EFiled: Aug 29 2023 10:58AM EDT
Filing ID 70738427
Case Number 167,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EPICENTRX, INC., Plaintiff Below-Appellant, v. PROTHEX, INC., Defendant Below-Appellee	No. 167, 2023 APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. No. 2021-0724-PAF **Redacted Public Version** **Dated: August 29, 2023**

APPELLEE'S CORRECTED ANSWERING BRIEF

Jonathan M. Stemerman (No. 4510)
ARMSTRONG TEASDALE LLP
1007 North Market Street, 3rd Floor
Wilmington, DE 19801
(302) 416-9667
Email: jstemerman@atllp.com

Attorneys for Defendant Below-Appellee Prothex, Inc.

Dated: August 22, 2023

[redacted]

TABLE OF CONTENTS

[redacted]

[redacted]

TABLE OF AUTHORITIES

Page(s)

Cases

[redacted]

Statutes

[redacted]

NATURE OF THE PROCEEDINGS

On August 24, 2021, Plaintiff Below-Appellant EpicentRx, Inc. ("EpicentRx") commenced an action against Prothex, Inc. pursuant to 8 *Del. C.* § 220 ("Section 220"). At the time it commenced its action, EpicentRx was a stockholder of Prothex, had a representative on Prothex's Board of Directors, was the licensor to Prothex of Prothex's primary asset and its deal to re-acquire that asset from Prothex had recently fallen through. EpicentRx had also commenced an action against one of Prothex's officers for breach of fiduciary duty (among other things) and would shortly thereafter file a different complaint against Prothex for breach of its license agreement with EpicentRx.

Trial in this matter occurred in Court of Chancery on May 24, 2022. On May 24, 2023, the Court of Chancery issued its Post-Trial Opinion (the "Post-Trial Op."). The Court of Chancery concluded that EpicentRx's stated purpose, to investigate mismanagement, was not its primary purpose. (Post-Trial Op. at 23:9-20; 34:24-7.) Rather, EpicentRx's true purpose was primarily related to its interests a license holder and potential acquirer rather than a stockholder. (*Id.* at 23:12-20; 26:16-22.) The Court based its finding on: (a) EpicentRx's efforts to cancel or terminate the license agreement or otherwise extract the rights Prothex currently has for itself; (b) the timing of the demand and litigation; (c) the presence of an EpicentRx representative on Prothex's Board of Directors; (d) EpicentRx's filing of other

[redacted]

actions against Prothex and its officers; (e) EpicentRx's facially overbroad demand; and (f) EpicentRx's conduct in this litigation. (*Id*. at 26:23-35:7.). Based on its finding that EpicentRx's stated purpose was not its primary purpose, and that its primary purpose was improper, the Court of Chancery denied EpicenttRx's books and records request. (*Id.* at 34:24-35:7.) The Court of Chancery also sanctioned EpicentRx for its failure to timely prosecute the books and records action and for certain discovery delays, awarding Prothex certain fees and costs. (*Id.* at 35:8-41:24.)

The Court of Chancery issued its Post-Trial Judgement on April 5, 2023 (OB, Ex. B.) On April 14, 2023, the Court of Chancery entered its Order Awarding Fees and Expenses. (OB, Ex. C.)

EpicentRx filed the instant appeal on May 15, 2023. In this appeal, EpicentRx challenges the Court of Chancery's determination that its stated purpose was not its primary purpose. (OB at 3.) EpicentRx does not challenge the Court of Chancery's award of certain fees and expenses to Prothex based on EpicentRx's litigation conduct. (*Id.*)

[redacted]

SUMMARY OF ARGUMENT

1. **Denied**. EpicentRx concedes that the determination of a books and records plaintiff's stated purpose is its primary purpose is a question of fact. (OB at 19). EpicentRx further concedes that the Court of Chancery's factual findings are undisputed. (OB at 3, 20). Accordingly, EpicentRx concedes that the Court of Chancery correctly found that its stated purpose was not its primary purpose, and the lower court's judgment must be affirmed. But even if this Court reviews the Court of Chancery's factual findings under the "clearly erroneous" standard, the lower court's judgment must still be affirmed because its factual findings are sufficiently supported by the record and are the product of an orderly and logical deductive process. Even under *de novo* review, which is not the proper standard of review here, the Court of Chancery properly applied the law in finding that EpicentRx's stated purpose was not its primary purpose. There is ample—and undisputed—factual and support for Prothex's affirmative defense. The Court of Chancery's judgment must therefore be affirmed.

[redacted]

STATEMENT OF FACTS

The factual background is taken from the evidentiary record presented to the Court of Chancery. EpicentRx does not contest the Court of Chancery's factual findings set forth in its Post-Trial Op. and thus the factual records set forth therein is undisputed. (OB at 3, 20.)

A. The Parties

Plaintiff EpicentRx, Inc. ("EpicentRx"), a Delaware corporation is a biotechnology company and a stockholder of Defendant Prothex, Inc. ("Prothex"). (Post-Trial Op. at 4:11-21.) At all times relevant hereto, Prothex was a Delaware corporation, was a clinical-stage pharmaceutical company working to develop treatments receiving radiation therapy to treat cancer. (*Id.* at 4:2-4.) The parties have had a long relationship, with Prothex first assisting Plaintiff in 2008, after an introduction by Dr. Arnold Oronsky. (A0909:12-A0910:3.)

B. The License Agreement

On July 2, 2018, at the suggestion of Dr. Oronsky, EpicentRx and Prothex entered into a license and development agreement (the "License Agreement"), under which EpicentRx acquired about 43 percent of Prothex's outstanding stock and the right to appoint a representative to Prothex's Board of Directors. (Post-Trial Op. at 4:16-21; A0910:7-19.) Additionally, Dr. Tony Reid, who co-owned and co-founded EpicentRx and is now its Chief Executive Officer, together with Bryan Oronsky,

[redacted]

Plaintiff's Chief Medical Officer, each acquired 2.16% of Prothex's shares. (Post-Trial Op. at 4:22-5:5; A0403, ¶¶ 6-7.). In exchange, Prothex acquired the exclusive rights to a limited field of use to research and sell a compound known as "RRx-001", which is designed to treat cancer. (Post-Trial Op. at 6:5-10; A0403, ¶ 8.)[1] Under the License Agreement, Prothex was required to pay Plaintiff for [redacted] related to RRx-001 known as the PREVLAR study. (Post-Trial Op. at 6:10-13; A0403, ¶ 9.)

