EFiled: Jan 18 2019 04:45PM EST
Transaction ID 62879854
Case No. 2018-0804-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THOMAS S. HOWLAND, JR., derivatively on behalf of ANIXA BIOSCIENCES, INC. (f/k/a ITUS CORPORATION), Plaintiff, v. AMIT KUMAR, LEWIS H. TITTERTON, JR., ARNOLD M. BASKIES, JOHN MONAHAN, MICHAEL J. CATELANI, JOHN A. ROOP, ANTHONY CAMPISI, and DALE FOX, Defendants, and ANIXA BIOSCIENCES, INC. (f/k/a ITUS CORPORATION), Nominal Defendant.	C.A. No.: 2018-0804-KSJM

OPENING BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE VERIFIED SHAREHOLDER DERIVATIVE COMPLAINT

WILSON SONSINI GOODRICH
& ROSATI, P.C.
Bradley D. Sorrels (#5233)
Phillip R. Sumpter (#5811)
Daniyal M. Iqbal (#6167)
222 Delaware Avenue, Suite 800
Wilmington, Delaware 19801
(302) 304-7600

Attorneys for Defendants Amit Kumar, Lewis H. Titterton, Jr., Arnold M. Baskies, John Monahan, Michael J. Catelani, John A. Roop, Anthony

Campisi, and Dale Fox

ASHBY & GEDDES
Stephen E. Jenkins (#2152)
500 Delaware Ave., 8th Floor
Wilmington, DE 19801
(302) 654-1888

Attorneys for Nominal Defendant Anixa Biosciences, Inc. (f/k/a ITUS Corporation)

Dated: January 18, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

PRELIMINARY STATEMENT

The entire premise of Plaintiff's complaint is that Defendants, officers and directors of Anixa Biosciences, Inc. ("Anixa" or the "Company"), intentionally repriced options while in possession of material, non-public information to enrich themselves. That premise is false. Plaintiff not only fails to allege the elements of that claim—namely, that the directors who approved the re-pricing were aware of the information at issue or that the information was even material—but the premise is disproven by the other facts in the record, which Plaintiff ignores or pleads around.

Specifically, Plaintiff alleges that Defendants repriced all of the options held by the Company's then-employees, officers and directors knowing that the Company would soon disclose the issuance of a patent. Critically, Plaintiff does not allege that the exercise price chosen in the repricing was unfair. Nor could he, given that the options were repriced based on the closing stock price on the day of the repricing, consistent with the Company's governing share incentive plans that permitted the repricing, and at a price similar to that at which the Company's stock had traded for several months prior to that point. That is, Plaintiff's claim that the repricing was "unfair" rises and falls on whether Defendants repriced the options while possessing material, non-public information. They did not.

As an initial matter, the record is clear that the repricing was approved by the Compensation Committee of Anixa's Board of Directors (the "Compensation Committee") at a meeting held on September 6, 2017, consistent with the delegation of authority under the Compensation Committee charter and the relevant share incentive plans. Thus, Plaintiff's repeated and conclusory allegations that "Defendants" or the "Board" approved the repricing are demonstrably false.

More importantly, Plaintiff fails to allege that the Compensation Committee members who approved the repricing (let alone a majority of the entire Anixa Board of Directors (the "Board")) were aware of the patent issuance at the time the options were repriced, thus defeating any argument that they misused inside information when they approved the repricing. Nor, in any event, can Plaintiff show that the "fact of" the patent being issued was material and altered the "total mix" of information available to stockholders given that the Company had already disclosed months before that the United States Patent and Trademark Office ("USPTO") had issued a "Notice of Allowance" for the relevant patent application, which meant the USPTO had completed its substantive review and approved the patent for issuance. That is, the "allowance" of the patent was the celebratory moment and the Company touted that fact in its public disclosures to the market in May 2017, resulting in a significant bump in the Company's stock price. Plaintiff

downplays these facts and instead focuses on the general movement in Anixa's stock price in the *weeks* surrounding the announcement of the patent issuance to establish the materiality of that disclosure. But Plaintiff's effort to plead materiality in hindsight fails under established Delaware law and, in any event, ignores multiple other positive disclosures made by the Company during that period that correlate positively with the movement in the Company's stock price.

Because the entire premise of his claims surrounding alleged misuse of inside information fails, Plaintiff's complaint must be dismissed under both Court of Chancery Rules 12(b)(6) and 23.1. Aside from that flawed premise, Plaintiff does not (and cannot) allege that the repriced options were unfair or anything other than a valid exercise of business judgment, and therefore cannot make out a claim for breach of fiduciary duty no matter what the standard of review is. Plaintiff's inability to plead unfairness or lack of justification is also fatal to his other claim that the Company's employees were "unjustly enriched" by the decision to reprice options consistent with the Company's incentive plans and then-stock price. Accordingly, both counts raised in the complaint fail to state a claim and should be dismissed under Rule 12(b)(6).

For largely the same reasons, Plaintiff has not pled with particularity that a majority of Anixa's Board at the time of his complaint, which is comprised of four of the individual Defendants and a fifth non-defendant director (the "Demand

Board"), could not effectively consider demand. Plaintiff does not plead with any particularity that the Demand Board faces a substantial likelihood of liability given the fundamental flaws in Plaintiff's claims. Thus, Plaintiff's demand futility argument rests solely on the contention that a majority of the directors on the Demand Board are "interested" merely because they had options that were repriced along with the rest of Anixa's employees, officers, and directors. But under Delaware law, Plaintiff cannot establish the interestedness of directors solely by arguing that they possess options that were repriced during the challenged transaction. This is especially so here, where all then-current employees, directors, and officers of Anixa had their options uniformly repriced at the same exercise price and on the same terms, belying any notion that the repricing constituted an act of self-dealing aimed at providing Defendants with a unique benefit. Plaintiff therefore cannot plead with particularity why a majority of the Demand Board could not adequately consider demand.

Accordingly, Defendants respectfully request that the Court dismiss Plaintiff's claims in their entirety with prejudice.

FACTUAL BACKGROUND[1]

A. Anixa and Its Officers and Directors.

Anixa is a Delaware corporation headquartered in San Jose, California. Compl. ¶ 14. It is a biotechnology company that uses the power of the immune system to diagnose and treat cancer, and is publicly traded on NASDAQ under the stock symbol "ANIX." *Id.* On October 1, 2018, Anixa changed its name from ITUS Corporation ("ITUS"). *Id.*

The Complaint names four officers of the Company as Defendants: Dr. Amit Kumar, the Chairman, President, and Chief Executive Officer; Michael J. Catelani, the Chief Operating Officer and Chief Financial Officer; John A. Roop, the Senior Vice President of Engineering; and Anthony Campisi, the Vice President of Engineering. *Id.* ¶¶ 5, 10-12. Messrs. Catelani, Roop, and Campisi constitute the "Officer Defendants."

---

[1] The facts are taken from the Verified Shareholder Derivative Complaint (cited as "Complaint" or "Compl."), documents incorporated by reference into the Complaint, filings with the Securities and Exchange Commission ("SEC"), publicly available press releases, and Anixa's stock price. *See In re Duke Energy Corp. Derivative Litig.*, 2016 WL 4543788, at *4 n.34 (Del. Ch. Aug. 31, 2016) ("I take judicial notice of the publicly available press release"); *Cty. of York Emps. Ret. Plan v. Merrill Lynch & Co.*, 2008 WL 4824053, at *7 (Del. Ch. Oct. 28, 2008) (observing that "the Court may take notice of the state of the markets" and a company's "share price"); *Fairthorne Maint. Corp. v. Ramunno*, 2007 WL 2214318, at *4 (Del. Ch. July 20, 2007) ("[T]he court may consider documents incorporated into the pleadings by reference and may take judicial notice of relevant public filings.").

Defendant Dale Fox is a former director of the Company, having resigned from the Board on or about September 22, 2017. *Id.* ¶ 13. The remaining Defendants—Lewis H. Titterton, Jr., Dr. Arnold M. Baskies, and Dr. John Monahan—were outside directors at the time the Complaint was filed. *Id.* ¶¶ 6-8. Non-Defendant David Cavalier was also a director at the time the Complaint was filed. *Id.* ¶ 9. Drs. Kumar, Baskies, and Monahan and Messrs. Titterton and Fox constitute the "Director Defendants." For purposes of evaluating demand futility, the Demand Board consists of five members: Drs. Kumar, Baskies, and Monahan and Messrs. Titterton and Cavalier. *Id.*

B. The Company Announces the Allowance of the '783 Patent by the USPTO.

In mid-2017, the Company was developing a platform called Cchek for conducting non-invasive blood tests for the early detection of cancer. *See* Ex. A (May 10 Press Release).[2] To protect its cancer detection technology, the Company filed patent applications with the United States Patent and Trademark Office ("USPTO"), including Patent Application No. 15/209,616 (the "Patent Application"), which was filed on July 13, 2016. *See* Ex. 1 (Notice of Allowance) at 1. Nearly one year later, the USPTO issued a Notice of Allowance and Fee(s)

[2] Lettered exhibits refer to exhibits attached to the Complaint. All numbered exhibits are attached to the accompanying Transmittal Affidavit of Phillip R. Sumpter and are cited as "Ex. [#]."

