

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: MABVAX THERAPEUTICS)
HOLDINGS, INC.) C.A. No.
)
)

VERIFIED PETITION FOR RELIEF UNDER 8 DEL. C. § 205

Petitioner MabVax Therapeutics Holdings, Inc. (“MabVax” or the “Company”) brings this petition pursuant to 8 *Del. C.* § 205 (the “Petition”) and alleges as follows:

INTRODUCTION

1. MabVax seeks an order, pursuant to Section 205 of the Delaware General Corporation Law (“DGCL”), validating (i) conversions of its preferred stock into common stock that occurred between June 30, 2014 and February 12, 2018 and (ii) corporate acts that may not have been approved by the requisite percentage of stockholder voting power during the same time period.

2. MabVax common stock was, until recently, publicly-traded on The Nasdaq Capital Market as operated by The Nasdaq Stock Market LLC (“Nasdaq”) and is presently registered pursuant to Section 12 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”). Since July 2014, it has issued 15 series of preferred stock designated Series A-1 through Series O. Preferred stockholders generally have the right to convert their preferred stock into

common stock at any time. The Certificates of Designations, Preferences and Rights for MabVax's preferred stock ("Certificates of Designation") contain provisions generally prohibiting conversions into common stock if the conversion would result in the holder beneficially owning more than 4.99% of MabVax's common stock outstanding after the conversion (the "Conversion Blocker"). The Certificates of Designation also prohibit a preferred stockholder from exercising voting control over more than 4.99% of the voting power of MabVax ("Voting Limitation"). These provisions provide that ownership is determined in accordance with Section 13(d) of the Exchange Act. Although these restrictions allow a preferred stockholder to specify in writing a different percentage restriction, not to exceed 9.99%, no preferred stockholder ever invoked that provision to specify a different percentage.

3. This type of conversion blocker and voting limitation for preferred stock is a method favored by preferred stockholders who seek to avoid becoming subject to the reporting requirements of Section 13(d) of the Exchange Act. Section 13(d) generally requires a person who acquires beneficial ownership of more than five percent of a class of equity securities registered pursuant to Section 12 of the Exchange Act to file a Schedule 13D (or in specific and limited situations, a Schedule 13G) with the United States Securities and Exchange Commission ("SEC"). Schedule 13D requires the disclosure of specific and

detailed information related to the person's investment in a company, including his or her beneficial ownership, the source of funds for the investment, a description of the method of acquisition, the purpose of the acquisition, and any plans or proposals that the person may have for the corporation – such as mergers or changes in the board of directors. MabVax common stock is currently, and during the period in question was, registered pursuant to Section 12 of the Exchange Act. Shares of its preferred stock are not registered pursuant to Section 12 of the Exchange Act, but, in accordance with Section 13(d), a person is deemed to own beneficially any securities acquirable within sixty days; this includes shares of common stock issuable upon conversion of preferred stock. Thus, the MabVax investors required as a condition of their investment that the Company include in the Certificates of Designation the Conversion Blockers to prevent the shares of common stock that would otherwise be issuable upon conversion of their shares of preferred stock in excess of the 4.99% limitation of the Conversion Blocker from being beneficially owned in accordance with Section 13(d).

4. Between June 30, 2014 and February 12, 2018, multiple holders of MabVax preferred stock exercised their right to convert preferred stock into common stock. At the time of (and after giving effect to) each conversion, MabVax believed each converting stockholder individually held less than 5% of MabVax's outstanding common stock. Following conversion, these preferred

stockholders were entitled to sell their respective shares of common stock, either directly into the public market or in private sales to others who, in turn, may have sold on the open market.

5. On January 26, 2018, the SEC issued a formal order directing an investigation into potential violations of securities laws by MabVax and its directors, officers, employees and certain of its stockholders, including whether certain unidentified holders of MabVax preferred stock had acted as a “group” under Section 13(d)(3) of the Exchange Act. Under Section 13(d)(3), if a group of stockholders act in furtherance of a common objective, their ownership is aggregated for purposes of triggering the reporting requirements under Section 13(d).

6. If the ownership of the MabVax preferred stockholders who may be under investigation is aggregated, they may have acquired more than five percent of MabVax’s common stock through their conversions of preferred stock into common stock. Consequently, if the stockholders who are under investigation are determined to have acted as a group under Section 13(d)(3), then a large number of the conversions may have violated the Conversion Blocker in the Certificates of Designation, which could render those conversions – and the common stock issued in those conversions – invalid. MabVax executed the conversions at the request of preferred stockholders with a good faith belief that

those requests were appropriate such that none of the conversions violated the Conversion Blocker and in reliance on its stockholders' compliance with their beneficial ownership reporting obligations, including Schedule 13D and 13G reports. Still other investors who thereafter purchased those potentially invalid common shares in the public market had, to MabVax's knowledge, no reason to doubt their validity.

7. Due to the operation of public securities markets and the nature of beneficial ownership, potentially invalid common shares cannot be traced or identified. The total number of common shares that were potentially issued in violation of the Conversion Blocker could be as high as 28% of the outstanding common stock. Additionally, under MabVax's governing documents, preferred and common stockholders vote together on approval of corporate acts, and shares of preferred stock generally vote on an as-converted basis. If certain preferred stockholders acted as a group under Section 13(d), then the Voting Limitation in the Certificates of Designation could have been triggered for stockholder votes. Due to the impact of the Conversion Blocker and Voting Limitation, MabVax cannot use Section 204 to ratify the stock conversions because MabVax cannot rely upon obtaining a vote of the holders of a majority of the voting power of MabVax's valid stock to approve the ratifications as required by Section 204(c) and (d) of the DGCL.

8. In addition to validation of the stock conversions, MabVax also seeks an order validating four types of corporate acts: (i) director elections, (ii) amendments or restatements of MabVax's certificate of incorporation, (iii) amendments to MabVax's equity incentive plan and (iv) approvals of certain types of stock transactions under Nasdaq rules. Those stockholder votes are potentially invalid because the approval votes (or quorum counts) might have included too many invalid common shares or because the votes of some preferred stockholders might have been restricted by the Voting Limitation.

