IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ALPHA VENTURE CAPITAL PARTNERS LP, CARACCIOLO FAMILY TRUST, GREGORY A. GOULD, LAW OFFICES OF KENNETH E. CHYTEN DEFINED BENEFIT PENSION PLAN, GAVIN MYERS, AND MARTIN PETERSON, derivatively on behalf of CYTODYN INC., Plaintiffs, v. NADER Z. POURHASSAN, SCOTT A. KELLY, MICHAEL A. KLUMP, JORDAN G. NAYDENOV, DAVID F. WELCH, CRAIG S. EASTWOOD, MICHAEL D. MULHOLLAND, NITYA G. RAY, and BRENDAN RAE, Defendants, -and- CYTODYN INC., a Delaware Corporation, Nominal Defendant.	C.A. No. 2020-0307-PAF PUBLIC VERSION FILED FEBRUARY 3, 2021

BRIEF IN SUPPORT OF THE SPECIAL LITIGATION COMMITTEE'S MOTION FOR APPROVAL OF THE PROPOSED SETTLEMENT

OF COUNSEL:

Barry M. Kaplan
Gregory L. Watts
WILSON SONSINI GOODRICH & ROSATI, P.C.
701 Fifth Avenue, Suite 5100
Seattle, WA 98104
(206) 883-2500

WILSON SONSINI GOODRICH & ROSATI, P.C.
Brad D. Sorrels (#5233)
Andrew D. Cordo (#4534)
Andrew D. Berni (#6137)
222 Delaware Avenue, Suite 800
Wilmington, DE 19801
(302) 304-7600

Counsel for the Special Litigation Committee of the Board of Directors of Nominal Defendant CytoDyn Inc.

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I. PRELIMINARY STATEMENT

The Special Litigation Committee (the "SLC") of the Board of Directors of CytoDyn Inc. ("CytoDyn" or the "Company") seeks the Court's approval of the Stipulation and Agreement of Compromise, Settlement and Release (the "Stipulation" and the "Settlement"), which was negotiated between the SLC and the Defendants. Plaintiffs allege in their Verified Stockholder Derivative Complaint (the "Complaint") that, among other things, the Company's board of directors (the "Board") engaged in self-dealing by approving lucrative equity awards to themselves in December 2019 (the "December 2019 Awards") and again in January 2020 (the "January 2020 Awards," and, together, the "Awards"). The SLC, composed of independent directors with no financial interest in the outcome of the litigation, was created to investigate the Complaint's claims. After a six-month investigation assisted by independent counsel and advisors, the SLC concluded that Plaintiffs' main fiduciary duty claims against the director defendants have merit and should be settled. The Settlement was reached after several weeks of arm's length negotiations with the Defendants.

The Settlement will afford CytoDyn a valuable recovery and divest the director defendants of most of the benefits of the unfair compensation. Three of the director defendants will forfeit 100% of the value of the December 2019 Awards and

the other two director defendants will forfeit approximately 60%.[1] Thus, the recovery, and the concomitant reversal of dilution, is of substantial value to the Company.

In the Settlement, the SLC also secured the director defendants' agreement to enact corporate governance reforms aimed at preventing a recurrence of the process failures that precipitated the Awards. Those reforms include strengthening the Company's Compensation Committee and erecting guardrails on director and executive compensation that will remain in place for five years unless modified by stockholder vote. The Settlement will also benefit the Company by ending the cost, uncertainty and distraction of continuing litigation.

The Settlement is a resolution that the SLC believes is in the best interests of CytoDyn and its stockholders. The SLC therefore requests that the Court approve it.

[1] As discussed below, the January 2020 Awards expired unvested in July 2020, and therefore there is nothing left of them to forfeit.

II. THE SLC'S FACTUAL FINDINGS

These are the facts as they appear to the SLC based on its investigation.

A. The Company and the Parties

CytoDyn is a publicly traded Delaware corporation headquartered in Vancouver, Washington.[2] Founded in 2002, CytoDyn is a late stage biotechnology company developing innovative treatments for multiple therapeutic indications including HIV, cancer and other immunological conditions.[3] CytoDyn is focused on developing leronlimab (PRO 40), a monoclonal antibody CCR5 receptor antagonist, to be used as a platform drug for a variety of indications, including certain cancers.[4]

CytoDyn has been led by its current CEO, Defendant Nader Pourhassan, since September 2012.[5] Pourhassan also serves as a member of the Board.[6] Defendant Scott Kelly is also a member of the Board; he served in the non-executive position

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[2] Compl. ¶ 23; *Company Information*, CYTODYN, https://www.cytodyn.com/investors/company-information.

[3] Compl. ¶ 34; *Company Information*, *supra* n.2.

[4] Compl. ¶¶ 34-36; *Company Information*, *supra* n.2.

[5] *Management Team: Board of Directors*, CytoDyn, https://www.cytodyn.com/our-team/management-team.

[6] Compl. ¶ 24.

of Chief Science Officer while at the same time maintaining a private medical practice.[7] Kelly left his medical practice to work full-time for the Company as its Chief Medical Officer in April 2020.[8] The remainder of the Board in December 2019 consisted of outside directors: Defendants Jordan Naydenov, David Welch, and Michael Klump (collectively with Pourhassan and Kelly, the "Director Defendants").[9] Welch and Naydenov comprised the Company's Compensation Committee, with Welch as its chair.[10]

At the relevant times, Defendant Craig Eastwood was CFO, Defendant Michael Mulholland was Senior Vice President-Finance, Defendant Nitya G. Ray was Chief Technology Officer, and Defendant Brendan Rae was Senior Vice President of Business Development.[11] Non-party Bruce Patterson served as a

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[7] *Board of Directors*, CYTODYN, https://www.cytodyn.com/our-team/board-of-directors.

[8] Press Release, *CytoDyn Appoints Scott A. Kelly, M.D. as Chief Medical Officer and Head of Business Development*, CytoDyn (Apr. 13, 2020), https://www.cytodyn.com/newsroom/press-releases/detail/414/cytodyn-appoints-scott-a-kelly-m-d-as-chief-medical.

[9] Compl. ¶¶ 24-28.

[10] *Id.* ¶ 86.

[11] *Id.* ¶¶ 29-32.

consultant to the Company and was involved with leronlimab's clinical development.[12]

Plaintiffs are CytoDyn stockholders.[13] Three of the Plaintiffs, Carl Dockery, Gregory Gould and Anthony Caracciolo, are former CytoDyn directors.[14] The three of them, among others, historically opposed what they viewed as unreasonable compensation practices by the Board, which led to friction with the other directors.[15] Caracciolo resigned from the Board in 2018.[16] Dockery and Gould left the Board in 2019 for reasons that are disputed.[17] Although it is unnecessary for the SLC to

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[12] Compl. ¶ 114; *see also* Ex. 32 ¶ 26 (Memorandum of Interview of Nader Pourhassan, Ph.D., "Pourhassan Interview"). Copies of the cited witness interview memoranda, and the other numbered exhibits, are attached to the Transmittal Affidavit of Andrew Berni, filed with this Brief. The filed version of certain of the exhibits are redacted to prevent disclosing privileged material. The SLC is not relying on any redacted material as the basis for seeking approval of the Settlement.

[13] Compl. ¶ 16.

[14] To be precise, only Gould is personally a party to this action. *Id.* ¶¶ 2 n.2, 19. Plaintiff Alpha Venture Capital Partners LP is controlled by Dockery, and Plaintiff the Caracciolo Family Trust is controlled by Caracciolo. *Id*. ¶¶ 2 n.2, 17-18.

[15] *See id*. ¶ 72.

[16] *Id.* ¶ 18.

[17] *Compare* Compl. ¶¶ 66, 73-78 (alleging Dockery and Gould were removed from the management slate of directors due to their objection to alleged misstatements regarding Pourhassan's compensation), *with* Ex. 30 ¶¶ 10-13 (Memorandum of Interview of Scott Kelly, M.D., "Kelly Interview") (contending

resolve that dispute in reaching the conclusion that certain of Plaintiffs' claims have merit, the existence of the dispute is relevant insofar as longstanding interpersonal tensions, as well as differing visions about the Company's direction, between Dockery, Gould and Caracciolo on the one hand, and Pourhassan and certain other directors on the other hand underly some of the Defendants' explanations for some of the events of December 2019.

B. The December 2019 Awards

At the beginning of December 2019, the Company was nearing completion of several months of negotiations with Vyera Pharmaceuticals ("Vyera") over an exclusive marketing and distribution agreement for leronlimab in the U.S. for the treatment of HIV once the drug gained regulatory approval.[18] Under the agreement, Vyera agreed to pay up to $87.5 million in upfront and regulatory- and sales-based milestone payments, and to make an investment in CytoDyn of $4 million in a

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they were dropped from the management slate for, respectively, inappropriately sharing confidential information and inability to work constructively with the CEO).

[18] *See* Ex. 1 at Welch00000833 (Dec. 19, 2019 email chain); Ex. 2 at 1 (Dec. 17, 2019 email chain); Press Release, *CytoDyn Signs Definitive Agreements with Vyera Pharmaceuticals to Commercialize Leronlimab in the U.S. for the Treatment of HIV*, CytoDyn (Dec. 17, 2019) ("Dec. 17, 2019 Vyera Press Release"), https://www.cytodyn.com/investors/news-events/press-releases/detail/369/cytodyn-signs-definitive-agreements-with-vyera.

registered offering.[19] It was understood that the Vyera deal was a positive step toward leronlimab's development and commercialization, particularly as it meant that CytoDyn would not have to fund distribution and marketing efforts, which would have necessitated raising additional money.[20]

1. Pourhassan Develops and Proposes the December 2019 Awards.

On December 16, 2019, after negotiations with Vyera were substantively complete, Pourhassan sent Kelly an email outlining his proposal for equity awards to the directors and certain employees tied to completion of the Vyera deal and the submission of a biologics license application ("BLA") to the U.S. Food and Drug Administration ("FDA").[21] The December 16 email was the earliest record of consideration of what would become the December 2019 Awards.

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[19] Dec. 17, 2019 Vyera Press Release.

