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Case No. 2025-0293-MTZ

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RAINALDI REVOCABLE TRUST, derivatively on behalf of SUMMIT THERAPEUTICS INC., Plaintiff, v. ROBERT W. DUGGAN, MAHKAM ZANGANEH, MANMEET SONI, ROBERT BOOTH, UJWALA MAHATME, Defendants, and SUMMIT THERAPEUTICS INC., Nominal Defendant.	C.A. No. 2025-0293-MTZ

MOTION TO CERTIFY CONSTITUTIONAL QUESTIONS TO THE DELAWARE SUPREME COURT

Pursuant to Delaware Supreme Court Rule 41(a)(i), Plaintiff Rainaldi Revocable Trust ("Plaintiff") moves for an order certifying two questions of constitutional law to the Delaware Supreme Court (the "Constitutional Questions"):

1. The Jurisdiction Question: Does Section 1 of Senate Bill 21, codified at 8 *Del. C.* § 144 (the "Safe Harbor Provision")—eliminating the Court of Chancery's ability to award "equitable relief" or "damages" where the Safe Harbor Provision is satisfied—violate the Delaware Constitution of 1897, including by purporting to divest the Court of Chancery of its equitable jurisdiction?

2. The Retroactivity Question: Does Section 3 of Senate Bill 21, codified at 85 Del. Laws ch. 6, § 3 (2025) (the "Retroactivity Provision")—applying

the Safe Harbor Provision to plenary breach of fiduciary duty claims arising from acts or transactions that occurred before the date that Senate Bill 21 was enacted—violate the Delaware Constitution of 1897, including by purporting to eliminate causes of action that had already accrued or vested?

INTRODUCTION

1. The changes wrought by Senate Bill 21 are, in the words of one of its authors, "sweeping."[1] They represent "the most significant single-year revision of Delaware's corporate code since at least 1967[.]"[2] These sweeping changes are also unconstitutional in at least two respects.

2. *First*, Section 1 of Senate Bill 21 (the Safe Harbor Provision) rewrites Section 144 of the Delaware General Corporation Law ("DGCL") to provide that a wide range of acts or transactions "may not be the subject of equitable relief, or give rise to an award of damages" against certain categories of enumerated defendants if certain statutory safe harbors are satisfied. The Safe Harbor Provision violates Article IV, Section 10 of the Delaware Constitution of 1897 by purporting to divest the Court of Chancery of equitable jurisdiction.

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[1] Lawrence Hamermesh and Henry T.C. Hu, *Reconceptualizing Stockholder "Disinterestedness": Transformative Institutional Investor Changes and Motivational Misalignments in Voting* ("*Reconceptualizing Disinterestedness*"), 80:2 BUS. LAWYER 1, 32 (Spring 2025) ("As a whole, the SB 21 changes are sweeping[.]").

[2] Eric Talley, Sarath Sanga, & Gabriel Rauterberg, *Delaware Law's Biggest Overhaul in Half a Century: A Bold Reform – or the Beginning of an Unraveling?*, THE CLS BLUE SKY BLOG (Feb. 18, 2025), https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/.

3. *Second*, Section 3 of Senate Bill 21 (the Retroactivity Provision) provides that the Safe Harbor Provision forecloses equitable review of acts or transactions that occurred before the Bill was enacted unless a plenary breach of fiduciary duty claim was already pending before February 17, 2025. The Retroactivity Provision violates Article I, Section 9 of the Delaware Constitution of 1897 by purporting to eliminate causes of action that accrued or vested before the effective date of the statute.[3]

4. The Constitutional Questions are presented in this case and must ultimately be resolved by the Delaware Supreme Court. There is an urgent need for the Delaware Supreme Court to answer the Constitutional Questions in order to (i) minimize uncertainty for transaction planners seeking to take advantage of the Safe Harbor Provisions; and (ii) provide clarity for stockholders with potential fiduciary claims affected by Senate Bill 21 that may be time-barred if stockholders are forced to wait months or years for answers.

5. The Court should certify the Constitutional Questions so that the Delaware Supreme Court can provide those answers promptly.

FACTUAL BACKGROUND

6. This derivative action, filed on behalf of Nominal Defendant Summit

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[3] *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 418 (Del. 1984).

Therapeutics, Inc. ("Summit" or the "Company"), challenges a Note Purchase Agreement that Summit entered into with its controlling stockholder, Robert Duggan ("Duggan"), and his wife, Mahkam Zanganeh ("Zanganeh"). Summit entered into the Note Purchase Agreement in connection with a Licensing Agreement between Summit and Akeso, Inc. ("Akeso") that provided Summit the opportunity to develop and commercialize a promising drug therapy, ivonescimab, in the United States, Canada, Europe, and Japan.