9. Because of these issues, MabVax determined, and on May, 21, 2018 publicly disclosed, it could not timely file its Form 10-Q with the SEC for the quarter ended March 31, 2018 ("Form 10-Q") as it is unable to report confidentially certain per share figures. At the same time, and for the same reason, the Company also cautioned that financial statements and prior disclosures regarding the beneficial ownership of MabVax's capital stock since 2014 should not be relied upon. As a result, MabVax common stock has been suspended and delisted from trading on Nasdaq and is currently quoted on the OTC Pink Market. In addition, for the reasons stated in the Affidavit of J. David Hansen, Chief Executive Officer ("CEO") of the Company, filed contemporaneously with this Petition (the "Hansen Affidavit"), these issues are complicating the execution of MabVax's strategic plans.

10. Since late May 2018, MabVax has evaluated potential corrective actions to eliminate any resulting cloud over its capital structure, including the filing of this Petition, in order to protect its public stockholders. MabVax was not able, however, to pursue actively filing this Petition until recently because MabVax did not have the necessary funds to do so until it received a payment in connection with closing the sale of an asset on July 6, 2018.

11. MabVax knows of no reason why the orders of validity it seeks in this Petition would harm any person. The relief MabVax seeks in this Petition would protect innocent public stockholders who purchased their common shares with no reason to doubt the validity of them. The SEC has been informed of MabVax's intention to file this Petition and to pursue a court order validating the conversions and other potentially defective acts and has taken no position with respect to the Company's intention to do so.

PARTIES

12. Petitioner MabVax is a Delaware corporation with its principal place of business at 11535 Sorrento Valley Road, San Diego, California 92121. MabVax was originally formed in 1988 under the name Terrapin Diagnostics, Inc. and was subsequently renamed as Telik, Inc. in 1998. On July 8, 2014, the Company effected a reverse merger in which a wholly-owned subsidiary of the Company merged with MabVax Therapeutics, with MabVax Therapeutics

surviving the merger as a wholly-owned subsidiary of the Company. The Company changed its name to MabVax Therapeutics Holdings, Inc. in September 2014. MabVax's common stock was approved for listing on Nasdaq in August 2016, where it was publicly traded until certain events described herein caused its delisting on July 11, 2018 and its being quoted on the OTC Pink Market.

FACTUAL BACKGROUND

I. MABVAX AND ITS CAPITAL STRUCTURE.

A. MabVax's Business.

13. MabVax is a clinical-stage biotechnology company engaged in the discovery and development of antibody-based products to address unmet needs in the treatment of cancer. MabVax has discovered a pipeline of human antibodies using the protective immune responses generated by patients who have been vaccinated against targeted cancers with MabVax's proprietary vaccines.

14. MabVax's approach involves surveying the immune response from many patients vaccinated with the same vaccine in order to identify one or more optimal antibody candidates for cancer treatments. This novel, next-generation human antibody technology platform enables MabVax to discover antibody candidates with superior performance characteristics while minimizing toxicity and many of the drawbacks of other discovery technologies.

15. MabVax's lead therapeutic program centers on its HuMab-5B1 antibody. The antibody targets an antigen, CA19-9, that is expressed on pancreatic

cancer in over 90% of pancreatic cancer patients and in significant percentages on small cell lung, stomach, colon, and other cancers. MabVax has multiple antibody candidates that it is developing through clinical trials, all of which the Company discovered using the same methodologies.

16. MabVax as a clinical stage company historically has had, and for the foreseeable future expects to have, negative cash flows. MabVax has funded itself through various public and private financing transactions that include a series of preferred stock financings. Since July 2014, MabVax has issued fifteen different series of preferred stock, labeled alphabetically from Series A-1 through Series O.

17. MabVax's research and development efforts consume substantial sums of cash. MabVax needs capital to continue its operations and to fund its clinical product development programs. The current cloud over the validity of a significant portion of MabVax's common stock will significantly hinder its ability to raise capital.

B. MabVax's Stock.

18. MabVax's ownership structure is comprised of common stock and numerous series of preferred stock as detailed below.

(i) Common Stock.

19. Currently, MabVax has 9,253,081 shares of common stock outstanding, including the shares issued upon conversion of preferred stock that are the subject of this Petition. Between December 31, 2014, and June 30, 2018, MabVax issued a total of 2,628,766 shares of common stock¹ upon conversion of various series of its preferred stock. The following chart lists the total number of shares of common stock issued in connection with conversions of shares of each series of preferred stock:²

SERIES	SHARES OF COMMON STOCK RESULTING FROM CONVERSION
Series A-1	1,733
Series B	12,473
Series C	5,438
Series D	874,124
Series I	441,010
Series J	537,876
Series K	61,667
Series L	694,445

20. MabVax has 6,624,315 shares of common stock outstanding that have been issued other than upon conversion of Preferred Stock.

¹ Except where otherwise noted, all references in this Petition to numbers of shares refer to MabVax's current capital structure, as adjusted for several reverse stock splits.

² For all series of preferred stock that are omitted from the chart, no shares have been converted to common stock as of the date of the Petition.

(ii) Preferred Stock.

21. MabVax has issued fifteen series of preferred stock to raise capital since going public through the reverse merger, beginning with Series A-1 and continuing through Series O. Currently, MabVax has 853,468.93 total shares of preferred stock outstanding, convertible into 7,869,862 shares of common stock. The following chart lists the total number of outstanding shares of each series of preferred stock and the number of shares of common stock that the outstanding shares of each series are convertible into without giving effect to the Conversion Blocker.³

SERIES	OUTSTANDING PREFERRED SHARES OF SERIES	TOTAL NUMBER OF COMMON SHARES ISSUABLE UPON CONVERSION
Series D	44,104	198,667
Series E	33,333	173,251
Series I	645,640	215,214
Series J	772.73	386,365
Series K	63,150	2,105,000
Series L	45,500	2,527,778
Series M	5,000	666,667
Series N	5,363.64	536,364
Series O	10,605.56	1,060,556
Total	853,468.93	7,869,862

³ There are no shares outstanding of the series that are omitted from the chart below. All such series (*i.e.*, the Series A-1, B, C, F, G and H) have been eliminated from MabVax's certificate of incorporation through the filing of certificates of elimination.