Due with respect to the Patent Application (the "Notice of Allowance"). *See id.* The Notice of Allowance expressly stated that the Patent Application had been examined and was "**ALLOWED FOR ISSUANCE**," and that "**PROSECUTION ON THE MERITS IS CLOSED**." *Id.* (emphasis in original). It also provided that a $960 "Issue Fee" was due by July 27, 2017. *Id.* On May 10, 2017, the Company announced the issuance of the Notice of Allowance by the USPTO (the "May 10 Press Release"). Ex. A; *see also* Compl. ¶ 22.

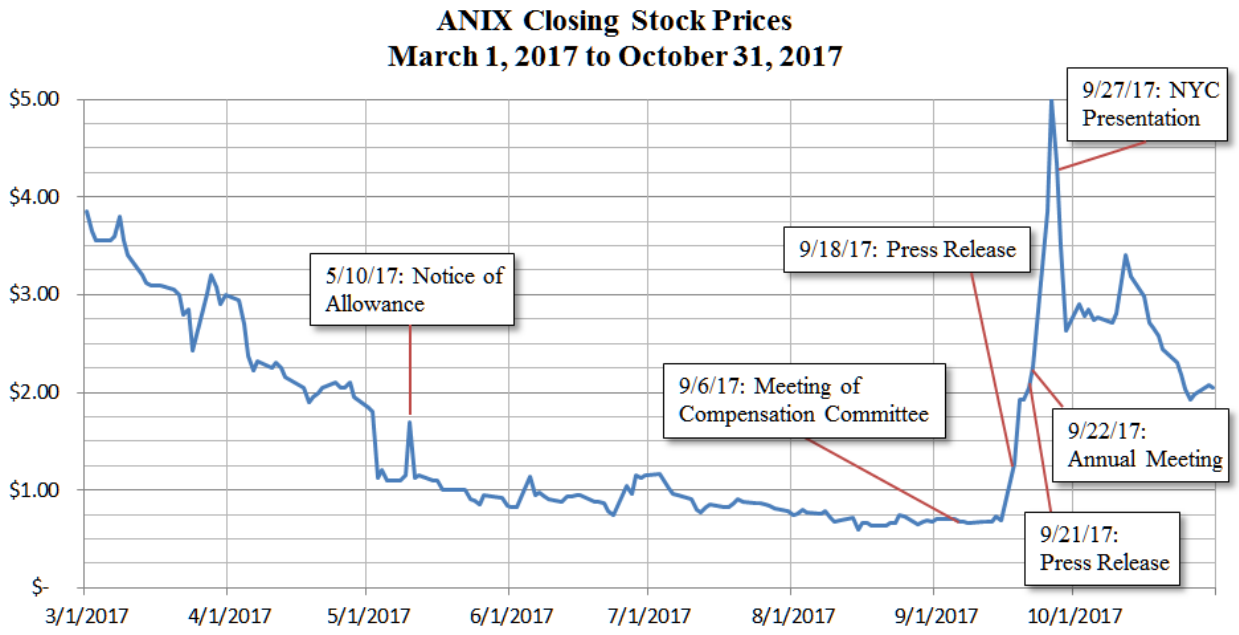
The Notice of Allowance was critical because it signified that the USPTO had completed its substantive review of the Patent Application and determined that Anixa was entitled to the patent. Thus, barring unforeseen circumstances, the actual issuance of the patent would follow Anixa's payment of the Issue Fee, consistent with the relevant statute. *See* 35 U.S.C. § 151(a) ("If it appears that an applicant is entitled to a patent under the law, a written notice of allowance of the application shall be given or mailed to the applicant. The notice shall specify a sum, constituting the issue fee and any required publication fee, which shall be paid within 3 months thereafter."); *Syngenta Seeds, Inc. v. Monsanto Co.*, 2004 WL 2002208, at *1 (D. Del. Aug. 27, 2004) ("On December 9, 2003, the [USPTO] issued a Notice of Allowance, which allowed the '488 patent to issue as soon as

the issue fee was paid.").[3] The Company anticipated that this patent would be the first of "several patents" to protect the new Cchek technology, and announced that another patent application was also pending and that future patent applications related to the cancer detection technology would be filed as the Company's research progressed. Ex. A (May 10 Press Release); *see also* Compl. ¶ 22. Reflecting the significance of the patent announcement to investors, the Company's stock price increased by ***48%*** on May 10, closing at $1.70 based on high trading volume. Compl. ¶ 23.

Despite the positive news, the Company's stock price abruptly declined the next day to $1.13 after the Company announced it had priced a public offering of 3.5 million shares of common stock at $1.05 per share. *See* Ex. 2 (ANIX Historical Stock Information); Ex. 3 (May 11, 2017 ITUS Press Release). The Company's stock price continued to decline over the course of May 2017, "closing out the month of May at $0.84." Compl. ¶ 23.

---

[3] *See also* 37 C.F.R. § 1.311(a) ("If, on examination, it appears that the applicant is entitled to a patent under the law, a notice of allowance will be sent to the applicant at the correspondence address indicated in § 1.33. The notice of allowance shall specify a sum constituting the issue fee and any required publication fee (§ 1.211(e)), which issue fee and any required publication fee must both be paid within three months from the date of mailing of the notice of allowance to avoid abandonment of the application. This three-month period is not extendable.").



This decline was a continuation of a steady slide in the Company's stock throughout 2017, as reflected in the chart above (the "ANIX Stock Chart").[4] The Company's stock price woes had persisted over the course of the year despite the Company's success using its technology to detect several types of cancer, including the four largest causes of worldwide cancer mortalities: lung, breast, colon, and prostate cancers. *See* Ex. A (May 10 Press Release).

As shown in the ANIX Stock Chart, Anixa's stock price remained fairly stagnant during early summer 2017, trading between $0.74 and $1.17 (with a median stock price of $0.88) in June and July 2017. *See* Ex. 2 (ANIX Historical Stock Information). As Anixa's stock price stagnated, in early July 2017, the

[4] The chart is derived from historical ANIX trading data maintained by The Wall Street Journal. *See* Ex. 2 (ANIX Historical Stock Information).

Company instituted a management change and appointed Dr. Kumar—the inventor of Cchek—as its President and CEO, and promoted Mr. Catelani to COO. *See* Ex. 4 (July 7, 2017 Press Release). The Company expected Cchek to be its "primary focus" in the near term. *See* Ex. 5 (ITUS Form 10-Q, filed with the SEC on September 8, 2017 (the "Q3 2017 10-Q")) at ITUS-001050 (cited at Compl. ¶ 33).

On August 3, 2017, the Company's outside patent counsel forwarded to Dr. Kumar and Mr. Roop an "Issue Notification" from the USPTO concerning the Patent Application (the "August 3 Email"). Ex. B (Issue Notification). Although the cover email from counsel commented that the referenced patent "will issue" on August 22, 2017, the Issue Notification itself only provided that the patent was "projected" to issue on August 22, 2017 and included the "***projected*** patent number and issue date" of U.S. Patent No. 7,739,783 (the "'783 Patent"). Ex. B (Issue Notification) at ITUS-001207, 001209 (emphasis added); *see also* Compl. ¶ 24.

C. The Company's Reliance on Stock-Based Compensation.

As a growth company in the biotechnology space with limited revenue and negative operating cash flows, stock-based compensation, and specifically stock option grants, formed a critical component of the Company's employee compensation. For instance, a majority of the compensation paid to certain senior executives of the Company in 2016 and 2017 was in the form of stock option awards. *See* Ex. 6 (ITUS Form 10-K, filed with the SEC on January 9, 2018 (the

"2017 10-K")) at 39. For the first three quarters of 2017 and 2016, respectively, the Company posted revenue of $362,500 and $100,000, and operating cash flows of *negative* $3,057,422 and *negative* $2,698,705. *See* Ex. 5 (Q3 2017 10-Q) at ITUS-001046, 001049. During those same periods, the Company recorded $932,773 and $570,190 in stock option compensation to employees and directors, and granted options to purchase 352,000 and 545,000 shares of Anixa common stock to employees and directors under the CopyTele, Inc. 2010 Share Incentive Plan (the "2010 Share Incentive Plan").[5] *See* Ex. 5 (Q3 2017 10-Q) at ITUS-00149, 001053.

But by September 2017, the stock options held by the Company's employees, officers, and directors were significantly underwater given the deterioration and subsequent stagnation of the Company's stock price.[6] Indeed, the Company's stock price continued to stagnate in August 2017, trading between $0.60 and $0.80 (with a median stock price of $0.69), and closing the month at

[5] On September 2, 2014, CopyTele, Inc. changed its name to ITUS. *See* Ex. 7 (ITUS Form 8-K, filed with the SEC on September 4, 2014) at ITUS-001157.

[6] The stock price languished despite continued success with the Cchek platform. *Compare* Ex. 5 (Q3 2017 10-Q) ("[I]n July of 2017, ITUS and Wistar [the nation's first independent biomedical research institute and a leading National Cancer Institute designated cancer research center] announced that they renewed and expanded their relationship [for the third year].") at ITUS-001050, *with* Ex. 2 (ANIX Stock Chart) (showing stock price slump).

$0.67 on August 31. *See* Ex. 2 (ANIX Historical Stock Information). At the same time, the Company was refocusing its business toward developing its new cancer detection technology and preparing for upcoming clinical trials. *See* Ex. A (May 10 Press Release).

