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.,	)	C.A. No. 2020-0307-PAF
Plaintiffs,	)	
vs.	)	
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.	)	

PLAINTIFFS' BRIEF IN FURTHER SUPPORT OF THE SETTLEMENT AND APPLICATION FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES

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PRELIMINARY STATEMENT

In this action, Plaintiffs successfully challenged fiduciary malfeasance that was blatant and egregious in equal measure, and, thus, entirely unfair to CytoDyn, Inc. ("CytoDyn" or the "Company") and its stockholders. In the span of just thirty days, from mid-December 2019, through mid-January 2020, the Board of Directors (the "Board") of CytoDyn awarded themselves (among other insiders) ***20,950,000 shares*** of CytoDyn stock, which represented a staggering 5% of the Company's outstanding common stock. They did so in two transactions approved over the course of two meetings, which together lasted roughly 90 minutes, without (a) the assistance or input of a compensation expert or independent advisor, (b) peer data or analysis, and (c) any semblance of a deliberative process. The complete lack of any of the standard procedural devices that directors typically employ when making compensation decisions reflect that fairness to CytoDyn and its stockholders was not even a consideration in these transactions, much less an objective.

The challenged transactions were orchestrated by CytoDyn's Chief Executive Officer, Nader Pourhassan, who spent his tenure incessantly demanding increases to his already-generous compensation package. While he was unsuccessful in the past, Pourhassan waged a war of attrition that gradually took its toll. By the end of 2019, Pourhassan's self-aggrandizing campaign had become so rampant, disruptive, and toxic that it resulted in the resignations of the directors (including three of the

Plaintiffs) who (prior to resignation) staunchly protected the Company by opposing Pourhassan's unreasonable demands. With his path cleared, Pourhassan seized the opportunity to enrich himself. In doing so, Pourhassan encountered no resistance from the Board because Pourhassan suggested, and the other members of the Board accepted, massive grants of equity.

Defendants may have succeeded in their attempt to fleece CytoDyn and its stockholders were it not for Plaintiffs. Following a pre-suit books and records investigation pursuant to 8 *Del. C.* § 220, and conversations with counsel to the Company, Plaintiffs sued Defendants for breach of fiduciary duty, bad faith, unjust enrichment, and waste. Just days before the Complaint was filed, but after Plaintiffs brought their concerns to the Company and threatened this lawsuit, the Company appointed a new director to the Board and almost immediately formed a Special Litigation Committee (the "SLC"), which investigated Plaintiffs' claims. Following that investigation, the SLC concluded that Plaintiffs' claims "likely have merit," and, indeed, that Defendants likely would lose this action if it went to trial.

Based upon the strength of Plaintiffs' claims, the SLC negotiated a settlement of this action that provides Plaintiffs—and, more importantly, the Company and its stockholders—with a decisive victory. The extremely lucrative awards that Defendants granted to themselves largely have been eliminated, through rescission and forfeiture, and the extensive corporate governance reforms that CytoDyn will

implement will prevent a repeat incident of the serious misconduct Plaintiffs challenged in this action.

For achieving these results, Plaintiffs seek a fee and expense award ("Fee and Expense Award") of $4,134,797.34 inclusive of $3,079.53 in out-of-pocket costs, which represents approximately 10% of the $27,151,396 economic benefit achieved for CytoDyn as a result of this lawsuit, plus an additional amount for the substantial corporate governance reforms that will likewise benefit the Company. The requested Fee and Expense Award is supported by the *Sugarland* factors and is consistent with the fees this Court has awarded in other cases.

STATEMENT OF FACTS

I. BACKGROUND OF THE PARTIES AND CYTODYN

A. Plaintiffs and Defendants

Plaintiffs are six current holders of CytoDyn common stock.[1] Two of the Plaintiffs are entities controlled by former CytoDyn directors (Carl Dockery and

[1] Verified Stockholder Derivative Complaint (Trans. ID 65598100) (the "Complaint") ¶¶ 16-22. References to "¶" are citations to paragraphs of the Complaint. After the Court stayed this action, Plaintiff Kenneth E. Chyten Defined Benefit Pension Plan ("KEC Pension Plan") assigned its shares in CytoDyn to the Kenneth E. Chyten 401(k) Profit Sharing Plan (the "KEC Profit Sharing Plan"). In light of the Court's stay order (which remains in place), and Plaintiffs' subsequent determination not to object to the proposed Settlement, Plaintiffs determined that a motion to substitute the KEC Pension Plan for the KEC Profit Sharing Plan as plaintiff would not be a proper use of the Court's time and resources. To the extent the proposed Settlement is not approved, Plaintiffs intend to file a motion to substitute.

Anthony Caracciolo), and another former CytoDyn director (Gregory Gould) is a Plaintiff in his personal capacity.[2] Messrs. Dockery, Caracciolo, and Gould are sophisticated investors in the biotech space and have substantial experience serving in senior management roles at publicly-traded companies. *See* ¶¶ 17-19. Further, from their respective times on the Board, Messrs. Dockery, Caracciolo, and Gould have personal experience with and knowledge of the Company's management and operations, including as it relates to executive compensation decisions:

- Carl Dockery served as a director on the Board from September 2014 to September 2019. Mr. Dockery also served on the Compensation Committee of the Board from November 2014 until September 2019.

- Anthony Caracciolo served as a director of the Company from 2011 to December 2018, including as Chairman of the Board from June 2013 until December 2018. Mr. Caracciolo also served in an executive capacity at the Company as Executive Chairman (a role in which he worked closely with the CEO and had an active role in strategic planning, business development, and Company operations) from January 2017 until July 2018.[3]

- Plaintiff Greg Gould served on the Board from 2006 until August 2019. Mr. Gould was Chairman of the Board from July 2012 until June 2013, preceding Mr. Caracciolo in that role. Mr. Gould served as a member of the Compensation Committee of the Board from October 2012 until August 2019.[4]

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[2] ¶¶ 17-19.

[3] ¶ 18.

[4] ¶ 19.

The remaining Plaintiffs are unaffiliated stockholders that continuously held stock in CytoDyn for a number of years predating the relevant period at issue.

The individual defendants are current and former officers and directors of CytoDyn who approved and/or received Awards. Director defendants include Defendant Pourhassan, who served as the Company's CEO, President, and a Board member since 2012.[5] Defendant Scott Kelly served on the Board since April 2017, and was named Chairman of the Board in December 2018, succeeding Mr. Caracciolo.[6] In July 2019, Kelly became a paid consultant to the Company, and in April 2020, the Company announced that Kelly would serve in an executive role as Chief Medical Officer and Head of Business Development.

Defendants Jordan Naydenov and David Welch are outside directors, who have served on the Board since June 2009 and January 2019, respectively. In July 2018, Welch became a paid consultant for the Company, and therefore not "independent" under NASDAQ Rules.[7] In late 2019 and early 2020, Defendants Naydenov and Welch comprised the entire Compensation Committee of the Board, with Welch serving as Chairman and Naydenov serving as the only "independent" member. Defendant Klump is a former outside director on the Board, who served

[5] ¶ 24.

[6] ¶ 25.

[7] ¶ 28.

from August 10, 2018 until his resignation on January 15, 2020. The individual defendants also include current and former officers at the Company.[8]

B. Nominal Defendant CytoDyn

Nominal defendant CytoDyn is a Delaware corporation that was founded in 2002, and is headquartered in Vancouver, Washington.[9] CytoDyn is a pre-revenue, clinical-stage biotechnology company working to develop treatments for multiple therapeutic indications. CytoDyn's primary focus is the development of leronlimab ("PRO 140" or "leronlimab") as a treatment for HIV, cancer, and other immunological conditions, including more recently COVID-19.[10] CytoDyn is publicly-traded, over-the-counter under the ticker symbol "CYDY."

For years, CytoDyn has been seeking regulatory approval for leronlimab from the Food and Drug Administration ("FDA") and has not generated a single dollar of revenue since its inception in 2002. In May 2020, the Company disclosed to investors that it completed a Biologics License Application ("BLA") for its use in combination therapy for HIV patients, which, if granted, would permit CytoDyn to introduce leronlimab for commercial production and sale. In July 2020, however, the FDA responded with a "refusal to file" letter indicating that the BLA was

[8] ¶¶ 29-32.

[9] ¶ 23.

[10] ¶¶ 34-36.

incomplete and/or structurally flawed.[11] The BLA remains outstanding, and while the Company previously announced to investors that the BLA would be re-submitted by end of 2020, it has since indicated that it expects to do so by the end of the second quarter of 2021.[12] Despite achieving no FDA approvals or revenues, the Company has raised hundreds of millions of dollars from investors. At the time of the Settlement, the Company's market capitalization was approximately $3.2 billion.[13]

C. The Incentive Plan

In 2012, the Board adopted and stockholders approved an equity compensation plan for CytoDyn officers and directors (the "Incentive Plan").[14] Originally, the Incentive Plan reserved 3 million shares that could be used to provide equity awards to Company insiders and consultants, including stock options, warrants, and restricted stock units ("RSUs").

Since 2012, the Board adopted and stockholders approved several amendments to the Incentive Plan, including increases to the Incentive Plan's

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[11] *See* CytoDyn Press Release, July 13, 2020, *available at*: https://www.cytodyn.com/newsroom/press-releases/detail/449/update-on-hiv-bla-pdufa-fda-requested-more-information-to.

[12] *See* CytoDyn Press Release, March 11, 2021, *available at*: https://www.cytodyn.com/newsroom/press-releases/detail/507/cytodyns-long-haulers-covid-19-trial-enrolled-20.

[13] In its most recent Form 10-Q, the Company reported nearly 600 million shares outstanding as of December 31, 2020, and the Company's stock price on the date of the settlement, January 27, 2020, was $5.38 per share.

[14] ¶ 42.

aggregate share reserve. Despite those increases, by April 2019, the *15 million* shares then available under the Incentive Plan almost entirely were depleted.[15] Accordingly, in the Company's April 2019 proxy statement ("April 2019 Proxy"), the Board sought approval of an amendment to the Incentive Plan to increase the aggregate share reserve by another 10 million shares, for a total of 25 million shares.[16]

To secure stockholder approval of the amendment, the April 2019 Proxy represented to stockholders that the Incentive Plan was the only vehicle available for the Board to grant equity awards to CytoDyn executives and employees:

> The amendment to the 2012 Equity Incentive Plan is intended to ensure that the Company can continue to provide an incentive to employees, directors and consultants by enabling them to share in the Company's future growth . . . The Board requires additional shares available for issuance under the 2012 Equity Incentive Plan for the effective implementation of its compensation strategy . . . ***If Proposal 2 is not approved, the Company will not be able to provide equity incentive compensation to current and future employees and, as a result, the Company may not be able to retain current employees or retract new employees.***"[17]

The April 2019 Proxy also proposed an amendment to CytoDyn's Certificate of Incorporation to increase the Company's total authorized shares from 600 million to 700 million, which the Company represented was for purposes *other* than

[15] ¶¶ 43-46.