22. Each series of preferred stock provides that the holder generally can convert any whole number of its preferred shares into fully paid and non-assessable shares of common stock at the ratio set forth in the series' respective Certificate of Designation.

23. Each holder's conversion right is subject to the limitation that preferred shares *cannot* be converted if the conversion would result in the holder "beneficially owning" *more than 4.99% of MabVax's common stock*. Under each Certificate of Designation, "beneficial ownership" is determined in accordance with Section 13(d) of the Exchange Act.

24. The Exchange Act defines a "beneficial owner" as any "person" who directly or indirectly shares voting power or investment power.⁴ However, Section 13(d) does not limit "person" to a single individual purchaser, but also includes a group of individuals acting in concert. *See* Exchange Act § 13(d)(3) (defining "person" to include two or more people or entities acting as a "partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer").

25. Under Section 13(d) of the Exchange Act, a person is deemed to own beneficially any securities acquirable within sixty days; this includes shares of common stock issuable upon conversion of preferred stock. Thus, even where a

⁴ *See* 17 C.F.R. § 240.13d-3(a); *see also* Exchange Act § 13(o).

corporation's preferred stock is not registered pursuant to Section 12 of the Exchange Act, investors in the preferred stock may be deemed to own beneficially shares of common stock issuable upon conversion of the preferred stock.

26. Section 13(d) states that when a person or group of people acquires beneficial ownership of more than five percent of a class of securities registered pursuant to Section 13(d) of the Exchange Act, they are required to file a Schedule 13D with the SEC within ten days. *See id.* § 13(d)(1). In specific and limited circumstances, a person or group of people can be eligible to file a more abbreviated Schedule 13G in lieu of a Schedule 13D. *See id.* § 13(d)(5).

27. In a Schedule 13D, the stockholder must disclose (1) the background and identity of every individual who purchased the securities; (2) the source and amount of the funds used to purchase the securities; (3) the purpose of the purchase[s], if the purpose is to acquire control of the business; (4) the number of shares of the security owned by the purchaser[s]; and (5) any information as to contracts or arrangements among any people who purchased the securities. *Id.* Any material changes in the facts contained in the Schedules require prompt amendment. *See id.* §13(d)(2).

28. As a condition of their investment, the holders of MabVax's preferred stock required that the terms of the preferred stock contain limitations on the preferred stock's conversion and voting rights to prevent the preferred

stockholders from becoming subject to the burden of complying with Section 13(d). As a condition of their investment, the preferred stockholders required MabVax to include “Conversion Blockers” in the Certificates of Designation that were intended to prevent a preferred stockholder from becoming the beneficial owner of 5% or more of MabVax’s common stock:⁵

- a. The Corporation shall not effect the conversion of any portion of **Series A-1** Preferred Stock, and no Holder shall have the right to convert any portion of **Series A-1** Preferred Stock, to the extent that after giving effect to such conversion, such Holder together with the other Attribution Parties⁶ collectively

⁵ A copy of each Certificate of Designation is attached as **Exhibits A-1 through A-15**, respectively.

The Certificates of Designation for the Series A-1 through C Preferred Stock, Exhibits A-1 through A-3 to this Petition, were set forth in a Certificate of Correction of Amended and Restated Certificate of Incorporation of MabVax filed on September 22, 2016. A Certificate of Designation with respect to the Series G Preferred Stock was originally filed on April 21, 2017, which was subsequently eliminated on May 3, 2017. A new Certificate of Designation was filed on May 15, 2017 authorizing the issuance of Series G Preferred Stock. Both of these Certificates of Designation are included in the respective exhibit, A-7. After the filing of the Certificate of Designation for each of the Series L and Series N Preferred Stock, MabVax filed a Certificate of Correction with respect to each such Certificate of Designation pursuant to Section 103 of the DGCL. The exhibits with respect to the Series L and Series N Preferred Stock include both the original Certificates of Designation and the subsequently filed Certificates of Correction. *See* A-12, A-14.

⁶ The **Series A-1** Certificate of Designation defines “Attribution Parties” as “any other Persons whose beneficial ownership of the Corporation’s Common Stock would or could be aggregated with the Holder’s and the other Attribution Parties for purposes of Section 13(d) of the Exchange Act. (Continued . . .)

would beneficially own in excess of 4.99% (“Maximum Percentage”) of the shares of Common Stock outstanding immediately after giving effect to such conversion. . . . For purposes of this Section 8(d), beneficial ownership shall be calculated in accordance with Section 13(d) of the Exchange Act. *See* Ex. A-1 at 16.

- b. The Company shall not effect the conversion of any portion of the [**Series B** or **Series C**] Preferred Shares, and no Holder shall have the right to convert any portion of the [**Series B** or **Series C**] Preferred Shares, to the extent that after giving effect to such conversion, the beneficial owner of the shares (together with such Person’s Affiliates⁷) would have acquired, through conversion of [**Series B** or **Series C**] Preferred Shares or otherwise, beneficial ownership of a number of shares of Common Stock that exceeds 4.99% (the “Maximum Percentage”) of the shares of Common Stock outstanding immediately after giving effect to such conversion. . . . For purposes of this Section . . . beneficial ownership shall be calculated in accordance with Section 13(d) of the Exchange Act. *See* Ex. A-2 at 50; Ex. A-3 at 77.

(. . . continued)

For clarity, the purpose of the foregoing is to subject collectively the Holder and all other Attribution Parties to the Maximum Percentage.” “Person” is defined as “an individual, a limited liability company, a partnership, a joint venture, a corporation, a trust, an unincorporated organization, any other entity and a government or any department or agency thereof.” *See* Ex. A-1 at 26.

