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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BENJAMIN WARNER, Plaintiff-Below/Appellant, v. TIMOTHY C. TYSON, RICHARD CUNNINGHAM, CLIVE KABATZNIK, VINCENT PALMIERI, EDWARD ROFFMAN, and MICHAEL TAGLICH, Individual Defendants-Below/Appellees, -and- ICAGEN, INC. nka IXC DISCOVERY, INC., Nominal Defendant-Below/Appellee.	No. 322, 2024 On appeal from the Court of Chancery, C.A. 2023-0159-PAF

APPELLANT'S CORRECTED REPLY BRIEF

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I. PLAINTIFF HAS ADEQUATELY ALLEGED THAT THE MAJORITY OF DIRECTORS APPROVING THE TRANSACTION SUFFERED FROM A DISABLING CONFLICT OF INTEREST

A. Three of the Five Directors Approving The Transaction Were Interested In The Transaction

Plaintiff/Appellant asserts that a majority of directors approving the undervalued asset sale of Icagen's "crown jewels" for a paltry $15 million (the "Transaction") faced a disabling conflict of interest when the Transaction, as presented, inured to their personal benefit to the tune of more than $19 million dollars.

Defendants/Appellees persist in mainly arguing that Plaintiff merely relies on the fact that Defendants possessed Series C Preferred shares, ignoring Plaintiff's allegations that it was the weaponization of such shares specifically regarding the Transaction that crossed the line into impermissible interestedness. Appellee's Answering Brief ("AB") at 27.

Moreover, Defendants harp on the fact that the benefits voted for and complained of were in part not realized, ignoring the fact that, of course, there was no way for the Defendants to know at the time of approving the Transaction whether such material financial benefits would be realized. AB at 28. By voting to approve the complained of benefits for them alone, the directors stepped into the conflict thus warranting the application of entire fairness.

Plaintiff, in his Opening Brief, set forth the proper standard by which the Court is to evaluate interestedness:

> In *DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *12 (Del. Ch. Sept. 30, 2013), the Chancery Court held that "[w]hen a fiduciary appears on both sides of a transaction or receives a personal benefit that is not shared by all stockholders, that fiduciary has an impermissible self-interest in the transaction that implicates the duty of loyalty. Not all personal benefits, however, create a disqualifying self-interest for a fiduciary. Only benefits that are material to the fiduciary, as judged from the perspective of the fiduciary herself, raise issues under the duty of loyalty."

Plaintiff's Opening Brief ("OB") at 26 (internal citation omitted).

More specifically, as Plaintiff argued, Delaware courts have recognized that:

> [A] director or officer "competes with common stockholders when [he or she] (1) "receives greater monetary consideration for its shares than the minority stockholders"; (2) "takes a different form of consideration than the minority stockholders"; or (3) receives "a 'unique benefit' by extracting 'something uniquely valuable to the [director or officer], even if the [director or officer] nominally receives the same consideration as all other stockholders'" to the detriment of the minority.

In re MultiPlan Corp. S'holders Litig., 268 A.3d 784, 810 (Del. Ch. 2022); OB at 25 (internal citation omitted).

Three of the five directors (a majority) approving the Transaction were Interested in the Transaction: Tyson, Taglich and Kabatznik.

The "weaponization" of the Series C Preferred Stock that Plaintiff complains of was set forth in the Complaint and repeatedly argued. Plaintiff complains that:

> In changing the capital structure and issuing the class of Preferred C shares, with super voting powers, the Board and management: 1) gave themselves enhanced voting rights (3x) that allowed insiders to take voting control (51%)

> of entire company; 2) gave themselves a $5.25 liquidation preference meaning that these insiders will receive 1.5 times their investment before any other shareholders received anything; 3) gave themselves 1x warrant coverage which effectively doubles their portion of the company in case of a situation like the Transaction (asset sale); 4) gave themselves 12% cumulative interest on the shares, and; 5) gave themselves the ability for each Series C holder to appoint a director. (A039-040 ¶ 58).

OB at 9.