[16] *Id.*

[17] ¶ 47; *citing* April 2019 Proxy at 7 (emphasis added).

compensation, namely "financings and acquisitions." Based on these and other representations in the April 2019 Proxy, stockholders approved the requested amendment to the Incentive Plan.[18]

D. CytoDyn's Historical Compensation Practices

Historically, compensation decisions pertaining to non-employee directors were handled separately from compensation decisions pertaining to Company officers and employees.[19] The Board is responsible for determining the compensation of its non-employee members, which has historically consisted of a cash retainer and annual grants of stock options. For instance, for the 2019 fiscal year (ending May 31, 2019), CytoDyn's non-employee directors received a $25,000 cash retainer, additional cash retainers ranging from $2,500 to $15,000 for chairing or serving on various Board committees, an additional cash retainer of $15,000 for the Chairman of the Board, and a grant of 100,000 stock options under the Incentive Plan.[20]

The Company's executive compensation program was handled separately by the Compensation Committee, and generally consisted of a base salary, the opportunity to earn a bonus based on achievement of performance objectives, and

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[18] ¶¶ 47-49.

[19] ¶¶ 54-56.

[20] ¶ 56.

an annual award of stock options under the Incentive Plan.[21] The Compensation Committee Charter sets forth requirements for the Committee in performing its function of evaluating and determining executive compensation. The Compensation Committee Charter requires, among other things, that the Committee: (a) be comprised of at least two "independent" directors as determined under NASDAQ rules and the Securities Exchange Act of 1934; (b) evaluate executive compensation at least annually and make recommendations to the full Board for approval; and (c) consider various factors in connection with its evaluation, including "the Company's performance," "relative stockholder return," and the "value of compensation packages" at comparable companies.[22]

As CEO, Pourhassan historically received generous compensation: from 2013 to 2018 his compensation substantially exceeded CEO compensation at comparable companies.[23] During that period, Pourhassan's highest annual compensation totaled approximately $1.3 million, and the largest annual stock grant he received was worth approximately $696,000.[24]

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[21] ¶¶ 57-58; *see also See* Unsworn Declaration of Mark Richardson ("Richardson Declaration" or "Richardson Decl."), Exhibit 3. References to "Ex." are exhibits to the Richardson Declaration.

[22] ¶¶ 58-60.

[23] ¶¶ 64-65.

[24] ¶ 64.

E. Pourhassan and His Cronies Overhaul the Board and Eliminate Meaningful Oversight at the Company

Despite receiving generous compensation, Pourhassan made incessant demands for more, causing significant disruption at the Company and on the Board.[25] Pourhassan routinely and aggressively lobbied the Board for more compensation, using various dishonest and self-serving tactics.[26]

Pourhassan's repeated and improper demands reached a climax in June 2019, when the Compensation Committee (including Dockery and Gould) was reviewing Pourhassan's annual compensation for fiscal year 2019.[27] Gould and Dockery confronted Defendants Pourhassan and Kelly regarding misrepresentations they had made in connection with the approval of Pourhassan's 2019 bonus.[28] In clear retaliation for Dockery and Gould's attempt to exercise appropriate oversight over executive compensation, Pourhassan and Kelly caused the Board to remove Dockery and Gould from the Board-approved slate of directors who would stand for reelection in September 2019.[29]

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[25] ¶¶ 66-72.

[26] *Id.*

[27] ¶ 73.

[28] ¶¶ 74-78.

[29] ¶ 78.

Additional changes to the Board and the oversight structure at the Company also helped "clear the way" for the egregious misconduct pled in the Complaint. By the end of 2018, three other directors who routinely pushed back on Pourhassan's compensation demands resigned from the Board: Caracciolo, Denis Burger, Bruce Montgomery.[30] Another director, Richard Pestell, who also served as Chief Medical Officer and frequently disagreed with Pourhassan's conduct and management of the Company, was terminated purportedly for "cause" on July 25, 2019, over the objections of Dockery and Gould.[31]

CytoDyn also entered into several related-party transactions that further undermined the Board's independence. On July 15, 2019, the Company entered into "Consulting Agreements" with Kelly and Welch specifying that they would take on the roles of Chief Science Officer and Strategy Advisor, respectively. The Consulting Agreements further provided that Kelly and Welch each would be paid $20,000 per month in cash and would receive stock options in addition to their annual grants.[32] Accordingly, the August 2019 Proxy acknowledged that Kelly and Welch were no longer considered "independent" directors.[33] In September 2019,

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[30] ¶ 79.

[31] ¶ 81.

[32] ¶ 82.

[33] ¶ 84.

Kelly and Welch were granted stock option awards of 750,000 shares and 250,000 shares, respectively, pursuant to the Consulting Agreements.[34]

Finally, by early January 2020, the Board terminated its long-time external general counsel at Lowenstein Sandler LLP.[35]

II. PROCEDURAL HISTORY AND PLAINTIFFS' EFFORTS IN THE LITIGATION

A. Plaintiffs' Books and Records Investigation

Almost immediately after the Company's disclosure of the January 2020 Awards, Plaintiffs served demands for inspection of the Company's books and records pursuant to 8 *Del. C.* § 220 ("Section 220"). Plaintiffs Myers and Peterson served their demand on February 6, 2020, and Plaintiffs Dockery, Caracciolo, and Gould served their demand on March 6, 2020 (together, the "Demands").[36] Among other things, the Demands set out detailed bases to investigate the outsized Awards, as well as Plaintiffs' concerns over corporate misconduct and a lack of oversight at the Company.

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[34] ¶ 87.

[35] ¶ 121.

[36] *See* Trans. ID 65682658 (Demands attached as Exhibit A). KEC Pension Plan did not serve its own demand but coordinated with the other Plaintiffs and their counsel in procuring and investigating the Company's books and records. In addition, Labaton Sucharow LLP was paid hourly for the books and records investigation, and, therefore, all of Labaton's time and expense in connection therewith is excluded from Plaintiffs' fee application. *See* Richardson Decl. ¶ 4.

B. With Litigation Imminent, CytoDyn Hires a New General Counsel and Adds an Independent Director to the Board

Soon after service of the Demands, CytoDyn hired a new general counsel. On March 16, 2020, the Company entered into an employment agreement with Arian Colachis to serve in that role.[37] The previous general counsel, who had been at the Company during the approval of the January 2020 Awards (*see* SLC Br. at 25-26) appears to have left the Company around this time.

In response to the Demands, the Company produced internal books and records on April 7, 2020, and April 16, 2020. The production totaled 23 documents and 181 pages. After Plaintiffs and their counsel reviewed the documents, which made clear the Awards would not withstand judicial scrutiny, Plaintiffs' counsel, on a phone call on April 16, 2020 with CytoDyn's counsel, made a demand that the Company rescind the Awards to avoid litigation. Richardson Decl. ¶ 6. The Company refused to rescind the Awards.

On April 20, 2020, mere days before the Complaint was filed, the Board appointed an additional independent director to serve on the Board, Samir Patel.[38]

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[37] *See* Ex. 4 (Employment Agreement between CytoDyn and Arian Colachis, dated March 16, 2020), *available at*: https://www.sec.gov/Archives/edgar/data/1175680/000119312520220598/d923315dex1063.htm.

[38] *See* CytoDyn Press Release (April 20, 2020), *available at*: https://www.cytodyn.com/newsroom/press-releases/detail/419/cytodyn-appoints-samir-patel-m-d-to-its-board-of.

Mr. Patel would later be appointed to the SLC almost immediately after the Complaint was filed.

C. The Verified Stockholder Derivative Complaint

Plaintiffs filed the Verified Stockholder Derivative Complaint on April 24, 2020. The Complaint incorporates information obtained through a detailed investigation by Plaintiffs and Plaintiffs' counsel of the public record and materials produced by the Company pursuant to Section 220.

1. The December 2019 Awards

With the independence and oversight functions of the Board completely undermined, and with Caracciolo, Dockery, Gould, and others who historically protected the Company from Pourhassan's self-interested conduct out of the way, Pourhassan and his cronies pounced. On December 19, 2019, the Board awarded themselves and other insiders a total of ***9,300,000*** stock options and warrants (the "December 2019 Awards"), then valued at approximately $2.7 million.[39] Pourhassan himself received four million share awards, evenly split between stock options and warrants.[40] The December 2019 Awards had an exercise price of $0.63 per share, the closing price of the Company's common stock on December 19, 2019. The December 2019 Awards were distributed as follows:

[39] ¶¶ 93-97.

[40] *Id.*

Name	**Stock Options / Warrants**
Pourhassan	4,000,000
Kelly	1,250,000
Klump	750,000
Naydenov	750,000
Welch	750,000
4 Other Insiders	1,800,000
Total	**9,300,000**

Board minutes and other documents obtained in connection with Plaintiffs' Section 220 investigation revealed that the "process" the Board followed in approving the December 2019 Awards was entirely a sham.[41] The December 2019 Awards were the result of a non-routine, *ad hoc* meeting that lasted less than an hour and that was initiated by Pourhassan.[42] Earlier in 2019, CytoDyn's directors and officers already received their regular, annual grants of stock options pursuant to the Incentive Plan.[43] The December 19, 2019 meeting was scheduled hastily, at night, without any advisors or consultants in attendance, and at the time the lone "independent" member of the Compensation Committee (Defendant Naydenov) was out of the country and unable to attend.[44]

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[41] ¶¶ 5-9, 93-110, 117-118.

[42] ¶¶ 98-102.

[43] ¶¶ 87-88, 98.

[44] ¶¶ 99-100.

The December 2019 Awards also exceeded the number of shares available under the Incentive Plan and violated the Compensation Committee Charter.[45] As of December 19, 2019, just over 9 million shares remained available for issuance under the Incentive Plan. The 9.3 million shares issued in the December 2019 Awards exceeded that limit, but two million of the shares (for Pourhassan) were issued as warrant shares purportedly "outside of" the Incentive Plan.[46] In fact, the Board expressly recognized that the December 2019 Award would exceed the Incentive Plan's reserves, and that 2 million shares "must be" awarded as "a Warrant due to limited availability of shares under the [Incentive Plan]."[47]

The Board's decision to go "outside of" the Incentive Plan by awarding two million warrant shares to Pourhassan was particularly unfair given that the Company represented to stockholders that the Incentive Plan would be the sole vehicle for awarding equity compensation to insiders.[48] In addition, the stated rationale was simply wrong: the plain language of the Incentive Plan unambiguously covers "Share purchase warrants."[49]

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[45] ¶¶ 98-110.