C. InterWest and Its Connections to Prothex and EpicentRx

In addition to EpicentRx, Reid and Bryan Oronsky, Prothex's only other stockholder was an affiliate of InterWest Partners LLC ("InterWest"), which owned the remaining 52.59% of Prothex's stock. (Post-Trial Op. at 5:7-9). InterWest also has the right to appoint a representative to Prothex's board. (*Id.* at 5:9-10.) Prior to his death in November 2020, Dr. Arnold Ornosky was InterWest's representative on Prothex's Board. (*Id.* at 5:12-13.) Dr. Arnold Oronsky served as chairman of Prothex's Board from 2008 until November 2020. (*Id.* at 5:17-19.)

InterWest (or an affiliate) is also a co-owner of EpicentRx along with Dr. Reid. (*Id.* at 5:14-15.). Dr. Arnold Oronsky, a managing director of InterWest, also served as the Chairman of EpicentRx's board of directors from its formation until

[1] The license was exclusive even to EpicentRx, though EpicentRx retained the right for other fields of use. (Post-Trial Op. at 6:13-15.)

[redacted]

his death in November 2020. (*Id.* at 5:12-17.) In addition to being the chair of both Prothex's Board and EpicentRx's board, Dr. Arnold Oronsky is also the father of Dr. Bryan Oronsky. (A0404, ¶ 17.)

D. EpicentRx's Representation on Prothex's Board

EpicentRx first appointed its then-CEO, Corey Carter to Prothex's Board in July 2018. (A0404, ¶ 13.) Dr. Carter served as Plaintiff's representative on Prothex's Board through May 2020. (A0404, ¶ 19.) In or about May 2020, Dr. Tony Reid replaced Dr. Carter both as Plaintiff's CEO and its representative on Prothex's Board. (Post-Trial Op. 5:24-6:3, A0405, ¶ 20.) During his time on Prothex's Board, Dr. Reid never asked for any documents in his capacity as a director or sought to investigate mismanagement. (Post-Trial Op at 30:23-31:4.)

E. Prothex's Board

As a result of the large stakes held by EpicentRx and InterWest, from July 2018 to May 2020, Prothex's Board consisted of Prothex's CEO, Dr. Donna Tempel, Dr. Arnold Oronsky and EpicentRx's then-CEO, Corey Carter. (Post-Trial Op. 5:20-6:24, A0404, ¶ 19.) Dr. Reid replaced Dr. Carter on Prothex's Board an,d from May 2020 through November 2020, Prothex's Board consisted of Dr. Tempel, Dr. Oronsky and Dr. Reid. (Post-Trial Op. 5:24-6:3, A0405, ¶¶ 24.) InterWest did not replace Dr. Arnold Oronsky on Prothex's Board after his death. (A0405, ¶¶ 25.) Dr. Reid resigned from Prothex's Board on August 25, 2021 (A0405, ¶¶ 26.)

[redacted]

Accordingly, from November 2020 to August 25, 2021, the only members of Prothex's Board were Dr. Tempel and EpicentRx's representative and CEO, Dr. Reid. (A0405, ¶¶ 27.)

F. The Parties' Commercial Relationship Deteriorates

Following the execution of the July 2018 License Agreement, EpicentRx and Prothex collaborated to increase the value of RRx-001. (Post-Trial Op. 6:16-18.) Unfortunately, the collaborative relationship did not last. (*Id.* at 6:18-19) EpicentRx grew concerned that Prothex had been communicating with the U.S. Food and Drug Administration ("FDA") regarding approval of the entire RRx-001 platform, rather than making clear that its involvement was limited to the field of use set forth in the License Agreement. (*Id.* at 6:20-24). In fact, Prothex had received pre-approval from EpicentRx to reference EpicentRx's FDA submissions. (B038; A0913:4-11.) EpicentRx insisted that Prothex had held an unauthorized in-person or telephonic meeting with the FDA, even though the FDA itself had stated that it would only be providing written responses in lieu of a meeting. (A0874:15-A0879:5; A0427.)

EpicentRx also had concerns regarding a January 31, 2020 Prothex submission to the U.S. Patent and Trademark Office ("USPTO"). (Post-Trial Op. at 7:6-12.) As with the FDA submission, EpicentRx asserted that Prothex's USPTO submission infringed upon EpicentRx's rights to RRx-001. (*Id.* at 7:8-12.) Prothex denied that it infringed on EpicentRx's rights. (A0914:23-112:17.)

[redacted]

Beginning in 2020 and continuing into 2021, EpicentRx also alleged that Prothex had failed to comply with its payment obligations to Prothex under the License Agreement. (OB at 6-7; Post-Trial Op. at 8:23-29:9.) Prothex had begun disputing certain invoices in 2019. (Post-Trial Op. at 27:11-12.) While Prothex did not contest the amounts set forth in three invoices issued in 2020 and 2021, Prothex asserted that the amounts owing under those invoices should be offset by amounts advanced by Prothex under the License Agreement. (*Id.* at 29:2-6.) EpicentRx disputed Prothex's claims. (*Id.* at 29:6-9.)

G. Amendment No. 2 Hamstrings Prothex

In July 2020, EpicentRx, Prothex and InterWest executed an amendment to the License Agreement referred to as "Amendment No. 2". (Post-Trial Op. at 7:12-15; A0405 ¶ 21.) Amendment No. 2 was executed by Dr. Tempel on behalf of Prothex and Dr. Reid (who, by that time, was on Prothex's Board) on behalf of EpicentRx. (A0405 ¶ 21.) Amendment No. 2 gave control of the development of RRx-001 to EpicentRx, including decision-making as it related to Prothex. (Post-Trial Op. at 7:13-17.) Among other things, Amendment No. 2 granted EpicentRx additional oversight regarding Prothex's communications with the USPTO and FDA/ (*Id.* at 7:17-21.) It further required Prothex to withdraw its provisional patent

[redacted]

application and gave EpicentRx the right to request that Prothex withdraw or amend any future submissions. (*Id.* at 7:21-8:1.)

H. EpicentRx Makes its Move to Reacquire RRx-001

On March 4, 2021 Plaintiff sent a letter of intent ("LOI") to Prothex in which it offered to purchase all of Prothex's assets related to RRx-001 for $[redacted]. (Post-Trial Op. at 8:2-5;B039-B041.) Under EpicentRx's proposal, the parties would terminate the License Agreement and full ownership of the RRx-001 technology would revert to EpicentRx. (Post-Trial Op. at 8:10-13.) In the cover letter accompanying the letter of intent, EpicentRx's counsel stated that "[t]o assist it in framing an offer, EpicentRx engaged an advisory firm, [redacted], which performed a valuation of Prothex RRx-001 and proposed the deal structure and terms contained in the LOI." (B039.; Post-Trial Op. at 8:13-16.) Dr. Tempel testified at trial that, after receiving the LOI, she discussed it with Gil Kliman at IntwerWest and her attorneys. (Post-Trial Op. at 8:17-19.) At the time the LOI was delivered, the only members of Prothex's Board were Dr. Tempel and EpicentRx's CEO, Dr. Reid. (*Id.* at 8:19-22.)

