IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JERALD HAMMANN, Plaintiff, v. CYTRX CORPORATION, STEVEN A KRIEGSMAN, LOUIS IGNARRO, JOEL K. CALDWELL, and EARL W. BRIEN, Defendants.	)	C.A. No. 2021-0676-PAF **Public Version Filed:** **August 16, 2021**

DEFENDANTS' ANSWERING BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND MOTION TO EXPEDITE PROCEEDINGS

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PRELIMINARY STATEMENT

This action is the latest installment in a long dispute between Plaintiff Jerald Hammann ("Plaintiff" or "Hammann")—a professional disgruntled stockholder and serial litigant—and Defendant CytRx Corporation ("CytRx" or the "Company"), stemming from Plaintiff's dissatisfaction with the Company's and Board of Directors' business judgment and management decisions. Hammann began his attack on CytRx in February of 2020, starting with a series of revised Section 220 requests and culminating in a proxy fight that August, in which Hammann nominated himself to the Board and circulated a Rule 23 demand. In order to avoid the substantial expense and distraction of these initiatives, the Company agreed to resolve the proxy fight before any stockholder vote via entry into a Cooperation Agreement with Hammann on August 21, 2020.

Pursuant to the Cooperation Agreement, Hammann agreed to withdraw his nomination and covenanted not to bring suit during a two-year standstill period. He also agreed to sell his shares in CytRx within twelve months of executing the Cooperation Agreement. For its part, the Company agreed to a number of governance reform provisions and payments to Hammann. Among other provisions, the Company agreed to add a new independent director from a list compiled by Hammann, freeze executive compensation, and refrain from any action to increase the number of the Company's authorized shares, unless the Board determined in

good faith, after consulting outside counsel, that the lack of such action would prohibit Board members from complying with their fiduciary duties.

The Company has scrupulously honored its obligations under the Cooperation Agreement. The Company nominated [redacted] Dr. Jennifer K. Simpson, who was duly elected to the Board on July 29, 2021, within the one-year timeframe required by the Cooperation Agreement. [redacted] The proxy dispute of August 2020 was, until recently, a settled matter.

Hammann now revives this fight to challenge the Board's decision to raise capital, a decision which was made in good faith, out of necessity, and which is entirely consistent with the Board's obligations under the Cooperation Agreement. [redacted]

[redacted] Thus, the Board approved the transaction with Armistice, and on July 13, 2021, the Company entered into the agreement with Armistice ("the Purchase Agreement").

Though the Board's decision was both consistent with the clear terms of the Cooperation Agreement and a valid exercise of business judgment, Hammann now brings this suit. He claims breach of the Cooperation Agreement and—violating his covenant not to sue—three counts alleging breach of fiduciary duty. Hammann now seeks action for "emergency" injunctive relief forbidding the Company from convening a special meeting of stockholders by September 25, 2021, in compliance with the Purchase Agreement. Despite claiming that his suit seeks to enforce the Cooperation Agreement, Hammann also seeks an injunction releasing him from his own obligations under that contract, including his obligation to sell his CytRx shares by August 21, 2021. This request should be denied, under each of the required elements for a Temporary Restraining Order.

First, Hammann has not stated a colorable claim. The first count for breach of the Cooperation Agreement fails because Plaintiff has failed to make even basic allegations that would demonstrate a breach of the contract, and he cannot allege damages. A financing that increases the number of shares is perfectly consistent with the Cooperation Agreement if the Board determines in good faith, after consulting with counsel, that such action is necessary to comply with the Board members' fiduciary duties. Hammann fails to allege any facts at all showing that the Board did not honor this requirement. Moreover, Plaintiff fails to plead that he would suffer any damages as a result of any alleged breach. Nor could he allege damages, since he is contractually obligated to sell his CytRx shares before the event he seeks to enjoin, and any accompanying dilution of his stock ownership, will occur.

Hammann's second, third, and fourth counts for breaches of the fiduciary duty of loyalty likewise fail for multiple reasons. As an initial matter, Hammann is barred from bringing these claims under the plain language of the Cooperation Agreement, under which Hammann has covenanted that he would not pursue any litigation against the Company except for breaches of that agreement. Additionally, these claims are properly classified as derivative claims, but Plaintiff is improperly attempting to assert them directly without making any effort to make a demand or allege demand futility—a standard he could not have met in any event. Moreover,

Defendants' actions with respect to the challenged transaction are subject to the business judgment rule, and Hammann has not pleaded any facts to suggest that Defendants were involved in any self-dealing.

Second, Hammann cannot show that irreparable harm would occur absent injunctive relief. Hammann must sell his stock by August 21, 2021, which means that even if any dilution were to occur, it would have no impact whatsoever on Hammann. And even if such dilution could somehow, counterfactually, affect Hammann's shares, any diminution in the value of Hammann's shares would be reparable by money damages. Accordingly, there is no imminent irreparable harm that could support granting a temporary restraining order here.

Finally, the balance of the equities weighs strongly against granting injunctive relief here. The relief Hammann seeks is extraordinary—enjoining the Company from convening a Special Meeting, the purpose of which is to comply with the terms of a third-party agreement which the Company has previously determined is in its best interest. Hammann is a tiny minority stockholder who is single-handedly attempting to hold up a large transaction from being presented to the Company's stockholders, despite the fact that he will have no interest in the Company by the time such vote takes place. Thus, there is no equitable benefit to Hammann from granting the requested TRO, the effect of which would be, instead, to impose further

costs on the Company and deprive stockholder of a chance to vote up or down on the proposed transaction.

