SAUL EWING
LLP

February 7, 2025

VIA ONLINE SUBMISSION

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: *Supernus Pharmaceuticals, Inc.*
Stockholder Proposal of North Atlantic States Carpenters Pension Fund
Securities Exchange Act of 1934 – Rule 14a-8

Ladies and Gentlemen:

This letter is to inform you that our client, Supernus Pharmaceuticals, Inc., a Delaware corporation (the "**Company**"), intends to omit from its proxy statement and form of proxy for its 2025 Annual Meeting of Stockholders (collectively, the "**2025 Proxy Materials**") a stockholder proposal (the "**Proposal**"), including statements in support thereof received from the North Atlantic States Carpenters Pension Fund (the "**Proponent**").

Pursuant to Rule 14a-8(j) we have:

- filed this letter with the Securities and Exchange Commission (the "**Commission**") no later than eighty (80) calendar days before the Company intends to file its definitive 2025 Proxy Materials with the Commission; and

- concurrently sent a copy of this correspondence to the Proponent.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) ("**SLB 14D**") provide that stockholder proponents are required to send companies a copy of any correspondence that the proponent elects to submit to the Commission or the staff of the Division of Corporation Finance (the "**Staff**"). Accordingly, we are taking this opportunity to inform the Proponent that if it elects to submit additional correspondence to the Commission or the Staff with respect to the Proposal,

a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

THE PROPOSAL

On December 19, 2024, the Company received a letter from the Proponent, dated December 17, 2024, submitting the Proposal for inclusion in the 2025 Proxy Materials. The text of the Proposal and supporting statement are set forth below and a copy of the original Proposal and supporting statement are attached hereto as Exhibit A.

> **Resolved**: The shareholders of Supernus (the "Company") request that the Board adopt a new Director Election Resignation Guideline ("Resignation Guideline" or "Guideline") provision to address those situations when one or more incumbent Board nominees fail to receive the **required majority vote** for re-election. The Resignation Guideline shall provide that each director upon joining the Board tender an irrevocable conditional resignation conditioned on the director's failure to receive the **required majority vote support** in an uncontested election. The Guideline shall provide that an unelected director's tendered resignation will be effective no later than ninety days following the certification of the election vote and he or she will leave the board within that time period.
>
> **Supporting Statement**: Delaware corporate law states that each director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal. An incumbent director who fails to receive the required vote for election continues to serve as "holdover" director. Delaware corporate law was amended in 2006 to provide for director resignations conditioned on an incumbent director's failure to be re-elected under **the majority vote standard** that was broadly adopted in the market. The law provided that the resignation could be conditional and irrevocable and was designed to effectuate **the majority vote election standard** as incumbent directors in uncontested director elections could now be unelected but continue to serve. The Company has in place a director resignation policy that requires incumbent directors to tender a resignation following their failure to be re-elected in an annual election. Rather than providing for the resignation to be effective on a date certain following the vote certification, the policy sets a process and timeline for the Board's Governance and Nominating Committee to recommend to the Board whether to accept or reject the tendered resignation. This process affords the Board the opportunity to override the shareholder vote. The proposed Resignation Guideline would establish a straightforward process for effectuating the election outcome determined by shareholders. Shareholder voting rights to elect the corporate board of directors established under Delaware corporate law are foundational rights

> in the governance of corporations. The majority vote director election standard adopted by the Company gives shareholders voting rights that have legal effect. It is important that corporate director resignation guidelines and bylaws not undermine shareholder voting rights. The proposed Resignation Guideline strikes a lawful balance between board discretion and shareholder legal voting rights and establishes shareholder voting in director elections as a more consequential governance right.

BASES FOR EXCLUSION

We hereby respectfully request that the Staff concur in our view that the Proposal may be excluded from the 2025 Proxy Materials pursuant to:

- Rule 14a-8(i)(3) because the Proposal is materially false and misleading and therefore contrary to the Staff's Proxy Rules, Including Rule 14a-9;

- Rule 14a-8(i)(2) because the Proposal would cause the Company to violate Delaware law; and

- Rule 14a-8(i)(10) because the Company has already substantially implemented the Proposal.

ANALYSIS

Background

In addition to the specific reasoning set forth below for exclusion of the Proposal from the 2025 Proxy Materials under each of the aforementioned Rules serving as a basis for exclusion, the context in which the Proposal is made is important. The Proposal is part of an ongoing campaign by the Proponent to require companies to implement mandatory resignations for failure to receive a majority vote in an election of directors. However, proposals that are similar or identical to the Proposal have been submitted to companies somewhat indiscriminately by the Proponent, without regard for compliance with applicable law, or, as is the case here, without considering whether statements in the Proposal and supporting statement are accurate in the context of a particular company. As discussed in further detail below, the Staff concurred with at least a dozen no-action requests in the past year to exclude similar proposals made by the Proponent that also sought to require mandatory director resignations in violation of the Delaware General Corporation Law (the "**DGCL**") or analogous laws in other states under Rule 14a-8(i)(2). Despite repeated advisement that such proposals are unlawful, the Proponent is continuing its campaign apparently under the premise that tweaking a few words will obviate the multitude of opinions delivered by respected law firms last year opining on its illegality under the DGCL.