[20] Kelly Interview ¶¶ 21-22; Ex. 34 ¶¶ 20-21 (Memorandum of Interview of David Welch, "Welch Interview"); Ex. 1 at Welch00000833 (describing the Vyera transaction as "incredible"); Ex. 2 at 1 (describing the Vyera signing as a "historic day" for the Company).

[21] Ex. 1 at Welch00000834. A BLA is "a request for permission to introduce, or deliver for introduction, a biologic product into interstate commerce." *Biologics License Applications (BLA) Process (CBER)*, FDA, (Jan. 11, 2021), https://www.fda.gov/vaccines-blood-biologics/development-approval-process-cber/biologics-license-applications-bla-process-cber; *see also* 21 C.F.R. §§ 600-80.

Pourhassan "just made up the numbers" in the proposal based on what he felt each recipient deserved.[22] That is, he did not derive the numbers from any specific or objective metric. When formulating the proposal, Pourhassan did not take into consideration the value of CytoDyn's stock or where it seemed likely to be headed.[23] The Compensation Committee was not involved with originating the proposal.[24]

On December 17, 2019, the Company publicly announced the transaction with Vyera.[25] Echoing the sentiment expressed internally,[26] the market reacted favorably,

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[22] *See* Pourhassan Interview ¶¶ 12-16 (maintaining there was "nothing special" about the specific amounts he proposed and that he "just made up the numbers"); *see also* Kelly Interview ¶¶ 23-25 (explaining that Pourhassan determined the amounts and recipients of the December 2019 Awards). In his interview, Pourhassan referred to a memorandum prepared by his personal counsel that contained an analysis of his compensation versus that of comparable executives. Pourhassan Interview ¶¶ 12, 17. That memorandum was prepared and furnished to the Company in January 2020 in connection with a proposed renegotiation of his compensation and was not the source of any of the proposed amounts of the Awards. *Id.* ¶ 12 n.2.

[23] *Id.* ¶¶ 14, 16.

[24] Ex. 31 ¶¶ 6, 11 (Memorandum of Interview of Jordan Naydenov, "Naydenov Interview"); Welch Interview ¶¶ 14-15.

[25] Ex. 3 at 2 (CytoDyn Inc. Form 8-K filed Dec. 28, 2019); Dec. 17, 2019 Vyera Press Release.

[26] *See supra* n.20.

with CytoDyn's stock price, which had been flat for the preceding three months, trading up from $0.30 to $0.63 in two days.[27]

On December 16, 2019, Pourhassan had a conversation with the Company's outside counsel, Mary Ann Frantz of Miller, Nash, Graham & Dunn LLP, regarding his proposal for the December 2019 Awards. Frantz emailed Kelly separately on December 16 about the proposal; her email contained specific recommendations regarding the proposed award. Although Pourhassan and Kelly received Frantz's advice, they did not follow it.[28] Frantz's advice was not disseminated to any of the other members of the Board.[29]

On December 18, 2019, Pourhassan sent the Board and members of the management team an email describing positive results for the second patient in an ongoing clinical trial.[30] Pourhassan described the results as "unbelievable" and

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[27] *CytoDyn Inc. (CYDY)*, YAHOO! FINANCE https://finance.yahoo.com/quote/CYDY/history?period1=1452816000&period2=1610668800&interval=1d&filter=history&frequency=1d&includeAdjustedClose=true.

[28] *See id.* ¶¶ 27, 34; Pourhassan Interview ¶ 24.

[29] *See* Naydenov Interview ¶ 11 (suggesting the Board had been told her advice but offering an inaccurate description of that advice); Welch Interview ¶ 31; Kelly Interview ¶ 31.

[30] Ex. 4 (Dec. 17-18, 2019 email chain). On December 3, 2019, the Company had announced positive results for the first patient. Ex. 5 (Press Release, *CytoDyn*

"incredible," while Kelly noted that "very few treatments" can achieve such positive results so quickly.[31]

Later that day, Pourhassan sent a draft press release announcing the positive clinical results (describing them as "stunning") to a consultant with LifeSci Communications, a communications and marketing agency.[32] Pourhassan requested edits "ASAP" because he wanted to issue the press release the following morning before the markets opened.[33] However, the draft press release would go through several rounds of edits over the ensuing weekend and was not issued until December 23, 2019.[34]

2. Pourhassan Proposes the December 2019 Awards to the Board.

On December 19, at 8:05 a.m., Pourhassan forwarded the Board a report in which analyst H.C. Wainwright Research, the only analyst covering CytoDyn's stock, doubled its forecast for the Company's market capitalization to $900 million

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Reports Early Results from First Patient in its Phase 1b/2 CCR5+ Metastatic Triple-Negative Breast Cancer Trial, CytoDyn (Dec. 3, 2019)).

[31] Ex. 4 at Kelly00001364, -65.

[32] Ex. 6 (Dec. 18, 2019 email).

[33] *Id*.

[34] *See infra* Section II.B.4.

due to the Vyera transaction.[35] The directors were generally optimistic about the Company's prospects in this period.[36] For his part, Pourhassan thought the Company's share price should go to the "double-digits."[37]

About two hours later, at 9:56 a.m., Pourhassan emailed the Board again and proposed they meet later that day to approve options for each of the directors plus Rae, Ray and Mulholland.[38] Pourhassan explained the awards were intended to "reward[]" "the management team" for achieving the Vyera deal and for getting the Company in a position to file its first BLA in short order.[39] The 9:56 a.m. email was the first mention of a December 19, 2019 Board meeting. None of the directors other than Pourhassan and Kelly were aware of the concept of considering the December 2019 Awards prior to the 9:56 a.m. email.[40]

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[35] Ex. 7 (Dec. 19, 2019 email chain); Pourhassan Interview ¶ 5.

[36] Kelly Interview ¶¶ 21-22, 50; Naydenov Interview ¶¶ 3-4, 15; Welch Interview ¶ 11; Ex. 33 ¶ 3 (Memorandum of Interview of Michael Klump, "Klump Interview").

[37] Pourhassan Interview ¶ 6.

[38] Ex. 1 at Welch00000833.

[39] *Id.*

[40] Kelly Interview ¶ 32.

There was no business reason or exigency justifying consideration of the December 2019 Awards on less than one day's notice. The only rationale Pourhassan gave for wanting to hold the meeting on the same day was that he likes to do things quickly.[41] None of the Director Defendants appears to have expressed an opinion on the timing one way or the other.[42]

At 10:12 a.m., Pourhassan emailed the Board again, reporting that it was necessary to modify the proposed awards so that the Audit Committee members would receive the same number of options as the other directors.[43] The revised proposal increased the options to be awarded to Welch and Klump by 500,000 (to 750,000) to bring them into parity with Kelly and Naydenov.[44]

	Vyera deal completed	BLA submission
Nader Pourhassan	2 million	2 million
Scott Kelly	750,000	500,000
Dave Welch	750,000	
Michael Klump	750,000	
Jordan Naydenov	750,000	
Brendan Rae	300,000	
Nitya Ray	200,000	400,000
Michael Mulholland	350,000	350,000

[41] Pourhassan Interview ¶¶ 20-21.

[42] *See id.* (not recalling whether any other directors asked for more time to consider the awards); Klump Interview ¶ 16; Welch Interview ¶ 17; Kelly Interview ¶¶ 32-33.

[43] Ex. 8 at Welch00000827 (Dec. 19, 2019 email chain).

[44] *See id*. at Welch00000827-28.

At 12:47 p.m., Welch emailed Pourhassan and Kelly a "metric" that he thought they "may be able to use when justifying different grants."[45] Specifically, Welch noted that in "Silicon Valley, it is not out of the ordinary for a board member to be granted 1% [of the company's total outstanding equity] for their service over a 2 year period."[46]

At 1:56 p.m., Pourhassan emailed the Board an agenda for the meeting, which was now scheduled for 6:00 p.m. Pacific.[47] The agenda added the first mention of a proposed award of 200,000 options to Patterson.[48] The complete list of the proposed options—described as "recommendations from [the] CEO"—is as follows:[49]

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[45] *Id.* at Welch00000826.

[46] *Id*.

[47] Ex. 9 at Welch00000823-24 (Dec. 19, 2019 email).

[48] *Id.* at Welch00000825.

[49] *Id*.

Grantee	Vesting Event		Total Award as of 12/19/2019	
	Vyera Deal Completed	BLA submission		
Nader Pourhassan (a)	2,000,000	2,000,000	4,000,000	(a)
Scott Kelly	750,000	500,000	1,250,000	
Dave Welch	750,000	-	750,000	
Michael Klump	750,000	-	750,000	
Jordan Naydenov	750,000	-	750,000	
Brendan Rae	300,000	-	300,000	
Nitya Ray	200,000	400,000	600,000	
Michael Mulholland	350,000	350,000	700,000	
Bruce Patterson	200,000	-	200,000	
Totals	**6,050,000**	**3,250,000**	**9,300,000**	(b)

The options in the second column of the table above would vest immediately because the vesting event—the Vyera transaction—had already occurred.[50] The warrant and options in the third column would vest upon the Company's BLA submission.[51] The agenda noted that the two million shares to Pourhassan vesting upon the BLA submission had to be in the form of a warrant "due to [the] limited availability of shares under the [Company's 2012 Equity Incentive Plan ("Plan")]."[52] The strike price for all the awards was $0.63, the closing trading price on December 19, 2019,

[50] *See id.*; Ex. 10 at 25 (CytoDyn Inc. Form 10-Q filed Jan. 9, 2020) ("Stock options covering 6,050,000 shares vested immediately upon issuance.").

[51] Ex. 9 at Welch00000825.

[52] *Id.*

and the awards would be exercisable for 10 years, consistent with the Company's standard director and employee compensation.[53]

At 2:56 p.m., Pourhassan sent a text message to Naydenov asking if he could join the call, reporting that the "[s]tock hit 71 cents and closed at 63 cents with 9 million shares traded today."[54] Naydenov, who was several time zones away in Europe at the time, did not attend the Board meeting as a result of technical difficulties.[55] However, Naydenov talked with Pourhassan on the telephone before the meeting took place and was supportive of the proposal.[56]

3. The Board Approves the December 2019 Awards.

The Board meeting began at 6:00 p.m.—just over eight hours after the December 2019 Awards were proposed—with the Board (minus Naydenov), Eastwood, Mulholland, and outside counsel present.[57] The directors did not recall counsel giving any analysis during the meeting.[58] The entire meeting, which

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[53] *Id*.

