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RE: *In re Northwest Biotherapeutics, Inc. Stockholder Litigation*, Consolidated C.A. No. 2022-0193-JTL

Dear Counsel:

The plaintiffs contend that option grants to officers and directors constituted a breach of fiduciary duty. The court denied the defendants' motions to dismiss. Before any determination on the merits, the defendants submitted the grants to the stockholders for potential ratification. The stockholders approved the grants. The plaintiffs dispute the effectiveness of the vote. The procedural question is how to move forward.

There are several possibilities:

- The plaintiffs could be required to amend their complaint and plead facts sufficient to state a claim challenging the ratifying effect of the vote (the "Amended and Supplemental Complaint Option").

- The defendants could move for summary judgment based on the vote, with the plaintiffs having the ability to identify facts in dispute and seek discovery under Court of Chancery Rule 56(f) (the "Summary Judgment Option").
- The defendants could serve interrogatories on the plaintiffs asking them to identify on what basis they dispute the effectiveness of the vote (the "Interrogatory Option").
- The parties could proceed with full-blown, plenary discovery, including discovery into the ratifying vote (the "Plenary Discovery Option").

After amending their answer to raise the ratifying vote as an affirmative defense, the defendants have sought to pursue each of the first three options. The plaintiffs seek to pursue the fourth option. The court wants one option.

Taking the options in reverse order, the Plenary Discovery Option seems least desirable. One of the reasons for seeking a ratifying vote is to moot a claim and avoid the need for plenary discovery and a trial. The Plenary Discovery Option defeats that purpose. Although it gives the most effect to the plaintiffs' success in defeating the defendants' initial motion to dismiss, the Plenary Discovery Option fails to recognize that the vote fundamentally altered the factual landscape of the case.

The Interrogatory Option gives some weight to the plaintiffs' success in defeating the defendants' initial motion to dismiss, but it encourages the plaintiffs to serve wide-ranging interrogatory responses. That appears to be the case here, because the plaintiffs' interrogatory responses did not help focus the issues for resolution.

The Summary Judgment Option might seem to offer the best path forward. Rule 56(f) establishes a mechanism for identifying disputed issues of fact and the discovery needed to address them. In this case, however, the plaintiffs' interrogatory responses suggest that a Rule 56(f) affidavit would not help focus the issues either.

That leaves the Amended and Supplemental Complaint Option. I was initially skeptical of this option because it seemed to give no credit to the plaintiffs' success in defeating the defendants' motion to dismiss. Instead, it treated the vote as if it were effective, even though ratification is an affirmative defense that the defendants bear the burden of establishing. It also seemed odd that the defendants could take action that forced the plaintiff to file an amended and supplemental pleading. Rather than the plaintiffs being the masters of their complaint, in some sense the defendants would be.

Upon further reflection, I have concluded that the Amended and Supplemental Complaint Option provides the most efficient framework for addressing the effect of the vote. By obtaining a potentially ratifying vote, the defendants have reset the transactional landscape. The legitimacy of the original decision to grant the options has become secondary. The effectiveness of the vote is now primary.

When contesting the effect of a vote, Delaware law puts the burden on the plaintiff to plead a disclosure violation. *See In re Solera Hldgs., Inc. S'holder Litig.*, 2017 WL 57839, at *8 (Del. Ch. Jan. 5, 2017); *In re Anaplan, Inc. S'holders Litig.*, 2024 WL 3086013, at *7 (Del. Ch. June 21, 2024), *aff'd*, 2025 WL 369753, at *1 (Del. Feb. 3, 2025) (ORDER). Consistent with that authority, the plaintiffs should have to plead a viable challenge to the effectiveness of the vote.

The only twist to this analysis is that a stockholder charged with pleading a disclosure violation could use 8 *Del. C.* § 220 ("Section 220") to obtain books and records before filing suit. The plaintiffs did so here, and the books and records they obtained enabled them to defeat the defendants' motion to dismiss. Requiring the plaintiffs to plead a viable challenge to the effectiveness of the vote without similar access to information would penalize the plaintiffs for prevailing on the initial motion to dismiss.

"Delaware trial courts have inherent power to control their dockets." *Solow v. Aspect Res., LLC*, 46 A.3d 1074, 1075 (Del. 2012). That authority includes determining how to proceed for the "orderly adjudication of claims." *Unbound P'rs Ltd. P'ship v. Invoy Hldgs. Inc.*, 251 A.3d 1016, 1030 (Del. Super. 2021) (footnote omitted). Court of Chancery Rule 1 instructs the members of this court that the rules "should be construed, administered, and employed by the Court and the parties to secure the just, speedy, and inexpensive determination of every proceeding." Ct. Ch. R. 1. Commenting on the sibling federal rule, a leading treatise states that "[t]here probably is no provision in the federal rules that is more important than this mandate. It reflects the spirit in which the rules were conceived and written, and in which they should be interpreted." 4 Charles Alan Wright, Arthur R. Miller & Adam N. Steinman, *Federal Practice and Procedure* § 1029 (4th ed. 2024 Update) (footnote omitted).

Court of Chancery Rule 16(a) similarly contemplates that a court may take steps to "formulat[e] and simplif[y] . . . the issues" and to address "[s]uch other matters as may aid in the disposition of the action." Ct. Ch. R. 16(a)(1), (5). The same authoritative treatise explains that "case management [is] an express goal of pretrial procedure." 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1521 (3d ed. 2024 Update) (footnote omitted). To that end, the Advisory Committee's note to the federal rule emphasizes the need for "a process of judicial management that embraces the entire pretrial phase." Fed. R. Civ. P. 16 advisory committee's note to 1983 amendment. The commentary recognizes that "[t]he timing of any attempt at issue formulation is a matter of judicial discretion." *Id.*

The court will exercise its authority by providing the plaintiffs with limited discovery equivalent to what they could have received under Section 220. In other words, to recreate the possibility of using Section 220 as if the defendants had sought a ratifying vote on a clear day, without litigation pending, the plaintiffs may serve

requests for production of documents that seek to obtain the same types of materials regarding the vote that they could have obtained using Section 220 if litigation had not already been filed. The plaintiffs must serve their requests for production within two weeks. The defendants must serve responses to the requests within one week after receiving them, then produce documents and a privilege log (if warranted) within two weeks after serving their responses. If there are disputes about the scope of the production, the plaintiffs may file a motion to compel.

Once this limited opportunity for document production is complete, then the plaintiffs must file an amended and supplemental complaint that pleads their bases for challenging the effectiveness of the vote. The defendants may move, answer, or respond in accordance with Court of Chancery Rule 12.

The defendants' pending motion for summary judgment is denied without prejudice.

Sincerely yours,

/s/ J. Travis Laster

J. Travis Laster
Vice Chancellor

JTL/krw