

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JAMES A. FELDMAN, individually
and derivatively on behalf of Precision
Biologics, Inc.

Plaintiff,

v.

PATRICK SOON-SHIONG,
CHARLES KIM, CHRISTIAN ZAPF
and NANTCELL, INC.,

Defendants,

and

PRECISION BIOLOGICS, INC.,

Nominal Defendant.

C.A. No.

Public Inspection Version Filed
July 10, 2017

COMPLAINT

Plaintiff James A. Feldman (“Plaintiff”), by and through his undersigned attorneys, upon knowledge as to himself and, as to all other matters, upon investigation by himself and his counsel, including: a review of documents and information available to plaintiff pursuant to his contractual and statutory rights under §§ 3.1 and 3.2 of the Rights Agreement (defined below) and 8 Del. C. § 220; a review of news articles and other publicly available information regarding the defendants; pleadings, and documents filed in other civil actions involving the defendants; and review of other publicly available information alleges as follows:

THE PARTIES AND THE NATURE OF THE ACTION

1. This complaint is brought by a minority stockholder individually and derivatively on behalf of defendant Precision Biologics, Inc. (“Precision Biologics” or the “Company”), a privately held Delaware corporation against the Company’s controlling stockholder, NantCell, Inc. (“NantCell”) and those directors of the Company appointed by NantCell.

2. Precision Biologics is a Delaware corporation with its principal executive offices located at 5910 North Central Expressway, Suite 1300, Dallas, Texas. Precision Biologics is a research and development stage company developing drugs intended to extend survival and improve the quality of life of cancer patients. It also is developing diagnostic products intended to enable earlier detection of cancer.

3. In October 2015, NantCell, Inc. (“NantCell”), a company owned and controlled by purported billionaire and entrepreneur Dr. Patrick Soon-Shiong (“Soon-Shiong”), purchased a majority of the Company’s Series A Preferred Stock (“Preferred Stock”) in exchange for a payment of \$50,000,000 to the Company. As a result of NantCell’s investment, it became the Company’s controlling stockholder.

4. NantCell also obtained the right to designate three directors to the Company’s five-member, classified Board of Directors (the “Board”). The directors

appointed by NantCell are defendants Soon-Shiong, Charles Kim and Christian Zapf. (the “Defendant Directors”).

5. Contemporaneous to that investment, NantCell, certain Precision Biologics stockholders (including Plaintiff) and the Company entered into an Investors’ Rights Agreement dated October 2, 2015 (the “Rights Agreement”).¹ Pursuant to the Rights Agreement, NantCell’s \$50 million investment was to be deposited into a Company-owned account to be used to fund the Company’s ongoing operations—most importantly, its continued development of several cancer treatment drugs.

6. Although the \$50 million was initially deposited in the Company-owned account, Defendants almost immediately and without authorization removed approximately \$47 million of those funds from the Company-owned account without notice or explanation to the Company’s Board of directors or stockholders. Because the money was withdrawn within weeks of its deposit, Defendants likely intended from the beginning to defraud the Company of the bulk of the purchase price Nantcell had promised to pay for its controlling interest in the Company. As a result, Soon-Shiong in effect stole control of the Company in exchange for only a small fraction of the agreed-upon \$50 million purchase price.

¹ A copy of the Rights Agreement is attached hereto as Exhibit 1.

7. Subsequently, Defendants consistently acted contrary to the interests of the Company and its stockholders. They used their ill-gotten control of the Company to act in their own interests, concealing their wrongful taking of tens of millions of dollars from the Company and denying the Company access to its own funds that were required to meet customary and ordinary expenses of the Company.

8. Plaintiff is the owner of 100,864 shares of Precision Biologics Preferred Stock and 450,000 shares of Precision Biologics common stock. Plaintiff is a “Major Investor” under the terms of the Rights Agreement—i.e., he holds more than 40,000 shares of Company common stock or shares of common stock issuable upon conversion of Preferred Stock. Plaintiff made a significant investment to obtain his shares. He invested \$675,000 for his common shares and an additional \$100,000 for his preferred shares.