⁷ The Certificates of Designation for the **Series B** and **Series C** Preferred Stock define “Affiliates” as meaning “with respect to any Person, any other Person that directly or indirectly controls, is controlled by, or is under common control with, such Person[.]” *See* Ex. A-2 at 57; *See* Ex. A-3 at 81. “Person” is defined as “an individual, a limited liability company, a partnership, a joint venture, a corporation, a trust, an unincorporated organization, any other entity and a government or any department or agency thereof.” *See* Ex. A-2 at 62; *See* Ex. A-3 at 83.

- c. Notwithstanding anything to the contrary set forth in this Certificate of Designation, at no time may all or a portion of shares of [**Series D**, **Series I**, **Series K**, or **Series O**] Preferred Stock be converted if the number of shares of Common Stock to be issued pursuant to such conversion would exceed, when aggregated with all other shares of Common Stock owned by such holder at such time, the number of shares of Common Stock which would result in such holder beneficially owning (as determined in accordance with Section 13(d) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) and the rules thereunder) more than 4.99% of all the Common Stock outstanding at such time (the “4.99% Beneficial Ownership Limitation”).⁸ Ex. A-4 at 3; Ex. A-9 at 3; Ex. A-11 at 3; Ex. A-15 at 3.
- d. Notwithstanding anything to the contrary contained in this Certificate of Designations, the [**Series E**, **Series F**, **Series G**, **Series H**, **Series J**, **Series L**, and **Series N**] Preferred Shares held by a Holder shall not be convertible by such Holder, and the Company shall not effect any conversion of any Preferred Shares held by such Holder, to the extent (but only to the extent) that such Holder or any of its affiliates would

⁸ With respect to the **Series D** through **Series O** Preferred Stock, the respective Certificates of Designation permit a preferred stockholder to waive the Conversion Blocker, so long as the conversion would not result in the stockholder beneficially owning more than 9.99% of MabVax’s common stock. As noted above, under Section 13(d), a person is deemed to own beneficially any securities acquirable within sixty days, including shares of common stock issuable upon conversion of preferred stock. However, in order for these holders to exercise their right to waive the Conversion Blocker, the holder was required to provide the Company sixty-one days’ notice. This sixty-one day notice period is intended to prevent a preferred stockholder from becoming the beneficial owner of the additional shares of common stock issuable as a result of the waiver, until after the waiver actually occurs. Accordingly, the existence of this waiver provision would not vitiate the protection offered by the Conversion Blocker or Voting Limitation. *See, e.g.*, Ex. A-4 at 3.

beneficially own in excess of 4.99% (the “Maximum Percentage”) of the Common Stock. . . . For purposes of this Section 4(e), beneficial ownership and all determinations and calculations (including, without limitation, with respect to calculations of percentage ownership) shall be determined in accordance with Section 13(d) of the 1934 Act and the rules and regulations promulgated thereunder. *See* Ex. A-5 at 6; Ex. A-6 at 6; Ex. A-7 at 6, 29; Ex. A-8 at 5-6; Ex. A-10 at 6; Ex. A-12 at 5-6, 27-28; Ex. A-14 at 6.

- e. Notwithstanding anything to the contrary set forth in this Certificate of Designation, at no time may all or a portion of the **Series M** Preferred Stock be converted if the number of shares of Common Stock to be issued pursuant to such conversion would exceed, when aggregated with all other shares of Common Stock owned by the Holder at such time, the number of shares of Common Stock that would result in the Holder beneficially owning (as determined in accordance with Section 13(d) of the 1934 Act and the rules thereunder) more than 4.99% of all of the Common Stock outstanding at such time (the “4.99% Beneficial Ownership Limitation”).⁹ *See* Ex. A-13 at 6.

29. The Conversion Blocker in each of the Certificates of Designation also applies to impose a limit on the voting power of all series of preferred stock (“Voting Limitation”):

⁹ Although the common stockholders are listed as third party beneficiaries of the Conversion Blocker, the Conversion Blocker is actually structured as such in order to strengthen the protections it affords the preferred stockholders. By including a third party beneficiary, the Conversion Blockers prevent the preferred stockholders from independently amending the Certificates of Designation to remove the Conversion Blockers. This limitation allows the preferred stockholders confidently to rely on the Conversion Blockers for Section 13(d) reporting purposes.

Except as otherwise expressly required by law, each holder of [any series] of Preferred Stock shall be entitled to vote on all matters submitted to the stockholders of the Corporation and shall be entitled to the number of votes for each share of . . . Preferred Stock owned at the record date . . . equal to the number of shares of Common Stock such shares of . . . Preferred Stock are convertible into at such time, but *not in excess of the conversion limitations set forth . . . herein.*

Ex. A-4 at 2.

II. PREFERRED STOCK CONVERSIONS.

A. MabVax's Stock Conversions and Resulting Effect on Beneficial Ownership.

30. From July 2014 through the present, MabVax has effectuated, at the request of preferred stockholders, 70 conversions of preferred stock into common stock. A list of the 70 conversions is attached as **Exhibit B**.

31. As of the date of this Petition, 2,628,766 shares of common stock have been issued upon conversion of preferred stock, which represents approximately 28.4% of the total 9,253,081 shares of common stock currently outstanding.

32. In reporting beneficial ownership of its stockholders, MabVax historically relied, as it must, on the accuracy of each stockholder's own reporting of its beneficial ownership in filings with the SEC. In calculating beneficial ownership to ensure compliance with the Conversion Blocker, MabVax similarly relied upon the accuracy of such stockholder-reported beneficial ownership.

MabVax also relied on experienced outside counsel's determination that the stock owned by various stockholders should be disaggregated from that owned by others for purposes of SEC reporting and conversions.

