NOTIFY 63

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss**

**SUPERIOR COURT**
**CIVIL ACTION**
**NO. 2184-CV-1346**

**HEMBIO, INC. f/k/a HEMERA BIOSCIENCES, INC.**

**vs.**

**PAUL FIREMAN, ADAM ROGERS, AND HEMERA BIOSCIENCES, LLC**

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND TO STRIKE**

Hembio, Inc. f/k/a Hemera Biosciences, Inc. ("Hembio") brings this action against Adam Rogers, Hembio's former CEO and a former member of its Board of Directors; Paul Fireman, another former Hembio board member; and Hemera, LLC ("Hemera"). Hembio alleges that Rogers and Fireman misled Hembio's Board and its shareholders to convince them to sell Hembio's intellectual property and assets to Hemera, an entity controlled by Fireman and for which Rogers became CEO. Each Defendant brings a motion for summary judgment.

There is one preliminary matter. In support of its contention that the sale to Hemera was the product of an unfair process and material omissions, Hembio relies upon an affidavit from Theresa M. Stevens ("Stevens Aff."). See Omnibus Opposition at 36-41; Joint Appendix ("JA") Ex. 2. Stevens purports to be an "expert … [on] the practices and customs, and standards of care, in [the biotechnology and pharmaceutical] industry," Stevens Aff., ¶¶ 1-2, and offers the opinions that:

> [T]he conduct of Adam Rogers and Paul Fireman in affecting the sale of Hembio's assets was well outside the custom and practice in the industry in many respects, and that the process of the transaction was not fair. Further, it is my opinion that, in part, because of this tainted sale process, the price obtained for that sale was well outside what reasonably

> could have been obtained. It is my opinion that Rogers and Fireman utterly corrupted the sale process in an effort to preclude any action other than a sale to Fireman at an unfair price. ... [I]t is [also] my opinion that Rogers and Fireman were not candid with the board, that the information they withheld would have been material and relevant to the board, and of such a magnitude to be important to the board in carrying out its decision making. ... [I]t is also my opinion that there is a substantial likelihood that the disclosure of admitted facts would have been viewed by a reasonable board as having significantly altered the total mix of information, and would have been relevant to the board in carrying out its decision making.

Stevens Aff., ¶¶ 3-5. Defendants have filed a motion to strike the affidavit on the grounds, among others, that the affidavit lacks a reliable methodology, includes speculation and conclusory assertions, and characterizes the record with comments that are not the proper subject of expert testimony. See Abdulky v. Lubin & Meyer, P.C., 102 Mass. App. Ct. 441, 451–452, review denied, 492 Mass. 1103 (2023) (admissibility of expert testimony to defeat summary judgment "is governed by Commonwealth v. Lanigan, 419 Mass. 15 (1994), and its progeny ... [under which] [a] proponent of expert testimony must show (among other things) both (1) that the proposed expert testimony is based upon a reliable methodology, and (2) that that methodology has been reliably applied to the facts of the case.").

With the exception of Stevens' testimony regarding customs and practices in the biotechnology and pharmaceutical industry (discussed below), the Court generally agrees with Defendants' contentions. For instance, Stevens' opinions on fact determinations to be made by the jury, e.g., whether or not Rogers or Fireman were candid, are inadmissible. See, e.g., Commonwealth v. DiGiacomo, 57 Mass. App. Ct. 312, 323–324 (2003), quoting Commonwealth v. Reed, 417 Mass. 558, 561 (1994) ("[i]t is well settled that an expert may not offer an opinion on a witness's credibility"). Other opinions are speculative and not grounded on a reliable methodology, e.g., that other companies would have paid more for Hemera than Fireman. See, e.g., Lightlab Imaging, Inc. v. Axsun Techs., Inc., 469 Mass. 181, 189 (2014) (citations omitted)

("[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert."); Van Brode Grp., Inc. v. Bowditch & Dewey, 36 Mass. App. Ct. 509, 520 (1994) ("An expert should not be permitted to give an opinion that is based on conjecture or speculation from an insufficient evidentiary foundation."). However, the customs and practice in an industry is a question of fact that may be a proper area for expert testimony, but a witness giving such testimony cannot "give his opinion as to the legal effect of the custom or usage." DiMarzo v. American Mut. Ins. Co., 389 Mass. 85, 103 (1983). Stevens does that here, such as by opining that the transaction at issue violated industry custom and practice and then opines "the process of the transaction was not fair." Stevens Aff., ¶ 3. Nevertheless, Stevens' testimony regarding customary industry practice constitute facts that are within the scope of her expertise and that are relevant and potentially helpful here. See, e.g., Stevens Aff., ¶¶ 86, 125 ("big pharma [business development] people do not typically request the [JP Morgan] meetings unless they're very interested in their company."). Accordingly, the motion to strike is **ALLOWED IN PART**; as reflected below, the Court will consider Stevens' testimony regarding industry custom and practice.

As to the summary judgment motion, and in light of the filings and arguments of the parties and for the reasons that follow, all three motions are **ALLOWED IN PART**:

1. Rogers' motion for summary judgment is **ALLOWED** as to Counts III-VIII but **DENIED** as to Counts I and II.
2. Fireman's motion for summary judgment is **ALLOWED** as to Counts I, II, IV-VII but **DENIED** as to Count VIII.
3. Hemera's motion is **ALLOWED** as to Count IV but **DENIED** as to Count VIII.

## BACKGROUND

Hembio, a Delaware corporation, was founded in July 2010 by Rogers, a medical doctor, and three other medical doctors – Jay Duker, Rajendra Kumar-Singh, and Elias Reichel – to develop a novel gene therapy drug ("HMR59") for age-related macular degeneration and guide HMR59 through clinical trials. Defendants' Consolidated Statement of Undisputed Facts ("SUF") 1. Between 2013 and 2015, Hembio engaged in a Series A fundraising round and a convertible note financing round. SUF 4, 5. Fireman, Rogers' father-in-law, was the single largest investor in both rounds. Id.

In March 2017, Hembio began its Phase 1 clinical human trial. SUF 7. Almost a year later, Hembio entered into an agreement with Paragon Bioservices, Inc. ("Paragon") to develop and produce drugs needed for Hembio to conduct Phase 2 trials. SUF 8.

During this time period, Hembio's Board of Directors consisted of Rogers, Duker, Reichel, Kumar-Singh, and Fireman. Rogers was also the company's CEO. SUF 11 n.4.

As of the fall of 2018, Hembio was experiencing financial distress. SUF 9. On November 15, 2018, Rogers sent an email to the Board noting Hembio's current cash position, the existence of several large upcoming expenses, and projecting that Hembio would run out of cash in April 2019. SUF 11. The same day, the Board approved a Series B term sheet as part of a capital campaign to raise $45 million to pay for the Phase 2 testing of HMR59 (the "Series B Round"). SUF 13. The Series B term sheet provided for (1) a minimum fundraising threshold at $35 million; (2) Fireman to serve as the "lead" investor by pledging to invest $15 million if the threshold was reached; and (3) a 120-day deadline for Hembio to raise the remaining $20 million. SUF 14. When Hembio did not receive enough interest in the Series B Round, Fireman extended his commitment to allow an additional 180 days to raise the money. SUF 15. Hembio, however, was ultimately unable to meet this extended deadline. SUF 17.

In May 2019, as the Series B Round was in progress, Hembio engaged Guggenheim Securities, LLC ("Guggenheim") to advise the company on the potential sale of Hembio. JA Exs. B66, M10.

On July 17, 2019, Rogers emailed the Board and informed them that the company was "dangerously close to insolvency" and that it would exhaust its cash in no more than three months. JA Ex. F219. At the end of July and into August 2019, the Board discussed winding down the company, bankruptcy, and going into "stealth mode" (cutting all spending and waiting out any creditors) to address the company's financial problems. SUF 21.

On July 25, Cameron Taylor, Guggenheim's lead banker, sent Rogers a status report regarding Guggenheim's sale efforts. JA Ex. F220. Rogers provided the report to the Board. The report stated, among other information, that Janssen Pharmaceuticals ("Janssen") and Merck were in contact with Hembio. Id. Rogers subsequently informed the Board that Merck had signed a Confidential Disclosure Agreement ("CDA") and that he was setting up a data room for it. JA Exs. K127, K128. Janssen, however, was not prepared in July 2019 to make an offer. JA Ex. L at 195:24-197:5.

Beginning in August, Hembio attempted a Series A-2 investment round at the suggestion of Duker with the goal of raising $1-3 million in emergency capital to fund the company for an additional six months (the "Series A-2 Round"). SUF 22. Rogers offered to invest an additional $250,000 in the Series A-2 Round and urged others to do the same to send a strong message to other potential investors. SUF 24. However, Reichel and Kumar-Singh did not offer to invest additional funds and Duker only offered to invest $9,500. Id. Hembio ultimately did not reach the $1 million threshold to move forward with the Series A-2 Round. SUF 27.

On August 19, Rogers spoke with Paragon and requested that its bill be divided into two installments, the first due in September 2019 and the second due in October 2019. Paragon approved the forbearance. JA Ex. 120. See JA Ex. 4 at 423:11-20.