[46] ¶¶ 9, 96.

[47] *Id.*

[48] ¶ 132.

[49] ¶ 106.

Further, the Board violated the Compensation Committee Charter by failing to consider "the Company's performance, relative [to] stockholder return, the value of compensation packages of chief executive officers at comparable companies, and the incentive awards given to the Company's CEO in past years" in determining whether to approve Pourhassan's December 2019 Award.[50] In addition, the Compensation Committee was required to make a recommendation for the "full Board" to approve, "provided that the CEO shall not be present during voting or deliberations on the CEO's compensation."[51] The Board ignored this requirement in several respects: (a) the Compensation Committee never met separately to deliberate on the December 2019 Awards and never made a recommendation to the "full Board"; (b) the "full Board" did not approve the December 2019 Awards, because Naydenov (the only "independent" member of the Compensation Committee) was not present and did not vote; and (c) Pourhassan was present during voting and deliberations regarding his own compensation.[52]

Finally, the December 19, 2019 meeting also suspiciously preceded CytoDyn's imminent release of non-public, highly positive material information

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[50] ¶¶ 102-105.

[51] ¶ 107.

[52] *Id.*

regarding one of its clinical trials.[53] As Defendants anticipated, after this clinical data was disclosed two business days later, CytoDyn's stock price soared by over 55 percent, and the December 2019 Awards were almost immediately "in-the-money" by more than $3.2 million in the aggregate.[54]

2. The January 2020 Awards

Defendants Pourhassan, Kelly, Naydenov, and Welch were not done improperly enriching themselves. Approximately one month after granting themselves the December 2019 Awards, the directors again sought to unjustly reward themselves at the expense of the Company and its stockholders—this time to the tune of ***11.65 million*** "performance shares" that were not subject to any exercise price or long-term vesting schedule (the "January 2020 Awards").[55]

Like the December 2019 Awards, the January 2020 Awards were the product of another hastily arranged meeting that Pourhassan orchestrated.[56] On January 18, 2020 (a Saturday), the Board approved the January 2020 Awards without any advisors' presence or input.[57] Again, the Board approved the January 2020 Awards without first receiving a recommendation from the Compensation Committee, and,

[53] ¶¶ 111-117.

[54] ¶ 115.

[55] ¶¶ 119-124.

[56] ¶ 123.

[57] ¶¶ 134-138.

again, completely disregarded both the Compensation Committee Charter and the Incentive Plan's share limitations.[58] The January 2020 Awards are even more egregiously unfair than the December 2019 Awards—they had no exercise price or trading restrictions, and using the Company's stock price on the grant date, amounted to an additional $12.23 million in compensation for the recipients, as follows:

Name	**"Performance" Shares**
Pourhassan	6,000,000
Kelly	2,500,000
Welch	1,500,000
Naydenov	1,500,000
Eastwood	150,000
Total	**11,650,000**

The January 2020 Awards were memorialized in the form of a "Performance Share Award Agreement" for each recipient, and would vest when three conditions were met: (a) "[t]he Company achieves Breakthrough Therapy Designation within 6 months from January 27, 2020"; (b) "[t]here are enough shares available for these awards"; and (c) "[t]here are no legal issues related to these awards, as determined at the times Number 1 and Number 2 have been met."[59]

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[58] *Id.; see also* ¶¶ 123-133.

[59] ¶ 124.

The third condition that there be “no legal issues related to these awards” demonstrates that the directors were aware that the awards could expose the Company to legal action and expense, yet they approved them anyway.[60] In that regard, Defendants’ bad faith conduct is responsible for this lawsuit, and this lawsuit—which raised legal issues relating to the January 2020 Awards—is in part responsible for the fact that the awards did not vest.

3. Counts and Prayer for Relief

The Complaint asserts four claims for relief. Count I is a derivative breach of fiduciary duty claim against Defendants Pourhassan, Kelly, Naydenov, Welch, and Klump (collectively, the “Board Defendants”), which asserts that the Board Defendants breached their duties of loyalty to the Company by granting to themselves and each other the egregiously unfair December 2019 Awards and January 2020 Awards.[61]

Count II asserts that the Board Defendants engaged in bad faith for knowingly and intentionally violating their fiduciary duties, including because they, among other things, (a) intentionally ignored the processes and procedures established in the Compensation Committee Charter, and (b) intentionally granted the Awards in excess of the share reserves available under the stockholder-approved Incentive

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[60] ¶ 125.

[61] ¶¶ 153-159.

Plan, and in contravention of the representations made to stockholders concerning that plan being the sole vehicle for issuing equity compensation.[62]

Count III asserts a claim for unjust enrichment against all Defendants for their receipt of the excessive, unfair, and spring-loaded Awards that resulted from the Board Defendants' breaches of duty to the Company.[63]

Count IV asserts a claim for corporate waste against the Board Defendants for their approval of the Awards, on the basis that the Awards served no rational business purposes or legitimate corporate objective and amounted to a gift of Company assets to the Defendants for no consideration.[64]

Finally, the Complaint's Prayer for Relief seeks the following remedies: (a) rescission of the Awards; (b) a declaration that the Board Defendants breached their fiduciary duties to the Company; (c) monetary damages against all Defendants for their breaches of fiduciary duty, unjust enrichment, bad faith misconduct, and/or waste; and (d) any other relief that this Court deems just and proper. In addition, the Complaint sought recovery of costs and disbursements of Plaintiffs and their counsel, including attorneys' fees.[65]

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[62] ¶¶ 160-165.

[63] ¶¶ 166-169.

[64] ¶¶ 170-174.

[65] ¶¶ 69-70.

D. The Formation of the SLC and the SLC's Motion to Stay

Almost immediately after the Complaint was filed, the Board—having no legitimate basis to move for dismissal of the Complaint and desperate to avoid plenary discovery directed by Plaintiffs—adopted resolutions forming the SLC on May 4, 2020. The Board appointed two outside directors, Alan Timmins and Samir Patel, to serve as members of the SLC.

On May 22, 2020, after conferring with Plaintiffs' counsel, the SLC moved to stay this action so that it could investigate the allegations raised in the Complaint.[66] The Motion to Stay sought an order staying the case for "six months," which presumably would have resulted in a stay until approximately January 2021, *i.e.*, eight months since the filing of the Complaint.[67]

Plaintiffs did not challenge the formation of the SLC or its right to investigate but opposed the length of the stay that the SLC requested, on the basis that the facts uncovered during the Section 220 investigation and pled in the Complaint made liability clear and did not require a lengthy amount of time to investigate. On June 8, 2020, Plaintiffs filed their Opposition to the Special Litigation Committee's

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[66] Trans. ID 65653505 (the "Motion to Stay").

[67] Motion to Stay ¶ 1.

Motion to Stay, which also alerted this Court and the SLC to additional post-Complaint misconduct.[68]

On July 2, 2020, this Court held oral argument on the Motion to Stay and granted a five-month stay until December 1, 2020 for the SLC to conduct its investigation.[69]

E. Plaintiffs' Participation in the SLC's Process and Investigation

During the course of the SLC's investigation, Plaintiffs and their counsel repeatedly interacted with the SLC and/or the SLC's counsel for purposes of (a) pushing the SLC to take steps to protect the Company and the claims at issue, (b) alerting the SLC to post-complaint misconduct that further illustrated Plaintiffs' assertions that Company management lacked meaningful oversight, and (c) providing the SLC with information to assist in its investigation and pursuit of meaningful governance reforms at the Company.

Shortly before the SLC was formed, Pourhassan and Kelly exercised stock options (including 2 million options awarded to Pourhassan challenged in this litigation) and sold the stock in late April and early May 2020.[70] On a May 14, 2020 phone call, Plaintiffs' counsel alerted the SLC's counsel of the sales and requested

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[68] Trans. ID 65682658 (the "Motion to Stay Opp."). *See* Motion to Stay Opp. ¶¶ 7-10, 17-21.

[69] Trans. ID 65749467.

[70] *See* Motion to Stay Opp. ¶ 19 & Ex. F.

that the SLC take steps to prevent future sales and/or dissipation of stock at issue in the litigation. Initially, the SLC resisted the request. In response to the resistance, Plaintiffs' counsel followed up the call with a formal letter, dated May 15, 2020, demanding that the SLC take steps to restrict the Defendants from selling additional stock, or escrow the proceeds of such sales, and to recover the proceeds from Pourhassan for his exercise and sale of the 2 million option shares challenged by the Complaint.[71] Plaintiffs' efforts caused the SLC to impose conditions on future transactions that preserved the challenged awards pending resolution of this litigation.[72]

In July 2020, Defendant Scott Kelly, Chairman of the Board, circumvented the SLC and this Court's stay order by improperly contacting Anthony Caracciolo, the representative of Plaintiff Caracciolo Family Trust, to discuss this action. Dr. Kelly attempted to threaten and intimidate Plaintiffs by saying that if this lawsuit was not "dropped," the Company would publicly "blame" Plaintiffs if the Company was unable to up-list onto NASDAQ and "will sue" them, which would cause

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[71] Ex. 5 (May 15, 2020 Ltr.).

[72] *See* SLC's Motion to Stay at ¶ 27 ("the SLC has formally directed the Defendants—pursuant to its broad authority under its forming resolutions—not to exercise or sell any of the equity issued in the challenged awards going forward, provided that they may exercise or sell any such awards if they agree to place the proceeds into an escrow account for the duration of the investigation").

Plaintiffs to suffer economic and reputational harm.[73] Plaintiffs' counsel promptly alerted the SLC and this Court on July 18 and July 20, 2020, respectively.[74]

On September 16, 2020, Plaintiffs and their counsel met with the SLC and its counsel via a Zoom teleconference that lasted approximately an hour and a half. Plaintiffs' counsel prepared a slide show presentation that provided the SLC and its counsel with an overview of the factual allegations pled in the Complaint, alerted the SLC and its counsel to additional post-complaint conduct evidencing a lack of controls and the dire need for corporate governance reforms,[75] and proposed a set of governance reforms that Plaintiffs urged the SLC to pursue in connection with any potential resolution of this litigation.

Plaintiff representatives Dockery, Caracciolo, and Gould personally attended the teleconference and answered questions of the SLC's counsel concerning the allegations of the Complaint, their personal experiences with Defendants and the Company's operations from the time they served as directors, and their departures

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[73] *See* Ex. 6 (July 20, 2020 Ltr.).

[74] *Id*.

