



**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

DAVID PORTNOY, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 CRYO-CELL INTERNATIONAL, INC., a )  
 Delaware corporation, MERCEDES )  
 WALTON, GABY W. GOUBRAN, )  
 JAGDISH SHETH, Ph.D., ANTHONY P. )  
 FINCH and SCOTT CHRISTIAN, )  
 )  
 Defendants. )

**REDACTED - PUBLIC VERSION**

**NOVEMBER 28, 2007**

**C.A. No. 3142-VCS**

**PLAINTIFF'S OPENING POST-TRIAL BRIEF**

**ASHBY & GEDDES**

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Dated: November 23, 2007

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## STATEMENT OF FACTS<sup>1</sup>

### A. The Parties.

Defendant Cryo-Cell is a publicly held Delaware corporation. Cryo-Cell's former chairman and CEO, Daniel Richard, founded the Company in 1989 with a primary focus on the cryopreservation of umbilical cord stem cells for family use. (Tr. 312:4-5 (Walton)) (Joint Pre-Trial Order, Admitted Facts at ¶ 2).<sup>2</sup>

Plaintiff, David I. Portnoy, is the beneficial owner of approximately 864,509 shares of Cryo-Cell. (*Id.* at ¶ 9). Mr. Portnoy, along with non-party stockholders Visual Investment Corp., Partner Community, Inc., Jamie H. Zidell, Mayim Investment Limited Partnership, David W. Ruttenberg, Lynn Portnoy, Gilbert Portnoy, Mark L. Portnoy, Capital Asset Fund Limited Partnership, George Gaines, Scott D. Martin, and Steven Berkowitz (collectively, the "Portnoy Group"), hold a beneficial interest in approximately 1,537,869 shares of common stock of Cryo-Cell, which represents approximately 13% of the Company's outstanding shares. (JX 126 at CRYO 316).

Defendant Mercedes Walton is currently acting as Chairman of the Board and Chief Executive Officer ("CEO") of Cryo-Cell. (Joint Pre-Trial Order, Admitted Facts at ¶ 4). Defendants Gaby W. Goubran, Jagdish Sheth, Ph.D., Anthony P. Finch and Scott Christian purport to be directors of the Company and have each served on the Cryo-Cell Board since at least April 2003. (Joint Pre-Trial Order, Admitted Facts at ¶¶ 5-8).

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<sup>1</sup> For the Court's ease of reference, Exhibit A hereto sets forth a summary time-line of relevant events.

<sup>2</sup> Trial testimony is cited as "[Tr. (witness last name)] \_\_\_." Deposition testimony is cited as "[witness last name] Depo. \_\_\_." Joint trial exhibits are cited as "JX \_\_\_".

**B. Cryo-Cell's Underperformance And Mismanagement Under The Leadership Of The Director Defendants.**

In recent years, the Company has dramatically underperformed and lost market share in a growing market. For instance, for the fiscal year ended November 30, 2004, the Company reported operating income of \$3.2 million from revenues of \$12.2 million. (JX 7 at p.35). Even though the Company's revenues continued to rise, mainly due to price increases and not unit volume, for the fiscal year ended November 30, 2006 (reporting \$17.1 million), the Company reported operating losses of \$3 million—a negative swing of \$6.2 million from 2004 to 2006. (*See* JX 37 at p.32). In addition, the market price of the Company's common stock decreased by over 50% from \$3.05 on August 15, 2005 to \$1.48 as of July 30, 2007, without the payment of any dividends or the repurchase of any shares. (JX 290).

**C. The Director Defendants Attempt To Entrench The Current Board By Unilaterally Amending The Company's Bylaws.**

In the wake of the Company's underperformance and mismanagement, the Director Defendants faced mounting stockholder discontent. (Tr. 6:13-7:7 (D. Portnoy), 167:1-10 (Filipowski); Northcutt Depo. 13:20-14:6, 15:5-12). Consequently, the Director Defendants launched a campaign to entrench the Company's Board of Directors (the "Board") at the expense of a free and fair stockholder franchise.

The entrenchment campaign commenced on December 18, 2006 when the Board announced that it had amended the Bylaws of the Company (the "Amendments"). (JX 16). The Amendments purported to limit the stockholders' ability to hold directors accountable by placing significant substantive and procedural barriers to stockholder

participation. (*Id.*). Specifically, the Amendments purported to: (i) impose additional requirements on stockholders seeking to bring business before the Board or nominate directors; (ii) restrict stockholders' ability to call special meetings of stockholders; (iii) limit the ability of a stockholder to act by written consent; and (iv) impair stockholders' ability to amend portions of the Bylaws. (*Id.*).

**D. The Stockholders Question The Sincerity And Ability Of The Director Defendants.**

As news of the Director Defendants' entrenchment campaign spread, many stockholders began to voice their dissatisfaction with the Board. (Tr. 320:13-321:2, 380:24-381:4 (Walton)). One group of those shareholders, Andrew J. Filipowski, a wealthy entrepreneur, and Matthew G. Roszak (together with the Andrew Filipowski Revocable Trust and Silk Road Equities (Messrs. Filipowski and Roszak's private investment firm), the "Filipowski Group"),<sup>3</sup> articulated their complaint to the Board by letter on January 9, 2007. (Tr. 321:10-13, 381:8-14 (Walton)) (JX 22). In that letter, the Filipowski Group told the Director Defendants that they were "dismay[ed] by the recent actions of the Board of Directors in amending the bylaws ... without stockholder approval." (Roszak Depo. 25:6-26:7) (JX 22). The Filipowski Group characterized the Amendments as "nothing more than a way for existing management to entrench itself and to perpetuate its role with the Company and the economic benefits that go along with that." (JX 22). The Filipowski Group also "question[ed] the sincerity and ability of the

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<sup>3</sup> As of May 25, 2007, the Filipowski Group held a beneficial interest in approximately 731,250 shares of Cryo-Cell's common stock (the "Filipowski Shares"), which represented approximately 6.27% of the Company's outstanding shares. (Joint Pre-Trial Order, Admitted Facts ¶ 13).

current directors to provide leadership and support the stockholders' interests" and concluded that "the current Board appears determined to insulate existing management from any meaningful accountability to stockholders." (*Id.*). As a result of these concerns, the Filipowski Group informed the Board that it was considering putting up a slate of directors for election. (Tr. 383:23-384:3 (Walton), 171:2-24 (Filipowski)).

On January 31, 2007, Plaintiff wrote the Director Defendants to express the Portnoy Group's concerns about the Amendments, as well as the recent performance of the Company. (Verified Complaint, JX 282 at Ex. 3). The Director Defendants failed to respond to any of the concerns raised in Plaintiff's January 31<sup>st</sup> letter. (Tr. 321:3-5 (Walton)). During this time period, the Portnoy Group and Filipowski Group were in discussions with each other about their mutual dissatisfaction with the Board and the possibility of cooperating in a proxy contest. (Tr. 29:14-17 (D. Portnoy), 153:18-156:2, 168:22-169:3 (Filipowski)).