On September 2, while the Series A-2 Round was still in progress, Duker sent an email to Kumar-Singh and Reichel in which he complained about Fireman. JA Ex. D162. He stated:

> I may be wrong about all or some of this but here are some of my conclusions: [ ]Paul Fireman wants to totally control (not run – that is for Adam [Rogers]) [Hembio] … [and] [ ]Paul has no intention of letting [Hembio] wind down and go away.
>
> Why hasn't Paul agreed to go in on the Series A-2? It's a great deal. Total control, great price. Answer – he wants a better deal. And he wants to punish the Founders for not putting in more money or taking his prior offers.
>
> I think we need to prepare for several outcomes:
>
> - Paul does invest in the A2, the minimum is raised, and [Hembio] goes on without us[.]
>
> - Paul and others do not invest enough, the A2 offer disappears and we start the wind down. Paul then comes in with an even lower ball offer as an individual investor for the "assets" of [Hembio] as a take it or leave it. This will involve a completely new entity coming in and [Hembio] will truly no longer exist. If we don't take it, he threatens to sue us individually in order to protect his investment. My guess is that the offer will involve a complete dissolution of the Founders and the Series A shares. I would not be surprised if he offers us a "bone" in some form to sign an agreement that we will not speak negatively about [Hembio] or Paul or Adam.
>
> I am personally torn between being so tired of these guys that I just want to forget about it versus seeing what our options are. In order to do the latter we need to … hire outside counsel.

Id.

In a board meeting the next day, Rogers stated that it was very unlikely that the company would reach the $1 million threshold for the Series A-2 Round and opened the floor to other members to offer alternatives. JA Ex. K138. Fireman opined that the Series A-2 Round was not a good investment and that he would not commit to putting in money for this reason. Id. Duker asked Fireman if he had any proposals and Fireman put forward a proposed deal. Id. Under the term sheet Fireman provided the following day (JA Ex. H191), the deal would be structured as follows: Fireman would commit $40 million, and in return, each class of company shares (common, Series A, and convertible noteholders) would be given 5% of common shares in a new company based on their current pro rata percentage. Moreover, Duker, Reichel, and Kumar-Singh would each be given either $500,000 or $750,000, depending on whether they surrendered their 5% in common shares. To obtain either amount, they would have to sign non-competition agreements (among other documents) and would have to resign from the Board. As part of this recapitalization, all Series A documents would be terminated and replaced with Series B documents. Duker, Reichel, and Kumar-Singh went on to consider the offer.

On September 5, Taylor sent Rogers a status report regarding Guggenheim's sale efforts. JA Ex. F228. Rogers instructed Taylor to send the report to Duker, who had requested an update. JA Exs. F229, M16. The report stated, among other things, that Guggenheim was "[i]n contact with" Janssen and "determining next [steps]." JA Ex. F229. It also stated that Merck had executed a CDA and was "entering dataroom." Id.

On September 10, Rogers sent Kumar-Singh an email (Fireman was cc'd) with an offer to serve as a consultant if Fireman's offer was accepted. JA Ex. 41. Rogers conveyed that such an offer was not being made to any other founder and that Kumar-Singh should keep the offer confidential. Id.

As negotiations over Fireman's offer proceeded, tensions arose between Fireman and Duker, Kumar-Singh, and Reichel over the terms of the noncompetition agreements that were required under the offer. On September 26, Fireman emailed Rogers complaining about their intransigence and requesting that Rogers take steps to preserve Hembio's cash and present a plan for liquidity if the deal was not consummated by September 30. JA Ex. 48. In response, Rogers stated that he was "on the same page" as Fireman, that "*we* should not negotiate at all on the non compete," and that he would call an emergency board meeting on September 30 to take a vote to enter bankruptcy if the deal fell through. Id. (emphasis added). Soon thereafter, Rogers sent Fireman's attorney an email with proposed revisions to the noncompete agreement. JA Ex. 50. He wrote: "[I]n the email to [the other founders'] legal team I would like you to remove my name and keep only Paul [Fireman]'s as this agreement is between Paul and the three founders. *My name will only enflame the other three and the goal is to get this signed.*" Id. (emphasis added). As these communications among Fireman, his attorney, and Rogers were occurring, Janssen expressed a desire to sit down with Rogers in October 2019. JA Ex. 47. This fact was not shared with the Board.

On September 30, Rogers sent an email to the Board explaining that due to a breakdown in the negotiations regarding the non-competition agreements (as well as other documents related to the deal), Fireman had rescinded his offer. JA Ex. H195. Rogers also stated that "this leaves [the company] without any other opportunities for funding to meet its obligations as they come due given the [company's] current cash position" and called an emergency meeting that same day to vote on "engag[ing] Marc Porter [(Hembio's corporate counsel)] to assist with winding down the company and distributing the remaining available funds equitably among [the company's] creditors." Id.

At the meeting, Duker, Kumar-Singh, and Reichel objected to the fact that 24-hour notice was not provided per the bylaws and refused to waive the notice requirement. JA Ex. 51. In response, Rogers and Fireman "stressed the importance to act" in light of the company's financial situation and Fireman separately "warned the objecting Board members that they were exposing the Board to liability for failure to act." Id. The meeting was adjourned due to the notice objections. Id.

The day after the meeting, Rogers emailed Len Nannarone, who was Hembio's counsel and who had represented most of Fireman's start-ups (Ex. 20), to meet with him and Fireman to "discuss next steps." JA Ex. 55. Nannarone agreed to the meeting and mentioned that he knew a bankruptcy attorney that could be used for Hembio. Id.

On October 2, Nannarone sent an email to insolvency attorney, Brian Goldstein, introducing Goldstein to Rogers (who was cc'd on the email) and stating that Hembio needed immediate assistance with Chapter 11 filing for Hembio. JA Ex. 119. The three of them then arranged a meeting on October 3 with Fireman. Id.

Later that day, Rogers cancelled the board meeting scheduled for that day, stating: "I am continuing to perform due diligence on a wind down and have nothing new to report at this time." JA Ex. 57. Rogers then emailed Marc Porter (Nannarone was cc'd) stating that the "board is going to be actively discussing and then voting on a wind down or bankruptcy path" and seeking an attorney from his firm to "help walk the board members through their fiduciary responsibilities to the company and options for the wind down of the company." JA Ex. 56.

On October 3, Nannarone exchanged emails with Attorney Goldstein. JA Ex. 58. The subject of the email chain read: "I am lobbying you to represent Paul. Who knows if [Hembio] can ever pay you." Id. Goldstein explained in one email that: "The key is to get an outside company counsel to advise the founders on their fiduciary duties and options. Once they see they have no option, I am hopeful they will be more cooperative. One other benefit of bankruptcy is that Paul won't need to pay common anything, and they will be totally out of the company, no fiduciary duties going forward." Id.

Later that day, October 3, Rogers sent to the Board Fireman's letter of resignation from the Board, and Rogers held a board meeting. JA Ex. 59.

At the meeting, Rogers mentioned that he and Nannarone were talking to a number of bankruptcy attorneys and that he would call a meeting on October 7, 2019, the following Monday, to vote on winddown or bankruptcy. JA Ex. Q4 at 3:22-25. There is no evidence that shows Rogers had been talking to a number of bankruptcy attorneys at that time. Rogers also stated: "I'm still talking to some companies but it's not easy to talk to people when there's no cash and no future." Id. at 4:21-23. Upon being asked which companies he was talking to, Rogers identified Merck, Regeneron, and Applied Genetic Technologies Corporation ("AGTC"). Id. at 5:4. Rogers did not mention a meeting with Merck the next day.

During the board meeting, Duker suggested that a company like Merck might be interested in buying Hembio's assets in bankruptcy. JA Ex. Q4 at 15:14-18. In response, Rogers stated: "[B]efore you get off on the Merck tangent, so just so you know, [Kumar-Singh] and I met with them a month and a half ago, only got through a part of the slide deck they just want to talk about the next part of the slide deck." Id. at 15:19-24. Duker also expressed surprise about outstanding bills due to Paragon and asserted that Rogers had only informed the Board about the bills for the first time just the week prior. Id. at 25:3-27:6. Rogers denied this and stated: "[L]isten, we're at the point in time in this company where time is of the essence, and we're going to have to make decisions quickly. We can't drag this on for two or three or four more weeks. It's just not going to happen. That's the reality, here guys." Id. at 25:3-28:2.

After the board meeting, Rogers emailed AGTC to confirm his availability to meet on October 18 to discuss "any mutual interest regarding a collaboration/deal." JA Ex. 60.

On October 4, Rogers met with Merck. Although Taylor advised him to have the "full team" at the meeting (JA Ex. 43), Rogers attended the meeting alone, telling Merck that his co-founders were out of town. JA Ex. 54. At least for Kumar-Singh, this was not the case. JA Ex. 63.

That same day, Rogers again emailed Porter. JA Ex. 67. He wrote:

> We have reached the point where [Hembio] has 300k in cash and is insolvent. The offer from Paul Fireman expired as of Monday ... Are you free at 1230 EST ... October 7, 2019 for a 30 minute board call to outline/discuss [the] path forward with the board so they can get educated. I'm still out raising money and meeting with funders but we are out of time and want to limit the risk given our financial situation.