[75] In addition to the post-complaint stock sales and Dr. Kelly's attempts to harass Plaintiffs to drop their suit, this conduct included the Board's June 2020 decisions to (i) increase Dr. Pourhassan's salary to $1 million per year and extend his severance package from 12 to 18 months, (ii) approve an amendment to the Incentive Plan, removing both the annual limitation on the number of shares the Board may grant and the aggregate limitation on the number of RSUs the Board may grant, and (iii) approve awards of 225,000 stock options for each of Defendants Naydenov and Welch and both members of the SLC.

from the Board. Following the teleconference, Plaintiffs' counsel sent the SLC's counsel a letter detailing additional information that the SLC requested.[76]

III. THE SLC'S FINDINGS

The SLC's factual findings and conclusions are set forth in detail in the SLC's Brief.[77] To avoid unnecessary repetition, Plaintiffs highlight only the findings and conclusions of particular note.

The SLC determined that Plaintiffs' claims for breach of fiduciary duty in connection with the Awards "**Likely Have Merit**."[78] As to the December 2019 Awards, the SLC determined that they "**Likely Were Not Entirely Fair,**" [79] and made factual conclusions that were first identified by Plaintiffs in connection with their Section 220 investigation and pled in the Complaint:

- The December 2019 Awards likely were not entirely fair because, "[i]n short, no meaningful process was employed to protect the stockholders' interests." SLC Br. at 36; *compare with* ¶¶ 98-109.

- None of the directors "engaged with the proposal itself or gave much in the way of consideration to the Board's process." SLC Br. at 37; *compare with* ¶¶ 102-110.

- "Pourhassan drove the timing and amounts of the awards, and he received the largest number of options and warrants." SLC Br. at 37; *compare with* ¶¶ 97-101.

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[76] Ex. 3 (Sept. 29, 2020 Ltr.).

[77] *See* Trans. ID 66288552 ("SLC Br.") at 6-28, 33-48.

[78] SLC Br. at 33 (bold and capitalization in original).

[79] SLC Br. at 36 (bold and capitalization in original).

- "No advisors were involved in determining the amount of the awards or evaluating the fairness of the value to the Company or the stockholders." SLC Br. at 37; *compare with* ¶¶ 100-102, 106.

- The "Compensation Committee was not substantively involved." SLC Br. at 37; *compare with* ¶¶ 107-109.

- 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 [Incentive] Plan." SLC Br. at 37; *compare with* ¶¶ 98-106.

- "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." SLC Br. at 40; *compare with* ¶¶ 93-98, 106-110, 117-118.

As to the January 2020 Awards, the SLC found that they "**Were Not Entirely Fair,**"[80] and reached conclusions first identified by Plaintiffs in the Complaint:

- "Pourhassan initiated and orchestrated the process: he proposed the awards and drove the timing of their consideration" and "received the lion's share of the awards." SLC Br. at 44; *compare with* ¶¶ 123, 134-136.

- "[N]o objective data was considered in determining the appropriate form or amount of the awards." SLC Br. at 44; *compare with* ¶¶ 134-137.

- "No consideration was given to valuation of the awards or the stockholders' likely reaction." SLC Br. at 44; *compare with* ¶¶ 137-139.

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[80] SLC Br. at 44.

- "The awards were outside of the [Incentive] Plan and consisted of as-yet unauthorized shares." SLC Br. at 44; *compare with* ¶ 132.

- "The Compensation Committee was not substantively involved before the January 18, 2020 meeting" and it "received [no] advice or analysis supporting the proposal. . . ." SLC Br. at 44; *compare with* ¶¶ 134-137.

Moreover, the SLC found that "[a]lthough the January 2020 Awards expired by their terms so that there is nothing to be done in terms of forfeiture," the above facts, first identified by Plaintiffs, "suggest a pattern of behavior with respect to the Board's compensation practices, which influenced the SLC's settlement position" and led to the meaningful corporate governance benefits embodied in the Settlement. SLC Br. at 46; *compare with* ¶¶ 127-137.

IV. THE SETTLEMENT

A. The Memorandum of Understanding

On December 15, 2020, following several weeks of settlement negotiations, the SLC and Defendants reached a settlement in principle. SLC Br. at 48-50. The settlement in principle was reflected in a Memorandum of Understanding ("MOU") filed with this Court on December 18, 2020.[81]

On January 13, 2021, after Plaintiffs and their counsel had spent hours evaluating and discussing the terms of the MOU, Plaintiffs' counsel had a telephonic conference with the SLC's counsel to discuss the proposed terms of the settlement.

[81] Trans. ID 66198396.

The SLC's counsel provided a general overview of the negotiations and "sticking points" in connection therewith, such that Plaintiffs' counsel were satisfied that the negotiations were hard-fought and that the SLC vigorously represented the Company's and stockholders' interests in extracting the benefits obtained in the Settlement.

Plaintiffs' counsel also made several suggestions to improve the Settlement, two of which the SLC successfully obtained from Defendants and incorporated into the final Settlement. *First*, per Plaintiffs' suggestion, the Compensation Committee is required to receive a *written* recommendation from its independent consultant on matters of director and executive compensation. The MOU did not require the recommendation to be in writing. *See Id.* § 2(g)(ii).

Second, Plaintiffs' counsel demanded that the contemplated release (a) be appropriately limited in scope to claims that were or could have been alleged on behalf of CytoDyn in the Complaint; and (b) expressly carve out a claim asserted by Plaintiffs on CytoDyn's behalf against Pourhassan in Western District of Washington federal court under Section 16(b) of the Securities Exchange Act of

1934.[82] These efforts also were successful. *See* Settlement Agreement § 2.18[83]; SLC Br. at 51.

B. The Settlement is Finalized

On January 27, 2021, the SLC filed the final Settlement and its brief. Plaintiffs and their counsel spent hours evaluating, reviewing, and discussing the terms of the Settlement.[84] On February 4, 2021, Plaintiffs and their counsel participated in a teleconference with the SLC's counsel. The SLC's counsel provided an overview of the terms of the Settlement, provided their views of the Settlement terms and the benefits to the Company, and answered questions of Plaintiffs and their counsel.

Following the February 4, 2021 teleconference, Plaintiffs and their counsel determined that the Settlement is fair and reasonable and provides substantial benefits to the Company and its stockholders. The Settlement provides both

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[82] *Alpha Venture Capital Partners LP, et al. v. Pourhassan*, Case No. 3:20-cv-05909-JLR (W.D. Wash.). On March 12, 2021, the Washington federal court granted Pourhassan's motion to dismiss, and Plaintiffs are currently considering whether to appeal that decision. All time and expenses incurred by Plaintiffs' counsel in connection with the Western District of Washington action, which also was undertaken on a contingent basis, have been recorded separately and are excluded from this fee application.

[83] Trans. ID 66288552.

[84] Of the total 1,019.85 hours comprising this fee application, a combined total of 44.1 hours were spent on reviewing, evaluating, and discussing with Plaintiffs and the SLC's counsel the terms of the proposed Settlement after it was finalized.

quantifiable economic benefits and corporate governance benefits to the Company. As the SLC recognizes, the "Settlement provides the Company with substantial benefits reflective of the SLC's determinations concerning the merit of the claims." SLC Br. at 49.

ARGUMENT

This Court may award attorneys' fees and expenses to counsel whose efforts created a common fund or conferred a common corporate benefit.[85] A benefit warranting an award of attorneys' fees may be achieved through settlement, a judgment at trial, or where the case has been rendered moot.

If this Court approves the Settlement proposed by the SLC and Defendants—and Plaintiffs urge this Court to do so given the substantial benefits the Settlement will provide to CytoDyn—Plaintiffs' claims will be released and rendered moot. In a situation involving mooted claims, fees may be awarded if (a) the litigation was meritorious when filed, (b) a corporate benefit was produced prior to judicial resolution; and (c) the lawsuit and the benefit were causally related. *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012). Plaintiffs meet these requirements here.

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[85] *See, e.g.*, *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1255 (Del. 2012); *Tandycrafts, Inc. v. Initio Pr's*, 562 A.2d 1162, 1164 (Del. 1989); *San Antonio Fire & Police Pension Fund v. Bradbury*, 2010 WL 4273171, at *7 (Del. Ch. Oct. 28, 2010).

I. THE SLC DETERMIEND THAT PLAINTIFFS' CLAIMS HAVE MERIT AND WOULD LIKELY SUCCEED AT TRIAL

A claim is "meritorious when filed" if it is capable of surviving a motion to dismiss and the plaintiff has knowledge of "provable facts" that provide a "reasonable likelihood of ultimate success." *Chrysler Corp. v. Dann*, 223 A.2d 384, 387 (Del. 1966). Plaintiffs' breach of fiduciary duty claims challenged acts of self-dealing by Defendants that were subject to the entire fairness test—Delaware's most exacting standard of review for claims of fiduciary misconduct. *See In re Invs. Bancorp, Inc. S'holder Litig.*, 177 A.3d 1217 (Del. 2017) (citing *Telxon Corp. v. Meyerson*, 802 A.2d 257, 265 (Del. 2002)). Plaintiffs' claims were well-pled and Defendants could not credibly have moved to dismiss.

Furthermore, if this action went to trial, Plaintiffs would probably prevail because, as the SLC's investigation determined, Defendants were unlikely to carry their burden of proving that the Awards were entirely fair. *See* SLC Br. at 36, 44.

If the Settlement is approved, then there will be no need for a trial and Plaintiffs' claims will be rendered moot. The Settlement will substantially eliminate the Awards that Plaintiffs challenged, and governance reforms will be implemented to preclude recidivist acts of self-dealing by Defendants (or their successors). The Settlement is a significant victory for CytoDyn and its stockholders, and precisely the result Plaintiffs set out to accomplish in this action. Plaintiffs' counsel undertook

the representation on a fully contingent basis and now seek an award of attorneys' fees and expenses for the results achieved.

II. THIS ACTION RESULTED IN IN SUBSTANTIAL ECONOMIC AND CORPORATE GOVERNANCE BENEFITS FOR CYTODYN

The Court of Chancery evaluates fee applications using the familiar *Sugarland* factors: (a) results achieved; (b) efforts of counsel and time invested; (c) the contingent nature of counsel's fee; (d) difficulty of the litigation; and (e) counsel's standing and ability. *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980).

The results achieved in this action are exceptional. As set forth in the accompanying declaration of Plaintiffs' valuation expert, Andrew P. Restaino ("Restaino Decl."),[86] the rescission of the December 2019 Awards and additional stock options from Pourhassan (together, the "Rescinded Awards") represents an economic benefit for the Company valued at approximately $15,647,828, while the expiration and Defendants' forfeiture of the January 2020 Awards is valued at approximately $41,138,480.