On March 15, 2021, Prothex sent a written indication of interest (the "IOI"). (*Id.* at 8:23-24; B059-B073.) The IOI was communicated by Dr. Tempel to Dr. Reid. B059.) The IOI counterproposed that EpicentRx pay $[redacted] for the Prothex stock it did not already own. (Post-Trial Op. at 9:1-3; B061.) Plaintiff never

[redacted]

considered the IOI, nor (ironically considering its allegations against Prothex and Dr. Tempel) even present the offer to its senior management nor Board of Directors. (B074-B078.)[2] After not receiving a response from EpicentRx, Dr. Tempel forwarded a copy of the IOI to EpicentRx's board of directors on March 29, 2021. (Post-Trial Op. at 9:4-7; B043-B058.)

I. EpicentRx's Facially Overbroad Demand

The very next day, March 30, 2021, EpicentRx sent Prothex a facially overbroad demand pursuant to 8 *Del. C.* § 220 (the "Original Demand"). (A0689-0786.) The Original Demand was sent to, among others, Dr. Tempel, Dr. Reid and representatives of InterWest. *Id.*[3] For the period January 1, 2018 through March 30, 2021, the Original Demand requested eighteen (18) categories of information for inspection (collectively, the "Requests"). (A0700-0701.)

The categories, many of which are overlapping, encompass virtually all of Prothex's documents (collectively, the "Categories" or "Requests"):

> 1. All articles of incorporation, bylaws, minute books, notices and records of Board and shareholder meetings, accounting records of the corporation and the record of shareholders.

[2] JX 83 at 1 ("… EpicentRx does not deem [the IOI] to require the attention of EpicentRx's senior management or Board.").
[3] At this time, Dr. Tempel and Dr. Reid were the only members of Prothex's Board.

[redacted]

2. All of Prothex's quarterly and annual financial records, including, without limitation, bank account statements, balance sheets and profit and loss statements.

3. All statements of current outstanding debts owed by Prothex, identifying the amount owed, and the name and contact information of the entity or individual the debt is owed.

4. All records, written or electronic documents and Board Materials pertaining to valuations of Prothex and/or RRx-001.

5. All records, written or electronic documents and Board Materials pertaining to any merger, acquisition or sale of Prothex and negotiations thereof.

6. All records, written or electronic documents and Board Materials pertaining to RRx-001.

7. All records, written or electronic documents and Board Materials pertaining to EpicentRx's March 4, 2021 Letter of Intent ("LOI") and term sheet regarding a proposed acquisition.

8. All records, written or electronic documents and Board Materials pertaining to information provided to InterWest regarding the LOI and term sheet.

9. All records, written or electronic documents and Board Materials pertaining to information provided to James Brown about RRx-001.

10. All records, written or electronic documents and Board Materials pertaining to communications from or to any financial professionals, including, but not limited to, investment bankers, shareholders, consultants, or investors, who assisted or advised, or are presently assisting and advising, Prothex to raise money for Prothex's business operations.

[redacted]

11. All records, written or electronic documents and Board Materials pertaining to the advance of RRx-001 from the pre-IND stage to Phase 2B and subsequent clinical trials.

12. All records, written or electronic documents and Board Materials pertaining to the design, development, and execution of the PREVLAR clinical trials.

13. All records, written or electronic documents and Board Materials pertaining to submission and communications with the FDA pertaining to RRx-001.

14. All records, written or electronic documents and Board Materials pertaining to submissions, applications and communications with the U.S. Patent and Trademark Office.

15. All records, written or electronic documents and Board Materials pertaining to the fair market value of RRx-001.

16. All records, written or electronic documents and Board Materials pertaining to the fair market value of Prothex.

17. All records, written or electronic documents and Board Materials pertaining to the July 2, 2020, License and Development Agreement between EpicentRx, on the one hand, and Prothex, on the other hand, and any amendments thereto ("License Agreement").

18. All records, written or electronic documents and Board Materials sufficient to show Prothex's ability to further develop RRx-001, move forward with the Phase 2B clinical trials, and complete its mission.

Id.

EpicentRx also listed several general purposes for the Requests. (A0702-A0703; Post-Trial Op. at 9:11-10:1.) Among other things, EpicentRx asserted that it was investigating whether Prothex and Dr. Tempel were moving RRx-001 forward

[redacted]

and completing clinical trials; whether Prothex has run out (or was close to running out) of funding, asserted that Prothex had not made certain payments to EpicentRx under the License Agreement and failed to honor various reporting obligations under the License Agreement. (*Id.*) EpicentRx also asserted that "[t]hese breaches may result in the termination of the License Agreement and Prothex surrendering all rights to RRx-001 …." (Post-Trial Op. at 9:22-24; A0704.) EpicentRx further asserted that the purpose of the Original Demand was to "examine whether Prothex's meeting with members of the FDA and subsequent commitment of one of its shareholders to expensive … studies furthered shareholder interest" and "whether Prothex's submission of a patent application was in violation of its License Agreement and, thus, adverse to investor value." (A0705.) EpicentRx also claimed it was investigating whether "Prothex has engaged in self-dealing to enrich itself … by using the research and development of RRx-001 for its own benefit, at the expense of investors." (*Id.*)

Nevertheless, EpicentRx did not tie any Request with any asserted purpose. (*Id.* at A0704-0705.) However, given EpicentRx's attempts to reacquire RRx-001, its representation on Prothex's Board, and in light of the Notice of Breach below, Prothex suspected EpicentRx's motives to be that of a licensor or potential acquiror, and not that of a shareholder. (A0923:16-22) (Dr. Tempel: "The only conclusion I could reach was that this was related to the acquisition. They wanted to acquire

[redacted]

RRx-001 and they wanted information to give them an unfair advantage in the negotiations. That's what seemed quite clear to me.")

J. EpicentRx Declares a Breach of the License Agreement

The same day it sent its Original Demand, EpicentRx also sent Prothex a letter entitled "Response to 'Indication of Interest' and Notice of Breach of License Agreement." (the "Notice of Breach") (Post-Trial Op. at 10:2-3; B074-B078.) The Notice of Breach purported to reject the IOI and accused Prothex's officers of breaching their fiduciary duties by mismanaging Prothex and failing to present EpicentRx's LOI to Prothex's Board.[4] (Post-Trial Op. at 10:4-8; B074-B076.) Finally, the Notice of Breach asserted that Prothex was in breach of the License Agreement for regarding its payment and reporting obligations to EpicentRx. (Post-Trial Op. at 10:8-14; B076-B077.) The Notice of Breach further stated "[i]f Prothex does not timely cure the breaches noted above, EpicentRx will have no choice but to terminate the License Agreement for cause …." (B077.) Prothex responded to the Notice of Breach on April 13, 2021. Post-Trial Op. at 10:16-17; B079-B090.)