Accordingly, Hammann has satisfied none of the elements of his burden in seeking injunctive relief, and his Motion for Temporary Restraining Order should be denied.

NATURE AND STAGE OF PROCEEDINGS

On August 3, 2021, Hammann filed his Verified Complaint for Injunctive and Declaratory Relief (the "Complaint") and Motion to Expedite Proceedings, and subsequently on August 4, 2021, a Motion for Temporary Restraining Order with an accompanying brief (the "Motion"). Therein, Hammann asserts that Defendants CytRx and the Board breached the Cooperation Agreement and their fiduciary duties of loyalty by entering into a third-party securities purchase agreement and, pursuant to the terms of that agreement, pursuing a stockholder vote to approve an increase in the number of authorized shares.

Hammann requests that the Court enjoin the September 25, 2021 Special Meeting and excuse Hammann from complying with certain obligations owed by Hammann to the Company under the Cooperation Agreement. This is Defendants' Answering Brief in Opposition to the Motion.

STATEMENT OF FACTS

A. The Parties.

Plaintiff Hammann is a serial litigant,[1] with a history of targeting publicly-traded companies based on their stock value and then initiating proxy contests. *See* NoticePapers (https://noticepapers.com/) (Hammann's personal investor activism website).

Defendant CytRx Corporation is a biopharmaceutical research and development company specializing in oncology and rare diseases, the focus of which

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[1] *See, e.g.*, *Hammann v. Donald Deyo*, A08-2185, 2010 WL 154212 (Minn. Ct. App. Jan. 19, 2010); *Hammann v. Falls/Pinnacle, LLC*, 562 U.S. 1198 (2011); *Hammann v. Falls/Pinnacle, LLC*, 562 U.S. 1272 (2011); *Hammann v. Wells Fargo Bank, N.A.*, 141 S. Ct. 368 (2020); *Hammann v. 1-800 Ideas, Inc.*, 690 Fed. Appx. 956 (9th Cir. 2017); *Hammann v. Schwan's Sales Enterprises, Inc.*, A03-1496, 2004 WL 1049170 (Minn. Ct. App. May 11, 2004); *Hammann v. Sexton Lofts, LLC*, 136 S. Ct. 2023 (2016); *Hammann v. 1-800 Ideas, Inc.*, 138 S. Ct. 2609 (2018); *Hammann v. Wells Fargo Bank, N.A.*, 138 S. Ct. 482 (2017); *Streambend Properties II, LLC v. Ivy Tower Minneapolis, LLC*, 577 U.S. 808 (2015); *Streambend Properties, LLC v. The Carlyle Condos, LLC, & Opus Nw., LLC*, CV 09-2102 JRT/AJB, 2010 WL 11537472 (D. Minn. May 18, 2010), *report and recommendation adopted in part, rejected in part sub nom*. *Streambend Properties, LLC v. Carlyle Condos, LLC*, CV 09-2102 (JRT/AJB), 2010 WL 11534596 (D. Minn. Aug. 3, 2010); *Hammann v. Turnstone Calhoun L.L.C.*, A07-1356, 2008 WL 2885800 (Minn. Ct. App. July 29, 2008); *Streambend Properties II, LLC v. Ivy Tower Minneapolis, LLC*, 701 Fed. Appx. 544 (8th Cir. 2017); *Vandervest v. Jola & Sopp (J & S) Excavating*, 546 N.W.2d 24 (Minn. 1996); *Streambend Properties II, LLC v. Ivy Tower Minneapolis, LLC*, CV 10-4257 (JNE), 2017 WL 66381 (D. Minn. Jan. 6, 2017), *aff'd*, 701 Fed. Appx. 544 (8th Cir. 2017); *Streambend Properties II, LLC v. Ivy Tower Minneapolis LLC*, A18-1488, 2019 WL 2332409 (Minn. Ct. App. June 3, 2019), *cert. denied*, 140 S. Ct. 1118 (2020); *Jerald Hammann v. Adamis Pharmaceuticals Corporation*, C.A. No. 2021-0506-PAF (Del. Ch. 2021).

has been on the discovery, research and clinical development of novel anti-cancer drug candidates. Ex. 1, CytRx Corporation, Form 10-K, March 24, 2021, Item 1 at 4.

B. Hammann initiates a proxy contest against the Company.

On February 4, 2020, Mr. Hammann sent a letter to the Company pursuant to Section 220 of the Delaware General Corporation Law ("Section 220") requesting certain information relating to the Company and its stockholders. Mr. Hammann represented that he owned 43,703 shares of the Company's Common Stock, representing approximately 0.1% of the Company's then outstanding shares of Common Stock. *See* Ex. 2, CytRx Corporation, Schedule 14A, August 7, 2020 at 8. Mr. Hammann also sent a nomination notice on February 18, 2020, notifying the Company of his intention to nominate himself for election as a director. *See id.* On July 2, 2020, he filed a preliminary proxy statement with the SEC, which he amended on July 6, 2020. *See id.* The Company filed its definitive proxy statement with the SEC on August 7, 2020. *See id.* On August 12, 2020, Hammann filed his own definitive proxy statement and issued a letter to the Company's stockholders, detailing his complaints against the Company's management.[2]

[2] *See* CytRx Corporation, Schedule 14A, August 12, 2020 (https://www.sec.gov/Archives/edgar/data/799698/000181607920000009/prrn14aHammannA4.htm).