Id. Upon receiving a reply from Porter, Rogers emailed the Board and informed them that Porter and his associate would be at the October 7 meeting to discuss next steps and the Board's fiduciary duty to Hembio. Id. Rogers also mentioned the meeting with Merck, noting that it went well and that Merck would be in touch. Id. He further stated: "It is a long process with these organizations and they are very methodical [and] deliberate. [Kumar-Singh] and I have been meeting with them since early May to put this in perspective." Id. The email to Porter and Porter's response was apparently attached to this email. Id.

Also on October 4, Goldstein and Jack McElhinney, Fireman's longtime personal advisor and attorney, exchanged emails after an introduction from Nannarone. JA. Ex. 64. Goldstein sent Fireman an engagement letter. Id. In response, McElhinney stated:

> Paul has decided that presenting a further offer to the Board to buy the company would be a waste of time, and just creates further opportunities for delays. Instead he would like to have you coordinate a filing to put the company into an involuntary bankruptcy and then deal with a trustee on an offer.

Id. Rogers and Fireman were cc'd on the email. Id.

Shortly thereafter, Goldstein emailed Rogers explaining that he and Nannarone had spoken with Fireman and they had recommended "a plan of action" (apparently a renewed offer from Fireman to purchase Hembio) that they wanted to review with Rogers. JA Ex. 62. In a subsequent email, Rogers asked Goldstein whether the offer should be sent before or after the board meeting on October 7. Id. Goldstein responded that either time was fine and noted that he did not want the offer to expire too quickly and preferred a deadline greater than 48 hours. Id. Rogers later reviewed Fireman's offer letter and informed McElhinney and Nannarone that "there needs to be a deadline of 48 hours to accept or reject this offer." JA. Ex. 71. Rogers would later explain that the short deadline was needed because the "board members had shown over numerous years at various times that they could not make decisions in a timely fashion. So we needed to push them along. Either take the money or let's wind down the company, period." JA Ex. 4 at 455:8-12.

On October 5, Rogers sent the Board an email attached to which were the company's unpaid bills and its financial statements as of October 4, 2019. JA Ex. 72. He stated: "I want to remind everyone that from July 2019 onward we have agreed on the board (not voted on) to start a wind down once we reached 300k in cash. We are there. ... The agenda of [the October 7 meeting] will be to discuss [Hembio's] next steps and vote on any items that are necessary." Id. The email did not inform the Board that Fireman was putting together another offer.

On October 6, Rogers, McElhinney, and Goldstein continued to discuss Fireman's offer. JA Ex. 73 McElhinney conveyed to Rogers his "fear ... that the more detail we put into this proposal, the more ammunition we give to the board to delay things and *request additional diligence and advice*. I think the goal should be to force an up or down vote quickly, so that we can put the company into bankruptcy by the end of next week." Id. (emphasis added). Goldstein, however, was concerned that "the offer look as much like an arm's length offer as possible." Id. Rogers disclosed none of this to the Board.

That same day, Duker emailed Reichel and Kumar-Singh and informed them that he had spoken to a bankruptcy attorney. SUF 38; JA Ex. J24. He explained:

> [The attorney] felt there are three options for us: -wind down - discussing the situation with all our creditors that we are about to go bankrupt - can we have more time to try to get funding before we go under.
>
> My opinion on this is while it sounds good, the likelihood of success is close to zero. We have not had anyone get even close to buying or funding us and these processes take months to years. We will be out of money completely just paying Adam before anything could possibly come to fruition.
>
> Of course if we do this, "newco" may come in and make another offer to buy/fund that we cannot turn down as we will have no other options.

JA Ex. J24. In response, Kumar-Singh suggested they ask Adam not to take a salary and cease Hembio's operations to prevent any further damage to Hembio's creditors and investors and to give them some "breathing space." Id. He noted that: "If Adam rejects the idea (which he likely will), it just further confirms he has no interest in looking for outs for [Hembio] and that too goes on record." Id.

On October 7 before the 12:30 p.m. board meeting, Rogers sent the Board an email stating:

> This morning,[1] I received a term sheet from Paul Fireman ... that I have included in this email for the board's review. I have reviewed the offer with Len [Nannarone] this morning and suggest that all of us review the proposal so that we may have questions available to Len and Marc at the 12[:]30 meeting. Marc [Porter] will still attend with his bankruptcy colleague ... to answer any questions on wind down versus bankruptcy if Paul Fireman's new offer is not acceptable to a majority of the Board after due consideration.

JA Ex. 75. Rogers further noted that Fireman had a "strict deadline of 48 hours to respond" to the offer. Id. Rogers closed the email by stating: "I believe as a Board we have to work with

[1] Rogers' use of the phrase "this morning" suggests he had just received the term sheet and was unaware of it and its provisions prior to that time, which does not appear to be accurate.

whatever deadlines an investor presents so we must have a vote by Wednesday [October 9] due to the expiration date contained in the offer letter." Id.

At the meeting, a bankruptcy associate from Porter's firm gave a 5 minute and 14 second presentation that primarily discussed the differences between Chapter 7 and Chapter 11 bankruptcies. JA Ex. 3 at ¶ 3; JA Ex. Q5 at 10:24-15:14. The remainder of meeting was devoted to Fireman's offer and the process that would ensue if the Board approved the term sheet. See JA Ex Q5. At the end of the meeting, the Board unanimously voted to approve the term sheet and authorized Rogers to negotiate the transaction. SUF 40. However, Reichel noted: "[A]s I said before, I think we can work a better deal here." JA Q5 at 66:12-13.

On that same day, Rogers asked Taylor to press Janssen to follow up about meeting with him. JA Ex. 130. He noted that one individual from Janssen had "been very interested in us." Id.

The next day, on October 8, Rogers emailed Kumar-Singh (Reichel, Duker, Nannarone, and Porter were cc'd), stating, among other things: "Given the fact that we are currently fielding a deal for the company I do not recommend that any board members reach out to vendors or investors. I would include Guggenheim as well as they alerted me you reached out to them two weeks ago. We do not want the deal cancelled due to inappropriate board activity." JA Ex. 77. In response, Kumar-Singh contested that reaching out to Guggenheim had been inappropriate and commented: "I have no idea what deal you think is going to get cancelled given our present circumstances." Id. Additionally, Kumar-Singh requested access to Hembio's data room and certain information from Paragon detailing the work they provided in connection with two invoices. Id. Kumar-Singh further noted he had reached out to Paragon but received no reply. Id. Thereafter, Rogers continued to deny Kumar-Singh easy access to the data room (JA Ex. 78), and, at one point, stated to Porter that "before [Kumar-Singh] is granted any access to all the data it should be run by Paul and his lawyers." JA Ex. 79.

On October 10, Duker emailed Rogers asking if Porter had been able to negotiate a higher percentage of share ownership in the new company following the deal. JA Ex. 79. Rogers replied: "Paul will not negotiate on the 10%." Id. See also JA Ex. 4 at 488:12-14. On October 13, Rogers emailed Taylor to inform him that a meeting with Regeneron "went well" and that it "seemed interested." JA Ex. 81. In response, Taylor expressed hope that Hembio could "use Janssen (once in contact) and Merck to push them a bit." Id. Rogers replied: "Let's keep [m]oving this forward." Id.

On October 18, 2019, Rogers met with AGTC. Despite the fact that Taylor recommended including the co-founders (JA Ex. 37), he attended the meeting alone, telling AGTC that the other board members were unavailable "due to travel in our group." JA Ex. 84. At least for Duker, this may not have been the case. See JA Ex. 82 at 2:9-19. Soon after the meeting, AGTC expressed to Rogers that their discussion had been "really productive," that Hembio's data was "pretty intriguing," that it "shared the idea the two companies would have great synergy," and that they would get back to Rogers with "next steps shortly." JA Ex. 89.

As noted above, in August 2019, Paragon agreed to divide a payment owed to it in two installments due in September and October. On October 22, 2019, Paragon contacted Rogers because the first of the two payments was 27 days past due. JA Ex. 120. In response, Rogers sought an additional forbearance, stating: "[Hembio] is in the final stages of a financing round. Would you please give the company 30 additional days to finish the transaction and we will wire the money immediately." Id. It appears Rogers was granted the additional forbearance and that he did not disclose this to the Board. See Ex. 4 at 423:11-18.

On October 23, Janssen, after being prompted by Taylor, reached out to Rogers about meeting at a biotech-specific conference organized by JP Morgan taking place in January 2020. JA Ex. 90. Rogers expressed interest in doing so. Id.[2] Janssen eventually confirmed a meeting with Rogers and Janssen's extended team at the JP Morgan conference. Plaintiffs concede that Janssen was not prepared to make a binding offer to acquire Hembio at the conference, but, citing Stevens' affidavit, contend that Janssen's request for a meeting at the JP Morgan conference evidenced their continued interest. See Stevens Aff., ¶¶ 125, 126.