Unfortunately for the Company and its other shareholders, the Proponent has included a number of materially false and misleading statements and has apparently not considered that the Company's existing Majority Voting and Director Resignation Policy[1] (the "**Resignation Policy**") already substantially implements the Proposal to the extent it can be implemented without violating the DGCL.

The Proposal May Be Excluded Under Rule 14a-8(i)(3) Because It Is Materially False And Misleading.

Rule 14a-8(i)(3) provides that a company may exclude a stockholder proposal from its proxy materials if the proposal or supporting statement is "contrary to any of the Commission's proxy rules, including 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials." Rule 14a-9 prohibits solicitation by means of a proxy statement containing "any statement, which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." In Staff Legal Bulletin No. 14B (Sept. 15, 2004) ("**SLB 14B**"), the Staff asserted that exclusion under Rule 14a-8(i)(3) may be appropriate where "the company demonstrates objectively that a factual statement is materially false or misleading."

Following SLB 14B, the Staff has consistently allowed complete exclusion of stockholder proposals under Rule 14a-8(i)(3) where objectively false or misleading information is included. *See, e.g., General Electric Co.* (Jan. 6, 2009) (concurring with exclusion of a proposal that referenced the company having a plurality voting standard in elections of directors, when in fact the company had a majority voting standard in the vast majority of its elections); *JPMorgan Chase & Co.* (Mar. 11, 2014) (concurring with exclusion of a proposal that implied that the company had a plurality voting standard in uncontested elections of directors, when in fact the company had a majority voting standard); *State Street Corp*. (Mar. 1, 2005) (concurring with exclusion of a proposal referring to a state law that had been recodified and was no longer in force); and *Duke Energy Corp.* (Feb. 8, 2002) (concurring with exclusion of a proposal related to the composition of the company's nominating committee, when the company did not, in fact, have a nominating committee).

The Proposal contains numerous material false and misleading statements. First, the Proposal states that it is meant to address "those situations when one or more incumbent Board nominees fail to receive the required majority vote for re-election," and that it will apply to directors who fail "to receive the required majority vote support in an uncontested election." The Proposal is premised on the notion that the Company employs a majority voting standard in uncontested elections of directors. It suggests layering an additional policy over the majority voting standard to prevent a situation of having "holdover" directors remain in office after failing to obtain enough votes for re-election. However, the Company does not employ a majority voting

[1] *See* Supernus Pharmaceuticals, Inc. Majority Voting and Director Resignation Policy, adopted August 2, 2019. Available at https://ir.supernus.com/corporate-governance.

standard. Accordingly, it would be impossible for stockholders to interpret the Proposal in a reasonable manner as the assumptions and statements made in the Proposal and supporting statement are inapplicable to the Company.

Pursuant to Section 5(a) of the Company's Amended and Restated Certificate of Incorporation, dated May 4, 2012 (the "**COI**"), "[a]ny election of directors by stockholders shall be determined by a plurality of the votes cast by stockholders entitled to vote." Under a plurality voting standard, the nominees who receive the greatest number of votes will be elected, which is not the majority voting standard the Proponent claims that the Company employs. Proponent's statements in the Proposal regarding the Company's voting standard in director elections are false, and will mislead and confuse stockholders if included in the Proxy Materials. The Proposal's repeated references to majority voting in elections of the Company's directors, when in fact such directors are elected by plurality voting, render it excludable under Rule 14a-8(i)(3).

In addition, the Proposal and its supporting statement refer multiple times to the fact that the Proposal purports to correct situations in which directors "fail to receive the required vote for election," and "serve as a 'holdover' director," but these concepts are not applicable under Delaware law in a plurality voting situation. The directors elected by plurality voting are those directors who receive the highest number of votes, with no specific threshold of votes needed for election in the same way there would be in the majority voting scenario that the Proponent falsely states that the Company utilizes. Similarly, the concept of a "holdover director" is not applicable to companies with plurality voting under Delaware law. "Holdover directors" can only exist in a voting system that requires a set number or percentage of votes for reelection. In such a system, if enough directors do not receive the required percentage of votes, existing directors can remain in office as "holdover directors." Again, since the Company utilizes plurality voting in director elections without a requirement they receive any specific percentage of the vote, there is no possibility of there being a "holdover director." Reference to these concepts that only would apply based on a false premise will mislead and confuse stockholders.