C. Hammann and the Company enter into a Cooperation Agreement.

On August 21, 2020, the parties entered into the Cooperation Agreement, bringing the proxy fight to an end. [redacted]

Since entering the Cooperation Agreement, the Company has scrupulously honored its obligations, [redacted]

[redacted]

D. [redacted]

[redacted]

[redacted]

E. The Company enters into a securities purchase agreement and files a preliminary proxy statement.

[redacted]

[redacted]

[redacted]

On July 13, 2021, the Company accepted the financing offer and entered into a securities purchase agreement (the "Purchase Agreement") with Armistice for aggregate gross proceeds of approximately $10 million. *See id*. ¶ 17. The Purchase Agreement included private placement of approximately $8.24 million worth of Series C 10.00% Convertible Preferred Stock, convertible into common stock upon stockholder approval of an increase to the number of the Company's authorized outstanding shares of Common Stock (the "Authorized Share Increase"). *See id*. The Purchase Agreement also included an additional "Investment Option" allowing the investor to purchase up to approximately $10 million worth of common shares, also subject to the Authorized Share Increase. *See id*.

Under the Purchase Agreement, the Company must hold a meeting of its stockholders not later than September 25, 2021, to seek the requisite stockholder approval. *See id*. ¶ 18. This meeting has not yet been scheduled, but it will not be held before mid-September 2021. *See id*. ¶ 20. On July 30, 2021, the Company filed

a preliminary proxy statement related to this meeting and vote. *See* Ex. 5, CytRx Corporation, Schedule 14A, July 30, 2021.

Notably, the Board unanimously supports the proposal to increase the authorized number of shares, [redacted] *See* Caloz Decl. ¶ 21.

F. Hammann files his Complaint, Motion to Expedite, and Motion for Temporary Restraining Order.

On August 3, 2021, Hammann filed his Complaint and Motion to Expedite Proceedings in this Court, and subsequently on August 4, 2021, he filed his Motion for Temporary Restraining Order. In his Complaint, Hammann brings four alleged claims against CytRx and the Board, specifically: Count I against the Company for breach of the Cooperation Agreement; Count II against Defendants Kriegsman, Ignarro, and Caldwell for breach of the fiduciary duty of loyalty, for consenting to the Purchase Agreement; Count III against Defendant Brien for breach of the fiduciary duty of loyalty, for retiring after purportedly gaining knowledge of and/or participating in the alleged "plan to breach the Cooperation Agreement" (Compl. ¶ 96); and Count IV against Defendants Kriegsman, Ignarro, and Caldwell for breach of the fiduciary duty of loyalty, for purportedly making a false statement

that Defendant Brien's retirement was "not in connection with any disagreement with the Company" (Compl. ¶ 106).

Pursuant to the claims outlined in his Complaint, Hamman requests via his Motion to Expedite Proceedings and Motion for Temporary Restraining Order that the Court issue a temporary restraining order to prevent CytRx from convening a Special Meeting on or before September 25, 2021. *See* TRO Motion at 1.

ARGUMENT

A. Hammann has failed to satisfy the standard for obtaining a temporary restraining order.

In Plaintiff's TRO Brief, Hammann seeks an order "to prevent Defendants from holding the Special Meeting until the dispute between the parties is resolved" and to "prevent CytRx from enforcing and excuse Hammann from any breach of [certain sections of the] Cooperation Agreement." Pl.'s Br. at 23. However, as explained below, Hammann has not satisfied the burden for obtaining a temporary restraining order: "(i) the existence of a colorable claim, (ii) the irreparable harm that will be suffered if relief is not granted, and (iii) a balancing of hardships favoring the moving party." *CBOT Hldgs., Inc. v. Chi. Bd. Options Exch., Inc.*, 2007 WL 2296356, at *3 (Del. Ch. Aug. 3, 2007). Accordingly, his request for injunctive relief should be denied.

1. Hammann has failed to establish the existence of a colorable claim.

In the Complaint, Hammann brings four claims: Count I for purported breach of the Cooperation Agreement (Compl. ¶¶ 70–79) and three counts for purported breaches of the fiduciary duty of loyalty: Count II (Compl. ¶¶ 80–93), Count III (Compl. ¶¶ 94–103), and Count IV (Compl. ¶¶ 104–10). Hammann has failed to establish that any of these claims are colorable.

a. Count I is not colorable because Hammann (i) has not pleaded any facts to show a breach of the Cooperation Agreement and (ii) cannot make a colorable claim of damages.

With Count I, Hammann contends that the Company violated Paragraph 3 of the Cooperation Agreement by "ma[king] a proposal and t[aking] action in support of said proposal to increase the number of the Company's authorized outstanding shares of Common Stock." Compl. ¶ 72. This claim is not colorable for two reasons:

First, as Hammann concedes, the Cooperation Agreement does not prohibit CytRx from undertaking an Authorized Share Increase Proposal under any circumstances; rather, the Cooperation Agreement provides that the Company shall not do so "unless the Board determines in good faith, after consulting outside counsel, that the lack of such action would prohibit Board members from complying

with their fiduciary duties." *Id.* ¶ 71 (quoting the Cooperation Agreement); *see also* Pl.'s Br. at Ex. A, Cooperation Agreement, ¶3.

Here, as the Company has repeatedly disclosed in its public filings with the SEC, CytRx faced a grave risk of being deemed a "going concern" by its auditor absent an ability to obtain additional financing.[3] [redacted]

[3] *See, e.g.*, Ex. 3, CytRx Corporation, Form 10-Q, May 13, 2021 at 18 ("We continue to evaluate potential future sources of capital, as we do not currently have commitments from any third parties to provide us with additional capital and we may not be able to obtain future financing on favorable terms, or at all.…Failure to obtain adequate financing would adversely affect our ability to operate as a going concern.").

