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Case Number 70,2026

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHP III, L.P.,	:	
	:	
Plaintiff Below, Appellant,	:	No: 70, 2026
	:	
v.	:	Case Below: Court of Chancery
	:	of the State of Delaware
BENJAMIN F. CRAVATT, THOMAS	:	C.A. No. 2024-0867-KSJM
WOIWODE, CHRISTOPHER G.	:	
PARKER, BELHARRA	:	**Original Version Filed:**
THERAPEUTICS, INC., VERSANT	:	**May 19, 2026**
VENTURE MANAGEMENT, LLC,	:	
INCEPTION THERAPEUTICS, INC.,	:	**Public Version Filed:**
	:	**June 3, 2026**
Defendants Below, Appellees.	:	

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The Court of Chancery fundamentally misread the Amended Complaint. It deemed the "crux" of Cardinal's allegations to be fraud ***after*** merger negotiations, Op.13, when Cardinal repeatedly alleged fraud ***during*** negotiations.[1] The Court's mistaken belief that any fraud postdated the merger led it to assert incorrectly that Cardinal did not allege the fraud had impacted Bayer's diligence or the Vividion Board's merger approval. But Cardinal alleged the fraud had the specific purpose of influencing Bayer and the Vividion Board.

Defendants barely try to defend the Court of Chancery's misreading. They agree that the Court did not "credit" Cardinal's allegations, but argue that it "properly declined" to do so. AB.20. That fails twice over. The Court of Chancery did not consider Cardinal's allegations of fraud during merger negotiations and "decline" to credit them. It ignored them. Defendants cannot treat the Court's silence as a reasoned decision. Nor did Cardinal make the type of "conclusory" allegations a court could decline to credit. It alleged specific misstatements made during merger negotiations, named documents showing concealment of material information, and identified false representations in the Merger Agreement. Those specific allegations about fraud during merger negotiations cannot be reconciled

[1] This Reply Brief uses abbreviations defined in Cardinal's Opening Brief.

with the Court's assertion that the alleged fraud occurred only after negotiations concluded.

The Court of Chancery's failure to credit the Amended Complaint's allegations and draw inferences in Cardinal's favor suffices to resolve this appeal. But this Court has discretion to go further and recognize that the Amended Complaint satisfies the requirements for a direct claim under *Parnes v. Bally Entertainment*. Cardinal alleged that the Defendant directors used fraud during the merger to conceal technology's value and divert it to an entity they controlled, where they raised hundreds of millions of dollars to develop that technology. Those allegations show that misconduct corrupted the merger process and resulted in a material diversion of merger consideration.

Defendants' contrary arguments misstate the law and dispute well-pleaded allegations. Defendants contend *Parnes* applies only to controllers who explicitly condition merger approval on direct receipt of improper payments. But that limitation defies this Court's precedent. It would immunize vast swaths of fiduciary misconduct without any principled basis. Defendants further argue that the alleged fraud could not have deceived sophisticated parties like Bayer and the Vividion Board. But those factual arguments must await discovery, because they contradict the Amended Complaint's allegations. Reversal is warranted.

ARGUMENT

I. THE COURT OF CHANCERY FAILED TO CREDIT CARDINAL'S ALLEGATIONS AND DREW INFERENCES AGAINST CARDINAL

The Amended Complaint alleged specific facts showing fraud occurred during merger negotiations, tainting both the Vividion Board's approval and Bayer's diligence. The Court of Chancery ignored those detailed allegations—literally did not mention them—and deemed the "crux" of Cardinal's claims to be misstatements made ***after*** the merger closed, when they could not affect Bayer or Vividion's Board. That resulted in three errors. *First*, the Court ignored repeated allegations that fraud occurred during merger negotiations. OB.26-31. *Second*, the Court wrongly asserted that Cardinal did not allege an impact on Bayer's diligence or the Vividion Board's approval, which the Court mistakenly believed had predated the fraud. OB.31-34. *Third*, the Court drew inferences against Cardinal, wrongly assuming any misstatements in license-amendment negotiations occurred in the two business days after merger negotiations concluded. OB.34-36.

Defendants admit the Court of Chancery did not credit Cardinal's allegations, but urge that it "properly declined" to do so because the allegations were conclusory. AB.20. But the Court of Chancery did not consider Cardinal's allegations and "decline to credit" them. It ignored them. Nor were the allegations conclusory. They identified specific misstatements made and documents exchanged during merger negotiations. Defendants' preference for a counternarrative provides no basis for dismissal, no matter how many times they wrongly characterize their counternarrative as "undisputed."