As to director/defendant Tyson, Defendants acknowledge:

> At the time of the Transaction, Tyson held 685,704 shares (19.9%) of the Series C Preferred, as well as 164,284 shares of common stock, warrants to purchase 820,704 shares of common stock, and options to purchase 223,500 shares of common stock (of which 99.9% were vested or would vest within 60 days), altogether representing beneficial ownership of 23.3% of the Company's common stock. A040-A041. In addition, Tyson held a 10% bridge note issued by the Company in the principal amount of $300,000, which was not paid at maturity and the interest rate thereon was increased to 15%. A041; A130.

AB at 7-8.

Importantly, Defendants do not contest Plaintiff's argument that:

> At no time did the Court consider Plaintiff's allegations that Tyson voted for the preference payout to him of approximately $3,599,946 (685,704 shares x $5.25/share) plus interest, based upon the likelihood of the cash liquidity event at the time of the vote. Nor did the Court consider the sizeable warrants and options Tyson voted to award himself as part of the Transaction nor did the Court consider the personal loan that Tyson voted for the ability to repay at sizeable interest.

OB at 31-32.

Defendants contend that the Cash Liquidity Event that would trigger the payment of the $19 million preference to the director defendants was merely speculative. AB at 28-30. However, the Company's Information Statement disclosures show that the Cash Liquidity event was not speculative. As Plaintiff demonstrated: "By the terms of the APA [asset sale agreement], Icagen was to continue its operations at its only other facility, in Tucson. However, Icagen had agreed to promptly retain a commercial real estate broker for the sale of the Tucson Facility by July 16, 2020, **which it was required to sell by August 15, 2020 in accordance with the terms of the Icagen-T Credit Agreement."** OB at 11-12 (emphasis added).

This requirement to sell the Tucson facility was critical in that, as Icagen's relevant Information Statement disclosed, "**Thus, the Asset Sale together with the sale of the Tucson Facility may be considered to be a Cash Liquidity Event**." (emphasis added). (A029-030 ¶41). OB at 12-13.

Defendants also argue that "because the bulk of the proceeds of the Ligand Transaction went solely to pay down the Company's third party debt (which was in default), the directors had the same interest as all other stockholders in getting the highest price available for the assets." AB at 29. However, Icagen's SEC disclosures said differently. Specifically, Icagen disclosed that, as Plaintiff previously argued, "[i]t was anticipated that proceeds from the sale of the Tucson Facility, in

conjunction with the proceeds raised in the Transaction would fully pay off all of the Company's debts **including the loans provided by the individual defendants**." (A 0 1 8 ¶ 8; A026 – A028 ¶¶38-40; A 121; A498); OB at 12 (emphasis added).

Therefore, it was reasonable for the director defendants, including Tyson, to anticipate at the time of approving the Transaction that they would be paid both the preference and the notes, not to mention that over generous allocation of warrants allotted to the Defendants. While the fact that the sale of the Tucson facility did not occur later was unknowable at the time of the vote, the interested directors fully intended and stated in writing that their vote was expected to trigger the Cash Liquidity Event that would pay them off handsomely.

Strikingly, the Vice Chancellor and now Defendants ignored Icagen's own representations, as alleged in the Complaint, that Tyson was conflicted when voting to approve the Transaction. Plaintiff alleged, as Icagen disclosed: "As such, Mr. Tyson has the ability to influence the manner and order in which the Corporation repays its debts and the payments under the Series C Preferred Stock and thus may be in a position to favor the repayment of his 10% Note and payments under the Series C Preferred Stock to the detriment of the holders of the Common Stock." (A041-42 ¶61). Plaintiff argues that it was error for the Court of Chancery to ignore this analysis. OB at 32.