7. The Note Purchase Agreement was fundamentally unfair to the Company's minority stockholders.[4] In order to make an upfront payment to Akeso in connection with the License Agreement, the Company needed a short-term "bridge" loan, which would be paid back when the Company conducted a $500 million rights offering a few months later.[5] Duggan wielded his control over Summit to steer the Company away from outside financing and instead make the loan himself. Duggan ensured that the Note Purchase Agreement provided him and his wife with a windfall.

8. The Note Purchase Agreement provided that Duggan and Zanganeh would loan the Company $520 million at 7.5% interest.[6] It also entitled Duggan and

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[4] Compl. ¶¶ 95-101.

[5] Compl. ¶¶ 90-91.

[6] Compl. ¶¶ 84-85.

Zanganeh to (i) immediate prepayment of all interest that would accrue on the Notes through February 13, 2025, and (ii) a right to take that immediate prepayment in the form of Summit common shares valued at $0.7813 per share, the closing price of the Company's stock on December 5, 2022 (the day before the announcement of the License Agreement), plus a $0.01 "premium."[7]

9. At an interest rate of 7.5%, the prepaid interest that would accrue through February 2025 amounted to an immediate payment of just under $8 million ($7,691,666) in shares.[8] Based on the Note Purchase Agreement's $0.7913 per share valuation metric, Duggan and Zanganeh received 9,720,291 Summit shares on December 5, 2022, which they knew would become much more valuable the next day when Summit announced the Licensing Agreement with Akeso.[9]

10. That is precisely what happened. When Summit announced the Licensing Agreement on December 6, its stock price soared to a closing price of $2.31. Using that closing price, the 9,720,291 shares issued to Duggan and Zanganeh were worth $22,453,873—a windfall of nearly $15 million in 24 hours.[10] The

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[7] Compl. ¶ 96.

[8] Compl. ¶ 97.

[9] Compl. ¶ 95.

[10] Compl. ¶ 98.

prepaid interest payment that Summit made to Duggan and Zanganeh equated to a usurious and plainly unfair 22% interest rate.[11]

11. Had the prepaid interest been calculated based on a $2.31 valuation, the Company could have issued Duggan and Zanganeh only 3,329,725 shares.[12] By using the artificially low pre-announcement $0.7913 share price, Duggan and Zanganeh collectively received an extra 6,390,566 shares that are currently worth approximately ***$168 million.***[13]

12. The transaction was approved by a special committee comprising purportedly independent directors. Before swiftly capitulating to Duggan's demands, the special committee met just once and outsourced its "diligence" to Duggan so that he could "scan" the debt market for alternative financing sources that he had no interest in finding.[14] The special committee failed to hire any advisors, did not search for outside financing options, and never negotiated with Duggan or made a counteroffer to his first and only (unfair) proposal.[15]

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[11] Compl. ¶ 98.

[12] Compl. ¶ 99.

[13] Compl. ¶ 14.

[14] Compl. ¶ 123.

[15] Compl. ¶¶ 109-111.

13. On February 17, 2025, Delaware's Senate Majority Leader Bryan Townsend introduced Senate Bill 21. Senate Bill 21 was passed by the General Assembly and signed by Governor Matt Meyer late in the evening on March 26, 2025.

14. As amended by Section 1 of Senate Bill 21, Section 144(b) of the DGCL now purports to eliminate this Court's ability to award either "equitable relief" or "damages" for any "controlling stockholder transaction" (which the challenged transaction here is) other than a "going private transaction" (which the challenged transaction is not) if the transaction is approved by a committee that satisfies certain criteria. Specifically, Section 144(b)(1) cleansing requires that:

> The material facts as to such controlling stockholder transaction (including the controlling stockholder's or control group's interest therein) are disclosed or are known to all members of a committee of the board of directors to which the board of directors has expressly delegated the authority to negotiate (or oversee the negotiation of) and to reject such controlling stockholder transaction, and such controlling stockholder transaction is approved (or recommended for approval) in good faith and without gross negligence by a majority of the disinterested directors then serving on the committee; provided that the committee consists of 2 or more directors, each of whom the board of directors has determined to be a disinterested director with respect to the controlling stockholder transaction.