[redacted] the Board determined that entering into the proposed transaction was necessary in order to comply with their fiduciary duties. *See id.* ¶ 16. This conduct and decision was entirely consistent with the Cooperation Agreement. *See* Pl.'s Br. at Ex. A, Cooperation Agreement, ¶ 3.

Hammann has not alleged any basis for believing that the Board did not make its determination with respect to the Authorized Share Increase Proposal in good faith or after consultation with outside counsel. *See* Pl.'s Br. at 18 (providing no such basis).[4] Hammann alleges that "[h]onoring the Cooperation Agreement would not have prohibited Board members from complying with their fiduciary duties," Compl. ¶ 73, but this claim fails to even acknowledge that the Board may fully "honor the Cooperation Agreement" by making a good faith determination, after consulting with counsel, that a share increase is necessary. *See* Pl.'s Br. at Ex. A, Cooperation Agreement, ¶3. This requirement merely requires the *subjective* good

[4] Instead, Hammann rests his argument entirely on the fact that "Defendants have not provided any evidence to Hammann…and Hammann is aware of none." Plf's Br. at 18. But Hammann did not seek such information through 8 *Del. C.* § 220. And, as he admits, the Company agreed to "discuss the matter with Hammann 'in the following week'" on August 3, 2021, in response to his informal communications. *See* Pl.'s Br. at 13. Instead of agreeing to such a discussion, however, Hammann filed suit the next day without any basis to allege that the Board's decision did not comply with the "good faith" exception. Accordingly, his claim is not colorable.

faith of the Board.[5] Delaware law presumes that directors act "in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). And Hammann fails to allege—even in conclusory fashion—subjective bad faith.[6] Instead, Hammann blithely assumes that any share increase is a breach,[7] despite the express terms of the agreement that permit share increases. Compl. ¶¶ 73–75. Hammann's allegation that "CytRx breached the Cooperation Agreement," *see* Compl. ¶ 75, is conclusory and fails to rebut the presumption that the Board acted in good faith. It is thus insufficient to state a colorable claim for relief. *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *10 (Del. Ch. May 4, 2005) ("Pejorative rhetoric and conclusory allegations are insufficient to state a claim."), *aff'd*, 897 A.2d 162 (Del. 2006).

Second, even if Hammann had pleaded a sufficient basis for showing a breach of the Cooperation Agreement by CytRx—which he has not—Count I would still

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[5] *See, e.g.*, *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 361 (Del. 2013) (noting that courts have found a subjective good faith standard where, as here, the contract does not add "the term 'reasonably'" as a modifier to the good faith standard).

[6] Nor could he have done so. *Cf., e.g.*, *In re CVR Ref., LP Unitholder Litig.*, 2020 WL 506680, at *9 (Del. Ch. Jan. 31, 2020) ("To plead subjective bad faith, a plaintiff must plead facts to show that the defendants subjectively believed that an action was 'against the partnership's best interests' or that the defendants 'failed intentionally to act in the face of a known duty.'").

[7] *See supra,* n.4.

fail for the independently sufficient reason that Hammann is contractually required to sell his Company stock by August 21, 2021, and he therefore cannot allege damages—an essential element of a breach of contract claim. *See, e.g.*, *Daniels v. Dover Downs Hotel & Casino Valet Parking*, 2017 WL 1929654, at *2 (Del. Super. Ct. May 9, 2017) (granting Rule 12(b)(6) motion to dismiss because plaintiff failed to "adequately allege one of the essential elements of breach of contract: resultant damage to the plaintiff"); *Carlson v. Hallinan*, 925 A.2d 506, 529 (Del. Ch. 2006) ("Plaintiffs have not proven, however, that any damages resulted from the violation, the third required element of a breach of contract claim….Thus, Plaintiffs' claim for breach of the CRSA…fails.").

In an attempt to conjure damages for this claim, Hammann contends that he is a "victim[] of Defendants' violation" of the Cooperation Agreement because the Company's action will have the effect of "coercing [Hammann and other stockholders] into voting to inequitably dilute themselves." Compl. ¶ 78. But if CytRx's stockholders decide to approve the increase of authorized shares at the Special Meeting, Hammann will not suffer any such dilution because, pursuant to the Cooperation Agreement, he has agreed to sell all of his stake in the Company *before* the Special Meeting is to be held. After all, Hammann admits in the Complaint that he is obligated to sell all of his shares in the Company by August 21,

2021.[8] Compl. ¶ 56 (citing Cooperation Agreement ¶ 4(a)). As a result, Hammann will be entirely unaffected by any share issuance that occurs following a Special Meeting in September.[9] *See* Caloz Decl., ¶ 20 (the Special Meeting will not be held before September 13); Pl.'s Br. at 1 (seeking to enjoin "a Special Meeting (likely to occur on or before September 25, 2021)"). Accordingly, Hammann has not alleged a colorable claim for damages under Count 1, so he has no colorable claim for breach of contract. *See Daniels*, 2017 WL 1929654, at *2 (dismissing breach of contract claim for failure to allege resultant damages); *Carlson*, 925 A.2d at 529 (same).

b. Counts II, III, and IV are not colorable because Hammann has previously waived his ability to seek relief against the Director Defendants for alleged breaches of their fiduciary duties, and any such claims are derivative in nature.