In addition, the lawsuit prompted fundamental changes to CytoDyn's approach to corporate governance: including the addition of a new general counsel,

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[86] Mr. Restaino's Declaration is attached as Exhibit 2 to the Richardson Declaration. Mr. Restaino is the founder of Technical Compensation Advisors, Inc., an independent boutique consulting firm specializing in compensation matters.

a new independent director, and meaningful reforms that dramatically will (a) improve the process of setting executive and director compensation, and (b) eliminate the problematic practices that Plaintiffs identified. The governance reforms included in the Settlement directly target the allegations of the Complaint and should prevent the sort of abusive self-dealing transactions that were challenged in this action.

For achieving these results, Plaintiffs seek a Fee and Expense Award of $4,134,797.34 in attorneys' fees and expenses, inclusive of $2,934.53 in out-of-pocket costs, which represents approximately 10% of the economic benefit achieved by this litigation, plus a reasonable fee in connection with the substantial corporate governance benefits conferred to the Company.

A summary of Plaintiffs' requested Fee and Expense Award is attached as Exhibit 1 to the Richardson Declaration. As explained below, Plaintiffs' request is supported by the *Sugarland* factors and is within the range of fees awarded in similar cases.

A. The Rescinded Awards Provide a Benefit for the Company in Excess of $15 Million

The benefit achieved by the litigation is the predominant factor driving the *Sugarland* analysis.[87] As *Sugarland* explicitly recognized, in a derivative case

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[87] *See Ams. Mining Corp.*, 51 A.3d at 1257-58 (quoting *Sugarland,* 420 A.2d at 147).

involving the rescission of equity awards "the benefit to the corporation is measured in dollars and there is a direct causal relationship between the actions of counsel and creation of the 'entire' fund or benefit conferred."[88]

For purposes of measuring the value of a corporate benefit produced by litigation, rescinded equity awards are treated as a monetary benefit to the corporation and/or a "common fund." Indeed, following *Sugarland*, the Court of Chancery awarded attorneys' fees on a common fund basis in several cases involving the rescission of stock awards.[89] As set forth in the accompanying declaration of Plaintiffs' valuation expert, Mr. Restaino, using the Company's stock price on the date that Pourhassan sold two million of his option shares, the rescission of the December 2019 Awards (and the additional awards rescinded from Pourhassan) (the "Rescinded Awards") provides CytoDyn with a monetary benefit of approximately

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[88] *Sugarland*, 420 A.2d at 152; *see also Ams. Mining Corp.*, 51 A.3d at 1218-19 (affirming award of attorneys' fees based on common fund recovery where defendant was permitted to pay damages by returning stock or repaying its cash value).

[89] *See, e.g., In re Triarc Cos. Class & Deriv. Litig.*, 791 A.2d 872, 874 n.1 (Del. Ch. 2001) (awarding $2.5 million in attorneys' fees based on settlement consideration comprised of cancellation of stock options and note from defendants payable to company); *Baupost Ltd. P'ship 1983 A-1 v. Providential Corp.*, 1993 WL 401866, at *3 (Del. Ch. Sept. 3, 1993) (settlement providing for cancellation of restricted stock and stock options created common fund of approximately $2.5 million); *Moses v. Pickens*, 1982 WL 17825, at *1 (Del. Ch. Nov. 10, 1982) (cancellation of stock options created common fund of $4 million).

$15,647,828.[90] Moreover, as the SLC recognized, CytoDyn's "stockholders will recognize a benefit in the form of reduced dilution" due to the rescission. SLC Br. at 51.

B. Plaintiffs Are Entitled to Partial Credit for Defendants' Forfeiture of the January 2020 Awards, Which Were Worth Over $41 million

In addition to the Rescinded Awards, Mr. Restaino determined that the expiration and Defendants' forfeiture of the January 2020 Awards provides a monetary benefit to the Company valued at approximately $41,138,480.[91] Of course, Plaintiffs recognize that their lawsuit was not the sole cause of this benefit. While another of the vesting conditions was not met (the obtaining of a Breakthrough Therapy Designation from the FDA), ultimately, it is impossible to know how the situation would have developed if Plaintiffs did not raise a meritorious challenge to the fairness of the January 2020 Awards.

According to the vesting requirements attached to the January 2020 Awards, Defendants needed to achieve Breakthrough Therapy designation by the end of July 2020. Plaintiffs filed their Complaint over three months before this deadline, which likely impacted Defendants' actions (and perhaps inaction) with respect to

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[90] Ex. 2 (Restaino Decl.) ¶¶ 16-19 & Exhibit B thereto. The SLC uses a different date (December 15, 2020) and stock price ($3.46) in its brief (*see* SLC Br. at 50), but the calculation provided therein appears to be incorrect.

[91] Ex. 2 (Restaino Decl.) ¶ 23.

meeting their self-imposed timetable. Before the Complaint was filed, Defendants actively sought to achieve Breakthrough Therapy designation through various filings with the FDA; after the filing of the Complaint, Defendants' quest to achieve Breakthrough Therapy designation vanished.[92] Plaintiffs do not believe that the filing of the Complaint and the change in Defendants' conduct thereafter was a mere coincidence.

More importantly, the six-month window was arbitrary, and in the absence of Plaintiffs' challenge, there is no reason to believe that Defendants would not have decided to extend or waive the time period, or even resuscitate the awards after they had expired. Defendants certainly understood, however, that any such extension, waiver, or resuscitation would likely be a non-starter given the pendency of Plaintiffs' lawsuit. Moreover, Defendants now understand that, if the Settlement is approved, the corporate governance reforms coming to the Company will prevent such behavior going forward.

The Company disputes that Plaintiffs are entitled to a fee in connection with the elimination of the January 2020 Awards. The expiration of these Awards and

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[92] *See* CytoDyn Press Release, dated January 13, 2020 (available at: https://www.cytodyn.com/newsroom/press-releases/detail/372/cytodyn-files-for-breakthrough-therapy-designation-with-the); CytoDyn Press Release, dated April 3, 2020 (available at: https://www.cytodyn.com/newsroom/press-releases/detail/407/cytodyn-files-request-with-fda-for-preliminary-meeting-for).

Defendants' resulting forfeiture of ***11.65 million shares*** with no exercise price or vesting schedule (*i.e.*, providing *nothing* to CytoDyn in return), however, is undoubtedly a benefit worth tens of millions of dollars. In addition, there is a rebuttable legal presumption that Plaintiffs' lawsuit and this benefit were causally related, at least in part.[93] The presumption is a strong one, and Defendants bear the burden to show the absence of "any" causal connection between the benefit and the litigation.[94] Further, a plaintiff's entitlement to a mootness fee is not lost simply because the benefit has more than one cause, as is the case here. In other words, "the benefit need not be directly and entirely attributable to the underlying litigation" for plaintiff to receive a mootness fee.[95]

Even if Defendants pushed to achieve Breakthrough Therapy designation within six months, this litigation presented a formidable obstacle to Defendants' ability to reap the benefits of the January 2020 Awards, or to extend or waive the

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[93] *See*, *e.g.*, *EMAK Worldwide*, 50 A.3d at 433 ("when a defendant took an action after the suit was filed that mooted a claim, there is a rebuttable presumption the suit and the benefit were causally related. . . .").

[94] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 852 (Del. Ch. 1998); *see also Kuo v. Genius Prods.*, 2009 WL 2913618, at *1 (Del. Ch. Aug. 26, 2009) (defendants failed to produce evidence to rebut "strong presumption" of causal connection between lawsuit and "abandonment" of challenged transaction).

[95] *See*, *e.g.*, *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *6 (Del. Ch. Nov. 27, 1990); *see also San Antonio*, 2010 WL 4273171, at *11 (presumption of causation not rebutted because defendant failed to show "that the lawsuit in no way caused the benefits").

timing condition. In fact, because the shares would not vest if there were unresolved "legal issues" concerning the January 2020 Awards, it is inconceivable that Defendants did not consider this lawsuit when they took no action to preserve the awards, *e.g.*, by actively pursuing the Breakthrough Therapy designation, or by extending or waiving the timetable for achieving Breakthrough Therapy designation.

Having made a meritorious challenge to the January 2020 Awards, Plaintiffs deserve at least partial credit for the fact that those awards no longer exist. As the SLC recognized: "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." SLC Br. at 46. The SLC further recognized that Plaintiffs' challenge to the January 2020 Awards exposed "a pattern of behavior with respect to the Board's compensation practices, which influenced the SLC's settlement position." *Id*.

Courts recognize shared credit in similar circumstances where the causation question is convoluted or legitimately disputed. For instance, in *In re Plains Res., Inc. S'holders Litig.*, 2005 WL 332811, at *4 (Del. Ch. Feb. 4, 2005), this Court found that plaintiffs were entitled to partial credit for an increased tender offer because the litigation played some role in improving the deal even if "other factors, such as changing market conditions, might have played a larger role in the directors'

decision-making process." Plaintiffs have been awarded fees on a shared credit basis in other cases as well.[96]

Here, affording Plaintiffs 33 percent of the credit for this benefit is appropriate and equivalent to a monetary value of $13,575,698 (33% x $41,138,480 = $13,575,698). Providing Plaintiffs with 33 percent credit is consistent with the structure of the awards (because the absence of legal issues was one of three vesting conditions attached to the January 2020 Awards) and a reasonable allocation of the benefit considering the particular circumstances of this action.

C. The Corporate Governance Benefits Achieved Provide Substantial Additional Value to the Company

In addition to the nearly complete elimination of the challenged Awards, Plaintiffs' claims resulted in governance benefits that are transformational to CytoDyn and are particularly critical in light of the blatant misconduct and lack of oversight that harmed the Company.

The Board and the CEO treated CytoDyn as their personal "candy store." The allegations in the Complaint, substantiated by the Company's internal documents and the SLC's determinations, demonstrated that the directors consciously failed to monitor, oversee, or utilize the Compensation Committee, and failed to employ any other protective devices in connection with executive

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[96] *See*, *e.g.*, *In re Emerson Radio S'holder Deriv. Litig.*, 2011 WL 1135006, at *5-6 (Del. Ch. Mar. 28, 2011) (awarding plaintiff 50% credit).

officer compensation and the granting of equity to directors and executive officers. In response to Plaintiffs' detailed Demands and just prior to the Complaint, the Company retained a new general counsel (Ms. Colachis) and added an independent director to the Board (Mr. Patel). *See supra* at 14-15. In addition, the governance benefits achieved in the Settlement will make future breaches of the duty of care, breaches of the duty of loyalty, and bad-faith conduct significantly more difficult (if not impossible) for Defendants to carry out.