A. <u>The Alleged Fraud Occurred During Merger Negotiations</u>

Cardinal alleged that Cravatt and Woiwode committed three kinds of fraud ***during*** merger negotiations. *First*, Cravatt abused both Bayer's and the Vividion Board's reliance on his unique knowledge of Vividion's IP by "knowingly misrepresent[ing] the value" of the '444 Application and related Technical Information, telling them it was "worthless." A90, 82 (¶¶ 107, 83); OB.12-13, 28-29. *Second*, Cravatt and Woiwode concealed Belharra, the rival company they founded to make millions from the same technology—which would have revealed the technology's true value and created material conflicts of interest. A75-79, 81, 90-91 (¶¶ 70-75, 81, 105-107); OB.14-15, 29-30. *Third*, Cravatt and Woiwode approved representations in the Merger Agreement they knew were false. A79-80, 82 (¶¶ 76-78, 83); OB.15-16, 30. The Amended Complaint explicitly alleged that each of these three types of fraudulent conduct occurred "***throughout***" and "***during***" merger negotiations, for the purpose of inducing the release of Vividion's exclusive license to the '444 Application and related Technical Information as part of the merger. A48, 71, 81 (¶¶ 5, 61, 81); OB.27. The Court of Chancery erred by describing the "crux" of Cardinal's claims as misrepresentations made ***after*** merger negotiations closed. Op.13.

Defendants agree that the Amended Complaint alleged fraud "during Merger negotiations," AB.15, and that the Court did not "credit such allegations," AB.20. But they urge that it "properly declined" to credit allegations that were "not well pleaded," "conclusory and speculative." AB.20. That argument has ***zero*** support in the Court's opinion. The Court did not consider the allegations and "decline" to credit them. It entirely ignored the allegations of fraud during the merger. It never mentioned Cravatt and Woiwode's alleged concealment of Belharra, much less the documents the Amended Complaint identified as support for that concealment. OB.22. Nor did it mention Cardinal's allegation that Cravatt and Woiwode approved representations in the Merger Agreement they knew were false. OB.22-23. The Court used the terms "well-pleaded" and "conclusory" only once, to explain Rule 12(b)(6)'s standard. Op.11. It did not mention the term "speculative" at all. Defendants cannot recast the Court's failure to mention allegations ***at all*** as a reasoned decision to reject those allegations.

Defendants assert that the Court of Chancery's discussion of the Merger Agreement—which did not mention Cravatt's alleged misstatements—concluded that "Bayer had *already* determined" the '444 Application "was immaterial," and thus implicitly rejected allegations that Cravatt had misrepresented it as "immaterial and worthless." AB.21. But that argument simply repeats the Court of Chancery's error. Its reliance on the Merger Agreement again assumes that the misstatements must have occurred after that Agreement's execution. The Amended Complaint alleges the opposite: that Cravatt made misstatements ***before*** the parties executed the Merger Agreement, for the purpose of "shap[ing]" Bayer's "thinking." A71(¶61). Defendants cannot rely on the "thinking" Cravatt's misstatements "shape[d]," as reflected in the Merger Agreement, to argue that no misstatements occurred.

Defendants' characterization of the Amended Complaint's allegations as "conclusory" also fails. "[E]ven vague allegations are 'well-pleaded' if they give the opposing party notice of the claim." *Erste Asset Mgmt. GmbH v. Hees*, 341 A.3d 1008, 1025 (Del. 2025). The Amended Complaint alleges who made misstatements (Cravatt, A82(¶83)), what he said (technology "immaterial," "useless," "not worth the upkeep costs," A78, 82(¶¶75, 83)), when ("during negotiations over Vividion's representations," A81(¶81)), and why (to "shape both sides' thinking" and induce them to release the technology, A71(¶61)). *See YWCA of Rochester & Monroe Cnty. v. Hatteras Funds, LP*, 2026 WL 851163, at *23 (Del. Ch. Mar. 27, 2026) (allegations not "conclusory" where complaint "points to specific facts"). It provides similar details for other fraudulent conduct, identifying specific merger representations Cravatt and Woiwode knew were false and naming documents—

Vividion's S-1 and a draft [redacted]—that show Belharra's concealment. OB.14-16. Those allegations are not conclusions. They are not even "vague." Defendants do not mention them, much less respond. AB.20.

