PUBLIC VERSION DATED
JULY 31, 2020

EFiled: Jul 31 2020 02:55PM EDT
Filing ID 65813586
Case Number 110,2020

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, Individual Defendants-Below Appellees, and ESPERION THERAPEUTICS, INC., Nominal Defendant-Below Appellee.	No. 110,2020 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 12985-VCS

APPELLANT HUBERT OWENS' REPLY BRIEF

Dated: July 16, 2020

RIGRODSKY & LONG, P.A.
Seth D. Rigrodsky (#3147)
Gina M. Serra (#5387)
300 Delaware Avenue, Suite 1220
Wilmington, DE 19801
(302) 295-5310
Attorneys for Plaintiff-Below Appellant

PUBLIC VERSION DATED
JULY 31, 2020

OF COUNSEL:

ROBBINS LLP
Brian J. Robbins
Stephen J. Oddo
Shane P. Sanders
5040 Shoreham Place
San Diego, CA 92122
(619) 525-3990

PUBLIC VERSION DATED
JULY 31, 2020

TABLE OF CONTENTS

PUBLIC VERSION DATED
JULY 31, 2020

TABLE OF AUTHORITIES

CASES **PAGE(S)**

PUBLIC VERSION DATED
JULY 31, 2020

PRELIMINARY STATEMENT

This is anything but a "routine" appeal of a "thorough" Trial Court decision finding a complaint lacked the necessary factual particularity to establish demand futility. Answering Brief ("AB") at 1.[1] Defendants concede two members of the nine-member Board are interested for purposes of demand futility. AB at 43. Accordingly, Plaintiff need only allege facts creating reason to doubt the disinterestedness (e.g., by virtue of facing a substantial likelihood of liability) or independence (from inside directors Mayeben and Newton) of *three* of the outside directors. AB at 24. In this case, *every member* of Esperion's Board participated *from start to finish* in the drafting of the August 17, 2015 press release containing the false statements. Not only that, *every member* of the Board was given a strong incentive by management to overstate EC-1002's prospects for approval before the press release drafting process began.

The Trial Court faulted Plaintiff for being unable to identify the precise edits or other contributions each individual Board member made to the false and misleading statements and their specific knowledge of the falsity of the statements -- despite Esperion's refusal to provide documents pursuant to Plaintiff's Section

[1] All abbreviated terms, unless otherwise noted, are as defined in Plaintiff's Opening Brief and Defendants' Answering Brief.

220 demand that would have supplied critical missing information and the Sixth Circuit's determination that Mayleben acted with scienter. Consequently, the Trial Court improperly failed to draw all reasonable inferences from the many available particularized facts in Plaintiff's favor, and concluded Plaintiff did not establish that demand was futile with respect to a majority of the Board. This was clear error. The judgment of the Trial Court should be reversed on this basis.

Additionally, Plaintiff alleged particularized facts creating reason to doubt the independence of at least three of the outside directors—including long-standing, lucrative, and overlapping venture capital and other business relationships—rendering demand on the nine-member Board futile. Defendants' Answering Brief misapplies the relevant legal standards and ignores germane case law, incorrectly analyzes Plaintiff's allegations in isolation rather than in their totality, and mischaracterizes and ignores Plaintiff's particularized factual allegations. The Trial Court's ruling that Plaintiff failed to allege adequately reason to doubt the independence of a majority of the Board should be reversed on this basis as well.

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO CONCLUDE PLAINTIFF ADEQUATELY PLED PARTICULARIZED FACTS SUPPORTING A REASONABLE INFERENCE THAT A MAJORITY OF ESPERION'S DIRECTORS FACED A SUBSTANTIAL LIKELIHOOD OF LIABILITY FOR BREACHING THEIR DUTY OF LOYALTY

A. Introduction

It is undisputed that "Esperion executives" attended the August 11, 2015 EOP2 meeting with the FDA regarding bempedoic acid's upcoming Phase 3 trials. AB at 8.[2] It is also clear the statements in the Company's August 17, 2015 press release that "[b]ased on feedback from the FDA, approval of ETC-1002 in the [relevant] patient populations will not require the completion of a cardiovascular outcomes trial (CVOT)," "LDL-C remains an accepted clinical surrogate endpoint for the approval of an LDL-C lowering therapy such as ETC-1002 in [relevant] patients," and "[w]e have a clear regulatory path forward for development and approval of ETC-1002," and Mayleben's similar remarks during an investor conference call later that day, were materially false and misleading. *Dougherty v.*