Specifically, the Settlement provides the following governance benefits targeted at the process issues uncovered by Plaintiffs and their counsel. ***First***, the Board will cause CytoDyn to explore adding a new director who meets NASDAQ standards for independence within the next 12 months. ***Second***, the Board will reconstitute the Compensation Committee to consist of at least three independent directors. ***Third***, the Board will cause CytoDyn to adopt a compensation policy that applies to CytoDyn's directors and executive officers and that must remain in place for five years (unless the stockholders approve an amendment to the policy in the intervening period), requiring:

- Director and executive compensation to be developed and approved by the Compensation Committee;
- The Compensation Committee to retain, and receive *written* recommendations from, an independent compensation advisor to assist in determining the type and levels for such compensation;

- The Compensation Committee to assess the compensation levels and structure of its peer group at least annually based upon such factors the Compensation Committee deems relevant after discussion with its independent compensation advisor;

- Director and executive compensation to be determined on an annual basis by the Compensation Committee, except for certain extraordinary circumstances; and

- Prohibition of performance bonuses for outside directors.[97]

By meeting with the SLC and making further suggestions, Plaintiffs and their counsel also assisted in obtaining the following corporate governance benefits:

- The Compensation Committee must receive a *written* recommendation from an independent compensation advisor. (Previously, there was no requirement that the recommendation be in writing.)

- Ensuring that the release provided to Defendants was appropriately limited in scope and expressly carved out Plaintiffs' claim to recover for the Company's benefit Pourhassan's illicit sale profits in an action filed in Washington federal court.[98]

Most importantly, the governance reforms achieved by the Settlement will effectively prevent Defendants from seeking to recreate the transactions Plaintiffs successfully challenged in this action. As the SLC put it, these "corporate governance reforms [are] aimed at preventing a recurrence of the process failures

[97] *See* SLC Br. at 51-52; *see also* Settlement Agreement ¶¶ 3.8-3.8.5. As recognized by the SLC, "[a]mong other benefits, the Governance Consideration is meant to prevent the recurrence of the failures of governance that gave rise to this action." SLC Br. at 52.

[98] *See supra* at 30-31, n.82.

that precipitated the Awards."[99] Governance reforms are particularly impactful here in light of the troubling "pattern of behavior with respect to the Board's compensation practices[.]"[100] Were it not for this lawsuit, the abusive pattern was highly likely to continue, and without governance reforms in place going forward, the Awards easily could have been resurrected in one form or another.

1. The valuation methodology utilized in *Emerson Radio* is appropriate here

Given the high likelihood of additional misconduct absent Plaintiffs' lawsuit, including a likelihood that the challenged Awards would have been renewed or reestablished in some form, the benefit resulting from Plaintiffs' lawsuit is substantial. The significance of the corporate governance benefits in this action is well illustrated by examining the risk that Defendants' "pattern" of abusive self-dealing would continue if no reforms were implemented.

In this respect, *In re Emerson Radio Shareholder Derivative Litigation*, 2011 WL 1135006 (Del. Ch. Mar. 28, 2011) is particularly instructive. In *Emerson Radio*, this Court calculated the benefit of governance reforms aimed at preventing future transactions similar to those challenged by the plaintiff. Specifically, this Court determined the monetary value of a provision designed to prevent a reoccurrence of

[99] SLC Br. at 2.

[100] SLC Br. at 46.

certain improper related-party transactions by multiplying the damages from the original harm (the $3.9 million recovered by the plaintiff) by an estimated risk (which this Court determined to be 25 percent) that similar transactions would occur in the future absent the prophylactic measures included in the settlement. On this analysis, this Court determined that there was a benefit of nearly $1 million on top of the monetary recovery plaintiff achieved. *Id*. at *5-6.

Using the same logic and positing the same 25% risk of future wrongdoing in the absence of prophylactic measures, the corporate governance reforms achieved here provide CytoDyn with an additional benefit valued at nearly $14 million (25% x 55,574,580 = $13,893,645). Plaintiffs' counsel would then receive a percentage of the calculated value as an additional fee for the corporate governance reforms conferred in the proposed Settlement (*e.g.*, 10% x $13,893,645 = $1,389,364). While this valuation exercise is admittedly theoretical and imprecise, this Court does not demand "mathematical exactitude" or "scientific precision" in quantifying a corporate benefit.[101]

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[101] *In re Compellent Techs., Inc. S'holder Litig.*, 2011 WL 6382523, at *20-21 (Del. Ch. Dec. 9, 2011).

2. In the alternative and/or as a cross-check, precedent fee awards for similar corporate governance reforms support a $1 to $2 million fee

Precedent fee awards for corporate governance reforms further demonstrate the appropriateness of Plaintiffs' requested fee. To be sure, whether precisely quantifiable or not, corporate governance reforms that prevent future harm are "properly considered by this Court in determining a fee award."[102] In a typical derivative case, "the fundamental aim of the litigation" is "to correct" failures by corporate directors and mitigate the "resulting damage to [the company], by implementing specific changes to [the company's] corporate governance mechanisms."[103] As a result, governance benefits have served as "the sole basis for the fee award" in many cases.[104]

For example, in *In re Google Inc. Class C S'holder Litig.*,[105] plaintiff's counsel were awarded $8.5 million for a "largely corporate governance settlement" that was, in baseball parlance, "between a solid single and a double." Similarly, in

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[102] *Ryan ex rel. Maxim Integrated Prods. v. Gifford*, 2009 WL 18143, at *13 (Del. Ch. Jan. 2, 2009).

[103] *In re Schering-Plough Corp. S'holders Deriv. Litig.*, 2008 WL 185809, at *2 (D.N.J. Jan. 12, 2008).

[104] *Ryan*, 2009 WL 18143, at *13; *see also Tandycrafts*, 592 A.2d at 1165.

[105] C.A. No. 7469-CS, Tr. at 19-20 (Del. Ch. Oct. 28, 2013) (TRANSCRIPT); *see also In re Yahoo! S'holders Litig.*, C.A. No. 3561-CC, Ltr. Op. at 1 (Del. Ch. Mar. 6, 2009) (awarding $8.4 million for "substantial benefit" of amending employee severance plan that "made it less expensive to sell Yahoo, making the company a more attractive target to potential suitors.").

Williams v. Ji, plaintiff was awarded $3.25 million in attorneys' fees after the parties settled claims relating to the issuance of director stock options by rescinding the transactions and establishing a board committee delegated with the authority to review related-party transactions.[106] Numerous other governance-related fees are illustrative.[107] Further, when compared to disclosure-only settlements—which are far less significant than the governance reforms achieved here—a fee in the range of $1 to $2 million is more than appropriate.[108]

Indeed, given the severe and repeated process failures that led to the Awards, the governance reforms achieved in this action are especially valuable.

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[106] *Williams v. Ji*, C.A. No. 12729-VCMR, Stipulation and Agreement of Settlement, at 15-16 (Del. Ch. Dec. 22, 2017), and Final Order and Judgment, at ¶ 14 (Del. Ch. May 15, 2018). The parties settled after adjudication of a motion to dismiss, limited discovery and mediation.

[107] *See*, *e.g.*, *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 2008 WL 1776494 (Del. Ch. Apr. 11, 2008) ($2,692,000 fee awarded where settlement included protections concerning related-party transactions); *In re Liberty Tax, Inc. S'holder Litig.*, No. 2017-0883 (Del. Ch. June 28, 2019) (Final Order and Judgment) (awarding $1.4 million for corporate governance reforms, which included, among other things, changes to harassment policies and adoption of training programs and enhancing board committee's responsibilities).

[108] *See*, *e.g.*, *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1136 (Del. Ch. 2011) ("This Court has often awarded fees of approximately $400,000 to $500,000 for one or two meaningful disclosures."); *In re Susser Hldgs. Corp. S'holder Litig.*, C.A. No. 9613-VCG, Tr. at 62 (Del. Ch. Sept. 15, 2015) (TRANSCRIPT) ("The Sauer-Danfoss case suggests that where disclosures are of an important but not overwhelming home run type, they tend to generate a fee in the [$]4[00,000] to $500,000 range.").

As this Court recognized in *Ebix*,[109] governance reform to address severe and repeated wrongdoing has substantial value. In *Ebix*, plaintiffs challenged (among other things) an acquisition bonus agreement that was approved by the Ebix board and enriched the CEO at the expense of Ebix and its stockholders. After the filing of the complaint, the directors of Ebix amended the ABA, which plaintiffs challenged, alleging that it continued to enrich the CEO at the expense of Ebix and its stockholders. In a settlement, in addition to quantifiable benefits realized by Ebix, directors agreed to adopt governance reforms to address the severe and repeated wrongful conduct regarding the CEO's compensation.

Specifically, Ebix agreed (a) to hire an in-house counsel, (b) to develop a succession plan for the Ebix CEO, (c) to engage a nationally-recognized independent compensation consultant to advise the compensation committee annually on director and officer compensation, (d) to appoint an independent member of the Ebix board to the compensation committee, and (e) to cause the nominating and corporate governance committee of the Ebix board to meet annually. For this corporate governance package, plaintiffs' counsel requested a fee of at least $1 million to $2 million, and argued that the immediate and long-term benefits to Ebix, and the avoidance of reoccurrence of the governance failures

[109] *In re Ebix, Inc. S'holder Litig.*, C.A. No. 8526-VCS, Tr. at 101 (Del. Ch. Apr. 5, 2019) (TRANSCRIPT).

that contributed to the need for the action, justified the requested fee. This Court recognized the substantial benefits resulting from the governance reforms, and held:

> As for the governance reforms achieved through the settlement, plaintiffs seek a $2 million fee award and defendants don't meaningfully contest this aspect of the fee request. I've analyzed the governance reforms set forth in the settlement and find them to be beneficial to the plaintiffs, stockholders, and the company. In the absence of a contrary assertion—or at least a persuasive one—by the defendants, and after considering comparable awards, I think a $2 million fee for governance benefits is justified.[110]

Similar to the situation in *Ebix*, the governance reform in the proposed Settlement is meaningful and was crafted in a manner to remedy the specific wrongdoing alleged in the Complaint. As in *Ebix* where severe and repeated wrongdoing was challenged, the wrongdoing in this action involves severe and repeated "looting" by the Board and the CEO involving the Awards. In fact, the wrongdoing challenged in the Complaint arguably is more severe than the wrongdoing challenged in *Ebix* because the members of the Board and the CEO granted the Awards to themselves, which enriched the members of the Board and the CEO (rather than solely the CEO) at the expense and the Company and its stockholders.

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[110] *Ebix*, C.A. No. 8526-VCS, Tr. at 101 (Del. Ch. Apr. 5, 2019) (TRANSCRIPT).