III. CORPORATE ACTS TAKEN SINCE JUNE 30, 2014.

33. The MabVax board of directors is classified under Section 141 of the DGCL. At the Company's annual stockholder meetings in 2015-2017, the stockholders elected the following directors:¹⁰

- The election on August 26, 2015 of Kenneth M. Cohen and Paul V. Maier as Class III directors, with each to serve until the 2018 Annual Meeting of Stockholders. *See* Ex. C-1.
- The election on June 29, 2016 of J. David Hansen, Philip O. Livingston, M.D., and Thomas C. Varvaro as Class I directors, with each to serve until the 2019 Annual Meeting of Stockholders. *See* Ex. C-2.
- The election on June 12, 2017 of Jeffrey F. Eisenberg and Jeffrey V. Ravetch, M.D., Ph.D., as Class II directors, with each to serve until the 2020 Annual Meeting of Stockholders. *See* Ex. C-3.

34. MabVax's stockholders have approved other actions at stockholder meetings since July 2014, which are described below:

¹⁰ The acts described in this Section were approved at stockholder meetings held between September 2014 and December 2017. Public filings announcing the stockholder voting results of those meetings are attached as **Exhibits C-1** through **C-7**.

- a. *Amendments of MabVax's Certificate of Incorporation.*¹¹
- Amended and Restated Certificate of Incorporation of MabVax, filed with the State Office on September 8, 2014. *See* Ex. C-4; Ex. D-1.
 - Certificate of Amendment of Amended and Restated Certificate of Incorporation of MabVax, filed with the State Office on September 8, 2014, which effected an 8-for-1 reverse stock split of MabVax's common stock. *See* Ex. C-4; Ex. D-2.
 - Certificate of Amendment of Amended and Restated Certificate of Incorporation of MabVax, filed with the State Office on August 16, 2016, which effected a 7.4-for-1 reverse stock split of MabVax's common stock. *See* Ex. C-2; Ex. D-3.
 - Certificate of Amendment of Amended and Restated Certificate of Incorporation of MabVax, filed with the State Office on February 14, 2018, which effected a 3-for-1 reverse stock split of MabVax's common stock. *See* Ex. C-5; Ex. D-4.

¹¹ The actual amendments filed with the Office of the Secretary of State of the State of Delaware (the "State Office") are attached as **Exhibits D-1** through **D-4**. As noted above, a Certificate of Correction was filed with the State Office on September 22, 2016 with respect to the Amended and Restated Certificate of Incorporation filed with the State Office on September 8, 2014. The Certificate of Correction inserted the Certificates of Designation for the Series A-1 through Series C Preferred Stock, set forth in Exhibits A-1 through A-3 to this Petition, into such Amended and Restated Certificate of Incorporation which had been inadvertently omitted therefrom at the time of the original filing.

- b. *Amendments to MabVax's Amended and Restated 2014 Employee, Director and Consultant Equity Incentive Plan:*¹²
- Second Amended and Restated 2014 Employee, Director and Consultant Equity Incentive Plan, including increasing the number of shares issuable thereunder to 8,360,789 shares, which was approved by the stockholders of MabVax on August 26, 2015. *See* Ex. C-1; Ex. E-1.
 - Fourth Amended and Restated 2014 Employee, Director and Consultant Equity Incentive Plan, including increasing the number of shares issuable thereunder to 4,128,406 shares, which was approved by the stockholders of MabVax on June 12, 2017.¹³ *See* Ex. C-3; Ex. E-2.
 - Fifth Amended and Restated 2014 Employee, Director and Consultant Equity Incentive Plan, including increasing the number of shares issuable thereunder to 6,128,406 shares, which was approved by the

¹² References to the number of shares issuable under the equity incentive plans listed below have not been adjusted for subsequent reverse stock splits. As of the date of this Petition, due to adjustments to the current equity incentive plan in connection with reverse stock splits, 3,376,135 shares are currently authorized and issued or reserved for issuance thereunder. The actual amendments are attached as **Exhibits E-1** through **E-4**.

¹³ In 2017, the Board of Directors also approved a Third Amended and Restated 2014 Employee, Director and Consultant Equity Incentive Plan (the "Third Plan") that effected an interim increase in the number of shares issuable thereunder. Because the Fourth Amended and Restated 2014 Employee, Director and Consultant Equity Incentive Plan – which superseded the Third Plan – was approved prior to, and submitted for stockholder approval at, MabVax's 2017 Annual Meeting of Stockholders, the Third Plan was not submitted for stockholder approval.

stockholders of MabVax on October 2, 2017. *See* Ex. C-6; Ex. E-3.

- An amendment to the Fifth Amended and Restated 2014 Employee, Director and Consultant Equity Incentive Plan, including increasing the number of shares issuable thereunder to 10,128,406 shares, which was approved by the stockholders of MabVax on December 1, 2017. *See* Ex. C-7; Ex. E-4.
- c. *Corporate authorization, for stock exchange purposes, of certain potential issuances of common stock, the ratification of certain prior issuances of common stock and certain issuances of securities.*
- The potential issuance, approved by the stockholders on October 2, 2017, of up to an aggregate of 3,400,000 shares of common stock, in excess of 19.99% of the number of shares of common stock that were issued and outstanding on August 11, 2017, consisting of (i) 2,386,360 shares of common stock issuable upon conversion of Series J Preferred Stock, issued to investors in a financing consummated in August 2017 and (ii) 1,013,640 shares of common stock available for issuance under designated but unissued shares of Series J Preferred Stock. *See* Ex. C-6.
 - The potential issuance, approved by the stockholders on October 2, 2017, of up to 6,500,000 shares of common stock upon conversion of Series K Preferred Stock issuable in connection with a financing consummated in August 2017, in excess of 19.99% of the number of shares of common stock that were issued and outstanding on August 11, 2017. *See* Ex. C-6.
 - The issuance, approved by the stockholders on October 2, 2017, of securities in one or more non-public offerings where the maximum discount at which securities will be offered will be equivalent to a discount of 30% below the market price of the common stock, as required by and in

accordance with Nasdaq Marketplace Rule 5635(d). *See* Ex. C-6.