[2] Defendants claim for the first time that Mayleben did not attend the FDA meeting. AB at 9. There is no support in the record for this factual assertion and it must be disregarded by the Court. *See Tribbitt v. Tribbitt*, 963 A.2d 1128, 1131 (Del. 2008) ("while a judge may take judicial notice of a fact outside the record, that fact must not be subject to reasonable dispute and the parties must be given prior notice and an opportunity to challenge judicial notice of that fact").

Esperion Therapeutics, Inc., 905 F.3d 971 (6th Cir. 2018).[3] The only real issue is whether at least three so-called "outside" members of the Board knew the statements were false when made.

B. The Board Had A Motive to Deceive Investors

The Trial Court determined Defendants had no motive to "intentionally lie to the market," and "[i]n the absence of *some* conceivable explanation for why Defendants would lie so openly, especially when they were virtually certain to be caught in the lie, it is not reasonable to infer bad faith." OB Ex. A at 22 (emphasis in original). However, the record demonstrated Defendants' motivation to lie to the market. [redacted]

[3] As noted by the Trial Court, the FDA's confirmation years later that LDL-C lowering is an acceptable clinical surrogate endpoint for ETC-1002 is "not relevant for purposes of this motion." OB Ex. A at 15 n.77.

[redacted]

A186 (emphasis added).

[redacted][4] Consequently, the Board had a substantial incentive to raise the price of Esperion stock as high as possible by issuing false statements before the FDA's assessment became public and the bubble

[4] "A short squeeze occurs when a stock … jumps sharply higher, forcing traders who had bet that its price would fall to buy it in order to forestall even greater losses. Their scramble to buy only adds to the upward pressure on the stock's price." https://www.investopedia.com/terms/s/shortsqueeze.asp.

created by the short squeeze burst, sending the stock price back down to plateau at a higher level than it would have but for the false statements and the short squeeze.

The Board's concern for the Company's stock price was demonstrated again during its meeting on August 19, 2015, two days after the false statements were made. [redacted] AR004.

The Trial Court's determination that a lack of motive was a basis for granting Defendants' motion to dismiss, its unfounded conclusion that Defendants lacked motive, and its failure to consider the reasonable inferences flowing from the particularized facts concerning motive, were clear error requiring reversal. *Cf. Dougherty*, 905 F.3d at 982 ("the absence of a motive allegation is not fatal") (quotation omitted).

C. Esperion Hides the Facts

[redacted] AR005. Plaintiff has no information about what

transpired during [redacted] because Defendants did not produce any materials about them in response to Plaintiff's Section 220 demand.[5]

Plaintiff noted in his Answering Brief before the Trial Court that [redacted] A145, 155. However, the Trial Court refused to do so. *Cf. Hughes v. Hu*, 2020 Del. Ch. LEXIS 162, at *29 (Del. Ch. Apr. 27, 2020) ("While Rule 23.1 requires that a plaintiff allege specific facts, he need not plead evidence.") (quotation omitted).

The need to read all reasonable inferences against the Defendants was especially pressing here because, as described below, [redacted] Plaintiff "heed[ed] the repeated admonitions of this Court and the Court of Chancery to make a diligent pre-suit investigation," *Sandys v. Pincus*, 152 A.3d 124, 126 (Del. 2016), before filing his complaint, and received information demonstrating

[5] Plaintiff's Section 220 demand covered books and records regarding these calls. B090.

the entire Board had a motive to issue a false statement and participated in the preparation of the August 17 press release containing false statements.

[redacted][6] which said:

[redacted]

B285 (emphasis added).

[6] Goodwin Procter is listed as "Of Counsel" to Defendants in this matter.

[redacted] and two days after the FDA meeting, [redacted] [7] which contained numerous false statements. The draft press release stated:

- [redacted]
- [redacted]
- [redacted]

B286-87.[8]

[redacted] Again, Esperion failed to provide any materials

[7] It is unknown whether a draft press release existed [redacted] due to the Company's failure to produce.