Defendants mischaracterize the Court's decision and the Amended Complaint because they have no persuasive response to the plain error that occurred. The Amended Complaint alleged, time and again, that fraud occurred ***during*** merger negotiations. The Court of Chancery wrongly deemed the "crux" of Cardinal's claims to be misstatements ***after*** negotiations concluded. Op.13. That basic misreading of Cardinal's allegations cannot stand.

B. The Court of Chancery Misdescribed Cardinal's Other Allegations

The Court of Chancery wrongly asserted that the Amended Complaint did not allege that fraud impacted Bayer and the Vividion Board. That error followed from its misunderstanding of the alleged fraud's timing and purpose. Cardinal alleged fraud during merger negotiations, for the purpose of shaping Bayer and the Vividion Board's thinking, which succeeded in impacting the diligence and approval processes. Defendants' contrary arguments defy the standard on a motion to dismiss.

Defendants baldly assert an "undisputed reality" that "Bayer conducted full and unrestricted due diligence" into Vividion's IP. AB.22. But repeating the word "undisputed" does not make it so. *See* OB.31-32. Defendants ignore unambiguous allegations that Bayer "relied" on Cravatt, A78 (¶75), that Cravatt "lied . . . to Bayer" during "the diligence process," A48, 71 (¶¶6, 61), and that Cravatt and Woiwode withheld information about Belharra that "would have been material to Bayer," A77 (¶73). That some information was available to Bayer, AB.22, does not change Cardinal's allegations that other critical facts, such as Technical Information and Belharra's existence, were not, A58-59, 78 (¶¶31-34, 75). Knowing a potential method for drug discovery exists (the '444 Application) is very different from knowing that the method has identified treatment candidates (Technical Information), which a rival company is working to exploit (Belharra). *See Prairie Cap. III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 52 (Del. Ch. 2015) (if party "allows the counterparty to conduct an investigation, the party cannot conceal information"). The Court of Chancery did not consider those allegations and reject them. It asserted Cardinal "does not claim that the Individual Defendants obscured Bayer's diligence." Op.13. That was wrong.

Equally wrong was the Court's statement that Cardinal "did not allege" Cravatt and Woiwode "manipulated" Vividion's Board. Op.15. Defendants attempt to defend that error on the basis that the Board was "majority independent" and relied on "independent advice." AB.22-23. But that is a non-sequitur. Cardinal alleged the Board "relied on Cravatt's input" in evaluating whether his "discoveries" should be "surrendered for nothing." A74-75 (¶67). Even "independent" directors (and their advisors) can be defrauded. OB.33-34. Cardinal's "independent" Board designee, in verifying the Amended Complaint, attested he was defrauded. A92-93 (¶ 111). That is not "speculation" about a "single hypothetical dissent." AB.22-23. It is percipient witness testimony about manipulation. The Court of Chancery erred by ignoring that such manipulation was alleged.

Finally, the Court of Chancery wrongly ignored the Amended Complaint's allegations about Cravatt's "influence" over Scripps. Defendants dismiss those allegations as "insufficient" to show Scripps's "complicit[y]." AB.22. But that is not the standard. *See* pp. 13-17, *infra*. Regardless, the Court did not consider Cardinal's allegations and deem them "insufficient." It again ignored them.

C. <u>**The Court Drew Inferences Against Cardinal**</u>

Cardinal's Opening Brief explained that the Court of Chancery drew inferences against Cardinal. OB.34-36. It assumed that any alleged misstatement during Vividion's license-amendment negotiations with Scripps occurred during the two business days after Vividion and Bayer executed the Merger Agreement, despite context and evidence showing that merger and license-amendment negotiations proceeded in parallel. *Id.* Defendants ***do not respond***. They thus waive any argument that the Court drew all inferences in Cardinal's favor. *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999); *Larkin v. Shah*, 2016 WL 4485447, at *20 n.126 (Del. Ch. Aug. 25, 2016). The Court's departure from that "well settled" standard alone supports reversal. *Erste*, 341 A.3d at 1025.

*   *   *

The Court of Chancery dismissed Cardinal's Amended Complaint based on a fundamental misunderstanding of what Cardinal pled. It failed to credit specific allegations of fraud during merger negotiations, misdescribed the Amended Complaint, and drew inferences against Cardinal. Reversal is warranted.