**E. The Portnoy Slate Forms To Oppose The Current Board.**

On March 26, 2007 the Portnoy Group filed the Portnoy Proxy Statement with the SEC and notified the Company of, among other things, its intent to solicit proxies to elect David Portnoy, Mark L. Portnoy, Craig E. Fleishman, M.D., Harold D. Berger and Scott D. Martin (collectively, the "Portnoy Slate") to the Board at the Annual Meeting. (JX 46).<sup>4</sup> In subsequent proxy materials, the Portnoy Slate pledged to, among other things,

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<sup>4</sup> John Z. Yin, Ph.D. was later added as the sixth member of the Portnoy Slate. (JX 126 at CRYO 317).

eliminate all unnecessary expenses, reduce the annual cash compensation of directors, and examine the level of compensation of the Company's senior management. (JX 126).

**F. The Filipowski Group Conditions Its Support Of The Management Slate Upon Mr. Filipowski's Nomination To The Board Of Directors.**

By early April 2007, Mr. Filipowski had missed the nomination deadline in the Company's Bylaws to propose his own slate of directors and the threat of a three-way proxy fight had passed. (JX 14 at Article II, Section 10; JX 11). Nevertheless, the Director Defendants recognized that if Mr. Filipowski supported the Portnoy Slate, the incumbents would stand a slim chance of winning re-election given the dissension in the shareholder base with the Company's performance.<sup>5</sup> (Tr. 204:13-205:16 (Hayden)). With this in mind, on May 21, 2007, Ms. Walton informed the Governance Committee that "although initially Mr. Filipowski had proposed the names of other nominees, he had subsequently confirmed that his agreement to support management's slate was conditioned on his nomination to the Board." (JX 84). After Ms. Walton made this announcement, the Director Defendants discussed "the possible results of a proxy contest, with or without Mr. Filipowski's support." (*Id.*).

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<sup>5</sup> In February 2007, the Director Defendants met with the Filipowski Group to discuss their January 9, 2007 letter to the Board. (JX 31; JX 34) (Tr. 321:14-20, 322:19-323:10 (Walton), 271:20-272:3 Christian)). In that letter, the Filipowski Group had "question[ed] the sincerity and ability of the current directors to provide leadership and support the stockholders' interests," and informed the Board that it was considering putting up a slate of directors for election. (JX 22). Nonetheless, two days after the Portnoy Proxy Statement was filed on March 26, the Board met to consider "whether anyone from the Filipowski Group should be invited to join the Board of Directors as a management representative to be elected at the [Annual Meeting]. . . ." (JX 46, JX 47, JX 48, JX 49, JX 54, JX 56).

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**G. The Director Defendants Commence Their Illegal Vote Buying Scheme By Creating A Board Seat For Mr. Filipowski And Entering Into A Voting Agreement With The Filipowski Group.**

On May 25, 2007, Ms. Walton notified Mr. Filipowski of the Director Defendants' agreement to nominate him to the Board, contingent upon him executing a voting agreement with the Company. (JX 98) (Tr. 394:15-18 (Walton)). Although none of the other members of the Board were required to enter into such agreements, and Ms. Walton claimed she was not concerned that Mr. Filipowski would vote his shares against the Board's proposed slate of directors, which was composed of the Director Defendants (the

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“Management Slate”), (Tr. 331:23-332:13 (Walton)), Mr. Roszak, Mr. Filipowski and the Andrew J. Filipowski Revocable Trust, executed the Voting Agreement with the Company on June 4, 2007 (the “Voting Agreement”). (JX 108). The Voting Agreement provided, among other things, that the Director Defendants would nominate Mr. Filipowski to fill the newly-created directorship and, in exchange, the Filipowski Group would vote its shares in favor of the Management Slate at the Annual Meeting. (JX 108).

The testimony of Cryo-Cell’s proxy solicitor, Georgeson, Inc., made clear that the purpose of the Voting Agreement and the creation of a board seat for Mr. Filipowski was to facilitate the reelection of the incumbent Board. Specifically, Christopher Hayden of Georgeson testified at deposition that:

[The Company’s management group created a board seat for Mr. Filipowski because] [h]e was a significant shareholder of the [C]ompany. He had also threatened a proxy fight . . . at the same point that Mr. Portnoy . . . had considered a proxy fight. We thought it would be very difficult for the [B]oard to be reelected in light of two different shareholder parties launching proxy fights.

(Tr. 204:13-205:16 (Hayden)).<sup>7</sup> This contrasts with Mr. Christian’s insistence, in the face of overwhelming evidence to the contrary, that Mr. Filipowski’s nomination to the Board had “*nothing*” to do with the proxy contest. (Tr. 267:2-9 (Christian)).

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<sup>7</sup> An e-mail from Ms. Walton to her team on June 7, 2007 also makes clear that the nomination of Mr. Filipowski to the Board was to facilitate the Board’s reelection. In that e-mail, Ms. Walton forwards her team the following post on the Company’s message board, adding “I hope [the author of the post is] right on the money”:

No Greater Coup . . . Could Possibly have been [A]ccomplished!!! [Mr. Filipowski] joining the [B]oard ‘lays to waste’ considerable efforts and monies squandered on the ‘overthrow’ . . . Game, Set, Match?? Me thinks so. JMHFO

(JX 115).

**H. The Director Defendants Devised And Implemented The Plan Whereby Board Seats Were Promised To Stockholders Who Would Buy Votes.**

In the week prior to the Cryo-Cell Annual Meeting, the Portnoy Group achieved a decisive lead in the voting. Ms. Walton, Cryo-Cell's Chairman and CEO, was "very concerned," and the Filipowski Group had all but given up. (Tr. 413-14:22-3 (Walton), 175:5-10 (Filipowski)) (JX 184). Vote reports on July 12 showed that the Portnoy Group had widened its lead over the Management Slate, with 4,106,441 votes for the Portnoy Group as compared to the Management Slate's 2,098,579 votes. (JX 189). As the Annual Meeting approached, the Portnoy Group continued to gain additional votes, increasing its lead by the morning of July 13 to a margin of 50%. (JX 200).

**1. Development Of The Vote Buying Plan.**

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**2. The Cryo-Cell Board Approves The Vote Buying Plan.**

That afternoon at 2:00 p.m., Cryo-Cell held a telephonic Board meeting at which Ms. Walton described the Portnoy Slate's lead in the voting as well as the Company's proxy solicitation efforts and strategy. (JX 190).

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**3. Implementation of the Vote Buying Plan.**

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**I. The Director Defendants Coerce Saneron Into Voting For The Management Slate.**

Saneron CCEL Therapeutics, Inc. (“Saneron”), a self-professed “entrepreneurial, biotechnology R&D startup company,” is the beneficial owner of approximately 253,000 shares of Cryo-Cell’s common stock (the “Saneron Shares”), representing approximately 2% of the Company’s outstanding shares. (Skerkowski Depo. 9:21-22, 10:24-11:6; Tr. 334:13-18 (Walton)) (Joint Pre-Trial Order, Admitted Facts ¶ 19). Cryo-Cell owns a significant position in Saneron, holding approximately 38% of Saneron’s outstanding shares. (Skerkowski Depo. 8:13-14, 9:23-24; Tr. 334:8-12 (Walton)). Cryo-Cell and Saneron are involved in many collaborative projects together, including an on-going technology development project. (Tr. 335:7-17, 342:2-7, 399:15-18 (Walton)).

Saneron held the Saneron Shares on a single stock certificate (the “Saneron Stock Certificate”), which contained a legend restricting the transfer of these shares without an effective registration statement or an opinion of company counsel that such registration is not required. (Skerkowski Depo. 11:24-12:13) (JX 2).