Notwithstanding the plurality voting standard established in the COI, the Board adopted the Resignation Policy in 2019 to ensure that it and future Boards considered and, if deemed appropriate by the then-serving Board, could readily act on a signal from the Company's shareholders regarding their dissatisfaction with a director.

The Proponent notes in its supporting statement to the Proposal that the Company has the Resignation Policy in place, and such policy requires incumbent directors to tender a resignation in circumstances in which a nominee receives "a greater number of votes "withheld" or "against" his or her election than votes "for" his or her election…in an election of directors that is not a contested election". However, when Proponent references the Resignation Policy, it falsely asserts that the Resignation Policy applies when a director "fails to receive the required vote for election." This is another false and misleading statement, given the Company's plurality voting standard. While the Company does require directors who do not receive a majority vote in the annual election of directors to tender a resignation so that the Board of Directors (the "Board") can, in its business judgment, determine whether or not the director should continue in office, this does not alter the

underlying plurality voting standard that is used in the Company's annual election of directors. Any director who tenders a resignation pursuant to the Resignation Policy was validly elected by plurality voting under Delaware law and the Company's organizational documents, but the Proponent's statements are false and misleading in suggesting that a majority standard applies.

Consistent with the precedents cited above, the materially false and misleading statements made by Proponent in the Proposal and its supporting statement thereto misstate the Company's voting standard in uncontested director elections as one of majority voting, when in fact the standard is one of plurality voting. The Staff has allowed exclusion under Rule 14a-8(i)(3) in directly analogous situations such as *General Electric Co.*, and *JPMorgan Chase & Co.* cited above, so the Company respectfully requests that the Staff concur with our view and confirm that it will not recommend enforcement action to the Commission if the Company omits the Proposal from the 2025 Proxy Materials.

The Proposal May Be Excluded Under Rule 14a-8(i)(2) Because Implementation of the Proposal Would Cause The Company To Violate Delaware Law.

Rule 14a-8(i)(2) provides that a company may exclude a stockholder proposal from its proxy materials "if the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." *See The Goldman Sachs Group, Inc.* (Feb. 1, 2016); and *Bank of America Corp*. (Feb. 11, 2009). The Company is incorporated under the DGCL. For reasons discussed below and in the opinion of counsel attached hereto as Exhibit B (the "**Delaware Law Opinion**"), the Company believes that the implementation of the Proposal is excludable under Rule 14a-8(i)(2) because, if implemented, the Proposal would cause the Company to violate the DGCL.

The Staff has previously concurred with various no-action requests to exclude stockholder proposals requesting that companies take action that would violate state law, including the DGCL. *See General Motors Company* (Apr. 18, 2024) and *eBay Inc.* (Apr. 16, 2024) (each concurring with exclusion of a proposal to enact a bylaw in which director compensation would be set in a manner that would violate the "one vote for every share" rule under Section 212(a) of the DGCL); *Alaska Air Group, Inc.* (Mar. 20, 2023) (concurring with exclusion of a proposal requesting that both street name and non-street name shareholders be given the ability to formally participate in acting by written consent, which would violate Section 228 of the DGCL); *The Goldman Sachs Group, Inc.* (Feb. 1, 2016) (concurring with exclusion of a proposal requesting the board of directors include outside experts on the compensation committee that would violate Section 141(c) of the DGCL).

More specifically, the Staff has concurred with at least a dozen no-action requests in the past year seeking to exclude proposals that were made by the Proponent that also sought to require mandatory director resignations in violation of the DGCL or other analogous laws in other states. *See Verizon Communications Inc.* (Mar. 15, 2024) (concurring with exclusion of a proposal almost identical to the Proposal, but asking board of directors to make revisions to director election resignation provisions in the Company's bylaws); *See also AT&T Inc.* (Mar. 19, 2024); *Bristol-*

Myers Squibb Company (Mar. 19, 2024); *Simon Property Group, Inc.* (Mar. 20, 2024); *Quest Diagnostics Incorporated* (Mar. 25, 2024); *Lear Corporation* (Mar. 26, 2024); *Gartner, Inc.* (Mar. 29, 2024); *Chevron Corporation* (Mar. 29, 2024); *Zoetis Inc.* (Apr. 3, 2024); *Amgen Inc.* (Apr. 3, 2024); *WESCO International, Inc.* (Apr. 5, 2024); *Ingersoll Rand Inc.* (Apr. 17, 2024); *MetLife, Inc.* (Apr. 22, 2024). Despite being advised by opinions of Delaware counsel numerous times last year that its director resignation proposals were contrary to state law, including under Delaware law, and despite receiving concurrence from the Staff numerous times that such proposals can be excluded from proxy materials on that basis, the Proponent continues to submit such proposals to companies of which it is a stockholder, including the Company. In addition to the Proposal being contrary to Delaware law, this practice is wasting significant resources of the Staff and each of the companies involved.