In Counts II, III, and IV, Hammann brings claims against the Director Defendants for alleged breaches of their fiduciary duty of loyalty, based on the unsupported contention that the Stock Purchase Agreement "is designed…to

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[8] The Complaint alleges that this deadline is August 31, 2021, see ¶¶56, 66. But the correct date is August 21, 2021. Cooperation Agreement ¶4(a) (setting the deadline as "within twelve (12) months" of the Effective Date of August 21, 2020). In any event, the 10-day difference makes no difference to this argument.

[9] Incredibly, Hammann attempts to circumvent this problem by asking the Court to release him from his contractual obligation to dispose of his Company shares this month. Compl., Prayer for Relief ¶(f); Pl.'s Brief at 23. He cannot establish that any breach by the Board will cause him damages, so he asks for permission himself to breach, so that he might suffer damages and bring this suit. Such circularity is confusing and insufficient. Hammann cannot be allowed to use the Court's equitable powers to generate his own damages to support this claim.

penalize the Company's shareholders from exercising their exclusive right to increase the Company's authorized capital stock." *See* Pl.'s Brief at 19. However, any such claims are not colorable for two reasons: (1) Hammann is prohibited from bringing these claims under the express terms of the Cooperation Agreement, and (2) even if Hammann were theoretically able to bring such claims, Counts II, III, and IV are derivative in nature, and Hammann has not satisfied his burden for bringing any derivative claim in this case.

i. Claims for breaches of the fiduciary duty of loyalty are barred by the terms of the Cooperation Agreement.

As Hammann concedes in his pleadings, he is a party to the Cooperation Agreement with the Company. Compl. ¶ 13. Under Section 8 of that contract, Hammann is prohibited from "initiat[ing] or pursu[ing], any lawsuit, claim or proceeding…against the Company or any of its officers or directors…except for any Legal Proceeding initiated solely to remedy a breach of or to enforce this Agreement." *See* Pl.'s Br. at Ex. A, Cooperation Agreement, ¶ 8(a). Under this plain language, Hammann's claims for breaches of fiduciary duty fail as a matter of law. *In re Altor BioScience Corporation*, C.A. No. 2017-0466-JRS, at 14-16 (Del. Ch. May 15, 2019) (TRANSCRIPT) (dismissing as barred by a covenant not to sue, breach of fiduciary duty claims brought by stockholders against a company because "as a matter of hornbook law, parties can release unknown claims and damages that

arise in the future" and "where the wrong [i]s one that affect[s] a group [*i.e.* stockholders] generally, such that others not bound by the contract could bring suit, the covenant should and w[ill] be enforced"); *Manor Healthcare Corp. v. Tolbert*, 1986 WL 5476, at *4 (Del. Ch. May 13, 1986) ("If (as Manor contends) Anta has made what amounts to a covenant not to sue, that covenant would constitute an affirmative defense and a basis for a motion to dismiss that Manor can interpose in the Oklahoma action."); *see also In re Empire State Bldg. Assocs. L.L.C. Participant Litig.*, 133 A.D.3d 538 (N.Y. App. Div. 2015) (applying NY law) (dismissing action for breach of fiduciary duty as contractually barred by covenant not to sue), *lv. denied*, 27 N.Y.3d 908 (N.Y. 2016). On this basis alone, Counts II through IV are not colorable.

ii. Hammann's duty of loyalty claims are derivative in nature, and he has not made any demand on the Board, or made any allegation that such demand would be futile.

Counts II through IV also fail for the separate and independent reason that these claims are derivative in nature, and Hammann improperly attempts to bring them directly without making a demand on the Board or attempting to allege that such demand would be futile.

Delaware courts apply a two-part test to determine whether a claim is direct or derivative: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery

or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004). "Where all of a corporation's stockholders are harmed and would recover pro rata in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature." *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008). Under this paradigm, the "traditional rule [is] that dilution claims are classically derivative." *Hindlin v. Gottwald*, 2020 WL 4206570, at *7 (Del. Ch. July 22, 2020); *see also Prod. Res. Group, L.L.C. v. NCT Group, Inc.,* 863 A.2d 772, 792 (Del. Ch. 2004) (finding that alleged "poor decisions by directors that lead to a loss of corporate assets and are alleged to be a breaches of equitable fiduciary duties [are] harms to the corporate entity itself" and thus "[such] claims [are] derivative"); *see also In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 582 (Del. Ch. 2007) ("[M]ost claims involving the duty of loyalty are derivative[.]"). Under this rule, Hammann's claims in Counts II through IV are clearly derivative. For each Count he alleges that "shareholders" will suffer "damages" due to "dilution." *See* Compl. ¶¶ 92, 102, 109. Throughout his complaint, he alleges that the potential harm from the alleged breach and Financing Transaction will be due to dilution. *See, e.g.*, Compl. ¶¶ 11, 36. Accordingly, Counts II through IV are derivative in nature. *See Feldman*, 951 A.2d at 733.

Because these claims are derivative, in order to bring them, Hammann was required to either make a demand on the Board or sufficiently allege that any such demand would be futile. *See Aronson*, 473 A.2d at 808. Hammann did neither. Under Section V of the Complaint, he alleges various "attempts" he made to communicate with CytRx, but as he alleges, his focus was on gaining information related to any potential breach of the Cooperation Agreement. *See* Compl. ¶¶ 49–52. He does not allege that he made a "demand…to redress an alleged wrong to the corporation," because he did not in fact do so. *See Aronson*, 473 A.2d at 807. And nowhere in his Complaint does he allege, even in conclusory fashion, that such demand would be futile. Because Hammann did neither and instead elected to improperly bring these claims directly, these claims are not colorable and should be dismissed.[10]

iii. Plaintiff cannot allege that demand would have been futile.