9. On information and belief, Plaintiff understands that the Company is in and has been in dire need of the funds that NantCell took from the Company. Without these funds, Precision Biologics, has been and will continue to be unable to pay its suppliers. That makes it increasingly difficult or impossible for the Company to continue its clinical trials or to remain in business. Even if the funds are ultimately returned, the damage to the Company’s relationships with suppliers from its missed and late payments could severely damage the Company’s ability to rely on these and other suppliers in the future and continue its business. Soon-Shiong’s demonstrated

willingness to arbitrarily ignore the requirements of the Rights Agreement and deny the Company access to its own funds requires that his unilateral control over the Company's access to those funds cannot continue if the Company is to survive.

10. Had Plaintiff known that Soon-Shiong intended to withdraw \$47 million of the \$50 million of capital he agreed to pay for his controlling position, that Soon-Shiong would then maintain unilateral control over those funds, and that Soon-Shiong would almost immediately deny the Company access to those funds at a level sufficient to meet its normal operating needs, neither Feldman or the Company would have agreed to the terms of the Rights Agreement or to sell control of the Company to Soon-Shiong.

Jurisdiction, Venue and Applicable Law

11. Sections 6.2 and 6.11 of the Rights Agreement specify that the Agreement is governed by Delaware law and disputes arising out of or based on the Rights Agreement must be brought in the state or federal courts located in Delaware.

Plaintiff's Efforts to Obtain Information and Defendants' Resistance to Such Efforts

12. Although the Rights Agreement requires the Company to provide information to Plaintiff and all other stockholders who qualify as "Major Investors," the Company (which is controlled by NantCell and its appointed directors) did not provide any of the required information after execution of the Rights Agreement. Therefore, on May 2, 2017 a written request for the required information was

delivered to the Company (the “May 2 Demand”). The May 2 Demand was signed by fifteen Major Investors, including Plaintiff.

13. The Company ignored the May 2 Demand. On May 30, 2017, Plaintiff made a formal demand pursuant to 8 Del. C. §220 on the Company for information (the “§220 Demand”). The §220 Demand included, *inter alia*, a request for information relating to the Company-owned account into which the \$50 million was deposited and then largely withdrawn, as well as other information regarding Defendants’ use of the withdrawn Company funds. The Company, at the direction of Soon-Shiong and the other NantCell-designated directors has only partially, begrudgingly and very slowly started to provide some of the required information in response to Plaintiff’s §220 demand.

14. Notwithstanding that Defendants have caused the Company to provide some minimal information, the Company has taken numerous unreasonable positions with respect to various of Plaintiff’s demands and interfered with Plaintiff’s information rights as much as possible. For example, Defendants have refused to authorize the Company to provide very basic information, including a copy of the Company’s certificate of incorporation or its bylaws, and has insisted on onerous and unreasonable restrictions on Plaintiff’s use of any information that he may ultimately obtain. Further, Defendants have provided no information concerning the location or use of the approximately \$47 million since it was

withdrawn from the Company-owned account. Defendants did provide information about an account that may have contained a small fraction of those funds, but even that information was heavily redacted in a manner clearly intended to obscure the treatment and use of those funds.

15. Plaintiff continues to pursue information through his §220 Demand, but Defendants' recalcitrance in providing even basic information is unnecessarily and prejudicially delaying Plaintiff's receipt of information, while at the same time increasing the risk of irreparable harm to the Company because of its continued inability to adequately fund its operations.

16. Because of the imminent threat to the Company's continued existence and Defendants' obfuscation of information regarding NantCell's withdrawal of the \$47 million from the Company's account, Plaintiff files this suit to compel NantCell to immediately return all funds required under the terms of the Rights Agreement that Defendants previously took and to appoint a custodian to prevent NantCell and its appointed majority of directors from interfering with the Company's ability to utilize those funds to meet the Company's reasonable expenses in the future.

17. Because of the time sensitivities that result from the existence of active clinical trials by the Company, and the need to bring its clinical drugs and diagnostic products to market as promptly as possible, Plaintiff and the Company face irreparable harm if control of the Company remains with NantCell and Soon-Shiong.