II. THE AMENDED COMPLAINT STATES DIRECT CLAIMS UNDER ***PARNES***

Cardinal's allegations state a direct claim under *Parnes v. Bally Entertainment*, 722 A.2d 1243 (Del. 1999). Defendants agreed below that *Parnes* claims must meet three elements: (1) a diversion of merger consideration that (2) results from misconduct and (3) materially affects process or price, calling the merger's fairness or validity into question. A236, 1326; *Blue v. Fireman*, 2022 WL 593899, at *11 (Del. Ch. Feb. 28, 2022). While *Parnes* involved a controller's demand for side payments, this Court has long recognized stockholders' standing to bring direct fraud claims challenging a merger's fairness. OB.39-41; *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1188 (Del. 1988); *see Blue*, 2022 WL 593899, at *6.

Defendants seek to narrow *Parnes* to cases where "target insiders demanded a material diversion of merger consideration . . . to secure their consent to the merger." AB.28. But that conflicts with *Cede*, which Defendants nowhere address. AB.46. In *Cede*, this Court believed "[n]o one would assert that a former owner suing for loss of property through deception or fraud has lost standing to right the wrong that arguably caused the owner to relinquish ownership or possession." 542 A.2d at 1188. Defendants, however, assert exactly that. They attempt to limit direct standing to "cases involving an actual affirmative demand for the diversion of consideration," rather than diversions through fraud or deception. AB.50. That makes no sense. Whether an insider demands an asset's transfer or instead deceives the corporation into relinquishing it in a merger on unfair terms, the injury to stockholders is the same.

Defendants' repeated refrain that Cardinal's claims would "expand *Parnes* beyond recognition," AB.49, cannot be squared with the law or Cardinal's allegations. Cardinal does not allege that Cravatt and Woiwode "failed to maximize the total merger consideration, without more." AB.29. It alleges they lied about the value of an asset Cravatt uniquely understood, abused the merger process to convince Vividion's Board to relinquish that asset for nothing, acquired that asset for a secret, competitive venture, and then used it to raise hundreds of millions of dollars. Those allegations cannot be made in "virtually every post-merger claim." AB.5. They satisfy *Parnes*'s three elements.

A. <u>Defendants Diverted Merger Consideration</u>

Cardinal alleged that Cravatt and Woiwode "improperly diverted proceeds" that, absent misconduct, would have "ended up in the consideration paid to" stockholders. *Blue*, 2022 WL 593899, at *9 (quoting *Golaine v. Edwards*, 1999 WL 1271882, at *9 (Del. Ch. Dec. 21, 1999)). Before the merger, Vividion held valuable rights to the '444 Application and related Technical Information. OB.43-47. Absent Cravatt and Woiwode's misconduct, Vividion's Board could have obtained additional merger consideration for those rights. *Id.* Instead, Cravatt and Woiwode defrauded the Board into agreeing to release those rights without obtaining any consideration for stockholders.

1. Defendants argue *Parnes* applies only to a "direct diversion of merger funds to insiders." AB.31. That ignores precedent and principle. None of Defendants' citations require a "direct" diversion.[2] Although Defendants contend "every Delaware case" has involved a direct diversion, AB.31, they subsequently concede that *In re Straight Path Communications Inc. Consolidated Stockholder Litigation* involved a diversion to a "company in which defendant's 'children held a 10% equity interest,'" AB.35 (citing 2018 WL 3120804, at *6, 12-13 (Del. Ch. June 25, 2018)). This Court summarily affirmed that decision. *IDT Corp. v. JDS1, LLC*, 206 A.3d 260 (table) (Del. 2019). That conclusively shows that a diversion need not be "direct" to support a *Parnes* claim.

[2] *Parnes* required only that stockholders challenge the "validity of the merger itself," usually by charging fiduciary breaches "resulting in unfair dealing and/or unfair price." 722 A.2d at 1245. None of Defendants' citations reject *Parnes* claims because insiders benefited indirectly. *See Brokerage Jamie Goldenberg Komen Rev Tru U/A 06/10/08 Jamie L Komen Tr. for Komen v. Breyer*, 2020 WL 3484956, at *12 (Del. Ch. June 26, 2020) (diversion "immaterial" to transaction); *In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *8, 11 (Del. Ch. Sept. 30, 2009) (insider "not alleged to have received anything of value," directly or indirectly, apart from consideration available to all stockholders).

Defendants purported requirement is also illogical. *Parnes* is a standing doctrine. It asks whether a breach caused "an injury to the stockholders, not the corporation." *Parnes*, 722 A.2d at 1245. A diversion injures stockholders because, absent misconduct, it would have "ended up in the consideration paid" to them. *Blue*, 2022 WL 593899, at *9. Whether an insider receives diverted consideration directly or indirectly does not transform stockholders' injury into one suffered by the corporation. In both cases, *stockholders* receive less.