[54] Ex. 11 (Dec. 16-19, 2019 text message chain).

[55] Naydenov Interview ¶¶ 6-7.

[56] *Id*.

[57] Ex. 12 at 1 (Dec. 19, 2019 CytoDyn Board Meeting Minutes).

[58] Kelly Interview ¶ 40; Klump Interview ¶ 17; Pourhassan Interview ¶ 24.

included two other items of business, lasted 50 minutes.[59] The minutes reiterate that the proposed awards were made on the CEO's recommendation "based upon the Company achieving a significant milestone of executing its first commercialization and licensing agreement for leronlimab, as well as the upcoming anticipated filing of the BLA with the FDA."[60]

The only discussion about the awards reflected in the minutes is Welch's request for "comparables for stock options held by boards and management of similarly situated companies," in response to which Eastwood "provided a few comparables."[61] None of the directors could recall what, if anything, else was discussed in connection with the deliberation over the December 2019 Awards.[62]

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[59] *See* Ex. 12 at 2-3 (noting the awards were the third item of business and the meeting adjourned at 6:50 p.m.).

[60] Ex. 12 at 2; *accord* Ex. 13 at 3 (CytoDyn Inc. Form 8-K filed Dec. 27, 2019) (describing the December 2019 Awards as being made "[i]n recognition of the Company's entry into commercialization arrangements with Vyera").

[61] Ex. 12 at 2; *see also* Welch Interview ¶ 29 (explaining he was not concerned about proceeding without comparable company compensation data because he did not see the award proposal as falling outside of the "norm"); Naydenov Interview ¶ 11 (explaining the Compensation Committee did not independently consider the December 2019 Awards proposal).

[62] Pourhassan Interview ¶¶ 30-31; Klump Interview ¶ 22.

No one recalled asking any other questions or getting any advice from counsel or any other advisor.

The Board then engaged in round robin approvals for the awards for each of the four directors present; that is, for each vote the recipient of the particular award "abstained" while the other three directors voted in favor.[63] No resolution to approve awards to Naydenov is reflected in the minutes or any other written source provided to the SLC.[64] However, based on statements made during interviews[65] and the fact that 750,000 options were indeed granted to Naydenov,[66] this appears to be an oversight in the minutes.

The Board also voted 4-0 to approve awards to Rae, Ray, Mulholland and Patterson (the "Non-Director Recipients").[67] These individuals appeared to have

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[63] Ex. 12 at 2-3. Pourhassan believes that the minutes are incorrect and that the directors did not vote in round robin fashion. Pourhassan Interview ¶ 29. None of the directors had strong recollections about this point. *See* Kelly Interview ¶ 43; Klump Interview ¶ 22.

[64] *See* Ex. 12.

[65] Naydenov Interview ¶ 13; Pourhassan Interview ¶ 29; Kelly Interview ¶ 44.

[66] Ex. 14 (CytoDyn Inc. Form 4 filed Dec. 23, 2019).

[67] Ex. 12 at 3.

had minimal involvement with or been entirely unaware of the December 2019 Awards before they were granted.[68]

In their interviews, the three other directors who attended the meeting were asked to explain how they arrived at the decision to vote in favor of approving Pourhassan's recommendations for the December 2019 Awards. Their responses were in the vein that the directors had a sense or belief that the awards were within the range of reasonableness for outside director compensation under the circumstances and therefore were appropriate.[69] Welch was the only director to reference an objective metric: he believed that awards equivalent to approximately 0.1% of the Company's outstanding stock were reasonable.[70] However, neither he nor any other director valued the awards to the recipients or the cost to the Company. Only one of the directors, Klump, offered any rationale for his own award, namely that he traveled to New York to meet with Vyera to help the Company to close the

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[68] *See* Kelly Interview ¶ 45; *see also* Klump Interview ¶ 21; Pourhassan Interview ¶¶ 25, 28.

[69] *See, e.g.*, Klump Interview ¶ 14; Welch Interview ¶¶ 24, 29; *see also* Kelly Interview ¶ 35.

[70] Welch Interview ¶¶ 24, 27.

transaction.[71] Yet even he was not directly involved in the substantive negotiations.[72]

As to Pourhassan, the other directors considered the award Pourhassan proposed for himself to be appropriate because he had been historically undercompensated and had succeeded in growing the Company's value despite opposition (in their view, unjustified) from Dockery, Gould and Caracciolo.[73] According to Kelly, for example, "it was a critical time at the Company, given the fear that Pourhassan would 'walk' and the Company would therefore 'go to $0' because nobody else could raise money."[74] The directors unanimously agreed that the Vyera transaction and corresponding benefits were attributable to Pourhassan's efforts.[75]

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[71] Klump Interview ¶ 7.

[72] *Id*. ¶ 9.

[73] Kelly Interview ¶¶ 34, 37; Naydenov Interview ¶¶ 32-34; Welch Interview ¶¶ 18, 41; *see also* Pourhassan Interview ¶ 12. Again, the SLC has made no finding about the *bona fides* of the disagreements between certain Plaintiffs and Defendants.

[74] Kelly Interview ¶ 34; *see also id.* ¶ 37.

[75] Kelly Interview ¶ 24; Klump Interview ¶ 8; Pourhassan Interview ¶ 25; Welch Interview ¶ 20 ; *see also* Ex. 8 at Welch000827 (Pourhassan: "I am the person who found [Vyera] and talk[ed] to them [for] about 3 months. . . ."); Naydenov Interview ¶ 8.

4. Events After Approval of the December 2019 Awards

After the meeting, Eastwood sent Pourhassan the "comparables" that Welch had requested, namely, a list showing stock options outstanding as a percentage of total outstanding shares for five "other public companies in the Biotech space," four of which had similar market capitalization to CytoDyn.[76] Shortly thereafter, Pourhassan forwarded Eastwood's email to the Board and also noted that Naydenov was "going to email all about his vote."[77] However, Naydenov does not appear to have sent such an email and could not recall what Pourhassan was referring to.[78]

Four days later, on December 23, 2019, the Company issued a press release reporting "early, but strong" positive clinical results in two patients in the Company's ongoing breast cancer clinical trial based on the results discussed in Pourhassan's December 18, 2019 email to the Board.[79] Although the directors generally had a positive outlook about the results being reported, they did not expect

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[76] Ex. 15 (Dec. 19, 2019 email chain); Welch Interview ¶ 30 (explaining that the metric he was interested in was options as a percentage of outstanding equity).

[77] Ex. 15.

[78] Naydenov Interview ¶ 14.

[79] Ex. 16 (Press Release, *CytoDyn Reports Early, But Strong Positive Clinical Responses for Two Patients, One in Metastatic Breast Cancer and One in Metastatic Triple-Negative Breast Cancer Trials*, CytoDyn (Dec. 23, 2019)); Naydenov Interview ¶ 16; Kelly Interview ¶¶ 48-50.

the release to prompt a strong market reaction.[80] None of the directors other than Pourhassan were aware the press release was going to be issued on December 23, 2019 or that were involved with its preparation.[81]

At the price of $0.63 at which the Company's shares closed on December 19, 2019, the nine million shares underlying the December 2019 Awards were worth $5,670,000. In the days after the December 19, 2019 Board meeting, the Company's stock price steadily increased. On December 26, 2019, Pourhassan sent Naydenov a text message describing the stock as "red hot" and noting it had closed at $0.79 per share.[82] By December 30, 2019, CytoDyn's shares were trading around $1.00, a significant appreciation above where it had traded for most of the second half of 2019.[83]

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[80] *See* Kelly Interview ¶¶ 52-53 (noting it was impossible to predict how the market would react to such announcements and that "deals with revenue," such as Vyera, were far more important); Klump Interview ¶¶ 5-6; Naydenov Interview ¶¶ 16-17; Pourhassan Interview ¶¶ 9-11.

[81] *See* Kelly Interview ¶ 49; Klump Interview ¶ 5; Naydenov Interview ¶ 16.

[82] Ex. 11.

[83] *See CytoDyn Inc. (CYDY)*, YAHOO! FINANCE, https://finance.yahoo.com/quote/CYDY?p=CYDY&.tsrc=fin-srch.

C. The January 2020 Awards

Less than two weeks after the December 2019 Awards were approved, Pourhassan began exploring another round of equity awards to the directors. On December 28, 2019, Pourhassan requested legal advice from Frantz (copying Kelly), this time regarding a proposal to grant "performance shares" (not options) to the Company's directors. These would become the January 2020 Awards. The proposed grants would be made outside of the Plan and consist of 8 million shares for Pourhassan, 3 million shares for Kelly, and 2 million shares for each of Naydenov, Welch and Klump. Pourhassan intended that the awards be premised on (i) the FDA granting Breakthrough Therapy Designation ("BTD")[84] for leronlimab for cancer, and (ii) the Company having a sufficient number of authorized shares available to make the grants (as the Company then had an insufficient number of shares authorized and available to make the awards). As with the December 2019 Awards, Pourhassan formulated the amounts of these proposed awards without using

[84] BTD "is a process designed to expedite the development and review of drugs that are intended to treat a serious condition and preliminary clinical evidence indicates that the drug may demonstrate substantial improvement over available therapy on a clinically significant endpoint(s)." *Breakthrough Therapy*, FDA (Jan. 4, 2018), https://www.fda.gov/patients/fast-track-breakthrough-therapy-accelerated-approval-priority-review/breakthrough-therapy.

any particular methodology or reference to any objective metric.[85] Rather, he was focused on what the options would be worth if, as he predicted, the Company's stock price skyrocketed in response to the Company achieving a BTD.[86]

Frantz responded to Pourhassan and Kelly on December 29, 2019, apparently memorializing a phone call she had with Pourhassan the previous day. Her response included four specific recommendations for information the Board should gather or advice it should get in connection with considering the January 2020 Awards. None of Naydenov, Welch or Klump (before his resignation) were made aware of those recommendations.[87] Although Pourhassan and Kelly received Frantz's advice, they did not follow it or share it.[88]

On January 14, 2020, Eastwood shared an analysis of his and Pourhassan's compensation. Eastwood came to the following conclusions:[89]

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[85] Pourhassan Interview ¶¶ 32-35; Kelly Interview ¶ 58.