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[10] "[A] derivative cause of action belongs to [the] corporation." *Binning v. Gursahaney*, 2016 WL 2653662, at *2 (Del. Ch. May 6, 2016). And "[a] cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." *Aronson*, 473 A.2d at 811. Thus, a stockholder's pursuit of a derivative claim "[b]y its very nature…impinges on the managerial freedom of directors" and is not permitted under Rule 23.1 unless the stockholder either (i) made a demand on the corporation to initiate litigation that the corporation's board wrongfully refused or, (ii) if no demand was made, has pled "with particularity" sufficient reasons why making such demand would be futile. *See* Ct. Ch. R. 23.1(a); *Aronson*, 473 A.2d at 811, 814–15.

As Hammann did not make a demand or attempt to allege the futility of a demand, his fiduciary duty claims are not colorable, and the Court need go no further in its analysis as to Counts II through IV. But, in any event, Hammann would not have been able to show demand was futile even if he had tried.

To determine whether Plaintiff has carried this burden, Delaware courts apply the two-prong test first set forth in *Aronson,* which asks "whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment."[11] *Aronson,* 473 A.2d at 814. These pleading requirements are "stringent" and require a "factual particularity that differ[s] substantially from the permissive notice pleadings governed solely by Chancery Rule 8(a)." *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000). Neither prong is within Hammann's reach.

(1) Plaintiff has not asserted—let alone sufficiently alleged—that the Company's directors were interested in the Purchase Agreement or were beholden to someone who is interested.

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[11] Under Delaware law, "there is a presumption that directors are independent …. To rebut the business judgment rule on grounds of self-interest, the plaintiff must establish … that a director had a … '***substantial self-interest suggesting disloyalty*** … .'" *Se. Pa. Transp. Auth. v. Volgenau*, 2013 WL 4009193, at *12 (Del. Ch. Aug. 5, 2013) (emphasis added) (citations omitted), *judgment entered sub nom. Se. Pa. Transp Auth. v. Volgenau* (Del. Ch. 2013), *aff'd sub nom. Se. Pa. Transp. Auth. v. Volgenau*, 91 A.3d 562 (Del. 2014).

None of Hammann's allegations indicate that any of the Director Defendants are interested in the Purchase Agreement. "A director is 'interested' in a transaction if either that transaction will provide that director a personal financial benefit from a transaction that other stockholders do not share equally or the director stands on both sides of the transaction." *Benerofe v. Cha*, 14614, 1996 WL 535405, at *6 (Del. Ch. Sept. 12, 1996) (citing *Aronson*, 473 A.2d at 812). Here, the Purchase Agreement is undisputedly a third-party transaction. And Plaintiff has not—and cannot—allege that it provides any director with a personal benefit, or that the directors themselves stand on both sides of the transaction.[12] Thus no director is "interested" in the transaction.

Moreover, because Plaintiff has not identified *any* interested person, any contention (which, again, Plaintiff has not attempted to make) that other directors were not independent from an interested party must fail because "the independence of directors is only relevant when there exists an interested person" from which they

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[12] Plaintiff suggests that the Purchase Agreement may have an impact on future proxy campaigns. But no proxy campaign was threatened at the time the Purchase Agreement was entered into, rendering this suggestion irrelevant. *Cf. Openwave Sys., Inc. v. Harbinger Capital P'rs Master Fund I, Ltd.*, 924 A.2d 228, 242–44 (Del. Ch. 2007) (rejecting application of *Unocal* or *Blasius* standards and applying business judgment rule to decision to reduce size of board to eliminate vacant seats where directors acted on a clear day with no proxy contest imminent); *Blackrock Credit Allocation Income Tr. v. Saba Capital Master Fund, Ltd.*, 224 A.3d 964, 981 (Del. 2020) (finding that advance-notice bylaw was adopted on a clear day, and thus rejecting application of *Unocal* or *Blasius* standards to challenge the bylaw).

need to be independent. *See In re Dow Chem. Co. Deriv. Litig.*, 2010 WL 66769, at *8 n.38 (Del. Ch. Jan. 11, 2010). And, in any event, Hammann has made no attempt to challenge the directors' independence.

(2) Plaintiff has also neither asserted nor sufficiently alleged that demand may be excused under *Aronson*'s second prong.

Aronson's second prong applies only "when the particularized facts are such that it is 'difficult to conceive' that a director could have satisfied his or her fiduciary duties." *Chester Cty. Empls.' Ret. Fund v. New Residential Inv. Corp.*, 2017 WL 4461131, at *6 (Del. Ch. Oct. 6, 2017) (quoting *Ryan v. Gifford*, 918 A.2d 341, 355 (Del. Ch. 2007)). Specifically, to proceed under *Aronson*'s second prong, a plaintiff "must plead particularized facts sufficient to raise (1) a reason to doubt that the action was taken honestly and in good faith or (2) a reason to doubt that the board was adequately informed in making the decision." *Friedman v. Khosrowshahi*, 2014 WL 3519188, at *10 (Del. Ch. July 16, 2014) (citing *In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 286 (Del. Ch. 2003)). This is a "heavy burden," which requires Plaintiff to establish the existence of an "extreme case[] in which despite the appearance of independence and disinterest a decision is so extreme or curious as to itself raise a legitimate ground to justify further inquiry and judicial review." *Greenwald v. Batterson*, 1999 WL 596276, at *7 (Del. Ch. July 26, 1999).