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As the Annual Meeting approached, Saneron had not yet voted its shares and Ms. Walton became increasingly concerned since Saneron was a large shareholder. (Tr. 340:3-9, 398:7-399:4 (Walton)). Ms. Walton thus instructed Jill Taymans, the Company's Chief Financial Officer, to contact Nicole Kuzmin-Nichols, Saneron's Vice President of Business Development, to inquire as to how Saneron was going to vote its shares at the Annual Meeting. (Tr. 403:20-13 (Walton)) (JX 207).

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During the weekend preceding the Annual Meeting, knowing that the Portnoy Group held a substantial lead over the Management Slate, the Director Defendants exploited the Company's significant ownership interest in Saneron by exerting intense pressure and undue influence on Saneron's board of directors to vote the Saneron Shares in favor of the Management Slate. (JX 203; JX 212; JX 218).

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Although Saneron had previously decided that it was going to attend the Annual Meeting and wait until the meeting to vote, in return for Ms. Walton's

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agreement to remove the legend and pendent restrictions from the Saneron Stock Certificate,

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, Dr. Sanberg agreed during the call to vote the Saneron Shares in favor of the Management Slate that afternoon. (Kuzmin-Nichols Depo. 16:4-9, 19-21; Tr. 409:2-10, 409:21-410:1 (Walton)).

The clarity of the connection between the removal of the stock legend and Saneron's vote is illustrated by the following chronology of events. After her call with Dr. Sanberg on that Sunday, Ms. Walton immediately instructed the Company's counsel to issue an opinion letter authorizing the re-issuance of the Saneron Stock Certificate without "a securities restrictive legend." (Tr. 409:6-10 (Walton)) (JX 219). The opinion letter was then faxed to Saneron that afternoon. (Skerkowski Depo. 33:1-6, 33:13-17; Tr. 409:18-20 (Walton)). Just after receipt of Cryo-Cell's counsel's letter removing the restriction on the shares Sunday afternoon, Ms. Kuzmin-Nichols made a special trip half an hour back to her office on Sunday night for the sole purpose of voting Saneron's proxy in favor of incumbent management. (Kuzmin-Nichols Depo. 44:10-46:4; Skerkowski Depo. 33:4-6, 13-17, 23-25). Then, after Ms. Kuzmin-Nichols voted Saneron's proxy at about 5 p.m. that night, Ms. Walton circulated an e-mail at 5:52 p.m. declaring that "we just locked up Saneron." (JX 218) (Tr. 410:2-13 (Walton); Skerkowski Depo. 33:23-25).

**J. The Director Defendants Create a Rule of Conduct, Inconsistent with the Bylaws, to Ensure that Ms. Walton has Complete Control Over the Annual Meeting.**

With the threat of losing the election to the Portnoy Group looming, the Director Defendants intensified their entrenchment campaign by creating Rules of Conduct (the

“Rules”), which purported to vest Ms. Walton with total control over the administration of the Annual Meeting. (JX 228 at CRYO 1158). Notwithstanding the Bylaws, which explicitly provided that an annual meeting may be adjourned only “by a majority of the votes cast by the holders of shares entitled to vote thereon,” the Rules purported to bestow upon Ms. Walton absolute “authority to decide all procedural issues regarding the conduct of the meeting, including adjournment.” (*Id.*, ¶2; JX 14, Article II ¶ 8(b)).

Recognizing this apparent discrepancy and the Rules’ potential for abuse, counsel for the Portnoy Group expressly conditioned their approval upon the recognition that the Rules do not supersede the Bylaws. (JX 240). Although the Director Defendants took a different position in their pre-trial briefs, Ms. Walton admitted at trial that the Rules *do not* supersede the Bylaws. (Tr. 442:6-10). Nor could they. As Ms. Walton testified at trial, the Rules had not been agreed to by shareholders other than the Portnoy Group. (Tr. 441:12-442:5). Rather, they were simply created so that the Director Defendants and the Portnoy Group knew “the ground rules” for the Annual Meeting in advance. (*Id.*).

**K. The Annual Meeting Begins with the Portnoy Slate Holding a Lead Over the Management Slate.**

Notwithstanding the Director Defendants’ illegal vote buying scheme, as of the morning of the July 16<sup>th</sup> Annual Meeting, the Portnoy Slate still led the Management Slate in the voting. (Tr. 84:16-23 (Schulman), 75:6-11 (D. Portnoy)) (JX 239).

Moreover, the vote buying plan had hit a snag.

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On the morning of July

16<sup>th</sup>, Ms. Walton was surprised to discover that Mr. Choi had withheld votes for three members of the Management Slate on the approximately one million shares he had just purchased from Austin Lewis as well as on approximately 380,000 shares he owned previously. (Tr. 443:11-19 (Walton), 85:20-87:24 (Schulman)) (JX 223). Ms. Walton immediately called Mr. Choi who explained that he had withheld the votes in an attempt to create vacancies to appoint directors of his own choosing. (Tr. 444:1-17 (Walton)). Ms. Walton explained to Mr. Choi that the result of his withhold vote would be to split the slate, and they both set about to change the withhold vote. (Tr. 358:14-359:13, 444:18-21 (Walton), 187:15-188:4 (Hayden)).

The Annual Meeting began at 11:00 a.m., on July 16, 2007. (Northcutt Depo. 19:10-12). The Agenda items for consideration were: (i) the election of directors; (ii) the ratification of appointment of independent registered public accountants; and (iii) the Portnoy Group's shareholder proposal to increase the Company's directors' accountability to the stockholders by adopting substantially equivalent provisions to those set forth in SEC Proposed Rule 14a-11. (JX 228).

After the Agenda items were discussed, instead of calling for a vote or closing the polls, Ms. Walton delivered a lengthy presentation to the shareholders. (Tr. 8:17-9:6 (D. Portnoy), 296:8-22 (Christian)). After Ms. Walton concluded her lengthy presentation around 12:30 p.m., Plaintiff called for a vote on the Agenda items and moved to close the polls. (Tr. 9:7-10 (D. Portnoy), 364:24-365:22 (Walton)). However, Ms. Walton declared Mr. Portnoy "out of order" and refused his request. (*Id.*).

Thereafter, Ms. Walton acted to prolong the Meeting and delay closing the polls. She first called upon Cryo-Cell's Vice President of Laboratory Operations and R&D, Dr. Julie G. Allickson, to deliver another lengthy presentation. (Tr. 442:17-20 (Walton), 9:10-17 (D. Portnoy), 297:6-299:3, 302:17-303:6 (Christian); Northcutt Depo. 21:22-22:16) (JX 228). Indeed, Ms. Walton admitted at trial that this 30 minute presentation by Dr. Allickson was not only not on the Agenda for the Meeting but was not even planned by Ms. Walton until "at the meeting on the spot." (Tr. 447:1-15).

At approximately 1:00 p.m., after Dr. Allickson concluded her presentation, several stockholders, including Plaintiff and counsel for the Portnoy Group, renewed their previous call for a vote on the Agenda items and motion to close the polls. (Tr. 9:18-10:2 (D. Portnoy), 364:24-365:22 (Walton), 95:5-14 (Schulman); Northcutt Depo. 21:13-23:2). Again, Ms. Walton declared the stockholders "out of order" and refused their renewed requests. (*Id.*). Notably, at this time, the Portnoy Group held an approximately 50,000 vote lead over the Management Slate. (Tr. 95:22-96:16 (Schulman)) (JX 233; JX 239).