D. The Compensation Committee Approves the 2017 Repricing.

On September 6, 2017, Mr. Titterton and Dr. Baskies, constituting a quorum of the Compensation Committee, met to consider "a proposal to re-price certain issued and outstanding stock options for ***all of the current officers, directors, and employees of the Company***." Ex. D (Minutes of the September 6, 2017 Special Meeting of the Compensation Committee (the "September 6 Minutes")) at ITUS-001174 (emphasis added); *see also* Compl. ¶¶ 26-27. Dr. Kumar, Mr. Catelani, and the Company's outside corporate counsel were also present at the meeting. Ex. D (September 6 Minutes) at ITUS-001174.

Following discussion, the Compensation Committee approved the following resolution (the "2017 Repricing"):

> RESOLVED, that certain issued and outstanding stock options listed on the attached Exhibit A, shall be re-priced effective September 6, 2017, to the current market price ($0.67).

Id. at ITUS-001175; *see also* Compl. ¶ 27. The Compensation Committee then resolved that management was "authorized and empowered" to take any actions

necessary to "effectuate the purposes of the foregoing resolution." Ex. D (September 6 Minutes) at ITUS-001175.

Two days later, on September 8, 2017, the Company publicly announced the 2017 Repricing in its Form 10-Q for the third quarter of 2017. Compl. ¶ 33 (citing Q3 2017 10-Q). As a result of the 2017 Repricing, 2,029,600 stock options belonging to "all of the current officers, directors, and employees of the Company," along with certain consultants, were repriced to $0.67, the Company's closing stock price on September 6, 2017.[7] Ex. D (September 6 Minutes) at ITUS-001174, 001179; Ex. 5 (Q3 2017 10-Q) at ITUS-001061; *see also* Compl. ¶ 29. The original strike prices of these repriced options ranged between $0.82 and $5.30. Compl. ¶ 29. Most of the repriced options had been issued several years, and in some instances nearly a decade, before the 2017 Repricing. *See* Ex. D (September 6 Minutes) at ITUS-001177 – 001179 (listing original grant dates of the repriced options).

---

[7] The repriced options included 880,000 options owned by Dr. Kumar; 262,400 options owned by Mr. Titterton; 250,000 options owned by Mr. Catelani; 42,000 options owned by Mr. Fox; 18,000 options owned by Dr. Baskies; and 18,000 options owned by Dr. Monahan. Compl. ¶ 29. Of the repriced options, 18,200 were granted under the CopyTele, Inc. 2003 Share Incentive Plan (the "2003 Share Incentive Plan"), 965,400 were granted under the 2010 Share Incentive Plan, and 1,046,000 were not granted under any plan. *See* Ex. 6 (2017 10-K) at F-18.

The Compensation Committee's selection of the September 6 closing stock price as the revised exercise price is consistent with the terms of the Company's governing share incentive plans, which permit the Compensation Committee to use "the closing price of the Company's Common Stock on the date of calculation (or on the last preceding trading date if Common Stock was not traded on such date)" as the "Fair Market Value" for any benefits awarded under the plans. Ex. 8 (2010 Share Incentive Plan) at Section 18; Ex. 9 (2003 Share Incentive Plan) at Section 21. "All other terms of the previously granted [options] remain[ed] the same," including "the number of shares underlying the options granted, the vesting periods of the options, and the expiration dates of the options." Ex. 5 (Q3 2017 10-Q) at ITUS-001061.

The 2017 Repricing was carried out by the Compensation Committee "pursuant to the authority granted to [it] by the Board of Directors of the Company." Ex. 5 (Q3 2017 10-Q) at ITUS-001061. This authority had been delegated to the Compensation Committee under the Company's governing share incentive plans, which provide:

> In its sole discretion, the Committee may reduce the exercise price for any or all outstanding Stock Options or Stock Appreciation Rights, by repricing or replacing or offering to replace such Benefits, at any time and on any basis it believes is appropriate and consistent with the Plan's purposes.

Ex. 8 (2010 Share Incentive Plan) at Section 23; Ex. 9 (2003 Share Incentive Plan) at Section 26. The purpose of the Company's share incentive plans was to "provide incentives which will attract, retain and motivate highly competent persons as officers, key employees and non-employee directors" of, and consultants to, the Company. Ex. 8 (2010 Share Incentive Plan) at Section 1; Ex. 9 (2003 Share Incentive Plan) at Section 1.

As a result of the 2017 Repricing, the Company incurred a non-cash charge totaling approximately $261,000. *See* Ex. 6 (2017 10-K) at 42.

E. Dr. Kumar and Mr. Roop Are Informed of the Patent Issuance and Anixa Discloses the News to Stockholders.

On September 14, 2017, the Company's outside patent counsel informed Dr. Kumar and Mr. Roop (the "September 14 Letter") that the USPTO had issued the '783 Patent on August 22, 2017 (the "Patent Issuance"). *See* Ex. C at ITUS-001210; Compl. ¶ 25. Anixa publicly announced the Patent Issuance in a press release three business days later, on September 18, 2017 (the "September 18 Press Release"). Compl. ¶ 34 (citing the September 18 Press Release). In the September 18 Press Release, the Company reminded investors that "[t]he claims of this patent were allowed in May of 2017," and it was now announcing receipt of "the official issuance notification and patent number." Ex. 10 (September 18 Press Release). The Company's stock price closed at $1.28 on September 18, up $0.59 from the previous trading day. Compl. ¶ 35. The trading volume of the Company's stock

also increased from 209,959 on the previous trading day to 22,764,730 on September 18. *Id.*

The Company announced additional positive news regarding its cancer detection technology on September 21, 2017, and presented information to investors at its Annual Meeting of Stockholders and the 2017 Disruptive Growth Company Showcase NYC on September 22 and September 27, respectively.[8] As depicted in the ANIX Stock Chart above, these events correlate with favorable price movements in ANIX stock. Indeed, the closing stock prices on September 21, September 22, and September 27 were, respectively, $2.05, $2.27, and $4.35. *See* Ex. 2 (ANIX Historical Stock Information). In addition, as illustrated in the chart at Paragraph 36 of the Complaint, the trading volume of the Company's stock showed significant and unusual activity on the days of, and surrounding, these

---

[8] *See* Press Release, ITUS Corporation, ITUS Presentation to Annual Meeting of Stockholders (Sept. 26, 2017), https://ir.anixa.com/press-releases/detail/860/itus-presentation-to-annual-meeting-of-stockholders; Press Release, ITUS Corporation, ITUS Corporation to Present at the 2017 Disruptive Growth Company Showcase NYC Presented by SeeThruEquity and RHK Capital (Sept. 25, 2017), https://ir.anixa.com/press-releases/detail/859/itus-corporation-to-present-at-the-2017-disruptive-growth; Press Release, ITUS Corporation, ITUS Provides Update on Cancer Detection Technology and New CAR-T Initiative for Ovarian Cancer (Sept. 21, 2017), https://ir.anixa.com/press-releases/detail/858/itus-provides-update-on-cancer-detection-technology-and-new.

events. The Company's stock price "peaked" on September 26, 2017, when it closed at $4.99. Compl. ¶ 35.

One month after the Company disclosed the Patent Issuance, Messrs. Fox and Titterton exercised repriced stock options. Mr. Fox exercised all of his options, representing 42,000 shares, on October 16, 2017, shortly after resigning from the Board. Compl. ¶¶ 13, 39; Ex. D (September 6 Minutes) at ITUS-001177. On October 19, Mr. Titterton exercised options representing 2,400 shares (less than 1% of the options he held) that otherwise would have expired on November 30, 2017. Compl. ¶ 40; Ex. D (September 6 Minutes) at ITUS-001178-79 (listing an "11/30/12" grant of 2,400 stock options with an "Expiration Date" of "11/30/17").

F. Plaintiff's Section 220 Demand.

On November 8, 2017, Plaintiff sent an inspection demand to the Company under 8 *Del. C.* § 220 requesting documents relating to the 2017 Repricing. Compl. ¶ 44. The Company produced "many of the books and records sought by Plaintiff." Compl. ¶ 47. In connection with its production, the Company confirmed that the only Board or committee-level minutes concerning the 2017 Repricing were the September 6 Minutes discussed above and that there were no minutes at all regarding the '783 Patent. *See* Ex. 11 (Email from L. Fortunato to S. Liebesman, dated Dec. 8, 2017, Re: Thomas Howland/ITUS Corporation) ("[W]e

asked for minutes from 2016-2017 of any other meetings reflecting the repricing or the ’783 patent and are told that there are none.”).

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

The Complaint brings two Counts against Defendants: a breach of fiduciary duty claim (Count I), and an unjust enrichment claim (Count II). To state a claim, Plaintiff must set forth "well-pleaded factual allegations" demonstrating that recovery is "reasonably conceivable." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011). When evaluating whether allegations are "well-pled," the Court "do[es] not . . . credit conclusory allegations that are unsupported by specific facts or draw unreasonable inferences in the plaintiff's favor." *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 100 (Del. 2013); *see also Desimone v. Barrows*, 924 A.2d 908, 928-29 (Del. Ch. 2007) ("[T]o survive a Rule 12(b)(6) motion, a complaint alleging breach of fiduciary duty must plead facts supporting an inference of breach, not simply a conclusion to that effect . . . . [A] complaint must plead enough facts to plausibly suggest that the plaintiff will ultimately be entitled to the relief she seeks. If a complaint fails to do that and instead asserts mere conclusions, a Rule 12(b)(6) motion to dismiss must be granted."); *Iotex Commc'ns, Inc. v. Defries*, 1998 WL 914265, at *4 (Del. Ch. Dec. 21, 1998) ("Speculative conclusions unsupported by fact do not allege breaches of fiduciary duty."). Plaintiff does not meet these standards, and

therefore, the Complaint should be dismissed under Court of Chancery Rule 12(b)(6).