Defendants' requirement also contradicts fiduciary duty principles, which hold fiduciaries liable regardless of motive. It makes "no difference" why a director "intentionally fails to pursue the best interests of the corporation." *Calumet Cap. Partners LLC v. Victory Park Cap. Advisors, LLC*, 353 A.3d 88, 109 (Del. Ch. 2026). But under Defendants' proposed rule, a director's motive would make every difference. Only directors motivated by "direct" gain would face stockholder claims. Any director clever enough to route gains through an intermediary, or who acts "disloyally" for "reasons other than personal pecuniary interest," *Nagy v. Bistricer*, 770 A.2d 43, 48 n.2 (Del. Ch. 2000), would not.

Defendants protest that a different rule would permit *Parnes* claims for "corporate waste" or whenever a "target insider later acquires" corporate assets. AB.33, 35. Not so. Cardinal did not allege that Defendants simply wasted an asset or later acquired it. It alleged Cravatt lied about the asset's value, for the purpose of inducing Vividion to release it in the merger for no consideration to an intermediary he could control, and then acquired that asset for a secret rival he had founded. OB.12-19. Applying *Parnes* to those allegations is straightforward.

Defendants' rule, in contrast, would eviscerate "the policy that directors' unfair acts of self-dealing" in a "merger transaction should not be immune from stockholder challenge." *Houseman v. Sagerman*, 2014 WL 1600724, at *12 (Del. Ch. Apr. 16, 2014). Cardinal's Opening Brief posited that *Parnes* would come out no differently if the fiduciary had demanded the same side payments, but to a preferred charity. OB.47. Defendants do not dispute that, stating only that the example "does not fit the circumstances." AB.33. But it ***understates*** the circumstances here, because Cardinal alleges Cravatt could control the recipient of diverted assets and transfer them to his own company. A84(¶87). Stockholders can assert a direct claim for that diversion.

2. Defendants' argument about the need for a "side transaction," AB.31-36, fails for the same reasons. Courts applying *Parnes* use "side transaction" to refer to insiders' receipt of "benefits not shared with all the target stockholders." *Golaine*, 1999 WL 1271882, at *4, 7; *see Blue*, 2022 WL 593899, at *10. Cardinal alleges exactly that. Vividion's release of exclusive rights to the '444 Application and related Technical Information ***harmed*** stockholders, who received no consideration for those valuable assets. A83-84(¶86). But Cravatt and Woiwode benefited,

because the release freed them to acquire rights for Belharra, where they were commercializing the technology in violation of Vividion's rights. A84 (¶87). That release, [redacted], was a "special benefit in the sale itself." *Straight Path*, 2018 WL 3120804, at *1. Indeed, Defendants imply the release would have been an actionable "side transaction" if made directly to Belharra, touting the lack of "transaction between Vividion and any defendant." AB.34. But that simply repeats Defendants' mistaken reliance on the need for "direct" diversions. *See* pp. 13-15, *supra*.

3. Finally, Defendants urge that Belharra licensed the '444 Application "long after the Merger closed" in a "free-market" transaction with a "disinterested third party" that "anyone" could have entered. AB.34-36. But those factual arguments simply dispute Cardinal's well-pleaded allegations and require drawing inferences against Cardinal. Cardinal alleged that Cravatt had a "unique" understanding of the technology, that Scripps had a "policy" of conferring with named inventors about licenses, and that Cravatt could exercise "substantial influence" over any decision by virtue of his position at Scripps, all of which "effectively ensured" a license to Belharra. A84 (¶87); A63 (¶42). Those allegations render it reasonably conceivable that Defendants would benefit from the diversion. Defendants' suggestion that Cardinal "could have sought to license" the '444 Application, AB.35, highlights the unreasonableness of their contrary

inferences. A stockholder that has been falsely told technology was "worthless" by the technology's ***inventor*** would not seek to acquire it. But there is every reason to infer that an insider with "unique" knowledge of the technology's value and "substantial influence" over decision-making would do exactly that.