After Mr. Portnoy's second motion to close the polls, Ms. Walton continued to act to prolong the Annual Meeting in order to allow additional time to buy or otherwise secure additional votes. Specifically, she instructed Cryo-Cell's Vice President of Marketing and Sales, Rob Doll, to make another impromptu presentation. (Tr. 442:21-443:4, 447:9-15 (Walton), 10:3-9 (D. Portnoy), 297:9-13, 303:4-6 (Christian)). As with the presentation by Dr. Allickson, Mr. Doll's presentation was not on the Agenda and was planned by Ms. Walton "at the meeting on the spot." (Tr. 447:9-15 (Walton)).

**L. Ms. Walton Adjourns the Annual Meeting in Violation of the Bylaws so that the Management Slate Can Procure Additional Votes.**

Notwithstanding the stockholders' repeated calls for a vote on the Agenda items, and over counsel for the Portnoy Group's strenuous objections, after Mr. Doll's presentation concluded about 1:35-1:45 p.m. Ms. Walton adjourned the Meeting until 4:45 p.m., ostensibly for "lunch" (the "Adjournment"), in violation of Section 8(b) of Article II of the Bylaws, which provides that a meeting of stockholders may be adjourned only "by a majority of the votes cast by the holders of shares entitled to vote thereon."<sup>11</sup> (Tr. 366:4-22, 447:16-23 (Walton), 10:6-14 (D. Portnoy); Northcutt Depo. 23:18-24:17) (JX 14, Bylaws, Art. II ¶ 8(b)). Although a lunch break was not listed on the Agenda, Ms. Walton announced that the three hour Adjournment was for lunch and that the polls would remain open during that time. (Tr. 366:4-22, 368:12-14, 447:16-448:21 (Walton)).

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Regardless of the Defendants' purported reasons for the Adjournment, Ms. Walton's purpose for effecting the Adjournment of the Annual Meeting is clear. At the

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<sup>11</sup> Defendant Christian initially testified that the "lunch break" was taken because it was obvious that the Annual Meeting was not going to conclude very soon because shareholders were still asking questions at approximately 2 p.m. and Ms. Walton was not going to close the Meeting until all of the shareholders' questions had been answered. (Tr. 258:8-14, 261:17-263:2, 297:22-298:13). When pressed, however, Mr. Christian admitted that it actually had been over an hour since there had been a shareholder question, and in fact, the last hour of the Meeting before the Adjournment actually consisted of the impromptu presentations by Dr. Allickson and Mr. Doll. (Tr. 299:1-3, 302:1-13, 303:4-6).

time Ms. Walton called the Adjournment, the Portnoy Group held at least a 52,000 vote lead over the Management Slate. (JX233, Voting Report on July 16, 2007 as of 12:59 p.m.) (Tr. 97:9-15 (Schulman); Northcutt Depo. 24:24-25:15, 31:18-25). Ms. Walton clearly took the break so that management would have time to broker deals to gain more votes for the incumbent directors and to allow time for the Filipowski Group to finalize the purchase of additional shares from a significant Cryo-Cell stockholder, Apollo Capital Partners (“Apollo”), and make sure that Apollo’s approximately 323,000 shares (the “Apollo Shares”) were voted for the Management Slate.

For example, Ms. Walton pulled aside Charles Northcutt, who had voted his wife’s and his approximately 90,000 shares as well as 10,000 shares held by his friends and family in favor of the Portnoy Slate, about changing his vote during the illegal Adjournment. (Northcutt Depo. 9:12-18, 13:3-6, 25:16- 27:14, 28:11-25, 35:23-24). Ms. Walton also directed her administrative assistant, Irene Smith, to give Mr. Northcutt her business card, upon which Ms. Walton had written the name of Matthew Roszak and his number at SilkRoad Equity LLC (“SilkRoad”), a private investment firm owned and controlled by Mr. Filipowski, and instruct Mr. Northcutt to call the number to discuss the sale of his Cryo-Cell common stock. (Northcutt Depo. 27:1-28:18, 30:7-23; Smith Depo. 36:24-37:19, 38:1-39:9) (JX 284). Ms. Walton also wrote her cell phone number on that card. (Smith Depo. 37:20-22, 38:1-2) (JX 284). Although Mr. Northcutt did not change his vote, he later indicated that the whole situation and pressure exerted by Ms. Walton made him very uncomfortable. (Northcutt Depo. 25:16-30:23; *see also* JX 204; JX 264).

Meanwhile, sometime on the day of the Annual Meeting, Mr. Roszak had several conversations with Kyle Krueger, a representative of Apollo. The Management Slate had learned just that morning that Mr. Krueger had voted Apollo's approximately 323,000 Cryo-Cell shares for the Portnoy Group. (Tr. 372:2-12 (Walton); Roszak Depo. 129:7-130:7; 131:12-17).

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Mr. Roszak then put Mr. Krueger in touch with Georgeson to work through the logistics of the vote change. (*Id.* at 134:19-23) According to Ms. Walton, the Apollo Shares were pivotal. (Tr. 451:9-17 (Walton); *see* Tr. 99:1-18, 100:17-22, 103:2-7 (Schulman)). The revised Apollo votes, however, were not delivered to the Annual Meeting until approximately 3:41 p.m. (Tr. 101:21-102:10 (Schulman), 221:21-24 (Hayden)) (JX 37).

**M. After the Director Defendants and the Filipowski Group Buy or Otherwise Secure Enough Votes to Reelect the Management Slate, Ms. Walton Reconvenes the Annual Meeting and Immediately Closes the Polls.**

After allowing the Management Slate approximately three hours to buy or otherwise secure additional votes, including Apollo's and Mr. Choi's, Ms. Walton reconvened the Annual Meeting at or about 4:45 p.m., at which time the Management Slate held an approximately 600,000 vote lead over the Portnoy Slate. (Tr. 449:7-24 (Walton), 11:8-24 (D. Portnoy), 103:18-20, 104:18-105:22 (Schulman)) (JX 238). Immediately upon reconvening the Annual Meeting, Ms. Walton called for the vote on

the Agenda items and closed the polls. (Tr. 222:10-15 (Hayden), 103:18-104:9 (Schulman), 368:21-369:3, 449:7-12 (Walton)).

**N. Less than 30 Minutes After Ms. Walton Adjourns the Annual Meeting, the Company Discloses its Substantial Quarterly Losses.**

At or about 5:14 p.m., approximately 28 minutes after Ms. Walton adjourned the Annual Meeting, the Company filed its 10-Q with the SEC, which disclosed Cryo-Cell's substantial quarterly losses. (Tr. 450:24-451:8 (Walton)) (JX 234). The market's reaction demonstrates the obvious—that the earnings reported in the 10-Q were material. Specifically, from the market close on July 16, 2007, which was just prior to the 10-Q being released, to the market close on July 31, 2007, the Company's stock price dropped from \$2.35 to \$1.48, a decline of almost 40 percent. (Tr. 451:18-452:16 (Walton)) (JX 290, JX 295).<sup>12</sup> Cryo-Cell stock remains depressed and the closing stock price on November 19, 2007 was \$1.30.