As explained in further detail in the Delaware Law Opinion, the Proposal, if adopted, would require the Board to accept the previously tendered resignation of any director who failed to receive a majority vote in an election of directors. Under Section 141(a) of the DGCL, the "business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." 8 *Del. C.* § 141(a). In interpreting Section 141(a) of the DGCL, Delaware courts have consistently held that a board of directors may not restrict future boards in any manner relating to a fundamental matter of corporate governance without amending the COI. The Proposal does not seek to amend the Company's COI, which establishes a plurality voting standard, but seeks to restrict the decision-making of future Boards as if it had amended the COI, which is not permissible under Delaware law. The Proposal does not give the Board any discretion to determine whether or not to accept the tendered resignations, which is a violation of the DGCL and the fiduciary duties of the Board, which is required to have the ability to determine whether or not to accept the resignation of a director.

Additionally, the Proposal constitutes a forced removal of duly elected directors in certain circumstances, which is prohibited by Section 141(k) of the DGCL. Section 141(k) of the DGCL states: "Any director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors ..." 8 *Del. C.* § 141(k). Since the Company employs plurality voting in elections of directors, the resignations that the Proposal contemplates would allow directors to be removed based on not receiving a majority of votes cast for re-election, a standard that is lower than the required vote to remove a director, which is a majority of all outstanding shares entitled to vote in favor of removal required by Section 141(k) of the DGCL.

Practically speaking, if adopted by the Company, given the plurality voting standard established in the COI, the Proposal could lead to a situation in which a duly elected director is removed from the Board without receiving a single vote against their directorship or any vote for their removal by other directors or stockholders because they did not receive greater than fifty percent (50%) of votes "for" their election, a standard which has no basis in the Company's COI. Delaware law imposes a higher standard for removal of duly elected directors, and does not support imposing the terms of the Proposal as a substitute for the requirements of the DGCL.

The Proposal May Be Excluded Under Rule 14a-8(i)(10) Because The Company Has Already Substantially Implemented The Proposal.

Rule 14a-8(i)(10) provides that a company may exclude a shareholder proposal from its proxy materials if the company has already "substantially implemented" the proposal. Originally, the Staff interpreted the rule narrowly and granted no-action relief solely for proposals that were "'fully' effected" by the company. *See Release No. 34-19135* (Oct. 14, 1982). The Commission adopted the "substantially implemented" standard after determining that the "previous formalistic application" of the rule defeated its purpose, which is "to avoid the possibility of shareholders having to consider matters which already have been favorably acted upon by the management." *See Exchange Act Release No. 34-20091* (Aug. 16, 1983).

The Staff now interprets this exclusion to apply when the company has taken actions to satisfactorily address the proposal's underlying concerns and its essential objective. *See The Wendy's Co*. (Apr. 10, 2019) (concurring with exclusion of a proposal requesting a report assessing human rights risks of the company's operations, when, among other things, the company had a code of ethics and disclosed on its website the frequency and methodology of its human rights risk assessments); *Wal-Mart Stores, Inc.* (Mar. 25, 2015) (concurring with exclusion of a shareholder proposal requesting an employee engagement metric to be used in determining executive compensation when a "diversity and inclusion metric related to employee engagement" was already included in the company's incentive plan applicable to executives); *Exxon Mobil Corp.* (Mar. 23, 2018) (concurring with exclusion of a proposal requesting that the company issue a report related to decreasing the company's reliance on fossil fuels where the company had previously issued a report regarding changes to its business model to reduce greenhouse gas emissions).

Additionally, the Staff has permitted exclusion under Rule 14a-8(i)(10) in situations directly analogous to the Proposal. In situations in which a company has implemented a majority voting/director resignation policy to address issues related to majority voting, even where the resignation process does not align precisely with the process contained in the proposal made by a shareholder, the Staff has concurred with exclusion under Rule 14a-8(i)(10). For example, in *AECOM* (Dec. 21, 2018), the Staff concurred with exclusion of a shareholder proposal which requested that AECOM's board of directors initiate the process to amend the company's governing documents so that any so-called "holdover director" would be "removed from the board immediately." The company had instead amended its bylaws to provide a majority voting standard and amended its internal corporate governance guidelines to include a policy requiring any director who fails to be re-elected by the majority of votes to tender a resignation which the board of directors would consider whether to accept or reject within ninety (90) days following the election. The Staff permitted exclusion under Rule 14a-8(i)(10) and noted that "the [c]ompany's bylaws compare favorably with the guidelines of the [p]roposal and that the [c]ompany has, therefore, substantially implemented the [p]roposal." *See also Cisco Systems, Inc*. (Sept. 27, 2023) (concurring with exclusion where a proposal requesting that the company amend its organizational documents to require that when a director does not receive a majority vote, the director cannot

serve for more than 180 days after failure to receive a majority vote, while the existing governing documents of the company provided that the resignation would be automatically effective no later than 90 days after failure to receive a majority vote).