[86] Pourhassan Interview ¶ 34.

[87] *See* Klump Interview ¶ 17; Naydenov Interview ¶ 22; Welch Interview ¶ 32.

[88] *See* Pourhassan Interview ¶¶ 36 (noting that he immediately rejected Frantz's advice as he thought it was "ridiculous" because the awards would be conditioned on hundreds of millions or billions of dollars in revenue and if that were the case, there would be "nothing to think about"), 38-39, 51; *see also* Kelly Interview ¶¶ 55-57.

[89] Ex. 17 (Jan. 14-17, 2020 email chain).

- With respect to your role as CEO:
  - Your base salary appears in line with industry
  - Your incentive comp comes in at 200% vs. the industry standard
  - You are under par with respect to stock option awards by more than 50%
  - You have not been awarded any restricted stock units (RSU's)
- With respect to my role as CFO:
  - My base salary is 44% below industry standard
  - If I receive a 50% cash bonus this year, I would still be below industry standard due to low salary (on an absolute value basis)
  - I am under par with respect to stock option awards by 90%
  - Like you, I have not been awarded any restricted stock units (RSU's)

No similar analysis was done with respect to the outside directors' compensation.

On January 15, 2020, Klump resigned from the Board. The announcement of his departure stated that it was "not related to any known disagreement with the Company on any matters relating to its operations, policies or practices."[90] Klump explained in his interview that he left the Board because the time commitment became too taxing on his schedule.[91] Accordingly, Klump did not receive or approve the January 2020 Awards.

On January 16, 2020 at 9:12 a.m., Pourhassan emailed the Board proposing a call on January 17, 2020 to approve his proposal "for all of us to be compensated with [CytoDyn] shares and not options" if the Company achieved BTD designation

[90] Ex. 18 at 2 (CytoDyn Inc., Form 8-K filed Jan. 21, 2020).

[91] Klump Interview ¶ 25.

for cancer—i.e., the January 2020 Awards. Pourhassan made the following revised proposal:[92]

> So here is what I propose
> Nader Pourhassan 6 million
> Scott Kelly. 2.5 million
> Jordan Naydenov. 1.5 million
> David Welch. 1 million
> Michael Mulholland. 150,000
> Craig Eastwood. 125,000

He believed the awards were "the least we should do for [the] four of us [i.e., the directors]" and emphasized that he thought it was "very important to vote on this before we hire our next board member so that we don't have him involve[d] with something he was not part of . . . ."[93] The January 16 email was the first mention of a January 17 Board meeting. None of the directors, other than Pourhassan and Kelly, were aware of the concept of considering the January 2020 Awards prior to the email.[94]

Between January 17 and the meeting, Pourhassan and Kelly received advice regarding the January 2020 Awards from the Company's in-house counsel, Maura

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[92] Ex. 19 at Welch00000783 (Jan. 16, 2020 email chain).

[93] *Id.*

[94] Naydenov Interview ¶ 18; Welch Interview ¶ 32.

Fleming, all of which they rejected.[95] At some point the Board meeting was rescheduled to January 18, 2020. On January 18 at 10:44 a.m., Pourhassan emailed Welch with the subject line: "recommendation that you and [Naydenov] are working with."[96] The body of the email consisted of the numbers of shares Pourhassan was proposing to grant along with the names of their respective recipients.[97] There were two changes from Pourhassan's January 16, 2020 email: Mulholland's award was deleted, and Welch's award was increased from 1 million to 1.5 million shares.[98] Neither Welch nor Naydenov could recall what, if any, analysis they did of the proposed awards prior to the meeting.[99]

The Board met telephonically on January 18, 2020 beginning at 11:30 a.m.[100] The meeting lasted for approximately 30 minutes, and the equity grants were not the

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[95] Kelly Interview ¶ 60; Pourhassan Interview ¶ 47.

[96] Ex. 20 (Jan. 18, 2020 email).

[97] *Id.*

[98] *Compare id. with* Ex. 19; *see also* Naydenov Interview ¶ 23 (explaining that the Compensation Committee did not get advice from counsel, accountants, or advisors and did not look at any objective compensation data); Welch Interview ¶¶ 36-37 (indicating he was not involved with the changes but explaining his award increased because Pourhassan thought he was a "contributor").

[99] Naydenov Interview ¶¶ 18, 23; Welch Interview ¶¶ 38-39.

[100] Ex. 21 (Jan. 18, 2020 CytoDyn Board Meeting Minutes).

only agenda item.[101] The following performance share awards were considered and apparently approved:[102]

Recipient	Performance Shares Awarded
CEO Pourhassan	6 million
Chairman Kelly	2.5 million
Director Naydenov	1.5 million
Director Welch	1.5 million
CFO Eastwood	150,000

It is not clear what, if any, work related to the January 2020 Awards the Compensation Committee performed during the days after the January 18 meeting.[103] Nevertheless, on January 28, 2020, the Compensation Committee acted by unanimous written consent ("UWC") to approve the issuance of the shares in the amounts discussed/approved at the January 18 Board meeting.[104]

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[101] *Id.*

[102] We say "apparently" because there is conflicting evidence of what happened at the meeting. *Compare* Ex. 21 at 1 (minutes stating that the Board took "no action" and referred the matter to the Compensation Committee "for further review and consideration."), *with* Ex. 22 (Jan. 18, 2020 CytoDyn Board Meeting Minutes) (stating the Board approved the awards); Kelly Interview ¶ 62 (same); Naydenov Interview ¶ 25 (same); Pourhassan Interview ¶¶ 48-49 (same).

[103] Naydenov Interview ¶¶ 28-30; Welch Interview ¶ 40. According to Kelly, they "conducted diligence on the proposed awards and came back with a unanimous written consent to approve the previously proposed awards." Kelly Interview ¶ 17. However, this is not corroborated by Naydenov's and Welch's own recollections.

[104] Ex. 23 (Jan. 28, 2020 Compensation Committee UWC).

D. Subsequent Events

On February 3, 2020, the Company filed a Form 8-K announcing that on January 28, 2020 the Compensation Committee had approved the January 2020 Awards.[105] Six months passed, and the Company did not achieve BTD. Accordingly, the January 2020 Awards lapsed.[106]

On April 30, 2020, Pourhassan exercised the options he received in the December 2019 Awards to acquire 2,000,000 shares of common stock by paying the Company the cash exercise price. He also exercised other options (obtained prior to the December 2019 Awards) to acquire an additional approximately 3.22 million shares of common stock. In a series of sales closed on April 30, May 1 and May 4, 2020, Pourhassan sold approximately 4.8 million of the shares so acquired at prevailing market rates.[107] None of the other recipients have exercised any of their options received under the December 2019 Awards, and Pourhassan has not exercised the warrant he received as part of the December 2019 Awards.

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[105] Ex. 24 at 3 (CytoDyn Inc. Form 8-K filed Feb. 3, 2020).

[106] *Id.*; Stipulation ¶ 1.12.

[107] Ex. 25 (CytoDyn Inc. Form 4 filed May 4, 2020).

E. Plaintiffs Challenge the Awards in this Action.

On March 6, 2020, Plaintiffs sent the Company a demand for books and records related to the Awards pursuant to 8 *Del. C.* § 220, in response to which the Company produced documents to Plaintiffs on April 7, 2020.[108] On April 24, 2020, Plaintiffs filed the Complaint, alleging Defendants breached their fiduciary duties by approving the Awards. Specifically, the Complaint alleges the Director Defendants violated the duty of loyalty by approving unfair and dilutive equity awards to themselves, granting the Awards outside of the Plan, misleading CytoDyn's stockholders about the true purpose of the Awards, granting the Awards without stockholder approval, and awarding themselves "spring-loaded" stock options allegedly taking advantage of non-public information about the clinical trial announced on December 23, 2019.[109] It also alleges bad faith against the Director Defendants on the theory that they intentionally and knowingly followed an inadequate process in granting the Awards, granted the Awards in excess of the shares available under the Plan, and (with respect to Pourhassan, Kelly, Naydenov, and Welch) tied the vesting of the January 2020 Awards to the resolution of any

[108] *See* Ex. 26 (Mar. 6, 2020 Demand Letter Pursuant to 8 *Del. C.* § 220).

[109] Compl. ¶¶ 155-57.

"legal issues."[110] The Complaint further brings a claim for unjust enrichment against all Defendants based on their receipt of the Awards, as well as a claim for waste against the Director Defendants.[111] Plaintiffs seek rescission of the Awards, damages including interest and attorneys' fees, and a declaration that the Director Defendants breached their fiduciary duties.[112]

[110] *Id*. ¶¶ 162-63.

[111] *Id*. ¶¶ 166-74.

[112] *Id*. at 60-70.

III. THE SLC'S INVESTIGATION AND CONCLUSIONS

A. The Board Creates the Disinterested and Fully Empowered SLC.

On May 4, 2020, CytoDyn's Board created the SLC, comprised of directors Samir Patel and Alan Timmins, after determining that both Patel and Timmins were independent directors.[113] Both Patel and Timmins were appointed to the Board after the Awards were approved and are businessmen with decades of experience in operational and board roles and with no prior affiliation with CytoDyn or any of the Defendants.[114]

The Board granted the SLC the full and plenary power of the Company to act with respect to this action, including without limitation the full power to investigate, analyze, and evaluate the claims alleged, to consider and determine whether prosecution of the claims in this action is in the best interests of the Company and its stockholders, and to determine what other actions, if any, the Company should

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[113] Ex. 27 (May 4, 2020 SLC Resolutions).