Here, Hammann's allegations come nowhere close to meeting this heavy burden. [redacted]

Hamman's only criticism is that the action the Defendants ultimately took to resolve CytRx's urgent financing crisis was not on sufficiently favorable terms. But "business decisions of the board are not subject to challenge [simply] because in hindsight other choices might have been made instead." *New Residential*, 2017 WL 4461131, at *10. To the contrary, such contentions are "precisely the type of 'Monday morning quarterbacking' that this Court routinely rejects as insufficient to establish demand futility." *Teamsters Union 25 Health Services & Ins. Plan v. Baiera*, 119 A.3d 44, 65 (Del. Ch. 2015) (citation omitted); *see also e.g.*, *Ryan v. Gursahaney*, 2015 WL 1915911, at *9 (Del. Ch. Apr. 28, 2015) (holding that the plaintiff's contention that the company overpaid on a board-approved stock repurchase was insufficient under the second prong of *Aronson*); *In re Affiliated Computer Servs., Inc. S'holders Litig.*, 2009 WL 296078, at *10 (Del. Ch. Feb. 6, 2009) (holding that plaintiffs' hindsight contentions that they would have run the company differently were insufficient to establish demand futility under the second prong of *Aronson*).

Therefore, not only has Plaintiff entirely failed to assert that demand would be futile, he would fail to make such a showing under the stringent *Aronson* standard even if he tried.

iv. Plaintiff's purported duty of loyalty claims are not colorable because Plaintiff has not alleged that the Director Defendants engaged in self-dealing.

Finally, even if Hammann's purported fiduciary duty claims were direct as opposed to derivative (and, as explained above, they are derivative), Counts II through IV would not be colorable because they fail to allege that the Director Defendants engaged in self-dealing. "Essentially, the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." *OptimisCorp v. Waite*, 2015 WL 5147038, at *59 (Del. Ch. Aug. 26, 2015), *aff'd*, 137 A.3d 970 (Del. 2016) (quoting *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993)), *modified in irrelevant part*, 636 A.2d 956 (Del. 1994)).

Here, Hammann's claims for breach of the duty of loyalty are not colorable because Hammann cannot allege that the CytRx's directors were motivated to enter into the Purchase Agreement due to self-interest. *See OptimisCorp*, 2015 WL 5147038, at *59 (dismissing duty of loyalty claims because plaintiffs failed to allege that defendants had a motive or interest in conducting takeover scheme that was not

shared with stockholders); *In re Cornerstone Therapeutics Inc, S'holder Litig.*, 115 A.3d 1173, 1187 (Del. 2015) ("[W]hen the plaintiffs have pled no facts to support an inference that any of the independent directors breached their duty of loyalty, fidelity to the purpose of Section 102(b)(7) requires dismissal of the complaint against those directors."). As explained in the sections above regarding demand futility, the Complaint is devoid of any facts indicating that one or more of the directors was personally interested in the Purchase Agreement, lacked independence from someone who was personally interested, or otherwise acted in bad faith with respect to the Purchase Agreement. *See supra.* Because Plaintiff has failed to allege an essential element of his duty of loyalty claims, they are not colorable.

2. Hammann will not suffer irreparable harm absent injunctive relief.

Hammann's request for injunctive relief should also be denied because he has not established that he would suffer irreparable harm absent injunctive relief. In fact, Hammann cannot show *any harm at all* because, again, he has committed to sell the entirety of his stock in the Company by August 21, 2021, nearly a month before the special meeting and contemplated stockholder vote, which he contends will be the cause of his purported damages. *See supra.* For this reason alone, Plaintiff's request for a temporary restraining order should be denied.

But even if Hammann were able to show some measure of harm as alleged in his Complaint, any possible damages suffered by Hammann would be reparable. In

particular, even if Hammann's stock could theoretically end up diluted, any diminution in value of his stock would be compensable in money damages. *See Bernstein v. Vestron, Inc.*, 1986 WL 3138, at *5 (Del. Ch. Mar. 11, 1986) ("[I]f financial loss does result and the diluting transaction constituted a breach of duty, in the absence of special circumstances not present here a damage award in the amount of the loss should be an adequate remedy."). As such, the purportedly threatened dilution is not irreparable and cannot support Plaintiff's request for injunctive relief. *See id.*; *see also Ret. Bd. of Allegheny Cty. v. Rothblatt*, 2009 WL 3349262, at *2–3 (Del. Ch. Oct. 13, 2009) ("Plaintiff's third assertion, that substantial dilution of UTC stock will occur…does not demonstrate the type of irreparable injury for which a preliminary injunction can be granted.") (citing *Klein v. Panic*, 1986 WL 438, at *2 (Del. Ch. Nov. 20, 1986) ("Plaintiff argues that the dilutive effect of the additional outstanding stock [issued upon exercise of the challenged options] would, of itself, constitute irreparable injury. However, he cites to no authority and the Court is aware of none, at least in these circumstances where there is no claim that the additional stock will impact on the voting control of the company.")); *Aquila, Inc. v. Quanta Servs., Inc.*, 805 A.2d 196, 198 (Del. Ch. 2002) (no irreparable harm where

a stockholder's ownership and voting power were diluted from approximately 38% to 34% after the company issued eight million new shares).[13]