In Exchange Act Release No. 95267 (July 13, 2022), the Commission proposed to amend Rule 14a-8(i)(10) to provide that proposals would be excludable if a company has already implemented the "essential elements" of the proposal. We note the proposed amendment stated that when following the proposed standard, the analysis should be informed by the proponent's "primary objectives" and that a proposal "need not be rendered entirely moot, or be fully implemented in exactly the way a proponent desires, in order to be excluded." Under the proposed amendment, a company would be permitted to exclude a proposal it has not implemented precisely as requested if the differences between the proposal and the company's actions are not essential to the proposal.

Under both the existing and proposed standards, the Company substantially implemented the Proposal when it adopted the Resignation Policy in 2019. It did so by implementing all of the essential elements of the Proposal to the extent possible without violating the DGCL. Specifically, the Proposal asks the Company to implement a Board guideline with two key components:

1. All members of the Board will tender an irrevocable conditional resignation conditioned on the director's failure to receive the required majority vote support in an uncontested future election.

2. The guideline will also provide that an unelected director's tendered resignation will be effective no later than ninety (90) days following the certification of the election vote and he or she will leave the Board within that time period.

The Company's existing Resignation Policy substantially implements both of the Proponent's objectives. First, the Resignation Policy states "[i]t is a policy of the Board of Directors (the "Board") that any nominee for election as a director who receives a greater number of votes "withheld" or "against" his or her election than votes "for" his or her election (a "Majority Withheld Vote") in an election of directors that is not a contested election, is required to tender his or her resignation as a director to the Board of Directors promptly following the certification of the election results." The only difference between this existing policy and the Proposal is that the Proposal would require directors to tender their resignations prior to ever failing to receive majority vote support, while the existing Resignation Policy requires such resignation to be tendered after a director fails to receive majority vote support. The timing difference is immaterial, and does not change the fact that both the Proposal and existing Resignation Policy have the same ultimate outcome in terms of requiring the resignation of a director who has not received a majority of votes in an uncontested election.

The second component of the Proposal has also already been implemented by the existing Resignation Policy. The Resignation Policy provides that "the Board will act on each tendered resignation, taking into account the Committee's recommendation, within 90 days following the

certification of the election results." The Proposal instead proposes immediate effectiveness for such resignations, with no ability for the Board to review and consider whether or not to accept a resignation. This discrepancy is directly analogous to the situation in *AECOM*, in which the Staff concurred with exclusion where the company had a similar ninety (90)-day policy in place to allow its board of directors to review resignations, but the proponent in that situation also sought immediate effectiveness of resignations, without review by the board of directors. The policy that was already in place in *AECOM* was viewed to "compare favorably" with the proposal to support exclusion, so the Company's existing Resignation Policy should also be viewed as comparing favorably with the Proposal, as it has with virtually identical terms.

It is also important to note that the differences in the immediacy of effectiveness of a resignation between the Proposal and the existing Resignation Policy reflect a difference in legality under Delaware law. As discussed above and in the Delaware Law Opinion in more detail, the Proposal's requirement of director resignations with no ability of the Board to review and consider whether to accept such resignations is a violation of the DGCL. While the Proposal would violate Delaware law in this and other respects, the Resignation Policy was developed to remain in compliance with the DGCL by having a ninety (90)-day period for the Board to review and consider director resignations. Since the Company's existing policies have implemented all aspects of the Proposal that are legal, the Company has done everything it can to substantially implement the Proposal.

CONCLUSION

For the foregoing reasons, the Company believes that the Proposal may be omitted from the 2025 Proxy Materials and respectfully requests that the Staff confirm that it will not recommend any enforcement action if the Proposal is excluded from the 2025 Proxy Materials.

If you have any questions with respect to the foregoing, please contact us at 202-342-3444 or 202-295-6643.

Sincerely,

Mark Gruhin

George Naya

Mark I. Gruhin and George A. Naya

cc: Jack A. Khattar
President and Chief Executive Officer
Supernus Pharmaceuticals, Inc.