K. Prothex Responds to the Original Demand

On April 6, 2021, Prothex responded to the Original Demand. (Post-Trial Op. at 10:18-19; A0787-0788.) Prothex declared the Original Demand "deficient"

[4] Prothex's Board at the time consisted of Dr. Tempel and Dr. Reid, EpicentRx's CEO.

[redacted]

because, among other reasons, it lacked the "necessity for inspection." (A0787; Post-Trial Op. 10:10-21.) Nevertheless, Prothex invited EpicentRx to inspect certain documents EpicentRx requested in category 1 at Prothex's headquarters. (Post-Trial Op. at 10:22-24; A0787.)

Prothex stated that the remaining categories, 2-18, were "overbroad, unduly burdensome" and "inappropriate, especially in light of the ongoing discussion of merger or acquisition between Prothex and EpicentRx." (A0787-A0788; Post-Trial Op. at 11:6-10.) Prothex further asserted that the documents were not necessary and essential, because the categories of documents were not tied to the allegations of mismanagement. (A0788.)

L. EpicentRx Threatens Prothex

On April 20, 2021, EpicentRx responded to Prothex's April 6, 2021 letter. (A0793==A0798; Post-Trial Op. 11:11). Rather than start a "conversation" as EpicentRx would later claim was intended by the Original Demand (A0849:16-20), the April 20, 2021 letter doubled down, arguing that its demand was "Narrowly Tailored" and that "EpicentRx seeks only those records necessary for its investigation of the identified issues, and the scope of the Demand is proper." (A0797.) The letter further stated that if Prothex did not comply with the entire Original Demand, EpicentRx would file an action in the Court of Chancery and demand attorneys' fees. (0A798.)

[redacted]

M. EpicentRx and Prothex Continue to Negotiate an Acquisition and Reach Agreement

In the face of EpicentRx's accusations of breaches of the License Agreement and threats to terminate the License Agreement and enforce its facially overbroad Original Demand, EpicentRx sent Prothex a revised LOI on May 2, 2021, increasing its original offer. (Post-Trial Op. at 11:18-21.) Further revised LOIs, with increasing offers would occur on May 13, May 25 and May 26, 2021. (*Id.* at 11:21-23; B091-120.) Prothex, EpicentRx and InterWest executed the May 26, 2021 term sheet. (*Id.* at 11:23-24; B121-125.)

N. The Parties Fail to Consummate the Acquisition; Prothex Provides Certain Documents

Following execution of the May 26, 2021 term sheet EpicentRx requested certain documents related to, among other things, RRx-001 and Prothex provided various documents in response. (A0415, § 44; Post-Trial Op. at 12:1-9. Additionally, Prothex sent EpicentRx its 2019 Audited Financial Statement, 2020 Balance Sheet, 2020 Profit & Loss Statement, and most recent Capitalization Table. (A0415, § 45.) Ultimately, however, the parties did not enter into a definitive acquisition agreement. (Post-Trial Op. 12:5-6.)

O. EpicentRx Shifts to "Litigation Mode"

"Not long after the transaction cratered, EpicentRx shifted to litigation mode." (*Id.* at 12:7-8). On August 13, 2021, EpicentRx filed an action in California state

[redacted]

court against Prothex's Chief Development Officer, Dr. James Bianco, and Does 1-50 (the "Bianco Action"), accusing Dr. Bianco and others of breaching their fiduciary duties in connection with the acquisition process. (Post-Trial Op. at 12:8-14; B126-B155.) Specifically, the Bianco Action alleges that Dr. Bianco ignored the LOI and actively encouraged others to do so, and that he crafted the IOI for the benefit of himself and the detriment of Prothex's stockholders. (Post-Trial Op. at 12:15-18.)

On August 30, 2021, EpicentRx filed a second complaint in California state court, naming Prothex and Does 1-50 (the "Prothex Action" and, collectively with the Bianco Action, the "California Actions"). (Post-Trial Op. 13:1-3; B156-176.) The Prothex Action alleged that Prothex breached various sections of the License Agreement related to its payment obligations to EpicentRx, and further alleged that Prothex breached the License Agreement by filing an infringing patent application and by engaging inappropriate communications with the FDA. (Post-Trial Op. 13:9-15; B160, ¶¶16-18.) In addition to monetary damages, the Prothex Action requested a declaration that the License Agreement was terminated.

P. EpicentRx Files the Books and Records Action

Sandwiched in between the California Actions, EpicentRx filed a complaint against Prothex pursuant to 8 *Del. C.* § 220 (the "220 Complaint"). (Post-Trial Op. 13:16-18); A0027-A0077.) Despite the production of certain books and records and

[redacted]

the execution of the May 26, 2021 term sheet, the 220 Complaint was not narrowed and instead demanded the same books and records set forth in the Original Demand (A0039-A0042.) The 220 Complaint further alleged that Dr. Tempel "ignored EpicentRx's reasonable and generous offer [i.e., the LOI] … and Tempel and Prothex's management team did not even present EpicentRx's offer to Prothex's Board of Directors. (A0036-37, ¶ 22.) The 220 Complaint omitted that a term sheet had been executed and that, during the time in question, Prothex's only Board members were Dr. Tempel and EpicentRx's CEO, Dr. Reid. (A0029-A0052.) In fact, the 220 Complaint failed to mention Dr. Reid or his role on Prothex's Board at all. (*Id.*)

Q. EpicentRx's Litigation Conduct

Contemporaneously with its 220 Complaint, EpicentRx filed a motion to expedite which requested a final hearing within 60 days. (Post-Trial Op. 13:18-20.) One week later, on August 31, 2021, EpicentRx filed a follow-up letter, seeking a hearing on its motion to expedite at the Court of Chancery's earliest opportunity. (*Id.* at 13:21-23.) Prothex filed its answer to the 220 Complaint on September 17, 2021. (*Id.* at 13:21-24.) The Court of Chancery then offered dates for trial. (*Id.* at 13:24-14:1.) Despite Prothex's counsel's request that EpicentRx's counsel lock in a trial date, EpicntRx's counsel did not respond and did nothing to move this action forward. (*Id.* at 14:2-8.) Prothex's counsel filed a motion to dismiss the complaint

[redacted]

for failure to prosecute on November 17, 2021. (*Id.* at 14:9-13.) The Court of Chancery found that EpicentRx had "acted in bad faith when it failed to advance its summary books and records case despite expedition" (*Id.* at 37:2-37.) As a result of EpicentRx's failure to promptly secure a trial date, despite its request for expedition, the Court of Chancery awarded Prothex its reasonable attorneys' fees and costs incurred in prosecuting the motion to dismiss (*Id.* at 37:4-7.) EpicentRx has not challenged the Court of Chancery's finding or sanction in this appeal. (*See generally* OB.)