**O. The Purported Results of the Election.**

After the Review Session, on July 31, 2007, the Inspectors issued the Final Report of the Inspectors of Election (the "Final Report"). (JX 275). According to the Final Report, the Management Slate's nominees appeared to defeat the Portnoy Slate's nominees by, at most, 669,747 votes. (*Id.*). Thus, if the votes wrongfully procured by the

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<sup>12</sup> On July 25th, Mr. Choi filed a Schedule 13D in which he indicated his intention to seek a seat on the Cryo-Cell board. (JX 266). The Filipowski Group filed a similar 13D on August 1st. (JX 278). Unlike the promise of an additional Board seat to the Filipowski Group, which was expressly confirmed by e-mail, there is no record of Mr. Choi being promised a Board seat.

Director Defendants are disallowed and/or adjusted, the vote of stockholders freely exercising their franchise would be given effect and the Portnoy Slate would prevail.

**P. The Payoff.**

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**ARGUMENT**

**I. THE AGREEMENTS BETWEEN CRYO-CELL AND THE FILIPOWSKI GROUP CONSTITUTED IMPERMISSIBLE VOTE BUYING AND BREACHES OF FIDUCIARY DUTY.**

**A. The Voting Agreement Constituted Impermissible Vote Buying And Breaches Of Fiduciary Duty.**

**1. The Voting Agreement Constituted Illegal Vote Buying.**

The parties to the Voting Agreement agreed, among other things, that the Director Defendants would create a new Board seat and nominate Mr. Filipowski to it, and that the

Filipowski Group would vote its shares in favor of the Management Slate. (JX 119). This constituted illegal vote buying.

The use of a corporate asset, such as the creation of a new board seat, to secure victory in an election of directors constitutes illegal vote buying. As Chancellor Chandler explained in *Hewlett v. Hewlett-Packard Company*, 2002 WL 549137, \*7 (Del. Ch. April 18, 2002):

Absent measures protective of the shareholder franchise like those taken in *Schreiber [v. Carney]*, 447 A.2d 17 (Del. Ch. 1982), the Court should closely scrutinize transactions in which a board uses corporate assets to procure a voting agreement.

In denying the defendant's motion to dismiss in *Hewlett*, the Chancellor held that the use of corporate assets to buy votes in favor of the proposed Hewlett-Packard/Compaq merger would have been "an improper use of corporate assets by a board to interfere with the shareholder franchise." *Id.* at \*6. Here, the use of a corporate asset by creating a new board seat in order to defeat Plaintiff's proxy contest is even more troubling than in *Hewlett*, because it affected the stockholder franchise in an election of directors. *See Mercier v. Inter-Tel (Delaware) Incorporated*, 929 A. 2d 786, 811 (Del. Ch. 2007).

**a. The Creation Of A New Board Seat Constitutes Use of A Corporate Asset.**

Creation of the new Board seat required Board action and, by necessity, changed the composition of the Board and required the Company to incur additional director fees as well as significant additional legal, SEC and proxy solicitation expenses. Accordingly, the creation of a new Board seat and the nomination of Mr. Filipowski to it constituted the use of a corporate asset.

**b. The Purpose Of The Voting Agreement Was To Entrench The Director Defendants In Office.**

At trial, Ms. Walton asserted that Mr. Filipowski was invited to join the Management Slate because he “was perhaps, you know, the ideal profile of a candidate that we would like to add to our [B]oard.” (Tr. 329:14-330:16). Ms. Walton’s assertion, however, is flatly contradicted by the record. First, Ms. Walton herself described the requisite profile for directors of Cryo-Cell in an e-mail to Matt Roszak dated March 29, 2007, stating:

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As Mr. Christian admitted at trial, however, Mr. Filipowski did not meet this profile at all. (Tr. 268:17-269:15). Indeed, Ms. Walton herself characterized the addition of Mr. Filipowski to the Management Slate as creating “very strange bedfellows indeed.” (Tr. 396:12-19) (JX 134).

Second, Ms. Walton admitted at trial that the positive effect Mr. Filipowski’s nomination would have on the Management Slate’s proxy contest was a factor in creating a board seat and nominating him to it (Tr. 331:12-17) and, in their pre-trial briefs, the Defendants stated that one of the purposes of adding Mr. Filipowski to the Management Slate was “to avoid the potential expense and disruption of a three-headed race.” (Defendants’ Answering, Pre-Trial Brief “D.A.B.” at 3; *see* Defendants’ Opening Pre-Trial, “D.O.B.” at 36); *see also* Tr. 204:13-205:6 (Hayden)). However, since Mr. Filipowski missed the April 3 deadline (designated in the newly amended Bylaws), (JX

14 at Article II, Section 10; JX 11), to nominate his own slate, bringing Mr. Filipowski on board was designed only to defeat the Portnoy Slate, not to save the Company a three-headed race.

Third, although Mr. Filipowski and Ms. Walton both denied it at trial, Ms. Walton herself reported to the Corporate Governance Committee of Cryo-Cell's Board on May 21, 2007 that Mr. Filipowski had stated "that his agreement to support management's slate was conditioned on his nomination to the Board." (JX 84 at CRYO 01148). Given the fact that (i) Mr. Filipowski's support of the Management Slate was conditioned on himself being a nominee; (ii) Mr. Filipowski did not at all fit the requisite profile that the Cryo-Cell board had unanimously established for new directors; and (iii) Mr. Filipowski was nominated in the heat of a proxy contest on the condition that he execute a Voting Agreement binding him to support the incumbent slate, (Tr. 394:15-18 (Walton)), it is clear that the primary purpose of creating a new board seat and nominating Mr. Filipowski to it was to defeat Mr. Portnoy's proxy contest. Avoiding or defeating election challenges to directors, however, is *not* a legitimate business purpose for buying votes.<sup>13</sup> If it was, there would simply be no such thing as illegal vote buying. On the

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<sup>13</sup> The case relied upon by the Defendants in their pre-trial briefs for this Court's "acknowledge[ment]" that avoiding a proxy contest was a legitimate purpose is *Weinberger v. Bankston*, 1987 WL 20182, (Del. Ch. Nov. 19, 1987). (D.O.B. at 34). In that case, however, the parties ended litigation in which the corporation was a defendant with a settlement agreement that included, among other things, a payment by the corporation to the insurgents in partial reimbursement of their proxy contest expenses and an agreement by the insurgents to grant the corporation a proxy to vote their shares and to dispose of their shares over a one year period. 1987 WL 20182, at \*1. *Weinberger* is distinguishable here because, among other things, it involved settlement of litigation in which the corporation was a defendant (a benefit to the corporation) and did not involve the granting to insurgents of a board seat.

contrary, defeating challenges to board incumbency is exactly the type of purpose our courts have prevented directors from using as a basis for manipulating the corporate machinery or purchasing votes. *See Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651, 659-63 (Del. Ch. 1988); *see also, Hewlett*, 2002 WL 549137, at \*6. Here, the Director Defendants' creation of a board seat in exchange for Mr. Filipowski's support constituted illegal vote buying.