- The issuance, approved by the stockholders on October 2, 2017, of securities in one or more non-public offerings where the maximum discount at which securities will be offered will be equivalent to a discount of 20% below the market price of the common stock, as required by and in accordance with Nasdaq Marketplace Rule 5635(d). *See* Ex. C-6.
- The potential issuance, approved by the stockholders on December 1, 2017, of up to an aggregate of 9,666,667 shares of common stock, in excess of 19.99% of the number of shares of common stock that were issued and outstanding on October 17, 2017, upon the conversion of 58,000 shares of the Company's newly authorized Series L Convertible Preferred Stock, which were issued to certain holders of the Company's Preferred Stock pursuant to Exchange Agreements dated October 18, 2017. *See* Ex. C-7.
- Ratification of the issuance, approved by the stockholders on December 1, 2017, of up to an aggregate of 2,900,000 restricted shares of common stock to certain investors in the Company's May 2017 public offering, in excess of 19.99% of the number of shares of common stock that were issued and outstanding on May 3, 2017, including 1,968,664 shares of common stock underlying the Company's Series I Convertible Preferred Stock. *See* Ex. C-7.

IV. SEC INVESTIGATION AND ITS EFFECTS.

A. MabVax is Notified of SEC Investigation.

35. On January 26, 2018, the SEC issued an Order Directing Private Investigation and Examination and Designating Officers to Take

Testimony of MabVax (the “SEC Investigation”). The stated purpose of the SEC Investigation concerns potential violations of securities laws under Section 17(a) of the Securities Act of 1933 (the “Securities Act”) and Sections 10(b) and 13(d) of the Exchange Act, and SEC Rules 10b-5 and 13d-1.

36. As MabVax has publicly disclosed, the subject matter of the SEC Investigation includes (i) the circumstances under which certain stockholders invested in MabVax and whether they have acted as an undisclosed group in connection with their investment; (ii) the manner in which those stockholders may have sought to control or influence MabVax and its leadership since their respective investments (and the extent to which those efforts to control or influence have been successful); and (iii) MabVax’s prior disclosures regarding the control of the Company and beneficial ownership of its common and preferred stock included in its registration statements filed in 2017 and 2018 and in its Exchange Act reports.

37. MabVax is cooperating fully with the SEC Investigation. It has produced a substantial volume of electronic data requested by the SEC, and continues to provide additional documents.

38. The SEC Investigation is ongoing. MabVax cannot predict when the SEC Investigation will conclude or the eventual outcome.

B. Stockholder Group Under Section 13(d).

39. As noted above, under Section 13(d), if any person or group of people acquired beneficial ownership of more than five percent of any class of stock registered pursuant to Section 12 of the Exchange Act (*e.g.*, MabVax common stock or shares of MabVax common stock issuable upon conversion of MabVax preferred stock within sixty days), they were required to file a Schedule 13D or Schedule 13G with the SEC within ten days. If certain of MabVax's stockholders, acting as a group, acquired beneficial ownership of MabVax's common stock in excess of five percent and failed to file a Schedule 13D or 13G, they may be in violation of the Exchange Act. If a group of preferred stockholders converted preferred shares into common shares and, when aggregated, their beneficial ownership exceeded five percent of the common stock, then they violated not only the Exchange Act but also the Conversion Blocker – rendering their common shares potentially void. MabVax cannot determine with confidence the extent to which common shares issued through the conversions are void.

C. MabVax Sued in Class Action Securities Lawsuit.

40. On June 4, 2018, a stockholder of MabVax filed a putative class action securities lawsuit in the United States District Court for the Southern District of California against MabVax, its CEO, J. David Hansen, and its Chief Financial Officer, Greg Hanson (the “Securities Action”).

41. The plaintiff in the Securities Action alleges that MabVax, David Hansen, and Greg Hanson (the “Defendants”) violated Section 10(b) and 20(a) of the Exchange Act by failing to disclose that (i) MabVax’s internal controls over financial reporting were materially weak and deficient; (ii) MabVax incorrectly calculated and reported beneficial ownership of MabVax shares and allowed certain shareholders to gain improper control over MabVax and/or its officers and directors; and (iii) as a result, MabVax’s financial statements and Defendant’s statements about MabVax’s business, operations, and prospects were materially false and misleading at all times.

V. IMPACT OF POTENTIAL STOCKHOLDERS GROUP
UNDER SECTION 13(D) ON VALIDITY OF
CONVERSIONS AND COMMON STOCK

42. A failure to recognize a stockholder group and appropriately aggregate those investors’ beneficial ownership of common stock, if in fact it is the case that certain stockholders acted as a group, would result in significant legal consequences for MabVax under its charter and Certificates of Designation. The looming potential of these legal consequences has already caused MabVax (and will continue to cause it) significant and compounding business consequences, as set forth below and in the Hansen Affidavit.

A. Legal Impact.

43. If certain of MabVax's preferred stockholders were acting as a group and together held more than 4.99% of MabVax's outstanding common stock, then, under Section 13(d) each such holder would be deemed to own beneficially the shares held by other members of the group. A failure to aggregate such group's shares in calculating the beneficial ownership of common stock of each member of the group impacts the Company legally in two ways: (1) common stock issued upon conversion of preferred stock, which is now publicly traded, may be invalid; and (2) MabVax is now unable to determine whether actions approved by stockholder votes were validly approved.

(i) Impact on Common Stock.

44. If the investors' beneficial ownership of common stock should have been aggregated, then shares of common stock were issued upon conversion of preferred stock in violation of the Conversion Blocker. Due to the large number of conversions since 2014, up to 28.4% of the outstanding common stock (*i.e.*, the approximate percent of the outstanding common stock issued upon conversion of preferred stock) may be invalid. Because, to the best of MabVax's knowledge, the preferred stockholders sold their shares of common stock into the market (or in private sales that thereafter may have resulted in secondary transactions on the open market), they have been publicly-traded for potentially years and MabVax is

unable to “trace” them. As a result, there is a validity cloud over all of the Company’s publicly-traded common stock.