The immediate appointment of a custodian with complete authority over the funds invested by NantCell is necessary to prevent such irreparable harm.

SUBSTANTIVE ALLEGATIONS

Background

18. Precision Biologics is a clinical stage biotechnology corporation focused on developing therapeutic and diagnostic products for the early detection and treatment of cancer. The Company was founded in February 2012 and commenced business in September 2012 by purchasing a library of vaccines, antibodies, antigens and other assets from Neogenix Oncology, Inc.

19. Precision Biologics has several monoclonal antibodies in its pipeline. These include Ensituximab, also referred to as NPC-1C or NEO-102 (“NEO-102”); NEO-201; and NEO-301.

20. NEO-102 is a therapeutic antibody candidate for advanced pancreatic and colorectal cancer. Recently, the Company successfully completed a Phase 2a clinical trial of NEO-102. According to its website and the related link to clinicaltrials.gov, the Company is also conducting a second clinical trial to study NEO-102 in combination with second line chemotherapy agents in patients with metastatic pancreatic cancer²

² <http://precision-biologics.com/clinical-trials/>; and <https://www.clinicaltrials.gov/ct2/results?term=NPC-1C&Search=Search> (last visited on July 5, 2017)

21. NEO-201 and NEO-301 are pre-clinical assets, meaning that no clinical trials have taken place yet. According to the Company's website, Precision Biologics has signed a Cooperative Research and Development Agreement with the National Cancer Institute to conduct a "first in man" clinical trial of NEO-201 for patients with refractory solid tumors. The Company anticipates enrolling patients for this trial in the second half of 2017. In preparation for the clinical trial, NEO-201 is being manufactured by another company, Catalent, Inc.³

NantCell's Investment in and Control of Precision Biologics

22. On October 2, 2015, NantCell and Precision Biologics entered into a series of agreements pursuant to which NantCell agreed to purchase 40,964,051 shares of the Company's Preferred Stock (or 60.24% of the Company) at a purchase price of \$1.2206 per share for a total investment of \$50,000,000.

23. NantCell is controlled by NantWorks, LLC ("NantWorks"), which in turn is controlled by Soon-Shiong, who also serves as NantCell's Chief Executive Officer ("CEO"). In April 2016, the *Los Angeles Times* reported that Soon-Shiong was one of the highest-paid CEOs in 2015, netting a \$148 million pay package for the year as CEO of NantWorks affiliate NantKwest, Inc., and in November 2016, *Forbes* estimated Soon-Shiong's net worth at \$9 billion, ranking him 47th among United States billionaires. He also holds significant financial interests in the Los

³ <http://precision-biologics.com/pipeline/> (last visited July 5, 2017).

Angeles Lakers and Los Angeles Times. The Los Angeles Business Journal reported recently that Soon-Shiong told it that he plans to open a Los Angeles-based cancer center soon and to take NantCell and two other NantWorks related entities public in 2018.

24. Pursuant to a Voting Agreement entered into in connection with NantCell's investment in Precision Biologics, NantCell has the right to designate three of the five members of the Board. Currently the three NantCell designees are the three individual defendants, Soon-Shiong, who serves as Chairman, Charles Kim and Christian Zapf. The identities of Kim and Zapf had never been disclosed to the Company's stockholders. Plaintiff learned them only in connection with preparing this suit by obtaining a copy of the Company's annual franchise tax report from the State of Delaware.

25. Both Kim and Zapf are affiliated with NantCell's parent, NantWorks or other of its affiliates. Kim is General Counsel at Nanthealth Inc. and Nantworks LLC and is Chief Legal Officer at NantKwest Inc. Christian Zapf is Vice President, Corporate Development at NantWorks, LLC and is also a lawyer.

26. The remaining two members of the Board from October 2015 until recently were designees of the holders of the majority of the Company's common stock: Philip M. Arlen, who is also the Company's President and CEO, and Stanley

B. Archibald, Jr. Archibald resigned as a director on or about June 29, 2017. Plaintiff believes that the Board is now comprised of only four directors.