A. The Complaint Fails to State a Fiduciary Duty Claim in Count I.

The Complaint does not state a viable breach of fiduciary duty claim against any of Defendants. Critically, as Plaintiff concedes, his fiduciary duty claim is quite narrow: that "Defendants" misused material, non-public information relating to the issuance of the '783 Patent in connection with approving the 2017 Repricing.[9] Compl. ¶¶ 1, 27, 37, 54. That claim fails for two reasons. First, Plaintiff fails to allege that the directors on the Compensation Committee were aware of the technical patent issuance at the time of the 2017 Repricing. Second,

[9] With few exceptions, the allegations in the Complaint largely bundle "Defendants" together and attribute actions taken by one or two individuals to all Defendants. *See, e.g.*, Compl. ¶¶ 1-2, 26-27, 32, 34, 37-38, 43, 48-52, 54, 56, 67-74. Delaware courts have made clear that this pleading strategy is insufficient since it would permit a plaintiff to assert claims against a defendant even if the plaintiff is unable to identify any wrongdoing by the defendant. *See Hartsel v. Vanguard Grp., Inc.*, 2011 WL 2421003, at *10 (Del. Ch. June 15, 2011) (dismissing claims where the complaint "lump[ed] together" the defendants and "d[id] not differentiate among them"), *aff'd*, 38 A.3d 1254 (Del. 2012); *Shandler v. DLJ Merchant Banking Inc.*, 2010 WL 2929654, at *12 (Del. Ch. July 26, 2010) (dismissing complaint against a director, noting that the complaint "simply lumps him in with the other directors"); *Steinman v. Levine*, 2002 WL 31761252, at *15 (Del. Ch. Nov. 27, 2002) ("[Plaintiff] does not even identify misrepresentations made by any particular individuals. He simply lumps all the Director Defendants together in this cause of action. [Plaintiff] is required to identify specific acts of individual defendants for his negligent misrepresentation claim to survive.").

Plaintiff fails to allege that news of the issuance constituted material, non-public information.

Stripped of the allegations that Defendants misused material, non-public information in connection with approving the 2017 Repricing, the Complaint does not contain any allegations that the 2017 Repricing was "unfair" or anything other than a valid exercise of the Compensation Committee's business judgment to reprice the options consistent with the applicable share incentive plans. For these reasons, Plaintiff fails to state a claim for breach of fiduciary duty.[10]

1. Plaintiff Fails to Allege a Breach of Fiduciary Duty Based upon Misuse of Material, Non-Public Information.

By characterizing his fiduciary duty claim as a misuse of material, non-public information, Plaintiff is essentially pleading a claim akin to an insider trading claim. Plaintiff's fiduciary duty claim thus falls apart because he is unable to adequately plead that Defendants (1) possessed material, non-public information, *and* (2) used that information improperly by adopting the 2017

[10] Although Plaintiff complains about an alleged February 2015 repricing (Compl. ¶¶ 18-21), he does not bring any related claims. Any such claims would be time-barred since more than three years have passed since that time, and Plaintiff acknowledges "having his suspicions raised" at the time of that repricing. Compl. ¶ 42. *See In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998) (applying statute of limitations to breach of fiduciary duty claim and noting "[i]t is well-settled under Delaware law that a three-year statute of limitations applies to claims for breach of fiduciary duty."), *aff'd*, 725 A.2d 441 (Del. 1999).

Repricing to reap a financial benefit to the detriment of Anixa's stockholders. For several reasons, the Complaint falls well short of pleading facts sufficient to support this claim.

As an initial matter, because only Mr. Titterton and Dr. Baskies approved the 2017 Repricing, Plaintiff's fiduciary duty claims against the remaining "Defendants" fail at the outset. Other than impermissible "group pleading" allegations that "Defendants' re-priced" options in connection with the 2017 Repricing (Compl. ¶ 37), there are no specific allegations that any of the Officer Defendants approved the 2017 Repricing or had repricing authority.[11] Therefore, Plaintiff's claim premised on the misuse of inside information fails with respect to the Officer Defendants. Regarding the Director Defendants, despite having access to Company documents produced in response to Plaintiff's Section 220 demand, Plaintiff makes only a conclusory assertion that the "Board" approved the 2017 Repricing. Compl. ¶¶ 28, 29. He does not, however, allege when the necessary Board meeting to approve the transaction took place or which directors approved the transaction. These pleading deficiencies alone undermine Plaintiff's conclusory allegation. *See Thermopylae Capital Partners, L.P. v. Simbol, Inc.*,

---

[11] In fact, excluding generalized allegations that the Officer Defendants "personally benefited" from the 2017 Repricing (Compl. ¶¶ 10-12)—which are addressed *infra* at 42-44—there are no specific allegations of breach of fiduciary duty against any of the Officer Defendants.

2016 WL 368170, at *12 (Del. Ch. Jan. 29, 2016) (dismissing fiduciary duty claims where complaint challenged a board's repricing of stock and "references Board action but does not explain when that Board meeting took place" or "how the Directors voted").

In fact, as described above, only the Compensation Committee considered and approved the 2017 Repricing; the decision was never presented to Anixa's full Board for approval. *See supra* at 12-15.[12] Plaintiff therefore has not pled facts to plausibly suggest that Dr. Kumar, Dr. Monahan, Mr. Fox, or any of the Officer

[12] The Court need not accept Plaintiff's conclusory assertion that the "Board" approved the 2017 Repricing for three additional reasons. *First*, as the September 6 Minutes show, only two of the Director Defendants (representing a quorum of the Compensation Committee) approved the 2017 Repricing: Mr. Titterton and Dr. Baskies. *See* Ex. D. Plaintiff has not pled facts showing that any of the other Director Defendants—Drs. Kumar and Monahan, and Mr. Fox—ever approved the 2017 Repricing. *Second*, as discussed *supra* at 14, the Q3 2017 10-Q expressly states that the Compensation Committee approved the 2017 Repricing, which was done pursuant to the stock option repricing authority granted to the Compensation Committee in the 2003 and 2010 Share Incentive Plans. *See* 8 *Del. C.* § 141(c) (providing that the board of directors may establish a committee endowed with the full authority of the board). *Third*, in connection with the Section 220 production, the Company confirmed that, besides the September 6 Minutes, there were no other Board or committee minutes concerning the 2017 Repricing. *See supra* at 17-18.

Defendants took *any* action with respect to the 2017 Repricing that could subject them to liability for breach of fiduciary duties.[13]

Furthermore, as explained below, Plaintiff cannot show that Mr. Titterton and Dr. Baskies approved the 2017 Repricing while possessing material, non-public information. First, Plaintiff does not plead any non-conclusory allegations suggesting that any Defendants—including Mr. Titterton and Dr. Baskies—knew about the Patent Issuance at the time the Compensation Committee approved the 2017 Repricing. Second, regardless of whether any Defendants had knowledge of the Patent Issuance prior to the 2017 Repricing, Plaintiff fails to plead any non-conclusory allegations showing that news of the Patent Issuance was material. *See Thermopylae Capital*, 2016 WL 368170, at *1, *12 (finding complaint "deficient" where it left "the Court to speculate as to [the pertinent] facts or attempt to supply them through conclusory allegations").

---

[13] Plaintiff's claim that "Defendants" "violated the Compensation Committee Charter" by discussing Dr. Kumar's "compensation" in his presence finds no support in the documents cited in the Complaint. Compl. ¶ 27. The September 6 Minutes do not reflect any discussion of Dr. Kumar's "compensation or performance." Ex. D; *see also* Ex. E (Compensation Committee Charter) at 1 (prohibiting discussion of such matters in the CEO's presence). And nothing in the charter prohibits a discussion in the CEO's presence of the repricing of stock options held by all then-current employees, directors, and officers.

a. Plaintiff does not allege that the Compensation Committee knew of the Patent Issuance prior to approving the 2017 Repricing.

Plaintiff fails to plead any non-conclusory allegations showing that "Defendants" knew that the '783 Patent had been issued at the time the Compensation Committee approved the 2017 Repricing. Because, as explained above, only Mr. Titterton and Dr. Baskies approved the 2017 Repricing, the Court need only focus on whether they had knowledge of the Patent Issuance at the time of their approval.

Critically, Plaintiff does not plead any non-conclusory allegations that either Mr. Titterton or Dr. Baskies knew of the Patent Issuance before approving the 2017 Repricing. The sole allegation concerning any Defendant's knowledge of the Patent Issuance prior to the 2017 Repricing is that on August 3, 2017 Dr. Kumar and Mr. Roop received an email from Anixa's outside patent counsel indicating that the '783 Patent "will issue" on August 22, 2017. Compl. ¶ 24 (citing Ex. B (August 3 Email)). Neither Mr. Titterton nor Dr. Baskies was copied on the August 3 Email, and there are no allegations that anyone who was copied on that email forwarded it to them or otherwise notified them of the Issue Notification. *See Pfeffer v. Redstone*, 2008 WL 308450, at *10 (Del. Ch. Feb. 1, 2008) (rejecting plaintiff's "general allegations" and "daisy chain of surmise and illogic" that directors knew certain information because it was purportedly known by other

individuals who "would have shared" it with the directors), *aff'd*, 965 A.2d 676 (Del. 2009). The Complaint therefore does not plead any facts suggesting that Mr. Titterton or Dr. Baskies approved the 2017 Repricing while possessing knowledge of the Patent Issuance.