On October 30, 2019, Rogers emailed McElhinney, and another attorney representing Fireman (Fireman was cc'd) about the terms of the LLC Agreement for Hemera (the new Delaware company that would replace Hembio as a result of the deal). JA Ex. 93. He stated: "My biggest concern about the direction of this LLC is that the 10% [of Class B shares consisting of Hembio's former shareholders and noteholders] get too many rights and are putting in no money. Paul [Fireman] needs to take control of the LLC so he is not at the mercy of the 10%. Look forward to speaking at 2 PM. *Please keep this email between the 4 of us.*" Id. (Emphasis added). The next day, Rogers emailed McElhinney, and two other attorneys representing Fireman (Fireman was cc'd) and again commented about the terms of the LLC Agreement. JA Ex. 95. He wrote "I have been thinking about the drag/tag rights [in Sections 13.4 and 13.5 of the LLC Agreement] and am concerned that the minority common shareholders have too much insight and say into how Paul ... conducts the sale of the shares. ... [E]very decision in this document should be at Paul's discretion." Id. See also Ex. JA Q10.

[2] Rogers points out that this happened weeks after the October 7 vote to approve Fireman's non-binding term sheet, Rogers' Memorandum in Support at 17 n. 5, but does not suggest that the preliminary vote terminated his obligations to keep the Board properly informed.

On November 5, 2019, Rogers granted several AGTC team members access to the data room. JA Ex. 96, 99. Thereafter by letter dated November 6, 2019, Guggenheim sent AGTC a "Process Letter." JA Ex. 103. The letter outlined a formal process to solicit indications of interest; detailed the procedures and guidelines for submitting a written, nonbinding indication of interest in a transaction with Hembio; and requested that AGTC submit its indication of interest by December 10, 2019. Id. The next day, Rogers emailed Taylor stating: "There are a few key items we should have in mind on outward messaging, including that we are guiding AGTC to December 10 [two weeks after the sale to Fireman was to close] for an indication of interest (which their banker said didn't seem to be a problem on the call yesterday)." JA Ex. 99. Rogers stated that, at the time, "AGTC had a lot of interest." JA Ex. 4 at 537:11.

On November 14, 2019, Taylor sent an email to Rogers attached to which was a status report indicating that, as with AGTC, Process Letters had been sent to Merck, Janssen, Regeneron, and other companies, that discussions with Merck and AGTC remained "active," and that both were "in dataroom." JA Ex. 103. In his email, Taylor explained:

> We have upcoming discussions with Iveric (Ophthotech), Regenxbio and Janssen and will keep you informed of their response and those from any others. On the call with Regeneron today, it was clear that they likely prefer waiting to have more data but requested the process letter to facilitate an internal discussion ... You will note that Novartis, Biogen and Roche are all as second wave in this document as they have historically passed but we are trying to tee up discussions with them as well.

Id. The record does not reflect that this report was provided to the Board.

On Friday, November 15, 2019, Rogers scheduled a board meeting to vote on the Fireman deal for Monday, November 18, 2019 at 8:30 a.m. JA Ex. 105. On the same day, Taylor updated Rogers on his conversations with Janssen and Regenxbio. JA Ex. 104. With regard to Janssen, Taylor explained to Rogers that Janssen would "not be able to make the December 10 deadline [in the Process Letter] (or even early January) but are interested" and that "[t]hey were defensive about process timing and said that their request for a JP Morgan meeting was earnest and the goal was not for it to be a casual meeting but a detailed review of the data[.]" Id.[3] Taylor also stated:

> [T]hey tried to push on us saying that because [Hembio] is primarily just you, they wondered if you can even support a diligence process for a large company and won't you be a bottleneck that slows the process down. I think it is important to keep pressure on Janssen and that will mean that we will need to posture ourselves appropriately and be fully aligned on messaging to them. They likely won't even be able to bid until mid-to-late January but at every step of the way we need to push them and show them that they are behind and we are on top of things.

Id. Among other things, Taylor told Rogers that they could use the fact that Hembio was in talks with other companies to get Janssen to "work hard to catch up," and that Janssen would get back to them the following week as to their process. Id. As for Regenxbio, Taylor indicated that it sought to "tease out ... how low they could go upfront" and had "referenced ... internal hurdles." Id. Among other things, Taylor asked that that he and Rogers discuss things in greater detail on November 18. Id. In response, Rogers indicated he would be free after 8:30 a.m. and stated, "[a]s far as due diligence [in connection with Janssen] that is not an issue. It would be me even with additional employees." JA Ex. 121. He also alluded to the fact that he would be "clos[ing] the deal next week for funding." Id.

On November 18, 2019, the Board held its scheduled meeting. Rogers did not update the Board regarding the interest in Hembio by Janssen and other companies. All the directors except for Kumar-Singh, who abstained, voted to approve the deal. SUF 41. Thereafter, Hembio sold substantially all its assets to Hemera through an Asset Purchase Agreement ("APA") dated November 26, 2019, which contains a release. SUF 42; Ex. JA Q8, § 5.06. Rogers signed the APA as CEO of Hembio and as CEO of Hemera. JA Ex. Q8. In connection with the transaction,

[3] Indeed, Dr. Tobin at Janssen testified that Janssen was not prepared in making an offer for Hembio prior to their meeting with Rogers at the JP Morgan conference in January 2020. Joint App. L 180:23 – 181: 15.

Reichel, Duker, and Kumar-Singh each executed a Joinder Agreement under which they joined as members of Hemera and agreed to be bound by its LLC Agreement. JA Ex. B84. The Joinder Agreement also contains a release.

There is no dispute that Hembio was aware that Rogers was an interested party in the Hemera purchase because he was Fireman's son-in-law and was to be employed by Hemera following the sale. JA Ex. J16. In Hembio's resolution issued in connection with the APA, the Board acknowledged that "by virtue of certain directors' membership on the Board and either: (i) their individual benefits received from the Asset Sale pursuant to the Asset Purchase Agreement, or (ii) their employment by [Hembio] and *employment by the Purchaser* following the closing of the Asset Sale, the majority of the members of the Board may have a direct or indirect financial interest in the Asset Sale[.]" JA Ex. J16 (emphasis added). It further acknowledged that: "(a) Adam Rogers is an officer and director of [Hembio], and (b) Mr. Rogers is related to Paul Fireman, the buyer of [Hembio] under the Asset Purchase Agreement; therefore, Mr. Rogers may be an Interested Party and the Asset Sale may be an Interested Party Transaction." Id. Moreover, Reichel testified that she knew that Hemera would employ Rogers. JA Ex. J at 180:7-181:6, 184:3-8.

Several months later, on July 20, 2020, Janssen sent Hemera a non-binding term sheet for a potential asset purchase. Janssen ultimately purchased Hemera for $86 million on November 23, 2020. Reichel and Duker each executed a Release Agreement in connection with the transaction. JA Exs. B85, K93. The sale prompted this lawsuit.

## DISCUSSION

Summary judgment is appropriate when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Mass. R. Civ. P. 56(c); see DuPont v. Commissioner of Corr., 448 Mass. 389, 397 (2007). The moving party bears the initial burden of demonstrating that there is no triable issue and that he or she is entitled to judgment. Ng Bros. Constr., Inc. v. Cranney, 436 Mass. 638, 644 (2002), citing Pederson v. Time, Inc., 404 Mass. 14, 17 (1989); see Kourouvacilis v. Gen. Motors Corp., 410 Mass. 706, 716 (1991).

Hembio brings several claims against Defendants. It brings two claims for breach of the duty of loyalty against Rogers and Fireman (Counts I and II); a claim for breach of the fiduciary duty of care against Rogers (Count III); a claim for usurpation of corporate opportunity against Rogers, Fireman, and Hemera (Count IV); a fraud/misrepresentation claim against Fireman and Rogers; an equitable fraud (Count VI) against Fireman and Rogers; a negligent misrepresentation (Count VII) against Fireman and Rogers;[4] and an aiding and abetting breach of fiduciary duty claim (Count VIII) against Rogers, Fireman, and Hemera. As explained herein, only Counts I and II against Rogers and Count VIII against Fireman and Hemera survive summary judgment.

A. Effect of the APA and the Joinder Agreement Releases

Defendants initially argue that Hembio's claims are barred by two, substantively similar releases in the APA and the Joinder Agreement.[5] Thus, as a preliminary matter, the Court must analyze the effect of these releases on Hembio's claims.

Under the APA, Hembio:

> hereby irrevocably, unconditionally and fully released Buyer [Hemera] and the Principal [Fireman], and each of its ...officers [and] directors ... from any and all ... claims ... of any nature whatsoever, known or unknown, in law or equity ... which [Hembio] ever

[4] Although styled as a claim separate from its equitable fraud claim, the two claims are in fact the same. See Fortis Advisors LLC v. Dialog Semiconductor PLC, No. CV 9522-CB, 2015 WL 401371, at *9 (Del. Ch. Jan. 30, 2015) ("[a] claim for negligent misrepresentation is often referred to interchangeably as equitable fraud").

[5] It is unclear to what extent Defendants are also arguing that the releases signed in connection with the Janssen acquisition preclude the claims. See Hemera Memorandum in Support at 19. Given the dearth of argument on this issue, the Court does not address the impact of the releases, if any. It notes, however, that any fraudulent taint in the earlier releases would seemingly carry over into these releases.