Hammann is thus left to argue that the Cooperation Agreement "acknowledges the irreparable harm associated with its breach." *See* Pl.'s Br. at 24. But, under Delaware law, such provisions are not dispositive. Instead, they are merely "one relevant, and sometimes significant, contributor informing whether the flexible preliminary injunction standard [has been] met." *AM Gen. Holdings LLC v. Renco Grp., Inc.*, 2015 WL 9487922, at *3 (Del. Ch. Dec. 29, 2015). They are chiefly relevant "when the question of irreparable harm is a close one." *See id.* Where, as here, it is not a close question, parties cannot "impair the Court's exercise of its well-established discretionary role in the context of assessing the

[13] Further, Hammann's request for extraordinary relief is not justified where any threatened injury will not and cannot occur for several weeks. A temporary restraining order "will issue only to prevent irreparable injury that is occurring or is threatened to occur before the court may hear an application for a preliminary injunction." *McCann Surveyors, Inc. v. Evans*, 611 A.2d 1, 1–2 (Del. Ch. 1987). Here, an application for a preliminary injunction could be held before the Special Meeting, which is tentatively scheduled for September 25, 2021 and in any event cannot be held before September 13, 2021. *See* Caloz Decl. ¶ 21. And Hammann himself notes that his claimed irreparable harm would not occur until the Special Meeting. *See* Pl.'s Br. at 24 ("Hammann…will suffer irreparable harm *if the Special Meeting is held prior to the resolution of Hammann's claims*."). Accordingly, Hammann has not identified any "irreparable injury that is occurring or is threatened to occur before the court may hear an application for a preliminary injunction." *McCann*, 611 A.2d at 1–2. On this point alone, Hammann's motion should be denied.

reasonableness of interim injunctive relief" through "the use of a simple contractual stipulation that a breach of that contract would constitute irreparable harm." *See id.* (finding no irreparable harm despite such contractual provision and denying motion for preliminary injunction); *see also Cyber Holding LLC v. CyberCore Holding, Inc.*, 2016 WL 791069, at *7 & n.33 (Del. Ch. Feb. 26, 2016) ("Parties to a contract cannot deprive a court of equity of its discretion with respect to an award of an equitable remedy, especially where a remedy at law is readily available.").

Accordingly, Hammann has failed to show that he would face irreparable harm in the absence of injunctive relief here.

3. The balance of equities militates against injunctive relief.

Finally, in order to obtain injunctive relief, Hammann must also show that the balance of equities tips in his favor. *See Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 587 (Del. Ch. 1998). That is, to warrant injunctive relief, a plaintiff must show that the "threatened irreparable harm outweighs the harm that may result if the restraining order is improvidently granted." *Keenwick W. Prop. Owners Ass'n v. Matheos*, 2015 WL 3609518, at *1 (Del. Ch. June 9, 2015) (denying TRO based on the balance of equities). "It is also appropriate to consider the impact an injunction will have on the public and on innocent third parties." *Cantor*, 724 A.2d at 587.

Here, not issuing an injunction would cause no harm to Hammann (let alone irreparable harm) because, as discussed above, Hammann must sell his miniscule

interest in the Company's stock before the stockholder vote that he seeks to prevent. *See supra*. By contrast, an order issuing the injunction would prevent the Company's then-existing stockholders—none of whom have sought to stop the proposals from going to a vote—from exercising their right to vote on the proposals. The harm of this interference with the stockholder franchise far outweighs Hammann's non-existent and entirely reparable harms.

Indeed, this is especially clear here because denying the Company's then-existing stockholders the right to vote on these proposals will ensure that the Company must call, and bear the expense of, another stockholder meeting to reconsider whether to increase its outstanding shares in accordance with the Purchase Agreement. *See* Compl. ¶ 6. In the meantime, the Company would be required to pay Armistice $164,800 each month until the proposal to increase the Company's authorized shares is approved. *Id.* ¶ 7. Hammann has provided no basis for imposing such costs on a Company he will no longer be a stockholder of. [redacted] *See* Caloz Decl. ¶ 21. Accordingly, the balance of the equities weigh heavily against enjoining the upcoming stockholder vote.

Regarding Hammann's request that the Court order him released from certain requirements of the Cooperation Agreement (including the requirement that he sell

his stock by August 21, 2021), *see* Pl.'s Br. at 23, there is no equitable basis whatsoever for such a request. If the Court denies Hammann's request for this relief, Hammann will merely be required to comply with the Cooperation Agreement, an obligation he voluntarily assumed when he entered the agreement [redacted] Hammann is not entitled to relief from this voluntary obligation in order to *create* harm to himself that would not exist were he merely to comply with his obligations and sell his stock by August 21, 2021.

B. Hammann's Motion to Expedite Proceedings fails for the same reasons.

"This Court does not set matters for an expedited hearing unless there is a showing of good cause why that is necessary." *Lawrence v. Forster*, 2017 WL 3499922, at *1 (Del. Ch. Aug. 3, 2017). "To make the necessary showing, a plaintiff must articulate a sufficiently colorable claim and show a sufficient possibility of a threatened irreparable injury to justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited proceeding." *Id.*

Here, as explained above, Hammann has shown neither a sufficiently colorable claim nor a sufficient threat of irreparable injury to warrant expedition. Accordingly, the Motion to Expedite Proceedings should be denied.

CONCLUSION

For all of the foregoing reasons, CytRx respectfully requests that this Court deny Plaintiff's Motion for Temporary Restraining Order and Motion to Expedite.

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CERTIFICATE OF SERVICE

I, Alberto E. Chávez, Esquire, do hereby certify that on August 16, 2021, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below.

BY FILE & SERVEXPRESS and E-MAIL

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