As to director/defendant Taglich, Defendants acknowledge:

> At the time of the Transaction, Taglich held 114,285 shares (3.3%) of the Series C Preferred, as well as 453,314 shares of common stock, warrants to purchase 340,461 shares of common stock, and options to purchase 57,500 shares of common stock (of which 99.6% were vested or would vest within 60 days), altogether representing beneficial ownership of 14% of the Company's common stock. A042. In addition, Taglich held a 15% subordinated promissory note issued by the Company in the aggregate amount of $250,000. Id.; see also A131. Taglich's brother, non-party Robert Taglich, held 114,284 shares (3.3%) of the Series C Preferred and warrants to purchase 301,544 shares of common stock, representing beneficial ownership of 10.7% of the Company's common stock. A131. Robert Taglich also held a 15% subordinated promissory note issued by the Company in the aggregate amount of $250,000. Id.

AB at 8.

Importantly, Defendants do not contest Plaintiff's argument that:

> At no time did the Court consider Plaintiff's allegations that Taglich voted for the preference payout to him and his brother of approximately $1,199,987 (228,569 shares x $5.25/share) plus interest, based upon the likelihood of the cash liquidity event at the time of the vote. Nor did the Court consider the sizeable warrants and options Taglich voted to award himself and his brother as part of the Transaction nor did the Court consider the personal loans that Taglich voted for the ability to repay at sizeable interest.

OB. at 33.

As with Tyson, Defendants counter Plaintiff's argument of interestedness by stating that the payment of the cash preference was speculative, as was the payment of the notes. AB at 28-30. However, as Plaintiff agues with regard to Tyson above, **at the time that Taglich voted to approve the Transaction, the sale of the Tucson facility was required**. The sale of the Tucson facility together with the Transaction would result in a Cash Liquidity Event triggering the payment of the preference and

providing for sufficient funds to pay the high interest notes, not to mention that over generous allocation of warrants allotted to the defendants. The fact that the sale of the Tucson facility did not occur later was unknowable at the time of the vote. See *Infra*. At 7.

Again, the Vice Chancellor and now Defendants ignored Icagen's own representations, as alleged in the Complaint, that Taglich was conflicted when voting to approve the Transaction. Plaintiff alleged, as Icagen disclosed: "As such, Mr. Taglich has the ability to influence the manner and order in which the Corporation repays its debts and the payments under the Series C Preferred Stock and thus may be in a position to favor the repayment of his 15% note and payments under the Series C Preferred Stock to the detriment of the holders of the Common Stock." (A042-44 ¶¶62-63). It was error for the Chancery Court to ignore this analysis. OB at 33.

As to director/ defendant Kabatznik, Defendants acknowledge:

> Kabatznik held 28,571 shares (0.8%) of the Series C Preferred, as well as 25,000 shares of common stock, warrants to purchase 58,571 shares of common stock, and options to purchase 85,000 shares of common stock (of which 99.7% were vested or would vest within 60 days), altogether representing beneficial ownership of 3% of the Company's common stock. A044-A045; see also A131.

AB at 9.

Importantly, Defendants do not contest Plaintiff's argument that:

> [I]n analyzing Kabatznik's holdings, the Chancery Court has inexplicably dropped from its analysis the material fact that Kabatznik, in voting to approve the Transaction, had created an opportunity for him to generate an added benefit to himself representing 1.5 times his investment (plus 12% interest), in addition to the opportunity to achieve a 3% beneficial ownership in the company through the generous grant of warrants. (Compare A039-40 ¶58 with Opinion at 5, 13-14).

OB at 33-34.

As with director defendants Tyson and Taglich, Defendants counter Plaintiff's argument of interestedness by stating that the payment of the cash preference was speculative. AB at 28-30. However, as Plaintiff agues with regard to Tyson and Taglich above, at the time that Kabatznik voted to approve the Transaction the sale of the Tucson facility was required. The sale of the Tucson facility together with the Transaction would result in a Cash Liquidity Event triggering the payment of the preference. allotted to the defendants. The fact that the sale of the Tucson facility did not occur later was unknowable at the time of the vote. See *Infra.* at 7.