In addition to its bad .faith conduct in failing to prosecute this action, EpicentRx also engaged in dilatory behavior regarding discovery. (*Id.* at 37:8-39:11.) EpicentRx missed multiple discovery deadlines, despite receiving repeated extensions. (*Id*.) The Court of Chancery determined EpicentRx's conduct to be "egregious due to the cumulative effect of its repeated violations" and that EpicentRx " did not take its scheduling or discovery obligations seriously." (*Id.* at 39:17-24.) The Court further found that EpicentRx's conduct was "an abuse of the judicial process" and ordered EpicentRx to pay attorneys' fees and costs relating to Prothex's efforts to obtain certain discovery and prosecute its motion *in limine* related to that discovery. (*Id.* at 40:21-41:24.) EpicentRx has not challenged the Court of Chancery's finding or sanction in this appeal. (*See generally* OB.)

[redacted]

R. EpicentRx is Forced to Narrow its Original Demand

EpicentRx filed its Pre-Trial Opening Brief on May 17, 2022. Despite having taken discovery in this books and records action and the pendency of the California Actions, EpicentRx did not narrow its Original Demand (B019-B017.) Indeed, EpicentRx argued that "EpicentRx seeks only those records necessary for its investigation of mismanagement at Defendant, so the scope of its Demand is proper." (B027.)

At the pre-trial conference, EpceintRx's counsel stated: "[w]e set forth in our demand letter what we thought we were entitled to. And so, in the first instance, I don't believe the burden should be on us to narrow what we've asked for." (Post-Trial Op. at 15:14-21 (citing transcript of pre-trial conference) (quotations omitted.)) The Court of Chancery noted that the Original Demand was "facially overbroad" "particularly in light of [EpicentRx's] having had a representative on [Prothex's] board, the discovery exchanged, and [EpicentRx's] opportunity to depose [Prothex]." (*Id.* at 15:22-16:3.) The Court of Chancery therefore directed EpicentRx to narrow its demand. (*Id.* at 16:3-5.)

EpicentRx filed its revised demand (the "Revised Demand") on May 23, 2022. (*Id.* at 16:6-7). Trial occurred the next day, May 24, 2022.

[redacted]

S. Prothex Produces Additional Documents After Trial

After trial concluded, and prior to post-trial argument, Prothex provided some additional documents requested in the Revised Demand to EpicentRx. (Post-Trial Op. at 17:16-18). Post-trial argument occurred on November 9, 2023. (*Id.* at 17:15-16.). Following post-trial argument, at the direction of the Court of Chancery, the parties met and conferred regarding the outstanding categories of books and records requested. (*Id.* at 17:19-21.)

T. The Post-Trial Opinion

The Court of Chancery issued the Post Trial Op. on May 24, 2023. OB, Ex. A. The Court of Chancery concluded that EpicentRx's stated purpose, to investigate mismanagement, was not its primary purpose. (Post-Trial Op. at 23:9-20; 34:24-7.) Rather, EpicentRx's true purpose was primarily related to its interests a license holder and potential acquirer rather than a stockholder. (*Id.* at 23:12-20; 26:16-22.) In reaching its conclusion, the Court of Chancery found that EpicentRx prosecuted the books and records action "as part of a multi-pronged litigation strategy to cancel the license agreement or otherwise extract the rights that Prothex currently has to RRx-001 for itself." (*Id.* at 26:19-22.)

The Court based its finding on: (a) EpicentRx's efforts to cancel or terminate the license agreement or otherwise extract the rights Prothex currently has for itself; (b) the timing of the demand and litigation; (c) the presence of an EpicentRx

[redacted]

representative on Prothex's Board of Directors; (e) EpicentRx's visibility into Prothex's affairs as a contractual counterparty; (f) EpicentRx's filing of other actions against Prothex and its officers; (g) EpicentRx's facially overbroad demand; and (h) EpicentRx's conduct in this litigation. (*Id*. at 26:23-35:7.). The Court of Chancery noted that "[d]espite carefully phrased questions from counsel, EpicentRx's witnesses could not hide that the real motivation for the plaintiff's demand and litigation arose from its position as a licensor and potential buyer." (*Id*. 31:7-11.)

Based on its finding that EpicentRx's stated purpose was not its primary purpose, and that its primary purpose was improper, the Court of Chancery denied EpicenttRx's books and records request. (*Id.* at 34:24-35:7.) In denying inspection, even based on the Revised Demand, the Court of Chancery noted that, "after considering the submissions of both parties [following post-trial argument], *the bulk of the unproduced records are communications with InterWest or internal communications, and particularly concern discussions over the LOI or purported communications with the FDA or USPTO*." (*Id.* at 19:1-6 (emphasis added)). The Court further remarked that EpicentRx's chart listing the purported remaining categories of records demanded was "not a helpful description for the Court …." (*Id.* at 19:7-18.)

[redacted]

ARGUMENT

A. Question Presented

1. Whether the court below abused its discretion in determining that EpicentRx's stated purpose for inspection of books and records pursuant to 8 *Del. C.* § 220 was not its primary purpose?

B. Standard of Review

"The determination of whether [plaintiff's] stated purpose for the inspection was its primary purpose, is a question of fact warranting deference to the trial court's credibility assessments." *State ex rel. Scattered Corp. v. Chicago Stock Exchange* 676 A.2d 907 (Del. 1996) (Table) (citing *CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 793 (Del. 1982)). *See also Thomas & Betts Corp. v. Leviton Mfg. Co., Inc.,* 681 A.2d 1026, 1030 (Del. 1996).

"[F]actual determinations will not be disturbed by this Court unless clearly erroneous." . *Scattered Corp.*, 676 A.2d at 907. "Factual findings are not clearly erroneous 'if they are sufficiently supported by the record and are the product of an orderly and logical deductive process.' " *Bäcker v. Palisades Growth Capital II, L.P.*, 246 A.3d 81, 94-95 (Del. 2021) (quoting *Biolase, Inc. v. Oracle P'rs*, 97 A.3d 1029, 1035 (Del. 2014)). *See also CM & M Grp.,* 453 A.2d at 793 (Del. 1982) (Court of Chancery's factual determination will be upheld if it is "adequately

[redacted]

supported by the record, and appear[s] to be the result of an orderly and logical deductive process.").