Further, the Complaint does not contain any allegations that Mr. Titterton or Dr. Baskies failed to undertake any necessary steps prior to approving the 2017 Repricing or that there were any deficiencies with the Company's internal controls. Nor does the Complaint allege that Mr. Titterton or Dr. Baskies knew anything at all about the '783 Patent, or that the day-to-day maintenance of the Company's patent portfolio was within their purview as members of the Compensation Committee. *See id.* (granting motion to dismiss and noting that "directors are not as a matter of general experience presumed to know business operational information that is not of a kind routinely disclosed to boards of directors"); *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996) ("Most of the decisions that a corporation . . . makes are, of course, not the subject of director attention. Legally, the board itself will be required only to authorize the most significant corporate acts or transactions . . . .").[14] Plaintiff's failure to plead facts

[14] *Cf. South v. Baker*, 62 A.3d 1, 16 (Del. Ch. 2012) ("[I]t is not reasonable to infer that the Board acted in bad faith based on references to 'management,' particularly . . . on nuts-and-bolts operational issues."); *Desimone*, 924 A.2d at 940 (declining to infer that a board "must have" known about options

showing that Mr. Titterton and Dr. Baskies knew, or should have known, about the Patent Issuance prior to approving the 2017 Repricing is fatal to Count I.

To the extent the Court evaluates the knowledge of the remaining Defendants, Plaintiff does not allege that any of the Director Defendants who were not members of the Compensation Committee, other than *potentially* Dr. Kumar, were aware of the Patent Issuance prior to the 2017 Repricing. In particular, the Complaint fails to identify *which* of the Director Defendants had knowledge, or *when* they learned of the Patent Issuance. Therefore, the same pleading deficiencies described above with regard to Mr. Titterton and Dr. Baskies apply equally to Dr. Monahan and Mr. Fox as well.

Regarding Dr. Kumar, the Complaint alleges that he received the August 3 Email attaching the Issue Notification. Compl. ¶ 24. But as explained above, the Issue Notification states only that the technical patent issuance was "*projected*" to occur on August 22. *Supra* at 10. The only other allegations in the Complaint that Dr. Kumar knew about the "fact of" the issuance was that he received the September 14 Letter—which was sent *after* the Compensation Committee approved the 2017 Repricing—from the Company's patent counsel reporting that the USPTO had, in fact, issued the '783 Patent on August 22 as previously

> backdating based on allegation that the practice was "widely known" internally at the company).

projected. Compl. ¶ 25. Thus, there are no well-pled allegations that Dr. Kumar knew that the '783 Patent had in fact been issued until September 14, 2017 at the earliest.[15] With respect to the Officer Defendants, Plaintiff does not allege that Messrs. Catelani or Campisi had any knowledge of the Patent Issuance prior to the 2017 Repricing. And while Mr. Roop was copied on the August 3 Email, for the same reasons just described concerning Dr. Kumar, there are no well-pled allegations that Mr. Roop knew of the Patent Issuance until at least September 14, 2017.

b. Plaintiff cannot allege that news of the Patent Issuance was material, non-public information.

Even if Plaintiff had pled facts sufficient to show that Mr. Titterton or Dr. Baskies approved the 2017 Repricing while aware of the Patent Issuance—which he has failed to do—Count I must still be dismissed because Plaintiff has not

---

[15] Indeed, Plaintiff's entire theory based on these two allegations of "knowledge" makes little sense. Even if the Court accepts that "Defendants" had advance notice that the '783 Patent would issue on August 22, Plaintiff fails to explain why Defendants did not reprice the stock options in advance of August 22 when the patent would be publicly available on the USPTO's website and then disclose it to investors at that point. Plaintiff's theory assumes the additional (and unpled) inference that Defendants were aware that their patent counsel would send a letter confirming the Patent Issuance sometime after the September 6 Compensation Committee meeting. The more reasonable inference to draw from the fact that the Company issued its press release announcing the Patent Issuance three days after receiving the September 14 Letter is that the Company was not aware of the Patent Issuance until September 14.

adequately pled that this information was material. "Information is material if there is 'a substantial likelihood that the undisclosed information would ***significantly alter*** the total mix of information already provided.' '[O]mitted facts are not material simply because they might be helpful.'" *In re United Capital Corp., Stockholders Litig.*, 2017 WL 389520, at *3 (Del. Ch. Jan. 4, 2017) (citation omitted; emphasis added); *see also Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000) (same).

The news of the Patent Issuance did not "significantly alter" the total mix of information available to investors because the market was already aware—as early as May 10, 2017, when the Company disclosed the Notice of Allowance—that the '783 Patent would issue once Anixa paid the required fees. *See supra* at 6-7. Under federal patent law, a notice of allowance is the final substantive step in the long and complex patent application process. Such a notice is only granted once a patent has been fully examined and the USPTO determines that "the applicant is entitled to a patent under law." 37 C.F.R. § 1.311(a). Accordingly, the Notice of Allowance was the key material fact here, and as a practical matter, the patent would issue shortly after payment of the Issue Fee. *See* 35 U.S.C. § 151(a) (providing that a notice of allowance is given when "an applicant is entitled to a patent under the law" and the only remaining step before a patent technically issues is the payment of applicable statutory fees); *Syngenta*, 2004 WL 2002208, at *1

("On December 9, 2003, the [USPTO] issued a Notice of Allowance, which allowed the '488 patent to issue as soon as the issue fee was paid.").

Therefore, upon learning of the Notice of Allowance "approving" the patent, a reasonable investor would understand that the '783 Patent would be formally issued once Anixa paid the applicable fees. Consistent with the market's understanding of the significance of the Notice of Allowance, immediately after the May 10 Press Release, Anixa's stock price rose ***nearly 50%***, closing up $0.55 from the $1.15 closing price on May 9. Compl. ¶ 23. Plaintiff disregards this fact, claiming instead that the disclosure of the Notice of Allowance "had little effect on the price of the Company's common stock." *Id.*

For the same reasons, Plaintiff's claim that the (undefined) "Directors" knew the "likely impact the public disclosure [of the Patent Issuance] would have on the stock price" also fails because the Director Defendants had no reason to believe the September 18 Press Release would have a materially positive impact on the stock price. Compl. ¶ 33. There are no allegations that the '783 Patent was a core asset of the Company at that time, as evidenced by the fact that Anixa has never disclosed the specifics of the patent in any filing or whether the Company was (or is) even using the patent in its cancer detection technology. Indeed, the Company consistently disclosed that the '783 Patent would be just one of "several patents" expected to protect its cancer detection technology. Ex. A (May 10 Press Release);

Ex. 10 (September 18 Press Release). *See Desimone*, 924 A.2d at 945 (declining to draw an inference that directors intended to spring-load stock options, and concluding that "the complaint fails to enlighten the reader as to what the [positive information announced before issuing the stock options] is or how important it was to [the company's] business during that period"). Finally, as explained above, no Board or committee minutes mention the '783 Patent. *See supra* at 17-18.

The entire basis for Plaintiff's argument that the Patent Issuance was material information is premised on hindsight—specifically, that the Company's stock price increased following the September 18 Press Release and continued an upward trend in the *several weeks* that followed through October 14, 2017. Compl. ¶¶ 35, 36. This argument is not sufficient to establish materiality and was expressly rejected by the Court in *Desimone*. There, the Court dismissed the argument that a "strong upward surge" in a company's (Sycamore) stock price following the release of positive news to the market was enough for the Court to infer Sycamore's board intended to spring-load certain stock option grants. 924 A.2d at 945. The Court instead reasoned that "it [was] far from clear that the strong upward surge [following the announcement of positive news] was causally related to the announcement." *Id.* In particular, the Court criticized the plaintiff for "fail[ing] to provide any information about how Sycamore's stock performed on a market-adjusted basis during this period," leaving it "with no idea of whether

Sycamore's swings were correlated with overall market movements." *Id.* at 946. Consequently, the complaint "generate[d] no pleading stage inference either that the directors made the [challenged grants] knowing that a forthcoming announcement would move the share price in a positive direction or that the announcement that was made in fact had a materially positive effect on Sycamore's stock price." *Id.*

The Complaint suffers from the same defects as those in *Desimone*. In particular, Plaintiff failed to allege any information regarding Anixa's stock performance on a market-adjusted basis during the period in question. Instead, he points to the September 18 Press Release and claims that all price increases from that date "to October 14, 2017" were tied solely to that event. Compl. ¶ 36 (alleging "the trading volume and closing prices from September 1 ***to October 14, 2017***, clearly demonstrates the effect of the September 18, 2017 public disclosure on the Company's stock") (emphasis added). Plaintiff's incorrect causation theory also ignores the fact that events subsequent to the September 18 Press Release—such as the September 21 announcement of optimistic news regarding the Company's cancer technology, and the September 22 and September 27 presentations to stockholders and investors —also correlate positively with the rise in Anixa's stock during the latter part of September 2017, as reflected in the ANIX

Stock Chart above. The Complaint is therefore devoid of well-pled allegations demonstrating that news of the Patent Issuance was "material" to investors.