[8] [redacted] in the final August 17 press release. It was a curious comment, given Defendants' new and unsupported claim that Mayleben did not attend the FDA meeting.

documenting conversations or correspondence between [redacted]

The final press release, and Mayleben's comments at the August 17 analyst conference call, were even more misleading than the [redacted] the final press release had him stating "[w]e have a clear *regulatory* path forward for development *and approval* of ETC-1002." B016 (emphasis added). Mayleben added during the August 17 analyst conference call: "[W]e now have a clear regulatory path forward. Of particular note, the FDA confirmed for us that LDL-cholesterol lowering remains an acceptable clinical surrogate endpoint for the potential approval of a therapy such as 1002" and "[w]e know that [ETC-]1002 will not require a CV outcomes trial to be completed prior to approval in patients [in the relevant population." A041-42; B20-21.

It is undisputed that [redacted] B280 (emphasis added). [redacted]

[redacted] it may be reasonably inferred that at least one Board member in addition to Mayleben, and probably more, contributed to the false statements.

The Trial Court ignored these particularized facts showing the Board [redacted] Instead, the Trial Court found -- without support -- that "the Complaint pleads no facts that would allow a reasonable inference the Outside Directors, individually or collectively, knew that anything included in the press release was false," notwithstanding the Board's clear motive to issue a false statement. OB Ex. A at 21.

Defendants characterize [redacted] as "conclusory arguments based on group pleading of 'Board knowledge' and [redacted] AB at 27. This is untrue. "[U]nder Rule 23.1, the plaintiffs have a 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.'" *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 56 (Del. 2017) (quoting *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993)). [redacted]

[redacted]

[redacted] Plaintiff pled enough particularized facts to create the necessary reasonable doubt.

The cases cited by Defendants do not support their position. For example, *Higher Education Management Group, Inc. v. Mathews*, 2014 Del. Ch. LEXIS 224 (Del. Ch. July 15, 2014), bolsters Plaintiff's argument that he has alleged the individual Board members' conduct with sufficient particularity, especially given the Company refused to provide him with critical information. The Court in *Higher Education* said:

> Plaintiffs do not allege with particularity that each director, individually, participated in proffering the forms to Spada and thereby had knowledge that the Loan was a fabrication. Instead, Plaintiffs attribute identical actions to all of the directors, as a defined group, *without providing any context for this assertion*. *Such broad and identical assertions against the Director Defendants do not meet the requirements for pleading facts with particularity*. I therefore conclude that these allegations, in and of themselves, will not suffice to support an inference of knowledge such that Plaintiffs may establish demand futility.

2014 Del. Ch. LEXIS 224, at *25-26 (emphasis added; emphasis in original deleted).

That is precisely what did *not* happen in this case. Here, [redacted]

[redacted]

[redacted] Those are sufficiently particularized facts under the circumstances to support a reasonable inference that at least three "independent" Board members knew the August 17 press release contained materially false statements. *Cf. Wood v. Baum*, 953 A.2d 136, 142 (Del. 2008) ("The Board's execution of MME's financial reports, *without more*, is insufficient to create an inference that the directors had actual or constructive notice of any illegality.") (emphasis added).

D. Dougherty

The Sixth Circuit in *Dougherty*, which did not have the benefit of Section 220 materials, was not fooled by Defendants' obfuscation. *Dougherty* reversed and remanded a District Court decision granting a motion to dismiss a securities fraud class action against Esperion and Mayleben for violations of sections 10(b) and 20(a) of the Securities Exchange Act based on the same false statements made on August 17, 2015 that are the subject of the present Action. The Sixth Circuit determined the plaintiffs in *Dougherty* successfully established for the purposes of a motion to dismiss that Mayleben's and the Company's August 17 false statements were made with scienter.

Plaintiff argued before the Trial Court that Esperion "faces significant liability" as a result of *Dougherty*. A133, 147-48. However, the Trial Court's decision did not mention, much less discuss, *Dougherty*.[9] Nor did the Trial Court examine whether it could be reasonably inferred that the remainder of the Board acted with scienter in [redacted] The Trial Court's failure to do so was clear error.