27. Also in connection with NantCell's \$50 million investment in the Company, Precision Biologics and certain of its investors, including NantCell and Plaintiff, entered into the Rights Agreement. Among other things, the Rights Agreement directs how the proceeds from NantCell's investment are to be maintained and used, imposes certain corporate governance obligations on the Board, and establishes express information rights for the Company's "Major Investors," including Plaintiff.

28. Pursuant to Section 5.2 of the Rights Agreement ("Section 5.2"), the \$50 million in proceeds from sale of the Preferred Stock to NantCell was required to "be deposited into a Company-owned account established and maintained by NantCell on behalf of the Company (the 'Financing Account')." Soon-Shiong or his designee was to have sole signature authority over the Financing Account.

29. Section 5.2 requires the Board to "direct the transfer of funds from the Financing Account to one or more accounts used for payment of the Company's expenses (the 'Operating Account'), in amounts (i) sufficient to satisfy at all times at least three (3) months of budgeted expenses consistent with the Company's business plan and budget as the same shall be approved and/or modified by the Board, and (ii) necessary to satisfy other expenditures approved by the Board."

Modifications to the Company's business plan and budget require the approval by a majority of the Board.

30. Section 5.3 of the Rights Agreement ("Section 5.3") sets forth certain corporate governance requirements. Section 5.3 requires that the Board meet at least quarterly on an agreed-upon schedule and to have audit and compensation committees consisting of non-management directors. Pursuant to Section 5.3, "[e]ach non-employee director shall be entitled in such person's discretion to be a member of any Board committee." Section 5.3 also requires approval of a majority of the Board for "any material action relating to the development and commercialization of the Company's pipeline of clinical and pre-clinical drug candidates" and "any modification of the Company's business plan and budget."

31. Section 3.1 of the Rights Agreement ("Section 3.1") requires the Company to provide to each Major Investor quarterly and annual balance sheets, statements of income and cash flow, and statements of stockholders' equity. Prior to the current dispute, however, the Company had never provided any of this information to Plaintiff, and has now only begun to provide incomplete information after delivery of the §220 Demand.

32. Section 3.1 of the Rights Agreement also requires the Company to provide to each Major Investor "such other information relating to the financial condition, business, prospects, or corporate affairs of the Company as any Major

Investor may from time to time reasonably request.” Section 3.2 of the Rights Agreement requires that the Company “shall permit” each Major Investor to visit the Company’s properties, examine the Company’s books and records, and discuss the Company’s affairs, finances and accounts with its officers.

**NantCell and the NantCell Directors’ Breaches of the
Rights Agreement and Their Fiduciary Duties**

33. The NantCell-controlled Board has failed to transfer adequate funds to the Company’s Operating Account as required by Section 5.2, which constitutes a breach thereof. As a result, despite the fact that the Company has spent only a fraction of the \$50 million Nantcell investment that was supposed to be in its Financing Account, the Company does not have sufficient funds in its Operating Account and is in arrears on many of its bills.

34. On information and belief, Soon-Shiong and NantCell, who control the Financing Account, have withheld information regarding the Financing Account from the Company’s non-NantCell Directors and the Company’s officers, thereby preventing the Board from determining and potentially enforcing NantCell’s compliance with the terms of the Rights Agreement.

35. On information and belief, after originally funding the Financing Account as required by the Rights Agreement, Soon-Shiong quickly withdrew approximately \$47 million of those funds from the Financing Account and returned the funds to NantCell or NantCell affiliates. The withdrawal of those funds violates

§5.2 of the Rights Agreement which requires the funds provided by NantCell to be maintained in a Company-owned account. It was also an unauthorized conversion of Company funds, which were entrusted to Soon-Shiong, to Soon-Shiong's own uses.