15. Plaintiff filed its plenary complaint on March 17, 2025. Because the challenged transaction was approved by a purportedly independent committee and Plaintiff filed suit after February 17, 2025, Defendants have moved to dismiss on the grounds that, among other things, Plaintiff's claims are eradicated by the Safe

Harbor and Retroactivity Provisions. To resolve that argument, the Court will have to decide whether those provisions are constitutional.

ARGUMENT

16. Delaware Supreme Court Rule 41(a) authorizes this Court, on motion or *sua sponte*, to certify questions of law that it has not yet decided to the Delaware Supreme Court "if there is an important and urgent reason for an immediate determination[.]"[16]

17. Rule 41(b) provides an illustrative list of reasons for which the Delaware Supreme Court may exercise its discretion to accept certification, including that the "question of law is of first instance in this State" or that the "question of law relates to the constitutionality, construction or application of a statute of this State which has not been, but should be, settled by the [Supreme] Court."[17] Both criteria are satisfied here.

18. Moreover, as the Court recently observed, the Constitutional Questions present "an open question of law that speaks to the scope of this [C]ourt's subject

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[16] Article IV § 11(h) of the Delaware Constitution of 1897 grants the Delaware Supreme Court jurisdiction to answer questions certified in this manner.

[17] Supr. Ct. R. 41(b)(i), (iii).

matter jurisdiction and multiple pending matters on the court's docket," which "alone supplies 'an important and urgent reason for an immediate determination.'"[18]

A. Senate Bill 21 violates the Delaware Constitution.

19. Before Senate Bill 21 was adopted, sixty-four corporate law professors sent a letter to the General Assembly, suggesting that the bill be amended to require that companies "opt in" to the Safe Harbor Provision via a charter amendment.[19] The professors noted that one benefit of an opt-in amendment would be avoiding "thorny" constitutional "questions about separation of powers and legal validity" created by Senate Bill 21's "broad, mandatory limitation" on the Court of Chancery's "vested equitable powers[.]"[20] The General Assembly rejected that suggestion, and those thorny questions remain.

20. *First*, the Safe Harbor Provision violates Article IV, Section 10 of the Delaware Constitution of 1897 by purporting to divest the Court of Chancery of equitable jurisdiction.

21. Article IV, Section 10 provides that the Court of Chancery "shall have all the jurisdiction and powers vested by the laws of this State in the Court of

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[18] *Plumbers & Fitters Local 295 Pension Fund v. Dropbox, Inc., et al.*, C.A. No. 2025-0354-KSJM, at 2 (Del. Ch. May 21, 2025) (LETTER).

[19] Ex. A.

[20] *Id.* at 2.

Chancery." In *DuPont v. DuPont*, the Delaware Supreme Court held that this provision vests the Court of Chancery with "all the general equity jurisdiction of the High Court of Chancery of Great Britain as it existed prior to the separation of the colonies" except "where a sufficient remedy exists at law."[21] That includes fiduciary claims. "Among the most ancient of headings under which Chancery's jurisdiction falls is that of fiduciary relationships. . . . Chancery takes jurisdiction over 'fiduciary' relationships because equity, not law, is the source of the right asserted."[22] Those "equitable fiduciary duty precepts date back to a decision by the Lord Chancellor of England in 1742."[23] Article IV, Section 10's grant of equitable jurisdiction to the Court of Chancery is "a constitutional grant not subject to legislative curtailment" and is intended to "secure[] for the protection of the people an adequate judicial system [that is] remove[d] ... from the vagaries of legislative whim."[24] The Safe Harbor Provision violates this constitutional guarantee by purporting to divest this

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[21] 85 A.2d 724, 727 (Del. 1951).

[22] *McMahon v. New Castle Assocs.*, 532 A.2d 601, 604 (Del. Ch. 1987).

[23] Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 678 (2009) (citing *Charitable Corp. v. Sutton*, 2 Atk. 400, 406, 26 Eng. Rep. 642, 645 (Ch. 1742)).

[24] *DuPont*, 85 A.2d at 729. The General Assembly may only remove such jurisdiction from the Court of Chancery if it confers jurisdiction on "some other tribunal [and] . . . at the same time a remedy is provided in the new tribunal which is the equivalent of the remedy available in the Court of Chancery." *Id.* at 730. There is no other tribunal here; the Court of Chancery has exclusive jurisdiction over the category of claims affected by Senate Bill 21. *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 498 (Del. 1982).

Court of its ability to order equitable remedies for breaches of fiduciary duty.

22. *Second*, the Retroactivity Provision violates Article I, Section 9 of the Delaware Constitution of 1897 by purporting to eliminate causes of action that accrued or vested before the effective date of the statute.