B. The Diversion Resulted from Fraud and Fiduciary Breaches

Cardinal alleged a direct causal link between Cravatt's and Woiwode's misconduct and the diversion of consideration from Vividion's other stockholders. OB.45, 48. Cravatt and Woiwode defrauded both Bayer and Vividion's Board, deliberately misrepresenting that the '444 Application and related Technical Information were valueless and concealing their ongoing efforts to commercialize that same technology at Belharra. That fraud caused Vividion and Bayer to take Vividion's exclusive license to the technology "off the table" and release it for nothing. OB.48. Absent the fraud, Vividion's Board could have used the '444 Application and related Technical Information to secure hundreds of millions of dollars of additional consideration for stockholders, by either negotiating a higher price from Bayer or spinning the intellectual property off into a new company for Vividion's stockholders' benefit. OB.44-45.

Defendants' contrary arguments fail. Many boil down to disputed factual assertions that the alleged fraud could not have misled sophisticated parties like Bayer and Vividion's Board. AB.36-41. Those arguments defy the Amended

Complaint's well-pleaded allegations. Next, Defendants invent a new legal requirement, arguing that Cardinal must allege Cravatt or Woiwode explicitly "linked" their approval of the merger to receipt of diverted benefits. But that requirement has no basis in precedent and would eliminate *Parnes* claims for fraud, contradicting *Cede*.

1. <u>Defendants Cannot Ignore Well-Pleaded Fraud Allegations</u>

Defendants primarily dispute causation by arguing that the alleged conduct could not have impacted Bayer or Vividion's Board. Those factual disputes ignore the standard on a motion to dismiss.

a. Defendants urge that Bayer, a "sophisticated, international pharmaceutical conglomerate[ ]," could "sufficiently evaluate the value of the '444 application based on" public information. AB.38. But the Amended Complaint's factual allegations show otherwise. Bayer and Vividion negotiated on an expedited timeline. A75-76 (¶70). Part of what Bayer had to value was non-public Technical Information in Cravatt's possession. A58-59 (¶¶31-34); OB.31-32. Bayer thus "relied on Cravatt," A78 (¶75), who "play[ed] an important role in the diligence process," A71 (¶61). Bayer's reliance is reflected in the [redacted] it asked Cravatt to sign, which prohibited him from [redacted] A77-78 (¶73). Defendants cannot draw inferences against Cardinal based on Bayer's unpled sophistication, particularly when specific factual allegations show that Bayer needed to and did rely on Cravatt.

Defendants urge Cravatt and Woiwode "had no duty of disclosure *to Bayer*." AB.38. But the Amended Complaint alleges *affirmative* misstatements. A82(¶83). Such misstatements are actionable by themselves. *Prairie Cap.*, 132 A.3d at 52. Speaking, moreover, creates a duty not to withhold information that makes statements "misleading." *E.g., id.*; *see Norton v. Poplos*, 443 A.2d 1, 5 (Del. 1982). Similarly, when a party permits a counterparty's "investigation," it "cannot conceal information." *Prairie Cap.*, 132 A.3d at 52. Cravatt and Woiwode concealed information that was relevant to Bayer's diligence and also belied Cravatt's description of technology as "immaterial and worthless." A82(¶83). And the ultimate issue is causation. It is of course conceivable that misrepresentations that an asset is worthless and concealment of ongoing efforts to develop that same asset will cause even a sophisticated acquiror not to buy it. Two sophisticated pharmaceutical companies Cravatt did not deceive later paid over $100 million for non-exclusive access to technology Bayer could have acquired exclusively. OB.18, 44.

When Cardinal's fraud allegations are properly credited, Defendants remaining causation arguments fall apart. Defendants urge that the merger price would not have changed if Vividion did not release the '444 Application, and that

Cravatt did not "downplay[ ]" that Application's value until "after the Merger Agreement was negotiated and signed." AB.36-37. Both arguments ignore Cardinal's allegation that Cravatt's fraud ***during*** merger negotiations had already "shape[d]" Bayer's thinking (and the Vividion Board's) before the Merger Agreement was finalized. *See* pp. 4-7, *supra*. Two parties' agreement on an asset's price means nothing if ***both*** have been deceived about the asset's value.

b. Defendants next attack Cardinal's claim of fraud on Vividion's Board. AB.40-45. Defendants acknowledge Cardinal alleged that "Cravatt and Woiwode misrepresented to Vividion's Board that the '444 Application was 'immaterial and worthless,'" but inexplicably assert Cardinal "did not allege Cravatt or Woiwode said those words or their essence." AB.42. Nonsense. Cardinal alleged that Cravatt "falsely characterized the '444 application and associated intellectual property as immaterial and worthless to both Bayer and Vividion." A82 (¶83); *see also* A74-75 (¶67) ("Vividion relied on Cravatt's representation that the '444 application was not worth anything to Vividion's business."); A91 (¶109) (directors "deceived" by Cravatt "falsely asserting" Vividion would surrender "nominal or valueless rights"). The Amended Complaint does not "artful[ly]" plead that Cravatt *implied* the '444 Application was immaterial based on Vividion's covenant in the Merger Agreement not to release any "'material' IP rights." AB.42-43.[3] It alleges Cravatt said the technology was "worthless," "not worth anything to Vividion's business," and "valueless." A74-75, 82, 91 (¶¶67, 83, 109).