> had, now ha[s] or hereafter can, shall or may have, whether known or unknown (either directly, indirectly, derivatively or in any other representative capacity) by reason of any matter, fact or cause whatsoever from the beginning of time to the Closing. ... [Hembio further] covenants and agrees that it will not file or permit to be filed, any lawsuits at any time hereafter with respect to the Claims released pursuant to this Agreement. Except as otherwise permitted in this [section], Seller agrees that it will not voluntarily participate in any judicial proceeding of any nature or description against Buyer [Hemera], the Principal [Fireman] or [any of the other released parties] that in any way involves the allegations and facts that [Hembio] could have raised against the Buyer, the Principal or [any of the other released parties] as of the Closing.

JA Ex. Q8, §5.06.

Similarly, the Joinder Agreement, which applies to the individual members, provides:

> the Member ... hereby irrevocably, unconditionally and fully released the LLC [Hemera], [Hembio], and Fireman, and each of its or his former, present and future Affiliates, and each of their and their respective' [sic] Affiliates' respective shareholders, members, officers [and] directors ... (collectively, the "<u>Released Parties</u>"), from any and all past, present or future ...claims ... of any nature whatsoever, known or unknown, absolute or contingent, suspected or unsuspected, disclosed or undisclosed, in law or equity (collectively, "<u>Claims</u>") by reason of any matter fact or cause whatsoever. ... The Member ... covenants and agrees that it ... will not file or permit to be filed, any lawsuits at any time hereafter with respect to the Claims release pursuant hereto. Except as otherwise provided in this Section ..., the Member agrees ... that it will not voluntarily participate in any judicial proceeding of any nature or description against any of the Released Parties with respect to any Claims released pursuant hereto.

JA Ex. B84, ¶ 3. There is no dispute that both releases are governed by Delaware law.

As an initial matter, Hembio argues that the Joinder Agreement is unenforceable as to Hembio because Hembio was not a party to the agreement and none of the Hembio directors that signed it had the authority to bind Hembio. The Court disagrees that the release is irrelevant given that Duker, Reichel, and Duker's sister (who also signed the Joinder Agreement) authorized this lawsuit even though the Joinder Agreement expressly prohibited them from filing or permitting the filing of a lawsuit against the Released Parties. Both releases are thus relevant.

Fireman and Hemera are clearly within the scope of these releases. Rogers is also within the scope of these releases as, at a minimum, he was an officer of Hemera.[6] However, the releases are inapplicable if Hembio can establish that this is one of the "rare and exceptional" circumstances where a release is the product of fraud. See E.I. DuPont de Nemours & Co. v. Florida Evergreen Foliage, 744 A.2d 457, 461, 465 (Del. 1999) ("DuPont") (explaining that when a general release is itself fraudulently induced, the "party alleging fraud ... may elect rescission" and set aside that release, but noting that claims that releases were fraudulently induced are "rare and exceptional"). This analysis essentially involves two somewhat overlapping inquiries: (1) whether there is evidence of fraud in connection with the releases, and (2) whether the language of the releases themselves and the circumstances surrounding their execution otherwise put Hembio on notice that such fraud would not invalidate the releases.

With regard to this second inquiry, the Delaware Supreme Court in DuPont noted that "[a]t a minimum, if one party is to be held to release a claim for fraud in the execution of the release itself, the release should include a specific statement of exculpatory language referencing the fraud[.]" Dupont, 744 A.2d at 461. But, as explained by a Chancery Court judge in Seven Invs., LLC v. AD Cap., LLC, a case which upheld the enforceability of a release:

> The DuPont decision does not prevent parties from executing general releases that extinguish claims for fraud, including claims for fraud in the inducement, particularly where the party granting the release is on notice of potential fraud claims. ... In DuPont, the Delaware Supreme Court acknowledged that a successful claim for fraudulently inducing a general release would be "rare and exceptional." 744 A.2d at 461. Although not controlling, well-reasoned cases interpreting New York law take a similar approach and recognize that general releases are not readily vulnerable to fraud-in-the-inducement claims. ... [Where] the alleged fraud ... was not "different sequentially and conceptually" from the fraud that was the subject of the settlement, [the release controls].

[6] As noted above, there is no dispute that Hembio was aware that Rogers was an interested party in the Hemera purchase in part because he was to be employed by Hemera following the sale.

32 A.3d 391, 399–400 (Del. Ch. 2011). See also Innovate 2 Corp. v. Motorsport Games Inc., No. 1:21-CV-165-SB, 2022 WL 903801, at *5 (D. Del. Mar. 28, 2022) (Seven Inves., LLC did not apply and the court could consider merits of shareholders' claims because fraud in the inducement was not expressly mentioned in the release; the alleged fraud in the inducement claim was different sequentially and conceptually from the subject of the release, i.e., the released claims related to liability flowing from the company's management and the shareholders' fraudulent inducement claim concerned the sale of stock; and the releasors were not on notice of the alleged fraud).

As explained below, the Court concludes that Defendants are not entitled to summary judgment based on the releases. A rational jury could conclude based on the current record that Rogers defrauded Hembio in connection with the releases, and nothing in the releases or the circumstances surrounding their execution prevent them from being set aside.

Turning to the first question (the existence of fraud), Delaware common law recognizes two types of fraud. The first is fraud by commission, which "consists of: (1) a false representation, usually one of fact, made by the defendant; (2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance." Stephenson v. Capano Dev., Inc., 462 A.2d 1069, 1074 (Del. 1983). The second is fraud by omission, i.e., "deliberate concealment of material facts, or by silence in the face of a duty to speak." Id. This type of fraud occurs when "one … by omission fails to reveal that which it is his duty to disclose in order to prevent statements actually made from being misleading." Id.

Corporate officers and directors have a duty to disclose information. A recent Chancery Court decision explained that:

> [C]orporate officers owe fiduciary duties that are identical to those owed by corporate directors. To comply with the duty of loyalty, a corporate officer must act in subjective good faith, which requires officers scrupulously to place the interests of the corporation and shareholders that they serve before their own. Like directors, officers breach the duty of loyalty if they act out of a material self-interest that diverges from the interests of the stockholders, are sufficiently loyal to, beholden to, or otherwise influenced by an interested party, or intentionally act[ ] in bad faith for a purpose other than advancing the best interests of the corporation. ... Officers also owe fiduciary duties in their capacities as agents. ... Officers ... have a duty as agents to provide information to the board and any more senior agents with greater authority to whom the officer reports. The duty to provide information includes a duty not to mislead other fiduciaries: [F]iduciaries, corporate or otherwise, may not use superior information or knowledge to mislead others in the performance of their own fiduciary obligations.

Goldstein v. Denner, No. CV 2020-1061-JTL, 2022 WL 1671006, at *51-52 (Del. Ch. May 26, 2022) (internal quotations, citations, and footnotes omitted). See Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280, 1283 (Del. 1989) (this duty "embraces the duty of candor owed by corporate fiduciaries to disclose all material information relevant to corporate decisions from which they may derive a personal benefit" and not to remain silent "in the face of the[] rigorous affirmative duty of disclosure [where] ... such silence [would be] misleading and deceptive").

Hembio argues that the releases are ineffective "because [they] were procured by [the] fraudulent conduct of Rogers, Fireman, and Hemera, and because Fireman and Rogers were fiduciaries who failed to disclose their conduct." Omnibus Opposition at 45. To the extent Hembio's argument is premised on the conduct of either Fireman or Hemera, it fails. Neither Fireman nor Hemera had a duty of disclosure because they were both contracting counterparties at the time of the sale (Fireman had resigned from the Board on October 3, 2019), and there is no evidence that Fireman or Hemera made any affirmative misrepresentations in the lead up to the closing. Thus, Hembio must demonstrate there is sufficient evidence showing that Rogers committed fraud in connection with the releases to prevent their enforcement.

Here, the record in this case would permit a rational jury to find that while a director and CEO of Hembio, Rogers engaged in fraud by omission, at least, in the lead up to the APA. In particular, there is evidence in the record that permits the conclusion that well before the closing on the APA on November 18, 2019, Rogers was working to further Fireman's interests, not Hembio's, and had failed to disclose this to the Board. This is demonstrated by three contemporaneous emails Rogers sent in connection with Fireman's failed September 2019 effort to purchase Hembio, each of which reflects a shift in loyalty. In the first, sent on September 10, 2019 to Kumar-Singh, Rogers pressed Fireman's offer of a separate, lucrative consulting agreement, a proposal that Rogers purposefully sought to conceal from the rest of the Board, to secure the sale. JA Ex. 41. In the second, sent on September 27, 2019, Rogers told Fireman (who was complaining that the deal had not yet closed) that "I am on the same page *with you*" and that "*[w]e* should not negotiate at all on the non compete" that would apply to Rogers' fellow Board members. JA Ex. 48 (emphasis added). In the third, sent the next day to Fireman's lawyers, Rogers reviewed a draft of the noncompete and asked that his name be removed from the anticipated email "to their legal team" to conceal his involvement and "get this signed." JA Ex. 50.