23. The Retroactivity Provision states that the substantive provisions of Senate Bill 21, including the Safe Harbor Provision, "apply to all acts and transactions, whether occurring before, on, or after the enactment of this Act, except that [they] do not apply to or affect any action or proceeding commenced in a court of competent jurisdiction that is completed or pending, or any demand to inspect books and records made, on or before February 17, 2025."

24. Article I, Section 9 of the Delaware Constitution of 1897 guarantees that "every individual for an injury done him or her . . . shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense." This is Delaware's "due process" clause. "While no one has a vested interest in a rule of the common law, due process preserves a right of action which has accrued or vested before the effective date of the statute" that is protected by Article I, Section 9.[25] By purporting to apply the Safe Harbor Provision to claims that accrued

[25] *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 418 (Del. 1984).

before Senate Bill 21 was enacted, the Retroactivity Provision violates this constitutional guarantee.

B. There is an urgent need for the Delaware Supreme Court to answer the Constitutional Questions.

25. The Constitutional Questions are questions "of first instance in this State"[26] relating to "the constitutionality, construction or application of a statute of this State which has not been, but should be, settled by the [Supreme] Court."[27] Importantly, they are pure legal questions that do not require fact-finding.[28]

26. *First*, Senate Bill 21 dramatically rewrites decades of Delaware law.[29] Yet its drafters and most vocal proponents framed Senate Bill 21 as necessary to "restore the stability, predictability, and balance that long characterized Delaware

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[26] Supr. Ct. R. 41(b)(i).

[27] Supr. Ct. R. 41(b)(iii).

[28] Supr. Ct. R. 41(b) ("A certification will not be accepted if facts material to the issue certified are in dispute.").

[29] *See, e.g.*, Brian JM Quinn, *Just a little adjustment?*, M&A LAW PROF BLOG (Feb. 28, 2025), https://lawprofessors.typepad.com/mergers/2025/02/just-a-little-adjustment.html ("What's going on with SB 21 is a whole re-write of the Delaware Supreme Court's four decades of common law as it relates to controlling stockholders. Anyone talking about SB 21 should be forthright about that. SB 21 will be a wholesale rejection on the Delaware Supreme Court's work and the common law that Delaware purports to be so proud of.").

law"[30] and generate "predictable outcomes."[31] The longer it takes the Delaware Supreme Court to address the Constitutional Questions, the more loudly transaction planners will complain that a decision enforcing the Constitution undermines their reliance interests. To be sure, an unconstitutional statute "must bend to the organic law" regardless of reliance interests.[32] But there is no doubt that real uncertainty exists as long as the Constitutional Questions remain unanswered. The best way for this Court to minimize that uncertainty is to certify the Constitutional Questions.

27. *Second*, certifying the Constitutional Questions will also help minimize uncertainty for stockholders evaluating whether to file plenary breach of fiduciary duty claims that would be viable under pre-existing law but eliminated by the Safe Harbor Provision. If stockholders wait for the Delaware Supreme Court to answer the Constitutional Questions in the normal course, they may find that those claims are time-barred—particularly because the Retroactivity Provision provides that the Safe Harbor Provision applies retroactively. To avoid the risk of a laches dismissal, stockholders might have to file plenary claims before the Delaware Supreme Court

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[30] *Delaware Enacts Landmark Corporate Law Amendments*, WILSON SONSINI GOODRICH & ROSATI (Mar. 26, 2025), https://www.wsgr.com/en/insights/delaware-enacts-landmark-corporate-law-amendments.html.

[31] Lisa Schmidt, *A Message from RLF President Lisa Schmidt*, RICHARDS LAYTON & FINGER P.A. (Feb. 25, 2025), https://www.rlf.com/a-message-from-rlf-president-lisa-schmidt/.

[32] *State ex rel. Satterthwaite v. Stover*, 159 A. 239, 243 (Del. Super. 1932).

answers the Constitutional Questions. This would be inefficient as this Court would have to keep resolving the Constitutional Questions while awaiting definitive guidance from the Delaware Supreme Court. Accordingly, it would be far better to have the Delaware Supreme Court give that guidance sooner rather than later.

CONCLUSION

28. The Court should certify the Constitutional Questions so that the Delaware Supreme Court can provide urgently needed guidance to this Court concerning its equitable jurisdiction and to transaction planners and stockholders alike concerning the constitutionality of the Safe Harbor and Retroactivity Provisions.

Dated: May 29, 2025

Respectfully submitted,

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