C. Merits of Argument

The Court of Chancery determined that EpicentRx's stated purpose was not its primary purpose. (Post-Trial Op. at 23:9-20; 34:24-7.) Rather its primary purpose was based on its role of a license holder, not a stockholder. (*Id.* at 23:12-20; 26:16-22.) EpicentRx does not argue that the primary purpose found by the Court of Chancery is a proper purpose. (*See generally* OB.) Accordingly, this Court need only determine whether the Court of Chancery correctly determined that EpicentRx's stated purpose was not its primary purpose. The Court of Chancery was correct, and this Court should affirm its ruling.

1. The Determination of Primacy of Purpose is a Question of Fact

Under Delaware law, "[p]roper purpose has been construed to mean that a shareholder's primary purpose must be proper, irrespective of whether any secondary purpose is proper." *Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561, 565 (Del. Ch. 1998) (emphasis in original). *See also City of Westland Police & Fire Retirement Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 290 (Del. 2010) ("merely stating" a proper purpose "does not automatically entitle a shareholder to Section 220 inspection relief"). Thus, a defendant may try to "show as ***a factual matter***, the plaintiff's true purpose is other than what is stated in the demand," *i.e.*, that the plaintiff "has pursued its claim under

[redacted]

false pretenses." *Sutherland v. Dardanelle Timber Co.*, 2006 WL 1451531, at *8 (Del. Ch. May 16, 2006) (emphasis added).

When a corporation has reason to believe the stockholder plaintiff has advanced a purpose that does not reflect its true purpose, the corporation "'[u]nquestionably is entitled to challenge the plaintiff's stated purpose and to show that ***as a factual matter***, the plaintiff's true purpose is other than what is stated in the demand.'" *Georgia Notes 18, LLC v. Net Element, Inc.* 2021 WL 5368651, at *3 (Del. Ch. Nov. 18, 2021) (quoting *Coit v. Am. Century Corp.*, 1987 WL 8458, at *2 (Del. Ch. Mar. 20, 1987)) (emphasis added). Likewise, the corporation may resist a demand for inspection when it "***establishe[s] factually***" that "the plaintiff's demand is made for purposes adverse to the corporation's best interests." *Coit*, 1987 WL 8458, at *3 (emphasis added).

2. EpicentRx Concedes the Judgment Below Must Be Affirmed

EpicentRx concedes that the determination of a books and records plaintiff's stated purpose is its primary purpose is a question of fact. (OB at 19). EpicentRx further concedes that the Court of Chancery's factual findings are undisputed. (OB at 3, 20.) Accordingly, EpicentRx concedes that the Court of Chancery correctly found that its stated purpose was not its primary purpose. EpicentRx did not contend at trial, nor does it contest here, that the actual primary purpose found by the Court

[redacted]

of Chancery is a proper purpose.[5] Therefore, the Court of Chancery's judgment must be affirmed.

3. The Court of Chancery Did Not Abuse Its Discretion in Making Factual Findings that EpicentRx's Stated Purpose Was Not Its Primary Purpose Nor Made Any Errors of Law

Although EpicentRx does not dispute the standard of review or the Court of Chancery's factual findings, EpicentRx nevertheless argues that "the facts cited by the Court of Chancery do not support its conclusion that EpicentRx's true purpose in demanding to inspect books and records was not to investigate mismanagement." (OB at 24.) It is unclear if EpicentRx is arguing an abuse of discretion standard (inapplicable if it is conceding the factual findings) applies or challenging whether the Court of Chancery somehow misapplied the law. (OB at 22-24.) Regardless, there is no basis to reverse the Court of Chancery on either Basis.

(a) The Court of Chancery Correctly Applied *United Brokerage*

EpicentRx incorrectly argues that the Court of Chancery misapplied *State v. United Brokerage Co.*, 101 A. 433 (Del. Super. Ct. 1917). (OB at 23-24.) EpicentRx appears to believe that denial of a books and records request is only appropriate

[5] *See Oxbow Carbon & Mining Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 502 n. 77 (Del. 2019) ("The practice in the Court of Chancery is to find that an issue not raised in post-trial briefing has been waived."); *Everette v. State*, 694 A.2d 47 (TABLE) (" *Black v. State,* 625 A.2d 278 (TABLE) (failure to brief issue in Supreme Court "constitutes a waiver of that claim.").

[redacted]

where the plaintiff brings the action with the intent to annoy and harass the defendant *and* injure the defendant's business as, in attempting to distinguish *United Brokerage*, EpicentRx argues that "[t]here is no evidence that EpicentRx *intended* to injure Prothex's business, nor would it have any incentive to do so." *Id.* at 23 (emphasis added). EpicentRx is incorrect on both counts.

First, the Court of Chancery determined that EpicentRx's Original Demand was "part of a multi-pronged litigation strategy to cancel the license agreement or otherwise extract the rights that Prothex currently has to RRx-001 for itself." (Post-Trial Op. at 26:19-22; *Id.* at 26:15-18.) The Court of Chancery also found that the "real motivation for plaintiff's demand and litigation arose from its position as a licensor and potential buyer" of Prothex. (*Id.* at 31:11.) Those are factual findings made independently of any analysis of *United Brokerage*. The Court of Chancery further found that "[t]hose interests are adverse to those of the corporate defendant here." (*Id.* at 23:17-19.) It bears repeating that EpicentRx does not challenge the Court of Chancery's factual findings, nor its conclusion that EpicentRx's interest as a license holder was adverse to Prothex.

Second, the Court of Chancery correctly analyzed and applied *United Brokerage*. It is well-settled that a "purpose is not proper if it is made solely to harass the corporation *or* where it is adverse to the best interests of the corporation." *Alexandria Venture Investments, LLC v. Verseau Therapeutics, Inc.*, 2020 WL

[redacted]

7422068, at *5 (Del. Ch. Dec. 18, 2020) (citing *CM & M Grp., Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982) (emphasis added). *See also Seinfeld v. Verizon Comms.*, 909 A.2d 117, 123 n. 34 (Del. Supr. 2006) (citing *Skouras v. Admiralty Enters., Inc.*, 386 A.2d 674, 679 (Del. Ch. 1978)); *Bizzari v. Suburban Waste Services, Inc.,* 2016 WL 4540292, at *5 (Del. Ch. Aug. 30, 2016) ("a stockholder's purpose must not be adverse to the company, unrelated to a legitimate interest of the stockholder, or intended to harass the corporation."). Further, it is an abuse of the books and records process where an abuse of the books and records process and is "designed for some purpose other than to exercise [Plaintiff's] legitimate rights as a stockholder." *Highland Select Equity Fund, L.P. v. Motient Corp.,* 906 A.2d 156, 168 (Del. Ch. 2006). As noted above, the Court of Chancery determined that EpicentRx's primary purpose was as a license holder, not a stockholder. (Post-Trial Op. at 23:9-20; 32:1-34:13.)