Matthew R. Gerber
Counsel
Saul Ewing LLP

Enclosures

Exhibit A

Proposal and Supporting Statement

Director Election Resignation Guideline Proposal:

Resolved: The shareholders of Supernus (the "Company") request that the Board adopt a new Director Election Resignation Guideline ("Resignation Guideline" or "Guideline") provision to address those situations when one or more incumbent Board nominees fail to receive the required majority vote for re-election. The Resignation Guideline shall provide that each director upon joining the Board tender an irrevocable conditional resignation conditioned on the director's failure to receive the required majority vote support in an uncontested election. The Guideline shall provide that an unelected director's tendered resignation will be effective no later than ninety days following the certification of the election vote and he or she will leave the board within that time period.

Supporting Statement: Delaware corporate law states that each director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal. An incumbent director who fails to receive the required vote for election continues to serve as a "holdover" director. Delaware corporate law was amended in 2006 to provide for director resignations conditioned on an incumbent director's failure to be re-elected under the majority vote standard that was broadly adopted in the market. The law provided that the resignation could be conditional and irrevocable and was designed to effectuate the majority vote election standard as incumbent directors in uncontested director elections could now be unelected but continue to serve.

The Company has in place a director resignation policy that requires incumbent directors to tender a resignation following their failure to be re-elected in an annual election. Rather than providing for the resignation to be effective on a date certain following the vote certification, the policy sets a process and timeline for the Board's Governance and Nominating Committee to recommend to the Board whether to accept or reject the tendered resignation. This process affords the Board the opportunity to override the shareholder vote. The proposed Resignation Guideline would establish a straightforward process for effectuating the election outcome determined by shareholders.

Shareholder voting rights to elect the corporate board of directors established under Delaware corporate law are foundational rights in the governance of corporations. The majority vote director election standard adopted by the Company gives shareholders voting rights that have legal effect. It is important that corporate director resignation guidelines and bylaws not undermine shareholder voting rights. The proposed Resignation Guideline strikes a lawful balance between board discretion and shareholder legal voting rights and establishes shareholder voting in director elections as a more consequential governance right.

Exhibit B

Delaware Law Opinion

lawyers@saul.com
www.saul.com

SAUL EWING
LLP

February 7, 2025

Supernus Pharmaceuticals, Inc.
9715 Key West Avenue
Rockville, MD 20850

Re: Stockholder Proposal on behalf of the North Atlantic States Carpenters Pension Fund

Ladies and Gentlemen:

We have acted as Delaware counsel to Supernus Pharmaceuticals, Inc., a Delaware corporation (the "Company"), for the purpose of rendering this opinion in connection with a stockholder proposal (the "Proposal") on behalf of North Atlantic States Carpenters Pension Fund (the "Proponent"), dated December 17, 2024, for the 2025 annual meeting of stockholders of the Company (the "Annual Meeting"). In connection with the Proposal, you have requested our opinion as to certain matters under the laws of the State of Delaware. At your request, this opinion is being furnished to you.

For purposes of giving the opinions hereinafter set forth, our examination of documents has been limited to the examination of originals or copies of the following:

(a) the Amended and Restated Certificate of Incorporation of the Company (the "Certificate"), as filed with the Secretary of State of the State of Delaware on May 4, 2012;

(b) the Amended and Restated Bylaws of the Company, amended as of November 26, 2012; and

(c) the Proposal and associated supporting statement (the "Supporting Statement")

For purposes of this opinion, we have not reviewed any documents other than the documents listed in paragraphs (a) through (c) above. In particular, we have not reviewed any document (other than the documents listed in paragraphs (a) through (c) above) that is referred to in or incorporated by reference into any document reviewed by us. We have assumed that there exists no provision in any document that we have not reviewed that is inconsistent with the opinions stated herein. We have conducted no independent factual investigation of our own but rather have relied solely upon the foregoing documents, the statements and information set forth therein and the additional matters recited or assumed herein, all of which we have assumed to be true, complete and accurate in all material respects.

With respect to all documents examined by us, we have assumed and, to our knowledge, there are no facts inconsistent with, the following: (i) all signatures on documents examined by us are genuine, (ii) all documents submitted to us as originals are authentic and (iii) all documents submitted to us as copies conform with the original copies of those documents.