[114] Ex. 18 (CytoDyn's announcement of Timmins' appointment to the Board); Ex. 28 (CytoDyn Inc., Form 8-K filed Apr. 23, 2020) (CytoDyn's announcement of Patel's appointment to the Board); Ex. 27 (Timmins and Patel "joined the Board in January and April 2020, respectively, after the equity grants at issue in the Litigation were awarded, are not named as defendants in the Litigation, and are not alleged to have been involved in any way in the alleged facts and events giving rise to the Litigation; and . . . are independent, are not members of the Corporation's management, and do not have an interest in the Litigation which would impair their ability to perform their duties as members of the Special Litigation Committee.").

take with respect to the claims in the action (including without limitation settling the action).[115] Among other things, the Board resolutions creating the SLC provided that the SLC's decisions would not be reviewable by the full Board. It empowered the SLC to retain its own independent advisors.[116]

B. The SLC Conducts an Independent and Thorough Investigation.

The SLC, with the assistance of its independent counsel Wilson, Sonsini, Goodrich & Rosati ("WSGR") and independent expert executive compensation consultants at Aon Reward Solutions ("Aon"), investigated for about six months. The SLC thoroughly reviewed the factual and legal allegations in the Complaint. Through counsel, the SLC conducted a targeted review over approximately 51,000 documents furnished by the Company and the Defendants and interviewed the Plaintiffs (and Plaintiffs' counsel) and the five Director Defendants. The SLC members were personally and actively engaged, with at least one and usually both attending all interviews and meetings. The SLC formally met 14 times, during which, among other things, it analyzed the evidence, identified next steps, received legal advice and discussed and deliberated concerning its findings, conclusions and course of action. At the SLC's direction, Aon applied its research and compensation

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[115] Ex. 27.

[116] *Id*.

analysis tools to test certain of Plaintiffs' allegations, as well as potential Defendants' responses to those allegations, and to analyze questions posed by the SLC.

C. The SLC's Analysis of Plaintiffs' Claims

After conducting its investigation, the SLC analyzed Plaintiffs' claims. The SLC's legal analysis and conclusions are summarized next.

1. Plaintiffs' Claims for Breach of Fiduciary Duty in Connection with the Awards to the Director Defendants Likely Have Merit.[117]

a. Applicable Legal Standard

The SLC concluded that the appropriate legal standard by which to evaluate Plaintiffs' claims that the Director Defendants breached their fiduciary duties by approving the Awards to the Defendants is entire fairness. When directors approve a transaction, such as self-compensation, for which they receive a benefit that is not received by all stockholders ratably, then they are self-dealing, which implicates the duty of loyalty.[118] "[T]he law . . . does not presume that directors will be competent judges of the fair treatment of their company where fairness must be at their own

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[117] Because the SLC concludes that the breach of fiduciary claims arising from the Awards to the Director Defendants have merit, it is unnecessary for the SLC to consider Plaintiffs' overlapping claims for bad faith, waste or unjust enrichment.

[118] *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993); *Ramos Alvarado v. Lynch*, No. 2020-0237-AGB, Tr. at 35 (Del. Ch. Nov. 12, 2020).

personal expense. In such a situation the burden is upon the directors to prove not only that the transaction was in good faith, but also that its intrinsic fairness will withstand the most searching and objective analysis."[119] The Board considered the December 2019 Awards as a single transaction, in which each of them was obviously interested. The use of round robin approvals does not obviate the self-dealing nature of the decisions that the Board made on December 19, 2019.[120]

Application of the entire fairness standard involves a two-part analysis: fair process and fair price. Under that standard "the directors must establish to the court's satisfaction that the transaction was the product of both fair dealing and fair price."[121] The analysis is objective; that is, an honest belief that the decision was proper is not a defense.[122]

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[119] *Gottlieb v. Heyden Chem. Corp.*, 90 A.2d 660, 663 (Del. 1952).

[120] *See TVI Corp. v. Gallagher*, 2013 WL 5809271, at *8 (Del. Ch. Oct. 28, 2013) (discussing "I'll scratch your back, you scratch mine" relationships between directors in the context of approving employment contracts); Drexler & Sparks, DELAWARE CORPORATION LAW & PRACTICE § 15.05 n.24 (2021) ("There seems little doubt that the courts will treat such dealings as conventional self-dealing.").

[121] *Cede*, 634 A.2d at 361.

[122] *See In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 44 (Del. Ch. 2013) ("Not even an honest belief that the transaction was entirely fair will be sufficient to establish entire fairness. Rather, the transaction itself must be objectively fair, independent of the board's beliefs." (quoting *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1145 (Del. Ch. 2006))).

The inquiry into fair process looks at factors such as how the challenged transaction was "initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained."[123] This includes examining the source of the idea for the challenged transaction, who was the driving force behind it, and how the idea was formulated.[124] How the challenged events unfolded, including any negotiations, and the role of advisors are pertinent factors,[125] as is the manner in which director approval was obtained, including the deliberations leading up to approval.[126]

The fair price inquiry considers whether the company and the stockholders got a fair exchange.[127] That is, the inquiry is concerned with whether the financial terms of the transaction were equal to what would have resulted from arms' length bargaining.[128] In the compensation context, the fairness of the price may be shown

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[123] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

[124] *Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 746–48 (Del. Ch. 2007).

[125] *Id.*

[126] *Kahn v. Tremont Corp.*, 694 A.2d 422, 431 (Del. 1997).

[127] *Valeant*, 921 A.2d at 746, 749.

[128] *Id.* at 748–49.

by reference to a reliable market, significant comparable transactions, or whether the decision was the result of a narrow exercise of the Board's discretionary powers.[129]

Although the entire fairness test involves a bifurcated inquiry into process and price, those factors "are not independent, and the Court does not focus on each of them individually."[130] Instead it considers all facts and circumstances together. A poor process may result in the Court finding the transaction was unfair even if the financial terms were arguably fair.[131]

b. The December 2019 Awards Likely Were Not Entirely Fair.

(1) Process Considerations

The SLC's analysis of the process suggests that the Director Defendants would be unlikely to carry their burden of proving the December 2019 Awards were entirely fair. In short, no meaningful process was employed to protect the stockholders' interests.

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[129] *Id.* at 750.

[130] *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *13 (Del. Ch. Oct. 2, 2009), *appeal refused*, 984 A.2d 124 (Del. 2009).

[131] *See Kahn*, 694 A.2d at 432 ("[T]he process is so intertwined with price that under [the entire fairness] standard a finding that the price negotiated by the Special Committee might have been fair does not save the result.").

The December 2019 Awards were proposed to the Board by the CEO the same day they were deliberated on and approved, despite there being no business reason to rush, and only a few days after he formulated the proposal, against the backdrop of news causing the Company's stock to trade up. None of the directors questioned the timing, which suggests that no one engaged with the proposal itself or gave much in the way of consideration to the Board's process. Pourhassan drove the timing and amounts of the awards, and he received the largest number of options and warrants. No advisors were involved in determining the amount of the awards or evaluating the fairness of the value to the Company or the stockholders. And, in contrast to the Company's typical process for considering annual compensation awards in which management makes recommendations that the Compensation Committee evaluates,[132] the Compensation Committee was not substantively involved.

Moreover, the Board did not consider the value of the awards to the recipients, the cost to the Company of granting the awards, how the value of the awards compared to compensation of directors and officers at comparable companies, or the appropriateness of granting the warrant to Pourhassan outside the Plan.[133] No one

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[132] Kelly Interview ¶ 4.

[133] Indeed, while the minutes reflect that some comparables were provided during the meeting, Ex. 12 at 2, none of the directors recalled the limited

appears to have questioned Pourhassan about how he arrived at the amounts; if they had, they would have learned that he "just made [them] up."[134] The Board did not consider—and other than Pourhassan and Kelly, were not even made aware of—any of the factors that counsel advised ought to have been considered.[135]

(2) Price Considerations

The SLC's analysis of the price considerations surrounding the December 2019 Awards is more mixed, but still leaves serious doubts as to the fairness of the Awards to the Director Defendants. The SLC's evaluation of the fairness of the award amounts was guided by an analysis performed by its independent compensation consultant, Aon.[136] Aon calculated the Defendants' total compensation in fiscal year 2020, which ended May 31, 2020, by adding each Defendants' cash compensation as reported in the Company's proxy materials to the grant date fair value of their equity compensation, which includes the December 2019 Awards. It then compared those totals to the total compensation received by

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"comparables" provided by Eastwood being shared until *after* the December 2019 Awards had already been approved, Welch Interview ¶ 29.

[134] Pourhassan Interview ¶ 16.

[135] The presence of counsel at the December 19, 2019 meeting does not assist the Defendants in carrying their burden of proof in the absence of any evidence that anyone asked counsel for, or that he gave, any advice.

[136] *See generally* Ex. 29 (Aon, *CytoDyn Compensation Review*, Sept. 2020).

similarly situated individuals at comparable companies.[137] Aon's analysis resulted in the following conclusions about the Director Defendants' compensation:[138]

- Kelly's 2020 compensation was below the 25th percentile among individuals in comparable roles, even including the value of the December 2019 Awards.[139]
- Klump's, Naydenov's and Welch's 2020 compensation, including the December 2019 Awards, each exceeded the 75th percentile for comparable outside directors ($192,300) by more than $100,000, or 52%.[140]

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[137] Aon analyzed the Awards in the context of total annual compensation to the relevant individuals and created two peer groups for comparison to compensate for CytoDyn's market capitalization volatility. The first peer group replicated the process a company would typically undertake to inform grant levels and was built based on the profile of the Company immediately prior to the award date. The second peer group was constructed on a "backwards looking" basis based on the Company's size and profile at the conclusion of the fiscal year, which mirrors how proxy advisors would evaluate executive pay levels over the course of the fiscal year. *Id*. at 2.

[138] These data do not include the January 2020 Awards, which are discussed below in Section III.C.1.d.

[139] Ex. 29 at 8.

[140] *Id.* at 14-16.

- Pourhassan's 2020 compensation consisted of a salary and bonus totaling $1,483,200, which was below the 25th percentile of comparable CEOs.[141] He received options and the warrant, including the December 2019 Awards, valued at $1,242,200.[142] The value of Pourhassan's combined compensation thus totaled $2,725,300, which exceeded the 75th percentile of comparable CEOs ($2,380,500) by $344,800, or about 13%.[143]

In contrast to the December 2019 Awards conveying substantial value to the recipients, the Company got nothing in return. The awards were in the money, largely immediately exercisable and entirely compensation for services already rendered.[144]

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[141] *Id*. at 7.