EpicentRx minimizes the Court of Chancery's careful analysis of *United Brokerage*, which encompasses several pages of the Post-Trial Op. (Post Trial Op. at 24:12-26:12.) The Court of Chancery even acknowledged that the facts here were not as severe as in *United Brokerage*, but nevertheless found they were sufficient here to find that EpicentRx's true motivations were as a license holder and adverse to Prothex. (*Id.* at 26:13-22.) Moreover, the Court Chancery did not merely rely on *United Brokerage*, citing also to *Helmsan Mgmt. Servs. Inc.*, 525 A.2d 160, 164 (Del.

[redacted]

Ch. 1987), stating that a stockholder's purpose cannot be to harass the corporation and *Compaq Computer v. Horton*, 631 A.2d 1, 4 (Del. 1993), for further support that a stockholder's purpose cannot be adverse to the corporation. (Post-Trial Op. at 24:1-11.) EpicentRx ignores this, too. Those, the Court of Chancery's analysis of *United Brokerage* and other cases supports its findings and its decision must be affirmed.

(b) Consideration of the California Action and Bianco Action Was Entirely Appropriate

EpicentRx asserts that the Court of Chancery wrongly considered the pending California Action, arguing that denying a books and records request "solely" because of a previously filed derivative suit is improper.[6] But EpicentRx ignores that the pendency of the California Actions, while a contributing factor, was not the only reason for concluding that its stated purpose was improper. (Post-Trial Op. at 26:13-34:13.)

Moreover, consideration of the pending California Actions was entirely proper. "[W]hen a books and records action is brought with the goal of evaluating a

[6] OB at 24 (quotations omitted). Appellant mischaracterizes the Court of Chancery's findings, stating it found that the "mere pendency" of the California litigation "supported" its finding that Appellant was not seeking to investigate mismanagement. *Id.* As Appellant's own brief shows, the Court of Chancery considered much more than the "mere pendency" of the California actions and, viewing all of the facts, determined that Appellant's asserted *primary* purpose based on its role as a *license holder*, not a stockholder. (OB at 23-25.).

[redacted]

possible derivative suit, the books and records that satisfy the action are those that are required to prepare a well-pleaded complaint." *Kaufman v. CA, Inc.*, 905 A.2d 749, 753 (Del. Ch. 2006); *see also Saito v. McKesson HBOC, Inc.*, 806 A.2d 112, 115 (Del. 2022) ("[W]here a § 220 claim is based on alleged corporate wrongdoing, and assuming the allegation is meritorious, the stockholder should be given enough information to effectively address the problem, either through derivative litigation or through direct contact with the corporation's directors and/or stockholders."). Thus, it was entirely proper for the Court of Chancery to examine the California Actions, both to determine their connection to EpicentRx's overall scheme as well as whether the existence of these plenary actions showed that EpicentRx had sufficient information to assert certain derivative claims without obtaining additional books and records. (Post-Trial Op. 33:10-18 ("The fact that EpicentRx is pursuing derivative claims against Prothex … shows EpicentRx has satisfied itself that it has sufficient information to assert to those claims without obtaining books and records. And EpicentRx will be able to obtain discovery on those topics in the California litigation.").)

Such a finding is consistent with Delaware law. As the Court of Chancery stated in *Bizzari v. Suburban Waste Svsc., Inc.*, 2016 WL 4540292, *6 (Del. Ch. Aug. 30, 2016):

[redacted]

> By filing the Plenary Action, [plaintiff] effectively conceded that the books and records he seeks are not necessary or essential to his stated purpose of investigating mismanagement or wrongdoing …. [Plaintiff] and his counsel presumably concluded they possessed sufficient information under Rule 11 to file the complaint without first inspecting books and records. The availability of discovery in the Plenary Action undercuts [plaintiff's] alleged need to investigate mismanagement through an inspection demand.

Bizzari v. Suburban Waste Svsc., Inc., 2016 WL 4540292, *6 (Del. Ch. Aug. 30, 2016).[7] Additionally, under Delaware law, obtaining documents through a books and records demand is inappropriate when the information sought can be obtained through discovery in a related pending litigation. *See United Tech. Corp. v. Treppel*, 109 A.3d 553, 559 (Del. 2014) ("Delaware courts have been reluctant to grant § 220 relief when there is other pending litigation against the corporation and discovery is thus the more appropriate mechanism for obtaining relevant discovery."); *Bizzari v. Suburban Waste Svsc., Inc.*, 2016 WL 4540292, *6 (Del. Ch. Aug. 30, 2016) (the availability of discovery on the same topics in a pending plenary action undercuts a plaintiffs books and records claim).

Here, the Court of Chancery made uncontested factual findings that the conduct alleged in the California Actions, including conduct regarding the rejection of the LOI "feature prominently in the stated purposes and subjects of the demand." (Post-Trial Op. 33:2-7.). The Court of Chancery further noted that certain of the

[7] No motion to dismiss has been filed in either California Action.

[redacted]

unproduced records at issue in the 220 Action related to the LOI. (*Id.* at 19:1-6.) The Court of Chancery further found that "EpicentRx has satisfied itself it has sufficient information to assert those claims without obtaining books and records" and "will be able to obtain discovery on those topics in the California litigation," findings EpicentRx also does not contest. (*Id.* at 33:10-18.)

(c) EpicentRx took no investigatory steps prior to filing the books and records action

Another factor supporting the Court of Chancery's conclusion was EpicentRx's lack of interest actually investigating its purported concerns. The Court of Chancery noted that the parties had been working closely together to develop RRx-001 and had a representative of Prothex's Board for over 3 years. (Post-Trial Op. at 27:4-7; 29:10-12.) But the Court noted that "EpicentRx takes the incredible position that a director's role is untethered from investigating mismanagement." (*Id.* at 29;13-14.) As a stockholder, EpicentRx could have, but did not, avail itself of Dr. Reid's position on Prothex's Board to investigate perceived mismanagement at Prothex, but did not. (*Id.* at 29:21-31:1.) In fact, Dr. Reid—EpicentRx's CEO—had a duty to do so if he suspected management. *See In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

Contrary to EpicentRx's assertion (OB at 24), the Court of Chancery did not conclude that EpicentRx had waived its rights merely due to Dr. Reid's failure to

[redacted]

investigate perceived mismanagement at Prothex. Rather, the Court of Chancery therefore correctly found that "[t]he fact that Reid never asked for any documents in his capacity as a director or sought to investigate mismanagement while on the board *is probative evidence supporting the conclusion* that the primary purpose of the demand was not to investigate mismanagement." (Post-Trial Op. 30:23-31:4.)