Nor can Defendants avoid Cardinal's allegations regarding Belharra's concealment.[4] Without citation, Defendants assert "it was not reasonable to infer the Vividion Board was not fully informed about the '444 application." AB.43-44. But this Court need not draw any inference, because Cardinal alleged specific facts showing the Board was not "fully informed." Cravatt had unique access to Technical Information that other directors lacked. *See* pp. 8, 18, *supra*. A fully-informed Board, moreover, knows fellow directors' material conflicts of interest, which each director has an "unremitting obligation" to disclose. *HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 119 (Del. Ch. 1999); *Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051, 1061 (Del. Ch. 1987). Defendants attempt to distinguish *HMG* and

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[3] Cardinal alleged that Cravatt and Woiwode falsely approved two ***other*** Merger Agreement representations. A79-80 (¶¶77-78). But those representations concerned distinct subjects, providing a separate basis for the fraud claim. *Id.*

[4] Defendants assert the Court of Chancery "acknowledged CHP's arguments concerning Belharra." AB.44. It did not. The Court's "Legal Analysis" section never mentioned Belharra. Op. 10-15. The Factual Background, moreover, never acknowledged allegations that Cravatt and Woiwode concealed its existence. It simply discussed allegations that Belharra was formed, licensed the '444 Application, and secured hundreds of millions of dollars in funding. Op. 1, 4-5, 8-9.

Eisenberg as cases where directors stood on "both sides" of a transaction. AB.44. But the cases describe a broad duty to disclose ***any*** material conflict of interest. Cravatt and Woiwode engaged in classic self-dealing. They induced Vividion's Board to approve a transaction without disclosing their plan to acquire technology Vividion was releasing. *See* p. 4, *supra*.

The Board's use of a financial advisor does not preclude a finding of fraud. AB.41. Centerview did not possess the information the Board lacked and "did not itself [redacted] A75(¶68). If anything, its recommendations increased the Board's reliance on Cravatt's fraudulent statements. OB.13.

Consideration of the actual fraud Cardinal alleged again shows that fraud conceivably resulted in diversion of merger consideration. Defendants contend that Cardinal must show the Board's decision was "'so far beyond the bounds of reasonable judgment that it seems essentially inexplicable.'" AB.41 (quoting *Kahn v. Stern*, 2017 WL 3701611, at *13 (Del. Ch. Aug. 28, 2017)). But *Kahn* was not a fraud case. It examined whether a Board acted in "bad faith" when approving "side deals" that had been ***disclosed***. *Kahn*, 2017 WL 3701611, at *13. It does not apply where a complaint alleges fraud on the Board.

Cases considering fraud allegations ask whether the fraud "deprived" the Board of its "ability to obtain a better result on behalf of the stockholders." *In re*

Dole Food Co. S'holder Litig., 2015 WL 5052214, at *38 (Del. Ch. Aug. 27, 2015); *In re Rural Metro Corp.*, 88 A.3d 54, 101 (Del. Ch. 2014) ("[A] fully-informed Board would have had numerous opportunities to achieve a superior result."). It is reasonably conceivable that, with full information, Vividion's Board would have obtained a better result for stockholders. First, it could have negotiated a higher price from Bayer. Bayer stood to acquire technology for which other pharmaceutical companies later paid handsomely, had expressed interest in acquiring all Vividion's material IP, and wanted to avoid competition with Cravatt. OB.44; *see also Parnes*, 722 A.2d at 1245 (asking whether acquiror "might have paid a higher price").