**c. The Stockholders Did Not Ratify The Voting Agreement.**

The Defendants claim that the Voting Agreement was ratified by Cryo-Cell shareholders, because they elected Mr. Filipowski to office. (D.O.B. at 34-35). That assertion, however, suffers from two fatal defects. First, the stockholders did not approve the Voting Agreement or the terms thereof; they merely voted in an election of directors. Second, in claiming shareholder ratification of the Voting Agreement, the Defendants count the votes cast by the Filipowski Group, the interested party, and other illegally obtained votes.<sup>14</sup> Putting aside (i) the Filipowski Group's own votes; (ii) the votes Apollo cast for Mr. Filipowski after he purchased the Apollo shares through SilkRoad; (iii) the Saneron votes; and (iv) the Kime votes, Mr. Filipowski was defeated by a substantial margin. In fact, simply putting aside the votes cast by the Filipowski Group, the stockholders voted against Mr. Filipowski joining the Board.

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<sup>14</sup> *See Harbor Finance Partners v. Huizenga*, 751 A.2d 879, 900 (Del. Ch. 1999) ("only votes controlled by stockholders who are not 'interested' in the transaction are eligible for ratification effect"); *see also Carlson v. Hallinan*, 925 A.2d 506, 530-31 (Del. Ch. 2006) (no effective ratification where interested directors voted their own shares in favor of the challenged transactions, even though such directors constituted a majority of the stockholders).

In short, by using a corporate asset (the creation of a new board seat and the associated remuneration) to reward Mr. Filipowski for his vote and support, the Director Defendants committed illegal vote buying. *Hewlett*, 2002 WL 549137, at \*7. Moreover, even if not illegal *per se*, the vote buying here should be declared void and the Filipowski Group's votes should be nullified. Specifically, it was an interested transaction, which was not intrinsically fair to stockholders, because the purpose (and effect) of the Voting Agreement was to preserve the incumbency of the Director Defendants. *Id.* at \*4; *Schreiber v. Carney*, 447 A.2d 17, 26 (Del. Ch. 1982).

**B. Providing The Filipowski Group With At Least One Additional Undisclosed Board Seat Constituted Illegal Vote Buying And Is Invalid Under *Blasius* And Its Progeny.**

**1. Providing The Filipowski Group With At Least One Additional Undisclosed Board Seat Constituted Illegal Vote Buying.**

During the final days of the proxy contest the Director Defendants were desperate. In an effort to turn the tide in favor of the incumbents, Ms. Walton devised the vote buying plan. Messrs. Filipowski and Roszak were willing to purchase additional Cryo-Cell shares at a premium in order to obtain votes for the Management Slate, but wanted—in exchange for their efforts—Management and the Board (and the Company) to participate financially in the purchases and also wanted additional board seats over and above the one created for Mr. Filipowski. (Tr. 354:13-355:4 (Walton)). At trial, Ms. Walton testified that the request for Management, Board or Company financial participation in buying shares was flatly rejected, but that candidates submitted by the Filipowski Group “would be considered in the context of the [B]oard’s established

nomination process.” (Tr. 354:13-355:16). While there appears to be no evidence that the Director Defendants or the Company participated financially in the Filipowski Group’s subsequent purchase of shares,

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**C. The Voting Agreement And The Subsequent Promise Of At Least One Additional Board Seat To The Filipowski Group Were Invalid Under *Blasius*.**

Even if they did not constitute impermissible vote buying, the Voting Agreement and

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violated *Blasius* and its

progeny and are invalid for that reason. Those actions by the Director Defendants constituted a manipulation of the corporate machinery to change the outcome of an election of directors. This is simply impermissible absent a compelling justification. There is no justification, no less a compelling one, for directors to manipulate the corporate machinery simply to entrench themselves in office. Accordingly, the votes of the Filipowski Group should be declared void and the votes of the Apollo Shares acquired by the Filipowski Group and re-voted during the illegal Adjournment should be reverted back to being votes for the Portnoy Slate.

**II. THE SANERON VOTES WERE OBTAINED THOROUGH ILLEGAL VOTE BUYING AND BREACHES OF FIDUCIARY DUTY.**

**A. The Director Defendants Procured Saneron's Vote Through Illegal Vote Buying.**

**1. Removal Of The Restrictive Legend The Day Before The Annual Meeting In Exchange For Saneron's Vote The Same Day Constituted Illegal Vote Buying.**

Defendants have insisted that there was no relationship between the removal of the restrictive legend the day before the Annual Meeting and Saneron's vote in favor of the Management Slate. (D.O.B. at 35). The record shows otherwise.

First, it is undisputed that Saneron had sought for at least two and one half years to have the legend removed. (JX 4; JX 6). Yet until the day before the Annual Meeting, Cryo-Cell had not acceded to the request.

Second, as discussed above, the Friday and Saturday before the Meeting, after discussions with Dr. Sanberg, Ms. Walton sent several panicked e-mails about the uncertainty of Saneron's vote, including an e-mail to Mr. Roszak in which she stated, "[w]ithout Saneron we are at risk. No news this a[.]m[.] on Saneron—working every angle with Kovorek to get to Paul [Sanberg]." (JX 212; *see* JX 208; 215). Then, on Sunday, July 15, the day before the Meeting (and years after the initial requests), after a discussion with Dr. Sanberg, Ms. Walton instructed that the restrictive legend on Saneron's shares be removed. (JX 219). Ms. Walton was concerned enough about Saneron's vote to contact Dr. Sanberg on a Sunday morning before the Meeting. Dr. Sanberg was busy that weekend and did not even want to be involved in any discussions about the election, but Ms. Walton persisted. (Sanberg Depo. 12:16-13:13). After her conversation with Dr. Sanberg, Ms. Walton instructed the Company's counsel to draft the letter removing the legend that very same day (Sunday afternoon). (JX 219). As soon as Saneron received the opinion letter that afternoon releasing the legend restriction on Saneron's shares, Saneron voted in favor of the Management Slate.

Saneron had previously decided that it was going to attend the Annual Meeting and wait until the Annual Meeting to vote. (Kuzmin-Nichols Depo. 16:4-9, 19-21). Why then, did a senior vice president of Saneron drive approximately 20 miles on a Sunday

evening to go into the office and vote the shares when Saneron could have voted them the very next day? (*Id.* at 8:18-20, 45:23-46:4).

The obvious reason for Saneron's Sunday night vote is that Ms. Walton wanted Saneron's vote firmed up on paper to ensure that those votes went to the Management Slate and eliminate, or at least reduce, the risk of Saneron voting for the Portnoy Group before or at the Annual Meeting. Indeed at trial, Ms. Walton admitted that she had asked Saneron to cast its vote on Sunday. (Tr. 409:21-410:1). At 5:52 p.m. Sunday, July 15, Ms. Walton sent an e-mail declaring that the Board had "just locked up Saneron." (JX 218 at CRYO 02821).

Cryo-Cell's decision to remove the restrictive legend at the same time it wanted to "lock up" Saneron's vote for the Management Slate was not mere coincidence. Thus, in exchange for Ms. Walton's agreement to have the Company's counsel remove the legend, Saneron agreed to vote with the Management Slate. Contrary to Defendants' assertions, the action of removing the legend *does* constitute the use of a corporate asset. Regardless of whether or not Saneron's own counsel could have written an opinion regarding the legend, it did not; rather, Cryo-Cell's counsel did (and presumably Cryo-Cell footed the cost).<sup>17</sup> It is therefore clear that the Board used its ability to finally remove the restrictive legend in exchange for Saneron's vote. This constitutes illegal vote buying.