The Proposal, along with the associated Supporting Statement, states the following:

> Resolved: The shareholders of Supernus (the "Company") request that the Board adopt a new Director Election Resignation Guideline ("Resignation Guideline" or "Guideline") provision to address those situations when one or more incumbent Board nominees fail to receive the required majority vote for re-election. The Resignation Guideline shall provide that each director upon joining the Board tender an irrevocable conditional resignation conditioned on the director's failure to receive the required majority vote support in an uncontested election. The Guideline shall provide that an unelected director's tendered resignation will be effective no later than ninety days following the certification of the election vote and he or she will leave the board within that time period.
>
> **Supporting Statement**: Delaware corporate law states that each director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal. An incumbent director who fails to receive the required vote for election continues to serve as "holdover" director. Delaware corporate law was amended in 2006 to provide for director resignations conditioned on an incumbent director's failure to be re-elected under the majority vote standard that was broadly adopted in the market. The law provided that the resignation could be conditional and irrevocable and was designed to effectuate the majority vote

> election standard as incumbent directors in uncontested director elections could now be unelected but continue to serve. The Company has in place a director resignation policy that requires incumbent directors to tender a resignation following their failure to be re-elected in an annual election. Rather than providing for the resignation to be effective on a date certain following the vote certification, the policy sets a process and timeline for the Board's Governance and Nominating Committee to recommend to the Board whether to accept or reject the tendered resignation. This process affords the Board the opportunity to override the shareholder vote. The proposed Resignation Guideline would establish a straightforward process for effectuating the election outcome determined by shareholders. Shareholder voting rights to elect the corporate board of directors established under Delaware corporate law are foundational rights in the governance of corporations. The majority vote director election standard adopted by the Company gives shareholders voting rights that have legal effect. It is important that corporate director resignation guidelines and bylaws not undermine shareholder voting rights. The proposed Resignation Guideline strikes a lawful balance between board discretion and shareholder legal voting rights and establishes shareholder voting in director elections as a more consequential governance right.

We have been advised that the Company is considering excluding the Proposal from the Company's proxy statement for the Annual Meeting under, among other reasons, Rule 14a-8(i)(2) promulgated under the Securities Exchange Act of 1934, as amended. Rule 14a-8(i)(2) provides that a registrant may omit a proposal from its proxy statement when "the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." In connection with this, you have requested our opinion as to whether, under Delaware law, the implementation of the Proposal, if adopted by the Company's stockholders, would violate Delaware law.

Based upon the foregoing, as further discussed below, we are of the opinion that the Proposal, if implemented, would violate Delaware law. Our analysis supporting such opinion follows.

Section 141(a) of the General Corporation Law of the State of Delaware (the "DGCL") provides that the "business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." 8 *Del. C*. § 141(a). The Certificate does not provide that the Company may be managed by anyone other than its directors. Thus, the Board possesses the full power and authority to manage the business and affairs of the Company.

The Delaware Supreme Court has held for decades that "[a] cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984); *see also West Palm Beach Firefighters' Pension Fund v. Moelis & Co.,* 311 A.3d 809, 817 (Del.Ch., Feb. 23, 2024) ("One of the most basic tenets of Delaware corporate law is that the board

of directors has the ultimate responsibility for managing the business and affairs of a corporation...Section 141(a)...confers upon any newly elected board of directors *full* power to manage and direct the business and affairs of a Delaware corporation") (citing *Quickturn Design Sys., Inc. v. Shapiro (Quickturn II),* 721 A.2d 1281, 1291–92 (Del. 1998) (emphasis in original) (citation omitted)); *McRitchie v. Zuckerberg*, 315 A.3d 518, 536 (Del.Ch., Apr. 30, 2024) ("Delaware corporate law starts from the bedrock principle that '[t]he business and affairs of every corporation ... shall be managed by or under the direction of a board of directors'"); *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 232 (Del. 2008) ("Indeed, it is well-established that stockholders of a corporation subject to the DGCL may not directly manage the business and affairs of the corporation, at least without specific authorization in either the statute or the certificate of incorporation.").

Delaware courts have also invalidated governance provisions that would bind future directors or prevent future directors from making decisions on behalf of the corporation. In *Chapin v. Benwood Foundation, Inc*., 402 A.2d 1205 (Del.Ch., June 5, 1979), the Delaware Court of Chancery invalidated a multi-year agreement among four directors of a corporation, pursuant to which each director named a desired nominee as successor, and all of the other directors agreed to irrevocably vote in favor of the successor, regardless of future circumstances. The Court held that the agreement was unenforceable under Delaware law, and that the corporation "should be controlled by the long-standing rule that directors of a Delaware corporation may not delegate to others those duties which lay at the heart of the management of the corporation."[2] Similarly, in *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291 (Del. 1998), the Delaware Supreme Court struck down a provision that would have prevented newly-elected directors from redeeming a rights plan for a six-month period, stating that "[o]ne of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation."

The Proposal would require that directors tender a conditional, irrevocable resignation that will be effective automatically no later than ninety (90) days following such director's failure to receive a majority vote in an election of directors. Thus, the Board would have no role at all in determining whether or not to accept the resignation of such directors, which is contrary to Delaware law as set forth above and the primacy of director discretion and management of Delaware corporations.