(ii) Impact on Stockholder Votes Taken Since Conversions.

45. Preferred stockholders can vote the number of common shares that their preferred shares could be converted into based on the series’ conversion ratio. However, the Voting Limitation restricts preferred holders to voting only 4.99% of the outstanding voting shares of MabVax. Accordingly, any group of investors should have been limited, as a group, to voting shares equaling 4.99% of MabVax’s stock. With respect to each stockholder meeting, MabVax attempted to ensure that the Voting Limitation was applied appropriately to limit a preferred stockholder’s voting power, and calculated whether a quorum was present at stockholder meetings and whether various proposals were approved by the stockholders, all based on MabVax’s understanding at that time as to each stockholder’s beneficial ownership of MabVax’s stock. However, as described above, those quorum and voting determinations may have been based on an inaccurate assessment of certain preferred stockholders’ beneficial ownership.

46. As a result of this development, MabVax believes that, depending on whether – and to what extent – stockholder groups under Section 13(d) existed, it is realistically possible that (i) a quorum was not established at meetings where stockholder votes occurred, or (ii) the requisite stockholder

approvals were not obtained even if a quorum was present. Adding the 2,628,766 shares of common stock issued upon conversion of preferred stock to the voting power of the currently outstanding preferred stock (without giving effect to the Voting Limitation) equals 10,498,628 votes, which represents approximately 61.3% of the total outstanding voting power of the common and preferred. As a result of the questions that have been created by the SEC Investigation regarding whether the Conversion Blocker and Voting Limitation were correctly applied, the legitimacy of 61.3% of MabVax's voting power is now in doubt. Consequently, MabVax is currently unable to confirm whether stockholder votes taken since July 2014 (when MabVax went public) were effective.

B. Business Impact.

47. The legal effects of potentially invalid common stock and shareholder votes have already caused significant and damaging business consequences for MabVax, including causing it to elect to not file its Form 10-Q and the related consequences of such election. If MabVax issued invalid shares of common stock (which were then publicly traded) and effectuated reverse stock splits that were not passed by the requisite number of shareholder votes, it is impossible for MabVax to determine retroactively which outstanding shares of common stock are validly issued and which are not. Absent an accurate number of valid common shares outstanding, MabVax is unable to obtain accurate, audited

financial statements as they relate to its shares and per share figures included in such financial statements.

48. Accordingly, MabVax's auditors withdrew their audit reports included in MabVax's Annual Reports on Form 10-K for the years 2014 through 2017. MabVax has cautioned investors in its common stock not to rely on any financial statements or prior disclosures regarding the number of shares outstanding, and beneficial ownership, of capital stock in any SEC filing dated January 1, 2014 through the present. Without audited financial statements, MabVax is effectively unable to raise capital in public or private markets, because investors are unable to have confidence in the financial statements or the validity of MabVax's capitalization table.

49. The inability to raise capital will likely have significant consequences for MabVax, including those discussed in the Hansen Affidavit.

50. Among other consequences, as a result of the events described herein MabVax's common stock was delisted from Nasdaq on July 11, 2018 and it is now quoted on the OTC Pink Market. The staff at Nasdaq sent MabVax notice that it was not in compliance with Nasdaq Listing Rules due to its delay in filing its Form 10-Q. Nasdaq staff requested that MabVax submit a plan to regain compliance with its listing requirements. Ultimately, the Board of Directors, upon recommendation of management, determined that MabVax would be unable to file

its Form 10-Q in light of its present inability to report share and per share figures in its financial statements. Given the uncertainty surrounding the length and outcome of the SEC Investigation, MabVax was similarly unable to submit a plan to Nasdaq for retaining its listing on Nasdaq. Consequently, staff at Nasdaq suspended MabVax's common stock from trading on Nasdaq and its common stock is currently quoted on the OTC Pink Market.

VI. MABVAX NEEDS AND IS ENTITLED TO AN ORDER UNDER SECTION 205 VALIDATING CONVERSIONS AND OTHER CORPORATE ACTS.

51. MabVax seeks judicial validation of the corporate acts described above under 8 *Del. C.* § 205 (“Section 205”). Section 205 empowers the Court to “[d]etermine the validity of any corporate act or transaction and any stock, rights or options to acquire stock” and to “[d]eclare that a defective corporate act validated by the Court shall be effective as of the time of the defective corporate act.” 8 *Del. C.* § 205(a)(4), (b)(8).

A. Section 204 is Unavailable.

52. The “self-help” process for ratification under Section 204 of the DGCL (“Section 204”) requires a stockholder ratification vote. The potentially defective corporate acts that are the subject of this Petition (*see* ¶¶ 30, 33-34) required a stockholder vote for approval. Accordingly, ratification of those acts under Section 204 would require a stockholder ratification vote, but if the matter

were submitted to the stockholders, the Company would be unable to determine if a valid stockholder ratification vote had been obtained.

53. Under Section 204, stockholder approval for a ratification must be provided by the holders of the indisputably *valid* shares of the corporation. As noted above, nearly one-third of MabVax's common stock may be invalid and, because those shares are publicly traded, MabVax is unable to identify which holders are in possession of valid shares of common stock. Additionally, even if MabVax were able to identify with certainty which shares of common stock were validly issued, the preferred stock represents approximately 45.9% of the combined voting power of the common stock and preferred stock and the voting power of the preferred stock is restricted by the Voting Limitation. The potential application of the Voting Limitation to one or more groups of preferred stockholders creates uncertainty over the votes of preferred stockholders.

54. MabVax is, therefore, unable to obtain a stockholder approval that would be based upon votes of shares that are unequivocally valid. MabVax cannot rely on a Section 204 ratification.

