much less a reasonable doubt.

Janney and Vitullo. The Complaint's allegations concerning Janney and Vitullo fare no better, as they consist essentially of the unremarkable fact that Janney and Vitullo worked for Esperion stockholders—which plainly does not establish a lack of independence. *E.g.*, *McElrath*, 2019 WL 1430210, at *18. Specifically, the Complaint alleges that Janney, who joined the Board in 2012 (before Mayleben became CEO), is an employee at Alta, a venture capital firm that profited from selling stock in connection with Pfizer's acquisition of Old Esperion sixteen years ago. A030, A059, A064. There is no allegation that Janney profited from that transaction. The same is true of Vitullo, except that she joined the Board in 2008

[21] Plaintiff alleges that Braunstein is a partner at the same venture capital firm as Goldstein, yet concedes Braunstein's independence. A063.

and is a partner at a different venture capital firm, Domain, which also invested in Old Esperion. A029, A059, A069. From these allegations, Plaintiff theorizes that "Newton and Mayleben had confidence that Janney … would conform to their wishes, and Janney was incentivized to follow them down the path to another windfall." OB at 43. And as to Vitullo, Plaintiff posits that "Newton and then Mayleben trusted [her] to be loyal, and [she] unquestionably was seeking another big payday." *Id.* The Complaint, however, lacks any factual allegations supporting this hyperbolic conjecture, and does not allege any personal or ongoing business relationships (other than their employers' stockholdings) between Janney or Vitullo and Newton or Mayleben. *See McElrath*, 224 A.3d at 996 n.77 (rejecting "[h]earsay and hyperbole"); *Beam*, 845 A.2d at 1050 (rejecting "conclusory terms").

The fact that Janney and Vitullo worked for employers that made money on "Old Esperion" more than a decade ago does not sterilize their discretion. *See, e.g.*, *McElrath*, 2019 WL 1430210, at *18 (rejecting allegations that director "derived substantial wealth" from company in past, which did not support inference that interested party had "means to deprive [the outside director] of the wealth [he] has accumulated … let alone wealth that is material to [him]—going forward"). Plaintiff argues that because Janney and Vitullo are employed by Esperion stockholders, there is "reason to doubt" whether they would "vote to initiate litigation … due to the risk

of their [] funds being cut out of future investment opportunities in retaliation." OB at 44. But that is speculation and proves too much: Plaintiff's argument would mean that *no* Director affiliated with any private equity or venture capital firm could *ever* be independent, which is plainly (and for good reason) not the law. *See, e.g.*, *Shabbouei*, 2020 WL 1609177, at *9 (rejecting this "weak sauce" argument because a shareholder-affiliated director is "more likely to have interests that are aligned with the other shareholders"); *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 65-66 (Del. 1989) (rejecting argument that director who was president of major stockholder "did not act independently").

Gotto. Plaintiff's arguments about Gotto also fail to come close to overcoming the presumption of independence. Gotto was a Director of Old Esperion from 2001 to 2004, earned $840,000 as a result of Pfizer's purchase of Esperion in 2004, and then rejoined the Board ten years later. A030, A058, A067. That is it. From these threadbare allegations, Plaintiff surmises that it was "apparent Gotto was invited to rejoin the Esperion Board because of his long-term relationship with Mayleben and Newton and his proven loyalty and trustworthiness to them, and Gotto was willing to serve because he had made a significant sum of money from Esperion in the past and was looking for further enrichment." OB at 41-42. But Delaware courts have repeatedly rejected such "naked assertion[s] of [] previous business

relationship[s]." *Orman*, 794 A.2d at 27; *see also Turner*, 846 A.2d at 980 (finding "long-standing 15-year professional and personal relationship" insufficient). Indeed, the Complaint's factual allegations do not even support a "relationship" between Gotto and Mayleben or Newton, or his purported "proven loyalty and trustworthiness to them"—Plaintiff merely alleges that Gotto profited from "Old Esperion" and was then invited to rejoin the Board one decade later.

As the Court of Chancery correctly found, the Complaint's allegations raise "no reasonable doubts" as to the independence of *any* of the four Outside Directors above, much less three of them. Opinion at 30.

CONCLUSION

The Court should affirm the Court of Chancery's decision.

/s/ Rudolf Koch
Rudolf Koch (#4947)
Sarah A. Clark (#5872)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Counsel for Appellees

OF COUNSEL:

Deborah S. Birnbach
Adam Slutsky
David J. Zimmer
Ian Stearns
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, Massachusetts 02210
(617) 570-1000

Words: 9,998

Dated: July 1, 2020

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2020, the foregoing was caused to be served upon the following counsel of record via File & Serve*Xpress*:

Seth D. Rigrodsky, Esquire
Brian D. Long, Esquire
Gina M. Serra, Esquire
Rigrodsky & Long, P.A.
300 Delaware Avenue, Suite 1220
Wilmington, Delaware 19801

/s/ Sarah A. Clark
Sarah A. Clark (No. 5872)