36. Since draining the Financing Account, Soon-Shiong has provided approximately \$9 or \$10 million on an *ad hoc* basis. However, decisions regarding the timing and amount of funds provided to the Company are unilaterally made by Soon-Shiong, not the Company's Board of Directors. Soon-Shiong's provision of such funds has been inadequate to meet the Company's ongoing expenses and violates the terms of the Rights Agreement. Section 5.2 provides that authority over the transfer of funds from the Financing Account rests with the Company's Board of Directors to meet specific obligations, and states in pertinent part:

The Board of Directors shall direct the transfer of funds from the Financing Account to one or more account used for payment of the Company's expenses (the "Operating Account"), in amounts (i) sufficient to satisfy at all times at least three (3) months of budgeted expenses consistent with the Company's business plan and budget as the same shall be approved and/or modified by the Board, and (ii) necessary to satisfy other expenditures approved by the Board.

37. NantCell's actions violate Section 5.2 because the Company has been unable to meet three months of reasonable expenses and/or because the NantCell Directors (who constitute a majority of the Board) have not approved other reasonable expenses necessary to the Company's operations. At this point, Plaintiff

understands that Precision Biologics is several months behind in paying its suppliers, who are growing increasingly impatient. The overdue bills include those relating to the Company's day-to-day operations as well as those for drugs and related expenses needed for its clinical trials. In general, the Company's annual expenses approximate \$6 million. Therefore, if the bulk of the \$50 million had not been taken from the Company's account, the Company likely would have had sufficient funds to meet its obligations for at least the next six years.

38. According to its website, Precision Biologics has clinical trials at various stages. If Precision Biologics does not have the funds to pay its suppliers and clinical trial-related costs, no clinical trials will be able to proceed. Nor would the Company be able to develop its remaining portfolio of drugs for therapeutic and diagnostic use. Such consequences would be devastating to the Company, which could go out of business as a result.

39. Not only have the Defendants failed to comply with their obligations to direct the transfer of funds to the Operating Account, no Board meeting was held after NantCell's October 2015 investment until June 15, 2017 – after the §220 Demand. In addition, the Board has failed to form an audit committee or a compensation committee as required by Section 5.3.

40. These facts, among others, establish that NantCell has violated the Rights Agreement in multiple ways.

41. Beyond violating the terms of the Rights Agreement, the actions of the NantCell Directors and NantCell as the controlling stockholder constitute breaches of their fiduciary duties owed to the Company.

42. Soon-Shiong has made statements that he wants to eliminate development of the NEO-102 drug, cut much of the Company's staff, close the Company's New York office, and transfer the remaining scientific staff of the Company and development of the Company's remaining products to one of his other companies. On information and belief, Plaintiff alleges that Soon-Shiong is depriving the Company of the funds to which it is entitled under the Rights Agreement so that NantCell can obtain the Company's assets for far less than their fair value.

Soon-Shiong's History of Self-Dealing and Diverting Value from Minority Stockholders to His Entities

43. Soon-Shiong has engaged in a pattern of self-dealing transactions in the past at other companies that have benefitted him greatly at the expense of his business partners and minority investors.

44. An April 10, 2017 article published in POLITICO detailed a series of transactions undertaken by an allegedly non-profit foundation of Soon-Shiong which

appeared to benefit his for-profit businesses as much or more than any charitable enterprise.⁴

45. It has also been reported that Soon-Shiong withheld promised funds from a company named Tronc after it refused to invest in a NantWorks affiliate, and that Soon-Shiong while serving as a member of Tronc's board of directors caused Tronc to enter into a technology licensing term sheet with the NantWorks affiliate and insisted on payment of the contemplated consideration even though it turned out that the technology was of no use to Tronc.

46. *Forbes* reported on a number of Soon-Shiong's prior transactions where drug companies with products in the midst of clinical trials ultimately ended up as part of Soon-Shiong's privately held companies. One such deal was described by a Morningstar analyst as a "raw deal for minority stockholders as it serves only to line the pockets of Patrick Soon-Shiong."

47. Thus, Soon-Shiong has a history of acquiring controlling positions in development stage drug companies and then unfairly usurping the value of such companies for himself and his affiliates to the detriment of minority investors, utilizing his control position to divert control of the valuable assets into his own companies while preventing disclosure of information about his activities.