B. MabVax has an Immediate Business Need.

55. As discussed in the Hansen Affidavit, MabVax has a vital and immediate business need for validation of the acts in question. In addition, MabVax's innocent common stockholders hold shares that could be invalid. The

price of MabVax shares fell substantially following the May 21, 2018 disclosure of its inability to remain current with its periodic filings. Validation of MabVax's acts with regard to processing conversions of preferred stock and acts approved by the stockholders will allow it to begin immediately taking the necessary steps to regain its footing.

C. Section 205 Factors Weigh Heavily in Favor of Relief.

56. Section 205(d) sets forth five factors that the Court may consider in connection with the resolution of an application for judicial ratification:

- (1) Whether the defective corporate act was originally approved or effectuated with the belief that the approval or effectuation was in compliance with the provisions of [the DGCL], the certificate of incorporation or bylaws of the corporation;
- (2) Whether the corporation and board of directors has treated the defective corporate act as a valid act or transaction and whether any person has acted in reliance on the public record that such defective corporate act was valid;
- (3) Whether any person will be or was harmed by the ratification or validation of the defective corporate act...;
- (4) Whether any person will be harmed by the failure to ratify or validate the defective corporate act; and
- (5) Any other factors or considerations the Court deems just and equitable.

These factors justify granting MabVax's petition for relief under Section 205.

57. **First**, MabVax, its Board of Directors, and innocent common stockholders did not intend to violate the limitations in the various Certificates of Designation. In reliance on stockholder-reported beneficial ownership, MabVax effectuated the conversion of preferred stock to common stock in accordance with the Certificates of Designation and applicable provisions of the DGCL. Further, director elections, charter amendments, amendments to equity plans and approvals required by stock exchange rules were approved by the Board of Directors and the innocent stockholders of MabVax in the belief that such approvals complied with MabVax's organizational documents. MabVax had no reason to believe that the conversions or corporate acts could be invalid.

58. **Second**, MabVax, its Board of Directors, and stockholders have always treated the conversions and other acts approved by the stockholders as valid. The common shares resulting from the conversions have traded hands in the public marketplace for years. The public has relied on those shares being valid and on the accuracy of MabVax's public disclosures concerning those shares.

59. **Third**, no one will, or could, be harmed by the validation of the conversions, resulting issuances of common stock, and other corporate acts. Validation of MabVax's corporate acts would simply serve to restore MabVax and its stockholders to the positions that they all believed they were in prior to May 21, 2018.

60. *Fourth*, the absence of judicial ratification of the potentially defective acts would severely harm MabVax and its stockholders. The uncertainty lingering over MabVax’s capital structure will not be removed in any meaningful way or on any predictable or reliable schedule, if these corporate acts are not validated by the Court under Section 205.

61. MabVax has taken appropriate and reasonable steps to provide notice and transparency related to this Petition:

a. In connection with the SEC Investigation, MabVax’s Board of Directors appointed an independent Special Committee to supervise MabVax’s review of the matters believed to be under investigation (the “Special Committee”). The full Board of Directors of the Company have approved the filing of this Petition.

b. MabVax has informed the SEC of the filing of this Petition, the relief it seeks and the grounds for granting relief.

c. On May 21, 2018, MabVax’s stockholders were notified that MabVax was exploring mechanisms under Delaware law to remedy and ratify potentially invalid stock issuances with the intention to utilize those mechanisms.

d. On the same day MabVax files this Petition, MabVax intends to issue a press release in the form attached hereto as **Exhibit F**, disclosing the filing

of this Petition and informing investors that a subsequent press release will be issued when the Court sets a hearing date.

COUNT ONE

(Validation of Conversions and Issuances of Common
Stock Upon Conversion of Preferred Stock Under 8 *Del. C.* § 205)

62. Petitioner repeats and reiterates the allegations above as if set forth fully herein.

63. Uncertainty exists as to whether MabVax's conversions of preferred stock into common stock, as detailed in Exhibit B, were valid under the Certificates of Designation. If the conversions were invalid, the resulting common stock is invalid.

64. MabVax's conversions are potentially "defective corporate acts" under 8 *Del. C.* § 204(h)(1)-(2). The invalidly issued common shares resulting from those conversions may therefore be "putative stock" under 8 *Del. C.* § 204(h)(4).

65. Petitioner lacks the ability to ratify the conversions or issuances of common stock under Section 204 due to its inability to obtain a reliable stockholder vote on ratification.

66. Under Section 205, this Court can declare MabVax's conversions and resulting issuances of common stock upon such conversions valid as of the date of these occurrences as set forth in Exhibit B.

67. For the reasons detailed above, the policy considerations under Section 205 as well as other equitable and practical considerations weigh in favor of granting the relief requested.

68. Petitioners have no adequate remedy at law.

COUNT TWO

(Validation of Acts Approved by
Stockholders at Meetings Under 8 *Del. C.* § 205)

69. Petitioner repeats and reiterates the allegations above as if set forth fully herein.

70. The director elections, charter filings, equity plans amendments and other corporate approvals provided by stockholders detailed above are potentially invalid. If certain preferred stockholders acted as a group under Section 13(d) and should have been limited, as a group, to voting only 4.99% of MabVax's voting power, then MabVax effectuated those acts at meetings lacking a quorum or without a sufficient number of votes.

71. Petitioner cannot ratify these acts under Section 204 for the reasons herein.

72. Under Section 205, this Court can declare these acts valid and effective as of the date those acts were taken.

73. For the reasons detailed above, the policy considerations under Section 205 as well as other equitable and practical considerations weigh in favor of granting the relief requested.

74. Petitioners have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that the Court enter an Order in the form attached hereto as **Exhibit G**:

1. Validating and declaring effective the conversions detailed in Exhibit B and issuances of common stock upon conversion, with validity being retroactive to the time of each conversion;
2. Validating and declaring effective the director elections, charter filings, equity plan amendments and corporate authorizations detailed above that were approved by stockholders at MabVax stockholder meetings, with validity being retroactive to the time of each corporate act;
3. Granting such other and further relief as the Court deems proper.

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