2. Stripped of Allegations of Misuse of Material, Inside Information, Plaintiff Fails to Allege Unfairness.

For the reasons stated above, the Complaint fails to plead any non-conclusory allegations showing that Defendants misused material, non-public information in connection with approving the 2017 Repricing. Setting aside these conclusory allegations, all that Plaintiff challenges is a routine business transaction in which a duly-authorized Compensation Committee exercised its business judgment to reprice stock options at fair market value to compensate all of Anixa's then-current officers, directors, and employees consistent with the Company's reliance on stock-based compensation to compensate its employees. Plaintiff's breach of fiduciary duty claim must therefore be dismissed because he has not pled facts suggesting that the 2017 Repricing was not the product of a valid exercise of the Compensation Committee's business judgment. *See In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 124 (Del. Ch. 2009) ("The business judgment rule 'is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'") (citation omitted).

Nor does Plaintiff allege that the 2017 Repricing was unfair. "Delaware law is clear that even where . . . entire fairness review is in play—plaintiff must make

factual allegations about the transaction in the complaint that demonstrate the absence of fairness [and] a plaintiff who fails to do this has not stated a claim." *Monroe Cty. Emps.' Retirement Sys. v. Carlson*, 2010 WL 2376890, at *2 (Del. Ch. June 7, 2010); *see also Capella Holdings, Inc. v. Anderson*, 2015 WL 4238080, at *6 (Del. Ch. July 8, 2015) ("Without well-pleaded allegations about the unfairness of the transaction, [counterclaim plaintiff] fails to plead his entire fairness case . . . ."); *Solomon v. Pathe Commc'ns Corp.*, 1995 WL 250374, at *5 (Del. Ch. Apr. 21, 1995) ("Even in a self-interested transaction in order to state a claim a shareholder must allege some facts that tend to show that the transaction was not fair."). Absent any non-conclusory allegations demonstrating that the 2017 Repricing was the product of an unfair process or that the options were repriced at an unfair price, Count I must be dismissed.

As a threshold matter, merely alleging that not all Anixa stockholders (i.e., non-employee stockholders) benefited from the 2017 Repricing does not constitute a sufficient allegation of unfairness. "It is well established in our jurisprudence that stockholders need not always be treated equally for all purposes." *Nixon v. Blackwell*, 626 A.2d 1366, 1376 (Del. 1993); *see also Protas v. Cavanagh*, 2012 WL 1580969, at *7 (Del. Ch. May 4, 2012) (dismissing complaint and observing "there is no blanket rule under Delaware law obligating directors to treat stockholders equally. Provided that the directors act with a legitimate business

purpose and fulfill their duties of care and loyalty, they are free to treat stockholders differently").

In *Nixon*, the Delaware Supreme Court reversed a post-trial decision of the Court of Chancery, which had found directors' approval of an employee stock ownership plan and "key man" life insurance policies not entirely fair because the directors, but not all stockholders, benefited from those transactions. 626 A.2d at 1377, 1379. Although *Nixon* was decided after trial, the Supreme Court's reasoning applies with equal force here. In particular, the *Nixon* court reasoned that the Court of Chancery "overlook[ed] the significant facts" that the plaintiffs were neither "employees of the Corporation" nor "entitled to share in an ESOP [or] qualified for key man insurance." *Id.* at 1377. The Supreme Court reasoned that, because employee stock ownership plans and key man insurance were "normal corporate practice[s] and [were] generally thought to benefit the corporation," it would have been nonsensical "to require equal treatment for non-employee stockholders." *Id.*

Like the employee stock ownership plan and key man insurance in *Nixon*, Anixa's share incentive plans were a "normal corporate practice" that benefited the Company and its stockholders. Indeed, the express purpose of the plans was to "attract, retain and motivate highly competent persons as officers, key employees and non-employee directors" of, and consultants to, the Company. *See supra* at 15.

Accordingly, the fact that not all Anixa stockholders owned stock options that were repriced in the 2017 Repricing does not render that transaction unfair, and it is not enough to plead—once stripped of allegations of misuse of inside information—that fact alone as a basis to allege unfairness.

In particular, the Complaint fails to allege that the process leading up to the approval of the 2017 Repricing was unfair. Fair process "involves such aspects of the transaction as its timing, initiation, structure, [and] negotiation." *Monroe Cty.*, 2010 WL 2376890, at *1. As explained above, Plaintiff's quibbles with the timing of the Compensation Committee's approval are unsubstantiated. *See supra* at 21-28. Plaintiff fails to allege that Mr. Titterton and Dr. Baskies possessed any non-public information concerning the Patent Issuance when they approved the 2017 Repricing, and even if they had, that information was not material. Likewise, Plaintiff makes no allegations concerning the vesting requirements of the repriced options, the recipients of the repriced options, or any other structural aspect of the repriced options. Nor could he, as all of the options held by the then-current employees, officers, and directors of the Company were repriced with all other terms of the options remaining the same. *See supra* at 12-14.

Moreover, Plaintiff ignores the "rational [business] purpose[s]" that initiated the discussions leading to the repricing of *all* the stock options held by *all* of the Company's employees, officers, and directors. *Nixon*, 626 A.2d at 1379

(concluding challenged corporate dealings were entirely fair and noting the "rational purpose" underlying them). These stock options were critical components of employee, officer, and director compensation, and provided important retention and incentive benefits. The 2017 Repricing occurred at a time when the stock options held by the Company's employees, officers, and directors were significantly underwater due to the precipitous decline and subsequent stagnation in the Company's stock price over the course of 2017. *Compare* ANIX Stock Chart; *with* Ex. D (September 6 Minutes) at ITUS-001177 – 001179 (listing the original strike prices for the repriced options). Based on these facts, the Compensation Committee was understandably concerned about morale at the Company.

At the same time, Anixa was refocusing its business operations and preparing for upcoming clinical trials related to its developing technology, and it was imperative that the Company retain its employees, officers, and directors and provide them with incentives for future performance. *See supra* at 10-12. Rather than granting new stock options, which would have led to the potential dilution of all Anixa stockholders, the Compensation Committee uniformly repriced the stock options of *all* of its employees, officers, and directors at Anixa's then-fair market value, consistent with the Company's governing share incentive plans. Avoiding dilution of stockholders was particularly important for the Company because the

issuance of stock was its primary method of generating working capital for the business.[16] Thus, rather than issuing new, potentially dilutive, stock options, the Compensation Committee approved a simple, and permissible, repricing of existing options that would accomplish the same objective.

Similarly, Plaintiff makes no non-conclusory allegations that the $0.67 exercise price was unfair. "Fair price is concerned with the economics of the transaction, particularly the price." *Monroe Cty.*, 2010 WL 2376890, at *1. Plaintiff acknowledges that the repriced exercise price was the closing stock price on the date of the 2017 Repricing. Compl. ¶ 29. And as discussed above, the use of the closing stock price on September 6 as the repriced exercise price is consistent with the terms of the Company's governing share incentive plans.[17] Notably, Plaintiff does not allege that the exercise price under the 2017 Repricing fundamentally undervalued the Company. Nor does Plaintiff contend that the 2017 Repricing was carried out in violation of the Company's governing share incentive plans. Instead, Plaintiff alleges in conclusory fashion that the exercise price under

---

[16] *See* Ex. 5 (Q3 2017 10-Q) at ITUS-001049 (noting proceeds from sale of common stock through a rights offering to shareholders and through a public offering of approximately $7.5 million), 001051 ("To date, we have relied primarily upon cash from the public and private sale of equity and debt securities to generate the working capital needed to finance our operations.").

[17] *See* Ex. 8 (2010 Share Incentive Plan) at Section 18; Ex. 9 (2003 Share Incentive Plan) at Section 21.

the 2017 Repricing was "artificially low." Compl. ¶ 71. But where a plaintiff makes "*no* factual allegations geared towards proving . . . unfair price," the plaintiff fails to state a claim. *Monroe Cty.*, 2010 WL 2376890, at *2; *see also Capella Holdings*, 2015 WL 4238080, at *5-6 (dismissing fiduciary duty counterclaims where the counterclaims made only conclusory and "speculative" allegations regarding unfair price); *Solomon*, 1995 WL 250374, at *5 ("In my opinion the amended complaint weaves together a tangle of conclusions about fairness . . . but the facts it alleges fail to state a claim."). This is especially so where, as here, the plaintiff had the benefit of a Section 220 production prior to filing the Complaint.

Accordingly, because Plaintiff failed to sufficiently allege any facts suggesting the 2017 Repricing was unfair, Count I must be dismissed.

3. To the Extent Plaintiff Purports to Allege a Disclosure Claim, It Fails.

To the extent Plaintiff purports to plead a disclosure claim in Count I, that claim lacks merit, as it is premised on the incorrect assertion that "Defendants" knowingly withheld material information regarding the Patent Issuance from the "public" and "shareholders" until after the 2017 Repricing was approved in order to "generate significant personal financial windfall." Compl. ¶¶ 37, 69; *see also id.* ¶ 33 (alleging that the (undefined) "Directors" "refused to publicly disclose" the Patent Issuance in the 3Q 2017 10-Q).

Because there was no request for stockholder action, to prevail here, Plaintiff must show that Defendants "***deliberately*** misinform[ed] shareholders" or "***knowingly*** disseminate[d] materially false information." *Malone v. Brincat*, 722 A.2d 5, 14 (Del. 1998) (emphasis added); *see also In re infoUSA, Inc. S'holders Litig.*, 953 A.2d 963, 990 (Del. Ch. 2007) (directors may be found to violate their duty of candor only "where it can be shown that the directors involved issued their communication with the knowledge that it was deceptive or incomplete"); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 158 & n.88 (Del. Ch. 2004) (noting that the *Malone* standard is "even more stringent than[] the level of scienter required for common law fraud," in that scienter for common law fraud may be supported by a showing of "reckless indifference," which is insufficient for liability under *Malone*). Plaintiff does not satisfy this standard.