There is also evidence in the record that would permit the conclusion that Rogers continued to exhibit a shift of loyalty in connection with Fireman's second, ultimately successful offer. When Fireman was in the process of preparing his second offer (between October 4 and 6, 2019), Rogers was consulted on Fireman's "plan of action" and was actively involved in coordinating *with Fireman's attorneys* (namely, Goldstein and McElhinney) both on the terms of the offer and its presentation to the Board. JA Exs. 62, 71. He sought advice from Goldstein as to when the offer letter should be presented (before or after the October 7 board meeting) (JA Ex. 62) and commented on the draft offer letter, insisting that it include a 48-hour deadline despite Goldstein's concerns regarding this time frame. (JA Exs. 62, 71). Rogers was also well aware that McElhinney desired to limit the detail of the proposal to prevent the Board from seeking additional diligence and advice (indeed, he stated this directly to Rogers). JA Ex. 73. The record, however, reflects no pushback from Rogers. Instead, the record contains evidence of a potential effort by Rogers to hide his intimate involvement in the offer process. For example, in Rogers' October 7 email to the Board disclosing Fireman's offer, he made statements that can be read to imply that Fireman alone set the 48-hour deadline and that Rogers had only reviewed the offer that morning. JA Ex. 77.[7]

Subsequently, once the Board authorized Rogers to negotiate with Fireman on its behalf, Rogers continued to seemingly advocate for terms favorable to Fireman rather than advocate for terms favorable to Hembio. In emails, he expressed concern that the LLC agreement for Hemera gave the Hembio shareholders and noteholders too many rights. He additionally noted that Fireman needed "to take control of the LLC so he's not at the[ir] mercy," (JA Ex. 93) and that "every decision in this document should be at [Fireman's] discretion" (JA Ex. 95). As with Rogers' efforts assisting Fireman in preparing his offer, the record suggests Rogers did not disclose the extent of his work on behalf of Fireman to the Board. Indeed, in one of the above emails, Rogers cautioned: "Please keep this email between the 4 of us," i.e., Rogers, Fireman, McElhinney, and another attorney for Fireman. JA Ex. 93.

[7] The record also reflects that on October 5, 2019, Rogers sent an email to the Board that failed to give any indication that an offer from Fireman was forthcoming, and potentially misrepresented the focus of the October 7 Board meeting.

There is also evidence that both immediately before and after Fireman's offer that Rogers repeatedly failed to disclose or downplay his meetings and communications with other companies (e.g., AGTC, Merck, and Janssen) and their interest in purchasing Hembio. During the October 3, 2019 board meeting, which took place immediately following Fireman's resignation, Rogers admitted he was talking with Merck, AGTC, and other companies, but expressed that it was "not easy to talk to people when there is no cash and no future." JA Ex. Q4, 4:21-23. Afterward, Rogers repeatedly conveyed to the Board that they had a binary choice: accept Fireman's offer or file for bankruptcy.[8] Throughout this period, Rogers did not disclose the results of his ongoing work with Guggenheim. He did not tell the Board that he met with AGTC on October 18, 2019 to discuss "any mutual interest regarding a collaboration/deal" (JA Ex. 60), that AGTC found the meeting "really productive" (JA Ex. 89), and that Hembio had granted AGTC access to a data room (JA Ex. 99). Rogers likewise did not tell the Board that Janssen had repeatedly expressed interest in meeting with him (see JA Exs. 90, 104, 130), and that a meeting with Regeneron had gone "well" (JA Ex. 81; see also JA Ex. 105).

Indeed, the record reflects that Rogers may have actively sought to conceal these efforts during this period. He attended meetings with Merck and AGTC alone, apparently not being truthful about the availability of other Board members. Moreover, Rogers attempted to limit Kumar-Singh's access to Guggenheim and the data room. JA Ex. 77, 78, 79. Perhaps tellingly, Rogers told Kumar-Singh that contact with Guggenheim could result in Fireman withdrawing his offer (JA Ex. 77), even though Rogers continued to communicate with Guggenheim and coordinate with the firm.[9] Further, Rogers did not send the Board a November 2019 status report

[8] As for the bankruptcy option, there is no evidence that Rogers meaningfully prepared for that eventuality.
[9] Rogers' continued work with Guggenheim could be viewed as an attempt to secure an acquirer for Hemera, not Hembio.

prepared by Guggenheim, even though previous reports had been provided to Board members. JA Ex. 103. The report would have informed the Board that Guggenheim had initiated a formal bid process to conclude in early December after the APA was to close, that discussions with Merck and AGTC remained active, and that several companies had expressed at least some interest in Hembio.

Taken together, this evidence would permit a rational jury to conclude that Rogers omitted material information from the Board, namely his work on behalf of Fireman and the interest in Hembio from other companies, to assure the sale to Hemera. While the evidence shows that the company was facing a financial crisis, it also indicates that Rogers failed to fully advise the Board of the full facts to permit it, at a minimum, to ensure that it understood its position before agreeing to Fireman's terms. The material information omitted by Rogers would have permitted the Board, at a minimum, to engage in a more forceful negotiation with Fireman and to do so through representation solely loyal to it (as opposed to Fireman). Accordingly, the releases were potentially procured by fraud.

Turning to the second inquiry in this analysis, the Court concludes that neither the language of the releases nor other circumstances surrounding the releases' execution put Hembio on notice that fraud would not invalidate the releases. In reaching this conclusion, the Court is guided by DuPont, where a release was not enforced, and Seven Invs., LLC, where a release was upheld.[10] Here, neither release expressly references fraud, as DuPont instructs, nor states that there may be undiscovered, material facts, as was included in the release at issue in Seven Invs., LLC. See Seven Invs., LLC, 32 A.3d at 395. Additionally, unlike in Seven Invs., LLC, the members of Hembio's Board had no reason to suspect Rogers – its own chief executive officer

[10] Defendants heavily rely on Seven Invs., LLC in arguing that the releases bar Hembio's claims.

and fellow Board member – engaged in any fraudulent conduct; the fact that they were aware that he was an interested party or that they had a contentious relationship with him is insufficient for this purpose. See id. at 400. Indeed, in light of the heavy legal duty of loyalty and candor borne by Rogers, Hembio had no reason to suspect its CEO of engaging in wrongdoing such that it should have anticipated that fraud in the inducement of the releases would have been within the scope of the releases.[11]

Accordingly, Defendants are not entitled to prevail on their motions based on the release alone, as this is one of those rare and exceptional circumstances foreseen in DuPont where a general release may be set aside due to fraud.[12]

### B. Breach of the Duty of Loyalty Claims Against Rogers and Fireman (Counts I and II)

In Counts I and II, Hembio alleges that Rogers and Fireman breached their duties of loyalty in connection with the APA transaction. The parties dispute the standard of review applicable to these claims and the extent to which the claims can be maintained under their preferred standard. Defendants argue that the business judgment rule applies, while Hembio argues that the entire fairness standard applies (under a fraud on the board theory) or, alternatively, the enhanced scrutiny standard applies. As detailed below, the Court concludes that as to the claims against Rogers, the entire fairness or enhanced scrutiny standard applies, and that under either standard, the claims against Rogers survive. The claims against Fireman, however, fail given that his resignation from the Board in October 2019 undercuts Hembio's claim that he breached any duty of loyalty in connection with the APA transaction.

[11] Seven Invs., LLC can be further distinguished by the fact that here, unlike in that case, Rogers owed Hembio a heightened disclosure duty at the time the releases were executed.

[12] In his reply brief, Fireman argues that the releases are inapplicable to him personally because he did not commit fraud. See Fireman's Reply at 9. The Court reads the relevant standard as permitting the release to be set aside in its entirety if there is a show of any fraud in connection with the release.

"When determining whether directors have breached their fiduciary duties, Delaware corporate law distinguishes between the standard of conduct and the standard of review. The standard of conduct describes what directors are expected to do and is defined by the content of the duties of loyalty and care. The standard of review is the test that a court applies when evaluating whether directors have met the standard of conduct. It describes what a plaintiff must first plead and later prove to prevail." In re Trados Inc. S'holder Litig., 73 A.3d 17, 35–36 (Del. Ch. 2013) (citation omitted).[13]

"The starting point for analyzing a fiduciary breach is to determine the correct standard of review. Delaware corporate law has three tiers of review: the business judgment rule, enhanced scrutiny, and entire fairness." In re Columbia Pipeline Grp., Inc., No. CV 2018-0484-JTL, 2021 WL 772562, at *30 (Del. Ch. Mar. 1, 2021), cert. denied sub nom. In re Columbia Pipeline Grp. Inc. (Del. Ch. 2021), and appeal refused sub nom. In re Columbia Pipeline Grp., Inc. Merger Litig., 249 A.3d 801 (Del. 2021) (internal citation omitted). The business judgment rule is

> Delaware's default standard of review [and] presumes board members act on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. [W]here the business judgment presumptions are applicable, the board's decision will be upheld unless it cannot be attributed to any rational purpose.

In re Pattern Energy Grp. Inc. S'holders Litig., No. CV 2020-0357-MTZ, 2021 WL 1812674, at *31 (Del. Ch. May 6, 2021) (internal quotations and footnotes omitted). Enhanced scrutiny is an intermediary standard delineated in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986). Id. It

> is applied when board members face potential conflicts of interest because of situational dynamics present in particular transactions. Revlon enhanced scrutiny applies to final stage transactions, including a cash sale, a break-up, or a transaction like a change of control that fundamentally alters ownership rights because in these transactions, directors may be more prone to pursue self-interest and engage in selfish action.

[13] The applicable standard of conduct (i.e., the requirements of the duty of loyalty) are discussed above.