[142] *Id*.

[143] *Id*.

[144] *See Technicorp Int'l II, Inc. v. Johnston*, 1997 WL 538671, at *16 (Del. Ch. Aug. 25, 1997) ("The payment of compensation for services previously performed and for which compensation has already been received, will normally constitute an illegal gift of corporate assets.").

(3) Unitary Conclusion

In light of the process and price factors and the justifications proffered, the SLC concluded that the Defendants would be unlikely to prove that the December 2019 Awards to the Director Defendants were entirely fair and, therefore, the Defendants would likely be held liable for breach of fiduciary duty. The SLC considered it unlikely that the Court would permit directors to escape liability after engaging in such a deficient process to approve compensation from which they stood to profit so handsomely. However, as discussed next, the SLC viewed the question of the appropriate remedy for the unfairness to be more nuanced and took that into consideration in its settlement position.

Although the Director Defendants apparently held a sincere belief that Pourhassan was underpaid and that his performance merited increased compensation,[145] good faith is not by itself a defense to self-dealing, as the analysis is objective.[146] However, the results the Company achieved in December 2019, such as the Vyera transaction, hope for imminently filing its first BLA, and stock price

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[145] *See* Kelly Interview ¶¶ 24, 33-34, 37-38, 66; Naydenov Interview ¶¶ 8-9, 32; Welch Interview ¶¶ 16, 18-20, 23, 41.

[146] *Cf. Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) ("[F]ulfillment of the fiduciary function requires more than the mere absence of bad faith or fraud. Representation of the financial interests of others imposes on a director an affirmative duty to protect those interests and to proceed with a critical eye . . . .").

growth, are all the sorts of factors that can and do support a board awarding bonus compensation for management, even compensation that is above the 75th percentile. Concern that the CEO is underpaid and might "walk" if his compensation is not adjusted[147] is also a reasonable justification for additional compensation. And the SLC acknowledges that there is a litigable question whether Pourhassan's total 2020 compensation rises to the level of being unfair. While, in the SLC's view, none of the foregoing factors excuses the serious process deficiencies identified by the SLC summarized above—if anything they suggest the need for a thoughtful reconsideration of executive compensation and independent approval thereof—the SLC acknowledges these factors present litigation risk at both the liability and remedy phases.[148] Accordingly, the SLC took them into consideration when evaluating its settlement position. Similarly, the SLC took into consideration that

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[147] Kelly Interview ¶ 34.

[148] *See*, *e.g.*, *Trados*, 73 A.3d at 78 (finding a transaction entirely fair irrespective of unfair dealing because the defendants proved the price was fair); *In re Nine Sys. Corp. S'holders Litig.*, 2014 WL 4383127, at **46-47 (Del. Ch. Sep. 4, 2014) (awarding no damages to remedy an unfair conflicted transaction because the price was fair), *aff'd sub nom. Fuchs v. Wren Holdings, LLC*, 129 A.3d 882 (Del. 2015).

Kelly's 2019 compensation, even including the December 2019 Awards, fell below the 25th percentile for comparable executives.[149]

c. The SLC Did Not Find Corroboration for Plaintiffs' "Spring-Loading" Theory.

The SLC also investigated Plaintiffs' allegations that the December 2019 Awards were "spring-loaded"—that is, issued at the market price by directors who knew the stock was worth more than the market price based on non-public information, which is an inherently disloyal act.[150] Plaintiffs allege that, when approving the December 2019 Awards, the directors knew about the positive clinical results that would be announced in the December 23, 2019 press release and believed that information would cause CytoDyn's stock price to increase.[151]

However, the SLC's investigation did not corroborate this theory. There is no indication that any of the directors (other than Pourhassan) knew that a press release was going to be issued about the clinical results, and none, subjectively, were of the view that the new clinical data was likely to improve the stock price. Although Pourhassan was conscious of the imminent press release, the SLC found no evidence

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[149] Ex. 29 at 8.

[150] *See In re Tyson Foods, Inc.*, 919 A.2d 563, 593 (Del. Ch. 2007).

[151] Compl. ¶¶ 7, 111.

he sought to time it to take advantage of an artificially deflated stock price for purposes of the December 2019 Awards. To the contrary, he intended to issue the press release *before* the December 19, 2019 meeting, not after. Instead, it appears that the event that the directors perceived as likely to improve the stock price was the Vyera transaction—but that was announced on December 17, 2019, before the December 19, 2019 meeting.

d. The January 2020 Awards Were Not Entirely Fair.

As with the December 2019 Awards, the SLC's analysis of the process considerations surrounding the January 2020 Awards suggests unfairness. Again, Pourhassan initiated and orchestrated the process: he proposed the awards and drove the timing of their consideration. He also received the lion's share of the awards. Legal advice was obtained but not followed. Moreover, no objective data was considered in determining the appropriate form or amount of the awards. No consideration was given to valuation of the awards or the stockholders' likely reaction. The awards were outside of the Plan and consisted of as-yet unauthorized shares. Approval of the proposal was timed to avoid consideration by a new, independent director.

The Compensation Committee was not substantively involved before the January 18, 2020 meeting; there is no evidence it received any advice or analysis supporting the proposal; and witnesses could not recall what, if anything, that

committee did during the interim between the Board meeting and the UWC. In any event, Compensation Committee involvement would not cleanse the process, as each of its members received the awards alongside the other directors.

The SLC's analysis of the price considerations surrounding the January 2020 Awards is straightforward. The awards were extraordinarily valuable; including these awards among the Defendants' fiscal year 2020 compensation put that compensation above the 75th percentile by millions of dollars for each of the recipients.[152] For instance, Aon valued the January 2020 Awards Pourhassan received at $7.2 million alone.[153] By contrast, the 75th percentile for comparable CEOs' total compensation was $2.38 million.[154] Accepting Pourhassan's prediction that the Company's shares would trade above $10 upon achieving BTD,[155] the January 2020 Awards would have amounted to the directors awarding themselves shares worth more than $170 million ($80 million to Pourhassan alone) with no strike price and with no consideration flowing back to the Company in exchange.

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[152] *See* Ex. 29 at 5.

[153] *See id.* at 7.

[154] *See id*.

[155] Pourhassan Interview ¶ 34.

On top of this, the January 2020 Awards were unusual by their very nature in that they consisted of performance shares to outside directors.[156]

The fact that the January 2020 Awards were contingent on certain vesting events that ultimately did not come to fruition does not change the fact that they were approved by an unfair process and would have been excessively valuable to the recipients had those events taken place. Stated differently, the process was insufficient to justify approving awards potentially worth tens or hundreds of millions of dollars. Considering all these factors, the SLC concluded the Defendants would be unlikely to prove that the January 2020 Awards were entirely fair.

Although the January 2020 Awards expired by their terms so that there is nothing to be done in terms of forfeiture, the SLC concluded the January 2020 Awards suggest a pattern of behavior with respect to the Board's compensation practices, which influenced the SLC's settlement position.

2. Claims Regarding Awards to the Non-Director Recipients and Eastwood Likely Do Not Have Merit.

Plaintiffs allege that the Director Defendants breached their fiduciary duties and committed waste by approving the December 2019 Awards to the Non-Director

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[156] *See* Ex. 29 at 14 ("[I]ssuing performance-based equity awards to board members is an uncommon practice in the market[.]").

Recipients and that those recipients were unjustly enriched by receiving the awards.[157] Aon reached the following conclusions about the value of those awards:

- Mulholland's and Rae's 2020 compensation were below the 25th percentile among individuals in comparable roles, even including the value of the December 2019 Awards.[158]
- Ray's 2020 compensation, including the December 2019 Awards, was valued at $612,500, slightly below the 50th percentile figure of $617,300.[159]

None of the Director Defendants were interested or lacked independence with respect to the awards to the Non-Director Recipients, and none of those recipients were substantively involved in procuring the awards. Thus, there is no basis to treat those awards as anything but an exercise of the Director Defendants' business judgment.[160] And, in any event, the December 2019 Awards to the Non-Director Recipients were reasonable in amount, leaving no basis on which to conclude that

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[157] Compl. ¶¶ 155, 162, 167, 171-72.

[158] Ex. 29 at 9, 12.

[159] *Id.* at 11.

[160] *See Litt v. Wycoff*, 2003 WL 1794724, at *6 (Del. Ch. Mar. 28, 2003) (noting that a board's employee compensation decisions are normally entitled to the protection of the business judgment rule).

they were wasteful[161] or not fairly priced.[162] Therefore, the SLC concluded that Plaintiffs' claims as to the awards to the Non-Director Recipients are likely without merit. As such, the Settlement does not contemplate the forfeiture of the December 2019 Awards to the Non-Director Recipients or any other remedy from them in connection with the litigation.

The only challenged compensation Eastwood received was the January 2020 Award that has expired. Accordingly, there is no viable claim for unjust enrichment against him.

D. The SLC Negotiates a Settlement with Defendants and Determines the Settlement Is in the Best Interests of CytoDyn and Its Stockholders.

On November 19, 2020, WSGR met with counsel for the Defendants to discuss the findings of the SLC's investigation and the SLC's settlement proposal. After the meeting, WSGR sent a written settlement proposal to Defendants' counsel.

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[161] *See Calma v. Templeton*, 114 A.3d 563, 591 (Del. Ch. 2015) (holding that to constitute waste compensation must be "so far beyond the bounds of what a person of sound, ordinary business judgment would conclude is adequate consideration to the Company" so as to be essentially a gift).

[162] *See Valeant*, 921 A.2d at 748-49 (stating that a determination of whether a price was fair may involve "reference to reliable markets or by comparison to substantial and dependable precedent transactions" or "a showing that the terms of the transaction fit comfortably within the narrow range of [the board's] discretion, not at its outer boundaries").