⁴ <http://www.politico.com/story/2017/04/patrick-soon-shiong-taxes-nanthealth-foundation-236728>.

48. In this Court, Soon-Shiong has recently been accused of another instance of such conduct in connection with Altor Bioscience, Corp. *See Gray et. al. v. Soon-Shiong et. al.* Del. Ch. C.A. No. 2017-0466.

DERIVATIVE AND DEMAND EXCUSED ALLEGATIONS

49. Plaintiff brings his claims both individually and derivatively. As a party to the Rights Agreement, Plaintiff has standing to prosecute claims under the Rights Agreement in his individual capacity. To the extent Plaintiff seeks relief that would flow to the Company and such claims are determined to be derivative, demand on the Company's Board of Directors is excused.

50. As a result of the facts set forth herein, Plaintiff has not made any demand on the Precision Biologics' Board to institute this action against the Defendants named herein. Demand would be futile and useless because, as of the time of the challenged transactions and the filing of Plaintiff's complaint, the Company's Board consisted of a majority of directors who were not capable of making an independent and disinterested decision to institute and vigorously prosecute these claims.

51. The NantCell Directors constitute a majority of the Board and are employees of or work for Soon-Shiong. As a result, they have conflicting interests in the Financing Account funds and the plans to transfer assets from the Company

to NantCell. Kim and Zapf owe their livelihoods to Soon-Shiong and could not impartially consider a derivative demand.

52. Accordingly, demand on the current Company's Board is not required and would be futile.

COUNT I:
BREACH OF THE RIGHTS AGREEMENT INCLUDING THE IMPLIED
COVENANT OF GOOD FAITH AND FAIR DEALING

53. Plaintiff incorporates all the forgoing allegations by reference.

54. Count I is asserted against NantCell as a party to the Rights Agreement, and against NantCell and the NantCell Directors as a result of their *de facto* control of the Company and their acts that prevented the Company from satisfying its obligations under the Rights Agreement.

55. After closing on the transactions contemplated by the Rights Agreement, NantCell controlled the Company by virtue of its majority ownership of the Company and its ability to appoint a majority of the Company's Directors. In addition, Soon-Shiong, as Chairman of the Board effectively exercised authority over the day to day operations and decisions of the Company. As alleged above, no Board meetings were held after execution of the Rights Agreement until June 15, 2017, after the Major Investors sent their demand for information. During that period, Soon-Shiong used his possession and control of the Company's funds (the \$47 million that was stolen from the Company account) to function as a de facto

officer. He oversaw management of the Company, made material operational and strategic decisions, and instructed management regarding many decisions of substance, and he did so without consultation with the Board.

56. The NantCell Directors, and in particular, Soon-Shiong, have violated the terms of the Rights Agreement or caused the Company to violate the terms of the Rights Agreement in the following ways detailed above:

- a. By failing to provide Plaintiff with financial statements and related documents as required under §3.1 of the Rights Agreement;
- b. By withdrawing the vast majority of the funds from the Financing Account and failing to maintain such funds in an account owned by the Company in violation of §5.2;
- c. By failing to provide, or to cause the NantCell Directors to approve the transfer of funds to the Company sufficient to satisfy at all times at least three months of budgeted expenses or reasonable expenses in violation of §5.2;
- d. By failing to provide, or cause the NantCell Directors to approve the transfer of funds necessary for the Company to satisfy other expenditures that were or should have been reasonably approved by the Board in violation of §5.2;

- e. By failing to hold at least quarterly Board meetings of the Company as required by §5.3.
- f. By failing to establish audit and compensation committees of the Board as required by §5.3.
- g. In the case of NantCell and Soon-Shiong, by taking acts or causing the Company to take acts in furtherance of his plan to discontinue the development of NEO-102 without Board review or approval as required by Rights Agreement §5.3.
- h. In the case of Kim and Zapf, by permitting and acquiescing in the acts by NantCell and Soon-Shiong planning to discontinue the development of NEO-102 without Board review or approval as required by Rights Agreement §5.3.