E. Defendants' Belated Excuses Do Not Make Sense

Defendants' new explanation for the false statements further highlight the weaknesses in the Trial Court's analysis. Defendants now attempt to blame them on [redacted] AB at 10 & n.5. According to the August 19 Board meeting meetings, [redacted] B473.

There are numerous and obvious flaws with this argument. First, [redacted]

[9] The Action was stayed in the Trial Court by stipulation from May 18, 2017 to December 19, 2018, pending the resolution of the *Dougherty* appeal to the Sixth Circuit, making it remarkable that the Trial Court did not discuss the Sixth Circuit's decision.

[redacted] Second, [redacted] AR009 [redacted] It is highly implausible that [redacted] Rather, Defendants now are using [redacted] Third, according to Esperion's web site, [redacted] remains an executive at the Company, and was promoted twice since this supposed gaffe. https://www.esperion.com/the-esperion-story/leadership-team (last viewed July 14, 2020); Esperion Therapeutics, Inc., Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (Schedule 14A) (Apr. 16, 2020), at 9.

Perhaps most significantly, the email trail prior to the August 17 false statements [redacted]

Defendants' belated attempt to blame [redacted] for their misconduct is a transparent attempt to deflect from their own culpability.

F. The Court Should Not Reward Defendants for Stonewalling the Facts

After Plaintiff filed his Motion to Stay Appeal on June 12, 2020, Defendants conceded they withheld Section 220 books and records from Plaintiff. Reply to Appellees' Opposition to Appellant's Motion to Stay Appeal, at 5. Defendants claimed the settlement agreement ending Plaintiff's Section 220 action against Esperion did not require the disclosure of these documents. *Id*. at 6. Similar arguments as a basis to fend off demand futility allegations have been rejected before:

> [P]laintiffs made a § 220 request to defendants who knew the crux of plaintiffs' complaint. Even if the request was in fact narrow, defendants had the opportunity to widen the scope of documents granted in order to exculpate themselves. While they were, of course, not *required* to do so, it is more reasonable to infer that exculpatory documents would be provided than to believe the opposite: that such documents existed and yet were inexplicably withheld.

In re Tyson Foods, Inc. Consol. S'holder Litig., 919 A.2d 563, 578 (Del. Ch. 2007) (emphasis in original); *see also Hughes*, 2020 Del. Ch. LEXIS 162, at *48 ("The Company could have produced documents in response to the plaintiff's Section 220 demand that would have rebutted this inference. The absence of those documents is telling….").

Not only have Defendants admitted to have intentionally withheld Section 220 documents from Plaintiff, but there is a question whether the Company made and retained minutes, notes, and correspondence about the [redacted] Whether Esperion failed to make records of these significant events, destroyed them, or simply refused to produce them in response to Plaintiff's Section 220 demand is irrelevant – the Company has hidden the truth despite Plaintiff's best efforts to find it by using the long-promoted "tools at hand." *CHC Invs., LLC v. FirstSun Capital Bancorp*, 2019 Del. Ch. LEXIS 32, at *10 (Del. Ch. Jan. 24, 2019) ("Delaware policy encourages stockholders in the derivative … context to use the 'tools at hand' (*e.g.*, Section 220) to gather information before filing complaints that will be subject to heightened pleading standards."). Defendants should not be rewarded for their obfuscation.

It will be relatively easy to determine through discovery whether at least three of the Board members knew the August 17 press release was false when made. Plaintiff should not be denied the chance to conduct such discovery when so many known particularized facts and the reasonable inferences flowing therefrom, combined with Defendants' recalcitrance, demonstrate a significant possibility of a lack of loyalty and independence by a majority of the Board -- one that is just as

conceivable if not more so, than Defendants' explanations. *See Winshall v. Viacom Int'l Inc.*, 76 A.3d 808, 813 & n.12 (Del. 2013) ("Long standing Delaware case law holds that a complaint will survive a motion to dismiss if it states a cognizable claim under any 'reasonably conceivable' set of circumstances inferable from the alleged facts."). The Trial Court's decision should be reversed on this basis.