The value of the governance reforms in the Settlement are beyond dispute. Indeed, the SLC recognized and highlighted the value of the governance reforms in the Settlement, and, thus, it would be difficult for the Company to argue (let alone argue persuasively) that the governance reforms in the Settlement have little or no value.[111] Accordingly, like the situation in *Ebix*, the governance benefits in this action merit a fee of at least $1 million to $2 million. Indeed, the Company's addition of Mr. Patel as an additional independent director itself justifies a fee of at least $1 million.[112]

D. Plaintiffs' Requested Fee Award Represents Roughly 10% of the Economic Benefit Achieved.

Plaintiffs seek an attorneys' fee calculated as a percentage of the total economic benefit achieved, plus a reasonable fee for the corporate governance benefits conferred to CytoDyn. "When the benefit is quantifiable, . . . *Sugarland*

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[111] To the extent that the Company or the SLC attempt to diminish the non-quantifiable governance benefits that resulted from this action and the Settlement resulting therefrom, such attempts should be rejected. *See Solomon v. Take Two Interactive Software, Inc.*, C.A. No. 3604-VCL, Tr. at 64 (Del. Ch. June 18, 2009) (TRANSCRIPT) ("I don't think any member of this Court appreciates being put in the position by any defendant, someone who seeks to approve a settlement and obtain the benefits that the defendants get from the settlement, and then in response to the fee application thinks it's appropriate to argue that the very consideration that it has relied upon to support the settlement is worthless. It's inappropriate.").

[112] *See In re Title Shop Hldgs., Inc. S'holder Deriv. Litig.*, C.A. No. 108884-VCG, Tr. at 41-42 (Del. Ch. Aug. 23, 2018) (TRANSCRIPT) (awarding $1 million fee for addition of independent director to the board).

calls for an award of attorneys' fees based upon a percentage of the benefit."[113] Further, "[i]n determining the size of an award of attorney's fees, courts assign the greatest weight to the benefit achieved by the litigation."[114]

The requested award of attorneys' fees and expenses of $4,134,797 (inclusive of expenses) equates to approximately 10% of the total benefit achieved.[115] Delaware law supports awards of up to 33% of the benefit conferred in representative litigation, with the top of the range generally reserved for cases that go to trial.[116] As the Supreme Court has observed, the Court of Chancery historically awarded a lower percentage of the benefit where the parties settle before trial:

> When a case settles early, the Court of Chancery tends to award 10-15% of the monetary benefit conferred. When a

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[113] *Ams. Mining Corp.*, 51 A.3d at 1259; *see also Julian v. E. States Constr. Serv., Inc.*, 2009 WL 154432, at *2 (Del. Ch. Jan. 14, 2009) (citation omitted) ("When the benefit achieved is quantifiable, such as where the plaintiff's litigation secured a significant financial benefit for the corporation . . . courts typically apply a 'percentage of the benefit' approach.")

[114] *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *8 (Del. Ch. Aug. 30, 2007).

[115] As discussed above (*see supra* at 44-45), Plaintiffs submit that this Court should follow the *Emerson Radio* methodology for calculating the value of the benefit of corporate governance reforms, and award 10% of that benefit as an attorneys' fee. If this Court does not follow the *Emerson Radio* methodology, as discussed *supra* at 46-50, Plaintiffs submit that an additional fee of $1 million to $2 million should be awarded for corporate governance benefits on top of 10% of the economic benefits conferred. A summary of Plaintiffs' total fee request is provided in Exhibit 1.

[116] *See Ams. Mining*, 51 A.3d at 1259.

> case settles after the plaintiffs have engaged in meaningful litigation efforts, typically including multiple depositions and some level of motion practice, fee awards in the Court of Chancery range from 15-25% of the monetary benefits conferred.[117]

These ranges represent general guidance, not inflexible rules.[118] In practice, the Court of Chancery frequently awarded more than 15% of the benefit for early-stage settlements. For instance, in *City of Monroe Employees' Retirement System v. Murdoch*,[119] this Court awarded 25% of the benefit following a settlement reached on the basis of a pre-suit investigation before the complaint was filed. Similarly, in *In re China Integrated Energy, Inc. Stockholder Litigation*, C.A. No. 6625-VCL (Del. Ch. Dec. 2, 2015) (TRANSCRIPT), this Court awarded 26% of the monetary value of a settlement reached following a books and records production and while the defendants' motion to dismiss was pending. In addition, in two other recent cases, this Court awarded 20% of the monetary benefit conferred by settlements reached before depositions were taken.[120]

Based upon these precedents, Plaintiffs' requested award—which is within the 10-15% range of early settlements—is eminently reasonable. Indeed, courts

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[117] *Id.* at 1259-60 (internal citations omitted).

[118] *See Sciabacucchi v. Salzberg*, 2019 WL 2913272, at *7 (Del. Ch. July 8, 2019).

[119] C.A. No. 2017-0833-AGB (Del. Ch. Feb. 9, 2018) (TRANSCRIPT).

[120] *See Baker v. Sadiq*, 2016 WL 4375250 (Del. Ch. Aug. 16, 2016); *In re China Agritech, Inc. S'holders Deriv. Litig.*, C.A. No. 7163-VCL (Del. Ch. Feb. 13, 2015) (TRANSCRIPT).

historically granted "larger awards…when people actually get cash or actually recover stuff that the defendants had." *In re Cheniere Energy S'holders Litig., Inc.*, C.A. No. 9710-VCL, Tr. at 105 (Del. Ch. Mar. 16, 2015) (TRANSCRIPT). If anything, an even higher percentage is appropriate for a case, such as this one, in which counsel obtained a substantial recovery—approximately 60% of the December 2019 Awards[121] (including 100% of the options awarded to the outside directors) and the expiration of the January 2020 Awards in their entirety. Most lawsuits return nowhere close to this level of recovery.[122]

In light of this, the principal reason that courts awarded lower percentages for early resolutions—to disincentivize representative counsel from shirking their responsibilities by taking fast and easy settlements—does not apply in this action. Given what has been accomplished here, Plaintiffs and their counsel would have disserved CytoDyn had they attempted to continue the litigation.

Finally, the SLC's involvement in this action should not impact the attorneys' fees awarded to Plaintiffs' counsel. By commencing this action,

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[121] This percentage factors in the 373,000 option shares Pourhassan is forfeiting in lieu of the options he received in December 2019, which he already exercised and sold.

[122] For instance, in securities class actions, the median recovery over the last decade is between 4.2% and 6.3% of estimated "simplified tiered damages." *See Cornerstone Research, Securities Class Action Settlement: 2019 Review and Analysis*, at 21.

Plaintiffs identified and attempted to remedy a series of egregious self-dealing transactions. The Board created the SLC to investigate the self-dealing and, if wrongdoing existed, then to resolve the wrongdoing through litigation or settlement. Rather than "whitewash" the wrongdoing, the SLC acknowledged its existence and negotiated a meaningful settlement with the assistance of Plaintiffs—a rare result for a case involving a special litigation committee.

Nonetheless, while the SLC is to be commended for its approach, the SLC only investigated claims that Plaintiffs' counsel originated and developed—claims that were meritorious, as the SLC recognized. In other words, because the SLC ultimately agreed with Plaintiffs' allegations, the "benefit here has to be attributed substantially to the litigation, because the SLC's creation was really impelled by the litigation[.]"[123] Most importantly, Plaintiffs are requesting a fee award that is based on a percentage of the benefit associated with early-stage resolutions, *i.e.*, an award that already is at the bottom tier of the ranges this Court uses for guidance when determining fee applications.

[123] *In re Clear Channel Outdoor Hldgs. Inc. Deriv. Litig.*, C.A. No. 7315-CS, Tr. at 36 (Del. Ch. Sept. 9, 2013) (TRANSCRIPT).

E. The Secondary *Sugarland* Factors Also Support Plaintiffs' Requested Fee Award

1. Contingency risk

While the benefit achieved is the first and most important consideration, the contingent nature of counsel's representation is the "second most important factor" under *Sugarland*.[124] Successful contingent representation, therefore, entitles plaintiffs' counsel to a premium on top of the hourly value of their services in order to provide fair compensation for bearing contingency risks and to incentivize them to do so.[125] As a result, it is axiomatic that counsel may be "entitled to a much larger fee when the compensation is contingent than when it is fixed on an hourly or contractual basis."[126] Awarding larger fees in contingency cases reflects the "public policy of Delaware to reward this risk-taking in the interests of shareholders."[127]

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[124] *See Dow Jones & Co. v. Shields*, 1992 WL 44907, at *2 (Del. Ch. Jan. 10, 1992); *see also Chrysler*, 223 A.2d at 389.

[125] *See Seinfeld v. Coker*, 847 A.2d 330, 337 (Del. Ch. 2000).

[126] *Ryan*, 2009 WL 18143, at *13.

[127] *In re Plains Res.,* 2005 WL 332811, at *22; *see also Franklin Balance*, 2007 WL 2495018, at *12 ("Fee awards should encourage future meritorious lawsuits by compensating the plaintiffs' attorneys for their lost opportunity cost (typically their hourly rate), the risks associated with the litigation, and a premium.") (citations omitted).

Other than Labaton Sucharow LLP's involvement in the Section 220 investigation,[128] Plaintiffs' counsel pursued this matter on a fully contingent basis and faced the true risk that they "would receive nothing for their time and effort."[129] The contingency risk undertaken by Plaintiffs' counsel was heightened because CytoDyn is a small, financially challenged, and unstable corporation: the risk that counsel would not be paid and reimbursed should not be taken lightly.

Notwithstanding CytoDyn's relatively small size, lack of revenue, and volatile stock price, the conduct challenged in this action was so egregious (particularly considering repeated, unchecked self-dealing by Defendants) that Plaintiffs and their counsel believed that it was necessary to commence this action to remedy the wrongdoing and prevent similar wrongdoing in the future. That mission has been accomplished. Reducing the request of attorneys' fees under these circumstances would send the wrong message to corporations and their directors, as well as to stockholders and lawyers who take a substantial risk in derivative litigation, especially derivative litigation involving a small, financially challenged, and unstable corporation.

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[128] *See* Richardson Decl. ¶ 4.

[129] *In re Orchard Enters. S'holder Litig.*, 2014 WL 4181912, at *9 (Del. Ch. Aug. 22, 2014); *see also In re Versum Materials, Inc. S'holder Litig.*, C.A. No. 2019-0206-JTL, Tr. at 81 (Del. Ch. July 16, 2020) (TRANSCRIPT) (noting that "it's the contingent nature of the case that gets the plaintiff a percentage of the benefit award").