As explained throughout the Post-Trial Op., plenty of other facts—including the testimony of EpicentRx's own witnesses,[8] support the Court of Chancery's conclusion that EpicentRx's primary motivation for seeking books and records was due to its interest as a license holder. The Court of Chancery's denial of EpicentRx's books and records claim must therefore be affirmed.

(d) EpicentRx's Facially Overbroad Demand Further Contributed to the Court of Chancery's Finding

EpicentRx correctly notes that its facially overbroad Demand contributed to the Court of Chancery's determination[9] but argues that "overbreadth" is a "non-issue" because it narrowed its demand on the eve of trial. (OB at 25.) But EpicentRx only narrowed its demand after being directed by the Court of Chancery to do so. (Post-Trial Op. at 16:3-8.) From the time of its Original Demand—which it now

[8] *Id.* at 31:99-11 ("EpicentRx's own witnesses could not hide that the real motivation for the plaintiff's demand and litigation arose from its position as a license holder and potential buyer.").
[9] *See* Post-Trial Op. at 34:9-23.

[redacted]

concedes was facially overbroad—to as late as the pre-trial conference, EpicentRx insisted that the scope of its requests was entirely proper.[10] EpicentRx never narrowed its requests until forced to do so. That the Court of Chancery afforded EpicentRx the opportunity to narrow its request rather than dismiss the action outright,[11] is not evidence that the trial court abused its discretion or committed an error of law. Rather, it shows the Court of Chancery gave EpicentRx every opportunity to craft a books and records request primarily related to its interests as a stockholder. Nevertheless, the Court of Chancery determined that EpicentRx's primary purpose for seeking the narrowed set of records was still as a license holder.

(e) The Timing of the Original Demand Supports the Court of Chancery's Finding

In appealing the Court of Chancery's factual finding that EpicentRx's primary purpose was not its stated purpose, EpicentRx ignores a crucial factor: timing. As

---

[10] *See* A0797 ("EpicentRx seeks only those records necessary for its investigation of the identified issues, and the scope of the Demand is proper"); Post-Trial Op. at 15:14-21 (noting Plaintiff's counsel's resistance at pretrial conference to narrow demand prior to trial). (B027.) (repeating, after close of discovery that ""EpicentRx seeks only those records necessary for its investigation of mismanagement at Defendant, so the scope of its Demand is proper.").

[11] *See* Post-Trial Op. at 34:14-23 (citing *NVIDIA v. City of Westland Police and Fire*, 282 A.3d 1, 14 (Del. 2022). The *NVIDIA* Court explained that "Plaintiffs in Section 220 proceedings, however, should take heed that the deference we afford the Court of Chancery in these instances means that a Chancellor's or Vice Chancellor's denial of a demand as impermissibly overbroad will also be subject to an abuse of discretion standard and deference from this Court." *NVIDIA*, 282 A.2d at 14. Here, the Court of Chancery exercised its discretion in Appellant's favor.

[redacted]

the Court of Chancery explained "[t]he timing here is central to my conclusions." (Post-Trial Op. at 32:13-14.) The Court of Chancery explained that "[a]s the parties' relationship deteriorated, EpicentRx became more focused on regaining control over the RRx-001 molecule." (*Id.* at 32:5-7.) The Court of Chancery carefully detailed the chronology of the LOI, the IOI, Notice of Breach and Original Demand. (*Id.* at 32:14-20.). Referring to the Original Demand, the Court of Chancery found that EpicentRx " was seeking to pressure Prothex into acceding to its buyout offer by gathering evidence for a breach claim and entangling defendant in a dispute over corporate records." (*Id.* at 32:21-33:1). EpicentRx does not challenge any of these findings. Even if it did, these findings, coupled with the Court of Chancery's other factual findings support its conclusion that EpicentRx's stated purpose was not its primary purpose and that its actual primary purpose was improper.

(f) EpicentRx's Litigation Conduct Also Supports the Court of Chancery's Finding

EpicentRx ignores another factor found by the Court of Chancery to support its finding that EpicentRx's stated purpose was not its primary one: EpicentRx's litigation conduct. As the Court of Chancery found that "EpicentRx's actions -- or inactions -- underscore that the plaintiff was not interested in its capacity as a stockholder." (Post-Trial Op. at 33:23-2.) In support of this conclusion, the Court of Chancery noted, among other things: (a) EpicentRx's failure to promptly

[redacted]

prosecute the action despite initially seeking a trial within 60 days, which delay ultimately resulted in sanctions; and (b) flouting established case deadlines. (*Id.* at 34:2-9.) EpicentRx does not contest these factual findings, either.

Taking into account EpicentRx's litigation conduct is entirely proper, as is viewing such conduct in light of EpicentRx's other conduct and all of the Court of Chancery's other factual Findings. Thus, the Court of Chancery's judgment in favor of Prothex must be affirmed.

[redacted]

CONCLUSION

The record is therefore replete with uncontested factual findings supporting the Court of Chancery's well-reasoned conclusion that EpicentRx's primary purpose was not its stated purpose[12] and was improper. For all the reasons set forth herein, Prothex respectfully submits that the decision of the Court of Chancery be affirmed.

ARMSTRONG TEASDALE LLP

Dated: August 22, 2023

/s/ Jonathan M. Stemerman
Jonathan M. Stemerman (No. 4510)
1007 North Market Street, 3rd Floor
Wilmington, DE 19801
(302) 416-9667
Email: jstemerman@atllp.com

Attorneys for Defendant Below-Appellee Prothex, Inc.

[12] Appellant contended in the Court of Chancery (Post-Trial Op. at 22:9-11) and now (OB at 26) that its stated purpose was its *only* purpose.

[redacted]

CERTIFICATE OF SERVICE

I, Jonathan M. Stemerman, hereby certify that on August 29, 2023, a true and correct copy of the foregoing was served upon the following counsel of record via File & Serve*Xpress*:

Thad J. Bracegirdle, Esq.
Justin C. Barrett, Esq.
BAYARD, P.A.
600 N. King Street, Suite 400
Wilmington, DE 19801

Dated: August 29, 2023

ARMSTRONG TEASDALE LLP

/s/ *Jonathan M. Stemerman*
Jonathan M. Stemerman (#4510)
1007 North Market Street, Third Floor
Wilmington, DE 19801
Telephone: (302) 416-9667
Email: jstemerman@atllp.com

Attorneys for Defendant