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<sup>17</sup> Although Defendants claim that Saneron's counsel could have disposed of the legend by preparing its own opinion letter, (D.O.B. at 36), the Saneron Stock Certificate explicitly provides that such opinion had to come from *Cryo-Cell's counsel*. (JX 2).

**2. Linking Saneron's Vote To Cryo-Cell's Cooperation On A Joint Development Project Between The Companies Constituted Illegal Vote Buying.**

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**B. The Director Defendants Breached Their Fiduciary Duties In Connection With Procuring The Saneron Vote.**

Even if not viewed as illegal vote buying, the Director Defendants' coercion of Saneron's vote constituted a breach of fiduciary duty. In manipulating the corporate machinery (causing Company counsel on Sunday, July 15 to issue an opinion on the restrictive legend and Redacted

) in order to secure election, the Director Defendants violated the principles of *Blasius*. Because entrenchment was the sole purpose of the dealings with Saneron, no compelling justification can be shown. Accordingly, the Saneron votes should be declared void.

**III. MS. WALTON'S ADJOURNMENT OF THE MEETING CONSTITUTED A BREACH OF FIDUCIARY DUTY.**

**A. Ms. Walton's Adjournment Violated The Company's Bylaws.**

Article II, Section 8(b) of the Company's Bylaws provides that a meeting of stockholders may be adjourned "by a majority of the votes cast by the holders of shares entitled to vote thereon." (JX 14). Ms. Walton failed to obtain the requisite vote for her approximately three-hour adjournment of the Annual Meeting. Thus, the votes procured by the incumbent slate during the Adjournment should be invalidated for that reason alone.

Defendants' reliance upon the Rules of Conduct as a basis to provide Ms. Walton with "authority to decide all procedural issues regarding the conduct of the meeting,

including adjournment” is misplaced. (D.O.B. at 42). Specifically, although the Rules purported to vest Ms. Walton with total control over the administration of the Annual Meeting, such language is inconsistent with the provision in the Bylaws which explicitly provides that an annual meeting may be adjourned only “by a majority of the votes cast by the holders of shares entitled to vote thereon.” (*Compare* JX 228 at Cryo 1158, *with* JX 14, Bylaws at Article II ¶ 8(b)). At trial, Ms. Walton herself conceded that the Rules did not supersede the Bylaws. (Tr. 442:6-10). Furthermore, although the Defendants also attempt to claim that Plaintiff “agreed to [the Rules] in advance,” (D.O.B. at 42), they ignore that Plaintiff’s counsel expressly conditioned their approval upon the recognition that the Rules do not supersede the Bylaws. (JX 240 at CRYO 00598).

**B. Ms. Walton’s Conduct At The Annual Meeting Violated *Blasius*.**

When “the primary purpose of the board’s action is to interfere with or impede exercise of the shareholder franchise”, the directors must show a compelling justification for their conduct. *See Blasius*, 564 A.2d at 661. As discussed below, Ms. Walton’s conduct in prolonging the meeting and then adjourning<sup>18</sup> it violates *Blasius* because its *primary* purpose is transparent—Ms. Walton delayed and then adjourned the meeting in order to stall and allow time for the Management Slate to defeat the Portnoy Slate.

At trial, Ms. Walton admitted that the presentation by Dr. Allickson beginning at 12:30 p.m. and the subsequent presentation by Mr. Doll were not only not on the Agenda

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<sup>18</sup> Ms. Walton denies saying that the meeting was “adjourned.” (Tr. at 367:4-8). However, four witnesses testified that Ms. Walton used the term “adjourned” when she stopped the Annual Meeting at approximately 1:30-2 p.m. (*See* Tr. 10:10-17 (D. Portnoy), 96:21-97:10, 144:11-14 (Schulman)); M. Portnoy Depo. 24:14-24, 26:14-16, 33:2-5; Skerkowski Depo. 40:22-25).

for the Meeting but were not even planned by Ms. Walton until “at the meeting on the spot.” (Tr. 447:9-15). Essentially, Ms. Walton admitted that all of the conduct of the Meeting subsequent to the completion of her presentation at 12:30 p.m. and Mr. Portnoy’s first motion to close the polls was designed to delay. And although stubbornly clinging to her story that a three hour “recess” was taken in part to allow people to eat

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<sup>19</sup> It is interesting to note that the conference room where the Annual Meeting was held was only rented until approximately 1 p.m. that day, (Smith Depo. 44:20-45:5); the Defendants’ proxy solicitor had a plane ticket to leave at approximately 2:00 p.m., (Tr. 222:23-223:3 (Hayden)); and a Board meeting, which was scheduled to begin immediately after the shareholder meeting ended, had itself been scheduled to *conclude* by 3:30 p.m. (Tr. 430:24-431:6 (Walton)).

Despite the Defendants' purported reasons for the Adjournment, Ms. Walton's intent in adjourning the Annual Meeting (and delaying it with presentations before that) is clear: She believed that the Management Slate was losing and delayed the Meeting and took the break so that management would have time to broker deals to gain more votes for the incumbent directors and to allow time for the Filipowski Group to finalize the purchase of additional shares from Apollo and make sure that those shares were voted for the Management Slate.

Ms. Walton's true purpose in delaying and adjourning the Meeting is illustrated by the fact that management used the Adjournment to change and process proxies that were in the course of being bought or otherwise secured by the Filipowski Group. Indeed, Ms. Walton's own conduct proves as much. Ms. Walton used the Adjournment to approach at least one stockholder with significant holdings in Cryo-Cell to try to procure his vote. Specifically, Ms. Walton pulled aside Charles Northcutt, who had voted his wife's and his approximately 90,000 shares as well as 10,000 shares held by his friends and family in favor of the Portnoy Slate, about changing his vote during the illegal Adjournment. (Northcutt Depo. 9:12-18, 13:3-6, 25:16- 27:14, 28:11-25, 35:23-24). She even directed her administrative assistant, Irene Smith, to approach Mr. Northcutt about changing his vote. (Northcutt Depo. 27:1-28:18, 30:7-23; Smith Depo. 37:4-19, 38:1-39:9). Per Ms. Walton's instructions, Ms. Smith gave Mr. Northcutt Ms. Walton's business card upon which Ms. Walton had written Ms. Roszak's name and telephone number and her own cell phone number. (Northcutt Depo. 27:1-28:18, 30:7-23; Smith Depo. 36:24-37:19, 38:1-39:9) (JX 284). According to Mr. Northcutt, he did not know why Ms. Smith gave

him the business card, but it was his impression based upon his discussion with Ms. Walton that he should call the number to discuss the sale of his Cryo-Cell common stock, which he understood was conditioned on the “changing of [his] vote from the David Portnoy board of directors’ slate to . . . the management’s board of directors.” (Northcutt Depo. 27:20-28:25, 30:7-23).

In short, it is clear that as of 12:30 p.m. Ms. Walton knew that the incumbent Board was behind, so she delayed and then adjourned the Annual Meeting, and then abruptly closed the polls as soon as the Board knew that it had obtained enough votes for the Management Slate. Accordingly, Mr. Walton’s actions implicate *Blasius*’ compelling justification standard because it is clear that the delay and the Adjournment were effected in order to defeat the Portnoy Group’s proxy contest. There is no justification, no less a compelling one, for using corporate resources simply to defeat challenges to board incumbency.