B. Defendants' Conflict Was Material

Defendants argue that Plaintiff set forth the wrong standard for materiality. AB at 37, note 7. But Plaintiff has argued materiality under the correct standard. To wit, Plaintiff argued in his Opening Brief that, "…the materiality standard inquiry is properly framed as whether their interestedness could plausibly affect the [directors] ability to reasonably consider the merits of the transaction…" OB. at 33.

Moreover, and importantly, Plaintiff analyzed materiality through the prism of the Vice Chancellor's own analysis. The Court wrote:

> This court has opined, even in the absence of director-specific allegations, that payments of a certain level may be presumptively material. *See In re MultiPlan Corp. S'holders Litig.*, 268 A.3d 784, 813 (Del. Ch. 2022) ("A greater than half-million-dollar payout is presumptively material at the motion to dismiss stage."); *Orman*, 794 A.2d at 31 ("I think it would be naïve to say, as a matter of law, that $3.3 million is immaterial."). There are no allegations that any Defendant received or expected to receive any payment from the proceeds of the Ligand Transaction, or that Kabatznik's interest in the Series C Preferred was material to him. *McMullin v. Beran*, 765 A.2d 910, 923 (Del. 2000) ("In assessing director independence, Delaware courts apply a subjective 'actual person' standard to determine whether a 'given' director was likely to be affected in the same or similar circumstances.") (citing *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1167 (Del. 1995)); *Orman*, 794 A.2d at 24 ("In determining the sufficiency of factual allegations made by a plaintiff as to either a director's interest or lack of independence, the Delaware Supreme Court has rejected an objective 'reasonable director' test and instead requires the application of a subjective 'actual person' standard to determine whether a *particular* director's interest is material and debilitating or that he lacks independence because he is controlled by another.").

(Opinion at 13-14, n. 31). OB at 30-31.

Tyson and Taglich satisfy the materiality test. In connection with the Transaction they voted in favor of, they were: 1) to receive payment on their outstanding loans with substantial interest (from the approved Transaction); 2) received substantial and valuable warrants and options as part of the Transaction; and, 3) stood in line to profit handsomely from what seemed at the time to be a forthcoming profitable Cash Liquidity Event. Accordingly, these defendants had a disabling interest in the Transaction. Defendants do not specifically counter the

materiality analysis regarding Tyson or Taglich as they too, as the Chancery Court, largely ignore the analysis as to them.

Instead, Defendants take aim at the materiality analysis regarding Kabatznik. AB at 32. As to Kabatznik, Defendants challenge materiality arguing that payment of the preference was speculative. AB at 32-35. But Plaintiff has already countered such speculation making clear that at the time of the vote, the sale of the Tucson facility was required and Icagen disclosed that it anticipated the the proceeds from the Transaction and the sale of the Tucson facility would be sufficient to pay off the Company's debts. See *Infra.* at 9.

At bottom, the fact that Kabatznik voted to create an opportunity for himself to generate an added benefit to himself representing 1.5 times his investment (plus 12% interest), in addition to the opportunity to achieve a 3% beneficial ownership in the company through the generous grant of warrants satisfies the materiality test. OB at 33-34.

Defendants argue that Katbatznik's conflict is not presumptively material. AB at 35-39. But they are incorrect. While *Cede & Co.v. Technicolor, Inc.*, 634 A.2d 345 (Del. 1993) dispensed with the "reasonable person" standard, this Court has not written total objectivity out of the materiality equation. To do so would mean that an investor, absent discovery deep into a defendant's personal financial holdings and motivations, could never show materiality as to that particular defendant. Instead,

what the Court has done is express the reasonable view in *Cede* that "a trial court must have flexibility in determining whether an officer's or director's interest in a challenged board-approved transaction is sufficiently material to find the director to have breached his duty of loyalty and to have infected the board's decision." The Court rejected the notion that "'any'" found director self-interest, standing alone and without evidence of disloyalty, is sufficient to rebut the presumption of loyalty of our business judgment rule" *Cede*, 634 A.2d 345, 364.