Second, Vividion's Board could have implemented [redacted] transferring the '444 Application and related Technical Information to an affiliated entity held for stockholders' benefit. OB.45. Defendants' contrary arguments lack merit. The Amended Complaint's allegations about the [redacted] are not "speculative." AB.39. They concern a proposal Vividion considered. A64-65 (¶¶46-47). Nor would such an outcome fail to produce merger consideration for stockholders. AB.39. Merger consideration can take the form of "securities of any other corporation or entity." 8 *Del. C.* § 251(b)(5). *Straight Path* concerned an indemnification claim that "potential acquirers" might have "little interest" in buying, but it held stockholders could receive value through creation of a "litigation trust." 2018 WL 3120804, at *12. Finally, Cardinal did not waive this argument. AB.39. Its briefing below invoked the same allegations and precedent, A1333, 1363, and thus "fairly presented" the issue to the Court of Chancery, Del. Supr. Ct. R. 8.

Defendants' contention that Cravatt and Woiwode could not "have done anything" to "influence the Merger terms," AB.44, contradicts Cardinal's allegations and common sense. Of course directors can influence a merger's terms. They have even more power to do so when, as alleged, both sides rely on them and they possess unique information they misrepresent for personal gain. *See* pp. 4-7, *supra*. The fraud Cardinal alleged caused a reduction in stockholders' merger consideration, satisfying *Parnes*'s second element.

2. <u>There Is No "Linking" Requirement</u>

Defendants attempt to reformulate the causation element to require that Cravatt and Woiwode "link any side deal to their approval of the Merger." AB.49. But precedent imposes no such requirement. Instead, it requires only a "causal link between the breach complained of and the ultimate unfairness of the merger." *Blue*, 2022 WL 593899, at *9. That makes sense. Under this Court's decision in *Cede*, stockholders can directly challenge fraud that affects a merger's fairness. OB.40-41 (citing 542 A.2d at 1188). Requiring a "link" between merger approval and a side deal, however, would effectively preclude fraud-based *Parnes* claims. Defendants accused of *hiding* the illegitimate benefits they receive from a merger will not have explicitly "linked" those benefits to anything. Defendants' unsupported requirement thus contradicts this Court's precedent.

C. <u>**The Diversion Was Material**</u>

Finally, Cardinal alleged that Cravatt's and Woiwode's misconduct materially affected the merger's process and price. OB.49-51. Defendants agree that a *Parnes* claim can attack "process" or "price," but urge that the '444 Application and related Technical Information are immaterial under either analysis. AB.46. Their arguments, however, mostly rehash earlier contentions. They suggest only "directly diverted" consideration can be material, AB.45, and that Bayer valued the technology at "*zero dollars*," AB.46. But Bayer's valuation was the product of fraud, *see* pp. 7-8, *supra,* and diversion of merger consideration need not be "direct" to injure stockholders, *see* pp. 13-16, *supra*.

The Amended Complaint alleges that Belharra, a company based on the '444 Application and related Technical Information, raised $170 million in just a few short years after the merger, with the possibility of $2.7 ***billion*** in milestone payments. A81-82(¶82). Most of that funding came from large pharmaceutical companies comparable to Bayer. *Id.* Those companies paid for non-exclusive access to technology Bayer could have acquired exclusively. Versant-affiliated funds managed by Woiwode invested another $50 million in anticipation of "very high rates of return." OB.51 (quoting *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 50 (Del. Ch. 2013)).[5]

Defendants attempt to dismiss this evidence of value as mere "speculation" at the time of the merger. AB.47. But at the time of the merger, Defendants predicted these exact outcomes. That is why they founded Belharra, why Versant invested $50 million, why they devoted time and effort to commercializing the technology, and why they hid their efforts from (among others) Vividion stockholders who would have demanded to share the profits from corporate assets. This Court should not blind itself to evidence of value Defendants expected and succeeded in obtaining. Courts have found diversions immaterial only where they represent "less than one percent of the overall merger consideration." *Blue*, 2022 WL 593899, at *12. Whether 1% sets a "floor" for materiality, AB.45, is irrelevant, because the value Defendants diverted far exceeds that amount—and could ultimately exceed the value of the ***entire merger***, OB.50. Defendants cite no case where a director has concealed development of a corporate asset, acquired control of it, used that asset to raise over $100 million (and counting), and then successfully argued that the asset was immaterial as a matter of law. No such case exists. This case should not be the first.

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[5] Defendants argue Versant made this investment in "2024." AB.47. But the Amended Complaint alleges Belharra had received at least $130 million, including $50 million from Versant, no later than January 2023. A65-66(¶49).

CONCLUSION

This Court should reverse the Court of Chancery's decision dismissing Cardinal's Complaint.

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CERTIFICATE OF SERVICE

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