57. Further, by utilizing their control of the Company to prevent the Company from complying with its obligations under the Rights Agreement, Defendants have breached the Rights Agreement and have also violated the implied covenant of good faith and fair dealing inherent in the Rights Agreement by preventing the Plaintiff and other Major Investors from receiving the benefit of their bargain – specifically, adequate funding for the operations of the Company.

COUNT II
TORTIOUS INTERFERENCE WITH THE RIGHTS AGREEMENT

58. Plaintiff incorporates all the forgoing allegations by reference.

59. Count II is stated in the alternative to Count I as to the NantCell Directors.

60. In the event the Court determines that the NantCell Directors cannot be held liable for breach of contract because they were not individually parties to the Rights Agreement, then the NantCell directors are liable for tortious interference with the Rights Agreement.

61. By virtue of their acts detailed above, the NantCell Directors, and in particular Soon-Shiong, prevented and therefore tortiously interfered with the Company's right to receive adequate funding to meet its obligations by depriving it of the funding required by §5.2 of the Rights Agreement. As a result of the Company's inability to meet its obligations under the Rights Agreement, the Company and Plaintiff have suffered harm and the risk of future harm by the possible delay in development of the Company's products and other damage to the Company's ability to operate or possible failure of the Company.

62. The NantCell Directors also tortiously interfered with Plaintiff's rights under the Rights Agreement (i) to receive information, and (ii) to have Board oversight and review of decisions regarding use of proceeds from the Financing Account by:

- a. By failing to provide Plaintiff with financial statements and related documents as required under §3.1 of the Rights Agreement;

- b. By failing to provide, or to cause the NantCell Directors to consider or approve the transfer of funds to the Company sufficient to satisfy at all times at least three months of budgeted expenses or reasonable expenses under §5.2;
- c. By failing to provide, or cause the NantCell Directors to consider or approve the transfer of funds necessary for the Company to satisfy other expenditures that were or should have been reasonably approved by the Board under §5.2;
- d. By failing to hold at least quarterly Board meetings of the Company as required by §5.3.
- e. By failing to establish audit and compensation committees of the Board as required by §5.3.
- f. In the case of NantCell and Soon-Shiong, by taking acts or causing the Company to take acts in furtherance of his plan to discontinue the development of NEO-102 without Board review or approval as required by Rights Agreement §5.3.
- g. In the case of Kim and Zapf, by permitting and acquiescing in the acts by NantCell and Soon-Shiong planning to discontinue the development of NEO-102 without Board review or approval as required by Rights Agreement §5.3.

COUNT III
BREACH OF FIDUCIARY DUTY OF LOYALTY

63. Plaintiff incorporates all the forgoing allegations by reference.

64. This Count is alleged against all defendants. NantCell, as the controlling stockholder of Precision Biologics, owed fiduciary duties to the Plaintiff and the other minority stockholders. The NantCell Directors, as directors of Precision Biologics, owed fiduciary duties of care and loyalty to the Company and its stockholders.

65. Through the acts detailed above NantCell and the Defendant Directors have breached their fiduciary duty of loyalty by abdicating their responsibility to act for the best interests of the Company and its stockholders and instead utilizing the Company's assets, or planning to utilize the Company's assets, to benefit the Defendants and their affiliates at the expense of the Company and its stockholders.

66. Soon-Shiong's embezzlement of approximately \$47 million from the Financing Account is a blatant breach of fiduciary duty.

67. The participation in or acquiescence to that taking of Corporate funds by the other Defendant Directors constitutes a breach of their fiduciary duty of loyalty because they put their personal interests as employees of Soon-Shiong or NantCell affiliates above those of the Company and its stockholders.

68. Further, Defendants' intentional interference with Plaintiff's right and the right of the non-defendant directors of the Company to receive information

regarding the Financing Account proceeds was done to protect the interests of Soon-Shiong and NantCell at the expense of the Company by delaying and interfering with their ability to learn the details surrounding their conversion of funds from the Financing Account and to take actions to protect the interests of the Company and Plaintiff.