Therefore, Delaware law does allow for some objective consideration of the specific situation. This was the point recognized by the Chancery Court and its citing of a long line of precedent supporting that position. See *Infra.* at 11-12. In seeking to distinguish *In re MultiPlan Corp. S'holders Litig.*, 268 A.3d 784 (Del Ch. 2022) Defendants miss the point. The key inquiry there was whether there were divergent interests between different classes of stockholders (such as the Preferred C shares not made available to common stockholders) in that a voting director is expected to derive any material financial benefit from the transaction in the sense of self-dealing. *MultiPlan*, 268 A.3d 784, 813. Thus the *MultiPlan* Court concluded that "[a] greater than half-million-dollar payout is presumptively material at the motion to dismiss stage." *Id.*[1]

[1] Similarly, Defendants attempt to distinguish *Ormanv. Cullman*, 794 A.2d 5 (Del. Ch. 2002) is misplaced. AB at 37-38. The key inquiry again is whether the voting director will receive a personal financial benefit from a transaction that is not equally

Here, taking into account all of the circumstances, the conflict was material to Tyson, Taglich and Kabatznik.[2]

Tyson expected a financial benefit of $3,599,946 plus interest based upon the likelihood of the cash liquidity event at the time of the vote plus the awarding of sizeable options and warrants irrespective of any cash liquidity event, plus the payment of his personal note at sizeable interest.

Taglich (and his brother) expected a financial benefit of $1,199,987 plus interest based upon the likelihood of the cash liquidity event at the time of the vote plus the awarding of sizeable options and warrants irrespective of any cash liquidity event, plus the payment of his personal note at sizeable interest.

Kabatznik expected a financial benefit of $149,997.75 plus interest based upon the likelihood of the cash liquidity event at the time of the vote, but perhaps even more importantly, he benefitted himself representing 1.5 times his investment

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shared by the stockholders." *Orman*, at 29. Moreover, the inquiry is properly framed as to whether the financial benefit afforded the voting director would likely influence his vote in favor of his own interests. In *Orman,* the Court concluded, "[e]ven though there is no bright-line dollar amount at which consulting fees received by a director become material, at the motion to dismiss stage and on the facts before me, I think it is reasonable to infer that $ 75,000 would be material to director Bernbach." *Orman* at 30.

[2] *DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *12 (Del. Ch. Sept. 30, 2013), "[a] director's potentially conflicting financial interest need not be large, but there must be some basis to conclude it is material enough to that director that it could overcome their rational business judgment.

in addition to the opportunity to achieve a 3% beneficial ownership in the company through the generous grant of warrants (which did not depend upon the cash liquidity event). The holding of 3% ownership in the company itself is material. When that stock ownership is added to his other benefits, such benefit is also material.[3]

[3] Defendants further attempt to distinguish *In re Trados Inc. Shareholder Litigation*, 2009 WL 2225958 (Del. Ch. July 24, 2009) is without avail. AB at 39-40. Although the cash liquidity event did not happen in this instance, at the time of the vote the sale of the Tucson facility was required resulting in an anticipated future cash liquidity event.

II. THE COMPLAINT STATES A CLAIM FOR BREACH OF FIDUCIARY DUTY UNDER ENTIRE FAIRNESS

As Plaintiff argued in his Opening Brief, entire fairness is implicated when a majority of voting directors approving the Transaction have a disabling interest in the outcome of the vote. OB at 40. Here, Plaintiff sufficiently alleges that three of the five board members approving the Transaction suffered a disabling conflict.[4]

The Transaction they approved, the sale of Icagen's crown jewels for an inadequate price while using an inadequate process sufficiently states a claim for breach of fiduciary duty. OB at 18 – 21.

To the extent that Defendants argue that the asset sale did not provide for financial benefits (other than the possible preference) for the directors, AB at 41, but this is not true, as voting for the asset sale unlocked financial benefits for the directors. OB at 14.

CONCLUSION

The Court should reverse the Chancery Court's decision and sustain Plaintiff's Complaint.

[4] Plaintiff has adequately addressed the challenges as to Defendant Cunningham, both in the text and in a footnote. OB at 39.

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