II. PLAINTIFF ALLEGED FACTS CREATING REASON TO DOUBT THE INDEPENDENCE OF JANNEY, VITULLO, GOTTO, AND GOLDSTEIN—TOGETHER WITH MAYLEBEN AND NEWTON, A MAJORITY OF THE BOARD

In their Answering Brief, Defendants misstate the applicable standards for pleading demand futility based on allegations there is reason to doubt a director's independence. AB at 40-43.

The independence inquiry "turns on whether the [Plaintiff] ha[s] pled facts from which the director's ability to act impartially on a matter important to the interested party can be doubted because that director may feel either subject to the interested party's dominion or beholden to that interested party." *Sandys*, 152 A.3d at 128. Defendants acknowledge that Plaintiff need only show a "reasonable doubt" as to the ability of a director to act independently—not a judicial finding or a preponderance of the evidence. AB at 40. Defendants also concede that (1) "'[i]ndependence is a fact-specific determination,'" AB at 41 (quoting *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040 1049-50 (Del. 2004)); (2) outside business relationships with an interested director can support a reasonable doubt about a director's independence, AB at 41-42; (3) "'personal relationships' 'may raise a reasonable doubt' of independence," AB at 42 (quoting *Beam*, 845 A.2d at 1050-51); (4) close friendships, especially when combined with control over compensation, may create reason to doubt a director's independence,

AB at 42; and (5) allegations that a director's career was benefitted by another director may support reason to doubt the independence of that director, AB at 43.

However, Defendants ignore that in evaluating a director's independence, the Court must "consider all particularized facts pled by the plaintiff[] about the relationships between the director and the interested party in their totality and not in isolation from each other." *In re EZCORP Inc. Consulting Agreement Derivative Litig.*, 2016 WL 301245, at *34 (Del. Ch. Jan. 25, 2016) (quotation omitted). Here, Defendants improperly ask this Court to consider and reject each of Plaintiff's independence-based factual allegations individually and in isolation from each another.[10] That is not the proper analysis, and, as discussed below, the totality of Plaintiff's allegations supports a reason to doubt the independence of at least three of the outside directors.

In addition to misstating and misapplying the relevant case law and legal standards, Defendants mischaracterize and ignore Plaintiff's particularized factual

[10] In so doing, Defendants cite precedent standing for the unremarkable proposition that the mere existence of a social, personal, or business relationships—without more—is insufficient to create reason to doubt a director's independence. AB at 40 (merely being nominated or elected to the board by an interested director, standing alone, is not enough); 41 (director's status as a stockholder or mere fact that director is employed by a stockholder of the corporation, standing alone, is insufficient to create reason to doubt director's independence); 41 (naked assertion of previous business relationship, standing alone, is not enough); 42 (allegations of common collegial relationships and friendships, standing alone, are not enough).

allegations. When considered in their totality, Plaintiff's particularized allegations, and the reasonable inferences that can and must be drawn therefrom, create a reason to doubt the independence of defendants Janney, Vitullo, Gotto, and Goldstein—who, together with defendants Mayleben and Newton (neither of whom Defendants dispute is interested for purposes of demand futility here), constitute more than a bare majority of Esperion's Board.

Defendants incorrectly claim that Plaintif's allegations "consist essentially of the unremarkable fact that Janney and Vitullo worked for Esperion stockholders," AB at 44, and that Gotto merely profited from Old Esperion and later joined the Esperion Board, AB at 47. On the contrary, the Complaint alleges that: (1) [redacted] A030, A058-59; (2) [redacted] A030, A059-60; and (3) [redacted]

[redacted]

[redacted] A029, A059-60. These allegations go well beyond relatively minor and/or incidentally overlapping business interests and create reason to doubt the independence of Janney, Vitullo, and Gotto here.[11] None of the cases on which Defendants rely involved a similar set of facts, and the cases they do cite are distinguishable. For example, Defendants cite *McElrath v. Kalanick*, 2019 WL 1430210 (Del. Ch. Apr. 1, 2019), *aff'd* 224 A.3d 982 (Del. 2020) for the proposition that simply making money on Old Esperion does not create reason to doubt the independence of Janney and Vitullo. AB at 45. But *McElrath* did not involve millions of dollars earned on behalf of directors' venture capital firms in connection with investments and directorships in a predecessor company combined with a subsequent directorship in the new company, and, in any event, the court in