The decision to accept a resignation of a director is a business decision to be made by the Board, and that decision requires the Board to use its business judgment and exercise its fiduciary duties. *Louisiana Mun. Police Emps. Ret. Sys. v. Morgan Stanley & Co. Inc.*, 2011 WL 773316, at *6 (Del. Ch. Mar. 4, 2011) (citing *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 2009 WL 3086537, at *5 (Del. Ch. Sept. 28, 2009)). The business decision to be made regarding the acceptance or rejection of a director's resignation requires balancing a variety of factors, including the tenure and qualifications of the director, the past contributions and expected future contributions of such director to the Board, the overall status of the Board, including the extent to which such director's resignation would affect the functioning of the Board and Company in accordance with legal requirements, and any reasoning provided by stockholders for failing to

[2] *Id.* at 1210.

vote in larger numbers in favor of such director's election. The Proposal seeks to entirely eliminate the Board's ability to exercise its fiduciary duty in determining whether to accept or reject director resignations. If the Proposal were adopted, even if the Board, in an exercise of its good faith business judgment based on factors such as those discussed above, determines that a resignation is not in the best interests of the Company, it would not be permitted to reject the resignation.

Furthermore, while Section 141(b) of the DGCL allows for resignations of the type the Proposal suggests, stating that a "resignation which is conditioned upon the director failing to receive a specified vote for reelection as a director may provide that it is irrevocable," the Proposal completely removes Board discretion in that scenario by providing for automatic effectiveness of a resignation, which is contrary to the DGCL. Section 141(b) does not allow for a director's irrevocable resignation to override the Board's authority to consider the resignation and then ultimately accept or reject it. The Proposal would provide no such Board review of irrevocably tendered resignations in contravention of the DGCL.

Finally, the Proposal constitutes a forced removal of directors in certain circumstances, which is a violation of Section 141(k) of the DGCL. Section 141(k) of the DGCL states: "Any director or the entire board of directors may be removed, with or without cause, by the holders of a *majority of the shares then entitled to vote* at an election of directors ..." 8 *Del. C.* § 141(k) (emphasis added). There are two statutory exceptions, neither of which is applicable to the Proposal.[3] Currently, the directors of the Company are elected by plurality voting in uncontested elections. A plurality voting standard in a director election results in the director nominees that receive the highest number of "For" votes receiving election to open Board seats, regardless of the total number of votes received by such candidate. There is no option to vote "Against" a candidate in plurality voting, with the only alternative option being to "Withhold" one's vote.

With plurality voting, if a director fails to receive a majority of votes cast "For" re-election, and even has a significant number of votes "Withheld", no votes have been cast to affirmatively remove the director, and the director may be successful in the election.[4] However, the resignations that the Proposal contemplates would force directors to be removed based on failing to receive a majority of votes cast for re-election (even if validly re-elected via plurality voting), a standard that is lower than the vote required by Section 141(k) of the DGCL to remove a director, which is an affirmative vote to remove by the majority of all outstanding shares entitled to vote. The Proponent seeks to improperly substitute its own preference over the vote required by the DGCL for removal of directors.

We call your attention to the fact that our representation of the parties identified herein as our clients has been limited to the subject transaction and certain other specific matters

[3] Note: The statutory exceptions to Section 141(k) of the DGCL relate to situations in which a corporation has a classified board of directors or engages in cumulative voting.

[4] *See* Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations & Business Organizations* § 7.25 ("Number of Directors") (3d ed.) (noting that a campaign to withhold authority on voting on directors has significance in relation to the ultimate outcome of an election in a majority voting scenario, but that the same would not occur in a plurality voting scenario.)

as to which we have been consulted. This opinion is limited to the matters stated herein. This opinion is rendered as of the effective date set forth above, and we express no opinion as to circumstances or events which may occur subsequent to such date. We disavow any obligation to update this opinion or advise you of any changes in our opinion in the event of changes in applicable laws or facts or if additional or newly discovered information is brought to our attention. This opinion is provided to you as a legal opinion only and not as a guaranty or warranty with respect to the matters discussed herein and the documents referred to herein. No opinion may be inferred or implied beyond the matters expressly stated herein.

We understand that you will rely as to matters of Delaware law upon this opinion in connection with the matters addressed herein. We further understand that the Company may furnish a copy of this opinion letter to the Securities and Exchange Commission and to the Proponent in connection with the matters addressed herein, and we consent to your doing so. Except as stated in this paragraph, this opinion letter may not be furnished or quoted to, nor may the foregoing opinion be relied upon by, any other person or entity for any purpose without our prior written consent.

Very truly yours,

Saul Ewing LLP

MRG/RBC