#### **IV. THE DOCTRINE OF UNCLEAN HANDS DOES NOT BAR PLAINTIFF’S CLAIMS.**

Defendants accuse Mr. Portnoy of coming to the Court with “unclean hands.” By doing so, the Defendants ask that this Court ignore their illegal acts of entrenchment because they accuse the Plaintiff of “induc[ing] a former Cryo-Cell employee to violate her confidentiality agreement in hopes of gaining an information advantage in the proxy contest.” (D.O.B. at 49). While the Defendants attempt in their pre-trial briefing to spin a tale of spy intrigue (*see id.* at 10-14), the actual facts, and the utter lack of any effect they had on the proxy contest, are simply a “red herring” the Director Defendants hope will

deflect the Court's attention from their own misdeeds that *did* have a direct and illegal effect on the outcome of the proxy contest.

The "unclean hands" doctrine provides that "a litigant who engages in reprehensible conduct in relation to the matter in controversy . . . forfeits his right to have the court hear his claim, regardless of its merit." *Nakahara v. The NS 1991 American Trust*, 739 A.2d 770, 791-92 (Del. Ch. 1998). For the doctrine to apply the plaintiff's conduct that is alleged to have soiled his or her hands must "relate directly to the matter in controversy," *id.* at 792, and must rise to the level that the "conduct is so offensive to the integrity of the court that his claims should be denied, regardless of their merit." *Gallagher v. Holcomb & Salter*, 1991 WL 158969, at \*4 (Del. Ch. Aug. 16, 1991).

The Court, however, "has consistently refused to apply the doctrine of unclean hands to bar an otherwise valid claim of relief where the doctrine would work an inequitable result." *Dittrick v. Chalfant*, 2007 WL 1039548, at \*5 n.18 (Del. Ch. April 4, 2007). Given the opportunity and incentive for defendants to seize on relatively minor missteps of a plaintiff in an effort to avoid being held accountable for their own actions, the Court will carefully examine all claims that a plaintiff has come to the Court with unclean hands "to determine whether the public policy that undergirds the defense's existence is implicated." *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 2000 WL 1521371, at \*4 (Del. Ch. Sept. 27, 2000).

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Moreover, the conduct of which Mr. Portnoy is accused is not related in any way to the specific matter in controversy, that is, whether the Director Defendants engaged in an illegal scheme to entrench themselves in office. The Defendants have proffered no evidence that the communications between Mr. Portnoy and Redacted had any effect on their conduct during the proxy contest, and the presence or absence of those communications will not weigh in any fashion in the Court's determination of whether the Director Defendants illegally purchased votes or otherwise manipulated the corporate

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machinery for the purpose of entrenching their positions in office. For these reasons, Plaintiff respectfully asks that the Court deny Defendants' claim that he comes to the Court with unclean hands. *See Gotham Partners, L.P.*, 2000 WL 1521371, at \*4 ("The reality is that the Challenged Transactions were either proper or improper. Gotham's allegedly wrongful conduct has no effect on that analysis.").

**V. DECLARING THAT THE PORTNOY SLATE PREVAILED IN THE ELECTION IS THE ONLY JUST REMEDY.**

In a Section 225 proceeding, the Court of Chancery has the equitable power to fashion a "just and proper" remedy. 8 *Del. C.* § 225(a). Thus, although the Court may order a new election in accordance with Section 211 or Section 215 of the Delaware General Corporation Law if it should determine that no valid election has been held, this is clearly not the sole remedy available. *See id.* The Court "is not restricted to ordering a new election when irregularities are found to have invalidated the announced outcome of the vote." Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 8-8[d], at 8-133 (2007). Often the "most efficient remedy is simply to declare a new result without resort to a new meeting or election." *Id.* Indeed, "[s]uch a ruling, which is consistent with the statutory policy to minimize delay and resulting uncertainty, is clearly the preferable one where, for example, the result of the election under review turns upon the validity of certain proxies cast, or the ability of a finite number of shares to vote." *Id.*

A fair and just result can be achieved here merely by voiding the illegally obtained votes and thus avoiding the prohibitive time and expense implicit in a new election. This

Court has the power to sterilize votes when necessary to prevent harm. *See Rovner v. Health-Chem Corp.*, 1996 WL 377027 (Del. Ch. July 3, 1996) (citing *Unitrin, Inc. v. American Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995)). Similarly, in *Commonwealth Assoc. v. Providence Health Care*, 1993 WL 432779, at \*8, 11 (Del. Ch. Oct. 22, 1993), Chancellor Allen found that the insurgent was likely to prevail on its claim that a transaction was undertaken specifically to influence the outcome of the consent solicitation, applied *Blasius*, and preliminarily enjoined treatment of the shares at issue as valid for voting purposes. *See also Chesapeake Corp. v. Shore*, 771 A.2d 293, 323 n. 58 (Del. Ch. 2000).

In fact, when the shareholder franchise has been tampered with as here, and board seats were used to buy votes, it is only logical that those votes should be sterilized.<sup>22</sup>

Here, the votes of the Filipowski Group should be declared void because they were illegally procured pursuant to the Voting Agreement. Moreover, the votes of the Apollo Shares acquired by the Filipowski Group should be reverted back to being votes for the Portnoy Slate, because the later vote for management was acquired by the Filipowski Group

Redacted

In addition, the wrongfully coerced/purchased Saneron votes should be declared void. Finally, none of the shares voted at the Meeting subsequent to the completion of the Agenda items at 12:30 p.m. should be counted. By voiding and/or adjusting the

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<sup>22</sup> This Court can reject and give no effect to votes of a registered shareholder where his voting of them is found to be in violation of rights of another person. *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling*, 53 A.2d 441 (Del. 1947).

wrongfully procured votes for the Management Slate, the Court would be giving effect to the will of the stockholders to elect the Portnoy Slate.

An order declaring that the Portnoy Slate prevailed in the election is the only just remedy here. If the Court does find that the Director Defendants breached their fiduciary duties, simply ordering a new election would reward that conduct and set a troubling precedent. Incumbent boards that find themselves behind in elections would commit wrongdoing knowing that, at worst, if their wrongdoing is discovered, all parties would start from scratch with a new meeting, which would still be a net gain for the incumbents. That would not be justice.

If the Court were to order a new election, the Filipowski Group's shares should not be permitted to vote, because those votes would have been illegally obtained pursuant to the Voting Agreement Redacted *See*  
*Commonwealth, supra.*<sup>23</sup> Moreover, if a new election is ordered, the Company and/or certain members of the Board, including Ms. Walton, should be ordered to reimburse the Portnoy Group for all costs associated with the voided election, including all litigation expenses. If a new election is required, the fault lies squarely with the Board, and in particular, Ms. Walton; therefore, they, not the Company, should be personally responsible for the cost of a second election.

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<sup>23</sup> It should be noted that sterilizing the Filipowski Group's votes should not result in any prejudice to its members. Mr. Filipowski, who is now acting as a director, is certainly no innocent bystander. At the very least, he aided and abetted the Board's breach of its fiduciary duties.

## CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter judgment in his favor and grant the relief sought in the Verified Complaint, including a declaration that the Portnoy Slate prevailed in the election.

ASHBY & GEDDES

*/s/ Richard D. Heins (#3000)*

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