Over the next several weeks, the SLC, through WSGR, and Defendants, through their counsel, conducted extensive arm's length settlement negotiations, including several calls and email exchanges. The SLC met four times during this process to discuss the status of and direct the negotiations. The negotiations resulted in an agreement in principle reached on December 15, 2020.[163] On December 18, 2020, the SLC and Defendants executed a memorandum of understanding outlining the key terms of their agreement.[164]

The Settlement provides the Company with substantial benefits reflective of the SLC's determinations concerning the merit of the claims. As described in the Stipulation and subject to the Court's approval, the Defendants have agreed to certain Rescissory Consideration and Governance Changes. To summarize, the Rescissory Consideration consists of the following terms:

- Klump, Naydenov and Welch will each forfeit all 750,000 options they received in the December 2019 Awards;
- Kelly will forfeit 60% (750,000) of the options he received in the December 2019 Awards; and

[163] Dkt. 42.

[164] Dkt. 43.

- Pourhassan will forfeit the warrant he received in the December 2019 Awards, as well as vested options he was awarded prior to December 2019 to purchase 373,000 shares of Company common stock with a weighted average exercise price of $0.47. This is equivalent to approximately 60% of the equity he received from the December 2019 Awards.[165]

The day the settlement was reached, December 15, 2020, CytoDyn's shares closed at $3.46.[166] At that share price, the shares underlying the forfeited awards had the following values to the recipients, net of the cost of exercising the awards:

Name	Value of Forfeited Awards to Recipient Net of Exercise
Pourhassan	$6,775,419.00
Kelly	$1,273,500.00
Klump	$2,122,500.00
Naydenov	$2,122,500.00
Welch	$2,122,500.00
Total	**$14,416,419.00**

[165] Stipulation ¶¶ 3.1-3.3. The SLC agreed to accept Pourhassan forfeiting the pre-December 2019 options because he had already exercised the December 2019 options, for which he paid the Company cash. The options that Pourhassan is forfeiting are more valuable to Pourhassan because they carry a lower strike price.

[166] CytoDyn Inc. (CYDY), YAHOO! FINANCE, https://finance.yahoo.com/quote/CYDY/history/.

Thus, not only will the Settlement result in the Defendants forfeiting equity worth over $14.4 million to them, but the stockholders will recognize a benefit in the form of reduced dilution.

In consideration for these concessions, the Defendants will receive a limited release plus dismissal of this action with prejudice.[167] The proposed releases of the Defendants include any claims that have or could have been asserted on behalf of CytoDyn that relate to the allegations made in the action, but expressly carve out a claim asserted by Plaintiffs in another jurisdiction.[168]

The Governance Consideration consists of terms that can be summarized as follows: (a) the Board will explore adding a new independent director within the next 12 months; (b) the Board will reconstitute the Compensation Committee to consist of at least three independent directors; and (c) the Company will adopt a director and executive officer compensation policy containing the following terms: (i) director and executive compensation must be developed and approved by the Compensation Committee; (ii) the Compensation Committee must retain, and receive recommendations from, an independent compensation advisor to assist in determining the type and levels for such compensation; (iii) the Compensation

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[167] *See* Stipulation ¶¶ 3.14, 4.2.

[168] *Id.* ¶¶ 2.18, 4.1-4.4.

Committee must assess the compensation levels and structure of its peer group at least annually based on such factors it deems relevant after discussion with its independent compensation advisor; (iv) director and executive compensation will generally be determined on an annual basis by the Compensation Committee, except for certain extraordinary circumstances; and (v) bonuses based on Company performance for outside directors are prohibited.[169] Among other benefits, the Governance Consideration is meant to prevent the recurrence of the failures of governance that gave rise to this action.

[169] *Id.* ¶¶ 3.6-3.8.

IV. THE SETTLEMENT SHOULD BE APPROVED

A. Legal Standard for Approval of a Settlement

Consistent with the principle that "[t]he directors of a corporation and not its s[tock]holders manage the business and affairs of the corporation" and therefore "the directors are responsible for deciding whether to engage in derivative litigation,"[170] a corporation may, as CytoDyn did here, appoint disinterested and independent directors to an SLC and charge it with determining whether the prosecution of derivative litigation is in the best interests of the company.[171] That is, even a board "tainted by the self-interest of a majority of its members . . . can legally delegate its authority" to disinterested and independent directors.[172] A contrary rule would "automatically result in the placement in the hands of the litigating stockholder sole control of the corporate right throughout the litigation" and promote "the interest of one person or group to the exclusion of all others within the corporate entity."[173]

"[T]he *Zapata* procedure takes the case away from the [derivative] plaintiff" and "turns his allegations over to special agents appointed on behalf of the

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[170] *White v. Panic*, 783 A.2d 543, 550 n.18 (Del. 2001) (citation omitted).

[171] *Zapata Corp. v. Maldonado*, 430 A.2d 779, 785 (Del. 1981).

[172] *Id*. at 785-86.

[173] *Id.* at 784-85.

corporation for the purpose of making an informal, internal investigation of his charges."[174] "So long as the committee's actions withstand judicial review under the standards set forth by the Supreme Court in its *Zapata* opinion, a special litigation committee may decide to dismiss an action, or to prosecute it, in the manner of its choosing."[175] "By forming a committee whose fairness and objectivity cannot be reasonably questioned . . . the company can assuage concern among its stockholders and retain, through the SLC, control over any claims belonging to the company itself."[176]

The Court evaluates an SLC's recommendation using a two-step test.[177] First, the Court "inquire[s] into the independence and good faith of the committee and the

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[174] *In re Oracle Corp. Deriv. Litig.*, 808 A.2d 1206, 1210-11 (Del. Ch. 2002) ("*Oracle I*") (second alteration in original; citation omitted).

[175] *Id.* at 1210.

[176] *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 940 (Del. Ch. 2003) ("*Oracle II*").

[177] Although the *Zapata* standard applies in the context of an SLC's motion to terminate derivative litigation, courts have applied the same framework to evaluate an SLC-endorsed settlement. *See, e.g.*, *Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc.*, 1997 WL 305829 (Del. Ch. May 30, 1997) ("*TLC Beatrice II*"); *Sandys v. Pincus*, C.A. No. No. 9512-CB, Tr. at 51-52 (Del. Ch. Jan. 18, 2019). Given the facts presented here, including the independent SLC's decision to settle the claims in exchange for a benefit to the Company, a compelling argument could be made that the Settlement should be examined under the business judgment rule. But, as

bases supporting its conclusions."[178] The SLC has the burden of proving its "independence [and] good faith" and that it conducted "a reasonable investigation."[179] In determining whether there is a reasonable basis for the SLC's conclusions, the Court considers whether there is any "genuine dispute of material fact as to what the [SLC] did here or as to the information actually utilized by it in reaching its conclusions."[180] Accordingly, the Court will confirm the SLC's conclusions if "the Court is satisfied under Rule 56 standards that the committee was independent and showed reasonable bases for good faith findings and recommendations."[181]

Under Delaware law, the test for independence is whether the director "will receive a personal financial benefit from a [decision] that is not equally shared by the stockholders" or the decision "will have a materially detrimental impact on a

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detailed herein, the SLC's conclusion to enter the Settlement satisfies the more exacting *Zapata* standard.

[178] *Zapata*, 430 A.2d at 788.

[179] *Id.* at 789.

[180] *Kaplan v. Wyatt*, 484 A.2d 510, 519 (Del. Ch. 1984) (*"Kaplan I"*), *aff'd*, 499 A.2d 1184 (Del. 1984) ("*Kaplan II*").

[181] *Zapata*, 430 A.2d at 789.

director, but not on the corporation and the stockholders."[182] The Court's inquiry into the SLC's independence focuses on the members' personal financial interest in the disputed conduct and the members' relationships with the interested Defendants.[183] However, to be independent, an SLC member "does not have to be unacquainted or uninvolved with fellow directors."[184] In the settlement context, the inquiry also involves an evaluation of whether the SLC knew enough about the strengths and weaknesses of the claims to negotiate a fair and reasonable settlement.[185]

Second, the Court *may*, in its discretion, proceed to the next step under which it applies its own business judgment to determine "whether the SLC's recommended result falls within a range of reasonable outcomes that a disinterested and independent decision maker for the corporation, not acting under any compulsion and with the benefit of the information then available, could reasonably accept."[186] This step is "designed to offer protection for cases in which, while the court could

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[182] *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993).

[183] *See Sutherland v. Sutherland*, 958 A.2d 235, 239 (Del. Ch. 2008).

[184] *London v. Tyrrell*, 2010 WL 877528, at *12 (Del. Ch. Mar. 11, 2010).

[185] *Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc.*, 1997 WL 38130, at *1 (Del. Ch. Jan. 29, 1997) ("*TLC Beatrice I*").

[186] *In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455, 468 (Del. Ch. 2013).

not consciously determine on the first leg of the analysis that there was no want of independence or good faith, it nevertheless felt that the result reached was irrational or egregious or some other such extreme word."[187] However, the Court does not adjudicate the merits of the claims on a motion to approve a proposed settlement.[188]

The independent SLC and its months-long investigation meet the first step of the *Zapata* analysis, and the Court should grant the Motion on that ground alone. Even if the Court were to conduct a second-step discretionary analysis, there is no basis to disturb the SLC's good faith and detailed findings or carefully considered determination that the Settlement is the best way to resolve this action. Accordingly, the Settlement should be approved and the action dismissed.

B. The Court Should Approve the Settlement Under *Zapata*'s First Prong.

The Settlement should be approved under *Zapata*'s first prong. The SLC and its investigation satisfy the requirements of independence, good faith, and reasonableness.

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[187] *TLC Beatrice II*, 1997 WL 305829, at *2 (internal quotation marks omitted).

[188] *Id.* at *13.

1. The SLC Members Are Independent.

As discussed above, independence focuses on whether the directors have a (1) personal interest in the disputed transaction, or (2) a significant pre-existing or continuing relationship with any Defendant. Neither SLC member has or had any personal interest in the Awards. Neither was a director when the Awards were approved and neither received any portion of the Awards. Before their appointment as directors, neither had any involvement in the events underlying Plaintiffs' claims and did not have a business or other relationship with CytoDyn at that time. Thus, the SLC members do not have a "personal interest in the disputed transactions."[189] Neither Timmins nor Patel had (or has) a pre-existing or continuing relationship with any Defendant, save that both now serve as CytoDyn directors with the Defendants who remain on the Board.