As explained above (*see supra* at 40-42), Plaintiff's disclosure claim fails because none of Defendants deliberately misinformed or knowingly disseminated materially false information to Anixa's stockholders. Indeed, as discussed earlier, the Complaint does not show that any Defendants knew of the Patent Issuance until September 14, 2017 at the earliest, and the Company disclosed the Patent Issuance three business days later. *See Iotex Commc'ns*, 1998 WL 914265, at *4 ("[W]here pleading a claim of . . . breach of fiduciary duty that has at its core the charge that

the defendant knew something, there must, at least, be sufficient well-pleaded facts from which it can reasonably be inferred that this 'something' was knowable and that the defendant was in a position to know it."). Nor has Plaintiff sufficiently pled that the challenged information was material to Anixa's stockholders because the fact of the Patent Issuance did not "significantly alter" the total mix of information already provided to stockholders and the stock market generally. *See supra* at 28-33. Finally, while Plaintiff alleges that Defendants failed to disclose "adequate financial" information, he does not specify what information was not disclosed. Compl. ¶ 69.

Recognizing that the Patent Issuance was, in fact, publicly disclosed in the September 18 Press Release, Plaintiff makes the conclusory assertion that the "belated public disclosure" of the Patent Issuance caused "harm to the Company and its shareholders." Compl. ¶ 37. But Plaintiff does not articulate what harm the Company or its stockholders suffered as a result of the disclosure of the Patent Issuance on September 18, 2017, particularly given the actual allowance of the '783 Patent (which dictated by statute that the patent would issue once the issue fee was paid) had been fully disclosed since May 2017. For a disclosure claim to be actionable, the purported inadequate disclosure (or non-disclosure) itself—not the underlying undisclosed conduct—must have caused damages to the stockholder. *See O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 917 (Del. Ch. 1999)

("[I]n the event that the claim for breach of the fiduciary duty of disclosure arises from the misdisclosure of wrongdoing that underlies an accompanying claim challenging the fairness of the same transaction, the plaintiff will have to plead that the breach of the duty of disclosure created a cognizable harm discrete from the harm that the underlying wrongdoing caused, as well as the requisite causation and damages to support its request for more than nominal damages."). Absent any showing of harm, Plaintiff's disclosure claim fails.

B. Count II of The Complaint Fails to State an Unjust Enrichment Claim.

Plaintiff's unjust enrichment claim also fails. To plead such a claim, Plaintiff must allege: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law. *See Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010).

As an initial matter, it is unclear what the "impoverishment" here is or how, and to what extent, Anixa's stockholders were harmed. The 2017 Repricing resulted in a ***non-cash*** charge of only approximately $261,000.[18] *See supra* at 15. In any event, the Complaint does not allege any relationship between an

[18] In light of the negligible cost, any claim of "impoverishment" in connection with the 2017 Repricing should be disregarded for the same reasons explained *infra* at 44 n.19.

"enrichment" of Defendants and an "impoverishment." As explained above, there were legitimate business reasons for the 2017 Repricing and the Company benefited from the transaction. During a period of stagnate stock prices and significant business changes, the Company sought to compensate and retain its existing employees, officers, and directors. And it did so without granting new stock options that would have potentially diluted all stockholders, including Plaintiff.

Nor are there allegations suggesting that any such "enrichment"—which flowed uniformly to ***all employees, officers, and directors***—was unjustified. Indeed, Plaintiff's unjust enrichment claim is expressly tied to the success of his fiduciary duty claim relating to the misuse of inside information: his only argument that the Defendants were unjustly enriched by the 2017 Repricing is that they purportedly orchestrated the 2017 Repricing with "insider knowledge of the Patent [Issuance]" and with the intention of reaping a financial windfall upon public disclosure of the Patent Issuance. Compl. ¶¶ 77-78.

Because Plaintiff fails to state his breach of fiduciary duty claim, he necessarily cannot plead an unjust enrichment claim on the same basis. *See Steinberg v. Bearden*, 2018 WL 2434558, at *12 (Del. Ch. May 30, 2018) (dismissing unjust enrichment claim because it was contingent upon plaintiff's failed fiduciary duty claim); *Monroe Cty.*, 2010 WL 2376890, at *2 ("Count III

must be dismissed because the unjust enrichment claim asserted therein depends on the success of the breach of fiduciary duty claim alleged in Count II."). [19]

II. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO SATISFY THE PRE-SUIT DEMAND REQUIREMENTS OF RULE 23.1.

Plaintiff admits he made no pre-suit demand on the Board. Compl. ¶ 57. To demonstrate that demand is futile under Court of Chancery Rule 23.1, Plaintiff must plead "particularized factual statements" that a majority of the Demand Board—at least three of the five directors—cannot impartially consider a demand.

---

[19] Plaintiff also alleges in conclusory fashion that the Company suffered damages as a result of unspecified "abuse of control, gross mismanagement, [and] waste of corporate assets." Compl. ¶ 58. Those general, conclusory allegations cannot possibly state a claim. In any event, neither gross mismanagement nor abuse of control is recognized as a claim under Delaware law. *See Citigroup*, 964 A.2d at 114 n.6 ("Delaware law does not recognize an independent cause of action against corporate directors and officers for reckless and gross mismanagement; such claims are treated as claims for breach of fiduciary duty."); *see also In re Zoran Corp. Derivative Litig.*, 511 F. Supp. 2d 986, 1019 (N.D. Cal. 2007) (dismissing claims for gross mismanagement and abuse of control under Delaware law because "these claims are often considered a repackaging of claims for breach of fiduciary duties instead of being a separate tort"). Nor has Plaintiff sufficiently pled a waste claim—which the Court has described as "an extreme test, rarely satisfied by a shareholder plaintiff, because if under the circumstances any reasonable person might conclude that the deal made sense, then the judicial inquiry ends." *Seinfeld v. Slager*, 2012 WL 2501105, at *3 (Del. Ch. June 29, 2012) (citation omitted). For the reasons stated above, the Compensation Committee had a reasonable basis for approving the 2017 Repricing. Further, the stock-based compensation expense associated with the 2017 Repricing was a non-cash charge totaling only $261,000—hardly enough to constitute waste. *See* Ex. 6 (2017 10-K) at 42.

Brehm v. Eisner, 746 A.2d 244, 254 (Del. 2000) (holding a derivative plaintiff "must comply with stringent requirements of factual particularity that differ substantially from . . . permissive notice pleadings" and a "prolix complaint larded with conclusory language, like the Complaint here, does not comply with these fundamental pleading mandates").

Because the 2017 Repricing was approved by less than a majority of the Board, the challenged conduct is analyzed under the *Rales* standard. Plaintiff must therefore allege "particularized factual allegations . . . [that] create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand." *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993). Notably, the Complaint does not contain any independence allegations, and therefore, Plaintiff concedes the independence of all five members of the Demand Board. Plaintiff also concedes that Mr. Cavalier is disinterested for demand futility purposes. Compl. ¶ 9. Because the Complaint does not plead with sufficient factual particularity that three of the remaining four members of the Demand Board are interested, demand is not excused and the Complaint must be dismissed.

A. Plaintiff Fails to Plead Particularized Facts Showing that a Majority of the Demand Board Faces a Substantial Likelihood of Liability.

Plaintiff fails to establish demand futility by alleging that the "Board" faces a substantial likelihood of liability for breach of its fiduciary duties as a result of certain "intentional misconduct." Compl. ¶ 65. As explained above, even under the more plaintiff-friendly pleading standard of Rule 12(b)(6), Plaintiff cannot show that a majority of the Demand Board faces a substantial likelihood of liability under Count I because only two directors, Mr. Titterton and Dr. Baskies, approved the 2017 Repricing, and neither director had knowledge of the Patent Issuance at the time of their approval. *See supra* at 22-28. *See Citigroup*, 964 A.2d at 134 (dismissing claims where complaint did not "sufficiently allege that the director defendants had knowledge that any disclosures or omissions were false or misleading or that the director defendants acted in bad faith in not adequately informing themselves"); *In re NantKwest, Inc. Derivative Litig.*, 2018 WL 2303360, at *4 (Del. Ch. May 18, 2018) (dismissing claims, finding that the use of "broad group allegations" concerning "director defendants" was not "sufficiently particular to allow an analysis of the state of mind of the individual defendants" so as "to determine whether the alleged misleading statements or omissions were made with knowledge or in bad faith") (internal quotations omitted); *Guttman v. Huang*, 823 A.2d 492, 504 n.24 (Del. Ch. 2003) ("[A]bsent facts suggesting an

inference that these five directors knew of [certain information], the plaintiff's complaint does not raise a sufficiently ominous picture of liability.").

Plaintiff must therefore rely on Count II to show that a majority of the Demand Board faces a substantial likelihood of liability under a theory of unjust enrichment. But for the reasons previously discussed, this claim also fails as Plaintiff has not pled with particularity the required elements of the claim. *See supra* at 42-44. Consequently, Plaintiff fails to show that a majority of the Demand Board faces a substantial likelihood of liability in connection with the 2017 Repricing.[20]

B. Plaintiff Fails to Plead Particularized Facts Showing that a Majority of the Demand Board is Interested Because They Hold Repriced Stock Options.