69. Defendants have acted and continue to act as if the Company and its assets belong to NantCell and its affiliated entities in complete disregard of the rights of Plaintiff and the other stockholders of Precision Biologics. Unless enjoined from continuing their improper use of the Company's assets and refusal to provide the Company with access to the funds from the Financing Account to fund its operations, the Company will be irreparably harmed by delays in the development of products, other damage to the Company's ability to do business, and the possible failure of the Company.

COUNT IV:
APPOINTMENT OF A CUSTODIAN

70. Plaintiff incorporates all the forgoing allegations by reference.

71. Plaintiff as a stockholder of the Company is entitled to appointment of a custodian under 8 Del. C. §226. Appointment of a custodian is appropriate when (i) the business of the corporation is suffering or threatened with irreparable injury because the directors cannot reasonably act, (ii) the corporation has abandoned its business, (iii) there has been gross mismanagement, positive misconduct, or breach

of trust by those managing the corporation, or (iv) extreme circumstances exist that will lead to imminent danger of great loss to the corporation.

72. Since the execution of the Rights Agreement, most if not all substantive decisions at the Company required Soon-Shiong's approval. That fact is evidenced, among other things, by the absence of the required Board meetings.

73. Soon-Shiong and the other Defendants have caused the Company to become insolvent as evidenced by the fact that the Company is not meeting its obligations to vendors and creditors as they become due.

74. Soon-Shiong and the other Defendants have acted and indicated an intention to act in ways that constitute, effectively, the Company's abandonment of its business. As a result of Soon-Shiong's conversion of Company funds, the Company is now grossly undercapitalized. Further, he has stated his intention to abandon development of at least one of the Company's main assets, NEO-102, and to transfer its other assets to NantCell or affiliated entities for further development.

75. Finally, Soon-Shiong and the other defendants have engaged in gross mismanagement, positive misconduct, or breach of trust by: (i) wrongfully taking the vast majority of the Company's capital from the Financing Account without justification or explanation; (ii) failing to pay the Company's debts as they come due, thereby undermining the Company's relationship with vendors and suppliers which has and will continue to delay the conduct of clinical trials and the ability of

the Company to bring its developmental products to market. Any such delays create a risk of irreparable harm as other alternative products could come on the market that would be alternatives to Precision Biologics' products; and (iii) engaging in conduct and stating an intention to engage in future conduct that is intended to discontinue the Company's operations and take its assets for the benefit of NantCell, Soon-Shiong, and their affiliates.

76. As a result of that conduct, Plaintiff is entitled to the appointment of a custodian for the Company to protect and preserve its assets and interests.

WHEREFORE, Plaintiff demands judgment as follows:

- a. Preliminarily and permanently enjoining Defendants (i) from taking any acts out of the ordinary course of business that would constitute or result in the abandonment of or diminished support for any Company product; (ii) transferring or assigning any rights in any asset of the Company to Defendants or any affiliate of Defendants; and (iii) interfering in any way with the Company's conduct of its business in the usual and ordinary course;
- b. Ordering NantCell and the Director Defendants to return all funds taken from the Financing Account immediately and enjoining Defendants from interfering with the Company's officers' use of such funds to pay the operating expenses of the Company;

- c. Appointing a Custodian for the Company who shall have the powers of a receiver and specifically have power and authority over the Financing Account and decisions regarding how the funds in that account may be used by the Company;
- d. Awarding damages to the Company or to Plaintiff for all damages caused to the Company or Plaintiff's interest in the Company, including any legal fees and expenses that are incurred by the Company as a result of Defendants' conduct, as a result of Defendants' wrongful conduct, including a requirement that Defendants disgorge any benefits obtained by their wrongful use of the Financing Account proceeds;
- d. Awarding to Plaintiff attorneys' fees and expenses incurred in this action;
- f. Awarding interest on all damages awarded by the Court and;
- g. Awarding such other relief as the Court deems just and proper.

Dated: July 5, 2017

**PRICKETT, JONES & ELLIOTT,
P.A.**

By: /s/ Bruce E. Jameson

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