Likewise, the SLC's advisors were disinterested and independent. The SLC selected WSGR as its counsel after confirming that WSGR did not have any conflicts with the representation. Specifically, WSGR had not performed legal services for CytoDyn, the SLC members or any of the Defendants or entities associated with them before its retention by the SLC. The SLC also retained independent expert

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[189] *London*, 2010 WL 877528, at *12.

compensation consultants from Aon. Aon was selected from among multiple compensation consultant candidates, and it was confirmed that it had no conflicts.

These facts therefore establish that the SLC was independent and could base its "decision on the merits of the issue rather than being governed by extraneous considerations or influences."[190]

2. The SLC Acted in Good Faith and Conducted a Reasonable Investigation.

The SLC conducted a "good faith investigation of reasonable scope."[191] A committee should "explore all relevant facts and sources of information that bear on the central allegations in the complaint."[192] The SLC must also perform "a good faith review and analysis of the factual and legal underpinnings of the claims."[193] The thoroughness of an investigation cannot be questioned merely by contending that the SLC failed to examine some matter that is not central to the complaint's allegations.[194]

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[190] *Kaplan II*, 499 A.2d at 1189.

[191] *London*, 2010 WL 877528, at *17.

[192] *Id*.

[193] *TLC Beatrice II*, 1997 WL 305829, at *12.

[194] *Kaplan II*, 499 A.2d at 1191.

The SLC's investigation and analysis were conducted in good faith and were reasonable. The SLC calibrated its investigation strategy in consideration of the relative size of the Awards at issue and the desire to avoid unnecessary expenditure of the Company's resources, particularly in light of the fact that the January 2020 Awards, which accounted for the majority of the value at stake, had the potential to lapse (and then did lapse) of their own terms in July 2020. Accordingly, after collecting potentially relevant documents, the SLC's counsel conducted a targeted review designed to isolate key documents and communications relevant to the discrete Awards. Similarly, the SLC sought its independent compensation consultant's evaluation of the fairness of the economic terms of the Awards early in the investigation process so that its conclusion could guide the appropriate course for the rest of the investigation. After the SLC interviewed the Plaintiffs and the Director Defendants, in combination with the documents reviewed, a clear picture of the relevant factual background emerged. The SLC therefore determined that additional interviews of players who were not decision makers would be costly, duplicative and unlikely to change the SLC's conclusions and so decided to forego such interviews in favor of starting settlement discussions.

The SLC has documented its findings, conclusions and recommendations in the facts section of this brief after determining it would be more efficient to proceed in this manner in lieu of preparing a separate report. The SLC believes its relevant

factual findings and the bases for its conclusions have been adequately set forth in this brief given the relatively focused scope of the facts pertinent to this stage of the proceedings, as well as the nature of the SLC's conclusions—namely, that the Awards were likely not entirely fair. This Court has endorsed the presentation of an SLC's factual findings in briefing submitted by counsel in appropriate circumstances where efficiency considerations favor that approach.[195]

In sum, the SLC conducted an investigation tailored to the claims at issue that was undertaken in good faith and that was reasonable in scope. Through that investigation, the SLC developed a thorough understanding of the pertinent facts and was thus able to evaluate reliably the strengths and weaknesses of the claims.

3. The SLC Members Were Engaged and Performed a Thorough, Good Faith Review of the Allegations and Evaluation of the Settlement.

With the assistance of its counsel and expert consultants, the SLC members were engaged and approached the investigation with an open mind and a focus on thoroughly examining Plaintiffs' allegations. The SLC members, with WSGR, met

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[195] *See TLC Beatrice I*, 1997 WL 38130, at *4 (considering SLC brief "insofar as it contains statements of fact . . . to have the same integrity as would any report that those lawyers made to their client" and rejecting argument that plaintiff should be entitled to discovery into the SLC's factual findings because "[t]he fact that the SLC opted to prepare their report in this form, rather than spending further resources to produce a second document, does not entitle [plaintiff] to further discovery").

with several of the Plaintiffs and their counsel to understand the nature of and basis for Plaintiffs' claims and related concerns. At the SLC meetings (and after many of the interviews), the SLC, working with counsel, discussed the appropriate course for the investigation, additional avenues for exploration, individuals to interview and their views of the facts as they were uncovered. And in contrast with many SLCs, the SLC members attended and actively participated in the interviews. In other words, the SLC did not leave the investigative work to counsel and wait for counsel's conclusions; rather, the members of this SLC were present, involved and engaged.

Throughout the course of the investigation process and in particular after conducting the bulk of the interviews, the SLC spent significant time deliberating about the merits of the allegations before reaching its conclusions. All told, the SLC's factual and legal investigation lasted six months and involved significant expenditure of each SLC member's time and of the SLC's advisors' time. As explained above, the SLC concluded that the Awards were not entirely fair.

It was in this context that the SLC initiated settlement discussions, negotiated the proposed Settlement, and ultimately concluded that the Settlement is fair, reasonable and adequate to CytoDyn and its stockholders to compromise the Complaint's claims. The SLC reached its conclusion because of the substantial benefits that the Settlement offers—in the form of both the Rescissory Consideration (which will return value to the Company and its stockholders in the near term) and

the Governance Changes (intended to improve corporate governance going forward and avoid the process failures underlying this action). Against these benefits, the SLC considered the high costs in terms of time, money and disruption to the Company that would come with further litigation, regardless of the eventual outcome. It also considered that continued litigation could take years or more to finally resolve; would continue to be a distraction to the Company; would remain an overhang on CytoDyn's operations and reputation; would entail advancing the Defendants' defense costs; and the inherent uncertainty that attends litigating claims, particularly given the arguments available to Pourhassan and Kelly regarding the fairness of their overall compensation in fiscal year 2020, even including the December 2019 Awards.

The SLC's investigation and analysis more than satisfy *Zapata*. In particular, "the SLC knew enough about the strengths and weaknesses of the claims to negotiate a fair and reasonable settlement[.]"[196] The SLC's review of key documents, interviews of the key witnesses and consideration of expert analyses establish that the SLC explored the relevant facts and sources of information bearing on the

[196] *TLC Beatrice I*, 1997 WL 38130, at *1.

Complaint's central allegations.[197] Finally, the SLC made a considered decision that settling the action on the terms of the Stipulation is in the best interests of CytoDyn and its stockholders.

Because the members of the SLC are independent, reached the decision to settle this action in good faith, and performed an in-depth investigation that affords reasonable bases for its conclusions, the Court should approve the Settlement under the first prong of *Zapata*.

C. The Court Should Approve the Settlement Under *Zapata's* Second Prong.

Although it is not necessary to do so, if the Court proceeds to the second *Zapata* step, that analysis further supports approval of the Settlement. This discretionary prong is not intended as a forum to dispute the facts underlying Plaintiffs' claims.[198] Nor is the SLC "required to attempt to maximize returns from the lawsuit."[199] Rather, under this prong the Court should approve the Settlement if

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[197] *See Kaplan II*, 499 A.2d at 1190-91; *see also TLC Beatrice II*, 1997 WL 305829, at *2 (approving settlement where "the conclusions reached by the SLC, which formed the basis for the amount of the proposed settlement, were well informed by the existing record").

[198] *Zapata*, 430 A.2d at 787.

[199] *TLC Beatrice II*, 1997 WL 305829, at *11.

it falls "within a range which reasonable minds might accept" as being "in the long-run best interest of the corporation."[200]

Against this standard, the SLC's decision to settle on the terms set forth in the Stipulation should be confirmed by the Court as reasonable considering the relevant facts and circumstances. The SLC's determinations on the merits are supported by the documentary record and witness interviews. This, on its own, is sufficient to support Settlement approval.

Moreover, the Company will benefit from meaningful corporate governance reforms and receive a valuable recovery in exchange for a release of claims tailored to Plaintiffs' allegations. The recovery is substantial and concomitant with the SLC's conclusions concerning the underlying merits. The Settlement is further justified when compared against the inherent costs and uncertainty of litigating the claims. And beyond these considerations, the SLC's determination that the Settlement is a fair and reasonable compromise is further supported by the benefit to CytoDyn of finally concluding this litigation.

The substantial benefits that the Settlement confers on the Company support the proposition that the Settlement falls within the range that reasonable minds

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[200] *Id.* at *11, *19.

would find fair and adequate. Thus, even if the Court determines to evaluate the Settlement under the second prong of *Zapata*, the outcome should be the same and the Settlement should be approved.

V. CONCLUSION

For the reasons set forth above, the SLC respectfully requests that the Court: (i) approve the Settlement as set forth in the Stipulation; and (ii) enter the proposed Order and Final Judgment, in substantially the form attached to the Stipulation, reflecting the Court's approval of the Settlement and dismissing this action with prejudice.

WILSON SONSINI GOODRICH
& ROSATI, P.C.

/s/ Brad S. Sorrels

Brad D. Sorrels (#5233)
Andrew D. Cordo (#4534)
Andrew D. Berni (#6137)
222 Delaware Avenue, Suite 800
Wilmington, DE 19801
(302) 304-7600

Counsel for the Special Litigation Committee of the Board of Directors of Nominal Defendant CytoDyn Inc.

OF COUNSEL:

Barry M. Kaplan
Gregory L. Watts
WILSON SONSINI GOODRICH
& ROSATI, P.C.
701 Fifth Avenue, Suite 5100
Seattle, WA 98104
(206) 883-2500

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 3, 2021, he caused the foregoing document to be served by *File & ServeXpress* upon the following counsel:

Ned Weinberger
Mark Richardson
LABATON SUCHAROW LLP
300 Delaware Ave., Suite 1340
Wilmington, DE 19801

Michael J. Maimone
FAEGRE DRINKER BIDDLE & REATH LLP
222 Delaware Ave., Suite 1410
Wilmington, DE 19801

Ryan P. Newell
YOUNG CONAWAY STARGATT & TAYLOR, LLP
Rodney Square
1000 North King Street
Wilmington, DE 19801

Michael A. Pittenger
Caneel Radinson-Blasucci
POTTER ANDERSON & CORROON LLP
1313 N. Market Street
Hercules Plaza, 6th floor
Wilmington, DE 19801

/s/ *Brad D. Sorrels*
Brad D. Sorrels (#5233)