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**Via File & ServeXpress**

July 20, 2020

The Honorable Paul A. Fioravanti, Jr.  
Vice Chancellor  
Court of Chancery  
Leonard L. Williams Justice Center  
500 North King Street, Suite 11400  
Wilmington, DE 19801

**RE: *Alpha Venture Capital Partners, L.P. v. Pourhassan, et al.,***  
**Case No. 2020-0307-PAF (Del. Ch.)**

Dear Vice Chancellor Fioravanti:

On behalf of Plaintiffs in the above-captioned action, I write to apprise Your Honor of a troubling development and a potential violation of this Court's order staying proceedings (Trans. ID 65743119) (the "Stay Order") involving Defendant Scott Kelly, Chairman of the Board of Directors of nominal defendant CytoDyn, Inc. ("CytoDyn" or the "Company").

As Your Honor knows, this derivative lawsuit asserts breach of fiduciary duty of loyalty claims against officers and directors of CytoDyn for enriching themselves through blatantly unjustified awards of Company stock, currently

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worth approximately *\$125 million*.<sup>1</sup> On July 2, 2020, the Court entered the Stay Order pending the Special Litigation Committee's (the "SLC") investigation into Plaintiffs' claims.

This past Saturday evening, however, I learned that Mr. Kelly directly contacted Tony Caracciolo, the representative of Plaintiff Caracciolo Family Trust, to discuss this case. Without my knowledge, Mr. Kelly and Mr. Caracciolo had two conversations by telephone on July 17, 2020, and July 18, 2020. Despite Mr. Kelly's text message to Mr. Caracciolo stating that Mr. Kelly "received permission from the attorneys" to reach out to Mr. Caracciolo directly, Plaintiffs' counsel did not receive any notice of Mr. Kelly's intent to do so.<sup>2</sup>

Most troublingly, however, is that during those conversations, Mr. Kelly attempted to threaten and intimidate Mr. Caracciolo and the other Plaintiffs into

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<sup>1</sup> As set forth in the Complaint, Defendants granted themselves and others 9.3 million options and warrants at an exercise price of \$0.63 per share, and another 11.65 million "performance shares" not subject to any exercise price, in December 2019 and January 2020, respectively. The Company's stock is now trading around \$6 per share.

<sup>2</sup> I am not aware of (a) whether Mr. Kelly's claim that he received "permission from the attorneys" is true, or (b) if Mr. Kelly's claim is true, which "attorneys" gave him "permission" to speak to Mr. Caracciolo. On Sunday, July 19, 2020, I sent an email to counsel to Defendants and the SLC stating my assumption that none of them knew about or permitted Mr. Kelly's conduct, and asking that they correct my assumption if it is mistaken. See Exhibit 1. Counsel have not responded as of the filing of this letter.

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dropping their derivative claims. Specifically, Mr. Kelly claimed that this lawsuit is an impediment to the Company's attempt to up-list to NASDAQ, essentially arguing that an asset of the Company (this derivative action) is preventing CytoDyn from being up-listed to NASDAQ. He further stated that if the lawsuit is not "dropped," and the Company is unable to up-list, the Company will publicly "blame" Plaintiffs and "will sue" Plaintiffs for bringing this lawsuit. In other words, in a misguided attempt to circumvent counsel, the SLC, and this Court, Mr. Kelly threatened Mr. Caracciolo with a public smear campaign and a potential lawsuit<sup>3</sup> unless Plaintiffs dropped their derivative claims.

Mr. Kelly's threats are highly improper and continue a troubling pattern of post-complaint conduct demonstrating a lack of respect for these proceedings and Defendants' fiduciary duties to the Company and its stockholders. In addition to representing a breach of his fiduciary duties, Mr. Kelly's efforts also violate the Stay Order, which provides the SLC with exclusive control over the claims during the period of the stay. The SLC was created to investigate and address Plaintiffs'

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<sup>3</sup> Plaintiffs believe that any lawsuit (or threat of a lawsuit) premised upon Plaintiffs' commencement of this action (which asserts derivative claims belonging to the Company) is entirely baseless. That said, Plaintiffs requested that if any lawsuit is being contemplated against Plaintiffs, counsel to the Defendants and/or the Company should provide Plaintiffs with the legal grounds of any such lawsuit and any documents or facts in support. *See Exhibit 1.*

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claims on behalf of the Company, *including* claims against Mr. Kelly himself. Simply put, Mr. Kelly's (and potentially other Defendants') efforts to circumvent a duly empowered committee of the CytoDyn board of directors that is investigating Mr. Kelly's and others' alleged misconduct is offensive and a breach of Mr. Kelly's fiduciary duties to the Company.

Mr. Kelly's circumvention of the SLC directly undermines the work the SLC is attempting to do. Moreover, it is apparent from Mr. Kelly's conduct that the SLC is not controlling the Board of Directors or Company management regarding Plaintiffs' claims during the SLC's purported investigation. If the SLC cannot effectively guide the Company with respect to Plaintiffs' claims, then the SLC should disband and/or the stay should be lifted. *See, e.g., Biondi v. Scrushy*, 820 A.2d 1148, 1165-66 (Del. Ch. Jan. 16, 2003).

Plaintiffs believe Mr. Kelly's conduct is sufficiently serious to bring to Your Honor's attention immediately. Plaintiffs are available to the Court should Your Honor have any questions or concerns.

Respectfully submitted,



Mark Richardson (Bar No. 6575)

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Enclosure

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