Id. (internal quotations and footnotes omitted). "Framed generally, enhanced scrutiny requires that the fiduciary defendants bear the burden of persuasion to show that their motivations were proper and not selfish and that their actions were reasonable in relation to their legitimate objective." In re Columbia Pipeline Grp., Inc., 2021 WL 772562, at *30 (internal quotes omitted). Entire fairness is

> Delaware's most stringent standard [and] applies to board action where there exists actual conflicts of interest. Under the entire fairness standard, the defendants must show that the transaction in question was objectively fair, independent of the board's beliefs. Entire fairness applies in certain discrete circumstances, including (1) when a plaintiff pleads facts that call[ ] into question the disinterestedness and independence of a sufficient number of directors; (2) when the transaction was effectuated by a controlling or dominating shareholder, and (3) *when a plaintiff pleads a fraud-on-the-board theory and the attendant illicit manipulation of a board's deliberative processes by self-interested corporate fiduciaries.*

In re Pattern Energy Grp. Inc. S'holders Litig., 2021 WL 1812674, at *31 (internal quotations and footnotes omitted, emphasis added). See also Mills Acquisition Co., 559 A.2d at 1279 (applying entire fairness standard in connection with fraud on the board theory).[14] "When the entire fairness test applies, the burden of persuasion initially lies with the defendant." Bomarko, Inc. v. International Telecharge, Inc., 794 A.2d 1161, 1179 (Del. Ch. 1999).

The entire fairness analysis consists of two components: fair price and fair dealing. Id. at 1179-1180 (Del. Ch. 1999). "Fair dealing embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained." Id. at 1180 (internal quotations omitted). "The fair dealing element of the entire fairness analysis also embraces the duty of

[14] In his reply brief, Rogers suggests that only the first two circumstances trigger entire fairness review. See Rogers' Reply at 2-3. In support, he cites In re KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 990 (Del. Ch. 2014), aff'd sub nom. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015). The Court In re KKR Fin. Holdings LLC S'holder Litig. explained that: "There are *a number* of ways a plaintiff can rebut the business judgment presumption, *including* by showing that: (1) a controlling stockholder stands on both sides of a transaction or (2) at least half of the directors who approved the transaction were not disinterested or independent." Id. (footnote omitted, emphasis added). See eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 36 & n.117 (Del. Ch. 2010).

candor owed by corporate fiduciaries to disclose all material information relevant to corporate decisions from which they may derive a personal benefit." Id. (internal quotations omitted). "Fair price relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock." Id. (internal quotations omitted). "[T]he entire fairness analysis, though structurally bifurcated, is conceptually singular. All aspects of a transaction are considered in determining whether the challenged transaction is entirely fair." Id. at 1182-1183.

Delaware courts have sought to more clearly distinguish between a paradigmatic Revlon claim that requires enhanced scrutiny and a fraud on the board claim that warrants entire fairness review. As explained by one Chancery Court judge:

> In recent years, Delaware courts have honed the pleading-stage distinctions between a paradigmatic Revlon claim and a Mills [i.e., fraud on the board] theory warranting entire fairness review. First, the rogue fiduciary must be materially interested, as by seeking control or benefit from the company post-merger. Second, the board must be "inattentive or ineffective" and permit the fiduciary's manipulation. Third, so enabled, the fiduciary must commit deception or manipulation, as by "deceiving an independent board of directors into favoring a bidder" or "fail[ing] to disclose his 'interest in the transaction to the board.' " Fourth, that deception must be material. "[A]n omission is 'material' to a board if the undisclosed fact is relevant and of a magnitude to be important to directors in carrying out their fiduciary duty of care in decisionmaking." Finally, the "key issue" is whether it is reasonably conceivable that the deception "tainted the decisionmaking of [the] concededly independent and disinterested directors[.]" The fiduciary's allegedly deceptive or manipulative conduct must cause the board to take action or inaction that was outcome-determinative.
>
> Thus, to elevate the standard of review for a paradigmatic Revlon claim, an interested officer must be more than overweening; he must be fraudulent or outright manipulative. The board must be more than supine; it must be deceived and permit that deception. And the deception must affect the outcome. To raise the standard of review on any less risks swallowing enhanced scrutiny in every paradigmatic Revlon case.

In re Pattern Energy Grp. Inc. S'holders Litig., 2021 WL 1812674, at *33–34 (footnotes omitted). See also In re Oracle Corp. Derivative Litig., No. 2017-0337-SG, 2023 WL 3408772, at *27 (Del. Ch. May 12, 2023) ("To shift the standard of review under a 'fraud on the board' theory, [p]laintiffs must prove 1) that the fiduciary was materially interested, 2) that the board was inattentive or ineffective, 3) that the fiduciary deceived or manipulated the board, 4) that the deception was material, and 5) that the deception tainted the decisionmaking process of the board.").

Although a close question, the Court concludes that the entire fairness standard applies here to the extent the claims are asserted against Rogers, who had fiduciary duties as CEO and director at the time of the APA transaction.[15] Rogers was materially interested because he was Fireman's son-in-law and because he was to become Hemera's CEO after the deal closed. Moreover, there is evidence that Rogers withheld the extent of his efforts to secure favorable terms on behalf of Fireman as well as misrepresented or failed to disclose the level of interest in Hembio, actions which potentially deceived and manipulated the Board and rendered it ineffective. Further, there is evidence supporting that Rogers' nondisclosures were material and tainted the Board's decision-making process because such knowledge would have permitted the Board, at a minimum, to engage in a more forceful negotiation with Fireman and to do so through representation solely loyal to it (as opposed to Fireman). As a result, the decision making process of the board was tainted. Thus, Rogers bears the burden of showing that the APA transaction was objectively fair, see In re Pattern Energy Grp. Inc. S'holders Litig., 2021 WL 1812674, at *33, something the record does not permit him to establish for purposes of summary judgment. Indeed, Rogers does not argue that he can do so.

Even if the entire fairness standard did not apply, at the very least enhanced scrutiny would apply (and not the business judgment rule), given that the sale to Fireman can be

[15] As discussed below, no fiduciary duty claim can lie against Fireman as it relates to the APA transaction because he resigned from the Board.

characterized as a "final stage transaction." See In re Pattern Energy Grp. Inc. S'holders Litig., 2021 WL 1812674, at *31. See also Bomarko, 794 A.2d at 1178 (business judgment rule does not apply where there is "evidence of disloyalty"). In applying the enhanced scrutiny test, the court examines whether the conduct at issue

> fell within a range of reasonableness. What typically drives a finding of breach is evidence of self-interest, undue favoritism or disdain towards a particular bidder, or a similar non-stockholder-motivated influence that calls into question the integrity of the process. [W]hen there is a reason to conclude that debatable tactical decisions were motivated not by a principled evaluation of the risks and benefits to the company's stockholders, but by a fiduciary's consideration of his own financial or other personal self-interests, then the core animating principle of Revlon is implicated.

Goldstein, 2022 WL 1671006, at *29 (internal quotes and citations omitted). See In re Mindbody, Inc., 2020 WL 5870084, at *13 ("the paradigmatic Revlon claim involves a conflicted fiduciary who is insufficiently checked by the board and who tilts the sale process toward his own personal interests in ways inconsistent with maximizing stockholder value."). "The sins of just one fiduciary can support a viable Revlon claim. A plaintiff can state a Revlon claim by pleading that one conflicted fiduciary failed to provide material information to the board or that the board failed to sufficiently oversee the conflicted fiduciary." In re Mindbody, Inc., 2020 WL 5870084, at *14 (footnote omitted).

As noted above, there is evidence that Rogers failed to disclose material information to the Board and that this impacted the Board's evaluation of the Fireman deal. If the Court were to apply this standard, summary judgment on the breach of the duty of loyalty claims against Rogers would be improper. The record does not permit the Court to conclude as a matter of law that Rogers has met his burden of demonstrating that his motivations were proper and not selfish and that his actions were reasonable in relation to a legitimate objective. See In re Columbia

Pipeline Grp., Inc., 2021 WL 772562, at *30 (describing defendant's burden under enhanced scrutiny).

Defendants' argument that the lack of a commitment from Janssen to purchase Hembio at the time of the APA bars Plaintiff's claim is meritless. Defendants argue that the Plaintiff's claims turn solely on a purportedly usurped Janssen opportunity, which had not fully developed by the time of the APA. See, e.g., Rogers' Motion for Summary Judgment, Docket No. 50, at 2 ("Each claim is dependent on two core allegations: (1) the knowledge of an opportunity to do business with Janssen ... and (2) an alleged lack of sufficient disclosure from Dr. Rogers to the rest of Plaintiff's board of directors about the Janssen 'opportunity' so that he and Mr. Fireman could usurp it for themselves."). While this argument is persuasive in connection with the usurpation claims, discussed below, it is not persuasive as to the duty of loyalty claim. As Plaintiff points out, the issue is whether the sale process to Fireman was entirely fair or, alternatively, survives enhanced scrutiny and whether Rogers withheld material information concerning Hembio's prospects that was needed by the Board to fairly decide whether to sell to Fireman and accept the terms that he had proposed.

Accordingly, Rogers is not entitled to summary judgment on Counts I and II.