[11] *See In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 55 (Del. Ch. 2013) ("I find that Prang's current and past relationships with Gandhi and Sequoia resulted in a sense of 'owingness' that compromised his independence for purposes of determining the applicable standard of review."); *Sandys*, 152 A.3d at 134 (Del. 2016) (inferring that two directors were not independent of a controller for purposes of Rule 23.1 where they had "a mutually beneficial network of ongoing business relations" based on past investments and service on company boards); *In re Nanthealth, Inc. S'holder Litig.*, 2020 WL 211065, at *7-8 (Del. Ch. Jan. 14, 2020) (recognizing that lengthy personal and professional relationships can cast doubt on directors' ability to be impartial in deciding whether or not to initiate litigation).

McElrath simply held that the fact "[the CEO] hired the [director] as an employee, standing alone, is insufficient to raise a reasonable likelihood that [the director] lacks independence." *McElrath*, 2019 WL 1430210, at *18. Plaintiff has alleged much more than that here.

The Complaint also details a web of entangling relationships involving a majority of the Board members—Mayleben, Newton, Vitullo, Janney, and Goldstein—arising from their venture capital activity. A060-62. This Court has identified the particular independence concerns that arise in the context of directors' overlapping business—and, in particular, venture capital—interests. As the Court observed in *Sandys*, 152 A.3d 134:

> [T]he reality is that firms like [the VC firm at issue] compete with others to finance talented entrepreneurs like [the controlling director], and networks arise of repeat players who cut each other into beneficial roles in various situations. There is, of course, nothing at all wrong with that. In fact, it is crucial to commerce and most human relations. But, precisely because of the importance of a mutually beneficial ongoing business relationship, it is reasonable to expect that sort of relationship might have a material effect on the parties' ability to act adversely toward each other. Causing a lawsuit to be brought against another person is no small matter, and is the sort of thing that might plausibly endanger a relationship.

This Court further explained in *Sandys* that the "ongoing economic opportunities" generated by relationships between venture capitalists and entrepreneurs "can give rise to human motivations compromising the participants'

ability to act impartially toward each other on a matter of material importance." *Sandys*, 152 A.3d at 126. Critically, the Court in *Sandys* found demand futile notwithstanding the absence of allegations relating to "the size, profits, or materiality to [defendants] of [their overlapping] investments or interests." *Sandys*, 152 A.3d at 135 (Valihura, J., dissenting). Other courts have similarly held demand futile on independence grounds where the directors have overlapping interests in venture capital firms. *See, e.g.*, *Pacheco v. Guyer*, 2019 WL 4513270, at *8-10 (S.D.N.Y. Sept. 19, 2019) (finding demand futile based on allegations of overlapping venture capital investments among directors and allegations that directors sat on boards of companies financed by one another).

Contrary to Defendants' assertion that a ruling in Plaintiff's favor would "mean that no Director affiliated with any private equity or venture capital firm could ever be independent," AB at 46, this Court need not make any such prospective ruling. Rather, this Court should hold that, considering all the specific facts of this case in their totality, the Complaint creates reason to doubt the independence of the requisite number of directors.

Because Plaintiffs have adequately alleged facts creating reason to doubt the independence of (at least) Janney, Vitullo, Gotto, and Goldstein, demand is futile.

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests reversal of the decision of the Court of Chancery.

Dated: July 16, 2020
Public Version Dated:
July 31, 2020

RIGRODSKY & LONG, P.A.

By: */s/ Seth D. Rigrodsky*
Seth D. Rigrodsky (#3147)
Brian D. Long (#4347)
Gina M. Serra (#5387)
300 Delaware Avenue, Suite 1220
Wilmington, DE 19801
(302) 295-5310

Attorneys for Plaintiff-Below Appellant

Words: 5,497

OF COUNSEL:

ROBBINS LLP
Brian J. Robbins
Stephen J. Oddo
Shane P. Sanders
5040 Shoreham Place
San Diego, CA 92122
(619) 525-3990