Nor is it enough to allege that Drs. Kumar, Baskies, and Monahan and Mr. Titterton are "interested" in the 2017 Repricing solely because they are "direct beneficiaries" of the transaction. Compl. ¶ 62. Although a majority of the Demand Board holds repriced options (which were repriced along with all other then-current employees, officers, and directors), the Complaint fails to plead with particularity that Dr. Kumar, Dr. Monahan, and Mr. Cavalier approved the 2017

---

[20] That "Defendants" purportedly exposed the Company to "***potential*** SEC" investigations (but not actual investigations), does not establish a substantial likelihood of liability. Compl. ¶ 73 (emphasis added). *See Tilden v. Cunningham*, 2018 WL 5307706, at *13 (Del. Ch. Oct. 26, 2018) (rejecting "speculative allegations" of a director's "legal jeopardy").

Repricing and, therefore, stood on both sides of the transaction. *See Cal. Public Emps.' Ret. Sys. v. Coulter*, 2002 WL 31888343, at *8-9 (Del. Ch. Dec. 18, 2002).[21]

The *Coulter* case is instructive on this point. There, the Court found that the plaintiff had not "raise[d] a reasonable doubt about [director] disinterest" as to

---

[21] In the context of selective issuances of stock options or equity to certain directors or senior executives, the Court has found directors interested where they received challenged grants. But none of those cases considered the issue in the context of *repricing* existing options for *all* of a company's employees, officers, and directors. Unlike an issuance, a repricing neither dilutes stockholders nor involves a determination of the number of options to issue or the appropriate vesting schedule or expiration dates. *See Ret. Bd. of Allegheny Cty. v. Rothblatt*, 2009 WL 3349262, at *3 (Del. Ch. Oct. 13, 2009) (reasoning that the repricing of options did "not creat[e]" the type of dilutive harm that the issuance of "additional options" would have). The only change is to the exercise price of the existing options, which in this case was carried out by a duly-authorized Compensation Committee according to the terms of the Company's governing share incentive plans that expressly permitted setting the exercise price at the then-stock price. For these and other, case-specific reasons, the option and equity issuance line of cases are inapposite. *See, e.g.*, *Calma v. Templeton*, 114 A.3d 563, 568-69, 576 (Del. Ch. 2015) (finding outside directors interested where they issued restricted stock units worth nearly $1 million to only outside directors); *Conrad v. Blank*, 940 A.2d 28, 31, 34, 37-38 (Del. Ch. 2007) (finding directors interested where they granted more than 7.5 million backdated options at a cost of $10.8 million to certain senior executives and directors over a period of 10 years, "in violation of the corporation's stock option plans"; demand not required because the company had previously disclosed "substantial evidence" that options were mispriced); *London v. Tyrrell*, 2008 WL 2505435, at *1, *5 (Del. Ch. June 24, 2008) (finding directors interested where they "both granted and received" challenged stock options that were issued "in contravention of an equity incentive plan").

claims challenging the repricing of stock options owned by the directors, where the directors did not themselves approve the repricing of their own stock options. *Id.* at *8 ("Like [outside director] Greene, the only factual allegation of financial interest on the part of [outside director] Chaney is that he owned options that were repriced-52,000 options in 1997 and 65,600 in 1999. Certainly the argument has somewhat more force against Chaney, who was at least on the board when the approvals took place. Nonetheless, I am not persuaded that the facts alleged raise a reasonable doubt about Chaney's disinterest."); *see also Haber v. Bell*, 465 A.2d 353, 358 (Del. Ch. 1983) (concluding that directors who approved a challenged transaction and allegedly had a "personal financial interest" were not interested because plaintiffs did not show that a majority of the board "stood on both sides of the challenged transaction").[22] Likewise, here, although Dr. Kumar and Mr. Monahan possess options that were repriced in the 2017 Repricing, neither of them approved the 2017 Repricing. In addition, Mr. Cavalier neither approved the 2017 Repricing nor possesses repriced options.

---

[22] *See also Coulter*, 2002 WL 31888343, at *9 n.15 ("I include here CalPERS' allegation that [outside director] Mandigo owned options that were repriced. I do not, however, consider that this makes Mandigo 'interested,' any more than owning options made Greene or Chaney 'interested' for purposes of excusing demand."); *id.* at *9 n.20 ("As with Mandigo, I mention the allegation that [inside director] White benefited from options repricing. Still, as with Greene, Chaney, and Mandigo, I note that repriced options do not alone form a sufficient basis for finding White 'interested.'").

The argument that a majority of the Demand Board is disinterested is even stronger here than in *Coulter*. There, several of the challenged repricing transactions were ones where only stock options held by certain directors were repriced. *See* 2002 WL 31888343, at *3 (describing transactions where "outside directors' options were repriced"). Here, however, ***all*** then-current employees, directors, and officers of Anixa had their options uniformly repriced at the same exercise price and on the same terms, belying any argument that the Compensation Committee implemented the 2017 Repricing to provide members of the Demand Board with a unique benefit.

Further, Plaintiff does not allege that a majority of the Demand Board obtained a material benefit as a result of the 2017 Repricing. Nor could he. It is undisputed that Mr. Cavalier derived no benefit from the challenged transaction. And in terms of the cost avoided because of the lower exercise prices due to the 2017 Repricing, the value received by Drs. Baskies and Monahan for their 18,000 options only totaled approximately $70,000 (calculated by subtracting the cost to exercise their options at $0.67 from the cost to exercise under the former strike prices). The immateriality of the benefit derived from the 2017 Repricing is underscored by the fact that only one member of the Demand Board, Mr. Titterton, is alleged to have exercised his options following the 2017 Repricing—and he only exercised 2,400 options (less than 1% of his total options), which would have

otherwise expired soon after. *See supra* at 17. If the members of the Demand Board were scheming to reprice their options to capitalize on the rise in stock price following the announcement of the Patent Issuance, they presumably would have exercised all, or most, of their options shortly after the announcement and sold the resulting shares.

Moreover, because the threat of liability against any Director Defendant, let alone a majority of the Demand Board, is so insubstantial and Plaintiff's allegations against them are so thin, it would be unjust to strip the Demand Board of its authority to consider demand merely because certain directors possess some of the repriced stock options. *See H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 149 (Del. Ch. 2003) ("Because the threat of personal liability was so insubstantial, there is no force to [plaintiff's] contention that, because the Settlement Agreement includes releases running in favor of the directors, those directors were 'interested' in that transaction."); *Desimone*, 924 A.2d at 947, n.131 (positing that, "irrespective of whether a majority of the board were recipients" of challenged options, a "potential ground" for dismissal could be that "the threat of personal liability is so insubstantial").

Indeed, even under the more plaintiff-friendly pleading standard of Rule 12(b)(6), Plaintiff has failed to establish the central premise of the Complaint—that Defendants breached their fiduciary duties by repricing stock options while

knowing material, non-public information in order to reap a financial windfall. The Complaint therefore fails on its face, and there is no meaningful threat that the repriced options held by members of the Demand Board will be clawed back because of a future finding of liability. Accordingly, regardless of whether members of the Demand Board possess repriced options, there is no basis for concluding that a majority of the Demand Board is incapable of considering a demand based on the allegations raised in the Complaint.

Finally, Plaintiff cannot show demand futility by arguing that "despite the Board having knowledge of the potential claims and causes of action raised by Plaintiff, the Board has failed and refused to seek to recover for the Company for any of the wrongdoing alleged by Plaintiff herein." Compl. ¶ 63. Other than a conclusory allegation that the Board had "knowledge" of wrongdoing and "refused to take any action to protect" the Company and shareholders (*id.* ¶ 45), the Complaint is entirely devoid of any allegations—particularized or otherwise—related to this argument. In any event, this argument is completely meritless because Plaintiff is claiming that the Demand Board inadequately responded to his claims, even though he never made a formal demand on the Board to take corrective action. *See Desimone*, 924 A.2d at 950 (finding that accepting a similar argument would "undo a good deal of our settled law"; absent a demand on the board, plaintiff was "not entitled to bypass the consequences of failing to plead

demand excusal by making the accusation that the Sycamore board had inadequately investigated his claims"). Plaintiff is not entitled to bypass the consequences of failing to plead demand excusal, and the Complaint should be dismissed for failing to satisfy the requirements of Rule 23.1.

CONCLUSION

For these reasons, Defendants respectfully request that the Court dismiss the Complaint with prejudice.

WILSON SONSINI GOODRICH
& ROSATI, P.C.

/s/ Bradley D. Sorrels
Bradley D. Sorrels (#5233)
Phillip R. Sumpter (#5811)
Daniyal M. Iqbal (#6167)
222 Delaware Avenue, Suite 800
Wilmington, Delaware 19801
(302) 304-7600

Attorneys for Defendants Amit Kumar, Lewis H. Titterton, Jr., Arnold M. Baskies, John Monahan, Michael J. Catelani, John A. Roop, Anthony Campisi, and Dale Fox

ASHBY & GEDDES

/s/ Stephen E. Jenkins
Stephen E. Jenkins (#2152)
500 Delaware Ave., 8th Floor
Wilmington, DE 19801
(302) 654-1888

Attorneys for Nominal Defendant Anixa Biosciences, Inc. (f/k/a ITUS Corporation)

Words: 12,461

Dated: January 18, 2019