The breach of the duty of loyalty claims against Fireman are not similarly viable no matter which standard of review applies. Fireman was a board member from February 2016 until October 3, 2019, when he resigned. As such, an alleged breached of the duty of loyalty must have occurred in that time frame. See In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 758 (Del. Ch. 2005), aff'd, 906 A.2d 27 (Del. 2006) ("[j]ust as Delaware law does not require directors-to-be to comply with their fiduciary duties, former directors owe no fiduciary duties") (footnote omitted). Hembio argues that Fireman can be held liable for breach of fiduciary duty because "in the days leading up to [his] resignation, Rogers and Fireman were actively engaged in discussion about Hembio," Hembio's Omnibus Sur-Reply at 3-4. In support of this argument, Hembio points to Fireman's interrogatory admission that he may have received updates on Hembio from Rogers, his family relationship with Rogers, and telephone records showing calls between them. However, Hembio adduces no facts to show that that in the brief period before his resignation, Fireman had more information than the rest of the Board (e.g., Dr. James Tobin at Janssen and Taylor testified that Guggenheim did not provide Fireman any such information) or that he made any material omissions or affirmative misrepresentations regarding the deal. See, e.g., Abdulky, 102 Mass. App. Ct.at 451 (in opposing a motion for summary judgment, the adverse party must – 'by affidavits or as otherwise provided' under rule 56 – 'set forth specific facts showing that there is a genuine issue for trial.' Mass. R. Civ. P. 56 (e). See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991)."); cf. Trustees of Bos. Coll. v. Bos. Acad. of the Sacred Heart, Inc., 103 Mass. App. Ct. 83, 92 (2023) ("close relationship" between entities not enough to raise a conclusion based on it above the speculative level). In any event, Fireman resigned *before* the Board reviewed or made any decisions about his offer. The resignation signaled to the Board that going forward, Fireman did not intend to show any loyalty to Hembio in connection with it.[16] In other words, he fully disclosed his self-interest and his intent to procure a deal with terms favorable to him. Fireman is therefore entitled to summary judgment on Counts I and II.

[16] Moreover, the record reflects that the Board was aware of Fireman's interest in purchasing the company for some time.

C. Breach of the Fiduciary Duty Care Claim Against Rogers (Count III) and Claims Against Rogers, Fireman and/or Hemera Related to the Acquisition of Hemera by Janssen (Counts IV-VII)

Plaintiffs do not address Counts III-VII in their Omnibus Opposition or their Omnibus Sur-Reply. See Rogers' Reply Brief at 1 n. 2 (pointing out the omission). By failing to offer any response to Defendants' summary judgment argument on these claims, Hembio has waived them.

Even if that were not the case, Count IV (usurpation of corporate opportunity), Count V (fraud/misrepresentation) Count VI (equitable fraud), and Count VII (negligent misrepresentation) would fail. They are each based on Hembio's allegation that Rogers conspired with Fireman and Hemera to usurp an opportunity that existed in November 2019 to sell Hembio's assets to Janssen.[17] To prove usurpation, Hembio must show "(1) that the opportunity is either essential to the corporation or is one in which it has an interest or expectancy, (2) that the corporation is financially able to take advantage of the opportunity itself, and (3) that the party charged with taking the opportunity did so in an official rather than individual capacity." Schreiber v. Bryan, 396 A.2d 512, 519 (Del. Ch. 1978). The record makes clear that in November 2019, when the sale of Hembio's assets occurred, Janssen was interested in Hembio, as discussed above, but was not then willing to purchase Hembio and had not yet made an offer to Hembio. See JA Ex. 90; Ex. 104; Ex. L at 180:23-182:1, 198:7-199:19; Ex. M at 177:4-22. Thus, while Janssen's interest was potentially material to a consideration of Fireman's offer, it had yet not ripened into a corporate opportunity the could be usurped. Moreover, as to Fireman and Hemera, neither of them owed any fiduciary duty to Hembio at the time of the APA transaction and therefore cannot be liable. See Broz v. Cellular Info. Sys., Inc.,

[17] It also appears that Count III is primarily based on the purported Janssen opportunity. See Complaint, ¶ 212.

673 A.2d 148, 154 (Del. 1996) ("The doctrine of corporate opportunity represents but one species of the broad fiduciary duties assumed by a corporate director or officer."); Personal Touch Holding Corp. v. Glaubach, No. CV 11199-CB, 2019 WL 937180, at *13 (Del. Ch. Feb. 25, 2019), judgment entered sub nom. Personal Touch Holding Corp. v. Felix Glaubach, D.D.S. (Del. Ch. 2019) ("The corporate opportunity doctrine is … a subspecies of the fiduciary duty of loyalty.") (internal quotes omitted).[18]

D. Aiding and Abetting Claims (Count VIII)

In Count VIII, Hembio brings a claim for aiding and abetting breach of fiduciary duty against Rogers, Fireman, and Hemera. Under Delaware law, an aiding and abetting claim can only be asserted against a defendant who was not a fiduciary at the time the alleged misconduct occurred. See Cargill, Inc. v. JWH Special Circumstance LLC, 959 A.2d 1096, 1125 (Del. Ch. 2008). Hembio therefore cannot prosecute such a claim against Rogers because prior to the closing of the Fireman deal in November 2019, Rogers was a Hembio fiduciary. Accordingly, Rogers is entitled to summary judgment on Count VIII.[19]

The claims for aiding and abetting against Fireman and Hemera, which Fireman represented during the negotiations for the sale of Hembio's assets, are a different matter. Neither Fireman nor Hemera were fiduciaries at the time of the APA transaction.

[18] Counts I, II, and VIII are also based, in part, on this theory. The portions of those counts based on the theory fail for the same reasons.

[19] Citing In re The Brown Sch., 368 B.R. 394, 402-403 (Bankr. D. Del. 2007), Hembio contends that "fiduciaries can aid and abet each other." Omnibus Opposition at 7. However, this decision cannot be read so broadly. The Court merely explained that: "Although the elements of a claim for aiding and abetting a breach of fiduciary duty count are couched in terms of the primary violator being a fiduciary and the aider and abettor a non-fiduciary, there is no case law that precludes such a claim against a fiduciary. While a corporate director owes the corporation fiduciary duties, in some instances those duties may be limited (by corporate charter or statute). Thus, the Court may find that a director had no fiduciary duty but aided and abetted a party that did." Id. These circumstances are not present in this case.

To prevail on an aiding and abetting claim, a plaintiff must prove: "(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) a defendant, who is not a fiduciary, knowingly participated in a breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary." Cargill, Inc, 959 A.2d at 1125, quoting Globis Partners, L.P. v. Plumtree Software, Inc., 2007 WL 4292024, at *15 (Del.Ch. Nov. 30, 2007). The knowing participation element

> requires a defendant to have had actual or constructive knowledge of, and provided substantial assistance in, the fiduciary breach. Actual knowledge requires that the alleged aider and abettor act knowingly, intentionally, or with reckless indifference ... that is, with an illicit state of mind[,] whereas constructive knowledge may be found only if a fiduciary breaches its duty in an inherently wrongful manner by engaging in conduct so egregious so as to put a third party on notice of a breach. Substantial assistance, by definition, implies active participation or affirmative action.

In re DSI Renal Holdings, LLC, No. 11-11722 (KBO), 2020 WL 7054390, at *6 (Bankr. D. Del. Dec. 2, 2020) (internal quotes and footnotes omitted). "Generally, arm's length bargaining will not give rise to aiding and abetting liability. … [H]owever, an arm's length bargainer may be held liable if it attempts to create or exploit conflicts of interest in the board or induce fiduciary breach." Id. at *7 (internal quotes omitted).

Here, the record contains evidence indicating that Fireman, on behalf of himself and Hemera, exploited his relationship with Rogers to secure a favorable deal, despite the fact that as a former Hembio board member, he was well aware of the fiduciary duties Rogers owed Hembio. This is reflected in the email communications among Rogers, Fireman, and Fireman's agents in connection with his offer, which support a conclusion that Fireman was fully aware that Rogers was effectively acting as another one of Fireman's agents in connection with the Hemera deal.[20] Additionally, the record permits the conclusion that Fireman's actions harmed Hembio because it hamstrung the Board's ability to engage in a more forceful negotiation with Fireman and to do so through representation solely loyal to it. Thus, the claim survives against Fireman and Hemera, on whose behalf Fireman was working.

**ORDER**

For the foregoing reasons:

1. Defendants' motion to strike the Stevens affidavit is **ALLOWED IN PART**;
2. Rogers' motion for summary judgment is **ALLOWED** as to Counts III-VIII but **DENIED** as to Counts I and II.
3. Fireman's motion for summary judgment is **ALLOWED** as to Counts I, II, IV-VII but **DENIED** as to Count VIII.
4. Hemera's motion is **ALLOWED** as to Count IV but **DENIED** as to Count VIII.

**SO ORDERED.**

*M. D. Ricciuti*
MICHAEL D. RICCIUTI
Justice of the Superior Court

Date: December 21, 2023

[20] The communication between Fireman and Rogers in connection with Fireman's September 2019 offer provide further evidence of the relationship between Fireman and Rogers, and the manner in which Fireman may have relied on Rogers to achieve his goals.