2. Time and effort

In light of the substantial monetary benefits achieved, no adjustment is warranted based on the lodestar of Plaintiffs' counsel. While lodestar may be used "as a cross-check on the reasonableness" of a fee award, this Court recognized that the cross-check exercise is intended "'particularly in therapeutic benefit cases.'"[130] Indeed, this Court recently confirmed that it "generally doesn't use" the lodestar method in a case involving a quantifiable benefit.[131]

The requested fee award is warranted considering the results achieved and the efforts of Plaintiffs' counsel in their investigation, identification, and development of the meritorious claims pled in their Complaint. As discussed above, Plaintiffs' counsel expended significant time (a) investigating the wrongdoing, which included reviewing books and records obtained pursuant to a Section 220 demand, (b) drafting the Complaint, (c) opposing a stay requested by the SLC, (d) evaluating the original settlement terms, (e) assisting the SLC in making the original settlement terms more beneficial to CytoDyn and its stockholders, and (f) evaluating the Settlement.[132] After this Court entered the stay, Plaintiffs and their counsel could have remained

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[130] *Sciabacucchi*, 2019 WL 2913272, at *1, 6 (citations omitted).

[131] *Versum*, C.A. No. 2019-0206-JTL, Tr. at 79 (Del. Ch. July 16, 2020) (TRANSCRIPT).

[132] Of the total 1,025 attorney hours for which Plaintiffs' counsel seek fees, after the Settlement was finalized, 44.1 hours were spent reviewing, evaluating, and discussing the final Settlement terms with Plaintiffs and the SLC's counsel.

on the "sidelines" until there was a settlement or other resolution. Plaintiffs and their counsel instead actively remained involved during the investigation and settlement process to ensure that the Settlement was adequate, fair, and reasonable to CytoDyn and its stockholders.

Most importantly, these efforts produced an outstanding outcome. While the case was resolved at an early stage, that fact is already accounted for in the lower percentage of the benefit range applicable to early-stage settlements. Applying a double-discount under the rubric of a time and effort adjustment is not warranted, and would undermine the policy goals underlying *Sugarland*.[133]

From inception of the matter through February 18, 2021 (when Plaintiffs' counsel finished their evaluation of the proposed Settlement), Plaintiffs' counsel and their staff collectively expended a total of 1,019.85 hours, including 980.95 hours by attorneys. *See* Richardson Decl. ¶¶8-14 & Exs.7-8. The total combined lodestar for Plaintiffs' counsel is $778,249.50.

Given the appointment of the SLC, and the Settlement achieved following the SLC's investigation, this action was resolved at an early stage. Plaintiffs,

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[133] *See Sciabacucchi*, 2019 WL 2913272, at *6 ("Putting too much weight on time and effort could result in either undercompensation or overcompensation" and fee awards should neither penalize counsel for early victory nor incentivize dragging out litigation, expending unnecessary hours "or, even worse, exaggerating the number of hours worked") (citation omitted).

however, essentially achieved most of what "they could have obtained by litigating through a merits hearing," and, therefore, "should not be penalized for achieving complete victory quickly."[134] If the fee and expense application is granted in full, then the implied hourly rate will be $4,051.44 net of expenses. While that is a high figure, Plaintiffs' counsel were not compensated on an hourly basis, and "the benefit achieved by the litigation is the common yardstick by which plaintiff's counsel is compensated in a successful derivative action."[135]

When cases have resolved at an early stage but yielded substantial benefits, this Court frequently awarded fees with implied hourly rates comparable to Plaintiffs' counsel's request. Most recently, in *Versum* this Court awarded attorneys' fees of $12 million at an implied rate of roughly $10,000 per hour.[136] Similarly, in *Sciabacucchi* this Court awarded fees of $3 million for 266 hours worked to secure judgment, for an implied hourly rate of $11,262 per hour. As this Court explained:

> Although the plaintiff prevailed at a relatively early stage of the case, and accordingly incurred a relatively small number of hours to date, I do not believe that [the time and effort] factor warrants reducing the precedent-based award.[137]

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[134] *Olson v. ev3, Inc.*, 2011 WL 704409, at *15 (Del. Ch. Feb. 21, 2011).

[135] *See Ams. Mining*, 51 A.3d at 1257-58 (internal quotations and citation omitted).

[136] C.A. No. 2019-0206-JTL, Tr. at 81 (Del. Ch. July 16, 2020) (TRANSCRIPT).

[137] 2019 WL 2913272, at *7.

In the same vein, the *Clear Channel* case settled shortly after the expiration of a special litigation committee stay, with plaintiffs obtaining a $28 million recovery plus therapeutics and other terms. This Court awarded counsel $6 million, which represented an implied rate of $5,703 per hour based on 1,046 hours in attorney and professional time.[138] In *Franklin Balance Investment Fund v. Crowley*, counsel was awarded 15% of the monetary benefit and partial credit for other benefits, receiving more than $4.2 million or $4,023 per hour for 1,047 hours worked.[139] Similarly, in *City of Monroe Employees' Retirement System v. Murdoch*, this Court awarded counsel $22.5 million or approximately $4,000 per hour—representing 25% of the recovery—in an action that settled before the complaint was filed on the basis of a books and records inspection and pre-suit settlement discovery.[140]

3. Relative Complexities of the Litigation

While this action arguably lacks the complexity that would support an upward departure in the fee award, it is not the type of rote or simplistic case calling for a downward departure. Downward adjustments are typically reserved for "cookie-

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[138] *Clear Channel*, C.A. No. 7315-CS, Tr. at 31, 38 (Del. Ch. Sept. 9, 2013) (TRANSCRIPT) ("it's a nice hourly wage that's requested, but I'm not going to quibble with it").

[139] 2007 WL 2495018, at *13.

[140] C.A. No. 2017- 0833-AGB (Del. Ch. Feb. 9, 2018) (TRANSCRIPT).

cutter deal litigation in which . . . plaintiffs' counsel accepted a standard package of board minutes and bankers' books before agreeing to a disclosure-only settlement." *Compellent*, 2011 WL 6382523, at *28.

4. Standing and Ability of Counsel

The standing, ability, and reputation of Plaintiffs' counsel support the requested award. Plaintiffs' counsel are experienced law firms in the area of stockholder litigation and other representative actions, with extensive experience in this Court.

Faegre Drinker Biddle & Reath LLP's ("Faegre Drinker") participation in this action is of particular note. Faegre Drinker generally does not represent stockholders in derivative actions and does not accept matters based upon contingency fee arrangements. The firm agreed to the representation and a contingent fee arrangement in this action because of the egregious wrongful conduct of Defendants. Faegre Drinker's involvement also offered a different and beneficial perspective to Plaintiffs, and, thus, benefitted CytoDyn and its stockholders.

In light of these factors, Plaintiffs submit that the requested Fee and Expense Award is reasonable and appropriate.

III. EACH PLAINTIFF SHOULD BE AWARDED A $1,000 INCENTIVE AWARD

Finally, Plaintiffs seek approval of a $1,000 incentive award for each Plaintiff, which would be paid out of any Fee and Expense Award approved by the Court. It

is in the Court's discretion to approve an incentive award for representative plaintiffs.[141] An incentive award recognizes contributions made by a representative plaintiff who invested time and effort or "provided meaningful expertise" in connection with the case. *Id.* at *4.

The requested incentive awards are appropriate and reasonable in light of Plaintiffs' willingness to serve as the representative Plaintiffs in this matter.[142] Moreover, as explained above, the Plaintiffs contributed to the results achieved in this case by investing their time and attention, including in connection with a meeting with the SLC, which a number of the Plaintiffs attended via Zoom. Additionally, three of the Plaintiffs are former directors of the Company, and their resulting knowledge and experience assisted counsel in the prosecution of the case.

The amount requested per Plaintiff is less than the "modest" award of $2,500 that the Delaware Supreme Court recently sustained, which that Court differentiated

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[141] *Chen v. Howard-Anderson*, 2017 WL 2842185, at *3 (Del. Ch. June 30, 2017) (ORDER) (citations omitted).

[142] *See In re Xcel Energy, Inc.*, *Sec., Deriv. & ERISA Litig.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005) (recognizing importance of "individual shareholders willing to step forward and pursue a claim on behalf of other investors").

from large awards that implicate problematic incentives for representative plaintiffs.[143] Similar awards have been approved in other cases.[144]

IV. SUMMARY OF PLAINTIFFS' REQUESTED FEE AND EXPENSE AWARD

In Exhibit 1 to the Richardson Declaration, Plaintiffs provide a summary to assist the Court in assessing the reasonableness of Plaintiffs' Requested Fee and Expense Reward.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully submit that the Court should approve the proposed Settlement, the requested Fee and Expense Award, and the requested incentive awards.

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[143] *See Isaacson v. Niedermayer*, 200 A.3d 1205, 1205 n.1 (2018) (Table) (ORDER).

[144] *See*, *e.g.*, *In re Fitbit, Inc. S'holder Deriv. Litig.*, 2020 WL 6826394, at *3 (Del. Ch. Nov. 19, 2020) (ORDER) (approving incentive awards of $2,500 to each plaintiff); *Hignett v. Adams*, 2018 WL 4922098, at *3 (Del. Ch. Oct. 9, 2018) (ORDER) (approving $5,000 incentive award to each lead plaintiff).

	LABATON SUCHAROW LLP
OF COUNSEL:	*/s/ Mark Richardson* Ned Weinberger (Bar No. 5256) Mark Richardson (Bar No. 6575) 300 Delaware Ave., Suite 1340 Wilmington, DE 19801 (302) 573-2540
Steven J. Purcell Douglas E. Julie Robert H. Lefkowitz PURCELL JULIE & LEFKOWITZ LLP 708 Third Avenue, Sixth Floor New York, NY 10017 (212) 725-1000	FAEGRE DRINKER BIDDLE & REATH LLP */s/ Michael J. Maimone* Michael J. Maimone (Bar No. 3592) 222 Delaware Avenue, Suite 1410 Wilmington, DE 19801 (302) 467-4200 *Counsel for Plaintiffs*
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CERTIFICATE OF SERVICE

I, Mark Richardson, hereby certify that, on March 19, 2021, I caused a true and correct copy of Plaintiffs' Brief in Further Support of the Settlement and Application for an Award of Attorney's Fees and Expenses to be served on the following counsel of record by File and ServeXpress*:*

Michael J. Maimone
Faegre Drinker Biddle & Reath LLP
222 Delaware Avenue
Suite 1410
Wilmington, DE 19801

Henry E. Gallagher, Jr.
Ryan P. Newell
Jarrett W. Horowitz
Connolly Gallagher LLP
1201 North Market Street
20th Floor
Wilmington, DE 19801

Brad D. Sorrels
Andrew D. Cordo
Andrew D. Berni
Wilson Sonsini Goodrich
& Rosati, P.C.
222 Delaware Avenue, Suite 800
Wilmington, DE 19801

/s/ Mark Richardson
Mark Richardson (Bar No. 6575)